

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

RECEIVED

DEC 21 2015

S.C. Supreme Court

TUNZY A. SANDERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001970

APPENDIX

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Appellate Defender

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ATTORNEYS FOR RESPONDENT

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They were placed in Applicant-Sanders presence in order to secure information relating to the alleged crime. The information that they obtained should have been excluded. In the matter of State v. Passmore, 363 S.C. 568; 611 S.E.2d 273 (S.C. App. 2005), The South Carolina Court of Appeals opined that in criminal cases, although the failure of an attorney to preserve an issue at trial will preclude appellate review of that issue, it may nonetheless be a ground in a civil action for post-conviction relief as a claim of ineffective assistance of counsel." (citing Fossick v. State, 317 S.C. 375, 453 S.E.2d 899 (1995).

Ground No. 5

Issue: Did the trial court commit error by convicting the appellant despite the insufficiency of the evidence?

Sanders argues that the trial court erred in not granting a directed verdict because there was insufficient evidence to establish the crimes of murder, attempted robbery and criminal conspiracy. The Court acted arbitrarily and without any regard for the evidence presented to it. The Supreme Court reviewing the same evidence in the Buckmon, supra. case found it to be circumstantial and only amounting to a suspicion of guilt. The

~~trial court erred in admitting evidence. The law is clear that an abuse of discretion occurs when a trial court has acted arbitrarily or irrationally in admitting evidence.~~

United States v. Simpson, 910 F.2d 154, 157 (4th Cir. 1990)

On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). The trial court, in a directed verdict motion, is concerned with the existence or nonexistence of evidence, not with its weight. State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). This standard remains constant even when the

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State relies exclusively on circumstantial evidence. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. McHoney, 344 S.C. at 97, 544 S.E.2d at 36. A trial court should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

United States v. Collins, 412 F.3d 515 (4th Cir, 2005) the United States Court of Appeals opined that when a Defendant challenges the sufficiency of the evidence on appeal, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecutor, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The only evidence at the trial of the Applicant-Sanders that linked his involvement to the alleged crime was the testimony of two jailhouse informants who were familiar with the case through the media and from reviewing witness statements from the Applicant-Sanders discovery. Both jailhouse informants testified against their own co-defendants as well. Both jailhouse informants were known to work for the State and were experienced jailhouse informants. All of the other evidence in the case did not in any way implicate Applicant-Sanders. The testimony of the jailhouse informants also contradicted the other evidence in the case. The testimony of the jailhouse informants was unreliable and was based on an incentive to perjure their testimony both against their testimony against Applicant-Sanders as well as against their own co-defendants. Both jailhouse informants received very favorable treatment after their testimony against the Applicant-Sanders. Grant Gibbons and Judge Cleary both

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present after the first trial when Staley received preferential or favorable treatment in the form of a reduction in his bond. They reduced Staley's bond by \$70,000.00.

After reviewing the evidence no rational trier of fact could have found on each of the elements of murder, attempted armed robbery and criminal conspiracy beyond a reasonable doubt. Applicant-Sanders had no prior contact with the law and the unreliable testimony of experienced criminals acting as jailhouse informants was taken over Applicant-Sanders assertions that he was not involved in the alleged crime. The physical evidence actually exonerated Sanders of any involvement as did the testimony of Jermaine Walker, Temetrius Williams and even that of Maurice Benning.

Ground No. 6

Issue: Did the Appellant's appointed appellate counsel provide ineffective assistance of counsel by failing to address the issue of the trial court's denial of the directed verdict in Appellant's case?

Appellant requested that his appellate counsel, Joseph Savitz, address the directed verdict denial by the trial court. Appellant alleges that Joseph Savitz should have addressed all of the issues relating to the trial court's errors inasmuch as Joseph Savitz had prevailed on that same issue in co-defendant, Michael Paul Buckmon's case. State

v. Buckmon, 347 S.C. 316; 555 S.E.2d 402 (S.C. 2001). The Supreme Court reviewing much of the same evidence found that the evidence only gave rise to a suspicion of guilt. As a result, the Supreme Court overturned Buckmon's convictions. There was a deliberate attempt on the part of Mr. Savitz to sabotage applicant's appeal as he had prevailed the exact appellate issue of the denial of the directed verdict in Buckmon's case. In the matter of Garvin v. State, 365 S.C. 16; 615 S.E.2d 451 (S.C.

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2005) the Supreme Court of South Carolina ruled that in order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient and the deficient performance prejudiced the applicant's case. The performance of the applicant's appellate counsel was not only deficient, but deliberately deficient and such deficient performance prejudiced the applicant's case at bar. The applicant's appellate counsel fail to address appellate issues that he had already prevailed on in the co-defendant's case. Appellate counsel's failure to address the issue of the denial of the directed verdict in applicant's case was deficient knowing that the Supreme Court had already found the evidence to be lacking and not rising to a level of guilt in the co-defendant's case. The applicant clearly had a reasonable chance that his convictions would also be overturned.

Furthermore, in ruling on a motion for directed verdict in a criminal case, a trial court must view the evidence in the light most favorable to the State. State v. Buckmon, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001). The trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). Furthermore, the court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

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Ground No. 7

Issue: Did the trial court err in its admission of the ballistics evidence where it was unclear as to the type of bullet and the fact that the ballistics expert clearly indicated that he could not sure that it came from that gun?

The testimony of the firearms examiner was entirely lacking and could not even identify the bullet as coming from the gun in question. The bullet was also the subject of dispute as the medical examiner, Joel Sexton, had previously identified the bullet as a .22 caliber bullet. Obviously, because the gun was alleged to be a .25, the medical examiner then changed his testimony to indicate that the bullet extracted from the victim was an alleged .25 caliber bullet. There were no fingerprints on the gun implicating Applicant-Sanders. Additionally, Maurice Benning testified that the gun admitted into evidence was not the gun that he saw on the night of the alleged shooting. Such evidence was circumstantial and only gave rise to a suspicion of guilt. State v. Buckmon, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001). Clearly, the trial judge acted irrationally and without regard to the veracity of the witnesses or the evidence in the case. Trial court erred in admitting evidence. The trial judge's decision to admit the foregoing evidence constituted an abuse of discretion, which occurs when a trial court has acted arbitrarily or irrationally in admitting evidence. United States v. Simpson, 910 F.2d 154, 157 (4th Cir. 1990)

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Ground No. 8

Did the trial court err when it admitted the testimony of jailhouse informants who were not trustworthy, had a history of testifying against other defendants and received great consideration for their testimony against the appellant in this case as well as for their testimony against the co-defendants in their own cases? Should the appellant's conviction for murder, armed robbery and criminal conspiracy be allowed to stand on such unreliable evidence without corroboration from the physical evidence in the case?

The trial court erred when it relied solely on the testimony of several jailhouse informants and one unreliable co-defendant's testimony in the appellant's case. There was no corroborating evidence to support their testimony and it was clear that they had gathered the information from other sources. Co-defendant Maurice Benning failed a polygraph test on almost on every issue. The gun was found at his home in his mother's drawer. Co-defendant, Maurice Benning also had a criminal background for robbery and a pending robbery charge was dismissed as it related to co-defendant Benning for this testimony against Tunzy Sanders. There was no other witness or physical evidence linking Tunzy Sanders to the case. At trial, the fingerprint expert testified that he was unable to positively identify anyone in the case. No fingerprints were discovered on a spent shell casing found near the car. The medical examiner No fingerprints were found on a .25 caliber semi-automatic pistol the police recovered from the home of Maurice Benning. The firearms examiner testified the fired shell casing found at the scene came from the pistol that was recovered, however, the examiner could not conclusively determine whether the .25 caliber bullet recovered from the victim's body had been fired by the recovered pistol. There was no evidence that a robbery had been attempted as almost two thousand dollars was found on the victim at the time of the alleged crime. Maurice Benning testified that the .25 caliber pistol

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admitted into evidence was not the gun that he saw the night of the alleged shooting.

There was no evidence that the Appellant conspired with any other person to commit a robbery. Maurice Benning testified that Appellant never participated in any discussion regarding any robbery. Additionally, Jermaine Walker testified at the trial that he never heard Tunzy talk about a lick. Temetrius Williams indicated in her testimony that she was forced or coerced to give the testimony at the first trial inasmuch as the police agents were coming to her job and as a result her job was in jeopardy. Temetrius Williams did not testify that the Appellant was at the scene of the China Express Restaurant near or at the time of the alleged crime. There were two defense witnesses, Michelle Mixon and Sandra Loftis that testified that they were working in the BP Gas Station which is near the China Express Restaurant. They testified that they saw two men near the time of the alleged crime. One was a white man and the other was a black man. The description given by Michelle Mixon and also partially matched the description that Shirley Collins gave at the trial. Michelle Mixon and Sandra Loftis testified that there was one tall guy and one shorter guy. One of the guys had on a heavy coat and that they were at the BP station being over and looking at people as

they were sitting in their cars. Minh Chapman was found dead sitting in her vehicle in front of the China Express Restaurant which is only a couple of blocks from the BP Gas Station. Clearly, the trial judge acted irrationally and without regard to the veracity of the witnesses or the evidence in the case. Trial court erred in admitting evidence. The trial judge's decision to admit the foregoing evidence constituted an abuse of discretion, which occurs when a trial court has acted arbitrarily or irrationally in admitting evidence.

United States v. Simpson, 910 F.2d 154, 157 (4th Cir. 1990)

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Ground No. 9

Did the the delay in revealing that Vigier and Staley had received deals from the State constitute a Brady violation as such information was only revealed at the second trial of the Applicant-Sanders?

Applicant contends that the failure of the Solicitor to reveal that both Vigier and Staley were going to be considered for favorable treatment for testifying against their own co-defendants as well as against Applicant Sanders also constituted a Brady violation. The Solicitor did not reveal such information until the second trial of Applicant. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) This failure on the part of the Solicitor is also grounds for asserting and proving prosecutorial misconduct and for the dismissal of Applicant-Sanders' convictions. Gibson v. State, 334 S.C. 515; 514 S.E.2d 320 (1999).

**Mr. Tunzy Sanders
#255493
Broadriver Correctional Facility
SMU 230
4460 Broadriver Road
Columbia, South Carolina 29210**

Via Certified Mail-Registered Mail

May 10, 2006

Mr. George K. Fickling
Clerk of the Court
Barnwell County Common Pleas Court
P. O. Box 723
141 Main Street
Barnwell, South Carolina 29812

JUN 28 2010

RE: Tunzy A. Sanders v. State of South Carolina

Dear Mr. Fickling:

Enclosed herewith please find My Application for Post Conviction Relief and attached Appendix (21 Pages). Would you please file the same in your usual manner.

Thank you in advance for your cooperation in this regard. If you should have any further questions, please contact me at the address above.

Very truly yours,

Tunzy A. Sanders

TAS:bs
Enclosures

The Supreme Court of South Carolina

Tunzy A. Sanders, Petitioner,

v.

State of South Carolina, Respondent.

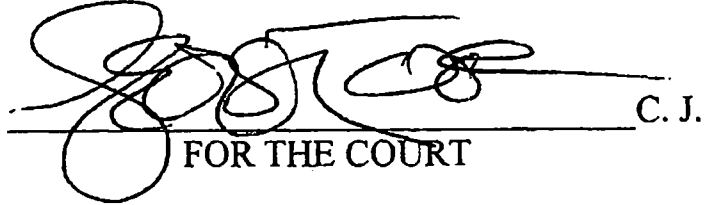
ORDER

Petitioner filed a notice of appeal from an order of the circuit court granting him an Austin review of the denial of his first application for post-conviction relief (PCR). However, the court reporter informed petitioner that a portion of the hearing on petitioner's first PCR application is missing from her tapes. Petitioner requested that the matter be remanded to the circuit court for a *de novo* hearing on petitioner's first PCR application. We granted the petition and remanded the matter to the Honorable J. Michael Baxley for the purpose of reconstructing the record of the hearing on petitioner's first PCR application. However, Judge Baxley has now informed the Court he could not fully reconstruct the missing portion of the transcript.

Petitioner has filed a renewed petition to remand for a *de novo* hearing on his first PCR application. The State has filed a return in opposition to the petition. In the event this Court grants the petition to remand, the State requests petitioner be limited to litigating the three claims already presented and that he not be granted a hearing *de novo*.

The petition to remand for a *de novo* hearing on petitioner's first PCR application is granted. The State's request to limit what can be litigated at the hearing is denied. We hereby vacate the order of September 18, 2007

denying and dismissing petitioner's first PCR application and the order dated March 23, 2010 finding petitioner is entitled to a belated review of the September 18, 2007 order, and we remand this matter to Judge Baxley for a *de novo* hearing on petitioner's first PCR application.


C. J.
FOR THE COURT

Columbia, South Carolina

March 23, 2012

cc: Tara Shurling, Esquire
Assistant Attorney General Mary S. Williams
The Honorable J. Michael Baxley

STATE OF SOUTH CAROLINA)
 COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT

Tunzy Sanders, # 255493,)

2006-CP-06-0106

Applicant,)

AMENDED POST-CONVICTION
 RELIEF APPLICATION

v.)

State of South Carolina,)

Respondent.)

RHONDA D. McELVEEN
 CLERK OF COURT
 BARNWELL COUNTY, S.C.

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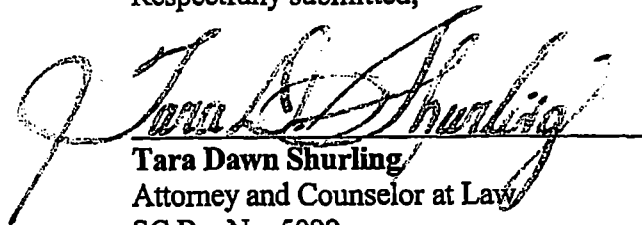
The Applicant alleges that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution, as well as Article I, § 14 of the South Carolina Constitution was violated, prior and during his trial. He alleges that his right to due process of law was violated in the trial court. The Post-Conviction Relief Application previously filed on May 11, 2006, under docket number 2006-CP-06-0106, is hereby amended to include the following additional specific allegations:

1. Trial Counsel failed to adequately advise the Applicant of all the potential disadvantages of a bench trial versus a jury trial.
2. Trial Counsel's failure to thoroughly advise the Applicant of the potential benefits of a jury trial resulted in the Applicant's inability to make a knowing and voluntary waiver of his right to trial by jury.
3. Trial Counsel failed to provide the Applicant reasonable professional assistance of counsel where they failed to seek a continuance despite the fact that lead counsel, Brenda Sanders, was not properly notified that the Applicant's case was scheduled for trial.
4. Trial Counsel was ineffective for failing to adequately argue the facts in support of the Applicant's motion to exclude from evidence a transcript of Aurelin Vigier's testimony from the Applicant's trial where Attorney Sanders had no previous opportunity to cross-examine this witness.
5. Trial Counsel Sanders was ineffective for failing to respond to the trial judge's assumption that she had the opportunity to have Attorney Williams pose any questions she deemed necessary to witness Vigier.
6. Trial Counsel was ineffective for allowing a transcript of witness Vigier's testimony from the Applicant's first trial to be admitted without objection.

7. Trial Counsel was ineffective for neglecting to object to a pattern of leading by the prosecution during their direct examination of State witnesses during the Applicant's trial.
8. Trial Counsel was ineffective for failing to object to hearsay testimony from Dr. Joel Sexton concerning what he was told concerning the type of ammunition used in this homicide.
9. Trial Counsel was ineffective for failing to object to the Solicitor's misstatement of the testimony of Maurice Benning during the prosecutions summary of the evidence before the Court where the prosecutor erroneously advised the Court that Maurice Benning had testified that he heard a shot from the area around the restaurant where the record fails to support that claim.
10. Trial Counsel was ineffective for failing to object to the Applicant sentence of 25 years for armed robbery where the Applicant was in fact charged with Attempted Armed Robbery.
11. Trial Counsel was ineffective for failing to point out to the Judge that the State did not rebut claim by the Applicant that only one officer got of the car at the first Chinese Restaurant; a fact that was not disclosed in Gadson's testimony.

The Applicant has no further amendments at this time. A copy of this amendment has been served on opposing counsels, David Spencer and Dan Gourley, Assistant Attorney Generals.

Respectfully submitted,



Tara Dawn Shurling
 Attorney and Counselor at Law
 SC Bar No. 5099
 3614 Landmark Dr., Ste. A
 Columbia, SC 29204
 803-738-8622
 803-738-1600 (Fax)

ATTORNEY FOR APPLICANT

This 19th day of August, 2013.

STATE OF SOUTH CAROLINA)
 COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT

Tunzy Sanders, # 255493,)

2006-CP-06-0106

Applicant,)

CERTIFICATE OF SERVICE

v.)

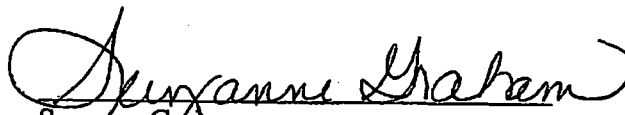
State of South Carolina,)

Respondent.)

The undersigned hereby certifies that a true copy of the Amended Post-Conviction Relief Application in the above matter has been emailed on this 19th day of August, 2013 to:

Brenda K. Sanders, Esquire
 Email: brendaksanders@live.com

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


 Suzanne Graham
 Paralegal to Tara Dawn Shurling

SWORN TO BEFORE ME this 19th day of
 August, 2013.

Sharon M. McCallister (L.S.)
 Notary Public for South Carolina

My Commission Expires: Jan. 16, 2017

STATE OF SOUTH CAROLINA)
 COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT

Tunzy Sanders, # 255493,)

2006-CP-06-0106

Applicant,)

CERTIFICATE OF SERVICE

v.)

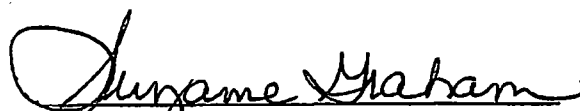
State of South Carolina,)

Respondent.)

The undersigned hereby certifies that a true copy of the Amended Post-Conviction Relief Application in the above matter has been emailed on this 19th day of August, 2013 to:

Daniel W. Williams, Esquire
 Bedingfield and Williams
 P. O. Box 616
 Barnwell, SC 29812
 Email: danwilliams@bellsouth.net

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


 Suzanne Graham
 Paralegal to Tara Dawn Shurling

SWORN TO BEFORE ME this 19th day of
 August, 2013.

Sharon H. McCollister (L.S.)
 Notary Public for South Carolina

My Commission Expires: Jan. 16, 2017

STATE OF SOUTH CAROLINA)
 COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT

Tunzy Sanders, # 255493,)

2006-CP-06-0106

Applicant,)

CERTIFICATE OF SERVICE

v.)

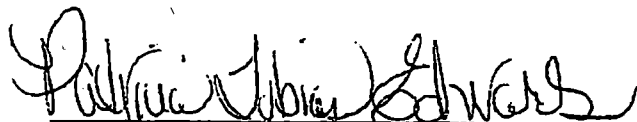
State of South Carolina,)

Respondent.)

The undersigned hereby certifies that a true copy of the Amended Post-Conviction Relief Application in the above matter has been hand-delivered on this 19th day of August, 2013 to:

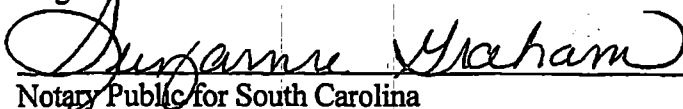
David Spencer
 Assistant Attorney General
 Office of the Attorney General
 P. O. Box 11549
 Columbia, SC 29211

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



Patricia Tobias Edwards
 Assistant to Tara Dawn Shurling

SWORN TO BEFORE ME this 19th day of
 August, 2013.



Notary Public for South Carolina

(L.S.)

My Commission Expires: 2/28/2023

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Tunzy Sanders, # 255493,)

2006-CP-06-0106

Applicant,)

CERTIFICATE OF SERVICE

v.)

State of South Carolina,)

Respondent.)

RIIONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

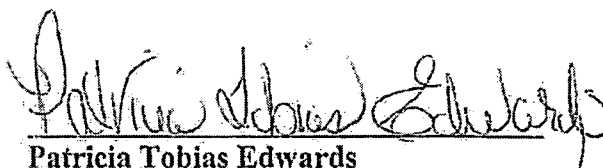
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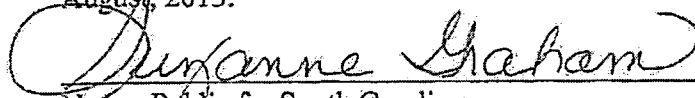
The undersigned hereby certifies that a true copy of the Amended Post-Conviction Relief Application in the above matter has been hand-delivered on this 19th day of August, 2013 to:

Daniel Gourley
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

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


Patricia Tobias Edwards
Assistant to Tara Dawn Shurling

SWORN TO BEFORE ME this 19th day of
August, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/28/2023

2006-CP

FILED FOR RECORD

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CLERK OF COURT
BARNWELL COUNTY, S.C.

Amended Appendix – Application
For Post-Conviction Relief

Mr. Tunzy Sanders
#255493
Broadriver Correctional Facility
SMU 230
4460 Broadriver Road
Columbia, South Carolina 29210

Tunzy A. Sanders
 Amended Appendix to Application for Post Conviction Relief
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Amended Appendix – Answers to Question 10 and Question 11 of Application for Post-Conviction Relief

Ground No. 10

Whether Applicant's indictment for murder (98-GS-06-180) was defective because it did not state the place and time of assault and the place and time of the death of Minh Chapman pursuant to S.C.Code Ann. § 17-19-30 (1985) thereby meaning that the Circuit Court lacked subject matter jurisdiction over the applicant at the time of Applicant's trial?

The trial court lacked subject matter jurisdiction over the Applicant- Sanders because the indictment failed to state the time and place of the victim's death. It also failed to state the type of weapon used, the person who possessed the gun and the motive for the killing with particularity. The indictment lacked the time of the assault and the time of the murder resulting from the assault. All of the above must be alleged in the indictment returned against the accused by the grand jury. No other indictments had been issued at the time that the indictment for murder had been issued.

South Carolina statutory law provides the following:

Every indictment for murder shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously, wilfully and of his malice aforethought kill and murder the deceased.

State v. Rector, 158 S.C. 212, 155 S.E. 385 (1930). In that case, the Court held that the use of the words "then and there" sufficiently stated the time and place of death because those terms clearly referred back to the only date and place listed in the indictment. *Id.* at 216, 155 S.E. at 387.

The "time and place of death" requirement found in § 17-19-30 merely codifies the common law. *State v. Rector*, 158 S.C. 212, 155 S.E. 385 (1930). Where the indictment references the place and date of the assault, and alleges that the victim died "then and there," this requirement has been satisfied. *Id.*; see also *State v. Platt*, 154 S.C. 1, 151 S.E. 206 (1930); *State v. Blakeney*, 33 S.C. 111, 11 S.E. 637 (1890). The present indictment alleges the time and place of the assault, but is silent on the time and place of the victim's death. As the Court said in *State v. Rector*:

The crime of murder is a composite one. It includes the assault committed upon a person ... and the resulting death from that assault. The State must

Tunzy A. Sanders
 Amended Appendix to Application for Post Conviction Relief
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prove not only the assault and the death occurring from it, but the time of the assault and the time of the death, as time is recognized in the law. In addition, the state [sic] must prove the place of the assault and the place of death. These necessary elements of the crime of murder must not only be proved, before a person accused may be lawfully convicted, but they must be alleged in the indictment returned against the accused by the grand jury. The provisions of the Constitution, recognizing and following the principles of the common law, require the indictment to contain allegations to those effects./

Therefore, the conviction for murder against Applicant-Sanders should be vacated, there being no valid indictment charging him with that offense.

Ground No. 11

Whether the indictments for Attempted Armed Robbery 99-GS-06-079 and Criminal Conspiracy - 99-GS-06-078 were defective thereby causing the Circuit Court to lack subject matter jurisdiction over the Applicant at the time of Applicant's trial.

Applicant asserts that the indictments for Attempted Armed Robbery and Criminal Conspiracy were defective. Applicant asserts that the indictments for Attempted Armed Robbery and Criminal Conspiracy were not properly presented before the grand jury and that there was not a valid waiver of presentment of indictment in lieu of presentment. The above-referenced indictments were issued in 1999 after the murder indictment had been presented to the grand jury in 1998. There was no evidence on the court record that the indictments of attempted armed robbery and criminal conspiracy had been presented to the grand jury. Applicant further asserts that said indictments were void of sufficient facts to justify the issuance of the indictments for attempted armed robbery and criminal conspiracy.

State v. Evans, 415 S.E.2d 816; 307 S.C. 477 (1992) Article I, § 11, of the South Carolina Constitution provides, in part:

No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed.... The General Assembly may provide for the waiver of an indictment by the accused.

We have interpreted this provision to mean that, in the absence of an indictment by the grand jury of the county where the offense was committed or a valid waiver of presentment of indictment, the circuit court lacks subject matter jurisdiction over the offense. State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986); Summerall v. State, 278 S.C. 255, 294 S.E.2d 344 (1982).

Tunzy, A. Sanders
Amended Appendix to Application for Post Conviction Relief
Page 1

Applicant asserts that the indictments for attempted armed robbery and criminal conspiracy are defective. Therefore, the Applicant's convictions for attempted armed robbery and criminal conspiracy should be reversed and all charges dismissed.

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Tunzy Sanders, # 255493,)
Applicant,)

2006-CP-06-0106

v.)
State of South Carolina,)
Respondent.)

SECOND AMENDED POST-CONVICTION
RELIEF APPLICATION

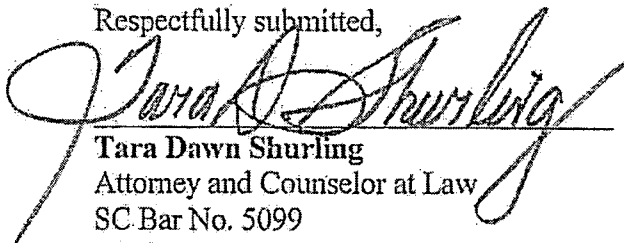
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RHONDA D. McELREATH
CLERK OF COURT
BARNWELL COUNTY

The Applicant alleges that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution, as well as Article I, § 1 of the South Carolina Constitution was violated, prior and during his trial. He alleges that his right to due process of law was violated in the trial court. The Post-Conviction Relief Application previously filed on May 11, 2006, under docket number 2006-CP-06-0106, and the First Amended Application served on August 19, 2013 is hereby amended to include the following additional specific allegations¹:

12. Trial Counsel was ineffective for failing to request that the Trial Court publish on the record all of the law to be applied by the Court in reaching a decision in the Applicant's case.
13. Trial Counsel provided the Applicant ineffective assistance of counsel when they waived the right to make a comprehensive closing argument summarizing the evidence and arguments in favor of the defense.

The Applicant has no further amendments at this time. A copy of this amendment has been served on opposing counsels, David Spencer and Dan Gourley, Assistant Attorney Generals.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
SC Bar No. 5099
3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT

This 19th day of August, 2013.

¹ For purposes of organization the Applicant is numbering these additional issues sequentially with those presented in his first Amended Application.

STATE OF SOUTH CAROLINA)
 COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT

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2006-CP-06-0106

Applicant,)

CERTIFICATE OF SERVICE

v.)

State of South Carolina,)

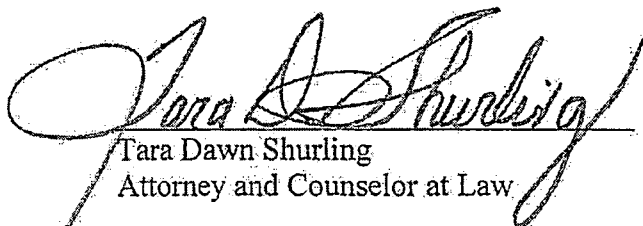
Respondent.)

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 BARNWELL COUNTY S.C.

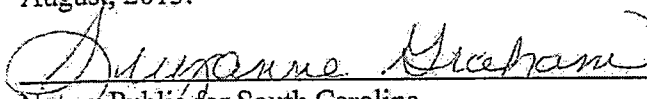
The undersigned hereby certifies that a true copy of the Second Amended Post-Conviction Relief Application in the above matter has been hand-delivered on this 20th day of August, 2013 to:

David Spencer, Assistant Attorney General
 Bamberg County Courthouse
 2959 Main Hwy.
 Bamberg, South Carolina 29003

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


 Tara Dawn Shurling
 Attorney and Counselor at Law

SWORN TO BEFORE ME this 20th day of
 August, 2013.

 (L.S.)
 Notary Public for South Carolina

My Commission Expires: 2/28/23

STATE OF SOUTH CAROLINA)
 COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT

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2006-CP-06-0106

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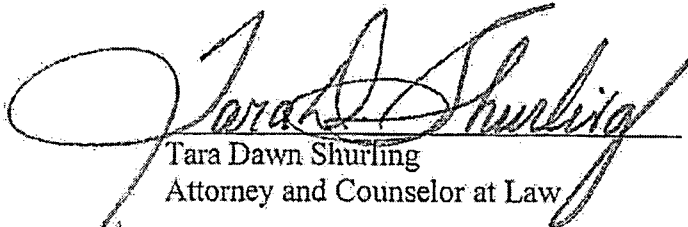
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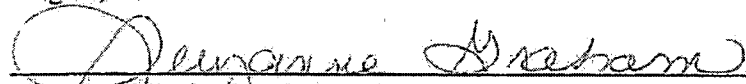
The undersigned hereby certifies that a true copy of the Second Amended Post-Conviction Relief Application in the above matter has been hand-delivered on this 20th day of August, 2013 to:

Daniel W. Williams, Esquire
 Bamberg County Courthouse
 2959 Main Hwy.
 Bamberg, South Carolina 29003

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


 Tara Dawn Shurling
 Attorney and Counselor at Law

SWORN TO BEFORE ME this 20th day of
 August, 2013.


 Notary Public for South Carolina (L.S.)

My Commission Expires: 2/28/23

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Tunzy Sanders, # 255493,)

2006-CP-06-0106

Applicant,)

CERTIFICATE OF SERVICE

v.)

State of South Carolina,)

Respondent.)

RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

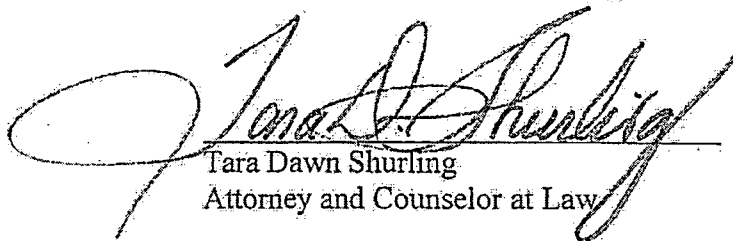
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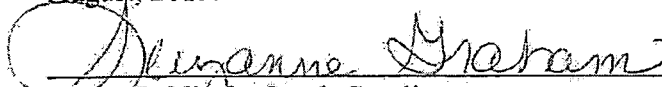
The undersigned hereby certifies that a true copy of the Second Amended Post-Conviction Relief Application in the above matter has been hand-delivered on this 20th day of August, 2013 to:

Brenda K. Sanders, Esquire
Bamberg County Courthouse
2959 Main Hwy.
Bamberg, South Carolina 29003

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


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE ME this 20th day of
August, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/28/23

STATE OF SOUTH CAROLINA)
 COUNTY OF BARNWELL)

IN THE COURT OF COMMON PLEAS
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2006-CP-06-0106

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RHONDA D. McELVEEN
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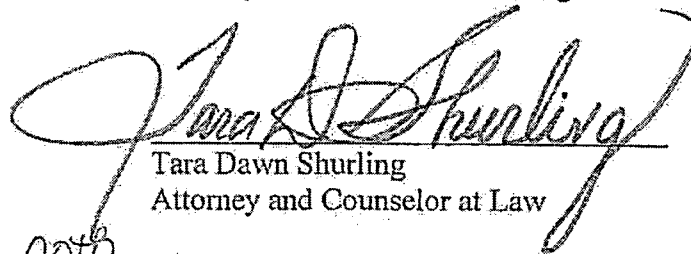
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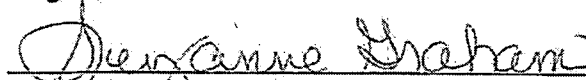
The undersigned hereby certifies that a true copy of the Second Amended Post-Conviction Relief Application in the above matter has been hand-delivered on this 20th day of August, 2013 to:

Daniel Gourley, Assistant Attorney General
 Bamberg County Courthouse
 2959 Main Hwy.
 Bamberg, South Carolina 29003

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


 Tara Dawn Shurling
 Attorney and Counselor at Law

SWORN TO BEFORE ME this 20th day of
 August, 2013.


 Notary Public for South Carolina (L.S.)

My Commission Expires: 2/28/23
 081 2-000

1 STATE OF SOUTH CAROLINA

2 COUNTY OF BARNWELL

CIRCUIT COURT
2006-CP-06-00106

3
4 TUNZY SANDERS,
Applicant,

5 -vs-

TRANSCRIPT OF RECORD

6 STATE OF SOUTH CAROLINA,
7 Respondent.

8
9 Post Conviction Relief Hearing

10 Heard on Tuesday, August 20, 2013

11 Bamberg, South Carolina

12
13 BEFORE:

14 THE HONORABLE DOYET A. EARLY, III

15
16 APPEARANCES:

17 Counsel on Behalf of the Applicant:
Tara Dawn Shurling, Esq.

18
19 Counsel on Behalf of the Respondent, State of SC:
David Spencer, Esq.
20 Daniel Gourley, Esq.

21
22
23 Cheri L. Young, RPR
Circuit Court Reporter
24 P O Box 5232
Aiken, SC 29804-5232
25

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MAR ADM

State's:

1 Letter dated 10-26-2000

186 186

1 ON TUESDAY, AUGUST 20, 2013 AT 10:30 A.M.:

2 MS. SHURLING: Your Honor, may we approach?

3 THE COURT: Yes, ma'am.

4 MS. SHURLING: It will take a moment.

5 (Off-the-record discussion.)

6 THE COURT: All right. We're on the record with the
7 case of Tunzy, T-U-N-Z-Y -- is he present?

8 MS. SHURLING: Your Honor --

9 THE COURT: -- A. Sanders. Is he here?

10 MS. SHURLING: I assume he's in the holding area.

11 THE CLERK: He's in the grand jury room.

12 (Applicant enters courtroom.)

13 THE COURT: Good morning, Mr. Sanders. How are you?

14 THE APPLICANT: All right.

15 THE COURT: Speak up for me so I can hear you, please.

16 THE APPLICANT: I'm doing okay.

17 THE COURT: All right. This is the post conviction
18 relief hearing of Tunzy, T-U-N-Z-Y, Sanders -v- State of
19 South Carolina, 2006-CP-06-106.

20 The original application looks like it was a pro se
21 application filed in May of 2006.

22 There was an amended post conviction relief
23 application filed by counsel, Ms. Shurling, on or about
24 August 13, 2013; is that correct, ma'am?

25 MS. SHURLING: That's correct, Your Honor, although

1 Respondent was notified of the issues or the majority of
2 them earlier than that by phone, we didn't actually have
3 them typed and served until that date.

4 THE COURT: Thank you.

5 Now, this case has a little bit of an unusual
6 history. Unfortunately it's not as unusual as it should
7 be in that as I understand the transcript was missing, the
8 tapes were missing and as happens in those situations,
9 actually it's happening more than it used to. Anyway,
10 I've had a couple of them lately. That's the reason I say
11 that.

12 The case was sent back to the lower court and I think
13 Judge Baxley was assigned the task of attempting to
14 reconstruct the testimony as we're often ordered to do.
15 But he informed the Court that he was unable to do that.
16 And based on that then the Applicant or Petitioner,
17 Mr. Sanders, filed a petition for a de novo hearing on his
18 first PCR application and I assume the amendments thereto.

19 And by order signed by Chief Justice Toal, March 23 of
20 2012, it was remanded for a de novo hearing at which time
21 they also dismissed the first -- vacating an order which
22 dismissed Petitioner's first PCR application.

23 And ordered that he was entitled to a belated review
24 of the September 18, 2007 order which is what -- the order
25 dated March 23, 2010 finding the Petitioner's entitled to

1 a belated review of the September 18, 2007 order. And we
2 remand this matter to Judge Baxley for a de novo hearing
3 on his first application.

4 So we're back to square one is basically where we are.

5 MS. SHURLING: Yes, sir, Your Honor.

6 THE COURT: All right. And, of course, Judge Baxley
7 is no longer in the area. He hasn't been assigned to the
8 Second Circuit for a while. Judge Baxley, if I remember
9 correctly, called me one day and asked me if I had any
10 knowledge of the case, knew anything about it, would I
11 mind hearing it. I told him obviously I did not and would
12 not mind hearing it.

13 And I think after that we scheduled hearings through
14 Ms. Shurling and the AG's Office and that's where we are
15 here today.

16 So I don't think anybody objects to me hearing it and
17 Judge Baxley not; is that correct, Ms. Shurling?

18 MS. SHURLING: That is correct, Your Honor. I have
19 advised my client that I believe that it would be in his
20 best interests to agree to that.

21 THE COURT: All right. And, Mr. Sanders, do you have
22 any opposition to that?

23 MS. SHURLING: Your Honor -- I'm sorry, sir.

24 THE COURT: Mr. Sanders, do you have any opposition to
25 me hearing it?

1 THE APPLICANT: No, sir.

2 THE COURT: Thank you.

3 Now, we just had a brief discussion off the record
4 concerning perhaps some issues that need to be addressed
5 before we get into the merits.

6 Ms. Shurling, anything on behalf of the Applicant that
7 you need to put on the record or make me aware of? Now's
8 your opportunity.

9 MS. SHURLING: Thank you, Your Honor.

10 I was advised moments ago at the bench that it is the
11 Respondent's position that since my client's sister,
12 Brenda Sanders, represented him at trial and assisted him
13 in preparing his initial application for post conviction
14 relief as well as was responsible for hiring me, that the
15 State intends to assert that there is an inherent conflict
16 of interest of some sort between myself and Ms. Sanders
17 and my client with regard to representing him in the
18 collateral proceeding.

19 This requires that I put several matters on the record
20 and I'll do it as briefly and organized as I can. When I
21 was first approached about representing Mr. Sanders and
22 became aware that his sister, who is in fact a judge in
23 Michigan, had --

24 THE COURT: Before you get -- he was tried in Barnwell
25 obviously?

1 MS. SHURLING: Yes, sir.

2 THE COURT: And who represented him at the trial?

3 MS. SHURLING: In his initial trial, Your Honor, he was
4 originally represented by Daniel Williams and Brenda
5 Sanders. However, there came a point in the initial
6 trial --

7 THE COURT: Who is Brenda Sanders?

8 MS. SHURLING: My client's sister.

9 THE COURT: All right. So Dan Williams and Sister
10 Sanders represented him in the original trial before the
11 jury?

12 MS. SHURLING: Yes, sir, Your Honor. And that was
13 January 11th, 1999.

14 THE COURT: All right.

15 MS. SHURLING: During that proceeding there were some
16 comments made from certain witnesses to the effect that
17 Ms. Sanders had talked to them about their potential
18 testimony prior to trial. Following that the State took
19 the position that she was perhaps a necessary witness in
20 the trial.

21 And the end result was that she was disqualified as
22 counsel for the remainder of the trial. She was removed
23 as an attorney in this matter because of the position by
24 the State that she was potentially going to be a witness
25 in this case.

1 That issue was raised on direct appeal. And the
2 Supreme Court of South Carolina reversed my client's
3 conviction and sentences for murder, attempted armed
4 robbery and conspiracy in an opinion filed on July 3rd,
5 2000, on the grounds that it had been improper under the
6 facts of this particular case for Ms. Sanders to be
7 removed as counsel based on the sparse record of some
8 alleged necessity for her to be a witness when in fact the
9 only testimony that was ultimately taken from her
10 indicated that she had done nothing more than interview
11 potential witnesses in the same manner that any defense
12 attorney would be entitled to do on behalf of their
13 client.

14 THE COURT: And that takes us to July 3, 2000.

15 MS. SHURLING: Yes, sir, Your Honor. And, is a copy --

16 THE COURT: Thereafter, what happened?

17 MS. SHURLING: -- of that decision in Your Honor's
18 package?

19 MR. GOURLEY: There should be a copy, Your Honor.

20 THE COURT: I have it right here.

21 MS. SHURLING: Thank you. So the matter was remanded
22 for a retrial.

23 THE COURT: Okay.

24 MS. SHURLING: At that point of course my client was
25 being represented once again by Mr. Williams and this time

1 by his sister, Brenda Sanders, who was not only co-counsel
2 for the duration of that trial, but at some point it's
3 made clear on the record that she will be lead counsel in
4 the case.

5 They proceed with a --

6 THE COURT: Was she a South Carolina lawyer or was she
7 admitted pro hoc vice or what?

8 MS. SHURLING: Your Honor, the record is less than
9 clear on that point. She, from the beginning of the
10 trial, based on the decision of the Supreme Court, was
11 treated as counsel of record and in fact advised the Court
12 that she was lead counsel.

13 THE COURT: Okay.

14 MS. SHURLING: I presume that at some previous
15 proceeding there had been a motion pro hac vice, but I
16 have no record of that.

17 THE COURT: Anyway, she's lead counsel in the second
18 trial and assisted by Mr. Dan Williams.

19 MS. SHURLING: They proceed to select a jury and
20 continue forward with a portion of the trial, but before
21 the first witness is called Judge Barber is advised that
22 the Defendant wishes to proceed with a bench trial.

23 THE COURT: And as a result --

24 MS. SHURLING: At that point --

25 THE COURT: And as a result of the bench trial, what

1 happened?

2 MS. SHURLING: He is found guilty of murder, attempted
3 armed robbery and conspiracy.

4 THE COURT: All right.

5 MS. SHURLING: Thereafter there was, of course, a
6 second direct appeal.

7 THE COURT: And his sentence was what?

8 MS. SHURLING: Thirty-five years, Your Honor. And
9 although the record indicates a 25-year sentence for armed
10 robbery concurrent, the sentencing sheets in fact reflect
11 that Judge Barber subsequently amended that to reflect a
12 20-year sentence for attempted armed robbery.

13 Evidently on the record at the time of sentencing he
14 missed -- well, not evidently. The record documents that
15 he misspoke. Gave him 25 years concurrent for armed
16 robbery when it was in fact a charge of attempted which
17 carried no more than 20. And Judge Barber amended that
18 sentencing sheet.

19 THE COURT: He's doing 35 on the murder and 20 on the
20 attempted armed robbery concurrent?

21 MS. SHURLING: Yes, sir, Your Honor. And five on
22 conspiracy, all concurrent.

23 THE COURT: All concurrent?

24 MS. SHURLING: Yes, sir.

25 THE COURT: Thereafter, was that bench trial decision

1 appealed?

2 MS. SHURLING: Yes, sir. That's where I was in my
3 presentation.

4 THE COURT: All right.

5 MS. SHURLING: There was then a direct appeal to the
6 Court of Appeals. The Applicant was represented by Joseph
7 Savitz, who's present here today, in that proceeding -- in
8 that appeal.

9 And an opinion was issued by the Court of Appeals on
10 October 20th, 2003, affirming the judgments and
11 sentences.

12 And I assume Your Honor has a copy of that opinion in
13 your packet as well?

14 THE COURT: Hold on a second. I don't see that.
15 Somebody make me -- provide a copy to me. I don't see it.

16 MR. GOURLEY: Yes, Your Honor.

17 MS. SHURLING: Did you have an extra? I don't have an
18 extra copy in the packet. Dave?

19 MR. SPENCER: I'll see if I have an extra one.

20 THE COURT: I apologize. I found it.

21 MR. GOURLEY: Thank you, Your Honor.

22 THE COURT: That's an opinion filed on October 20th,
23 2003?

24 MS. SHURLING: Correct, Your Honor.

25 THE COURT: And Judge Howard, Kittredge and Stilwell.

1 All right. Then, thereafter?

2 MS. SHURLING: Thereafter, Your Honor, there was an
3 application for post conviction relief filed. A hearing
4 was held. Relief was denied.

5 I was -- there was no appeal from the order denying --

6 THE COURT: All right. After the appeal from the
7 Court of Appeals, a PCR was filed and relief denied?

8 MS. SHURLING: Correct, Your Honor.

9 THE COURT: Any appeal?

10 MS. SHURLING: No, sir, Your Honor. Not initially.

11 THE COURT: Then what happened?

12 MS. SHURLING: Then apparently there was another, there
13 was an order granting a belated appeal under Austin.

14 THE COURT: Belated appeal of the PCR?

15 MS. SHURLING: Correct, Your Honor.

16 THE COURT: All right. And then what decision was
17 rendered on that?

18 MS. SHURLING: The belated appeal was granted.

19 THE COURT: Do we have a copy of that order?

20 MR. GOURLEY: Yes, Your Honor. It should be in your
21 packet. It's the March 23rd, 2012 order. I believe it's
22 on the last page, Your Honor.

23 THE COURT: March 23, 2012.

24 MS. SHURLING: That's --

25 THE COURT: That was not a decision but just an order

1 by the Supreme Court therein, what we just talked about,
2 vacating the order of September 18, 2007.

3 MS. SHURLING: Yes, Your Honor. And that order was
4 filed on March 30th, 2010.

5 THE COURT: So what -- he's now entitled to a review
6 of the September 18, 2007 order?

7 MS. SHURLING: No, sir, Your Honor. Let me tell you
8 what happened.

9 THE COURT: Well, I'm reading it.

10 MS. SHURLING: I understand. After that order was
11 issued --

12 THE COURT: Which order?

13 MS. SHURLING: The one we're discussing, the March
14 2010.

15 THE COURT: 2012.

16 MS. SHURLING: We're not there yet, Your Honor.

17 THE COURT: All right. Go back.

18 MS. SHURLING: Okay. After the Austin order was signed
19 granting a belated appeal, I came in contact with Brenda
20 Sanders who expressed an interest in hiring me to
21 represent her brother in his post conviction relief
22 appeal.

23 At that juncture I ordered the post conviction relief
24 hearing transcript and was advised subsequently by the
25 court reporter that it was not available.

1 That -- well, portions of it were available and
2 portions of it were not audible and could not be
3 transcribed. She transcribed what she could to the best
4 of her ability but there were significant portions
5 missing.

6 I then filed a petition in the Supreme Court asking
7 that the matter be remanded for a hearing de novo. That
8 motion was initially denied by the Court and the matter
9 was remanded to the Court of Common Pleas for a hearing to
10 least attempt to reconstruct the missing portions of the
11 PCR hearing.

12 At that point, Your Honor, we had one hearing before
13 Judge Baxley back on August 8th, 2007, but at that point
14 we were not able to go forward.

15 THE COURT: And ultimately Judge Baxley said, I can't
16 reconstruct it. And thereafter, Justice Toal signed the
17 order of March 23, 2012, remanding it de novo.

18 MS. SHURLING: Thank you, Your Honor. That's where we
19 are.

20 THE COURT: Where we are today. So obviously I'm
21 listening to his PCR application de novo.

22 MS. SHURLING: Thank you, Your Honor.

23 THE COURT: Now --

24 MS. SHURLING: Now to address the Respondent's position
25 with regard to the conflict, I need to put several matters

1 on the record.

2 When Ms. Sanders came to see me, I advised her as I
3 always advise people that --

4 THE COURT: Well, first of all, let me ask you this
5 question.

6 MS. SHURLING: Yes, sir.

7 THE COURT: In your PCR application that I am hearing
8 de novo, are there allegations of ineffective assistance
9 of counsel as to Mrs. Sanders?

10 MS. SHURLING: Indeed, Your Honor. There are.
11 Multiple ones.

12 THE COURT: All right. And Mrs. Sanders was his lead
13 counsel in the underlying trial; correct?

14 MS. SHURLING: She was, Your Honor.

15 THE COURT: Mrs. Sanders has retained you; is that
16 correct?

17 MS. SHURLING: It's my understanding that it's a
18 collective effort of the family in terms of payment of my
19 fees, but Ms. Sanders is who I dealt with and is who
20 signed my fee agreement.

21 THE COURT: And Ms. Sanders is who initially came to
22 you about the --

23 MS. SHURLING: Appeal.

24 THE COURT: Appeal?

25 MS. SHURLING: Yes, sir, Your Honor.

1 THE COURT: And now the de novo trial?

2 MS. SHURLING: Correct, Your Honor.

3 And if I may put on the record what I think are the
4 salient points.

5 THE COURT: Well, let me ask you this first.

6 Mrs. Sanders obviously -- you say she has a judicial
7 position in Michigan?

8 MS. SHURLING: Correct, Your Honor.

9 THE COURT: Currently?

10 MS. SHURLING: Yes, sir.

11 THE COURT: And at the time that she represented her
12 brother as lead counsel, she was obviously a practicing
13 attorney in some other state?

14 MS. SHURLING: Michigan.

15 THE COURT: Michigan?

16 MS. SHURLING: Yes, sir, Your Honor,

17 THE COURT: And she participated in the trial?

18 MS. SHURLING: Yes, sir.

19 THE COURT: Has she as an officer of this Court
20 subsequent to hiring you participated in the drafting of
21 his current amended post conviction relief application?

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

23 THE COURT: Did she prior to retaining you in the
24 initial application that he filed or any amendment thereto
25 before you were retained, participate in the preparation,

1 advice, counsel, whatever, rendering legal services or aid
2 to her brother in the preparation of that application?

3 MS. SHURLING: In preparation of the initial
4 application which was adopted by the Applicant, signed and
5 entered pro se; yes, sir.

6 THE COURT: And are the allegations contained in that
7 initial application signed and adopted by the pro se
8 Applicant? Are they re-alleged either in substance or
9 verbatim or likely or likewise in the application that you
10 filed, the amended post conviction relief application
11 dated 19 August, 2013? Aren't we talking about the same
12 issue basically?

13 MS. SHURLING: No, sir, Your Honor. We are not.

14 THE COURT: In your amended application, are you
15 alleging ineffective assistance of counsel?

16 MS. SHURLING: I am, Your Honor.

17 THE COURT: By Mrs. Sanders?

18 MS. SHURLING: I am, Your Honor,

19 THE COURT: Did the initial application that
20 Mrs. Sanders participated in allege ineffective assistance
21 of counsel?

22 MS. SHURLING: It is my interpretation of that
23 application that it does not raise any claims against
24 herself.

25 THE COURT: Well, that application is dated --

1 MS. SHURLING: It was filed May 11th, 2006, Your Honor.
2 It was notarized on May 9th, 2006, and signed by the
3 Applicant, Tunzy Sanders.

4 THE COURT: And how about pointing me to what his
5 grounds were for post conviction relief at that time.

6 MS. SHURLING: At that point, Your Honor, if Your Honor
7 looks to page five of the application, you will see that
8 she is raising numerous grounds which are --

9 THE COURT: Is that 16-A?

10 MS. SHURLING: -- 16-A, Your Honor. That are
11 claims -- as I read them, they are by and large
12 substantive errors of law which she asserts that appellate
13 counsel, Joseph Savitz, should have raised.

14 That's allegations two through nine.

15 On allegation one, she says: Did the Trial Court err
16 in allowing the admission of Aurelien Vigier's prior
17 testimony which violated the confrontation clause and it
18 goes on which is a substantive issue not a collateral
19 review issue. And is not in fact claiming ineffective
20 assistance of counsel.

21 There are a few additional points I would like to make
22 for the Court when the Court's ready to hear me.

23 THE COURT: On ground number three, it talks about --
24 that's the solicitor offering alleged false testimony, is
25 that correct? Not her -- his counsel.

1 Well, it looks like that obviously Ms. Sanders if she
2 did this appendix was heavily involved in the application,
3 the initial application.

4 MS. SHURLING: Absolutely, Your Honor. It would be the
5 Applicant's position, Your Honor, that that is no
6 different from any time a party in litigation is asked by
7 the Court to prepare a proposed order. And then once the
8 Court reviews it and finds it to be acceptable and adopts
9 it as its own and signs it, it becomes the order of the
10 Court, not the order of the person that prepared the
11 document.

12 THE COURT: I understand all of that. But now here we
13 are today on the amended post conviction relief
14 application filed by you after Mrs. Sanders was in charge
15 of retaining you; correct?

16 MS. SHURLING: Correct, Your Honor.

17 THE COURT: So the person who has hired you to proceed
18 in the post conviction relief who was his lawyer at trial,
19 you are now claiming that the person that hired you was
20 ineffective for a number of reasons as set out in your
21 amended application i.e., failing to advise of the
22 advantages and disadvantages of a bench trial versus a
23 jury trial; failed to seek a continuance; failing to argue
24 facts in support of a motion to exclude certain evidence.

25 Actually 11 allegations in the amended application,

1 all dealing with ineffective assistance of counsel in a
2 number of ways. All allegations being against
3 Mrs. Sanders who's now hired you for the post conviction
4 relief hearing.

5 MS. SHURLING: Actually, Your Honor, they would be
6 against counsel collectively; against both Ms. Sanders and
7 Mr. Williams.

8 THE COURT: Her name is listed a number of times.

9 MS. SHURLING: Sir?

10 THE COURT: I said, her name is specifically listed a
11 number of times.

12 MS. SHURLING: Yes, sir. But there are some that are
13 collective and refer --

14 THE COURT: I understand.

15 MS. SHURLING: -- to the duties of both.

16 THE COURT: And there's no question she was lead
17 counsel.

18 MS. SHURLING: Not according to the record. I mean,
19 there's no doubt -- it was -- the Court was advised she
20 was lead counsel.

21 THE COURT: Thank you. Now, what do you need to put
22 on the record in regards to this?

23 MS. SHURLING: Thank you. When I was approached about
24 representing the client with regard to a PCR appeal, the
25 question --

1 THE COURT: Well, first of all, when was that?

2 MS. SHURLING: Your Honor --

3 THE COURT: About.

4 MS. SHURLING: -- my records reflect that the order of
5 substitution -- I apologize, Your Honor. Let me get the
6 date.

7 An order of the Supreme Court was signed endorsing my
8 petition to be substituted as counsel on June 22nd, 2010.
9 So it would have been sometime shortly before that, Your
10 Honor.

11 THE COURT: It looks like your first efforts were
12 trying to get this transcript reenacted or reconstructed.

13 MS. SHURLING: Correct.

14 THE COURT: And then when that was unable to be done,
15 then obviously you had to deal with getting a hearing --

16 MS. SHURLING: Yes, sir.

17 THE COURT: -- de novo. So all of that sort of, after
18 that was done then you filed the amended post conviction
19 relief even though y'all had talked about it for some
20 time.

21 MS. SHURLING: Yes, sir. And here's what happened
22 essentially, Your Honor.

23 When I'm initially hired it's to do a PCR appeal. So
24 it didn't really matter who hired me because it would be,
25 of course, dealing with the issues on a hard record.

1 Once it became apparent that there was not a record
2 available of that proceeding and that we would be doing a
3 PCR hearing de novo, I had discussions with Ms. Sanders
4 and made very certain that she understood, and that
5 Mr. Tunzy Sanders understood, that no matter who pays my
6 fee he was the client.

7 I specifically advised my client that regardless of
8 whether a third party pays my fee or not, my primary and
9 only allegiance is to the client and that the third party
10 should not and will not be allowed to dictate to me how I
11 handle the case, what issues I raise and so forth.

12 And that was clearly understood both with Ms. Sanders
13 and with Tunzy Sanders.

14 I also explained that in preparing amended
15 applications for the Court there was a high degree of
16 probability that many or some at least of the allegations
17 would involve claims of ineffective assistance of counsel
18 against her. And that she needed to know that I took my
19 duty to my client, Mr. Tunzy Sanders, very clearly and
20 that I would not alter in any shape, form or fashion what
21 I would do on his behalf just because she had been
22 involved in the payment of my fees and that as long as
23 everyone understood that we were fine. And we went
24 forward from there.

25 THE COURT: Well, you were hired to do specifically,

1 what? To do the PCR hearing, or to do the appeal to get a
2 de novo hearing?

3 MS. SHURLING: To do the appeal, Your Honor.

4 THE COURT: So, were you hired to conduct a PCR
5 hearing?

6 MS. SHURLING: Your Honor, subsequently I had
7 conversations with Ms. Brenda Sanders in which I advised
8 her that if they wanted me to represent him on the remand
9 for a new Circuit Court proceeding that we need to modify
10 the terms of our original fee agreement and agree that I
11 would apply a portion of, in fact, the majority of the fee
12 that had been paid to me for the PCR appeal to my fee for
13 representing him in a new PCR.

14 THE COURT: Well, where do you stand on that?

15 MS. SHURLING: The fee has been paid, Your Honor. If I
16 can clarify.

17 There was an additional -- part of the fee went
18 towards the two hearings in the efforts to get the new PCR
19 proceeding. The balance was applied to the fee for the
20 PCR. The additional fee necessary to pay the entire fee
21 for the PCR was paid by the Sanders family. Everything is
22 current.

23 I have sent Ms. Sanders on a previous occasion an
24 amended written fee agreement acknowledging the terms
25 under which we had agreed to modify the original fee

1 agreement.

2 I've never gotten that back from Ms. Sanders.

3 However, I gave her a copy this morning. She has it with
4 her. And it was my understanding that she was getting
5 ready to execute it and hand it to me before the
6 proceedings started, and we just started a minute sooner.

7 I think she's indicating she'll hand it to me now,
8 Your Honor.

9 (Document handed to counsel.)

10 THE COURT: So what we have here is an Applicant who
11 was represented by his sister, he loses the trial, he
12 files now after all of the background getting here, he's
13 got a post conviction application filed by you,
14 Ms. Shurling, alleging that his sister who has been
15 responsible for paying the fee and signed the fee
16 agreement is ineffective.

17 MS. SHURLING: Correct, Your Honor.

18 THE COURT: That doesn't smell right to me.

19 MS. SHURLING: Your Honor --

20 THE COURT: What else do you want to put on the record
21 about that?

22 MS. SHURLING: Your Honor --

23 THE COURT: I mean, that would be like me representing
24 you, you get convicted. You're my sister. I go out and
25 hire John Doe to say, hey, John, Lawyer Early was, me, I

1 was ineffective. And of course you got to call me as a
2 witness. I'm obviously going to -- what do you say to
3 that?

4 MS. SHURLING: A couple of things, Your Honor.

5 An analogous situation although not on all fours is a
6 situation that happens every day in post conviction
7 relief, or at least with me. People will hire me to do a
8 direct appeal.

9 THE COURT: Sure.

10 MS. SHURLING: And after I lose, if the direct appeal
11 is lost, the family comes to me and says, we want to hire
12 you to do a post conviction relief. I go to the client
13 and say, you clearly have a right under Evans -v- Lucy and
14 its progeny to raise claims of ineffective assistance of
15 appellate counsel in a PCR.

16 If you hire me, your direct appeal lawyer to be your
17 PCR lawyer, I am obviously not going to raise claims
18 against myself. So if you want to hire me to be your PCR
19 lawyer, the Court is going to require that you waive any
20 claims of ineffective assistance of appellate counsel.
21 That's your choice. And you may want to talk to another
22 lawyer about it. The Court will certainly question you
23 about it.

24 The Court then routinely questions the individual as
25 to whether they realize that by hiring me they are waiving

1 their right to raise claims of ineffective assistance of
2 appellate counsel since as PCR counsel I'm obviously not
3 going to PCR myself. We do that routinely in cases all
4 the time.

5 In this situation --

6 THE COURT: Well, I understand that. You're not going
7 to PCR yourself.

8 Well, what we got here is, in effect, a trial lawyer
9 PCRing herself by hiring you to say she was ineffective.

10 MS. SHURLING: This isn't really any different, Your
11 Honor, from what happens frequently with public defenders.
12 I often have cases where I get a post conviction relief
13 case where the public defender, I contact the public
14 defender and am told, I realized after the trial that I
15 had made a serious mistake. I wrote him and sent him a
16 PCR application and told him to file a PCR application
17 alleging I was ineffective because of this mistake I made.

18 That frequently happens. And although there's no
19 money changing hands, it's the same situation where a
20 trial attorney that recognizes that they have made
21 mistakes ultimately hires someone else or initiates a
22 situation for someone else to do a PCR.

23 THE COURT: Do you know in all your years of practice
24 where a lawyer who represented a defendant who loses, that
25 lawyer goes out and hires a PCR attorney to say, hey, I

1 was ineffective, I'm paying you to file this PCR to show
2 that I was ineffective? No, ma'am, you don't know that;
3 do you?

4 MS. SHURLING: Not hires. Not where money trades
5 hands. But I have been involved in countless cases where
6 public defenders have advised a client to file a PCR,
7 gotten them an application and even told them what to say,
8 told them what mistake they made and what allegations to
9 raise against themselves.

10 THE COURT: Well, that's called falling on your sword.

11 MS. SHURLING: Yes, sir.

12 THE COURT: Anything else you want to put on the
13 record concerning this?

14 MS. SHURLING: Only, Your Honor, that I would state as
15 an officer of the Court, and the Court's known me a long
16 time, Ms. Sanders has not attempted in any way, shape,
17 form, or fashion to influence me with regard to what
18 issues I would raise on behalf of Tunzy Sanders in the new
19 post conviction relief proceeding.

20 She and I have interacted in this matter with regard
21 to preparation for this hearing in no way different from
22 how I would interact with any trial attorney that I speak
23 with before a court proceeding. There has been no
24 collusion or collaboration in terms of setting anything
25 up. There's certainly no attempt to sandbag the Court.

1 My interaction with her has been exclusively of the
2 exact same type and nature as I would have on a regular
3 basis with trial attorneys as a professional courtesy. As
4 an officer of the Court, I frequently sit down with trial
5 lawyers and go over the issues that I intend to raise and
6 I've provided Ms. Sanders with a copy of the application
7 and briefly spoken with her about a couple of the
8 allegations.

9 But that has been the beginning and end of her
10 involvement in directing the course of the current
11 allegations, those that have been added to the original
12 application.

13 THE COURT: Thank you. AG's Office?

14 MR. SPENCER: Yes, Your Honor. Just for the record,
15 David Spencer with the Attorney General's Office.

16 THE COURT: Well, Mr. Spencer before the trial started
17 you handed me the case of Carter versus State and State of
18 South Carolina versus Carter.

19 MR. SPENCER: Yes, sir, Your Honor.

20 THE COURT: In that it says that I shall make an
21 inquiry when there is dual representation. And in that
22 case the trial counsel, trial counsel was also the PCR
23 counsel.

24 MR. SPENCER: Right.

25 THE COURT: And obviously that's dual representation.

1 And when that happens the Court held that that would
2 result in a waiver of any claim of ineffective assistance
3 of counsel.

4 In this case Mrs. Sanders is not representing him in
5 the PCR hearing.

6 MR. SPENCER: Right. No longer.

7 THE COURT: So do we have dual representation?

8 MR. SPENCER: We don't have dual representation. As I
9 understand --

10 THE COURT: What do we have?

11 MR. SPENCER: -- at this point we no longer have dual
12 representation. It certainly shows how a conflict can
13 exist.

14 My understanding is she effectively represented him in
15 preparing the pleadings. That's providing legal
16 assistance.

17 At some point Mrs. Shurling comes into the case.
18 Ms. Shurling is counsel of record. There's nothing
19 indicating Ms. Sanders is counsel of record. So in that
20 regards, Carter wouldn't apply.

21 THE COURT: Would not apply?

22 MR. SPENCER: Would not apply because as I understand
23 it and, you know, Ms. Sanders is not representing
24 Mr. Sanders today.

25 THE COURT: I understand that.

1 MR. SPENCER: I think that's the distinction.

2 THE COURT: Are we going to move solely on your
3 allegations set out in the amended PCR application? We're
4 not going to go back on all the stuff that was in the
5 original application; are we?

6 MS. SHURLING: With regard to the claims of ineffective
7 assistance of appellate counsel we are, Your Honor, but
8 those allegation have nothing to do with Ms. Sanders.

9 THE COURT: I understand.

10 MR. SPENCER: There is one thing too, as Mr. Gourley
11 reminded me. She did call -- Ms. Sanders did call, or
12 Judge Sanders, excuse me, did call Mr. Gourley, I believe
13 it was last week or the week before, asking if we could
14 work something out, so...

15 MR. GOURLEY: Your Honor.

16 THE COURT: Work something out being like, what?

17 MR. SPENCER: Being like as if we would consent or
18 agree to come to some sort of consent agreement.
19 Obviously our office doesn't do anything like that.
20 That's just something we want on the record --

21 THE COURT: That's probably a benign --

22 MR. SPENCER: -- for purposes of disclosure.

23 THE COURT: That sounds like benign, trying to help
24 her brother out. I don't think there's anything untoward
25 about that.

1 MR. SPENCER: Your Honor, again, I feel I would be
2 remiss if I didn't bring that up to this Court's
3 attention.

4 THE COURT: I agree with you that in this particular
5 factual situation, Carter versus State is not applicable.
6 It's not dual representation. And I've known Ms. Shurling
7 a long time. If there was anything that was there, she
8 would tell me.

9 And you may call your first witness.

10 MS. SHURLING: Your Honor, before we proceed I wanted
11 to --

12 MR. SPENCER: I apologize, Your Honor, just if I
13 could. I do have problems with it. And I do just want to
14 address the issue. At least I've spoken to it. Thank you
15 for indulging me.

16 You know, my concerns about trial counsel paying PCR
17 counsel to proceed.

18 THE COURT: What are your concerns? Same thing?

19 MR. SPENCER: My concern is, is, you know, and it's
20 sort of what you Your Honor said yourself, it's just sort
21 of a smell test situation. I don't know what the -- how
22 to handle it.

23 THE COURT: I'll have to as the fact-finder as well,
24 sitting nonjury, I'm going to have to judge Judge Sanders'
25 credibility. If I feel like she's not being credible with

1 me about her representation of her brother at the nonjury
2 trial, I'll have to call it like I see it. I don't know
3 any other way to call it.

4 I'm sure she understands that. She's a seasoned
5 lawyer and now a judge in Michigan. And I'll be not only
6 listening to it for legal issues but I'll have to judge
7 the credibility. And obviously that will be one thing I
8 will look at; the fact that she's paying for a PCR, would
9 that affect her credibility. She would do the same thing
10 if she was sitting up here. I'll obviously have to look
11 at it, unless you got something else that you need to tell
12 me.

13 MR. SPENCER: No, Your Honor. I think that's it. And
14 I do appreciate you indulging me in making sure. I
15 certainly wanted all of this to be out there for
16 everybody.

17 And I think we would have figured this out in the
18 middle of the hearing or you would have figured this out
19 in the middle of the hearing. So I think it was best to
20 take this up up front.

21 THE COURT: It is a little bit of an unusual
22 situation, to say the least. I don't think I've ever
23 encountered it in all my 40 years. But every day is a new
24 day and every day you get a new set of facts. So that's
25 what's so interesting about practicing law; you never get

1 the same thing when you walk out of the office each
2 morning, or being a judge. It's hard for me to think I'm
3 not practicing law anymore even though it's been nine, 10
4 years.

5 Yes, ma'am. Anything else?

6 MS. SHURLING: As a young lawyer, Your Honor, I used
7 to take issue with the phrase 'practicing law'. The older
8 I got, the more I realized that we so continue to learn as
9 the process goes on that I came to understand that phrase
10 more and more.

11 THE COURT: I understand.

12 MS. SHURLING: Your Honor, in addition to the amended
13 application that Your Honor already has in your packet,
14 there was one additional issue, that I had already told
15 both Mr. Spencer and Mr. Gourley about, that I
16 inadvertently left out of the amended application.

17 And that issue was whether or not trial counsel was
18 ineffective for failing to request that the Trial Court
19 publish on the record all the law to be applied by the
20 Court in reaching a decision in the Applicant's case. I
21 have typed that up and done it in the form of a second
22 amended application.

23 At the same time, Your Honor, I raised one additional
24 issue that Mr. Spencer and Mr. Gourley were not advised of
25 until this morning. I have asked that they allow that we

1 go forward on this issue. It is not one that requires any
2 advance preparation on their part.

3 At the end of the trial, His Honor had, at some point
4 in the trial talked about, near the end, about closing
5 arguments. He was talking about giving the lawyers
6 approximately an hour a piece to summarize all the
7 evidence in the case. And the solicitor suggested that
8 they would waive closing arguments if the defense would.

9 And they bit. And they waived doing closing arguments
10 before Judge Barber. Judge Barber then requested that
11 they do at least a little short summary of what their
12 position was. And there are greatly abbreviated
13 statements at the end, but they are nowhere near as
14 comprehensive and detailed as a traditional closing
15 argument would be.

16 THE COURT: Any objection to that amendment?

17 MR. SPENCER: We object, just based on late notice.

18 THE COURT: Thank you. I'll allow it.

19 MS. SHURLING: Thank you, Your Honor.

20 THE COURT: We're already now an hour and 20 minutes
21 behind.

22 MS. SHURLING: Your Honor, I'm handing --

23 THE COURT: We're going to move forward.

24 MS. SHURLING: I'm handing up the Court a copy of that
25 second amended application --

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1 THE COURT: Thank you.

2 MS. SHURLING: -- which is the consent.

3 THE COURT: You may call your first witness.

4 MS. SHURLING: Your Honor, I guess since Mr. Savitz is
5 from out of town, we'll call him first.

6 THE COURT: That's entirely up to you.

7 JOSEPH L. SAVITZ, III, having been duly sworn, was
8 examined and testified as follows:

9 THE COURT: Please state your full name for the record
10 and spell your last name.

11 THE WITNESS: Okay. My name is Joseph L. Savitz,
12 S-A-V-I-T-Z, and I'm the Third.

13 THE COURT: I know when I was growing up there was a
14 Savitz Department Store.

15 THE WITNESS: That was in Saint Matthews. That's my
16 family.

17 THE COURT: Is that your family?

18 THE WITNESS: Yeah. Yes, sir.

19 (Off-the-record discussion.)

20 THE COURT: Go ahead. I grew up in Saint Matthews.

21 DIRECT EXAMINATION

22 BY MS. SHURLING:

23 Q. Mr. Savitz, would you state your full name for the
24 record?

25 A. It's Joseph L. Savitz the Third.

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1 Q. And are you currently practicing law?

2 A. No, I am not.

3 Q. Are you retired?

4 A. Well, sort of. Yes, from law I am. I'm still doing
5 other stuff, but I'm not practicing law right now.

6 Q. And up until your retirement, where were you employed?

7 A. At the Office of Appellate Defense.

8 Q. How long had you worked there?

9 A. Gosh, it seems like forever but it was only from
10 January of 1985 to January of 2011.

11 Q. Okay. And during your tenure with the Office of
12 Appellate Defense, do you recall having the occasion to
13 represent Tunzy Antwan Sanders in a direct appeal?

14 A. Yes, I did. I represented him in two appeals.

15 Q. You won the first one?

16 A. That's right.

17 Q. And that resulted in the remand you've heard us
18 discussing earlier for a new trial?

19 A. That's correct.

20 Q. Okay. In the second appeal -- well, let me backtrack
21 for a moment.

22 Have you had an opportunity to review the 2006
23 application for post conviction relief that was filed in
24 this case?

25 A. I'm sure I have at some point. I haven't -- yeah,

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1 yeah. As a matter of fact now that I see you holding it,
2 yeah, I did see that. I saw that earlier today.

3 Q. Okay. And looking back to the time period when you
4 were representing Mr. Sanders on direct appeal, did you
5 have communication with his sister, Brenda Sanders?

6 A. Yes, I did. We communicated, I believe, during both
7 appeals.

8 Q. On both appeals?

9 A. Yeah. By telephone, and she sent me some letters.

10 Q. And do you have a copy of your file or any of your
11 file materials with you?

12 A. I don't have anything with me.

13 Q. Have you had an opportunity to review your brief or
14 the decision issued in this case --

15 A. I read --

16 Q. -- on the second appeal?

17 A. Yeah. I read the opinion in the second appeal.

18 Q. Can you describe for us briefly what the issue was
19 that was raised --

20 A. Uh-huh.

21 Q. -- in the second appeal?

22 A. Yes. In the second appeal they had waived the jury
23 trial so it was a judge, bench trial. And when you do
24 that it narrows your issues down. We had just basically a
25 couple issues that I thought I could raise.

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1 What I raised was the use of the transcript of the
2 jailhouse informer's testimony, the guy that had skipped
3 out between the two trials and wasn't available to testify
4 at the second trial.

5 The difference between, I guess, the Buckmon case and
6 this case was basically the jailhouse informer's
7 testimony. And what I felt and I still feel is that a
8 conviction based upon that thin a reed is, really
9 shouldn't be upheld and that that evidence should not have
10 been admitted because we raised, like, confrontation, I
11 believe that should have been kept out.

12 There are two aspects to confrontation. One is the
13 lawyer questioning the witness. The other is the jury
14 actually seeing the guy testify. In this case the jury
15 did not get to see the guy testify. And since the
16 conviction was based pretty much on that testimony, I felt
17 like that it should have been excluded.

18 Q. And that was the only issue that was pursued by you on
19 direct appeal?

20 A. Yes.

21 Q. Okay. Now, were there additional issues that Judge
22 Sanders, Ms. Sanders, asked you to consider raising on
23 behalf of her brother?

24 A. Yes, there were. I don't remember -- I remember
25 directed verdict. She was adamant about raising directed

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1 verdict. And there may have been some other stuff but
2 directed verdict stands out in my mind. I think she sent
3 me a letter saying that she thought I should have raised
4 more stuff.

5 Q. Well, at the time you were representing Tunzy
6 Sanders --

7 A. Uh-huh.

8 Q. -- in his direct appeal, had the Court yet ruled on
9 the direct appeal of Michael Paul Buckmon?

10 A. I am not sure when the Buckmon decision came out but
11 it seems like that it must have come out around the time
12 that I was doing the second appeal or before.

13 I don't remember there being, you know, a question
14 about a directed verdict in the case prior to the Buckmon
15 opinion.

16 MS. SHURLING: A moment's indulgence, Your Honor.

17 THE COURT: What did Buckmon say? I'm not familiar
18 with that.

19 THE WITNESS: He got a directed verdict on appeal. He
20 was a co-defendant.

21 THE COURT: He was a co-defendant?

22 THE WITNESS: Yes, sir.

23 MS. SHURLING: Your Honor, it's Michael Paul Buckmon,
24 State versus Michael Paul Buckmon was in fact decided by
25 the Supreme Court on November 13th, 2001. And his,

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1 judgment, judgments and sentences for murder and attempted
2 armed robbery were vacated on sufficiency of the evidence
3 standard.

4 So it was outright vacation, no remand for retrial.
5 And as I've said --

6 THE COURT: That was a jury trial?

7 MS. SHURLING: It was, Your Honor. He was tried with
8 the Applicant in the original trial.

9 THE COURT: By Judge Clary.

10 MS. SHURLING: Yes, sir, Your Honor. And in --

11 THE COURT: And Judge Clary did not direct a verdict
12 for Buckmon and the Supreme Court said he should have?

13 MS. SHURLING: Correct, Your Honor. And another
14 individual, Mr. Maurice Benning, who would subsequently
15 testify against my client at his second trial, was also a
16 co-defendant at the original trial in 1999. And
17 Mr. Benning was acquitted on the murder and attempted
18 armed robbery charges in the trial before Judge Clary.

19 THE COURT: Acquitted by the jury?

20 MS. SHURLING: Correct, Your Honor.

21 THE COURT: And Buckmon was basically let go on an
22 appeal saying that the Trial Judge should have directed a
23 verdict of not guilty?

24 MS. SHURLING: Correct, Your Honor. And Buckmon's
25 decision was filed on November 13th, 2001. And the direct

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1 appeal decision -- pardon me.

2 The direct appeal in the second Tunzy Sanders' direct
3 appeal was submitted and was actually heard by the Supreme
4 Court on September 9th, 2003.

5 THE COURT: By the Court of Appeals.

6 MS. SHURLING: Pardon me. By the Court of Appeals
7 which would be substantially after the decision in Paul
8 Michael Buckmon.

9 THE COURT: All right.

10 MS. SHURLING: Thank you, Your Honor.

11 THE COURT: Can you hand me the Buckmon -- do you have
12 the Buckmon appeal?

13 MS. SHURLING: I have a copy, Your Honor. I can share
14 with the Court. It's my only one, so I might have to
15 borrow it at some point.

16 THE COURT: That's fine.

17 MS. SHURLING: But I do have it. (Document handed to
18 the Court.)

19 Q. Okay. Mr. Savitz, in your challenge to the
20 admissibility -- and I have trouble with this gentleman's
21 name, but it was Aurelien Vigier?

22 A. Yeah. That sounds right.

23 Q. That's as close to a pronunciation as I'm comfortable
24 with.

25 A. That sounds right.

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1 Q. In your challenge to the admissibility of his
2 statement you said you raised confrontation clause
3 issues?

4 A. I think that's right. I haven't looked at that. I
5 have looked at the opinion but exactly what I raised. I
6 mean, that seems to me that that would be the challenge,
7 that it was confrontational, unless confrontation hadn't
8 been raised below.

9 Q. Unless we all be confused, all of this was
10 pre-proffered; wasn't it?

11 A. Could be. You got me.

12 Q. Well, with regard to the admissibility of previous
13 testimonial --

14 A. Yeah.

15 Q. -- statements --

16 A. Right.

17 Q. -- the standard would be different today than it was
18 at that time; correct?

19 A. If you say so. I'll take your word for it.

20 Q. Okay.

21 THE COURT: Well, the decision certainly made mention
22 for it and they go on to a hearsay exception.

23 MS. SHURLING: Thank you, Your Honor.

24 THE COURT: 804(b).

25 BY MS. SHURLING:

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1 Q. All right. Now, when we are talking about this issue,
2 do you recall early on when the motion to exclude the
3 transcript of this individual's previous testimony was had
4 in court, Brenda Sanders raising the issue that although
5 there had been a Messiah hearing --

6 A. Uh-huh.

7 Q. -- at the time of Mr. Vigier's original appearance in
8 court -- and Madam Court Reporter, I do apologize. The
9 spelling of that gentleman's name is A-U-R-E-L-I-E-N.
10 Vigier, V-I-G-I-E-R.

11 Okay. At that time Ms. Sanders raised the issue that
12 although he had been present and questioned during the
13 Messiah hearing --

14 A. Right.

15 Q. -- she had not had the chance to question him?

16 A. Right.

17 Q. Correct?

18 A. I think. I mean, if you tell me that. I'll be honest
19 with you, I don't remember. I remember what I raised, but
20 I don't remember stuff I didn't raise.

21 Q. Well, I assume you also don't have a copy of the
22 transcript --

23 A. No.

24 Q. -- available?

25 A. No.

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1 MS. SHURLING: Your Honor, I would note that the
2 discussion concerning this goes over from about page five
3 line 18 over to page 10 line 16 at which point Judge
4 Barber takes it under advisement and says he's going to
5 discuss it with them further. Since it's a bench trial
6 that he doesn't have to make an immediate decision and
7 he's going to let them know his ruling later.

8 At a later point in the trial he ultimately rules that
9 although Ms. Sanders did not get to cross-examine Vigier
10 that she was there and present and had the opportunity to,
11 I guess, let Mr. Williams know if she had wanted to, that
12 she had an opportunity for input in the questions that
13 were put to Mr. Vigier during the Messiah proceeding and
14 that that was adequate.

15 In fact, Ms. Sanders early on had raised the question
16 about the fact that since her brother's case was reversed
17 on the ground that she didn't get to participate in the
18 full trial as his attorney of choice --

19 THE WITNESS: Right.

20 BY MS. SHURLING:

21 Q. -- that the fact that she didn't get to participate in
22 the Messiah hearing should render Mr. Vigier's testimony
23 inadmissible. Do you recall that?

24 A. That's correct. I do remember that.

25 Q. Okay. And when the issue was subsequently argued by

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1 Attorney Williams during the trial, Attorney Williams
2 didn't argue that point; did he?

3 A. I don't remember. I remember that being an issue.
4 And, I mean, that certainly being a concern of mine that
5 they got rid of his chosen counsel on a bogus reason. And
6 the lawyer that he picked wasn't able to cross-examine
7 what turned out to be the key witness in the subsequent
8 trial.

9 But I don't know how it came up, how exactly I raised
10 it in my brief. I'm, you know, kind of hazy on the
11 details.

12 Q. Thank you.

13 A moment's indulgence, Your Honor. I'm sorry. I'm
14 trying to find the page cite for the Court. (Pause.)
15 I'll find that in a moment.

16 If in fact the record indicates that Mr. Williams did
17 not renew --

18 A. Uh-huh.

19 Q. -- that aspect of the original motion in limine --

20 A. Right.

21 Q. -- then subsequently Judge Barber finds in his final
22 ruling as we've already gone over that, well, she might
23 not have been counsel of record but she had access, she
24 could give input?

25 A. Right.

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1 Q. She was involved?

2 A. Yeah.

3 Q. Okay. The Court of Appeals subsequently sort of
4 adopted that line of reasoning as well; did they not?

5 A. That seems right to me; yes.

6 Q. And in fact there's discussion in the opinion that
7 indicates that the sister had the opportunity to
8 participate in the Messiah hearing, if not directly as
9 counsel of record vis-a-vis Attorney Williams?

10 A. Right.

11 Q. Now if -- when Judge Barber ruled, if Attorney Sanders
12 had put on the record, had responded to that --

13 A. Right.

14 Q. -- and put on the record that her relationship with
15 Attorney Williams was not such that she had the
16 opportunity to contribute to his representation, that her
17 suggestions were not being followed, whatever --

18 A. Right.

19 Q. -- if a record had been made on her position that she
20 did not have the opportunity for input during the Messiah
21 hearing --

22 A. Right.

23 Q. -- would that aspect of this confrontation issue have
24 been something that you would have also argued on appeal?

25 A. If the Court had ruled as they did that she had the

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1 opportunity to do it, and the record reflected that she
2 had not based on her own statements, that if she said,
3 whoa, wait a minute, that didn't happen, I would have at
4 least filed a petition for rehearing had the Court ruled
5 that saying, wait a minute, that's not what happened. She
6 said this is what happened.

7 So, I mean, you can only argue what appears in the
8 record. You can't argue stuff that just isn't there.

9 Q. Certainly. But -- so there are really two issues.
10 Number one, we don't know whether Judge Barber would have
11 stuck to his ruling had Attorney Sanders stated as an --
12 that, the representation to the Court that she had ample
13 opportunity for input was not accurate --

14 A. Right.

15 Q. -- given her lack of cooperative working
16 relationship --

17 A. Yeah.

18 Q. -- with Attorney Williams?

19 A. Yeah.

20 Q. That would have been a factor --

21 A. Yes.

22 Q. -- potentially in influencing Judge Barber to change
23 his ruling?

24 A. Yeah, if she had said, we're not even talking about
25 this; yes.

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1 Q. So we can't today know what if any influence that
2 would have had on the Court of Appeals' decision either;
3 can we?

4 A. If they had held to the contrary and the record
5 reflected that there wasn't any kind of relationship
6 between the two of them that would have allowed that kind
7 of communication, then the Court wouldn't have said that's
8 what happened if the evidence was that that's not what
9 happened.

10 Q. So you would have pursued a petition for rehearing and
11 potential for a writ of certiorari to the Supreme Court on
12 that claim had that record been made below?

13 A. Had that been the evidence in the case, I would
14 definitely have pointed out -- I mean, you always want to
15 point out to the Court of Appeals or the Supreme Court,
16 whatever court, is wrong about the evidence below.

17 So, yes, you would just routinely point that out in a
18 petition for a hearing and possibly, you know, in the
19 Supreme Court they just reject it out of hand.

20 Q. With regard to the allegations contained in the
21 original post conviction relief application, let's go back
22 to that --

23 A. Okay.

24 Q. -- portion of the record for a moment. Your Honor,
25 I'm going to briefly see if I have an extra copy of that

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1 application for Mr. Savitz.

2 And I do.

3 I apologize, Your Honor. I forgot to ask for leave to
4 approach.

5 If I could direct your attention to page five.

6 A. Okay.

7 Q. The application for post conviction relief adopted by
8 Mr. Sanders as his own and filed pro se in this case
9 alleges, among other things, that you were ineffective for
10 failing to argue that the informant testimony of David
11 Staley and Aurelien Vigier should have been suppressed
12 because they were acting as government agents at the time,
13 they had conversations which they attributed to Tunzy
14 Sanders.

15 A. Right.

16 Q. And which were incriminating to him.

17 A. Okay.

18 Q. Did you consider raising that issue on direct appeal?

19 A. You know, I don't even remember that happening. I
20 don't remember -- no, I don't remember that being an issue
21 that -- but, you know, I know the State hates to hear me
22 say this but my testimony in all these PCR hearings is the
23 same. I know if I missed an issue that was a winner on
24 appeal, that would have won, then certainly I don't have
25 any strategic reason for abandoning those issues. There's

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1 no sense in abandoning a winning issue in favor of an
2 issue that ultimately lost.

3 You know, I don't think that's that good an issue. I
4 still don't. But, I mean, if it was a winner, my opinion
5 about it really doesn't matter.

6 I don't remember considering it. Obviously I didn't
7 raise it but had I raised it and he would have won, then I
8 was ineffective on appeal. There's just no way around
9 that.

10 Q. Well, do you have any specific recollection of any
11 strategic or tactical reason for not raising that aspect
12 of the confrontation clause issue that you were raising?

13 A. There is never a strategic reason for not raising a
14 winning issue. I don't believe that is a winning issue.
15 Those are two different things.

16 What I remember is that the jury trial, that there
17 wasn't a jury and that really limited what we could do in
18 the appeal. I thought the issue and still believe that
19 the issue I raised was meritorious.

20 I don't think a criminal conviction should rest upon
21 unreliable testimony like we have in this case. And
22 that's what I raised on appeal. And had I prevailed on
23 that, the ultimate result would have been a directed
24 verdict on remand, I believe, as in Buckmon.

25 It didn't work out that way, but there could be other

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1 issues that I, you know, that I missed. I'm certainly not
2 perfect.

3 Q. Thank you. You in fact filed a merits brief in this
4 case; didn't you?

5 A. Oh, yeah; yes.

6 Q. So this was not a situation where the appellate court
7 would be going behind you in reviewing the record from
8 cover to cover for issues that you missed?

9 A. No.

10 Q. As they do in an Anders brief situation?

11 A. No.

12 Q. So the scope of review by the appellate court would in
13 fact be limited to the issues that you've presented in
14 brief?

15 A. They looked at what I raised and decided the case
16 based on what I raised.

17 Q. Now, looking at page eight, there's an allegation that
18 you were ineffective. And let me explain, if I might.

19 In the original form application, the Applicant
20 alleges that you were ineffective for failing to raise
21 certain issues on appeal. Those issues are then set forth
22 in the attachment more by way of a discussion of
23 substantive errors of law. Just so we're clear.

24 But the claim that it was ineffective assistance of
25 counsel not to raise them is contained in the body of the

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1 form application.

2 A. Right.

3 Q. On page eight with regard to ground number three, did
4 the Trial Court err when it denied the appellant's motion
5 to quash Maurice Benning's testimony? Do you recall that
6 motion when it was made during the trial?

7 A. I will be honest with you, I do not. And reading
8 this, it's still not ringing any bells with me.

9 Q. There --

10 A. And I'll be honest, I don't remember exactly what the
11 substance of his testimony was.

12 Q. Okay. Do you recall testimony at trial that the State
13 had utilized a polygraph examination in order to test the
14 credibility of Maurice Benning's story prior to using him
15 as a witness at trial?

16 A. I wish I could remember Benning's -- I'm just not
17 coming up with anything on Benning testifying.

18 Q. Okay.

19 A. I don't remember polygraphs or what he testified to.

20 Q. So with regard to this allegation, you have no
21 independent recollection of why you didn't brief it?

22 A. No.

23 Q. I assume then neither do you have any current
24 recollection of deciding that the issue was without merit?

25 A. I mean, I'm sure I decided that the issue was without

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1 merit at some point because I raised it. But, you know,
2 what my thinking on it was, not being able to recollect
3 what the testimony was, I can't tell you why I didn't
4 think it had merit.

5 Q. On the standard for effective assistance of appellate
6 counsel which I'm sure after so many years of appellate
7 defense you're familiar with, appellate counsel is not
8 required to raise even every meritorious appellate issue;
9 are they?

10 A. Yeah. I mean, well, let's take this case, for
11 example. If there are meritorious issues that I didn't
12 raise, I'd say I'm not going to raise these meritorious
13 issues and I'm going to raise this loser then, yeah, I
14 would be ineffective.

15 To me, like appellate counsel, you either win the case
16 or you don't. If you don't and there are meritorious
17 issues in the case that you would have prevailed on then
18 you were ineffective unless there's some strategic reason
19 for not raising them. I didn't have any strategic reason
20 for not raising any of the issues you're talking about if
21 you don't consider not thinking they're meritorious is a
22 strategy and I don't. I don't think that's a strategy.

23 Q. Thank you for clarifying that. That's exactly the
24 point I wanted to make.

25 This was not a matter of you concluding that the issue

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1 although somewhat meritorious was not your strongest issue
2 so you went another direction?

3 A. Yeah. I mean, it's not like if I raised this it's
4 going to harm the appeal, therefore I'm not going to raise
5 it and raise this other one instead. No, it's nothing
6 like that. There's nothing to prevent you from raising a
7 number of, however many meritorious issues you might have
8 as long as it doesn't somehow harm the appeal and none of
9 these would have harmed the appeal.

10 Q. Well, in fact, you were only raising one meritorious
11 issue in your judgment on direct appeal.

12 A. That was the only one I saw.

13 Q. I understand.

14 A. I'm not saying that in retrospect a lot of these are
15 meritorious. I'm just saying that there is no reason not
16 to raise meritorious issues.

17 Q. I understand. My point being, there was no danger
18 that you were cluttering --

19 A. No.

20 Q. -- an already busy record with additional issues when
21 you were already presenting multiple issues on direct
22 appeal?

23 A. I had plenty of room to raise other issues.

24 Q. Thank you.

25 There again, on page ten ground four, is the specific

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1 restatement of the fact that you had declined to raise
2 certain issues despite the fact that you addressed
3 multiple issues in the co-defendant's appeal and prevailed
4 on those issues in the Court of Appeals.

5 A. I didn't represent the co-defendant. Buckmon?

6 Q. Correct. Well, at the time that you were doing this
7 particular appeal, in September of 2003 when you argued
8 it --

9 A. Uh-huh.

10 Q. -- in 2003, were you chief counsel at appellate
11 defense?

12 A. Yes, I was.

13 Q. So, when Mr. Buckmon was represented -- and Your
14 Honor, if I might glance at the Buckmon opinion that I've
15 handed up to the bench.

16 THE WITNESS: Is my name on the Buckmon opinion?

17 THE COURT: This.

18 THE WITNESS: I probably need to clarify that then.

19 BY MS. SHURLING:

20 Q. Okay.

21 A. I don't know how my name -- I think Eleanor Cleary
22 represented -- or Eleanor Duffy represented Mr. Buckmon.
23 I have no idea how my name appeared on that opinion
24 because I had nothing to do with this appeal.

25 THE COURT: When the Court of Appeals decided this,

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1 was there a petition for rehearing or petition for cert or
2 anything?

3 THE WITNESS: I do not remember. If there was, I
4 don't have any recollection why I wouldn't have sought
5 cert in that case.

6 THE COURT: Well, was there a deal given to Vigier
7 after he testified in the first trial?

8 THE WITNESS: I don't know. I know that by the time
9 of the second trial he was nowhere to be found so I'm
10 assuming he got some kind of deal.

11 THE COURT: Was released from incarceration.

12 THE WITNESS: He was just nowhere to be found. The
13 State could not locate him.

14 THE COURT: And the Court of Appeals said this
15 Sander's sister, lawyer, she had been at the first trial
16 and I guess heard the cross-examination. So that was
17 enough to bring in that hearsay.

18 THE WITNESS: I guess. I guess they're saying that.

19 THE COURT: Even though she was booted out of the
20 trial.

21 THE WITNESS: I suppose.

22 THE COURT: And even the Supreme Court reversed it for
23 booting her out.

24 THE WITNESS: I guess that's what they're saying.

25 THE COURT: If you had proffered, where would that put

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1 us?

2 THE WITNESS: I mean, I think what I was arguing is
3 that the testimony -- I still don't -- I still don't
4 believe they affirmed this case, I don't, you know, based
5 upon, you know, the testimony of a witness who didn't feel
6 strongly enough to stick around to testify.

7 And, like I say, I mean, you know, part of it is the
8 jury actually seeing the witness, the demeanor of the
9 witness. I mean, all they're hearing is his testimony
10 being read to him. The jury that convicted Mr. Sanders
11 had no opportunity to assess the demeanor --

12 THE COURT: He was tried nonjury though.

13 THE WITNESS: Yeah. Well, I mean, the Judge had no
14 opportunity. Part of it is assessing credibility.

15 THE COURT: Plus the other two co-defendants, one was
16 acquitted, one was reversed by the Supreme Court.

17 THE WITNESS: Yeah. And I thought waiving the jury
18 was also a mistake that didn't help us.

19 THE COURT: Is that an appealable issue though,
20 waiving a jury?

21 THE WITNESS: Not on this record. I mean, it wasn't a
22 direct appeal issue.

23 THE COURT: It would have been a PCR.

24 MS. SHURLING: And it is here today, Your Honor.

25 THE WITNESS: I mean, that was part of the problem. I

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1 thought the issue I raised was good. And normally judges
2 are presumed to be able to weigh evidence better than
3 juries. And one of the things we had is that we didn't
4 have a jury finding him guilty based upon this
5 questionable evidence. We had a judge trial, bench trial,
6 which didn't help even the issue I raised.

7 BY MS. SHURLING:

8 Q. Mr. Savitz, let's re-track for just a second. At the
9 original trial in January of 1999, Tunzy Sanders was tried
10 along with Michael Paul Buckmon and Maurice Benning?

11 A. That's right.

12 Q. You handled the direct appeal at that time for Tunzy
13 Sanders. You also handled the direct appeal or at least
14 were involved in it enough for your name to be on the
15 opinion in Michael Paul Buckmon; correct?

16 A. My name is there but, I'll be honest with you, I don't
17 think I had anything whatsoever to do with -- I mean, that
18 would be a conflict. I mean, there's obviously a conflict
19 of interest me representing Buckmon and Mr. Sanders when
20 Buckmon's raising, you know, the directed verdict. We're
21 not.

22 I mean, my name is on there. How it got there, I had
23 absolutely --

24 THE COURT: We've been over this. Let's move on.

25 THE WITNESS: -- I had nothing to do with the Buckmon

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1 appeal to my recollection, at all.

2 BY MS. SHURLING:

3 Q. Well, in his pro se application for post conviction
4 relief, Mr. Sanders alleges that you were ineffective for
5 not raising the same issue for him that you raised on
6 behalf of Michael Paul Buckmon.

7 A. Primarily --

8 Q. Buckmon was reversed on a finding that a directed
9 verdict of acquittal should have been granted; correct?

10 A. Right, right.

11 Q. Now in this case there was no direct evidence
12 whatsoever tying Mr. Tunzy Sanders to this crime; was
13 there?

14 MR. GOURLEY: Your Honor, I object. It's leading.

15 THE COURT: She's been leading all morning. Y'all
16 haven't said a word.

17 We're really spending -- ask direct questions and
18 let's move along.

19 THE WITNESS: Okay. I did not raise the directed
20 verdict motion in Mr. Sanders' case. Mr. Buckmon did. My
21 understanding is the difference between those two cases
22 was the presence of the jailhouse informer's testimony.

23 What I raised was that the jailhouse informer's
24 testimony was unreliable, shouldn't have come in. Had
25 that won we would have been to, in a directed verdict

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1 situation on -- he wouldn't have gotten life. He wouldn't
2 have walked had they suppressed that evidence. He would
3 have gotten a new trial but the result of that new trial
4 would have been a directed verdict. That was my thinking.

5 THE COURT: Are you telling me the only evidence tying
6 Mr. Sanders to it is the jailhouse lawyers?

7 THE WITNESS: I have not read the transcript in years
8 but my recollection of the case is a difference between
9 Mr. Buckmon's case and Mr. Sanders' case is the jailhouse,
10 the so-called jailhouse confession.

11 THE COURT: And which was presented in the second
12 trial before Judge Barber --

13 THE WITNESS: Via transcript.

14 THE COURT: -- by way of the transcript of the first
15 trial.

16 THE WITNESS: That's my recollection.

17 THE COURT: Where his lawyer was precluded from
18 participating. As a result of that the Supreme Court
19 reversed.

20 THE WITNESS: Right.

21 THE COURT: How does that make his lawyer,
22 Ms. Sanders, ineffective?

23 MS. SHURLING: We'll get to that, Your Honor.

24 Q. With regard to the direct appeal issues for Tunzy
25 Sanders, did you consider arguing as a second issue that

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1 but for the testimony that the Applicant was submitting
2 should have been suppressed in the appellant's issue,
3 one --

4 A. Yeah.

5 Q. -- that there was a dearth of any direct or
6 substantial circumstantial evidence, and a --

7 A. No, I didn't. And the reason I didn't is because had
8 we won, the Court wasn't going to direct a verdict on --
9 the rule is any evidence, even unreliable evidence like
10 this --

11 THE COURT: That's the rule on directed verdict. The
12 evidence is there concerning the --

13 THE WITNESS: Yeah.

14 THE COURT: -- testimony and if they say that
15 testimony is improper, they'd have sent it back for a new
16 trial.

17 THE WITNESS: And then you would have gotten a
18 directed verdict. Once the confession is gone, then my
19 idea was that he would have gotten a directed verdict on
20 remand. There was some evidence he was guilty. The
21 jailhouse --

22 THE COURT: He would have been fed out of the same
23 spoon as Buckmon.

24 THE WITNESS: If we had prevailed on appeal the second
25 time; yes, sir.

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1 BY MS. SHURLING:

2 Q. And, logically if you had prevailed on the issue of
3 the admissibility of the jailhouse snitch's testimony on
4 remand, your client, as I understand your testimony, would
5 have been in the same position as Mr. Buckmon?

6 MR. GOURLEY: Your Honor --

7 THE WITNESS: Unless they had come up --

8 THE COURT: Hold on. Hold on.

9 MS. SHURLING: He said it.

10 MR. GOURLEY: I object to the leading.

11 THE COURT: Please don't ask leading questions. I
12 mean, we don't have a jury and I understand that, ma'am.
13 Everybody in here is a lawyer, so, please ask non-leading
14 questions.

15 THE WITNESS: Okay. If -- unless they had come up
16 with something new between the trial and the retrial, if
17 they had had the same case they had that I had on this
18 appeal and I had suppressed the jailhouse informer's
19 testimony, it was my idea that he would have been -- that
20 there would have been a directed verdict on the retrial
21 unless they had come up with some other witness to say,
22 hey, you know, I never said anything but I saw this.

23 My understanding is they don't have any other evidence
24 that suggests that he's guilty other than the jailhouse
25 informer's testimony.

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1 BY MS. SHURLING:

2 Q. And with regard to ground eight found on page 19 of
3 the pro se application, this is an extension of the
4 argument that you should have presented the issue of
5 whether or not the lower court should have granted a
6 direct -- granted findings of not guilty at the directed
7 verdict stage?

8 A. Right.

9 Q. Correct?

10 A. Right.

11 Q. And I believe you've already addressed your reasons
12 for not raising those?

13 A. Right.

14 Q. Lastly, on page 21 it is alleged that the delay in
15 revealing the fact that Vigier and Staley had received
16 deals from the State constituted a Brady violation as such
17 testimony was only revealed at the second trial.

18 A. Right.

19 Q. Was that an issue that you considered raising on
20 direct appeal?

21 A. Yeah. I don't remember. I don't remember that. I
22 guess -- I mean, I read the transcript. I guess I
23 considered it. I didn't raise it, but I don't remember
24 going -- what I was thinking when I didn't raise it. I
25 don't know that I would raise it today.

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1 Q. Okay. Do you recall during the second trial the
2 solicitor revealing that Richard Breibart, counsel for
3 Mr. Buckmon, had been told that although there were no
4 promises that they certainly would agree to take his
5 cooperation into consideration in the future?

6 A. That came from Breibart. No, I don't remember that.
7 I don't know that that would be dispositive.

8 Q. And do you remember that issue being developed any
9 further at the second trial?

10 A. No, I do not.

11 Q. Had it been, would you have presented that as an
12 appellate issue?

13 A. Depending upon how the record, you know, was
14 developed.

15 Q. Just a couple more questions. On direct appeal, can
16 you reach back in your vast experience and tell us some of
17 the areas that frequently result in reversal on direct
18 appeal?

19 A. Jury charges.

20 MR. GOURLEY: Your Honor, I object. That's
21 irrelevant.

22 THE COURT: It's irrelevant, speculative, hasn't got
23 anything to do with this case. Sustained.

24 MS. SHURLING: Nothing further, Your Honor.

25 THE COURT: Thank you. Everybody okay. Madam Court

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1 Reporter --

2 (Off-the-record discussion.)

3 MR. GOURLEY: Your Honor, just briefly.

4 CROSS-EXAMINATION

5 BY MR. GOURLEY:

6 Q. Mr. Savitz.

7 A. Yes.

8 Q. You've been a practice appellate attorney for
9 approximately 26 years?

10 A. That's correct.

11 Q. And during that time, could you just go into, just
12 briefly, your procedures for reviewing a transcript and
13 deciding meritorious issues on appeal?

14 A. Yeah. What we do is we represent most of the indigent
15 defendants in South Carolina. We get the transcripts of
16 the trial. They're assigned to however many attorneys
17 happen to be there at the time. I did murders and death
18 penalty cases.

19 And you read the transcript and, you know, we're
20 obviously overworked. We read the transcript basically
21 once or twice, if we're lucky, and pick out the issues
22 that we think, you know, are possible issues on appeal.
23 Do a little bit of research, you know, winnow it down to
24 the issues that we think we can prevail upon. Write a
25 brief and file the brief and then go argue it if the Court

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1 asks us to.

2 Q. You did that procedure in this case?

3 A. I don't think we had an argument in this case but,
4 yeah, that's the procedure I followed except for the
5 argument.

6 Q. So you feel you raised all meritorious issues on
7 appeal?

8 A. The issues that I raised at the time I felt that was
9 the -- I thought if we were going to win that it was going
10 to be that issue. I did not see any other issues that I
11 thought we would have prevailed upon.

12 Q. And previously Brenda Sanders called you and asked you
13 to raise issues on appeal?

14 A. Yeah, there were definitely other issues. The issues
15 that we've been talking about are things that I'm not
16 hearing here for the first time today. She definitely
17 mentioned --

18 Q. So you aware of these issues?

19 A. Oh, yeah.

20 Q. And at the time you made a decision as an appellate
21 attorney with tons of experience to not raise those
22 issues; correct?

23 A. That's correct. That's correct.

24 Q. So therefore it's your understanding you raised the
25 meritorious issue that you felt was necessary?

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1 A. I raised the issue I thought was going to win; yes,
2 sir.

3 Q. Okay. Just briefly on this directed verdict motion.

4 A. Yeah.

5 Q. You explained that the difference between the two,
6 between Buckmon's case and this case was the jailhouse
7 snitch's testimony; correct?

8 A. That is my recollection. I mean, if you tell me I'm
9 wrong about that, there's other stuff, that can be correct
10 too. What I remember the difference being is the
11 jailhouse informer's testimony. And if I could have
12 gotten that knocked out, he'd have been in the same boat
13 Buckmon was in and would have walked ultimately. That was
14 my plan.

15 Q. And on your appeal you raised that issue; correct?

16 A. That's right.

17 Q. And the Court of Appeals addressed it?

18 A. Yes.

19 Q. They affirmed his conviction?

20 A. Yes, sir.

21 Q. And they went for a petition for cert to the Supreme
22 Court?

23 A. I don't remember doing that but if you tell me I did.

24 Q. And it got denied?

25 A. I lost?

JOSEPH L SAVITZ III - CROSS

1 Q. Correct.

2 A. Yeah, okay.

3 Q. So that jailhouse snitch testimony was properly
4 introduced then?

5 A. No, no. I disagree with both the Court of Appeals --

6 Q. According to the Court of Appeals.

7 A. I don't have to appear in front of them anymore. I
8 disagree with both of them. I think they were both wrong

9 THE COURT: Why was cert denied? What's your opinion
10 as to that?

11 THE WITNESS: You know --

12 THE COURT: This is an evidentiary issue.

13 THE WITNESS: They just got it wrong. I don't know.
14 It's hard to get them to, you know, to change their minds.
15 You know, you get back to the bench trial. And if I'd had
16 a jury trial and it had been evidence that the jury heard
17 and not just the Judge, I think that would help the issue
18 out. If you're -- I think the bench trial really, really
19 hurt us.

20 THE COURT: In the original trial, all three
21 co-defendants were tried together or were they tried --

22 MS. SHURLING: It was, Your Honor.

23 THE WITNESS: That's correct.

24 THE COURT: And in that original, co-defendants, all
25 of them tried together, one's acquitted as I said

JOSEPH L SAVITZ III - REDIRECT

1 earlier --

2 THE WITNESS: Uh-huh.

3 THE COURT: -- one got a direct verdict on appeal and
4 but for the jailhouse snitch who was not there to testify
5 before Judge Barber based on his testimony from the prior
6 trial --

7 THE WITNESS: That was what prevented us from arguing
8 the directed verdict on direct appeal.

9 THE COURT: Existence of evidence if you believe that.

10 THE WITNESS: Yeah, some evidence. I mean.

11 THE COURT: All right. Anything else?

12 MR. GOURLEY: Just briefly, Your Honor,

13 BY MR. GOURLEY:

14 Q. In regards to the motion to quash. Again, that was
15 pointed out to you and you were aware of that issue?

16 A. That's right. I mean, I knew about all of these
17 issues.

18 MR. GOURLEY: Okay. No further questions, Your
19 Honor.

20 THE COURT: Anything on redirect?

21 REDIRECT EXAMINATION

22 BY MS. SHURLING:

23 Q. You have indicated that absent the jailhouse snitch's
24 statements, that they would have been in the same posture.
25 Maurice Benning did not testify at the January 1999 trial;

JOSEPH L SAVITZ III - REDIRECT

1 did he?

2 A. No. He was on trial, I believe.

3 Q. He was a co-defendant?

4 A. Yes.

5 Q. And isn't it true that in the second trial when
6 Maurice Benning did testify he --

7 THE COURT: Hold on. We got an objection.

8 MR. GOURLEY: Objection, Your Honor. Leading.

9 BY MS. SHURLING:

10 Q. Did Mr. Benning make any revelations in his testimony
11 at the second trial?

12 A. I mean, I'll tell you again. I do not remember what
13 he testified to. My recollection is that had it not been
14 for the jailhouse informer, they'd have been --

15 THE COURT: You testified to that about ten times
16 now. Let's move along.

17 BY MS. SHURLING:

18 Q. Mr. Savitz, if I could get you to look at page 218,
19 lines 10 through 13.

20 A. Thank you.

21 Q. Can you review that briefly? Refresh your
22 recollection and publish that for us in the record,
23 please, with permission to abbreviate --

24 THE COURT: Trial record of the first trial or the
25 second trial?

JOSEPH L SAVITZ III - REDIRECT

1 MS. SHURLING: Second trial, Your Honor.

2 THE COURT: Before Judge Barber.

3 MS. SHURLING: Correct, Your Honor.

4 THE WITNESS: Okay. It says when I -- all right.

5 Says: Mike said I shot her. I said why the F did you
6 shoot her. And he said F that. Excuse my language. Who
7 was with them. Mr. Sanders. Who did you get the gun back
8 from. Mr. Sanders.

9 So that is not evidence that Mr. Sanders shot anybody,
10 certainly.

11 BY MS. SHURLING:

12 Q. So, at the second trial there was this testimony from
13 Mr. Benning --

14 A. Right.

15 Q. -- that Michael Paul Buckmon had admitted shooting
16 her?

17 A. That if that's the Mike, yes.

18 Q. And that's the testimony that the jury in the first
19 trial didn't hear because Mr. Benning was a co-defendant
20 and didn't testify?

21 A. That's correct.

22 MS. SHURLING: Thank you.

23 THE COURT: Thank you. You may step down. You may be
24 excused to go back to Saint Matthews.

25 THE WITNESS: Columbia.

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1 (Off-the-record discussion.)

2 THE COURT: Let's take about a ten-minute break.

3 MS. SHURLING: Thank you.

4 (Thereupon, at 12:05 p.m. a break was taken until
5 12:18 p.m., and the hearing resumed:)

6 MS. SHURLING: Your Honor, at this time I would call
7 Mr. Daniel Williams.

8 THE COURT: Come around, Mr. Williams.

9 DAN WILLIAMS, having been duly sworn, was examined and
10 testified as follows:

11 THE COURT: Thank you. Mr. Williams' involvement, he
12 was counsel on the first case, first trial?

13 MS. SHURLING: Yes, sir, Your Honor. He was also
14 counsel at the second trial along with Brenda Sanders.

15 THE COURT: Thank you.

16 DIRECT EXAMINATION

17 BY MS. SHURLING:

18 Q. Correct?

19 A. That's right.

20 Q. Okay. Let's start at the beginning. For the record,
21 would you state your full name?

22 A. Dan Williams.

23 Q. And, Mr. Williams, do you remember representing Tunzy
24 Sanders at both his 1999 trial and his subsequent retrial
25 in 2001?

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1 A. I do.

2 Q. In the first trial, who was your co-counsel?

3 A. Brenda Sanders was co-counsel. And there came a point
4 that you mentioned earlier where there was something about
5 her maybe being a witness in the case. And I don't
6 remember all the details about that, but for that reason
7 she sat either at counsel's table or near counsel's table
8 but didn't participate.

9 Q. You anticipated my next line of questioning.

10 A. Okay.

11 Q. Can you remember with any specificity where -- were
12 you -- you were not in this courtroom at the time; were
13 you?

14 A. We were in Barnwell.

15 Q. You were in Barnwell. Can you remember with any
16 certainty what the seating situation was? Who was seated
17 at counsel table for the remainder of --

18 A. There were three defendants at counsel table there in
19 the first trial.

20 And the record says that Ms. Sanders was there. And
21 it said that in the second hearing. Now I don't know that
22 she was right up there or not, to be honest with you. But
23 the record says she was there, so.

24 Q. Okay. Well, we know that Tunzy Sanders, Michael
25 Buckmon and Maurice Benning were all at the table with

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1 their lawyers; correct?

2 A. It was six of us around that table.

3 Q. So there were six of you without Brenda Sanders.

4 A. Like I said, I think she was sitting on the back row
5 but I can't -- it's been 14 years since that trial and I
6 don't really remember.

7 Q. Okay.

8 A. She may have been off to the side toward the grand
9 jury box.

10 Q. Okay.

11 A. It's been so long, I don't remember.

12 Q. Okay. Not very far into the retrial in 2001, it was
13 announced that your client was proceeding with a bench
14 trial. Do you recall that?

15 A. It was after we picked the jury, I believe.

16 Q. And had any witnesses been presented at that juncture?

17 A. No, I don't believe so.

18 Q. Can you tell us what you recall about the decision to
19 go forward with a bench trial?

20 A. Ms. Sanders and I talked, my recollection is, Saturday
21 by phone. And she said that she was thinking about
22 proceeding with just a bench trial.

23 THE COURT: Now, this is the Saturday before trial or
24 the Saturday after the jury is drawn?

25 THE WITNESS: The Saturday before trial.

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1 THE COURT: And Court's starting on Monday; right?

2 THE WITNESS: Right. Either Monday or Tuesday we
3 started trial.

4 THE COURT: Okay.

5 THE WITNESS: And I told her at that time that I
6 didn't believe it was good idea and that we needed to
7 proceed as we were going, with a jury. And she said, I
8 think, that she had concerns about getting a fair trial in
9 Barnwell with a jury.

10 BY MS. SHURLING:

11 Q. Did she express to you what her concerns about getting
12 a fair trial were?

13 A. That everybody in the community had heard about it and
14 that she didn't think her brother could get a fair trial
15 in Barnwell. And there may have been other things but
16 that's all, that's the gist of it.

17 Q. Okay. Was there any discussion of making a motion for
18 a change of venue instead of going forward with a bench
19 trial?

20 A. We did make a motion for a change of venue.

21 Q. And that motion was denied?

22 A. That's correct.

23 Q. Ultimately how did you become aware of the decision to
24 do a bench trial instead of go forward with the jury
25 trial?

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1 A. We talked and -- I think we talked and said, listen,
2 let's look, and let's pick the jury first! And then you
3 look at the jury and you see if you think you want to go
4 forward.

5 And she did that. And we picked a jury. And I was
6 impressed with what, the strikes we got or the panel we
7 got. It was fair.

8 And then we decided -- she decided that she wanted to
9 waive.

10 THE COURT: Well, who decided? You or her or whose
11 decision was it?

12 THE WITNESS: We both talked with the Defendant. I
13 talked to him and I can't sit here today and tell you I
14 gave him an exhaustive reason of why he should go with a
15 jury -- I mean, a jury as opposed to a bench trial.

16 He decided to waive his rights to a jury trial and we
17 went forward with a bench trial.

18 THE COURT: Were you retained or appointed?

19 THE WITNESS: Appointed.

20 THE COURT: So you were appointed on both trials and
21 then his sister having legal background came in to assist
22 y'all. Is that sort of how it worked?

23 THE WITNESS: That's correct.

24 BY MS. SHURLING:

25 Q. Can you remember specifically any advice that you gave

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1 Mr. Sanders concerning the pros and cons of a jury trial
2 versus a bench trial?

3 A. I know at some point in time we probably discussed
4 that.

5 Q. Not -- excuse me, sir. I don't mean to interrupt.

6 A. Sure.

7 Q. But I'm not interested in what probably or maybe
8 happened. I need to know what if anything you have,
9 sitting here today, a specific recollection of advising
10 him.

11 A. See, that's the problem. Twelve years ago. I can't
12 tell you about our specific conversations.

13 THE COURT: If you don't know, you don't know.

14 THE WITNESS: It's hard.

15 BY MS. SHURLING:

16 Q. Okay. Do you recall testifying, sir, at the hearing
17 before Judge Baxley back in September of 2011 in the
18 effort to reconstruct the PCR hearing transcript?

19 A. Yes.

20 MS. SHURLING: Your Honor, may I approach?

21 Q. Mr. Williams, if I could ask you to refresh your
22 recollection by reviewing the testimony at approximately
23 page 49 lines three going down to 24.

24 A. (Complying.) Okay.

25 Q. And can you share with us, having refreshed your

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1 recollection, back in September of 2011 what recollection
2 if any you had of the specific advice that had been given
3 to Tunzy Sanders concerning the pros and cons of a jury
4 trial versus a bench trial?

5 A. I don't think I had any specific recollection then
6 either, in 2011.

7 Q. Your Honor --

8 A. I remember having conversations but to give you the
9 exact what we talked about, I just don't remember it.

10 MS. SHURLING: Your Honor, if I may approach? I have
11 another copy of the transcript of that proceeding if Your
12 Honor wishes to see the testimony we're referencing.

13 Q. If I may, Mr. Williams?

14 A. Sure.

15 Q. Thank you. So would it be fair to say that nearly two
16 years ago you didn't have any recollection of any specific
17 advice you had given Mr. Sanders concerning this subject?

18 A. I don't think so.

19 Q. I'm sorry. You don't think?

20 A. I said, I mean, I don't think, two years, I had a
21 specific recollection.

22 Q. Thank you, sir.

23 With regard to a few specifics, you indicated in your
24 previous testimony and did here today, that you were
25 present during discussions about a bench trial with the

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1 Applicant and your co-counsel, Brenda Sanders?

2 A. Yeah. I think I was.

3 Q. Do you have any specific recollection here today of
4 any of the advice given by her on this subject?

5 A. No, I don't. And I would not have been present during
6 every conversation she would have had with him, so, but
7 no.

8 Q. Okay. Your Honor, a moment's indulgence.

9 THE COURT: Well, what was your advice as far as a
10 jury trial was concerned versus a nonjury?

11 THE WITNESS: Coming up at the end there, I understood
12 her reasoning and her strategy and why she wanted to have
13 a jury trial -- I mean, a bench trial.

14 But I've never had a situation in the past where we've
15 been on the eve of trial and waived the jury before. And
16 I thought that we were better off having a jury hear the
17 facts and at least hoping, hopefully having some
18 disagreement with the jury when they got in the back.

19 But you asked me if I remember telling him all of that
20 and I can't. I just can't remember it. I will tell you
21 that I, normally when I talk to a client about their
22 rights in a case, I tell them that they got a right to a
23 jury, they got a right to confront their witnesses and
24 that if they have a jury trial it has to be unanimous.

25 But to tell you in this specific case I did all of

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1 that on those days, I just can't tell you.

2 BY MS. SHURLING:

3 Q. Okay. If I may approach again?

4 At the bottom of the last line of page 48 going over
5 to the top of page 49.

6 MR. SPENCER: Which transcript are we in?

7 MS. SHURLING: This is the transcript of the
8 reconstruction hearing which I have previously provided
9 you a copy of.

10 THE COURT: That's fine. Go ahead and ask the
11 question.

12 BY MS. SHURLING:

13 Q. Thank you. In response to questions at that hearing,
14 didn't you in fact indicate that you were present when
15 Brenda Sanders discussed this decision with her brother?

16 A. I think I was. Partially, yeah. What I said was I
17 wasn't there for every conversation she had with him.

18 Q. Well, in your previous testimony on this same subject
19 back in September of 2011, did you indicate that there
20 were any conversations she had with him at which you were
21 not present?

22 A. I don't know if I did or not.

23 Q. Okay. And do you know for certain that there were
24 meetings she had with her brother on this subject that you
25 were not present at?

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1 A. No, I didn't say it was on this subject. I don't
2 know. I know she had conversations but I can't say it was
3 about this particular subject.

4 Q. Okay. Thank you.

5 Let's talk about some of the generalities. Did you
6 advise Mr. Sanders that you didn't think a bench trial was
7 a good idea?

8 A. I think I did but I can't, you know, like I said, I
9 can't have -- I don't have a specific memory of it.

10 Q. Okay.

11 A. It's my general advice that we go with a jury trial in
12 these kind of cases.

13 Q. Okay. Let's move on to a few specifics if we can.

14 A. All right.

15 Q. In this situation, Mr. Sanders had already been tried
16 by a jury and convicted of murder, attempted armed robbery
17 and conspiracy; correct?

18 A. That's correct.

19 Q. And those judgments had been reversed and the matter
20 remanded for retrial?

21 A. That's correct.

22 Q. And those are facts about which a jury would have had
23 no knowledge, would they?

24 A. Shouldn't have unless they read something in the paper
25 or something like that.

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1 Q. Okay. In the context of a jury trial, would it have
2 been admissible evidence to tell the jury that a previous
3 jury of 12 had convicted him?

4 A. No.

5 Q. Okay. So a jury would not, barring a substantive
6 error of law occurring during a trial, have been aware
7 that he had already been convicted by a previous jury?

8 A. Not while they're sitting there in the courtroom, no.
9 It would have to come from an outside source.

10 Q. And, you had the opportunity to ask for, voir dire
11 questions concerning whether or not these jurors had read
12 anything about previous proceedings during the jury
13 selection process; didn't you?

14 A. I think we did.

15 Q. So, a judge at a bench trial unlike a jury would have
16 known, would he not, that Mr. Sanders had already been
17 found guilty by a previous jury?

18 A. That's true.

19 THE COURT: Are you aware of any murder case tried
20 nonjury in this state where an acquittal has been --

21 THE WITNESS: Am I?

22 THE COURT: Yes, sir.

23 THE WITNESS: No, I'm not aware of any.

24 MS. SHURLING: Your Honor anticipated one of my
25 questions.

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1 Q. And, how many people do you have to convince to find
2 someone guilty at a bench trial?

3 A. One.

4 Q. If you're the prosecutor?

5 A. If you're the prosecutor, one.

6 Q. And how many people do you have to convince at a jury
7 trial?

8 A. Twelve.

9 Q. And if you were unable to get all 12 people to agree
10 with you, what happens?

11 A. You have a mistrial.

12 Q. And as I understand your testimony, you have no
13 recollection here today of covering that procedural
14 situation with your client in making the decision to
15 proceed with a bench trial?

16 A. I can't, I can't say that I did.

17 Q. Okay.

18 A. I mean, I think I did. And I think we talked about
19 it, but 12 years later I can't say that I did.

20 Q. What about preserving errors at trial? Do you try a
21 lot of cases, Mr. Williams?

22 A. I try some cases.

23 Q. I assume you're familiar with the contem -- pardon me.
24 I always have trouble with that word -- contemporaneous
25 objection rule in South Carolina?

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1 A. Yes.

2 Q. And if a jury hears testimony which is objected to and
3 the objection is overruled, does that give rise to a
4 reviewable issue for direct appeal?

5 A. Yes. Yeah.

6 Q. Likewise, various objections which might be made
7 during a trial concerning jury charges, closing arguments
8 and so forth, if objected to and ruled upon adversely to
9 you are potential issues on direct appeal; correct?

10 A. Yes.

11 Q. Did you advise Mr. Sanders that if he went to trial by
12 jury and were convicted that, just like happened the first
13 time that he would have a right to a direct appeal
14 following his re-conviction at a second trial?

15 MR. SPENCER: Your Honor, I don't understand the
16 relevance here. You're allowed a direct appeal no matter
17 what kind of trial it is.

18 THE COURT: I'll allow her to ask that one question.
19 We need to move forward. You're asking questions that
20 obviously everybody in here knows the answers to. I guess
21 you're making a record --

22 MS. SHURLING: I am, Your Honor.

23 THE COURT: -- but 12 to one and all that, I've been
24 doing this longer than you have. So, please move on.

25 THE WITNESS: If I understand the question, you're

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1 entitled to an appeal regardless.

2 Now the question you're answering (sic) is preserving
3 the record for the appeal. I don't know that that's any
4 difference between a judge and a jury.

5 MS. SHURLING: Your Honor, may I rephrase my question?

6 THE COURT: Yes, ma'am.

7 BY MS. SHURLING:

8 Q. My question is: Did you advise Mr. Tunzy Sanders that
9 if he had a jury trial and were convicted by the jury at
10 the second trial, he would have a right to a direct appeal
11 from those judgments and sentences just like he had one
12 after the first trial?

13 A. I don't know. I don't know that I told him that in
14 those particular words. I certainly told him he had a
15 right to an appeal.

16 Q. And did you discuss with him the differences in terms
17 of the likelihood of developing appealable issues in the
18 presence of a jury versus in a bench trial situation?

19 A. I don't remember doing that.

20 Q. Okay. Well, what about the concept of a jury of your
21 peers and having a jury which represents a cross-racial,
22 cross-cultural representation of the community and having
23 a jury that represents your peer base?

24 Did you discuss with him that he would be giving up
25 that if he elected to have a bench trial with Judge

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1 Barber?

2 A. I can't remember telling him that specifically, no.

3 Q. Okay. Let's move on to a couple of other issues.

4 Ultimately, do you recall your motion early in the
5 trial, and actually it was originally made by Attorney
6 Sanders, to exclude the testimony of Mr. Vigier?

7 A. Yes. After reading it in the record, I did.

8 Q. Okay. And do you recall -- and we're looking at page
9 five starting at line 18. Do you have a copy of the
10 record with you?

11 A. I think so. Hold on.

12 Q. Thank you.

13 A. Page five?

14 Q. About line 18 according to my notes. No. Line --
15 yes, line 18.

16 A. Okay.

17 Q. Would you agree that the record reflects that the
18 initial argument on this point was made by Ms. Sanders?

19 A. On page five at line 18 it starts Mr. Williams, so I
20 assume that's me talking.

21 Q. Okay. Let me -- I'm sorry. Let me --

22 MR. SPENCER: Rather than have to have him read the
23 transcript before answering the question, why don't we
24 just ask him whether he remembers whatever it is that, you
25 know, Ms. Shurling wants him to remember.

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1 THE COURT: Please ask the question. He may
2 remember. He may not. If you have to, go to the
3 transcript. That's how you normally do it.

4 MS. SHURLING: Thank you.

5 Q. Mr. Williams, do you remember Ms. Sanders advancing an
6 argument against the introduction of Mr. Vigier's prior
7 trial testimony based on the fact that she had not had an
8 opportunity to participate in his cross-examination during
9 the Messiah hearing?

10 A. I remember us arguing against the admission of the
11 evidence without being able to confront him. Whether she
12 did it or I did it, I know I participated in it. And to
13 tell you I remember that specific point, I heard you talk
14 about that earlier, I don't.

15 So if you can refer me to a point in the record.

16 Q. Okay. I can move on. The record will speak for
17 itself on that point.

18 Subsequently during the trial when the transcript of
19 Mr. Aurelien Vigier's testimony was introduced, we'll be
20 looking at page 232 of the trial record. And immediately
21 prior to the ruling on this point, you had been advancing
22 arguments on behalf of the exclusion of this transcript
23 from the record; correct?

24 A. I think so, yeah.

25 Q. And at that point -- again, Your Honor, I'm trying not

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1 to lead, but the record will speak for itself -- you did
2 not advance the argument, did you, that Ms. Sanders had
3 not participated in the Messiah hearing at the first
4 trial?

5 A. See, I don't remember saying that. So if it's not in
6 the record, I assume I didn't.

7 Q. Okay. And then subsequently when Judge Barber
8 ruled -- and, Your Honor, if you can give me just a second
9 I'll find --

10 MR. SPENCER: I believe it's on 225.

11 MS. SHURLING: Thank you. I'm looking for my notes on
12 that point, but that will help me find it.

13 Q. Okay. 225 line 11 through 226 line seven, Judge
14 Barber in ruling on this point picked up on Ms. Sanders'
15 earlier argument about her non-participation in the first
16 Messiah hearing; correct?

17 A. If it says that.

18 Q. Okay.

19 A. Do you want me to read it first?

20 Q. The record will speak for itself.

21 A. Okay.

22 Q. My question is: The record will reflect that Judge
23 Barber indicated that: Although she wasn't counsel of
24 record at that point; that she had the ability to
25 participate through you; that she could contribute to your

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1 examination of Mr. Vigier if she wanted to; she could have
2 handed you notes or given you questions. Do you recall
3 that?

4 A. I think I do remember that.

5 Q. Okay. Do you recall any reason why you didn't respond
6 to that assertion by the Court?

7 A. I remember Ms. Sanders being at the first trial. And
8 I remember meeting her, having conversation about the
9 evidence. Now, whether she gave me something related to
10 Vigier or not, I don't know.

11 But, I mean, she was there. So I don't know how I
12 could contradict that.

13 Q. I understand. I believe you've already indicated that
14 there were six people at counsel table; three lawyers and
15 three co-defendants?

16 A. Yeah. And I don't know that she was sitting at
17 counsel table. I think she was near counsel table, but I
18 don't think she was at counsel table.

19 Q. And, would it -- given even the physical setup in the
20 courtroom, would it have been plausible for her to be
21 actively involved in your cross-examination of this
22 gentleman?

23 A. Clearly not as active and she would have liked to have
24 been, you know. I don't think she was at the table. She
25 certainly could have handed me a note, and she may have

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1 handed me notes.

2 But she wasn't sitting there at the table so she could
3 whisper in my ear, if that's what you're asking.

4 Q. You have no recollection here today of her handing you
5 any notes?

6 A. I remember talking to her. Whether she handed me a
7 note or not, I don't know, so, no.

8 Q. You remember talking to her during the examination of
9 Mr. Vigier?

10 A. No, I can't say that.

11 Q. Okay. Well, that was my question.

12 A. During the trial. During the trial?

13 Q. You remember talking to her at the trial?

14 A. That's right.

15 Q. Do you remember whether you talked to her during the
16 trial or whether it was at breaks, recesses and so forth?

17 A. See -- and, I'm sorry. I just don't remember.

18 Q. Okay. Can you remember -- you say you know she -- or,
19 you don't believe she was seated at counsel table. And
20 I'm sorry. I'm not intimately familiar with the Barnwell
21 courtroom, but is it set up like most courtroom where
22 there's a barrier of some sort between the gallery and
23 counsel table?

24 A. There's a barrier. Normally if there's an overflow of
25 counsel, they'll sit over in the corner, say, where the

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1 jury box is, over there, or they might sit right behind in
2 the pews in the back.

3 The pews at Barnwell are a lot closer than they are
4 here, so.

5 Q. So if I understand your testimony here today in the
6 Bamberg courtroom, there's probably, I'm going to
7 estimate, 12 feet between the barrier and the first pew.
8 Would that be a fair estimate?

9 A. I guess.

10 Q. And your testimony is that the pews behind the barrier
11 are somewhat closer --

12 A. They are.

13 Q. -- in Barnwell? How much closer; do you know?

14 A. You know, five or six feet I guess.

15 Q. But there's still five or six feet --

16 A. Sure.

17 Q. -- between the barrier?

18 A. I would say there's a, room for another row of pews or
19 whatever, but.

20 Q. Okay. And just in terms of raw estimate, five or six
21 feet distance between the first pew and the barrier?

22 A. I'm guessing, yeah.

23 Q. Okay. In terms of your specific recollection here
24 today, if Ms. Sanders was no longer counsel of record,
25 would she -- do you remember for sure she wasn't at

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1 counsel table?

2 MR. SPENCER: Your Honor, this has been asked and
3 answered.

4 THE COURT: It has. Sustained. Move along, please.
5 BY MS. SHURLING:

6 Q. Do you recall her being behind the barrier?

7 THE COURT: Ma'am. Please, Ms. Shurling. I get the
8 picture of that.

9 MS. SHURLING: Thank you, sir.

10 Q. All right. Let's move on. Mr. Williams, with regard
11 to -- sorry, Your Honor, my -- (looking through records),
12 here we go.

13 There is a point in the record where there is
14 discussion about how Mr. Vigier's testimony is going to be
15 presented at the bench trial, whether it is going to be
16 read by someone on the stand or whether Judge Barber is
17 going to be given a transcript.

18 Do you recall that discussion?

19 A. I think so.

20 Q. Okay.

21 A. From reading the record. I read it last night.

22 Q. Okay. Did you consider -- well, first of all. Why
23 did you consent to Judge Barber or why did you not object
24 to Judge Barber entertaining that testimony by way of a
25 transcript?

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1 A. Well, because he's a judge and he's been a judge for a
2 while. And to me it made sense for him just to read the
3 record as opposed to putting a canned witness on the
4 stand.

5 Q. I understand. He had been a judge a long time but
6 he's still a human; right?

7 A. Well, we all are.

8 Q. Okay. All the other testimony in this case with the
9 exception of an uncontested portion of testimony on a cook
10 came in by live testimony in the courtroom; correct?

11 A. All except what now?

12 Q. There was another witness --

13 MR. SPENCER: Your Honor, I object. I don't recall
14 any allegation about whether the transcript was read or
15 not. Not that I can imagine, not that it matters.

16 MS. SHURLING: Number six.

17 THE COURT: How can that possibly be an allegation of
18 ineffective assistance of counsel, that you read the
19 transcript.

20 Number six. Well, she's got it in her allegations but
21 I don't know how in the world you can say that's
22 ineffective --

23 MS. SHURLING: Sorry, Your Honor. I thought you were
24 finished.

25 THE COURT: Go ahead.

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1 MR. SPENCER: And I was confused by that allegation. I
2 mean, I guess the idea is it should be published instead
3 of read which, you know, that's not really what it says.
4 I didn't understand the allegation, but.

5 THE COURT: Go ahead.

6 BY MS. SHURLING:

7 Q. Did you consider that by allowing it to be introduced
8 vis-a-vis the transcript that it would allow the
9 opportunity for that portion of the evidence to be given
10 undue emphasis because it was available to be read
11 multiple times as opposed to being heard once like the
12 remainder of the testimony at trial?

13 A. You know, I think a judge takes a transcript and he
14 reads it. And he considers it evidence like live
15 testimony and that's that.

16 I mean, I didn't think that, no.

17 Q. During the course of this trial, did you observe a
18 problem with -- and I realize this is ironic coming from
19 me today, but I'm trying to get us through this hearing
20 quickly. Did you notice a pattern of leading by the
21 prosecution at this trial?

22 A. Yeah, I saw that allegation yesterday. And there may
23 have been some but, you know, I tend not to object to that
24 unless it's really, really bad because, especially in
25 front of a jury because all that does is it sounds to the

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1 jury like you don't want to hear the testimony.

2 But I don't remember any glaringly bad leading
3 questions. If I'm wrong, I'm wrong.

4 Q. Okay.

5 MS. SHURLING: Your Honor, I can -- I can cite to
6 specific examples in either closing arguments or in a
7 memorandum at a later date?

8 THE COURT: That will be fine.

9 BY MS. SHURLING:

10 Q. Do you remember the testimony of Dr. Joel Sexton in
11 this case?

12 A. Somewhat, after reading the transcript.

13 Q. And one of the things that Dr. Sexton was -- well,
14 let's, first off, take a look at his testimony. On page
15 142, and then, pardon me, his cross begins on page 151.

16 MR. SPENCER: Can we have just, like, a question to
17 find out, I hope?

18 THE COURT: What's the question, ma'am? Just ask the,
19 something about hearsay on ammunition.

20 MS. SHURLING: Right.

21 Q. The record reflects that you handled the cross-
22 examination of Dr. Joel Sexton; correct?

23 A. I think so.

24 Q. I direct your attention to page 151, if you want to
25 verify that. Okay.

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1 Dr. Sexton was cross-examined concerning one aspect of
2 his autopsy report that turned out to be inaccurate. Do
3 you remember what that was?

4 A. It's -- he said in his notes that the bullet was a
5 .22 bullet as opposed to a .25 caliber bullet.

6 Q. Okay.

7 A. I think that's what you're referring to.

8 Q. And, in his testimony he was allowed to explain why he
9 thinks he made that mistake; wasn't he?

10 A. I believe he was.

11 Q. And what was the explanation that he gave?

12 A. As I recall, he said that it's 3-100ths difference
13 between a .22 and .25. He's not a ballistics expert.
14 He looked at it and he was somewhat familiar with the
15 casings and it just looked like a .22 so he put down .22.

16 Q. Can I get you to look at the trial record, page 153
17 line 16 and 17?

18 A. Yes, ma'am. 153.

19 Q. One fifty-three line 16 beginning with, at least. Can
20 you read the rest of that sentence for the record?

21 A. At least that's what I was told by the ballistics
22 expert.

23 Q. Would that testimony be hearsay? Is there any
24 strategic or practical reason why you didn't object to it?

25 A. I can't think of any now; no, ma'am.

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1 Q. Thank you.

2 At some point, and I apologize to the Court. I have
3 lost my flag.

4 But at some point there was discussion with the bench
5 about closing arguments. And the Court was asking if an
6 hour apiece was going to be accurate -- was going to be
7 adequate.

8 Do recall that colloquy with the bench?

9 A. I recall from reading the transcript last night
10 something about him saying he would give us an hour
11 apiece. I don't recall the rest of that about waiving
12 that but if it's in there, it's in there. I just don't
13 recall.

14 MR. SPENCER: Your Honor, for my edification, I would
15 just like the page cite for that because I don't recall
16 that either and I was first notified of that issue this
17 morning.

18 THE COURT: Where is it in the record, ma'am?

19 MS. SHURLING: Your Honor, the page cite is where my
20 flag fell off, but I'll find it over the lunch break.

21 THE COURT: Thank you.

22 BY MS. SHURLING:

23 Q. Subsequently, did the parties agree to waive closing
24 arguments?

25 A. We had a closing argument. It was -- and it wasn't an

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1 hour. And I don't know why I would need to argue an hour
2 in front of a judge as opposed to a jury, but we had a
3 closing argument.

4 Q. A moment indulgence, Your Honor.

5 Do you recall at some juncture the State saying they
6 would waive closing if you would?

7 A. I don't remember that.

8 Q. Okay. One moment please, Your Honor.

9 Your Honor, I will have to address those
10 subsequently. I may -- my notes may be incorrect on this
11 point. Let me move on to the next issue.

12 Did you hear me say earlier that the record reflected
13 a 25-year sentence for armed robbery?

14 A. I did.

15 Q. Okay. And were you aware subsequently that Judge
16 Barber amended that?

17 A. It's in the record --

18 Q. Okay.

19 A. -- that it is.

20 MR. SPENCER: Can I ask what -- I'm sorry. I don't
21 even understand the allegation because he got a legal
22 sentence in the end.

23 MS. SHURLING: I was just fixing to say, Your Honor,
24 that based upon the fact that I subsequently found out
25 that it was amended that I was withdrawing allegation

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1 number 10.

2 THE COURT: Thank you.

3 BY MS. SHURLING:

4 Q. Okay. Your client testified at jury trial number two;
5 correct?

6 A. Or trial number two, yeah.

7 THE COURT: Nonjury trial.

8 BY MS. SHURLING:

9 Q. Pardon me. Trial number two which started out as a
10 jury trial and ended up being a bench trial.

11 A. Right.

12 Q. Do you recall a portion of your client's testimony
13 where he said that he had actually seen the officers
14 arrive at the wrong Chinese restaurant when they checked
15 out the dispatch call?

16 A. I remember him from reading this last night saying
17 that he saw Officers Gadsen and Odom pull up at the first
18 Chinese restaurant. And I believe it came out that he was
19 referring to the one nearest the courthouse down across
20 from Hardee's, which is not the same Chinese restaurant.

21 Q. And do you recall him specifically testifying that
22 when he saw the officers pull up at this -- Your Honor, if
23 I might for purposes of clarification.

24 Officer Gadsen at the second jury trial testified that
25 when he was first dispatched they went to -- there were

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1 two China Expresses in town, and he went past the one in
2 the downtown area and went to the one further out the
3 highway. When he got to the one further out the highway,
4 he ascertained that he -- that was not the one where the
5 incident had taken place and turned around and backtracked
6 to the one in town.

7 Do you recall that testimony?

8 A. The one further out the highway is the place where it
9 happened at. There's two Chinese restaurants in
10 Barnwell. The one down across from Hardee's which is my
11 understanding of where he says he's walking after -- when
12 he leaves Jermaine Walker's house. Then there's the one
13 back up on the other side of Reid's.

14 And that's the one where it happened at, Reid's going
15 out of town.

16 Q. Okay. I apologize. I must have my geography
17 backwards. But in any event, he went to the wrong one
18 first?

19 A. He says he saw him around, I guess, sometime after 10,
20 and Odom at the other Chinese restaurant, the one down the
21 hill. Right.

22 Q. And the other China restaurant, other Chinese
23 restaurant, not the one where the incident had happened?

24 A. Right.

25 Q. And that he observed one officer get out of the car,

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1 then get back in and drive, and they drove off?

2 A. I don't remember that specific. I do remember he said
3 he saw the officers there.

4 Q. Okay. And Officer Gadsen was present and testified at
5 the second trial, the bench trial?

6 A. That's right.

7 Q. Correct? Did the State offer any reply testimony to
8 refute your client's position that only one officer had
9 gotten out of the car when they initially went to the
10 wrong scene?

11 A. No.

12 Q. Did you consider pointing that fact out to Judge
13 Barber?

14 A. I didn't point it out. And I didn't see a whole lot
15 of relevance in it. And if I'm wrong, I'm wrong. I just
16 didn't see where it made that much difference.

17 Q. Would that testimony, would that argument not have
18 strengthened the credibility of your client's --

19 MR. SPENCER: Your Honor, I object to the leading.

20 THE COURT: Well, it's not only leading. I mean, I
21 don't know how you can answer.

22 That's pure speculation as to whether it would booster
23 his credibility or what.

24 MS. SHURLING: Quickly.

25 Q. Did Officer Gadsen testify at the trial that when they

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1 went to the wrong place first, that only one of them got
2 out to check it out?

3 MR. SPENCER: That's asked and answered, Your Honor.

4 MS. SHURLING: He never answered it.

5 THE COURT: Go ahead. Go ahead.

6 THE WITNESS: See, I'm going to have to look in the
7 transcript. I don't remember that specifically.

8 BY MS. SHURLING:

9 Q. Okay. And do you recall whether or not Officer Gadsen
10 or Officer Odom testified to that information at the first
11 jury trial?

12 A. I don't.

13 Q. Okay. You did not consider noting that the State had
14 an opportunity to rebut that claim by your client and not
15 taking advantage of it?

16 A. I didn't see where it did us a whole lot of good.

17 Q. I understand.

18 A. So if I'm wrong, I'm wrong.

19 Q. I will move along.

20 THE COURT: Well, let's take a lunch break. It's one
21 o'clock. I said we were going to stop at one. Is 45
22 minutes enough for everybody?

23 MR. SPENCER: Yes, Your Honor.

24 MS. SHURLING: Your Honor, I can tell you that I only
25 have one more question on direct of this witness. If you

1 would rather me ask that before --

2 THE COURT: I would rather you ask that.

3 BY MS. SHURLING:

4 Q. Did you consider requesting that the Trial Judge place
5 on the record the law that he would be applying in
6 deciding this case? Like a jury instruction. Only
7 instead of instructing the jury, announcing what law he
8 deemed in his judgment applicable to the case and that he
9 would be considering in deciding the case.

10 A. I don't remember doing that, no. And I don't remember
11 having thought about it 12 years later.

12 MS. SHURLING: Thank you. No further questions.

13 THE COURT: Thank you. All right. How long is your
14 cross?

15 MR. SPENCER: Probably about, you know, about as long
16 maybe. Maybe a little bit less.

17 THE COURT: I'm sorry, Dan.

18 THE WITNESS: That's okay.

19 THE COURT: Can everybody eat -- what have y'all got
20 for him?

21 THE OFFICER: We got something for him.

22 THE COURT: How about you?

23 THE OFFICER: I'm good.

24 (Off-the-record discussion.)

25 THE COURT: Thank you. We'll stand at ease until

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1 1:45 p.m.

2 MR. GOURLEY: Thank you, Your Honor.

3 (The luncheon recess was taken from 1:03 p.m. until
4 1:53 p.m., and the hearing resumed:)

5 MR. GOURLEY: If it please the Court.

6 CROSS-EXAMINATION

7 BY MR. GOURLEY:

8 Q. Mr. Williams, were you prepared to try this case?

9 A. Yes.

10 Q. And in fact, y'all moved for a speedy trial motion
11 back in October?

12 A. I think so. At some point in time there was a speedy
13 trial motion made; yes.

14 Q. Now going with a bench trial, it's your testimony
15 today that you were opposed to pursuing a bench trial in
16 this case?

17 A. I was.

18 Q. Do you have a specific reason for that?

19 A. It just seemed, and sitting here and saying that I
20 remember all of that right now, I can't tell you that.

21 Q. Yes, sir.

22 A. But I don't know of any big trial like this that I've
23 ever heard of doing it as a bench trial as opposed to a
24 jury trial. And I thought we'd be better off with a jury
25 trial.

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1 Q. At the very least, you would have advised Mr. Sanders
2 of that, of your opposition to pursuing a bench trial?

3 A. Yes.

4 Q. Now Judge Early advised Mr. Sanders that he had a
5 constitutional right to jury trial; correct?

6 THE COURT: Not Judge Early.

7 MR. GOURLEY: I mean, I'm sorry. Judge Barber. I
8 apologize, Your Honor.

9 THE WITNESS: That's right.

10 BY MR. GOURLEY:

11 Q. And Judge Barber also advised Mr. Sanders that he
12 would be the judge of the facts and the judge of the law;
13 correct?

14 A. That's right.

15 Q. And, in fact, Mr. Sanders had already had a previous
16 jury trial; correct?

17 A. Yes.

18 Q. So he would have known the fact that it would have
19 been a unanimous decision by the jury to find him guilty
20 of these charges; correct?

21 A. Yes. And it's my practice at some point in time to go
22 through that with all criminal defendants. But I can't
23 sit here and specifically say I did that 12 years ago
24 during these conversations. I think I did but I can't
25 guarantee it.

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1 Q. Okay. And it was ultimately Mr. Sanders' decision to
2 pursue a bench trial; correct?

3 A. Yes, sir.

4 Q. And he did so against your advice?

5 A. Yes, sir.

6 Q. And in regards to Dr. Sexton's testimony about a .22
7 or a .25 caliber bullet, there was a forensic expert from
8 SLED, a ballistics expert came in and testified?

9 A. Named Paavel, I believe.

10 Q. Absolutely. He testified that that was a .25 caliber
11 bullet; correct?

12 A. That's right.

13 Q. Okay. Just to kind of go back through. Maurice
14 Benning testified that he heard a shot; correct? Or, do
15 you recall that?

16 A. Yeah. You know, it was a conspiracy thing. And the
17 reason I believe they let him off the first time is that
18 there was some evidence or testimony that he had moved
19 away and wasn't there when the shooting went on.

20 Q. Right.

21 A. And he says he heard a shot. And I think he says
22 Michael comes around and says something about feeling
23 powerful. And then there's some testimony about Tunzy
24 handing him the gun. And then the next day he says that
25 Tunzy told him he shot her.

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1 Q. Okay.

2 A. So, and that was in the record.

3 Q. Okay. And in fact there was two jailhouse informants
4 that testified at the second trial; correct?

5 A. That's correct.

6 Q. One being Vigier, the other being David Staley;
7 correct?

8 A. That's correct.

9 Q. And Staley was there and presented live testimony;
10 correct?

11 A. That's correct.

12 Q. And implicated Tunzy Sanders in this crime; correct?

13 A. That's correct.

14 Q. And Judge Early -- Judge Barber, I apologize. Judge
15 Barber during his closing when he read the sentence
16 specifically stated that he did not feel Mr. Sanders was
17 the shooter, however he felt that he was involved in this
18 crime; correct?

19 A. I remember him saying that.

20 Q. And therefore Judge Barber found under the hand of one
21 and the hand of all Mr. Sanders was guilty of this crime;
22 correct?

23 A. I think it had to do with the conspiracy and them
24 talking about going up there before and all of that, yeah.

25 Q. And Mr. Sanders' two co-defendants were actually

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1 charged with conspiracy and served their five years,
2 correct, as far as your recollection?

3 A. Well, no. Benning, Benning was found guilty of just
4 the conspiracy.

5 Q. Right.

6 A. Buckmon was found guilty of all three charges.

7 Q. Right.

8 A. They were reversed. But there wasn't -- it was all
9 circumstantial against Buckmon. There was no direct
10 evidence linking him to the shooting.

11 Q. Right.

12 A. Because Benning didn't testify in the first trial.

13 Q. Right. And also Vigier's testimony during the first
14 trial implicated Mr. Sanders but not Mr. Buckmon; correct?

15 A. That's right. The same with Staley.

16 Q. Correct. Did you feel there was any basis for an
17 objection to the State's closing argument that there was
18 one officer got out of the vehicle versus the second, two
19 officers getting out of the vehicle?

20 A. I don't believe I know the importance of that.

21 Q. Okay. And you did do a closing argument in this case;
22 correct?

23 A. I did.

24 Q. And did you feel it was necessary to have Judge Barber
25 place on the record the law that he was planning on

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1 charging?

2 A. You know this was --

3 THE COURT: Hold on a second. Everything okay? Does
4 she need something? She's fine. She's perfectly fine.
5 Make sure she's okay.

6 MS. SHURLING: Thank you, Your Honor.

7 BY MR. GOURLEY:

8 Q. Did you feel it was necessary for Judge Barber to
9 place on the record the law that he was planning on
10 charging or using in this case?

11 A. No.

12 Q. Just a brief second, Your Honor.

13 THE COURT: Here. We can get her some water.

14 (Pause.)

15 UNIDENTIFIED SPEAKER: Thank you very much.

16 MS. SHURLING: Two eighty-four.

17 MR. GOURLEY: Two eighty-seven, line 11.

18 MS. SHURLING: Thank you

19 THE COURT: What are we looking at?

20 MR. GOURLEY: The testimony from Maurice Benning
21 saying: When they came around the corner I said what
22 happened. That's when I got the gun back from Mr.
23 Sanders. And that's when Mike said, I shot her. I said
24 why the, explicative, did you do that. Did you draw a
25 reasonable inference that a shot was fired. Previously

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1 Mr. Benning testified, I heard a sound like it was
2 somebody hitting, banging something against something and
3 I started running.

4 During, I believe it was opening arguments, the
5 solicitor stated that a shot was fired. Therefore, it's a
6 reasonable inference drawn based off of Mr. Maurice
7 Benning's testimony that Michael Buckmon said he shot the
8 victim in this case.

9 MS. SHURLING: Thank you.

10 MR. GOURLEY: No problem. I believe that's all I have
11 Your Honor, on cross-examination.

12 THE COURT: Anything on redirect?

13 MS. SHURLING: Just briefly, Your Honor.

14 REDIRECT EXAMINATION

15 BY MS. SHURLING:

16 Q. With regard to allegation number nine in the amended
17 application. In its closing the prosecution summarized
18 the testimony of Maurice Benning and said that Maurice
19 Benning had testified that he heard a shot from the area
20 around the restaurant where the record fails to support
21 that claim is allegation number nine.

22 If you would, please, look at page 285 lines 20
23 through 21 which was referenced just a few moments ago by
24 counsel for Respondent.

25 Would you agree that at least at that juncture in the

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1 testimony Mr. Benning was saying that he heard a sound
2 like someone hitting, banging something against
3 something?

4 A. That's what it says. You know, I thought there was
5 another spot in here where he said specifically, I heard a
6 shot but now --

7 Q. Specifically if you look at page 281. It has now been
8 pointed out to me and I apologize, I missed it.

9 But on page 281 during direct examination he had
10 previously said, before I got to them though I heard the
11 gunshot. And that would be 281 line 12 and 13.

12 Do you see that?

13 A. I do.

14 Q. Two things. Number one, when he backed away from that
15 assertion to the extent that a few pages later he said he
16 heard a sound that sounded like somebody hitting, banging
17 something against something as opposed to claiming it was
18 a gunshot, did you consider cross-examining him on that
19 point?

20 A. Well, I think Ms. Sanders cross-examined him on that.
21 Let me see.

22 Q. I apologize. You're correct. I'll cover that with
23 her.

24 And was -- where in the references that have been
25 brought to your attention by the Respondent does it

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1 indicate that that, that the sound was from the area
2 around the restaurant?

3 A. Are you talking about the sound on 285 or the sound on
4 281 or assuming they're the same sound?

5 Q. I mean, do you recall any specific testimony from
6 Maurice Benning that the sound was, sounded as though it
7 originated from the area around the restaurant?

8 A. My understanding is they were all -- there's testimony
9 in here somewhere that they were, from Benning, that says
10 they were all around the restaurant.

11 I can't say that he said that I heard the sound coming
12 from the restaurant. It's not in there. It's just not in
13 there.

14 But they were all there and he had withdrawn, I
15 believe, was his testimony.

16 Q. You've indicated that you didn't think a bench trial
17 was a good idea. Isn't it true that ultimately Judge
18 Barber indicated the same thing?

19 A. You know, I think he did somewhere. I mean, I think
20 he had problems with it. And I think that's fairly clear
21 reading the record.

22 Q. Okay. If you would look at page 425 for me,
23 specifically line nine through 11. When Judge Barber
24 says, but the parties requested that I waive the jury
25 trial. Both of them agreed and I was not aware of any

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1 option that I had in the matter.

2 Do you recall those statements from the bench?

3 A. Can you point me more specifically?

4 THE COURT: Right here.

5 BY MS. SHURLING:

6 Q. Four twenty-five lines nine through 11.

7 A. Okay. Yes, ma'am.

8 Q. Do you know -- and if you know, fine, if you don't I'm
9 not asking you to speculate.

10 But do you know who the Judge was referring to when he
11 said both of them agreed?

12 A. I think what he's talking about is he asked the
13 Defendant the questions that he asked the State if they
14 objected to those, a bench trial and the State said they
15 didn't object to the bench trial.

16 So I think that's what he's talking about.

17 Q. All right. With regard to allegation number three,
18 the State asked you moments ago about whether or not you
19 considered yourself prepared for trial.

20 A. Yes, ma'am.

21 Q. Okay. Do you recall during the second trial Attorney
22 Sanders making the Court aware that she had only gotten a
23 few days' notice of her brother's case going to trial?

24 A. There's something about that in the transcript. And I
25 have a little bit of recollection about it.

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1 Q. And her further indicating that the only notice she
2 got was from you?

3 A. I think that's right.

4 Q. Okay. Did you discuss with Ms. Sanders at that point
5 the possibility of requesting a continuance based on the
6 fact that she had gotten so little notice of her brother's
7 trial, and, and certainly based on the first appellate
8 decision and the major issue was that she didn't get to
9 participate as counsel of record through the whole
10 trial --

11 MR. SPENCER: Your Honor, that's leading.

12 MS. SHURLING: Did you talk about a continuance?

13 THE COURT: Hold on. Hold on. Hold on. Ask the
14 question in a direct manner, please.

15 BY MS. SHURLING:

16 Q. Did you discuss the possibility of requesting a
17 continuance?

18 A. Well, we had been asking for a speedy trial. And
19 there's some conversation, I think, on the record about
20 that.

21 And, you know, it's hard unless you got a specific
22 reason and, you know -- whether her having enough notice
23 is enough of that, you know. It seemed to me we're ready
24 to go to trial. So I don't remember having a conversation
25 with her about that.

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1 Q. Would --

2 A. And, you know, she didn't ask for a continuance, so.

3 Q. Pardon?

4 A. She didn't ask for a continuance and I didn't think we
5 needed a continuance, so.

6 Q. I understand. Let me rephrase.

7 When you make a motion for a speedy trial, does that
8 waive your right at a subsequent point in time to object
9 if your client is brought to trial without adequate notice
10 of a trial date?

11 A. We had -- I'm trying to remember how much notice we
12 had but, you know, it had been tried before. We knew
13 pretty much who the witnesses were.

14 I don't know what ground we had for a continuance. I
15 mean, to me it's not uncommon, at least it wasn't uncommon
16 back then, to hear a week before that you were going to
17 try a case.

18 And I want to say that Judge Nicholson who heard a
19 subsequent bond motion told them to hear the case the next
20 term if they could. There was a conversation that I had
21 with Mr. Gibbons about another case that may have to go
22 before that.

23 When I called him about whether we were going to be
24 up, he said he thought the case was going. And then he
25 told me that that case wasn't going to go and we'd be up.

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1
2 And I think at the same time Mrs. Sanders was talking
3 about filing a speedy trial motion for that term. So, I
4 think she was ready also.

5 THE COURT: Well, the question was asked of her:
6 Well, all right. Are you all moving for a continuance, by
7 the Court. Mrs. Sanders said, no.

8 MS. SHURLING: Well, and my simple question to
9 Mr. Williams was whether or not there had been discussion
10 that he was privy to about the wisdom of asking for a
11 continuance at that juncture.

12 THE WITNESS: And those conversations, I don't think,
13 took place in his presence. And I don't know that I -- I
14 can't tell you 12 years later that I asked him that. I
15 can tell you as his attorney at that time I thought we
16 were ready to go to trial, as ready as we were going to
17 be.

18 BY MS. SHURLING:

19 Q. Okay. And the record reflects that you had previously
20 told Ms. Sanders that you would not be going to trial that
21 week; hadn't you?

22 A. A day or two later based upon the conversation I had
23 had with the solicitor's office, they indicated that
24 something else was going to be tried.

25 Q. I understand. But my point is you had had discussions

1 with Ms. Sanders in which you had told her the case would
2 not be going to trial?

3 A. I think that's right.

4 Q. And then subsequently the solicitor's office had a
5 case fall through, the circumstance changed. Did you
6 immediately notify Ms. Sanders of the change?

7 A. It's in the record, okay. So I remember it from that.

8 Q. Okay.

9 A. It says I called her. I couldn't get through with
10 her, then I sent her a letter the next day, so.

11 Q. Okay. All right. A moment's indulgence. (Pause).

12 MS. SHURLING: No further questions, Your Honor.

13 THE COURT: Thank you. May he be excused?

14 MR. SPENCER: Your Honor, we would just -- we haven't
15 heard from Mr. Sanders yet, or Ms. Sanders for that
16 matter. I would just ask that the witness be, that we
17 preserve the right to recall the witness if necessary.

18 THE WITNESS: Okay.

19 THE COURT: That's fine.

20 MR. SPENCER: I do apologize to Mr. Williams. I hate
21 to keep him captive here, but.

22 THE COURT: Next witness, please, ma'am.

23 MS. SHURLING: Your Honor, the next witness would be
24 Brenda K. Sanders.

25 BRENDA K. SANDERS, having been duly sworn, was

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1 examined and testified as follows:

2 THE COURT: Thank you. Would you give us your full
3 name for the record, spelling your last? And if you'll
4 pull up a little bit.

5 THE WITNESS: Okay. Sure.

6 My first name is Brenda, middle initial K., last name
7 Sanders. And it's spelled S-A-N-D-E-R-S.

8 THE COURT: Can everybody hear?

9 MR. GOURLEY: Yes, sir.

10 MR. SPENCER: Oh, yes.

11 MS. SHURLING: Thank you.

12 THE COURT: Thank you, ma'am.

13 DIRECT EXAMINATION

14 BY MS. SHURLING:

15 Q. Ms. Sanders, despite being a judge my experience with
16 you is that you're somewhat soft spoken. If I can ask you
17 to speak up a little bit, please, ma'am.

18 A. Sure.

19 Q. You've heard references in the courtroom today that
20 you are currently a judge, I believe, in Michigan; is that
21 correct?

22 A. That is correct.

23 Q. And what type of judge are you?

24 A. I'm a district court judge in Detroit, Michigan.

25 Q. A district court judge. Would that be in your

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1 experience sort of the equivalent of a circuit court judge
2 here?

3 A. Well, just under a circuit court judge. Actually the
4 Wayne County Circuit Court in Michigan has authority over
5 the district court that I'm at. So there's a circuit
6 court above us.

7 Q. Thank you.

8 THE COURT: Off the record.

9 (Off-the-record discussion.)

10 MS. SHURLING: Thank you.

11 Q. Ms. Sanders, how long have you been on the bench?

12 A. I have been on the bench almost six years now,
13 almost -- well, almost five years. I'm sorry.

14 Q. In addition to the State of Michigan, are you licensed
15 to practice law elsewhere?

16 A. No, ma'am; just the State of Michigan.

17 Q. Okay. Now, someone asked the question earlier that,
18 to be candid, I didn't know the answer to. At some point
19 did Mr. Williams move for your admission pro hac vice to
20 participate in your brother's case?

21 A. Yes, he did.

22 Q. Okay.

23 A. Yes, he did.

24 Q. And during the trial of the first case we all know
25 historically that you were removed as counsel of record

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1 during that trial because of a witness testimony issue;
2 correct?

3 A. Well, I was not -- I don't know if removal was correct
4 unless that's somewhere in the record. What I recall, not
5 having done a real close review of that record, was that I
6 was not allowed to participate in the first place.

7 In other words, I never had the opportunity to
8 represent Tunzy at all. Judge Clary, I believe, simply
9 did not allow me to participate as Tunzy's attorney.

10 Q. But in the second trial -- by the time the second
11 trial came around, it was clear your brother's first set
12 of judgements and sentences had been reversed because of
13 that very issue; correct?

14 A. That's correct.

15 Q. And you were planning on being and everyone knew you
16 were planning on being counsel in this case?

17 A. Yes.

18 Q. When various legal documents were filed, discovery or
19 anything of that sort, were you sent copies in Michigan?

20 A. I can say this. I'm not sure as to every document. I
21 think from the beginning I had a problem, I thought, with
22 the free flow of information in the case in the terms that
23 it concerned me or my brother.

24 And so I cannot fully say that at this time. I was
25 advised of some things. Some things I believe I did not

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1 have access to.

2 MR. SPENCER: Your Honor, I just -- I'm not aware of an
3 allegation concerning discovery.

4 MS. SHURLING: It isn't in reference to discovery.
5 I'll move along.

6 MR. SPENCER: I just ask that all of that be struck.

7 THE COURT: Hold on. Hold on.

8 THE WITNESS: I can reference one example right now.

9 THE COURT: Well, that's not --

10 MR. SPENCER: I would ask that all of that testimony
11 be struck.

12 MS. SHURLING: Your Honor, I can demonstrate
13 relevance. One more question.

14 THE COURT: Thank you. Move along.

15 BY MS. SHURLING:

16 Q. Had you gotten any correspondence directly from the
17 solicitor's office sent to you in Michigan?

18 A. Not that I am aware of, that I can recall.

19 Q. Did you get any notice of your brother's case being
20 about to go to trial, the second trial, directly from the
21 solicitor's office?

22 A. No, I don't recall that at all. I don't have any
23 references to any direct notices.

24 Q. Have you at my --

25 MR. SPENCER: Your Honor.

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1 THE COURT: Hold on. Yes, sir?

2 MR. SPENCER: I would just -- obviously the testimony
3 about the notice of the trial, that's fine, in terms of
4 continuance.

5 I would renew my motion to strike any motion -- any
6 testimony about discovery. That wasn't an allegation.

7 THE COURT: I understand what the allegations are.
8 I'm trying it nonjury. I'm going to let it in.

9 MR. SPENCER: I understand. And I now want to move to
10 strike her appellate practices because appellate defense
11 is then liable to then try and raise a discovery issue.

12 THE COURT: Discovery's not an issue as I understand.

13 MR. SPENCER: Thank you.

14 MS. SHURLING: Freely concede that discovery is not an
15 issue, Your Honor.

16 THE COURT: Thank you. Move along.

17 BY MS. SHURLING:

18 Q. How did you find out your brother's case was getting
19 ready to go to trial?

20 A. I believe, and I don't have a clear memory but it
21 wasn't through any formal way. I believe Dan Williams
22 left a voicemail on my phone. And I, if I remember
23 correctly it was about a week. It was less than two weeks
24 before the trial which handicapped me because I had to
25 adjourn my own cases as a lawyer and try to make

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1 arrangements to be here.

2 Q. Okay. Do you recall during the second trial making
3 the Court aware of how little notice you had been given of
4 the commencement of that proceeding?

5 THE COURT: Ms. Shurling, with all due respect, tell
6 me where you're going because she says she was not asking
7 for a continuance. I'm not sure where you're going with
8 this.

9 MS. SHURLING: I'll go to the next question.

10 Q. Given the fact that you were establishing for the
11 Court the brevity of your notice, why didn't you ask for a
12 continuance?

13 A. Well, pretty much based on what I remember, that I had
14 very little control over the situation. Dan Williams had,
15 Attorney Williams had more information. And he told me
16 they were moving forward no matter what. And so I --

17 Q. I'm sorry. I'm going to have to ask you to repeat
18 that. I couldn't hear you.

19 A. My information is that they were going to go forward
20 no matter what notice I had provided Dan. So I just tried
21 to make the best of this. I considered it a negative
22 situation for my brother.

23 Q. Well, but you placed on the record the fact that
24 you --

25 MR. SPENCER: Your Honor, I object to the leading

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1 questions.

2 THE COURT: All right. Let's --

3 BY MS. SHURLING:

4 Q. What was your purpose in making the Court aware of how
5 little notice you had?

6 A. Well, of course, hopefully to get an adjournment or to
7 give me another, you know, some more time to prepare for
8 the case in South Carolina. There were a number of
9 motions that after I got here I filed. And I did not have
10 those opportunities.

11 Now when I got here and found out they were
12 proceeding, then I just got in line with what was already,
13 apparently had been discussed and determined between
14 Attorney Williams and the solicitor's office.

15 And I did not say anything at the hearing with that
16 understanding, most of the understanding that it was no
17 matter what you say it's going to go forward. And I did
18 not say anything about it on the record.

19 Q. Again, Your Honor, I anticipate an asked-and-answered
20 objection but my question is: If you were not going to
21 ask for a continuance, why even put it on the record?

22 MR. SPENCER: That's asked and answered, Your Honor.

23 MS. SHURLING: She didn't answer it.

24 THE COURT: Hold on, ladies and gentlemen. You may
25 answer that. Why didn't you ask for a continuance? I

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1 think you've already said you thought it was probably
2 going to go ahead not withstanding.

3 THE WITNESS: Other than that, I don't recall.

4 THE COURT: Thank you. Move along.

5 BY MS. SHURLING:

6 Q. Do you have the contemporaneous objection rule in
7 Michigan?

8 A. That is that --

9 Q. That if an issue is not -- has to be raised and argued
10 in the lower court and ruled upon by the Court for it to
11 be available for appellate review?

12 A. Yes.

13 Q. So, were you aware that in South Carolina an issue
14 that is not raised and argued is not available for
15 appellate review?

16 A. As far as -- I believe I knew that. Maybe I didn't.

17 Q. Okay. So, I'll just move on.

18 With regard to the testimony of witness Vigier, the
19 jailhouse snitch, the French guy that was not present at
20 the second trial. Do you remember arguing that his
21 testimony should be excluded because you had not
22 participated in his examination at the first trial?

23 A. Yes. Vaguely.

24 Q. And do you remember Judge Barber's ultimate ruling
25 that although you didn't act as co-counsel that you were

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1 there and had the opportunity to have input in the Messiah
2 hearing through Attorney Williams?

3 A. Yes.

4 Q. Was that accurate?

5 A. That I had the opportunity to have --

6 Q. Yes.

7 A. Oh, absolutely not. Absolutely not. First of all, I
8 was not sitting at counsel table where I had immediate
9 access to Attorney Williams.

10 I'm going to say that Attorney Williams and I, myself,
11 it was a lot of discord and we had different styles. I'm
12 going to put it like that. And the way I may have
13 practiced in Michigan was different than what Mr. Williams
14 believed should be done here.

15 Q. Well --

16 A. And so we had differences which hindered our
17 communication.

18 Q. Okay. How far into the first jury trial was it when
19 you were made aware that you were not going to be allowed
20 to participate in the trial?

21 A. I think it was very early on. And, in addition, I
22 felt a little intimidated.

23 Q. Okay.

24 A. Well -- okay.

25 Q. Ms. Sanders --

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1 A. All right.

2 Q. -- I don't mean to be rude, but if you can try to
3 limit your answers to my questions, we'll get done
4 quicker.

5 MR. SPENCER: I ask that she be allowed to complete her
6 answer.

7 THE COURT: Restate the question. All right. Y'all
8 have been very nice up till now. Let's don't get off
9 center. Ask the question again.

10 MS. SHURLING: Thank you.

11 Q. How far into the first trial had the proceedings gone
12 when Judge Clary made it clear that you were not going to
13 participate as co-counsel?

14 A. In the initial stages. Right at the beginning.

15 Q. And from that point forward, where in the courtroom
16 did you sit?

17 A. I sat, like in the, not in the second bench but I
18 believe in the first bench behind the lawyers somewhere,
19 but -- near the lawyers but behind them. I wasn't at
20 counsel table. I wasn't sitting beside Tunzy at all or
21 anything like that.

22 Q. Okay. And during the Messiah hearing that was held on
23 the testimony of Mr. Vigier, did you have the opportunity
24 to consult with Attorney Williams at all?

25 A. I would say no. The judge had already made his ruling

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1 that I wasn't to participate. And communications broke
2 down. And very little, almost zero.

3 Q. Well, during the actual Messiah hearing, was there any
4 juncture -- were there any recesses where Mr. Williams was
5 afforded an opportunity to consult with you?

6 A. Of course, but, but like I said, my input was, I
7 considered to be very invaluable at that proceeding. And
8 I believe judge -- Attorney Williams considered it to be
9 at that point and followed Judge Clary's orders.

10 Q. Okay. Did you perceive yourself to have the
11 opportunity to offer suggestions to Mr. Williams as to how
12 he should handle the Messiah hearing, what questions he
13 should ask and so forth?

14 A. Well, as to the Messiah hearing I have no independent
15 recollection. But I can say this --

16 Q. Ms. Sanders. I can't hear you.

17 A. Okay. As to the Messiah hearing, I would say this.
18 Based on what my overall memory is at this point, that I
19 would suggest things to Attorney Williams and he didn't
20 always follow them. He would ignore them. We would argue
21 about it, whether it was valuable to him or not valuable
22 to me.

23 So it wasn't like he was obeying my every request. He
24 he was pretty much acting as the attorney for my brother
25 and I had very limited input.

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1 Q. Okay. I'm trying to get a clear picture here. When
2 were these arguments taking place?

3 A. Are you talking about the first trial or the second
4 trial?

5 Q. At the first trial. When you say you and Mr. Williams
6 were arguing, were you arguing specifically about the
7 testimony of Mr. Vigier or are you --

8 A. Yes.

9 Q. Okay. Ms. Sanders, from where you were sitting in the
10 courtroom, did you have the opportunity to, during the
11 proceeding, talk to Mr. Williams about what questions he
12 was going to ask?

13 A. I don't recall.

14 Q. Did you have the opportunity to hand him notes or
15 anything as the proceeding was being held?

16 A. May have had the opportunity but it, it wasn't doing
17 any good at that point.

18 Q. Okay. When Judge Barber stated that you had had the
19 opportunity to participate in Vigier's cross-examination
20 even though you weren't co-counsel, that you had the
21 chance to contribute through rulings; do you recall that
22 ruling?

23 A. Yes.

24 Q. Why didn't you, if you don't -- you testified earlier
25 that wasn't accurate. Why didn't you put that on the

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1 record?

2 A. In the first trial? During the first trial?

3 Q. No. At the second trial.

4 A. At the second trial.

5 Q. When Judge Barber ruled on the admissibility of
6 Vigier's testimony and said what he said about your having
7 the ability to participate even though you weren't
8 co-counsel, I asked you earlier if that was an accurate
9 assessment. You said, no, it wasn't.

10 Why didn't you stand up and tell him it wasn't?

11 A. I don't know. I did not. And I believe that would be
12 a failure on my part when that was definitely the case,
13 that I had very limited opportunity to discuss or persuade
14 Mr. Williams, Attorney Williams in any way.

15 It was just something I should have done and did not.

16 Q. And are you aware that the rulings of Judge Barber
17 along those lines were incorporated to a degree in the
18 Court of Appeals opinion in this case?

19 A. Yes.

20 Q. And that there was nothing on the record to refute
21 Judge Barber's position?

22 A. Well, that's when I knew it was a big mistake.

23 Q. Okay.

24 A. A huge mistake.

25 Q. Let's move along.

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1 Do you recall a discussion on the record when Judge
2 Barber was asking y'all how you wanted him to go about
3 entertaining the prior testimony of Mr. Vigier, whether
4 you wanted it published in the courtroom or you just
5 wanted him to have a transcript? Do you recall that?

6 A. I remember some of that.

7 Q. Did you have any particular reason for not objecting
8 to the Court having a transcript as opposed to hearing the
9 testimony published in the courtroom?

10 A. All I can say is that I believe that would have been a
11 mistake because, my experience as an attorney is to have
12 the testimony read on the record and to preserve it even
13 though it may, you know -- to have another person act out
14 the witness's role and have another person act out the
15 questioner-attorney. That certainly was a mistake.

16 And let me say this. I was very greatly emotionally
17 impacted in these proceedings due to the fact that my
18 brother was on trial. And that may have, you know, the
19 stress of it may have handicapped my decision making along
20 with what I was dealing with in having somebody else as
21 counsel more knowledgeable than me about what I should do
22 in this jurisdiction.

23 Q. Okay. Well, that leads us to another important
24 question. Your brother had a bench trial the second time
25 around; right?

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1 A. Yes.

2 Q. Whose decision was that?

3 A. Well, my brother was very scared and he couldn't make
4 up his mind. I was influenced by the fact that there had
5 been some horrific crime in Barnwell, robbery, at the
6 Sonic Restaurant and had a lot of publicity just two weeks
7 prior to my brother's trial. And that was another concern
8 I had about having the trial adjourned, to give the people
9 a chance to cool off in the newspapers. And I thought my
10 brother would be negatively impacted by a jury trial.

11 Now did I really communicate all of that to my
12 brother? Maybe not. I think I was more engaged in trying
13 to persuade Attorney Williams that I thought a jury trial
14 was going to hurt my brother because of all of that
15 publicity just two weeks and even into the week of my
16 brother's trial. It was just -- it just seemed like I had
17 no other recourse but to suggest that to Attorney
18 Williams.

19 Now my brother having been in jail for a period of
20 time, you know, he vacillated back and forth about what he
21 should do. And I just went on my experience as a lawyer
22 in Michigan. I had done it before in Michigan and then
23 looking here in this jurisdiction, it's a little
24 different.

25 And maybe that was bad advice for my brother. I, I,

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1 you know things are different, and ...

2 Q. Ms. Sanders, to -- whose final decision was it to have
3 a bench trial; his or yours?

4 A. I'm going to say me.

5 THE COURT: Ma'am, what?

6 THE WITNESS: I'm going to say me. I was his lawyer.
7 I was advising him. I was the closest to him. I'm going
8 to say that it was my decision.

9 BY MS. SHURLING:

10 Q. Well, leading up to the decision did you discuss with
11 your brother all the potential pros and cons of a jury
12 trial versus a bench trial?

13 A. As best I could. I don't think I knew all of them
14 given --

15 Q. Well, did you discuss with him what would happen at a
16 jury trial if all 12 people could not agree to convict?

17 A. I don't recall doing that.

18 MR. SPENCER: I'm sorry. I couldn't hear that.

19 THE WITNESS: I don't recall doing that. I just think
20 I was, felt pressured into a bench trial because of those
21 negative events. And at that point I had just said let's
22 just take a chance with the judge.

23 BY MS. SHURLING:

24 Q. I understand. But did you explain to your brother
25 that at a jury trial if all 12 jurors couldn't agree on a

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1 vote to convict, that he would get a mistrial?

2 A. I don't recall specifically doing that, today; no.

3 Q. Did you remind him that it would only take one holdout
4 on a jury trial out of 12 to get a mistrial?

5 A. No.

6 Q. All right. Did you discuss with him the fact that
7 Judge Barber clearly if he proceeded as the fact-finder
8 knew that a jury had previously convicted him of murder?
9 Did you discuss that with him?

10 A. I don't recall.

11 Q. And did you advise him that if he proceeded to trial
12 by jury that a new jury at the second trial would not be
13 allowed to know that he had previously been convicted and
14 that the conviction had been overturned?

15 A. I, I'm saying that the importance of that I may not
16 have particularly discussed with my brother given the
17 circumstances that we found ourself in.

18 Q. Well, do you have any recollection here today of
19 discussing that with him at all?

20 A. No.

21 Q. Did you discuss with him the fact that as a sitting
22 circuit court judge, Judge Barber would likely know that
23 Maurice Benning had been acquitted in, of the murder and
24 attempted armed robbery?

25 A. I don't recall that specifically. However, I was

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1 trying to -- I did file a motion. And I think it was
2 heard, to ask Judge Barber to quash his testimony because
3 he had failed several lie detector tests.

4 Q. But my question is: Did you discuss with your brother
5 the fact that, unlike a jury, Judge Barber would know that
6 Maurice Benning had been acquitted of murder and attempted
7 armed robbery?

8 A. I don't recall doing that.

9 Q. Okay. You made a Batsen motion during the jury
10 selection process in this case; did you not? An objection
11 to the State's use of preemptory strikes to exclude
12 members of your brother's minority from the jury?

13 A. I think Attorney Williams may have done that. If I
14 did it -- if you could refresh my memory. I thought that
15 Attorney Williams was the person that did that motion.

16 Q. Okay. But, well -- and the record will reflect who
17 argued it. But my question is: There was a Batsen motion
18 made regardless of whether you did it or Mr. Williams,
19 there was a Batsen motion made in this case; correct?

20 A. That's correct.

21 Q. And the basis of that motion was that the State had,
22 in your view, misused their preemptory strikes?

23 A. That's what I think I remember; yes.

24 Q. Okay. Did you --

25 THE COURT: Do you have an objection?

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1 MR. SPENCER: Yeah, I don't see the relevance of what
2 happened at the Batsen.

3 THE COURT: Well, the Batsen is not mentioned anywhere
4 in the application even though --

5 MS. SHURLING: I'm moving on, Your Honor, but you'll
6 understand the relevance when I do.

7 THE COURT: All right.

8 BY MS. SHURLING:

9 Q. Did you discuss with your brother in making the
10 decision about whether to have a bench trial or a jury
11 trial that he would be waiving his right to a trial by a
12 jury of his peers by electing to have a bench trial?

13 A. I don't recall that.

14 Q. Okay. Toward the end of the case -- oh, and, Your
15 Honor, I need to state for the record that I apologize
16 with regard to the argument about closings, allegation
17 number 13 about closing arguments.

18 Somewhere in this transcript, and I still haven't
19 located it, there was a discussion about the length of
20 time for closing arguments. And I thought I recalled
21 there being a waiver issue; however, I have read, reread
22 the end of trial transcript again and it's clear that no
23 matter what earlier discussion there was, there were full
24 closing arguments in this case.

25 So I will withdraw allegation number 13.

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1 THE COURT: Thank you.

2 BY MS. SHURLING:

3 Q. But with regard to allegation number 12, did you have
4 any discussions with your co-counsel about whether or not
5 you should ask the presiding judge at the bench trial to
6 state for the record the law that was being applied by him
7 in reaching a decision in this case?

8 THE COURT: Please tell me what that means. I'm
9 trying a case as a judge and jury, bench trial. Are you
10 telling me I'm supposed to put on the record somewhere
11 along the line what the law is?

12 MS. SHURLING: Yes, sir, Your Honor. There's an
13 argument in federal court. There's actually a specific
14 court rule that says --

15 THE COURT: I'm talking about in our state court
16 rules.

17 MS. SHURLING: I understand.

18 THE COURT: In the State of South Carolina.

19 MS. SHURLING: I understand. My argument will be very
20 clear to Your Honor, but I was saying by, just by
21 reference that in federal court, for example, although a
22 judge doesn't automatically do it, if you ask him to he
23 has to.

24 And the logic is this. Our Supreme Court and our
25 appellate court several times a year reverses convictions

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1 based on improper jury instruction having been given.

2 THE COURT: Well, I understand that.

3 MS. SHURLING: And we know what instructions were given
4 and they are available to examine for whether or not they
5 were appropriate because they're on the record.

6 In a bench trial situation, if the presiding judge
7 does not articulate the law that he believes is applicable
8 and state it for the record, then there is no record from
9 which to reference the law applied by the Court and know
10 whether or not the Court may perhaps have neglected to
11 consider some provision of the law that was applicable or
12 whether the Court may have misapplied the law and not
13 applied the proper standard in some situations.

14 You don't know if you don't have an articulation on
15 the record. And it would -- and the Applicant's position
16 would be that the failure to ask the Court to articulate
17 for the record what law was being considered eliminates
18 the possibility of arguing on appeal that the Court may
19 have applied the wrong law.

20 THE COURT: Well, I assume he's applying the law of
21 murder, attempted armed robbery and conspiracy in this
22 case.

23 THE WITNESS: I believe I can answer --

24 THE COURT: Hold on.

25 MR. SPENCER: I just point out, I mean, counsel's not

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1 required to be clairvoyant. This might be a wonderful
2 idea that Ms. Shurling has, but attorneys are not required
3 to anticipate changes in the law and there is no such law
4 right now.

5 THE COURT: Well, let's let her make her record.

6 MR. SPENCER: Thank you.

7 THE COURT: She might make us judges have to do one
8 more thing when we try a case.

9 BY MS. SHURLING:

10 Q. So it's your testimony that that wasn't discussed or
11 considered; is that correct?

12 A. No. I think it was more presumed. Federal authority,
13 you know, as I had with Mr. Savitz, there were federal
14 authorities that I believe where he should have brought
15 issues where the law was in our favor. And just the same
16 with, maybe, Judge Barber. I presume that would be done.
17 That would be one of the lone, probably, benefits of a
18 bench trial that unlike a jury trial maybe we would
19 perhaps know what was in the mind of the judge in
20 deliberating and that those should be articulated on the
21 record.

22 And it wasn't done. And I did not make a demand that
23 it particularly be done. In hindsight, with all due
24 respect, Judge Early, as a judge I try to abide by that
25 now when I make a decision at a bench trial, being aware

BRENDA K SANDERS - DIRECT

1 that it could be appealed and, you know, argued regarding
2 my decision.

3 Q. Did you consider pointing out to the Court or asking
4 Mr. Williams to point out in his closing argument the fact
5 that the State had not presented any reply testimony to
6 refute your brother's testimony about having observed the
7 officers go to the wrong restaurant at first?

8 A. I did not. And it was important to do so for the
9 reason that we had presented two witnesses who clearly
10 placed some other suspicious men closely in the area at
11 the time of this alleged incident -- of this incident and
12 what could have very well been the perpetrators of this.
13 And that was witness Michele Mixson and I forgot other
14 witness's name.

15 And that, that would have clearly undergirded my
16 brother's claim; that he was not present, he was somewhere
17 else when this took place.

18 Maurice Benning, the gun was found in his home and yet
19 no one even thought to think that he was responsible for
20 these crimes. The police confiscated the gun in his home
21 in the drawer. He had had previous burglary charges in, I
22 think it was Ohio or Georgia or somewhere where he had
23 been involved in other similar crimes.

24 None of that -- I think in my cross-examination, I was
25 able to get that on the record. But I think Defendant

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1 Benning had everything to lie about. The gun was his
2 mother's. It was found in their home.

3 My brother was arrested at our house and nothing
4 implicating him at all or connecting him to this crime at
5 all was found or ever alleged besides these jailhouse
6 informants that got all of this favorable consideration.
7 All of them walked from jail immediately after my
8 brother's trial. And they also testified against other
9 defendants in other cases. And so my brother was, I
10 believe, a victim of --

11 MR. SPENCER: Your Honor, I think this is unresponsive
12 to the question.

13 THE WITNESS: All right. I'm sorry.

14 MS. SHURLING: I wasn't going to interrupt, Your
15 Honor. I was totally wanting to let her answer the
16 question.

17 THE WITNESS: I'm sorry.

18 MR. SPENCER: That was a different question.

19 THE COURT: All right. All right. Ask the next
20 question.

21 MS. SHURLING: Okay. Moment's indulgence. (Pause.)
22 No further questions, Your Honor.

23 THE COURT: Cross?

24 MR. SPENCER: Thank you, Your Honor. May it please the
25 Court.

BRENDA K SANDERS - CROSS

CROSS-EXAMINATION

BY MR. SPENCER:

Q. Ms. -- excuse me. Judge Sanders, you testified you've been a judge for six years now. When were you admitted into practice as an attorney?

A. 1985 in Michigan.

Q. Okay. Where did you go to law school?

A. I went to the University of Detroit School of Law and University of Michigan undergrad.

Q. What kind of law did you practice between '85 and when you were admitted as a judge or elected as a judge?

A. I was practicing -- I was in private practice so I did, a good bit of my work was criminal work. And I'd say half and half, civil and criminal.

Q. Okay. And when you represented criminal defendants you told them about their right to a jury trial; right?

A. Yes.

Q. And you told them that -- you told them that in order to convict, for them to be convicted it had to be a unanimous verdict; right?

A. Yes.

Q. And you would tell them that even if one juror held out, if only one juror held out that would be enough to get a mistrial?

A. That is the textbook principle, yes.

BRENDA K SANDERS - CROSS

1 Q. Textbook principle. And then you decided to represent
2 Mr. Sanders, agreed to represent him in this matter;
3 right?

4 A. I had no choice. I just finished -- I was earning my
5 degree in divinity. And financially I was in school. I
6 had closed my law practice. And so, to protect or try to
7 protect my brother's rights, I elected and moved forward
8 with representing him with as much as I could be allowed
9 to.

10 Q. Okay. And you tried to do at least as good a job you
11 did with all these other criminal defendant clients you've
12 had in the past; right?

13 A. Yes, I did.

14 Q. And certainly, certainly you told him about his right
15 to a jury trial?

16 A. Yes, of course. I believe I did.

17 Q. And certainly you told him he had a right to a
18 unanimous verdict before he could be convicted?

19 A. That may have come up. I don't recall specifically
20 inasmuch as I was focused on this robbery that had
21 happened at the Sonic Restaurant and with those killings,
22 a great deal of unrest in Barnwell. And I may have placed
23 more emphasis on that rather than --

24 Q. So you're --

25 A. -- a discussion with Tunzy regarding a jury.

BRENDA K SANDERS - CROSS

1 Q. I didn't ask about emphasis. Did you tell him whether
2 or not a jury had to reach a unanimous verdict before he
3 could be convicted?

4 A. I can't specifically recall that.

5 Q. Okay. How many criminal defendants have you
6 represented in the past?

7 A. A lot.

8 Q. And how many of them would you decide not to tell
9 about whether or not a unanimous verdict was required?

10 A. I would never make a conscientious decision --

11 Q. Is it fair to say --

12 A. -- to not tell a defendant that.

13 Q. Okay. And how many -- and certainly it was your
14 standard practice to tell them that a unanimous verdict
15 was required; is that correct?

16 A. Standardly, yes.

17 Q. And you've testified that as an attorney up in
18 Michigan you've done bench trials and, on criminal cases;
19 is that correct?

20 A. Yes, sir.

21 Q. Okay. What were some of the reasons you would do a
22 bench trial with a client up in Michigan?

23 A. Well, one thing about being familiar with the area is
24 that you're familiar with the judge --

25 Q. Well, if you could -- I'm sorry. Keep going.

BRENDA K SANDERS - CROSS

1 THE COURT: Go ahead. Answer the question,
2 please, ma'am.

3 MR. SPENCER: Apologize, Your Honor.

4 THE WITNESS: Familiar with the judge. In Michigan
5 some judges have a track record of trying capital cases
6 and bench trials and finding not guilty and some do not.

7 BY MR. SPENCER:

8 Q. And are you familiar actually in the federal system
9 that there's a higher rate of acquittal for bench trials
10 than there are for jury trials?

11 A. Not particularly, I can't say I am. I know the
12 federal law is very favorable if it was followed in this
13 case.

14 MS. SHURLING: Your Honor, I would object to the
15 Attorney General presenting testimony in the form of a
16 question unless he's prepared to present authority to the
17 Court for that proposition.

18 THE COURT: He's on cross-examination. Go ahead.

19 MR. SPENCER: I have authority, Your Honor.

20 THE COURT: Overruled.

21 BY MR. SPENCER:

22 Q. And concerns about pretrial publicity -- let me
23 rephrase. I mean, I get tongue tied.

24 In terms of concerns about pretrial publicity, that's
25 a reason to choose a bench trial over a jury trial; isn't

BRENDA K SANDERS - CROSS

1 it?

2 A. It could be. This -- in fact, the reporter testified
3 I think in the first trial. And I believe it was allowed
4 and the solicitor presented a reporter in my brother's
5 case which I believe was very improper.

6 Q. Okay. Well, let me -- let's put that in perspective.
7 That wasn't about some source or anything. That was about
8 something that the reporter testified that Mr. Sanders had
9 told him; isn't that correct?

10 A. I can't recall what it was about, but I know one
11 thing. I thought it was very, highly irregular and
12 improper that a solicitor prosecutor who's trying to
13 really target and bring out the truth of a matter would
14 present someone as unreliable as a reporter for factual
15 evidence in a case.

16 Q. Are you saying reporters are like per se unreliable?
17 I don't understand that.

18 A. Well, they're moved by, you know, newspaper sales and
19 sometimes there can be a bias. I mean, you have the New
20 York Times which is considerably, I don't know, maybe --

21 THE COURT: All right. Ladies and gentlemen, let's
22 get back on --

23 THE WITNESS: All right.

24 THE COURT: -- what's relevant in this case, please.

25 THE WITNESS: Thank you.

BRENDA K SANDERS - CROSS

1 THE COURT: Mr. Solicitor -- I mean, Mr. AG, let's ask
2 relevant questions.

3 MR. SPENCER: Thank you, Your Honor. Beg the Court's
4 indulgence.

5 Q. Backing up to my point which you didn't exactly answer
6 but pretrial publicity can be a reason not to, can be a
7 reason to choose a bench trial; right?

8 A. Well, one of the reasons; yes.

9 Q. Thank you. And that's really the reason in this case,
10 one of the reasons you chose a bench trial; right?

11 Let me modify that. You and Mr. Sanders chose the bench
12 trial?

13 A. Well, I'm going to say this. I thought that the
14 evidence was so scarce in this case that anyone could look
15 at it and say not guilty, including Judge Barber.

16 It was filled with inaccuracies and disputed in every
17 way. The witnesses contradicted themselves in every way.
18 And, in my view, I could not see, you know, someone with a
19 trained eye -- naive, yeah, well, maybe I was naive, but I
20 could not see anyone with a trained eye saying guilty.

21 Q. Well, you say you're naive. But, again, you've been
22 practicing law since 1985?

23 A. Yeah, but not in this jurisdiction. And I was
24 severely handicapped with my representation of my brother
25 because of it. I had to rely on Attorney Williams who I

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1 don't think -- I think I agitated him. I think I just was
2 a problem to him and his office and looked upon as such.
3 And just, shut up and sit down, I'm, you know, I'm in
4 control here. I know what's going on and you don't.

5 That handicapped my representation of my brother. And
6 I believe that --

7 MR. SPENCER: Your Honor, I would ask the witness
8 respond to my question.

9 THE COURT: Sir, she is responding. Let her finish.

10 MR. SPENCER: Thank you.

11 THE WITNESS: I believe that the acrimony between us
12 and attorneys fight. As I sit here today, I look at
13 Attorney Williams, maybe he did what he thought was best
14 but I thought something else was best. And getting it out
15 in the courtroom to be practice was a different story.

16 THE COURT: Why didn't you fire him?

17 THE WITNESS: I did attempt to have him removed,
18 Judge. I have a copy of a motion that I filed to ask the
19 Court to remove him.

20 I don't have it in order as to what the final
21 disposition of that motion was. I have a copy in my
22 folder. And I think that just added to the discord and
23 contention. We were just not getting along. It did not
24 benefit my brother.

25 I have a copy.

BRENDA K SANDERS - CROSS

1 BY MR. SPENCER:

2 Q. What you did think would benefit your brother would be
3 a bench trial; right?

4 A. Right.

5 Q. At the time. I'm not asking hindsight. At the time.

6 A. Well, I thought so. We didn't have -- I thought we
7 didn't have a choice given the -- I thought a bench trial
8 where the authority would be followed and the law, yes, at
9 the time, and backing up against the wall with all of this
10 bad publicity and reporters everywhere.

11 Q. And you moved for a change of venue; right?

12 A. I believe Attorney Williams did.

13 Q. Okay. Mr. Williams did. And that was a good thing,
14 right, to move for a change of venue?

15 A. I thought that was good.

16 Q. All right. And Judge Barber ruled against you?

17 A. That's correct.

18 Q. All right. And you're familiar with the standard of
19 review on an appeal from denial of a change of venue?

20 A. Not particularly because I hadn't done those a lot. I
21 had not done those. I had not ever had a legal reason to
22 do that in any case that I had done. And I left that to
23 Attorney Williams.

24 Q. All right.

25 A. But because the other defendants were exonerated, I

BRENDA K SANDERS - CROSS

1 thought, again, that my brother would also be exonerated
2 given the evidence.

3 Q. And you thought the best chance was, of doing that was
4 a bench trial?

5 A. That's what I kept informing Attorney Williams of.
6 And, like I said, emotional as it was with all the
7 pressure of this bad publicity and all my family worrying
8 about this case, I took that chance. And it was not
9 really something, now that I look at -- that was something
10 I should have done.

11 Q. Well, let me ask you this. You thought it was a good
12 idea and you discussed it with Mr. Sanders, with your
13 brother, about going ahead and doing a bench trial instead
14 of a jury trial; is that correct?

15 A. Well, my focus was more on Attorney Williams because
16 he disagreed with me. I think we spent more times arguing
17 about the case than preparing for the case.

18 Q. Well, let me ask you this. Did you talk to your
19 brother about waiving a jury trial, though; yes or no?

20 A. I don't recall all the facets of it, but I do recall
21 this. I said, our back is up against the wall. Maybe we
22 should just do a bench trial.

23 Q. Right. And, and he had been through a jury trial
24 himself; right?

25 A. Yes.

BRENDA K SANDERS - CROSS

1 Q. And so he knew what a jury trial was; right?

2 A. Well, he certainly experienced the repercussions of a
3 jury trial. And sitting through one the second time,
4 the -- there were different factors that were involved.
5 And, like I said, the circumstances had changed as to
6 whether the jury trial was the best or not. And I believe
7 that I spent my time conversing with Attorney Williams
8 about it rather than more so with my brother.

9 Q. I understand you and Mr. Williams couldn't agree on
10 that. And so you, you two kind of fleshed out the pros
11 and cons before deciding on a bench trial. But what --

12 A. I would look at this more like --

13 Q. -- did you discuss with Mr. Sanders? As an attorney
14 who's licensed in Michigan, what did you explain to him
15 about, you know, about the right to a jury trial?

16 A. I would describe my communications with Attorney
17 Williams as a boxing match.

18 Q. I'm sorry. I was asking about your communications
19 with your brother.

20 A. Oh. My brother.

21 Q. Right. What were your communications with him as a
22 licensed attorney?

23 A. Well, I know they were limited because I was in
24 Michigan and Attorney Williams was here. I'm trying to
25 remember what my particular discussions were and I cannot.

BRENDA K SANDERS - CROSS

1 And I was not given free flow to -- I do recall I had
2 some problems communicating with even, my brother could
3 not call me or talk to me at all.

4 Q. Let me ask you this. Mr. Sanders was sitting at the
5 defense table in Barnwell County when the judge instructed
6 the jury on the law for them to apply and how they were to
7 reach a verdict and all of that; is that correct?

8 A. You mean, in the first --

9 Q. Mr. Sanders in the first trial would have been present
10 to hear Judge Clary advise the jury as to their duty; is
11 that correct?

12 A. Oh, he -- yes, he should. Yes. Now, was he paying
13 attention given all the problems and the pressures?
14 That's another thing.

15 Understanding is different than sitting through
16 something and just bearing with it and going through it.
17 Having a mental and voluntary, knowing and understanding,
18 I know that that's different.

19 Q. Beg the Court's indulgence.

20 Okay. In regards to Mr. Vigier who testified at the
21 first trial, Mr. Williams had an opportunity to cross-
22 examine him; right?

23 A. At the first trial?

24 Q. That's right.

25 A. Can I tell you something? I don't even remember him

BRENDA K SANDERS - CROSS

1 testifying at the first trial.

2 Q. Okay. So, you --

3 A. Unless you're going to refresh my memory. All I
4 remember is a transcript and a tape. And I believe there
5 was some disparities between the tape and the transcript.

6 Q. Well, see, you don't recall. You were present for the
7 trial but you don't recall seeing Mr. Vigier's testimony?
8 You don't recall it?

9 A. I believe he did testify. I don't specifically recall
10 just --

11 Q. Okay. And would it surprise that you Mr. Williams
12 cross-examined Mr. Vigier?

13 A. No.

14 Q. And would it surprise you that two defendants'
15 attorneys also would have had the opportunity to cross-
16 examine -- the other two defendants' attorneys would have
17 had the opportunity to cross examine him?

18 A. Wouldn't surprise me.

19 Q. Okay. So Mr. Vigier had been subjected to cross-
20 examination at the first trial; correct?

21 A. That's what I believe, yes. That's what I believe
22 happened.

23 Q. And that would be Mr. Sanders' trial as well as the
24 co-defendants. So Mr. Sanders was a party in that prior
25 proceeding; right?

BRENDA K SANDERS - CROSS

1 A. It was, but I don't think they did as good as a job as
2 I would have done. And that is evidenced by the second
3 trial. Many of the witnesses recanted or changed portions
4 of their testimony after my specific cross-examinations.
5 And I believe the same about many of the -- information
6 about Mr. Vigier testifying for other cases or defendants,
7 against other defendants was not adequately brought out to
8 the Court to show his bias.

9 He, he also got very -- a lot of favorable -- he was
10 allowed to walk free after he testified in that trial.
11 And I believe that was not adequately brought out in
12 anyone's cross-examination. And, in fact, it was not a,
13 a, a major factor that was brought out at the trial
14 because it happened after the trial.

15 And it should have been included because he should
16 have been exposed for who he was. And that was a biased
17 witness who had a deal before he even got up to testify
18 against my brother.

19 He walked on very serious -- I think it was attempted
20 murder, robbery; the same kind of charges that were
21 brought against my brother.

22 And how unjust was that? That was never brought out
23 in cross-examination in the first trial or the second.

24 Q. And you would have done a better job?

25 A. Absolutely.

BRENDA K SANDERS - CROSS

1 Q. All right. And so your prior testimony --

2 THE COURT: Whoa, whoa, whoa. Come right back over
3 here.

4 MR. SPENCER: Excuse me. I'm sorry, Judge.

5 THE COURT: Please take a deep breath.

6 MR. SPENCER: Thank you. Apologize, Your Honor.

7 THE COURT: Yes, sir.

8 BY MR. SPENCER:

9 Q. Your prior testimony that you were distraught, that
10 you were, felt all of this pressure, all of this stress
11 and that made you unable to make decisions, is that the
12 case or is this the case where you're on fire and you
13 could have done a better job with that co-defendant than
14 Mr. Williams? Which is correct?

15 A. Well, I was definitely frustrated by the fact -- I did
16 make decisions. If you looked at the transcript, of
17 course you would know that.

18 But the thing is, I was definitely frustrated by the
19 situation and surrounding circumstances of Mr. Vigier.
20 And it was not adequately, I believe, addressed in
21 anyone's cross-examination as it was -- well, I was going
22 to say with Mr. Benning. That was brought out later.

23 Q. Beg the Court's indulgence.

24 You mentioned what you felt was that Mr. Vigier had,
25 you know, walked, I guess was -- or got a good deal.

BRENDA K SANDERS - CROSS

1 Prior to the first trial, though, there was no deal
2 or, you know, that was the testimony; do you recall that?

3 THE COURT: That's what she's saying. She's saying
4 that he didn't have a deal to start off with. He had a
5 deal before the second trial. She wanted him there to
6 cross-examine him on that. Is that correct?

7 THE WITNESS: That's correct.

8 THE COURT: She's answered that.

9 BY MR. SPENCER:

10 Q. And Mr. Vigier actually testified, I believe, on
11 cross-examination that he was hoping the prosecution would
12 give some consideration for his testimony at trial. Do
13 you recall that?

14 A. I believe so. And he had absconded or something. I
15 also remember about him being some French National or
16 something. And the solicitor indicated they could not
17 even bring him back for a trial and that they could not
18 locate him which I thought was unreasonable given their
19 resources regarding this person, and then to rely so much
20 on his testimony and then say they couldn't locate him at
21 the time of my brother's trial.

22 Q. And he was out on bench warrant. He actually had a
23 bench warrant out for him. Do you recall that?

24 A. I don't particularly recall, but that may have been
25 the case.

BRENDA K SANDERS - CROSS

1 Q. And if he was back in France, he would be pretty hard
2 to bring back here; wouldn't he?

3 A. Well then, that's the danger of relying on a jailhouse
4 informant's testimony when you have no other material
5 connecting evidence in the case. You know, that person
6 may be looked upon as having -- and that wasn't available
7 to cross-examine him on on the first trial.

8 He absconded. And maybe that's a reference that this
9 person was unreliable in the first place and, like,
10 Mr. Benning and Mr. Staley, he would also been a normal
11 regular jailhouse informant.

12 And I believe that their testimony, they should be
13 scrutinized when they come to testify in someone's case,
14 you know. They had a history of getting deals and they
15 knew what they were doing. And so it was easy to sit and
16 testify against someone and ask for favorable treatment
17 and then not only ask for it but get it and then say what
18 someone wanted them to say and then get immediate releases
19 and abscond from, you know -- it's just -- to me
20 references their unreliability in the first place.

21 Q. And that's your viewpoint based on your experience as
22 an attorney and a judge; right?

23 A. Yes.

24 Q. And so you thought it was a good idea tactically to
25 have another judge look at it and be the fact finder. Is

BRENDA K SANDERS - REDIRECT

1 that correct?

2 A. I thought a judge would say -- look at the
3 unreliability of it and say, no way. This is too
4 important. Too much importance in this case. These are
5 capital offenses. Why would I rest my decision on two
6 jailhouse informants that were in those circumstances and
7 nothing else connecting. Just like any other defendants,
8 with the other defendants. Why? I didn't know. Naive
9 about that and that's what I will say now.

10 Q. And that's what you felt was best at the time? Just
11 ask you to answer yes or no.

12 A. Yes.

13 THE COURT: Thank you.

14 MR. SPENCER: Thank you. Anything on redirect, ma'am?

15 MS. SHURLING: Yes.

16 REDIRECT EXAMINATION

17 BY MS. SHURLING:

18 Q. Ms. Sanders, during during the in camera testimony --
19 well, let me back up.

20 You said a moment ago you don't recall Mr. Vigier's
21 testimony at the first trial. Is that what you said?

22 A. I don't recall, you know, what -- I can't visualize it
23 is what I'm saying right now.

24 Q. Okay.

25 A. To say it didn't happen, I'm not saying that.

BRENDA K SANDERS - REDIRECT

1 Q. Your Honor, may I approach? I am referencing page 424
2 of the first trial transcript specifically cross-
3 examination by Mr. Williams in camera. Can you take a
4 look if you will to lines four through seven? In fact,
5 publish that for us, please.

6 A. It says: All right. And is it your understanding
7 that my -- that might have helped you get a better deal in
8 your case if you did that? Answer: Hopefully, yes.

9 Question --

10 Q. Okay. Now, was there anything in that statement, in
11 that question or answer that made clear whether or not
12 that understanding was coming only from defense counsel or
13 whether there was also information coming from the
14 prosecution?

15 A. I thought that Mr. Vigier -- what I remember, I have
16 very limited memory about that. But I do, I got the
17 impression that he had, was motivated to testify for some
18 reason other than what was at hand, that he was going to
19 get something. I understood that he had gotten some
20 favorable treatment from some other cases where he had
21 testified.

22 Q. It's late. I'm tired.

23 A. Obviously. I'm sorry.

24 Q. I'm not as articulate as I want to be. Let me
25 rephrase.

BRENDA K SANDERS - REDIRECT

1 Can you determine from that question and answer
2 whether Mr. Vigier's hope that cooperating would help him
3 was coming solely from his communication with his lawyer
4 or whether or not it also involved communication with the
5 solicitor or information from the solicitor?

6 A. To get up and testify under oath like that I believe
7 he had some indication that he was going to get some
8 favorable treatment from the solicitor.

9 Q. But is there any direct indication --

10 A. No.

11 Q. -- in this question?

12 A. No, ma'am.

13 Q. And to your recollection -- well, the record will have
14 to speak for itself, Your Honor, with regard to the fact
15 that the more direct question was not posited during the
16 hearing.

17 THE COURT: Well --

18 BY MS. SHURLING:

19 Q. Now do you recall during the bench trial, and I'm
20 referring to page 170 of the record at lines 15 through
21 20, when the State stated for the record that when they
22 had been approached by Mr. Vigier's attorney, Richard
23 Breibart. And he asked us if he (verbatim) would give him
24 consideration and we told his attorney, you know, we
25 couldn't give him any deal right now but we would

TUNZY SANDERS - DIRECT

1 certainly take it into account when it came time to
2 sentence -- I mean, when it came time for him to go to
3 Court. Do you recall that statement?

4 A. Yes.

5 Q. Okay. If you had been the lawyer cross-examining
6 Mr. Vigier at the original Messiah hearing, would you have
7 questioned him concerning what if any information had been
8 relayed to him by his attorneys concerning assurances from
9 the prosecution?

10 A. Absolutely.

11 MR. GOURLEY: Thank you.

12 THE COURT: You may step down. All right. Let's take
13 a quick bathroom break, about 10 minutes. And let me
14 see -- about 10 minutes. Let me see y'all in chambers to
15 see where we are.

16 (Break taken from 3:17 p.m. until 3:26 p.m.)

17 THE COURT: You may call your next witness.

18 MS. SHURLING: Your Honor, at this time I would call
19 the Applicant, Tunzy Sanders.

20 THE COURT: Come around Mr. Sanders, please.

21 TUNZY SANDERS, having been duly sworn, was examined
22 and testified as follows:

23 THE COURT: Please have a seat. Give us your full
24 name.

25 THE WITNESS: Tunzy Sanders.

TUNZY SANDERS - DIRECT

DIRECT EXAMINATION

2 BY MS. SHURLING:

3 Q. Mr. Sanders --

4 THE COURT: Ms. Shurling, I was informed by my law
5 clerk a while ago while you were examining the witness or
6 listening to a witness, one of your lights came on.

7 MS. SHURLING: It did? I'm sorry. I wasn't doing it
8 on purpose. I promise. It's no signal.

9 Your Honor, just to make a good record on the matter
10 that was raised earlier in terms of a conflict, I'd like
11 to briefly question Mr. Sanders.

12 Q. Mr. Sanders, when I was hired to represent you by your
13 sister, later when it became apparent that we were going
14 to be doing a new PCR instead of a PCR appeal, you and I
15 had discussions about the fact that your sister had hired
16 me; didn't we?

17 A. Yes, ma'am.

18 Q. And I assured you that the fact that she was the one
19 paying my fee was not going to in any way affect my
20 tenacity with regard to raising claims of ineffective
21 assistance of counsel against her; is that true?

22 A. Yes, ma'am.

23 Q. But we discussed that and I explained to you that she
24 had paid my fee and you agreed to have me be your PCR
25 lawyer anyway; right?

TUNZY SANDERS - DIRECT

1 A. Yes, ma'am.

2 Q. And you understand the argument the State's making
3 that since she paid my fee, arguably there might have been
4 a conflict if I felt some kind of loyalty to her instead
5 of you. Do you understand that argument?

6 A. Yes, ma'am.

7 Q. Have you at any time during my representation had the
8 feeling that I had divided loyalty between you and your
9 sister?

10 A. No, ma'am.

11 Q. Are you comfortable going forward with me as your PCR
12 counsel even though I was paid by your sister?

13 A. Yes, ma'am.

14 Q. Thank you.

15 There's only one thing I want to ask you about. Your
16 first trial was a jury trial; correct?

17 A. Yes, ma'am.

18 Q. And in fact at the very end of your first trial when
19 the judge is instructing the jury, he does tell the jury
20 at your first trial that their verdict has to be
21 unanimous, that they have to all 12 agree to either
22 convict or acquit. Do you remember that?

23 A. Yes, ma'am.

24 Q. Okay. But prior to making the decision about whether
25 or not to have a bench trial or a jury trial at the second

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1 one, did anyone explain to you what would happen if the
2 jury didn't all 12 agree?

3 A. No, ma'am.

4 Q. Did anybody discuss with you the fact that you could
5 get a mistrial if even one person held out and didn't want
6 to vote to convict?

7 A. No.

8 Q. If you had understood that, would you have wanted to
9 forward with your jury trial instead of the bench trial?

10 A. Probably. Yes, sir -- yes, ma'am.

11 Q. Okay. And did -- I don't want to beat a dead horse
12 but you've heard me today going over some of the factors
13 that might would influence a decision to have a jury trial
14 versus a bench trial; haven't you?

15 A. Yes, ma'am.

16 Q. And have you and I discussed each of those factors
17 individually with each other prior to today?

18 A. Yes.

19 Q. If you had understood all of the potential advantages
20 of a jury trial --

21 MR. SPENCER: Your Honor, I would --

22 MS. SHURLING: -- versus --

23 MR. SPENCER: -- ask for direct examination questions
24 now. I really do want to hear Mr. Sanders' testimony.

25 THE COURT: Please ask direct questions.

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1 BY MS. SHURLING:

2 Q. Mr. Sanders, did Mr. Williams --

3 THE COURT: What did Mr. Williams advise you
4 concerning a jury trial; how about that?

5 BY MS. SHURLING:

6 Q. What did Mr. Williams advise you concerning going
7 forward with a jury trial or doing a bench trial?

8 A. Only thing I was advised was, I had a right to a jury
9 trial. Not anything per se of what would be the outcome
10 if, one against the other or anything in either trial.

11 Q. Okay. Did either Mr. Williams or your sister discuss
12 with you the potential advantages --

13 MR. SPENCER: Your Honor, it's leading.

14 MS. SHURLING: -- of a jury trial?

15 THE COURT: Sustained. What did they discuss with
16 you.

17 BY MS. SHURLING:

18 Q. What did they discuss with you concerning what would
19 happen at a jury trial versus a bench trial?

20 A. It was more of a, they was discussing that they -- one
21 wanted a jury trial. One wanted a bench trial. It was, I
22 guess, to see who was going to win. And at the end it was
23 decided that it would be a bench trial.

24 Nothing was said as far as 12 jurors or the difference
25 between either or other than it would be the judge or a

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1 jury.

2 Q. Who made the decision whether to proceed with a jury
3 trial or to have a bench trial?

4 A. My sister won. Brenda.

5 Q. Your sister?

6 A. She ultimately made the -- but it was no actual, no
7 understanding on my part, either or, one was greater than
8 the other or, you know.

9 Q. If you had understood everything about --

10 MR. SPENCER: Your Honor.

11 MS. SHURLING: Your Honor, this is --

12 THE COURT: Hold on. What's your objection?

13 MR. SPENCER: That's leading. I'm really trying to
14 keep a tab on the leading right now.

15 THE COURT: But she hasn't asked the question.

16 MR. SPENCER: Okay. I'm sorry.

17 THE COURT: Go ahead. If you had understood; finish
18 the question.

19 BY MS. SHURLING:

20 Q. If you had understood everything back in 2001 that you
21 now know about a jury --

22 MR. SPENCER: I think that assumes facts not in
23 evidence.

24 THE COURT: Overruled.

25 BY MS. SHURLING:

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1 Q. If you had understood everything in 2001 about the
2 differences between a jury trial and a bench trial, would
3 you have waived your right to a jury trial for a bench
4 trial?

5 A. No, ma'am.

6 Q. Would you have exercised your right to trial by jury
7 and gone on with -- you had already drawn a jury in your
8 case; hadn't you?

9 A. Yes, ma'am.

10 Q. Would you have gone on with a jury trial if you
11 understood then what you understand now?

12 A. Yes, ma'am.

13 Q. Is there any question in your mind -- I'll rephrase
14 that. The various factors that have been discussed here
15 today with regard to a jury trial or a bench trial, had
16 you ever discussed those with anybody other than me at the
17 time -- at the time of your trial had you discussed those
18 factors with anyone?

19 A. No, ma'am.

20 Q. And you've subsequently discussed those factors only
21 with me; is that correct?

22 A. Yes, ma'am.

23 Q. Had you understood those factors at the time of your
24 original trial, would you have waived your right to a jury
25 trial?

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1 A. No.

2 MS. SHURLING: Thank you. No further questions.

3 THE COURT: All right. Answer any questions the
4 Attorney General may have.

5 CROSS-EXAMINATION

6 BY MR. SPENCER:

7 Q. Okay. Mr. Sanders, you mentioned that Mr. Williams --
8 let me find -- a lot of times I'm over at the bar in other
9 courtrooms.

10 THE COURT: That's fine.

11 MR. SPENCER: I'm sorry, Judge.

12 Q. You've mentioned that Mr. Williams was for a jury
13 trial; is that correct?

14 A. Yes, sir.

15 Q. And your sister was for a bench trial?

16 A. Yes, sir.

17 Q. And they were arguing back and forth on which would be
18 better?

19 A. Yes, sir.

20 Q. And that was right in your presence; right?

21 A. At first.

22 Q. Okay. Well, let's talk about what was in your
23 presence. And why was Mr. Williams saying you should have
24 a jury trial?

25 A. I guess it was more because he didn't never seen

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1 nobody do a bench trial down South or he never
2 participated in one.

3 Q. It's fair to say -- is it fair to say that he was
4 basically saying that it's not something that's done very
5 much?

6 A. Yes, sir.

7 Q. And in fact he was -- in fact, he was saying you get
8 to have 12 people decide not just one when it's a jury
9 trial?

10 A. No, he didn't say that.

11 Q. You don't think he said that?

12 A. No.

13 Q. He just said it's never done and that's the reason we
14 don't do bench trials?

15 A. He didn't say that neither.

16 Q. Okay. Well, what did he say? What was his argument
17 for doing a jury trial?

18 A. He just said commonly is not done.

19 Q. Okay. What else?

20 A. That was it.

21 Q. Really, that was it?

22 A. Yes.

23 Q. That's a short argument.

24 A. In my presence.

25 Q. In your presence?

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1 A. Uh-huh.

2 Q. Okay. Well, what did Ms. Sanders say when she was
3 arguing?

4 A. It was more the point of the murder had just happened,
5 you know, and we couldn't get a change of venue.

6 THE COURT: The murder, the Sonic murder?

7 THE APPLICANT: Yes, sir.

8 THE COURT: Not the murder you --

9 THE APPLICANT: Not the one I was invol -- or
10 implicated in, but the Sonic murder.

11 BY MR. SPENCER:

12 Q. So she was concerned about pretrial publicity; right?

13 A. What the jurors have heard or jurors remembering when
14 I went through.

15 Q. And you remember when Mr. Williams moved for a change
16 of venue; right?

17 A. Yes.

18 Q. And when Judge Barber asked if anyone had read about
19 this case in the paper a lot of people stood up; right?

20 A. Everybody raised their hand.

21 Q. And when Judge Barber asked if that would affect their
22 ability to be fair and impartial, they all sat down;
23 right?

24 A. Yes, sir.

25 Q. Okay. And then Judge Barber denied the motion for

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1 change of venue; right?

2 A. Yes, sir.

3 Q. Okay. And your sister was concerned about the
4 publicity; right?

5 A. I guess. We, we didn't have no discussions after
6 that. If it was -- it was decided -- in other words, when
7 it was decided I wasn't in the discussion.

8 Q. Okay. Well, what did your sister tell Mr. Williams?

9 A. The only time we ever discussed it was when we was in
10 chambers before we came out to make the initial ruling as
11 far as picking the jurors.

12 MS. SHURLING: Your Honor, I can't hear. Your Honor,
13 Mr. Spencer's standing --

14 THE COURT: Stand over there a little bit.

15 MS. SHURLING: Thank you.

16 BY MR. SPENCER:

17 Q. If you could just speak up that would help everyone.
18 Okay? So this -- what you're telling me is this
19 conversation takes place back in chambers?

20 A. Yes, sir.

21 Q. Okay. And tell me what was said.

22 A. He was just saying that he would rather do a jury
23 trial because a bench trial isn't common, you know. And
24 she was saying that she was leaning towards a bench
25 trial. So then we came out.

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1 Q. And why did she say she was leaning towards a bench
2 trial?

3 A. We never finished because they called us to come out.
4 And that's when the judge started asking questions of the
5 jury, telling the jury raising their hands. And then they
6 said they could rule impartially, you know. And then they
7 started selecting the jury. And right before the jury was
8 sworn in, they made a motion to release the jury because
9 we was going to have a bench trial.

10 The only conversation that I was involved in as far as
11 a bench trial or jury trial was in chambers prior to the
12 judge asking the questions about who heard the case, other
13 than that.

14 Q. Okay. Well, there was one more conversation though.
15 There was a conversation between you and the judge; right?

16 A. Yes, sir.

17 Q. Okay. And Judge Barber asked you if you wanted to go
18 forward with a bench trial; right?

19 A. Yes, sir.

20 Q. And you said, yes, sir?

21 A. Yes, sir.

22 Q. And Judge Barber said you have a right to a jury
23 trial. Do you recall that?

24 A. If he said it.

25 Q. And you said you understood; right?

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1 A. Yes.

2 Q. And he mentioned, you've been through one jury trial
3 already and that, that you had observed the process and
4 made sure that you understood you had a right to a jury
5 trial; right?

6 A. Yes, sir. But it's a difference between going through
7 a process and knowing the process.

8 Q. And you said you wished to go forward with a bench
9 trial; right?

10 A. Yes, sir.

11 Q. And Judge Barber explained that he would be the judge
12 of the facts and the law with a bench trial; right?

13 A. Yes, sir.

14 Q. And then you indicated you understood?

15 A. Yes, sir.

16 Q. And you understood that the judge, that normally the
17 jury decides the facts of the case; right?

18 A. Yes, sir.

19 Q. And do you recall Judge Barber asking Mr. Williams and
20 Ms. Sanders if they were satisfied with the inquiry Judge
21 Barber made of you about whether to go with a bench trial
22 or a jury trial?

23 A. No, I don't remember that.

24 MR. SPENCER: Your Honor, I'd just point out pages

25 84 --

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1 THE COURT: Eighty-four lines 22 through 25, and 85
2 line one; is that correct?

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

4 Q. Okay. At what point did you ask Judge Barber, you
5 know, I want to know something more about this?

6 A. I didn't.

7 Q. At what point did you tell Judge Barber, I'm not sure
8 what all of this means?

9 A. I didn't.

10 Q. At what point --

11 A. My lawyer -- it was my understanding that my lawyers
12 were supposed to, you know, advise me of any and
13 everything that I needed to know. You know, I'm not a
14 professional. I'm not a lawyer. I didn't -- I don't know
15 nothing about the law system.

16 Q. So you were following their advice?

17 A. That's all I could do. They're the professionals.

18 Q. And as a matter of fact, you were aware there wasn't
19 total agreement on which was better; am I right?

20 A. Yes, sir.

21 Q. I mean, you knew that there was a dispute between your
22 sister and Mr. Williams as to which was a better choice?

23 A. I knew in the beginning it was, but in the end when
24 the decision was made that it would be a bench trial I
25 thought they were both in agreement.

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1 Q. And who is doing the time in prison right now?

2 A. I am.

3 Q. And so this case is more important to you than anyone
4 else; right?

5 A. Yes, sir.

6 Q. And you didn't tell Judge Barber, I'm not sure what's
7 going on. I'm not sure, you know, if I want a bench trial
8 or not.

9 A. Well, I didn't understand the particulars of, you
10 know, the 12 to one ratio or none of that, you know. The
11 basic thing was always presented to me was the bench trial
12 would be the judge or the jury trial would be 12. There's
13 no in depth conversations, you know, explaining the
14 difference between the two.

15 Q. And do you recall at the first trial Judge Clary
16 instructing the jury after -- in other words, the trial
17 finished, there was the closing arguments; right?

18 A. Yes, sir.

19 Q. And then the judge instructed the jury on the law;
20 right?

21 A. (Nods head.)

22 Q. And do you recall the judge telling the jury several
23 times that their verdict had to be a unanimous decision?

24 A. Yes, sir.

25 Q. And do you recall that from that first trial; right?

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1 A. Yes, sir.

2 Q. So you knew, you knew that the jury had to reach a
3 unanimous verdict in order to convict you?

4 A. (No response.)

5 Q. Is that correct?

6 A. At the time I didn't understand what that means.

7 Q. You didn't know what unanimous means?

8 A. No.

9 Q. So you didn't know that all 12 jurors --

10 A. No, I didn't understand that.

11 Q. -- had to convict? That's your testimony is you
12 didn't know what a unanimous verdict means?

13 A. Not at the time.

14 Q. And as a matter of fact, you were convicted on all
15 three counts at the first trial; right?

16 A. Yes, sir.

17 Q. At the second trial -- but at the first trial
18 Mr. Benning was found not guilty on two counts; right?

19 A. Yes, sir.

20 Q. And so you got to see the benefits of a jury trial;
21 isn't that true? At least for Mr. Benning; isn't that
22 true?

23 A. Well, I can't really say that because in the beginning
24 I was, I guess I was originally arrested because
25 Mr. Benning's testimony, so -- or his statement that he

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1 made.

2 So, so, so, if I saw anything from the trial it was
3 that if you cooperated that they would be lenient on me,
4 you know, they wouldn't pursue you as much as they would
5 pursue anybody else. That's what I got from it.

6 Q. Okay. And Mr. Benning actually testified at your
7 second trial; right?

8 A. Yes, sir.

9 Q. And he testified, basically his testimony was, was
10 that you and Mr. Buckmon had talked about committing a
11 robbery and he actually was trying to talk you out of it;
12 right?

13 A. I, I don't remember him saying that.

14 Q. That was his testimony.

15 A. It might have been, but I don't remember him saying
16 that.

17 Q. Okay. And do you recall that he testified that he
18 followed both you and Mr. Buckmon across the street over
19 to the Chinese restaurant?

20 A. I don't recall everything that he said in that second
21 trial.

22 Q. And that he said that, he said that Mr. Buckmon had
23 said he feels powerful after he had heard a gunshot go
24 off. Do you recall that testimony?

25 A. (Shakes head.) When he got up to testify --

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1 MS. SHURLING: Your Honor, I have to object. That's a
2 misrepresentation concerning the testimony.

3 THE COURT: Thank you. I'll have to look at the
4 record myself.

5 BY MR. SPENCER:

6 Q. And do you recall his testimony that the next day you
7 told him that you had shot the victim?

8 A. I don't recall him saying any of that because when he
9 got up to testify I really wasn't paying attention being
10 that he had already told one lie, you know. So anything
11 that he could get on the stand and say wouldn't be no
12 different.

13 Q. Well, you're on trial for murder and you're telling
14 the judge here today that you weren't paying attention?

15 A. Not to him. He done lied on me one time. That was
16 the reason I was arrested.

17 Q. Beg the Court's indulgence.

18 Another thing about your jury trial. Do you remember
19 when they polled the jury?

20 A. Pull it?

21 Q. When they asked each juror if that was their verdict?

22 A. No.

23 Q. You don't remember them polling the jury?

24 A. No.

25 Q. And, Your Honor, that was on page 615 where they

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1 polled the jury. Actually it was polling by having
2 everyone raise their hands.

3 THE COURT: Thank you. Anything else, ma'am?

4 MS. SHURLING: Briefly.

5 REDIRECT EXAMINATION

6 BY MS. SHURLING:

7 Q. At your bench trial, Mr. Benning testified against
8 you; correct?

9 A. Yes, ma'am.

10 Q. And isn't it a fact that Mr. Benning testified that it
11 was Mr. Buckmon who was discussing hitting a lick,
12 committing a robbery?

13 A. Like I said before, it all started through him. And
14 being that I had no part in it, when it was time to put
15 him on the stand, anything that he said really wasn't my
16 focus --

17 Q. I understand.

18 A. -- you know, so...

19 Q. Please focus on my question.

20 A. He could have said it. He could have said it. If
21 it's in the transcript, he did say it. But I'm saying as
22 far as I'm concerned, you know, when it was going on --

23 Q. At your first -- I'll rephrase.

24 Mr. Benning admitted at some juncture that he never
25 heard you say you were in agreement with the plan to

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1 commit a robbery, that he never heard you say you were
2 down with it or anything; didn't he? At the second
3 trial. You just don't remember what he said, period?

4 A. I don't remember.

5 Q. Okay. How far did you go in school?

6 A. About 11th grade.

7 Q. About the 11th grade?

8 A. I was in school when this happened.

9 Q. Okay. And had you had any, I don't know, civics
10 classes where you studied the jury system or anything at
11 that point in school?

12 A. I knew what it was but not as far as how it goes or
13 what's going on in it.

14 Q. Okay. And the State asked you about when the judge
15 questioned you about your right to a jury trial, when the
16 judge questioned you about that he didn't tell you
17 anything about what would happen if the jury couldn't
18 reach a unanimous verdict; did he?

19 A. No.

20 Q. And he didn't explain to you what the requirement of a
21 unanimous verdict meant and how it would apply to your
22 case; did he?

23 A. No, ma'am.

24 Q. And didn't really discuss any other differences
25 between a jury trial or a bench trial with you during that

1 discussion; did he?

2 A. No.

3 MS. SHURLING: Thank you. No further questions.

4 THE COURT: All right. You may step down. Next
5 witness.

6 MS. SHURLING: No further witnesses from the Applicant,
7 Your Honor.

8 THE COURT: By the Respondent? I'm going to just take
9 proposed orders. You can include any motions and all of
10 that. Trying to get all the testimony in today.

11 MS. SHURLING: Thank you, Your Honor.

12 MR. GOURLEY: Beg the Court's indulgence. We're just
13 trying to decide which witness to call.

14 THE COURT: Well whichever one to call, make sure
15 they're in response to what you've alleged, ineffective
16 assistance of counsel.

17 MR. SPENCER: Certainly. And that was what I was
18 trying to think through.

19 Your Honor, I think we can, we would move to have
20 Mr. Williams released.

21 THE COURT: All right. Then you want to call
22 Mr. Gibbons?

23 MR. SPENCER: We can.

24 MR. GOURLEY: Yes, sir.

25 MR. SPENCER: Yes, sir. We're going to call

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1 Mr. Gibbons.

2 THE COURT: Thank you, Mr. Williams. Mr. Gibbons,
3 come around, please.

4 MS. SHURLING: Your Honor, before I forget. I had
5 earlier referenced the transcript of the hearing before
6 Judge Baxley on the reconstruction. I had handed Your
7 Honor --

8 THE COURT: I have a copy.

9 MS. SHURLING: -- a copy. If I may trade it out, I'm
10 going to give Your Honor this one to be made part of the
11 package in this case. And I'll take back the loose one so
12 I can make another copy.

13 THE COURT: Thank you.

14 De GRANT GIBBONS, having been duly sworn, was examined
15 and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. GOURLEY:

18 Q. Mr. Gibbons, you were the solicitor in this case;
19 correct?

20 A. I was.

21 Q. Can you just recall very briefly some of the factual
22 evidence against Mr. Sanders in this case?

23 A. It changed between the trial when Mr. Benning had
24 already gone through trial. So he was an additional
25 witness in the second case. He testified of statements

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1 made by Mr. Buckmon, his whereabouts near the crime scene,
2 what was going on before, what was going on after.

3 And that was different. During the first trial he had
4 already made a statement, but there were Brewton problems
5 with using it during the first trial so we didn't really
6 bring it up during the first trial. So that was
7 additional testimony.

8 There was a young lady who had given statements to her
9 boyfriend as well as, I think, to law enforcement about
10 driving the three of them around different places in
11 Barnwell, talking about, you know, one of them said cheese
12 one of them said a lick.

13 I'm trying to think. There were two, two jailhouse
14 informants. I think one of them was Jones and one of them
15 was Mr. Vigier. They testified during the first trial and
16 then before the second trial, Mr. Vigier had disappeared
17 so his testimony was brought in through transcript.

18 Q. And y'all attempted to get Mr. Vigier to come testify
19 in the second trial; correct?

20 A. We did. I had drafted a letter to Mr. Williams before
21 trial, a couple weeks before trial saying we were having
22 trouble finding him and that I had run into him at a
23 hearing with a different attorney at some magistrate's
24 court somewhere. I didn't know what kind of hearing it
25 was. I put him on notice that I was going to need to get

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1 his address. That attorney provided me an address.

2 We had our investigator stake out that address for a
3 couple of days and he never showed up. No one knew him.
4 Nobody knew where he was. He had indicated to us that he
5 was a French National and so I just assumed he went back
6 to France, but we had never seen him again.

7 Q. Do you have a copy of that letter?

8 A. I do in my materials. Do you want me to grab it?

9 THE COURT: He's going to hand you the box.

10 THE WITNESS: You'll never find it. Let me keep
11 looking for that.

12 BY MR. GOURLEY:.

13 Q. And so Mr. Vigier was not available to testify at the
14 second trial; is that correct?

15 A. That's correct. And I think we had a hearing in front
16 of the judge and laid out the steps we had made to try and
17 find that. It was a fax cover sheet and a letter, October
18 26.

19 MR. GOURLEY: Your Honor, if I may move this into
20 evidence.

21 MS. SHURLING: I haven't seen it.

22 MR. GOURLEY: Sorry. (Document shown to Ms. Shurling.)

23 THE WITNESS: I had mentioned the name of a witness as
24 Jones. It was actually Staley. My mistake.

25 THE COURT: Any objection, ma'am?

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1 MS. SHURLING: No objection.

2 THE COURT: Thank you.

3 (State's Exhibit No. 1, letter dated 10-26-2000,
4 marked and received into evidence.)

5 BY MR. GOURLEY:

6 Q. Mr. Gibbons, was there any plea deal or any kind of
7 offer given to Mr. Vigier prior to his testimony in the
8 first trial?

9 A. Mr. Vigier was being prosecuted by Rob Madsen, another
10 attorney in our office. And he also had armed robbery and
11 attempted murder as well as ABWIK charges, back then.
12 And I never made him any offers. I did tell his attorney
13 that I would consider anything he did along the lines of
14 assistance at the appropriate time but I never made him
15 any promise.

16 Q. And Mr. Vigier testified in that other trial against
17 his co-defendants in his armed robbery and ABWIK charges;
18 correct?

19 A. He did. He testified against the shooter in that case
20 and I believe one other co-defendant.

21 Q. And so it's possible to say that any consideration
22 given to him for his sentence also was a result of his
23 testifying in a different trial other than this one;
24 correct?

25 A. Yeah. I never actually made the final deal with him.

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1 The other attorney did. I couldn't speak to that.

2 Q. And have you ever participated in a bench trial?

3 A. I have.

4 Q. Other than this one, of course?

5 A. One other one. It was a murder, armed robbery trial.

6 Q. And what was the result of that?

7 A. Judge Williams deemed that he had withdrawn from the
8 conspiracy and he found him not guilty.

9 MR. GOURLEY: No further questions, Your Honor.

10 THE COURT: Yes, ma'am?

11 CROSS-EXAMINATION

12 BY MS. SHURLING:

13 Q. Following Mr. Tunzy Sanders' conviction of murder, you
14 were aware, were you not, that his case was on direct
15 appeal?

16 A. I didn't know about it until I heard it been reversed
17 on the first case.

18 Q. Well, when someone's convicted of murder don't they
19 generally appeal?

20 A. Yes, until I -- I didn't even think about it. The
21 next time I thought about it was when I heard it had been
22 reversed.

23 Q. You had it within your power had you chosen to do so
24 to ask your fellow prosecutor to hold off on doing
25 anything with Mr. Vigier's charges until you saw whether

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1 or not you were going to need him for a retrial; didn't
2 you?

3 A. Well, I guess I could have done that. I had never
4 done that before because things are just too busy, too
5 many cases and we had judges just pushing us to get things
6 moved.

7 Q. Have you ever gotten a material witness warrant
8 against someone?

9 A. I have.

10 Q. Why didn't you do it in this case?

11 A. I would have if I'd have been able to find him at that
12 time.

13 Q. Well, let's look at that exhibit that you just
14 identified? Is it right --

15 (Exhibit retrieved from Mr. Gibbons' file.)

16 THE WITNESS: There it is. I'm sorry. I put things
17 away or I lose them.

18 BY MS. SHURLING:

19 Q. That's okay. Now this letter is dated October 26,
20 2000?

21 A. Right.

22 Q. Okay. And isn't it true that it indicates that you
23 contacted his probation officer and he told us that he,
24 he, Vigier, is not scheduled to come in for an appointment
25 until the middle of November?

GRANT GIBBONS - CROSS

1 A. Right.

2 Q. November, that would be November 2000?

3 A. Right.

4 Q. And this case was scheduled -- ended up being tried in
5 early 2001; correct?

6 A. Right. Uh-huh.

7 Q. So why would you not have had the opportunity the use
8 the occasion of his next probation appointment to serve
9 him with a material witness subpoena?

10 A. I believe that he was bench warranted before his
11 appointment even came around. I think, I think that the
12 probation people bench warranted him, if I'm correct.

13 Q. Why would they bench warrant him before he missed an
14 appointment?

15 A. I think that they had lost track of him, but of course
16 that's just my memory.

17 Q. Okay. Well, did you ever go back and meet with that
18 probation officer again?

19 A. My investigator did.

20 Q. Pardon?

21 A. My investigator went and checked probation, checked
22 with all the law enforcement agencies and looked for the
23 address that I had been given, but I personally didn't do
24 it.

25 Q. Okay. But you didn't seek a material witness warrant

1 against him?

2 A. I didn't.

3 Q. And you have done that in other cases?

4 A. I believe I did that on the Temetrius Williams,
5 witness in this case. Okay.

6 Q. So there was at least that avenue that you could have
7 used to try to secure his attendance that you didn't
8 pursue in this case?

9 A. That's right.

10 Q. Okay. Again, as we've already said, you could have
11 asked that your office hold off on making final, taking
12 final action on pending charges against Mr. Vigier until
13 after you saw whether or not you were going to need him as
14 a witness in a retrial?

15 A. I could have.

16 Q. And you didn't?

17 A. No, I didn't. I had a transcript and I had him on
18 probation. I thought he'd be there and I didn't think
19 he'd be changing it too much if I had the sworn testimony
20 from the first trial.

21 MS. SHURLING: Thank you. No further questions.

22 THE COURT: Anything on redirect?

23 MR. GOURLEY: Nothing further, Your Honor.

24 THE COURT: May he be released --

25 MR. GOURLEY: Yes, Your Honor.

BRENDA K SANDERS - CROSS

1 Prior to the first trial, though, there was no deal
2 or, you know, that was the testimony; do you recall that?

3 THE COURT: That's what she's saying. She's saying
4 that he didn't have a deal to start off with. He had a
5 deal before the second trial. She wanted him there to
6 cross-examine him on that. Is that correct?

7 THE WITNESS: That's correct.

8 THE COURT: She's answered that.

9 BY MR. SPENCER:

10 Q. And Mr. Vigier actually testified, I believe, on
11 cross-examination that he was hoping the prosecution would
12 give some consideration for his testimony at trial. Do
13 you recall that?

14 A. I believe so. And he had absconded or something. I
15 also remember about him being some French National or
16 something. And the solicitor indicated they could not
17 even bring him back for a trial and that they could not
18 locate him which I thought was unreasonable given their
19 resources regarding this person, and then to rely so much
20 on his testimony and then say they couldn't locate him at
21 the time of my brother's trial.

22 Q. And he was out on bench warrant. He actually had a
23 bench warrant out for him. Do you recall that?

24 A. I don't particularly recall, but that may have been
25 the case.

BRENDA K SANDERS - CROSS

1 Q. And if he was back in France, he would be pretty hard
2 to bring back here; wouldn't he?

3 A. Well then, that's the danger of relying on a jailhouse
4 informant's testimony when you have no other material
5 connecting evidence in the case. You know, that person
6 may be looked upon as having -- and that wasn't available
7 to cross-examine him on on the first trial.

8 He absconded. And maybe that's a reference that this
9 person was unreliable in the first place and, like,
10 Mr. Benning and Mr. Staley, he would also been a normal
11 regular jailhouse informant.

12 And I believe that their testimony, they should be
13 scrutinized when they come to testify in someone's case,
14 you know. They had a history of getting deals and they
15 knew what they were doing. And so it was easy to sit and
16 testify against someone and ask for favorable treatment
17 and then not only ask for it but get it and then say what
18 someone wanted them to say and then get immediate releases
19 and abscond from, you know -- it's just -- to me
20 references their unreliability in the first place.

21 Q. And that's your viewpoint based on your experience as
22 an attorney and a judge; right?

23 A. Yes.

24 Q. And so you thought it was a good idea tactically to
25 have another judge look at it and be the fact finder. Is

BRENDA K SANDERS - REDIRECT

1 that correct?

2 A. I thought a judge would say -- look at the
3 unreliability of it and say, no way. This is too
4 important. Too much importance in this case. These are
5 capital offenses. Why would I rest my decision on two
6 jailhouse informants that were in those circumstances and
7 nothing else connecting. Just like any other defendants,
8 with the other defendants. Why? I didn't know. Naive
9 about that and that's what I will say now.

10 Q. And that's what you felt was best at the time? Just
11 ask you to answer yes or no.

12 A. Yes.

13 THE COURT: Thank you.

14 MR. SPENCER: Thank you. Anything on redirect, ma'am?

15 MS. SHURLING: Yes.

16 REDIRECT EXAMINATION

17 BY MS. SHURLING:

18 Q. Ms. Sanders, during during the in camera testimony --
19 well, let me back up.

20 You said a moment ago you don't recall Mr. Vigier's
21 testimony at the first trial. Is that what you said?

22 A. I don't recall, you know, what -- I can't visualize it
23 is what I'm saying right now.

24 Q. Okay.

25 A. To say it didn't happen, I'm not saying that.

BRENDA K SANDERS - REDIRECT

1 Q. Your Honor, may I approach? I am referencing page 424
2 of the first trial transcript specifically cross-
3 examination by Mr. Williams in camera. Can you take a
4 look if you will to lines four through seven? In fact,
5 publish that for us, please.

6 A. It says: All right. And is it your understanding
7 that my -- that might have helped you get a better deal in
8 your case if you did that? Answer: Hopefully, yes.

9 Question --

10 Q. Okay. Now, was there anything in that statement, in
11 that question or answer that made clear whether or not
12 that understanding was coming only from defense counsel or
13 whether there was also information coming from the
14 prosecution?

15 A. I thought that Mr. Vigier -- what I remember, I have
16 very limited memory about that. But I do, I got the
17 impression that he had, was motivated to testify for some
18 reason other than what was at hand, that he was going to
19 get something. I understood that he had gotten some
20 favorable treatment from some other cases where he had
21 testified.

22 Q. It's late. I'm tired.

23 A. Obviously. I'm sorry.

24 Q. I'm not as articulate as I want to be. Let me
25 rephrase.

BRENDA K SANDERS - REDIRECT

1 Can you determine from that question and answer
2 whether Mr. Vigier's hope that cooperating would help him
3 was coming solely from his communication with his lawyer
4 or whether or not it also involved communication with the
5 solicitor or information from the solicitor?

6 A. To get up and testify under oath like that I believe
7 he had some indication that he was going to get some
8 favorable treatment from the solicitor.

9 Q. But is there any direct indication --

10 A. No.

11 Q. -- in this question?

12 A. No, ma'am.

13 Q. And to your recollection -- well, the record will have
14 to speak for itself, Your Honor, with regard to the fact
15 that the more direct question was not posited during the
16 hearing.

17 THE COURT: Well --

18 BY MS. SHURLING:

19 Q. Now do you recall during the bench trial, and I'm
20 referring to page 170 of the record at lines 15 through
21 20, when the State stated for the record that when they
22 had been approached by Mr. Vigier's attorney, Richard
23 Breibart. And he asked us if he (verbatim) would give him
24 consideration and we told his attorney, you know, we
25 couldn't give him any deal right now but we would

TUNZY SANDERS - DIRECT

1 certainly take it into account when it came time to
2 sentence -- I mean, when it came time for him to go to
3 Court. Do you recall that statement?

4 A. Yes.

5 Q. Okay. If you had been the lawyer cross-examining
6 Mr. Vigier at the original Messiah hearing, would you have
7 questioned him concerning what if any information had been
8 relayed to him by his attorneys concerning assurances from
9 the prosecution?

10 A. Absolutely.

11 MR. GOURLEY: Thank you.

12 THE COURT: You may step down. All right. Let's take
13 a quick bathroom break, about 10 minutes. And let me
14 see -- about 10 minutes. Let me see y'all in chambers to
15 see where we are.

16 (Break taken from 3:17 p.m. until 3:26 p.m.)

17 THE COURT: You may call your next witness.

18 MS. SHURLING: Your Honor, at this time I would call
19 the Applicant, Tunzy Sanders.

20 THE COURT: Come around Mr. Sanders, please.

21 TUNZY SANDERS, having been duly sworn, was examined
22 and testified as follows:

23 THE COURT: Please have a seat. Give us your full
24 name.

25 THE WITNESS: Tunzy Sanders.

TUNZY SANDERS - DIRECT

DIRECT EXAMINATION

BY MS. SHURLING:

Q. Mr. Sanders --

THE COURT: Ms. Shurling, I was informed by my law clerk a while ago while you were examining the witness or listening to a witness, one of your lights came on.

MS. SHURLING: It did? I'm sorry. I wasn't doing it on purpose. I promise. It's no signal.

Your Honor, just to make a good record on the matter that was raised earlier in terms of a conflict, I'd like to briefly question Mr. Sanders.

Q. Mr. Sanders, when I was hired to represent you by your sister, later when it became apparent that we were going to be doing a new PCR instead of a PCR appeal, you and I had discussions about the fact that your sister had hired me; didn't we?

A. Yes, ma'am.

Q. And I assured you that the fact that she was the one paying my fee was not going to in any way affect my tenacity with regard to raising claims of ineffective assistance of counsel against her; is that true?

A. Yes, ma'am.

Q. But we discussed that and I explained to you that she had paid my fee and you agreed to have me be your PCR lawyer anyway; right?

TUNZY SANDERS - DIRECT

1 A. Yes, ma'am.

2 Q. And you understand the argument the State's making
3 that since she paid my fee, arguably there might have been
4 a conflict if I felt some kind of loyalty to her instead
5 of you. Do you understand that argument?

6 A. Yes, ma'am.

7 Q. Have you at any time during my representation had the
8 feeling that I had divided loyalty between you and your
9 sister?

10 A. No, ma'am.

11 Q. Are you comfortable going forward with me as your PCR
12 counsel even though I was paid by your sister?

13 A. Yes, ma'am.

14 Q. Thank you.

15 There's only one thing I want to ask you about. Your
16 first trial was a jury trial; correct?

17 A. Yes, ma'am.

18 Q. And in fact at the very end of your first trial when
19 the judge is instructing the jury, he does tell the jury
20 at your first trial that their verdict has to be
21 unanimous, that they have to all 12 agree to either
22 convict or acquit. Do you remember that?

23 A. Yes, ma'am.

24 Q. Okay. But prior to making the decision about whether
25 or not to have a bench trial or a jury trial at the second

TUNZY SANDERS - DIRECT

1 one, did anyone explain to you what would happen if the
2 jury didn't all 12 agree?

3 A. No, ma'am.

4 Q. Did anybody discuss with you the fact that you could
5 get a mistrial if even one person held out and didn't want
6 to vote to convict?

7 A. No.

8 Q. If you had understood that, would you have wanted to
9 forward with your jury trial instead of the bench trial?

10 A. Probably. Yes, sir -- yes, ma'am.

11 Q. Okay. And did -- I don't want to beat a dead horse
12 but you've heard me today going over some of the factors
13 that might would influence a decision to have a jury trial
14 versus a bench trial; haven't you?

15 A. Yes, ma'am.

16 Q. And have you and I discussed each of those factors
17 individually with each other prior to today?

18 A. Yes.

19 Q. If you had understood all of the potential advantages
20 of a jury trial --

21 MR. SPENCER: Your Honor, I would --

22 MS. SHURLING: -- versus --

23 MR. SPENCER: -- ask for direct examination questions
24 now. I really do want to hear Mr. Sanders' testimony.

25 THE COURT: Please ask direct questions.

TUNZY SANDERS - DIRECT

1 BY MS. SHURLING:

2 Q. Mr. Sanders, did Mr. Williams --

3 THE COURT: What did Mr. Williams advise you
4 concerning a jury trial; how about that?

5 BY MS. SHURLING:

6 Q. What did Mr. Williams advise you concerning going
7 forward with a jury trial or doing a bench trial?

8 A. Only thing I was advised was, I had a right to a jury
9 trial. Not anything per se of what would be the outcome
10 if, one against the other or anything in either trial.

11 Q. Okay. Did either Mr. Williams or your sister discuss
12 with you the potential advantages --

13 MR. SPENCER: Your Honor, it's leading.

14 MS. SHURLING: -- of a jury trial?

15 THE COURT: Sustained. What did they discuss with
16 you.

17 BY MS. SHURLING:

18 Q. What did they discuss with you concerning what would
19 happen at a jury trial versus a bench trial?

20 A. It was more of a, they was discussing that they -- one
21 wanted a jury trial. One wanted a bench trial. It was, I
22 guess, to see who was going to win. And at the end it was
23 decided that it would be a bench trial.

24 Nothing was said as far as 12 jurors or the difference
25 between either or other than it would be the judge or a

TUNZY SANDERS - DIRECT

1 jury.

2 Q. Who made the decision whether to proceed with a jury
3 trial or to have a bench trial?

4 A. My sister won. Brenda.

5 Q. Your sister?

6 A. She ultimately made the -- but it was no actual, no
7 understanding on my part, either or, one was greater than
8 the other or, you know.

9 Q. If you had understood everything about --

10 MR. SPENCER: Your Honor.

11 MS. SHURLING: Your Honor, this is --

12 THE COURT: Hold on. What's your objection?

13 MR. SPENCER: That's leading. I'm really trying to
14 keep a tab on the leading right now.

15 THE COURT: But she hasn't asked the question.

16 MR. SPENCER: Okay. I'm sorry.

17 THE COURT: Go ahead. If you had understood; finish
18 the question.

19 BY MS. SHURLING:

20 Q. If you had understood everything back in 2001 that you
21 now know about a jury --

22 MR. SPENCER: I think that assumes facts not in
23 evidence.

24 THE COURT: Overruled.

25 BY MS. SHURLING:

TUNZY SANDERS - DIRECT

1 Q. If you had understood everything in 2001 about the
2 differences between a jury trial and a bench trial, would
3 you have waived your right to a jury trial for a bench
4 trial?

5 A. No, ma'am.

6 Q. Would you have exercised your right to trial by jury
7 and gone on with -- you had already drawn a jury in your
8 case; hadn't you?

9 A. Yes, ma'am.

10 Q. Would you have gone on with a jury trial if you
11 understood then what you understand now?

12 A. Yes, ma'am.

13 Q. Is there any question in your mind -- I'll rephrase
14 that. The various factors that have been discussed here
15 today with regard to a jury trial or a bench trial, had
16 you ever discussed those with anybody other than me at the
17 time -- at the time of your trial had you discussed those
18 factors with anyone?

19 A. No, ma'am.

20 Q. And you've subsequently discussed those factors only
21 with me; is that correct?

22 A. Yes, ma'am.

23 Q. Had you understood those factors at the time of your
24 original trial, would you have waived your right to a jury
25 trial?

TUNZY SANDERS - CROSS

1 A. No.

2 MS. SHURLING: Thank you. No further questions.

3 THE COURT: All right. Answer any questions the
4 Attorney General may have.

5 CROSS-EXAMINATION

6 BY MR. SPENCER:

7 Q. Okay. Mr. Sanders, you mentioned that Mr. Williams --
8 let me find -- a lot of times I'm over at the bar in other
9 courtrooms.

10 THE COURT: That's fine.

11 MR. SPENCER: I'm sorry, Judge.

12 Q. You've mentioned that Mr. Williams was for a jury
13 trial; is that correct?

14 A. Yes, sir.

15 Q. And your sister was for a bench trial?

16 A. Yes, sir.

17 Q. And they were arguing back and forth on which would be
18 better?

19 A. Yes, sir.

20 Q. And that was right in your presence; right?

21 A. At first.

22 Q. Okay. Well, let's talk about what was in your
23 presence. And why was Mr. Williams saying you should have
24 a jury trial?

25 A. I guess it was more because he didn't never seen

TUNZY SANDERS - CROSS

1 nobody do a bench trial down South or he never
2 participated in one.

3 Q. It's fair to say -- is it fair to say that he was
4 basically saying that it's not something that's done very
5 much?

6 A. Yes, sir.

7 Q. And in fact he was -- in fact, he was saying you get
8 to have 12 people decide not just one when it's a jury
9 trial?

10 A. No, he didn't say that.

11 Q. You don't think he said that?

12 A. No.

13 Q. He just said it's never done and that's the reason we
14 don't do bench trials?

15 A. He didn't say that neither.

16 Q. Okay. Well, what did he say? What was his argument
17 for doing a jury trial?

18 A. He just said commonly is not done.

19 Q. Okay. What else?

20 A. That was it.

21 Q. Really, that was it?

22 A. Yes.

23 Q. That's a short argument.

24 A. In my presence.

25 Q. In your presence?

TUNZY SANDERS - CROSS

1 A. Uh-huh.

2 Q. Okay. Well, what did Ms. Sanders say when she was
3 arguing?

4 A. It was more the point of the murder had just happened,
5 you know, and we couldn't get a change of venue.

6 THE COURT: The murder, the Sonic murder?

7 THE APPLICANT: Yes, sir.

8 THE COURT: Not the murder you --

9 THE APPLICANT: Not the one I was invol -- or
10 implicated in, but the Sonic murder.

11 BY MR. SPENCER:

12 Q. So she was concerned about pretrial publicity; right?

13 A. What the jurors have heard or jurors remembering when
14 I went through.

15 Q. And you remember when Mr. Williams moved for a change
16 of venue; right?

17 A. Yes.

18 Q. And when Judge Barber asked if anyone had read about
19 this case in the paper a lot of people stood up; right?

20 A. Everybody raised their hand.

21 Q. And when Judge Barber asked if that would affect their
22 ability to be fair and impartial, they all sat down;
23 right?

24 A. Yes, sir.

25 Q. Okay. And then Judge Barber denied the motion for

TUNZY SANDERS - CROSS

1 change of venue; right?

2 A. Yes, sir.

3 Q. Okay. And your sister was concerned about the
4 publicity; right?

5 A. I guess. We, we didn't have no discussions after
6 that. If it was -- it was decided -- in other words, when
7 it was decided I wasn't in the discussion.

8 Q. Okay. Well, what did your sister tell Mr. Williams?

9 A. The only time we ever discussed it was when we was in
10 chambers before we came out to make the initial ruling as
11 far as picking the jurors.

12 MS. SHURLING: Your Honor, I can't hear. Your Honor,
13 Mr. Spencer's standing --

14 THE COURT: Stand over there a little bit.

15 MS. SHURLING: Thank you.

16 BY MR. SPENCER:

17 Q. If you could just speak up that would help everyone.
18 Okay? So this -- what you're telling me is this
19 conversation takes place back in chambers?

20 A. Yes, sir.

21 Q. Okay. And tell me what was said.

22 A. He was just saying that he would rather do a jury
23 trial because a bench trial isn't common, you know. And
24 she was saying that she was leaning towards a bench
25 trial. So then we came out.

1 THE COURT: -- from the subpoena?

2 THE WITNESS: Thank you, Judge.

3 THE COURT: Any additional witnesses by the State?

4 MR. GOURLEY: No further witnesses from the State.

5 THE COURT: Anything in reply?

6 MS. SHURLING: No, sir, Your Honor.

7 THE COURT: How do you want to handle making any
8 closing argument? Do you want to provide proposed
9 orders? What do you want?

10 MR. SPENCER: Your Honor, I think it would be
11 beneficial, I think closing arguments while this is all
12 fresh in everybody's minds, I've -- I think credibility
13 has a lot to do with this case.

14 MS. SHURLING: Your Honor, I have an alternate
15 suggestion.

16 THE COURT: Me, too. What's yours?

17 MS. SHURLING: Certainly if Your Honor sees fit to
18 grant relief in this case, the odds are fairly
19 overwhelming that the State will file an appeal from that
20 ruling. And if in the unfortunate event you deny relief,
21 I can assure you that my client will want to appeal.

22 So at some juncture we're going to need the PCR
23 transcript anyway. I think given the need for details,
24 very thoughtful orders in this most-serious case, it would
25 be advisable to order the PCR hearing transcript. And I

1 would ask that I be allowed time to do so and that we have
2 a certain length of time after we get the transcript of
3 the PCR proceeding to provide Your Honor with proposed
4 orders.

5 My habit and custom has been in recent cases that I
6 will do a proposed order granting relief, of course
7 anticipating the State will do one, a proposed order
8 denying relief. And then I ask that whichever side loses,
9 whichever order you do not adopt, that that side be
10 allowed to submit their proposed order.

11 And what I generally do is just do a new cover sheet
12 where instead of order it says memorandum in the form of a
13 proposed order, and file that with the clerk of court's
14 office so that the losing side's arguments as they are
15 presented in the proposed order are filed with the clerk
16 of court in the form of a memorandum.

17 THE COURT: Well, I don't know that I need arguments.
18 I mean, I've listened to all of it. It's kind of a long
19 case. And it is a matter of credibility and failing to
20 ask for a jury trial, opting out for a bench trial. Is
21 that ineffective assistance of counsel? I don't know.

22 Here's what I'll to. If you want closing arguments,
23 I'm going to be in Columbia next week and the following
24 week. Let me know by Friday if you want them. I'll set
25 you -- give you, each side, 20 minutes in Columbia next

1 week or the following week.

2 If you don't want closing arguments, I will allow
3 proposed orders within 30 days after receipt of the --
4 I'll let you get the transcript so you can have that,
5 better stuff to write with or better -- it's best to have
6 the transcript so you can make reference to it in your
7 proposed order.

8 So just let me know by Friday if you want arguments.
9 I'll hear them next week. If not, I'll just take the
10 proposed orders within 30 days after receipt of the
11 transcript.

12 MS. SHURLING: I can tell Your Honor now that my
13 position always is that a very thoughtful, detailed
14 proposed order is preferable to trying to do oral
15 arguments. So I will express my preference now for my
16 final arguments on each of the issues to be submitted in
17 the form of a proposed order as opposed to oral argument.

18 MR. SPENCER: Just -- I'm sorry, Your Honor.

19 THE COURT: Go ahead.

20 MR. SPENCER: Just my concern, my experience has been
21 with these kind of hearings we're waiting on a transcript
22 and then waiting on proposed orders and things come up
23 within, inside 30 days that really Your Honor is probably
24 not going to have these proposed orders for possibly 90
25 days or so. And in a big record that you have to go back

1 and tackle, my experience is that it's not a very
2 expedient way of handling this.

3 THE COURT: I'll be expedient with you, I promise. If
4 you want a closing argument after you get the transcript,
5 I'll give you one then.

6 MR. SPENCER: Okay.

7 THE COURT: This was an easy one to remember. It's an
8 interesting case. Not many cases where you have three
9 defendants and two of them are, one's acquitted, one's
10 reversed on appeal on a directed verdict.

11 And then you got an interesting issue dealing with
12 this statement by the jailhouse guy. But the other side
13 of that coin is the Court of Appeals found it to be okay.
14 So I'm sort of bound by that.

15 It's a lot of interesting aspects of the case. But
16 I'm going to let you get the transcript. If you want an
17 argument at that time, fine. If not, proposed arguments
18 within 30 days after the transcript.

19 MS. SHURLING: Thank you, Your Honor.

20 MR. SPENCER: Thank you, Your Honor.

21 THE COURT: You all just keep me posted on where you
22 are.

23 MR. GOURLEY: Thank you, Your Honor.

24 END OF PROCEEDINGS: 4:08 P.M.

25 * * *

1 CERTIFICATE OF REPORTER

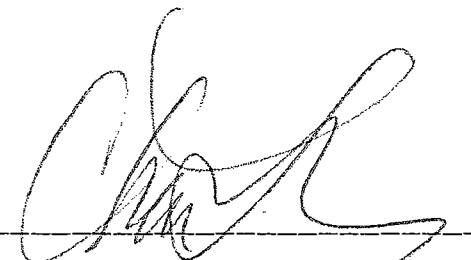
2 STATE OF SOUTH CAROLINA)

3 COUNTY OF AIKEN)
4

5 I, Cheri L. Young, Registered Professional Reporter
6 and Official Court Reporter for the State of South
7 Carolina, Second Circuit-At Large, do hereby certify that
8 the foregoing proceedings were written stenographically by
9 me using computer-aided translation; further, that the
10 foregoing is a true, accurate and complete record, to the
11 best of my skill and ability, of all the proceedings had
12 and evidence introduced in the hearing of the captioned
13 case, relative to appeal, in the Court of Common Pleas for
14 Bamberg County, on the 20th day of August, 2013.

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

17 I have hereunder set my hand this Saturday, the 19th
18 day of October, 2013.

19
20
21 

22 Cheri L. Young, RPR
23 Official Court Reporter
24
25

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Tunzy Sanders, #255493,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Case No. 2006-CP-06-0106

ORDER OF DISMISSAL

RHONDA D. McELVYEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

2014 AUG 19 PM 2:16

FILED FOR RECORD

This matter comes before the Court by way of an application for post-conviction relief filed May 11, 2006, and amended on August 19, 2013 and filed August 22, 2013. Respondent made its Return on June 13, 2007. An evidentiary hearing into the matter was convened on August 20, 2013, at the Bamberg County Courthouse. Applicant was present at the hearing and was represented Tara D. Shurling, Esquire. Respondent was represented by Senior Assistant Attorney General David Spencer and Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Applicant was indicted at the July 20, 1998 term of the Barnwell County Grand Jury for Murder (98-GS-06-180). Applicant was subsequently indicted at the January 11, 1999 term of the Barnwell County Grand Jury for Attempted Armed or Alleged Robbery (99-GS-06-078) and Criminal Conspiracy (99-GS-06-079). Applicant was represented by Daniel Williams, Esquire. On January 11, 1999, Applicant proceeded to trial and found guilty as indicted. He was sentenced by the Honorable Gary E. Clary to confinement for a period of life for Murder, twenty

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years for Attempted Armed Robbery, and five years for Criminal Conspiracy. All sentences were to be served concurrently.

A timely notice of appeal was filed and an appeal was perfected on Applicant's behalf. The South Carolina Supreme Court reversed and remanded the conviction due to Honorable Brenda Sanders (Applicants sister and a licensed Michigan Attorney) not being allowed to represent Applicant during his trial. State v. Sanders, Op. No. 25613 (filed July 3, 2000).

The case proceeded to re-trial on February 5-8, 2001. Applicant was represented by Brenda K. Sanders, Esquire and Daniel Williams Esquire.¹ Applicant was found guilty of the charges. The Honorable James R. Barber, III sentenced Applicant to confinement for a period of thirty-five years for Murder, twenty-five years for Armed Robbery, and five years for Criminal Conspiracy.

A notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed. State v. Sanders, 356 S.C. 214, 588 S.E.2d 142 (Ct. App. 2003). The Court of Appeals denied Applicant's Petition for Rehearing on February 19, 2004. Applicant filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The Petition was denied by order dated May 18, 2005. The remittitur was sent on May 19, 2005.

Applicant filed an application for post-conviction relief (PCR) on May 11, 2006 (C.A. No. 2006-CP-06-0106). In his application, Applicant asserted the following grounds for relief:

1. "Did the trial court err when it allowed the admission of Aurelein Vigier's prior testimony which violated applicant's Confrontation Clause rights because he was not afforded an opportunity to cross-examine the witness regarding 'subsequent revelations' pertaining to the State's alleged 'deal' with the witness?"
2. "Did the trial judge err in ruling appellant's cellmates were not government agents at the time applicant allegedly made incriminating statements to them?"

¹ Brenda K. Sanders is a member of the Michigan Bar and currently a summary court judge in Wayne County, Michigan. She was allowed to participate in Tunzy Sander's trial via pro hac vice.

3. "Did the trial judge err in admitting testimony of David Staley and Aurelien Vigier who were jailhouse informants who had initiated contact with the applicant and who were acting as government agents at the time the alleged statements were made by the applicant?"
4. "Did the trial court err when it denied the Appellant's Motion to Quash Maurice Benning's testimony?"
5. "Did the Appellant's appeal counsel provide ineffective assistance of counsel by failing to address all of the issues in his Appeal to the Court of Appeals and the Supreme Court despite the fact that the Appellant specifically requested that he do so and Appellant's counsel failed to address said issues despite the fact that he addressed multi issues in the co-defendants case and prevailed on those issues in the Court of Appeals?"
6. "Did the trial court commit error by convicting the Appellant despite insufficiency of the evidence?"
7. "Did the Appellant's appointed appellate counsel provide ineffective assistance of counsel by failing to address the issue of the trial court's denial of the directed verdict in Appellant's case?"
8. "Did the trial court err in its admission of the ballistics evidence where it was unclear as to the type of bullet and the fact that the ballistics expert clearly indicated that he could not be sure that it came from the same gun?"
9. "Did the trial court err when it admitted testimony of jailhouse informants who were not trustworthy, had a history of testifying against other defendants and received great consideration for their testimony against the appellant in this case as well as for their testimony against the co-defendants in their own cases? Should the appellant's conviction for murder, armed robbery, and criminal conspiracy be allowed to stand such unreliable evidence without corroboration from the physical evidence in the case?"
10. "Did the delay in revealing that Vigier and Staley had received deals from the State constitute a Brady violation as such information was only revealed at the second trial of the Applicant-Sanders?"

Applicant filed an amended application on June 8, 2006, asserting the following additional grounds for relief:

11. "Whether Applicant's indictment for murder (98-GS-06-180) was defective because it did not state a place and time of assault and the place and time of the death of Minh Chapman pursuant to S.C. Code Ann. §17-19-30 (1985) thereby

meaning that the Circuit Court lacked subject matter jurisdiction over the applicant at the time of Applicant's trial?"

12. "Whether the indictments for Attempted Armed Robbery 99-GS-06-079 and Criminal Conspiracy – 99-GS-06-078 were defective thereby causing the Circuit Court to lack subject matter jurisdiction over the Applicant at the time of Applicant's trial."

The State made its Return on June 13, 2007. An evidentiary hearing was convened before the Honorable J. Michael Baxley on August 8, 2007, at which Applicant was present and represented by Jane Matthews Moody, Esquire. In an order dated September 18, 2007, and filed October 4, 2007, Judge Baxley denied and dismissed the application with prejudice.

Subsequently, Applicant filed a second application for post-conviction relief (C.A. No. 2009-CP-06-0146) on June 16, 2009. In his application, Applicant asserted the following grounds for relief:

1. "Was PCR Attorney, Jane A. Moody, ineffective as counsel when she failed to communicate with Tunzy A. Sanders about his PCR Petition and PCR hearing?"
2. "Was PCR Attorney, Jane A. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to communicate with the former attorney for the Applicant, Tunzy A. Sanders, after being requested to do so on several occasions?"
3. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to notify the Applicant of the scheduling of the PCR hearing in the Barnwell County Circuit Court?"
4. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to notify trial counsel, Brenda K. Sanders, of the scheduling of the PCR hearing and when she failed to call Brenda K. Sanders to testify at the PCR hearing for the Applicant, Tunzy A. Sanders?"
5. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to file a timely notice of appeal on behalf of the Applicant, Tunzy A. Sanders within 30 days of the Barnwell County Circuit Court's decision which was rendered on October 4, 2007?"

6. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to notify the Applicant of the issuance of the Order Denying his PCR application until nine months after the Order had been entered by the Barnwell County Circuit Judge?"
7. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to adequately and individually address all of the issues outlined in the PCR Application of the Applicant, Tunzy A. Sanders, when she was specifically requested to do so on behalf of the Applicant, Tunzy A. Sanders?"
8. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to file a post-hearing motion with the Barnwell County Common Pleas Circuit Court requesting that Judge Baxter [sic] tender a ruling on each issue brought in the Applicant's PCR Application for Relief despite the fact that the PCR Attorney, Jane Moody, was specifically requested to do so on behalf of the Applicant, Tunzy A. Sanders?"

The Respondent made its Return on or about September 18, 2009, requesting all allegations except for Applicant's Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) claim be summarily dismissed. An evidentiary hearing into the matter was convened on January 29, 2010, at the Aiken County Courthouse. Applicant was represented by Christopher Moore, Esquire. Mary S. Williams, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Counsels for both parties consented to the dismissal of his Application for post-conviction relief and the grant of an appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) with regard to C.A. No. 2006-CP-06-0106. By Order filed March 30, 2010, the Honorable William Jeffrey Young granted Applicants appeal pursuant to Austin v. State and denied his remaining allegations.

Subsequently, the court reporter informed Applicant that a portion of the hearing on Applicant's first post-conviction relief application (C.A. No. 2006-CP-06-00106) was missing from her tapes. Applicant requested the matter be remanded to the circuit court for a de novo hearing on Applicant's first post-conviction relief application. The South Carolina Supreme

Court granted the petition and remanded the matter to the Honorable J. Michael Baxley for the purpose of reconstructing the record of the hearing. A hearing was held on August 8, 2007 before Judge Baxley. However, Judge Baxley informed the court that he could not fully reconstruct the missing portion of the transcript. Applicant renewed his petition to remand for a de novo hearing on his first post-conviction relief application. By Order dated March 23, 2012, the South Carolina Supreme Court vacated the order dated September 18, 2007 denying and dismissing Applicant's first post-conviction relief application and the order dated March 23, 2010 finding Applicant was entitled to a belated review of the September 18, 2007 Order. The South Carolina Supreme Court granted the Applicant's petition to remand and remanded the matter to Judge Baxley for a de novo hearing on Applicant's first post-conviction relief application.

In his application (C.A. No 2006-CP-06-106), Applicant re-alleged the following grounds for relief:

1. "Did the trial court err when it allowed the admission of Aurelein Vigier's prior testimony which violated applicant's Confrontation Clause rights because he was not afforded an opportunity to cross-examine the witness regarding 'subsequent revelations' pertaining to the State's alleged 'deal' with the witness?"
2. "Did the trial judge err in ruling appellant's cellmates were not government agents at the time applicant allegedly made incriminating statements to them? Did the trial judge err in admitting testimony of David Staley and Aurelien Vigier who were jailhouse informants who had initiated contact with the applicant and who were acting as government agents at the time the alleged statements were made by the applicant?"
3. "Did the trial court err when it denied the Appellant's Motion to Quash Maurice Benning's testimony?"
4. "Did the Appellant's appeal counsel provide ineffective assistance of counsel by failing to address all of the issues in his Appeal to the Court of Appeals and the Supreme Court despite the fact that the Appellant specifically requested

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that he do so and Appellant's counsel failed to address said issues despite the fact that he addressed multi issues in the co-defendants case and prevailed on those issues in the Court of Appeals?"

5. "Did the trial court commit error by convicting the Appellant despite insufficiency of the evidence?"
6. "Did the Appellant's appointed appellate counsel provide ineffective assistance of counsel by failing to address the issue of the trial court's denial of the directed verdict in Appellant's case?"
7. "Did the trial court err in its admission of the ballistics evidence where it was unclear as to the type of bullet and the fact that the ballistics expert clearly indicated that he could not sure that it came from the same gun?"
8. "Did the trial court err when it admitted testimony of jailhouse informants who were not trustworthy, had a history of testifying against other defendants and received great consideration for their testimony against the appellant in this case as well as for their testimony against the co-defendants in their own cases? Should the appellant's conviction for murder, armed robbery, and criminal conspiracy be allowed to stand such unreliable evidence without corroboration from the physical evidence in the case?"
9. "Did the delay in revealing that Vigier and Staley had received deals from the State constitute a Brady violation as such information was only revealed at the second trial of the Applicant-Sanders?"

Applicant filed an amended application on June 8, 2006, asserting the following additional grounds for relief:

10. "Whether Applicant's indictment for murder (98-GS-06-180) was defective because it did not state a place and time of assault and the place and time of the death of Minh Chapman pursuant to S.C. Code Ann. §17-19-30 (1985) thereby meaning that the Circuit Court lacked subject matter jurisdiction over the applicant at the time of Applicant's trial?"

Applicant amended Application on August 19, 2013 and filed August 21, 2013, asserting the following additional grounds for relief:

1. "Trial Counsel failed to adequately advise the Applicant of all the potential disadvantages of a bench trial versus a jury trial."

2. "Trial Counsel's failure to thoroughly advise the Applicant of the potential benefits of a jury trial resulted in the Applicant's inability to make a knowing and voluntary waiver of his rights."
3. "Trial Counsel failed to provide the Applicant the reasonable professional assistance of counsel where they failed to seek a continuance despite the fact that lead counsel, Brenda Sanders, was not properly notified that the Applicant's case was scheduled for trial."
4. "Trial Counsel was ineffective for failing to adequately argue the facts in support of the Applicant's motion to exclude from evidence a transcript of Aurelin Vigier's testimony from the Applicant's trial where Attorney Sanders had no previous opportunity to cross-examine this witness."
5. "Trial Counsel Sanders was ineffective for failing to respond to the trial judge's assumption that she had the opportunity to have Attorney Williams pose any questions she deemed necessary to witness Vigier."
6. "Trial Counsel was ineffective for allowing a transcript of Witness Vigier's testimony from the Applicant's first trial to be admitted without objection."
7. "Trial Counsel was ineffective for neglecting to object to a pattern of leading by the prosecution during their direct examination of State witnesses during the Applicant's trial."
8. "Trial Counsel was ineffective for failing to object to hearsay testimony from Dr. Joel Sexton concerning what he was told concerning the type of ammunition used in this homicide."
9. "Trial Counsel was ineffective for failing to object to the Solicitor's misstatement of the testimony of Maurice Benning during the prosecution's summary of the evidence before the Court where the prosecutor erroneously advised the Court that Maurice Benning had testified that he heard a shot from the area around the restaurant where the record fails to support that claim."
10. "Trial Counsel was ineffective for failing to object to the Applicant's sentence of 25 years for armed robbery where the Applicant was in fact charged with Attempted Armed Robbery."
11. "Trial Counsel was ineffective for failing to point out to the Judge that the State did not rebut claim by the Applicant that only one officer got out of the car at the first Chinese Restaurant; a fact that was not disclosed in Gadson's testimony."

Applicant submitted an additional amendment on August 19, 2013 and filed on August 22, 2013, asserting the following grounds:

12. Trial Counsel was ineffective for failing to request that the Trial Court publish on the record all of the law to be applied by the Court in reaching a decision on the Applicant's case."
13. "Trial Counsel provided the Applicant ineffective assistance of counsel when they waived the right to make a comprehensive closing argument summarizing the evidence and arguments in favor of the defense."

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. Additionally, Applicant called Joseph L. Savitz, III (Appellate Counsel), Dan Williams (Counsel Williams), Brenda K. Sanders (Counsel)² to testify on his behalf. The State presented testimony from DeGrant Gibbons (Solicitor). This Court also had before it a copy of Applicant's trial transcript, the records of the Barnwell County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant called Appellate Counsel to testify on his behalf. Appellate Counsel testified he worked at the Office of Appellate Defense for twenty six years. Appellate Counsel testified he would receive the transcripts of the trial, read the transcript "once or twice" and select the possible issues on appeal. (PCR tr. p. 66 line 11-22). Appellate Counsel testified once the issues were selected, he would research the relevant case law and narrow the issues down "to the issues that we think we can prevail upon." (PCR tr. p. 66 lines 23-24). Appellate Counsel testified he would then write and file the brief. (PCR tr. p. 66 lines

² This Court notes that Brenda K. Sanders (Counsel) is Applicant's sister. This Court further note's Counsel has paid PCR Counsel, Tara D. Shurling to represent Applicant in this post-conviction relief hearing. Further, PCR Counsel has alleged various allegations of ineffective assistance of counsel specifically alleging various deficiencies of Counsel during her representation of Applicant.

24-25). Appellate Counsel testified he followed this procedure in Applicant's case. (PCR tr. p. 67 line 2-5).

Appellate Counsel testified that during his representation of Applicant he communicated with Counsel regarding the various allegations she felt needed to be raised on appeal. Appellate Counsel testified that Counsel requested the issue of whether the trial court erred in denying Applicant's directed verdict motion be raised on appeal. Appellate Counsel testified the only issue raised on appeal was the use of the transcript of the jailhouse informant, Aurelin Vigier (Vigier). Appellate Counsel testified he was concerned that Applicant's counsel of choice, Brenda Sanders, was not able to cross-examine Vigier during Applicant's original trial and he was of the opinion that it was a meritorious issue. (PCR tr. p. 46 lines 3-11; p. 51 lines 8-9).

Appellate Counsel testified "if I missed an issue that was a winner on appeal, that would have won, then certainly I don't have any strategic reason for abandoning those issues. There's no sense in abandoning a winning issue in favor an issue that ultimately lost." However, Appellate Counsel explained that although there is no harm in raising multiple issues on appeal, he only raises issues that he believes to be meritorious. (PCR tr. p. 54 line 5—p. 55 line 15). Appellate Counsel testified in his opinion he raised all meritorious issues and "if [Applicant] was going to win that it was going to [be the] issue" raised on appeal. (PCR tr. p. 67 lines 6-10). Appellate Counsel testified "I did not see any other issues that I thought we would have prevailed upon." (PCR tr. p. 67 lines 10-11). Appellate Counsel further testified prior to submitting his brief for appellate review, Counsel made him aware of the various issues Applicant now alleges should have been raised on appeal. (PCR tr. p. 67 line 12-19). However, Appellate Counsel testified he made an informed decision not to raise those various issues and

instead raised the one issue that he felt was going to be successful. (PCR tr. p. 67 line 20—p.68 line 2; p. 70 lines 14-17).

Appellate Counsel testified that in his opinion, the issue of whether the testimony of David Staley (Staley) and Vigier should have been suppressed because they were allegedly acting as government agents during the time they had conversations with Applicant was not a good issue to raise. (PCR tr. p. 50 line 7—p. 51 line 15). Appellate Counsel testified he did not have any independent recollection regarding the motion to quash Maurice Benning's testimony. (PCR tr. p. 53 lines 3-22). However, Appellate Counsel testified he was sure that he felt that the issue was meritless because he did not raise it on appeal. (PCR tr. p. 53 line 23—p.54 line 4). Appellate Counsel further testified that he did not represent Michael Buckmon (Buckmon), Applicant's co-defendant, on appeal. (PCR tr. p. 55 line 25—p. 56 line 5). Appellate Counsel testified Eleanor Cleary represented Buckmon, despite the fact that Appellate Counsel's name was on the opinion. (PCR tr. p. 56 line 20-24). Appellate Counsel testified the South Carolina Supreme Court granted a directed verdict motion in Buckmon's case. (PCR tr. p. 60 lines 8-10). However, Appellate Counsel testified he did not raise the issue of whether the judge erred in denying the directed verdict motion because Vigier's testimony implicated Applicant and not Buckmon. (PCR tr. p. 60 lines 11-22). Appellate Counsel explained he raised the issue that the Vigier's testimony was unreliable and should not have been introduced into evidence. (PCR tr. p. 60 lines 11-22). Appellate Counsel testified had they been successful on appeal, the case would have been remanded for a new trial and a directed verdict would have been granted because Vigier's testimony was the only distinguishing factor between Buckmon's and Applicant's case. (PCR tr. p. 60 line 23—p. 4; p. 62 lines 17-21).

Appellate Counsel testified he did not raise the issue of whether the delay in revealing that Vigier and Staley allegedly received deals from the State constituted a Brady violation, since the testimony was only revealed at the second trial. (PCR tr. p. 64 lines 14-25). Further, Appellate Counsel testified he was of the opinion that he would not raise that issue today. (PCR tr. p. 64 lines 14-25). Appellate Counsel testified it was his opinion that Richard Breibart's, counsel for Buckmon, explanation that the State would take Buckmon's cooperation into consideration in the future was not an issue that needed to be raised on appeal. (PCR tr. p. 65 lines 1-7).

Following Applicant's testimony, Dan Williams (Counsel Williams) was called to testify by Applicant. Counsel Williams testified he represented Applicant at his initial 1999 trial (jury trial) and re-trial in 2001 (bench trial). Counsel Williams testified during the 1999 jury trial, Brenda Sanders (Counsel Sanders), was his co-counsel. However, prior to the start of trial the State alleged that she was a potential witness in the case and as a result, she was not allowed to participate in the trial. Counsel Williams testified "for that reason [Counsel Sanders] sat either at counsel's table or near counsel's table but didn't participate." (PCR tr. p. 74 lines 2-8).

Counsel Williams testified he was prepared to try the bench trial and previously made a motion for a speedy trial in October 2000. (PCR tr. p. 105 lines 8-13). Counsel Williams further testified he was the person who notified Counsel Sanders of the impending trial date. (PCR tr. p. 115 lines 1-3). Counsel Williams testified they did not request a continuance because they previously filed a motion for a speedy trial and he was of the opinion that they were prepared to try the case. (PCR tr. p. 115 lines 16-25). Counsel Williams further testified he previously tried the case, knew who the witnesses were, and did not feel there was a basis for making a motion to continue the case. (PCR tr. p. 116 lines 6-17).

Counsel Williams testified Applicant chose to proceed with the bench trial after they selected a jury. (PCR tr. p. 75 line 12-15). Counsel Williams testified prior to the start of the bench trial, Counsel Sanders informed Counsel Williams that "she was thinking about proceeding with just a bench trial." (PCR tr. p. 75 lines 18-22). Counsel Williams testified he understood Counsel Sanders's reasoning and strategy for wanting to waive the right to a jury trial, but in his opinion "we were better off having a jury hear the facts..." (PCR tr. p. 80 lines 11-17). Counsel Williams testified he explained to Counsel Sanders that it was not a good idea and "that we needed to proceed as we were going, with a jury." (PCR tr. p. 76 lines 5-7). Counsel Williams explained that Counsel Sanders was concerned with getting a fair jury trial in Barnwell County given that the community had previously heard about the case. (PCR tr. p. 76 lines 7-16). Counsel Williams testified because of Counsel Sanders's concerns they made a motion for a change of venue, which was ultimately denied. (PCR tr. p. 76 lines 17-22).

Counsel Williams testified Counsel Sanders agreed to select a jury prior to making a motion for bench trial. (PCR tr. p. 76 line 23—p. 77 line 4). Counsel Williams testified he was "impressed" with the panel that was selected and was of the opinion that it was a fair panel. (PCR tr. p. 77 lines 5-7). Counsel Williams testified he was opposed to a bench trial and expressed his concerns to the Applicant. (PCR tr. p. 105 line 14—p. 106 line 3). Counsel Williams explained that he did not know "of any big trial like this that [I] ever heard of doing it as a bench trial as opposed to a jury trial. And I thought we'd be better off with a jury trial." (PCR tr. p. 105 lines 18-25).

Counsel Williams testified he expressed his concerns about waiving a jury trial with Applicant, but could not recall the specific details of the conversation after a twelve year time period. (PCR tr. p. 106 lines 1-3). Counsel Williams testified it is his normal procedure to

discuss with a client "their rights in a case" including the right to a jury, the right to confront their witnesses, and the jury has to come to a unanimous decision in order for a defendant to be found guilty. (PCR tr. p. 80 lines 20-24; p. 106 lines 18-25). Furthermore, Counsel Williams testified Judge Barber advised Applicant that he had a constitutional right to jury trial and that he would be the judge of the facts and the law. (PCR tr. p. 106 lines 11-14). Counsel Williams testified Applicant previously had a jury trial and would have understood that the law requires a unanimous verdict. (PCR tr. p. 106 lines 18-21). Ultimately, Counsel Williams testified it was Applicant's decision to waive his right to a jury trial and Applicant did so against Counsel Williams's recommendation. (PCR tr. p. 107 lines 1-5).

Counsel Williams recalled Counsel Sanders arguing against the introduction of Vigier's prior trial testimony arguing she did not have an opportunity to participate in his cross examination during the Massiah hearing at the first trial. (PCR tr. p. 88 lines 5-17). Counsel Williams recalled Judge Barber referencing the fact that although Counsel Sanders was not the counsel of record during the first trial, she had the ability to participate through Counsel Williams. (PCR tr. p. 89 line 22—p. 90 line 4). Counsel Williams testified he did not object to Judge Barber's assertion because he recalled meeting with Counsel Sanders prior to the trial, reviewing evidence, and Counsel Williams specifically recalled Counsel Sanders being present during the trial. (PCR tr. p. 90 lines 5-12). Counsel Williams recalled meeting with Counsel Sanders during the first trial, but could not recall specifically whether Counsel Sanders provided notes to him. (PCR tr. p. 91 lines 4-14).

Counsel Williams testified he did not object to Judge Barber reading the transcript of Vigier's testimony from the first trial, because "he's a judge and he's been a judge for a while. And to [Counsel Williams] it made sense for him just to read the record as opposed to putting a

canned witness on the stand.” (PCR tr. p. 93 line 22—p. 94 line 4). Counsel Williams testified it was his opinion that “a judge takes a transcript and he reads it. And he considers it evidence like live testimony and that’s that.” (PCR tr. p. 95 lines 7-16). Counsel Williams testified he does not object to leading questions by the prosecutor unless it is “really, really bad.” Counsel Williams further testified he could not recall any glaringly bad leading questions. (PCR tr. p. 95 line 17—p. 96 line 3). Counsel Williams testified he chose not to object to leading questions in an effort to not draw attention to the testimony presented. (PCR tr. p. 96 line 23—p. 96 line 3). Counsel Williams further testified he did not recall any “glaringly bad leading questions...” (PCR tr. p. 96 lines 2-3).

Counsel Williams recalled Dr. Joel Sexton’s testimony. Dr. Sexton wrote in his notes that the bullet found on Victim was a .22 caliber as opposed to a .25 caliber bullet. (PCR tr. p. 97 lines 1-5). Counsel Williams testified Dr. Sexton explained he was not a ballistics expert, but over the course of his career, Dr. Sexton was able to identify various calibers of bullets. Counsel Williams recalled Dr. Sexton testifying that the ballistics expert told him it was an unusual .25 caliber bullet which explained why he initially thought the bullet was .22 caliber. (PCR tr. p. 97 lines 1-15). Counsel Williams testified Dr. Sexton’s explanation was hearsay testimony and he did not have any strategic or practical reason to not object to that testimony. (PCR tr. p. 97 lines 23-25). However, Counsel Williams testified that Vello Paavel (Paavel), a SLED Forensic expert, testified at the bench trial that the bullet used to kill Victim was .25 caliber. (PCR tr. p. 107 lines 6-12).

Counsel Williams recalled he did not see how it could benefit Applicant to point out to Judge Barber during the bench trial that the State failed to rebut Applicant’s testimony that only one officer got out of the car at the scene of the homicide. (PCR tr. p. 102 lines 4-16; p. 103

lines 13-16; p. 109 lines 16-20). Counsel Williams testified that he could not recall asking the judge to place on the record the law he deemed applicable to the case nor did he feel it was necessary to have Judge Barber place the applicable law on the record. (PCR tr. p. 104 lines 4-11; tr. p. 110 lines 8-11).

Counsel Williams testified that both Vigier and Staley testified at Applicant's first trial. (PCR tr. p. 108 lines 3-8). Counsel Williams further testified that Staley was present and presented live testimony implicating Applicant during the bench trial. (PCR tr. p. 108 lines 9-13). Counsel Williams further testified Judge Barber specifically stated that he did not feel Applicant was the shooter; however he felt Applicant was involved in the homicide. (PCR tr. p. 108 lines 14-19). Counsel Williams further testified Judge Barber found Applicant guilty under the "hand of one is the hand of all." (PCR tr. p. 108 lines 20-24).

Following Counsel Williams's testimony, Brenda Sanders (Counsel Sanders) was called to testify by the Applicant. Counsel Sanders testified she is currently a district court judge in Detroit, Michigan. (PCR tr. p. 119 lines 19-24). Counsel Sanders testified she has been a judge for approximately six years and is licensed only in the state of Michigan. (PCR tr. p. 120 lines 11-16). Counsel Sanders testified she was sworn into the Michigan bar in 1985 and was in private practice for majority of her career dealing with both criminal and civil cases. (PCR tr. p. 143 lines 3-14). Counsel Sanders testified Counsel Williams moved for her admission pro hac vice. (PCR tr. p. 120 lines 17-21). Counsel Sanders testified she was not allowed to participate in Applicant's first trial and was removed as counsel of record because of a witness testimony issue. (PCR tr. p. 120 line 22—p. 121 line 9).

Counsel Sanders testified it was clear she was counsel of record for Applicant's second trial; however Counsel Sanders felt she was not apprised of all the information during the course

of her preparation for trial. (PCR tr. p. 121 lines 15—p. 122 line 1). Counsel Sanders testified she never received any documents to her office in Michigan from the Solicitor's office, specifically, Counsel Sanders testified she could not recall receiving any notice of trial from the Solicitor's office. (PCR tr. p. 122 lines 16-23). Counsel Sanders testified Counsel Williams called and left a voicemail message on her phone stating Applicant's case was set for trial in approximately two weeks. (PCR tr. p. 123 lines 18-24). Counsel Sanders further testified she was required to adjourn her cases as a lawyer and make arrangements to be present for Applicant's trial. (PCR tr. p. 123 line 24—p. 124 line 1). Counsel Sanders testified she did not request a continuance because she had "very little control over the situation." (PCR tr. p. 124 lines 10-14). Counsel Sanders testified that Counsel Williams had more information and explained to her that the case was moving forward no matter what. (PCR tr. p. 124 lines 14-16). However, Counsel Sanders testified she discussed the notice issue with the Court in hopes of getting an "adjournment or to give...some more time to prepare the case in South Carolina." (PCR tr. p. 125 lines 6-14).

Counsel Sanders testified she vaguely recalled arguing Vigier's testimony should not be allowed into evidence. (PCR tr. p. 126 lines 17-23). Counsel Sanders testified during Applicant's first jury trial, she was not present at counsel's table, but sat in the first row behind the attorneys. (PCR tr. p. 127 lines 6-9; p. 128 lines 15-21). Counsel Sanders testified she and Counsel Williams had a lot of discord between each other which hindered their communication during Applicant's first jury trial. (PCR tr. p. 127 lines 6-17). Counsel Sanders testified during the first jury trial she was unable to consult with Counsel Williams because Judge Clary made his ruling in regards to her not being allowed to participate in the trial. (PCR tr. p. 128 line 22—p. 129 line 2). However, Counsel Sanders testified there were recesses where she was able to

consult with Counsel Williams. (PCR tr. p. 129 lines 3-6). Counsel Sanders further testified she may have had the opportunity to hand Counsel Williams notes and talk to Counsel Williams during the Massiah hearing of the first jury trial. (PCR tr. p. 130 lines 9-17).

Counsel Sanders testified that three defense attorneys had the opportunity to cross-examine Vigier during Applicant's first jury trial, including Counsel Williams. (PCR tr. p. 154 line 11—p. 155 line 2). Counsel Sanders further testified in her opinion she would have been able to do a better job of cross-examining Vigier, despite the fact that she was distraught when representing Applicant (brother) during the bench trial. (PCR tr. p. 155 lines 1—p. 156 line 9). Counsel Sanders testified in her opinion Vigier was a "biased witness who had a deal before he even got up to testify against her brother (Applicant)." (PCR tr. p. 155 lines 15-18). Counsel Sanders testified the fact that Vigier "walked on very serious—I think it was attempted murder, robbery; the same kind of charges that were brought against [her] brother (Applicant)" was never brought out during cross examination in the first trial. (PCR tr. p. 155 lines 19-21). Counsel Sanders testified the fact that Vigier had absconded to France and was no longer available for cross-examination showed he was an unreliable person. (PCR tr. p. 158 lines 1-11). Counsel Sanders further testified she "believe[d] that their (Vigier) testimony...should be scrutinized" and she felt "a judge would...look at the unreliability of it and say, 'no way.' 'This is too important....why would I rest my decision on to two jailhouse informants'." (PCR tr. p. 159 lines 2-9).

Counsel Sanders testified it was a mistake for her not objecting to Judge Barber reading the transcript versus having the testimony published in the courtroom. Counsel Sanders testified "I was greatly emotionally impacted in these proceedings due to the fact that my brother was on trial." (PCR tr. p. 132 lines 7-22). Counsel Sanders testified she did not request that Judge

Barber publish on the record all of the law to be applied by the court in reaching a decision. (PCR tr. p. 140 lines 10-12). Counsel Sanders testified she presumed it would be done due to her experience in federal court where the current case law requires the trial judge to publish the law to be considered. (PCR tr. p. 140 lines 10-23). Counsel Sanders testified she did not think to point out to the court during closing arguments the fact that the State had not presented any reply testimony to refute Applicant's testimony about observing the officers going to the wrong restaurant. (PCR tr. p. 141 lines 3-8). Counsel Sanders testified in her opinion it was important to point out this information to the court. (PCR tr. p. 141 lines 8-14).

Counsel Sanders testified that she advises all criminal defendants of their constitutional rights, including their right to a jury trial. (PCR tr. p. 143 lines 15-17). Counsel Sanders testified she advised Applicant of his right to a jury trial. (PCR tr. p. 144 lines 14-16). However, Counsel Sanders testified it was her decision to pursue a bench trial and not Applicant's. (PCR tr. p. 134 lines 2-8). Counsel Sanders testified she could not recall whether she discussed with the Applicant the fact that Judge Barber would know that a jury had previously convicted him of murder. (PCR tr. p. 135 lines 6-10). Counsel Sanders testified she could not recall if she discussed the fact that a jury of twelve would not be allowed to know that he had been previously found guilty. (PCR tr. p. 135 lines 11- 20). However on cross-examination, Counsel Sanders testified she discussed the potential pros and cons of pursuing a bench trial. (PCR tr. p. 134 lines 10-14). On cross-examination, Counsel Sanders testified she would advise all her criminal defendants that it would take a unanimous verdict for them to be found guilty. (PCR tr. p. 143 lines 18-21). Counsel Sanders further testified that it is a "textbook principle" that if only one juror held out that would be enough for a mistrial. (PCR tr. p. 143 lines 22-25). However,

Counsel Sanders testified she did not discuss this "text book principle" with Applicant. (PCR tr. p. . p. 134 line 24—135 line 5).

Counsel Sanders testified one of the reasons she advised Applicant to pursue a bench trial over a jury trial was due to the pretrial publicity. (PCR tr. p. 146 line 22—p. 147 line 2). Counsel Sanders further testified she advised Applicant to pursue a bench trial because she "thought the evidence was so scarce in [Applicant's] case that anyone could look at it and say not guilty, including Judge Barber." (PCR tr. p. 148 lines 9-15). Counsel Sanders testified the evidence was "filled with inaccuracies and disputed in every way. The witnesses contradicted themselves in every way" and Counsel Sanders "could not see anyone with a trained eye saying guilty." (PCR tr. p. 148 lines 9-20). Counsel Sanders further testified at the time she felt a bench trial would best benefit Applicant. (PCR tr. p. 150 lines 2-6).

Following Counsel Williams's testimony, Tunzy Sanders (Applicant) was called to testify on his own behalf. Applicant testified that prior to his bench trial, neither counsel advised him what would happen if all twelve jurors did not unanimously agree. (PCR tr. p. 164 line 24—p. line 165 line 3). Applicant testified no one advised him that he could get a mistrial if only one of the twelve jurors did not find him guilty. (PCR tr. p. 165 lines 4-7). However, Applicant testified during his jury trial the judge instructed the jury that their verdict would have to unanimous in order to convict. (PCR tr. p. 164 lines 15-23).

Applicant testified Counsel Williams wanted a jury trial while Counsel Sanders wanted a bench trial and "at the end it was decided that it would be a bench trial." (PCR tr. p. 166 lines 18-23). Applicant testified that Counsel Williams argued that a bench trial was not typically done in this jurisdiction nor had he ever participated in a bench trial. (PCR tr. p. 170 lines 3-6). Applicant testified Counsel Sanders was concerned with the pretrial publicity and being able to

receive a fair trial due to a unrelated murder that had just taken place a few weeks prior to Applicant's trial. (PCR tr. p. 171 lines 2-14). Applicant testified Counsel Williams made a motion for a change of venue, but it was ultimately denied. (PCR tr. p. 171 lines 15-17). Applicant testified Judge Barber asked the potential jurors during voir dire if they had read about the unrelated murder and "everybody raised their hand." (PCR tr. p. 171 lines 18-20). However, Applicant testified they all put their hands down when Judge Barber asked if that would affect their ability to be fair and impartial. (PCR tr. p. 171 lines 18-24).

Applicant testified Judge Barber asked Applicant if he wanted to proceed with a bench trial, which he responded "yes, sir." (PCR tr. p. 173 lines 14-16). Applicant testified Judge Barber explained to him that he had a right to a jury trial. (PCR tr. p. 173 line 22—p.174 line 1). Applicant testified Judge Barber mentioned that he had previously been through one jury trial and had observed the process. (PCR tr. p. 174 lines 2-6). Applicant testified he recalled during his first jury trial the judge instructing the jury on the law. (PCR tr. p. 176 lines 19-21). Applicant further testified during his first jury trial the trial judge told the jury several times that their verdict had to be a unanimous decision (PCR tr. p. 176 lines 22-24). However, Applicant claimed he did not understand the meaning of unanimous. (PCR tr. p. 177 lines 2-13). Applicant further testified he did not recall the judge polling the jury by asking them to raise their hand after they had reached their verdict. (PCR tr. p. 179 line 17—p. 180 line 2).

Applicant testified he told Judge Barber that he wished to go forward with a bench trial. (PCR tr. p. 174 lines 8-10). Applicant testified Judge Barber explained to him that he would be the judge of the law and the facts. (PCR tr. p. 174 lines 11-15). Applicant testified he understood that in a jury trial the jury would decide the facts of the case. (PCR tr. p. 174 lines 16-18). Applicant testified that he could not recall Judge Barber asking both attorneys if they

were satisfied with the inquiry made regarding Applicant's decision to proceed with a bench trial, however the transcript reflects such questioning. (PCR tr. p. 174 lines 19-24; Tr. p. 84 line 22—p. 85 line 1). Applicant testified he did not ask Judge Barber any additional questions about the process of a bench of trial nor did he ask Judge Barber the meaning of the process. (PCR tr. p. 175 lines 4-9). Yet, Applicant testified if he had understood the difference between a bench trial and a jury trial he would not have waived his right to a jury trial. (PCR tr. p. 168 lines 1-5).

Following Applicant's testimony, DeGrant Gibbons (Solicitor) was called to testify by the State. Solicitor testified he attempted to get Vigier to come testify in the second trial. Specifically, Solicitor testified he drafted a letter several weeks before trial to Counsel Williams explaining they were having problems locating Vigier. (PCR tr. p. 184 lines 18-22). Solicitor testified he previously saw Vigier at a magistrate court hearing prior to the bench trial and informed Vigier that he would be called to testify. (PCR tr. p. 184 line 23—p. 185 line 1). Solicitor testified he had an investigator go to Vigier's address and they received information indicating Vigier was a French National and had fled back to France. (PCR tr. p. 185 lines 2-6). Solicitor testified that Vigier was being prosecuted by Assistant Solicitor Rob Madsen for armed robbery, attempted murder, and assault and battery with intent to kill, but Solicitor never made any deal with Vieger. (PCR tr. p. 186 lines 6-12). Vigier testified against his co-defendant stemming from the charges Vigier was facing, and his cooperation was taken into consideration. (PCR tr. p. 186 lines 16-25). Solicitor further testified he previously was involved in a bench trial which resulted in the defendant being acquitted of the charges. (PCR tr. 187 lines 2-8).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to

observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically, this Court finds that Appellate Counsel's, Counsel Williams's and Solicitor's, testimony is very credible while Applicant's testimony is not as credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

but for counsel's unprofessional errors, the result of the proceeding would have been different."

Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Did the Appellant's appeal counsel provide ineffective assistance of counsel by failing to address all of the issues in his Appeal to the Court of Appeals and the Supreme Court despite the fact that the Appellant specifically requested that he do so and Appellant's counsel failed to address said issues despite the fact that he addressed multi issues in the co-defendants case and prevailed on those issues in the Court of Appeals?

This Court finds Applicant's allegation that Appellate Counsel was ineffective for failing to address all potential issues on appeal, despite Appellant's request to address certain issues is without merit. The Applicant must show that Appellate Counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Appellate Counsel testified he would receive the transcripts of the trial, read the transcript "once or twice" and select the possible issues on appeal. (PCR tr. p. 66 line 11-22). Appellate Counsel testified once the issues were selected, he would research the relevant case law and narrow the issues down "to the issues that we think we can prevail upon." (PCR tr. p. 66 lines 23-24). Appellate Counsel testified he would then write and file the brief. (PCR tr. p. 66 lines

24-25). Appellate Counsel testified he followed this procedure in Applicant's case. (PCR tr. p. 67 line 2-5).

Furthermore, Appellate Counsel testified in his opinion he raised all meritorious issues and "if [Applicant] was going to win that it was going to [be the] issue" raised on appeal. (PCR tr. p. 67 lines 6-10). Appellate Counsel testified "I did not see any other issues that I thought we would have prevailed upon." (PCR tr. p. 67 lines 10-11). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Appellate Counsel further testified prior to submitting his brief for appellate review, Counsel made him aware of the various issues Applicant now alleges should have been raised on appeal. (PCR tr. p. 67 line 12-19). However, Appellate Counsel testified he made an informed decision not to raise those various issues and instead raised the one issue that he felt was going to be meritorious. (PCR tr. p. 67 line 20—p.68 line 2; p. 70 lines 14-17).

Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Appellate Counsel testified he raised the issue that the Vigier's testimony was unreliable and should not have been introduced into evidence. (PCR tr. p. 60 lines 11-22). Appellate Counsel testified had the issue been successful on appeal, the case would have been remanded for a new trial and a directed verdict would have been granted because Vigier's testimony was the only distinguishing factor

between Buckmon's and Applicant's case. (PCR tr. p. 60 line 23—p. 4; p. 62 lines 17-21). This Court finds Applicant failed to meet his burden in regards to this allegation. Furthermore, this Court finds Applicant failed to meet his burden of showing any resulting prejudice from Appellate Counsel's alleged deficiency.

Did the Appellant's appointed appellate counsel provide ineffective assistance of counsel by failing to address the issue of the trial court's denial of the directed verdict in Appellant's case?

This Court finds Applicant's allegation that Appellate Counsel was ineffective for failing to address the issue of the trial court's denial of the directed verdict motion to be without merit. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983).). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Appellate Counsel testified in his opinion he raised all meritorious issues and "if [Applicant] was going to win that it was going to [be the] issue" raised on appeal. (PCR tr. p. 67 lines 6-10). Appellate Counsel testified "I did not see any other issues that I thought we would have prevailed upon." (PCR tr. p. 67 lines 10-11).

Appellate Counsel testified he did not raise the issue of whether the judge erred in denying the directed verdict motion because Vigier's testimony implicated Applicant and not Buckmon. (PCR tr. p. 60 lines 11-22). Appellate Counsel explained he raised the issue that the

Vigier's testimony was unreliable and should not have been introduced into evidence. (PCR tr. p. 60 lines 11-22). Appellate Counsel testified had they been successful on appeal, the case would have been remanded for a new trial and a directed verdict would have been granted because Vigier's testimony was the only distinguishing factor between Buckmon's and Applicant's case. (PCR tr. p. 60 line 23—p. 4; p. 62 lines 17-21). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). This Court finds Applicant has failed to meet his burden in regards to this allegation. Furthermore, this Court finds Applicant has failed to show that the issue Applicant alleges should have been raised by Appellate Counsel was clearly stronger than the issue actually raised. Greer, 800 F.2d at 646. Furthermore, this Court finds Applicant has failed to show how Appellate Counsel's alleged deficiency resulted in any actual prejudice. As a result, this Court finds this allegation must be denied and dismissed with prejudice.

INEFFECTIVE ASSISTANCE OF COUNSEL

Trial Counsel's failure to thoroughly advise the Applicant of the potential benefits of a jury trial resulted in the Applicant's inability to make a knowing and voluntary waiver of his rights.

This Court finds Applicant's allegation that Trial Counsel's failure to thoroughly advise the Applicant of the potential benefits of a jury trial resulted in the Applicant's inability to make a knowing and voluntary waiver of his rights is without merit. This Court finds Applicant knowingly, voluntarily, and intelligently waived his right to a jury trial. See Patton v. United States, 281 U.S. 276, 312-13, 50 S.Ct. 253, (1930) overruled on other grounds by Williams v. Florida, 399 U.S. 78, 92, 90 S.Ct. 1893 (1970). A defendant's knowing and voluntary waiver of

statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both. See Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000); See United States v. Boynes, 515 F.3d 284 (2008) (finding the Sixth Amendment does not require district court "to interrogate defendants as to the voluntariness of their waiver of a jury trial"); See Adams v. United States, 317 U.S. 269, 271, 63 S.Ct. 236, 241 (1942) (finding "whether or not there is an intelligent competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case).

In Moore v. State, 399 S.C. 641, 732 S.E.2d 871 (2012), the South Carolina Supreme Court found the trial court's lack of an on the record colloquy regarding the defendant's waiver of his right to a jury trial was grounds for reversal and remand. Id. at 874. In Moore the court found that the "record reflects that there was *no* colloquy between the court and [defendant's] trial counsel or [defendant] regarding the waiver." Id. (emphasis added). Furthermore, defendant's counsel could not testify that he explained to defendant the differences between a jury trial and a bench trial. Id. Additionally, defendant testified during the PCR hearing that he completed only the seventh grade, could not read or write, and did not know ahead of time that his counsel was planning to make a motion for a bench trial. Id. at 875.

Unlike Moore, the trial court had a lengthy and detailed discussion with Applicant about his waiver of a jury trial. (Tr. p. line 3—p. 85 line 6). Specifically, the trial court questioned Applicant whether he wished to waive his right to a jury trial and move forward with a bench trial. (Tr. p. 83 lines 10-11). The trial court specifically advised Applicant that he had a constitutional right to a jury trial. (Tr. p. 83 lines 12-14). The trial court noted Applicant had recently been through one jury trial and "observed the process." (Tr. p. 83 lines 15-16). The

trial court further noted that a jury had been drawn and the Applicant had the opportunity to participate in the selection of his jury panel. (Tr. p. 83 lines 15-21). The trial judge advised Applicant that he would be both the judge of the facts and the judge of the law in a bench trial. (Tr. p. 83 line 24—p. 84 line 1). The trial judge explained that “normally in cases, the jury is the judge of the facts. They listen to all of the evidence and ultimately determine the facts in the case.” (Tr. p. 84 lines 2-5). The trial court further questioned both Counsel Sanders and Counsel Williams whether they deemed a further inquiry necessary. (Tr. p. 84 line 22—p. 85 line 1).

Additionally, Counsel Williams testified he was opposed to a bench trial and expressed his concerns to the Applicant. (PCR tr. p. 105 line 14—p. 106 line 3). Counsel Williams explained that he did not know “of any big trial like this that [I] ever heard of doing it as a bench trial as opposed to a jury trial. And I thought we’d be better off with a jury trial.” (PCR tr. p. 105 lines 18-25). Counsel Williams testified he expressed his concerns about waiving a jury trial with Applicant, but could not recall the specific details of the conversation after a twelve year time period. (PCR tr. p. 106 lines 1-3). Counsel Williams testified it is his normal procedure to discuss with a client “their rights in a case” including the right to a jury, the right to confront their witnesses, and the jury has to come to a unanimous decision in order for a defendant to be found guilty. (PCR tr. p. 80 lines 20-24; p. 106 lines 18-25). Furthermore, Counsel Williams testified Judge Barber advised Applicant that he had a constitutional right to jury trial and that he would be the judge of the facts and the law. (PCR tr. p. 106 lines 11-14). Counsel Williams testified Applicant previously had a jury trial and would have understood that the law requires a unanimous verdict. (PCR tr. p. 106 lines 18-21). Ultimately, Counsel Williams testified it was Applicant’s decision to waive his right to a jury trial and Applicant did so against Counsel Williams’s recommendation. (PCR tr. p. 107 lines 1-5).

Additionally, Applicant testified Judge Barber asked him if he wanted to proceed with a bench trial, which he responded "yes, sir." (PCR tr. p. 173 lines 14-16). Applicant testified Judge Barber explained to him that he had a right to a jury trial. (PCR tr. p. 173 line 22—p.174 line 1). Applicant testified Judge Barber mentioned that he had previously been through one jury trial and had observed the process. (PCR tr. p. 174 lines 2-6). Applicant testified he recalled during his jury trial the judge instructing the jury on the law. (PCR tr. p. 176 lines 19-21). Applicant further testified during his jury trial the trial judge told the jury several times that their verdict had to be a unanimous decision (PCR tr. p. 176 lines 22-24). Applicant denied he understood the meaning of unanimous. (PCR tr. p. 177 lines 2-13). Applicant further testified he did not recall the judge polling the jury by asking them to raise their hand after they had reached their verdict. (PCR tr. p. 179 line 17—p. 180 line 2).

Applicant testified he told Judge Barber that he wished to go forward with a bench trial. (PCR tr. p. 174 lines 8-10). Applicant testified Judge Barber explained to him that he would be the judge of the law and the facts. (PCR tr. p. 174 lines 11-15). Applicant testified he understood that the jury would decide the facts of the case. (PCR tr. p. 174 lines 16-18). Applicant testified that he could not recall Judge Barber asking both attorneys if they were satisfied with the inquiry made regarding Applicant's decision to proceed with a bench trial, however the transcript reflects such questioning. (PCR tr. p. 174 lines 19-24; Tr. p. 84 line 22—p. 85 line 1). Applicant testified he did not ask Judge Barber any additional questions about the process of a bench of trial nor did he ask Judge Barber the meaning of the process. (PCR tr. p. 175 lines 4-9). Yet, Applicant testified if he had understood the difference between a bench trial and a jury trial he would not have waived his right to a jury trial. (PCR tr. p. 168 lines 1-5).

This Court finds that Applicant knowingly and voluntarily chose a bench trial in lieu of a jury trial. This Court finds that Applicant understood the differences between a jury trial and a bench trial. He was advised by Judge Barber that Judge Barber would decide the facts of the case instead of a jury if electing a bench trial. Further, Applicant's experience at the first trial debunks any contention that he did not understand the pros and cons of a jury trial. This Court finds that Applicant's contention that he did not understand what "unanimous" meant is not credible. Especially given that he admitted recalling the trial court using this term in its instructions to the jury at Applicant's first trial. This Court also rejects Counsel Sanders' contention that the decision to waive the jury trial was her decision and not her brother's. This Court also believes that her testimony was biased in favor of her brother. However, this Court notes that to the extent that Applicant was not given an opportunity to decide prior to trial whether he wanted to choose a bench trial instead of a jury trial, this oversight would have been cured by the trial court's colloquy with Applicant that ensured a bench trial was what Applicant sought.

This Court finds that Applicant has not met his burden of proving counsel was ineffective and denies this allegation.

Trial Counsel failed to provide the Applicant the reasonable professional assistance of counsel where they failed to seek a continuance despite the fact that lead counsel, Brenda Sanders, was not properly notified that the Applicant's case was scheduled for trial.

This Court finds Applicant allegation that Trial Counsel failed to provide Applicant the reasonable professional assistance of counsel where they failed to seek a continuance despite the fact that Counsel Sanders, was not properly notified that Applicant's case was scheduled for trial is without merit. "Where there is no showing that any other evidence on behalf of the appellant

could have been produced or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial," a continuance is unnecessary. State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51-52 (1996). Counsel Williams testified he was prepared to try the bench trial and had previously made a motion for a speedy trial in October 2000. (PCR tr. p. 105 lines 8-13). Counsel Williams further testified he was the person who notified Counsel Sanders of the impending trial date. (PCR tr. p. 115 lines 1-3). Counsel Williams testified they did not request a continuance because they had previously filed a motion for a speedy trial and he was of the opinion that they were prepared to try the case. (PCR tr. p. 115 lines 16-25). Counsel Williams further testified that he had previously tried the case, knew who the witnesses were, and did not feel there was a basis for making a motion to continue the case. (PCR tr. p. 116 lines 6-17). Furthermore, Applicant must show actual prejudice from the denial of a continuance. Skeen v. State, 325 S.C. 210, 213-14, 481 S.E.2d 129, 130-32 (1997) (Absent showing that additional preparation would have benefitted defense, counsel's failure to request continuance did not result in ineffective assistance). Applicant failed to present any evidence as to what benefit additional preparations would yield if counsel requested a continuance. As a result, this Court finds this allegation is denied and dismissed with prejudice.

Trial Counsel was ineffective for failing to adequately argue the facts in support of the Applicant's motion to exclude from evidence a transcript of Aurelin Vigier's testimony from the Applicant's trial where Attorney Sanders had no previous opportunity to cross-examine this witness.

This Court finds Applicant's allegation that trial counsel was ineffective for failing to adequately argue the facts in support of the Applicant's motion to exclude from evidence a transcript of Aurelin Vigier's (Vigier) testimony from the Applicant's trial where Counsel Sanders had no previous opportunity to cross-examine the witness is without merit. Counsel

Williams recalled Counsel Sanders arguing against the introduction of Vigier's prior trial testimony based on the fact that she had not had an opportunity to participate in his cross examination during the Massiah hearing. (PCR tr. p. 88 lines 5-17). Counsel Williams recalled Judge Barber referencing the fact that although Counsel Sanders was not the counsel of record during the first trial, she had the ability to participate through Counsel Williams. (PCR tr. p. 89 line 22—p. 90 line 4). Counsel Williams testified he did not object to Judge Barber's assertion because he recalled meeting with Counsel Sanders prior to the trial, reviewing evidence, and Counsel Williams specifically recalled Counsel Sanders being present during the trial. (PCR tr. p. 90 lines 5-12). Counsel Williams recalled meeting with Counsel Sanders during the first trial, but could not recall specifically whether Counsel Sanders provided notes to him. (PCR tr. p. 91 lines 4-14). Based on the foregoing, this Court finds that the Applicant has not shown that trial counsel's performance fell below "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Further SCRE 804(b)(1) states that former testimony is not excluded by the hearsay rule if the:

"Former Testimony: Testimony given as a witness at another hearing of the same or a different proceeding...taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered...had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

(emphasis added). This Court finds that under the rules of evidence the right to cross examine a witness follows the party not the individual attorney. As such, this Court finds that Counsel Williams had the opportunity and similar motive when cross examining Vigier during Applicant's first trial. Furthermore, the Applicant has shown no actual prejudice from any alleged deficiency of counsel. As a result, this Court finds this allegation is denied and dismissed with prejudice.

Trial Counsel Sanders was ineffective for failing to respond to the trial judge's assumption that she had the opportunity to have Attorney Williams pose any questions she deemed necessary to witness Vigier and allowing the transcript to be admitted into evidence without objection.

This Court finds Applicant's allegation that trial counsel was ineffective for failing to respond to the trial judge's assumption that she had the opportunity to have Attorney Williams pose any questions she deemed necessary to witness Vigier is without merit. Counsel Sanders testified there were recesses where she was able to consult with Counsel Williams. (PCR tr. p. 129 lines 3-6). Counsel Sanders further testified she may have had the opportunity to hand Counsel Williams notes and talk to Counsel Williams during the Massiah hearing of the first jury trial. (PCR tr. p. 130 lines 9-17). Counsel Williams testified Judge Barber referenced the fact that although Counsel Sanders was not the counsel of record during the jury trial, she had the ability to participate through Counsel Williams. (PCR tr. p. 89 line 22—p. 90 line 4). Counsel Williams testified he did not object to Judge Barber's assertion because he recalled meeting with Counsel Sanders prior to the jury trial, reviewing evidence with Counsel Sanders, and Counsel Sanders was present during the jury trial. (PCR tr. p. 90 lines 5-12). Counsel Williams recalled meeting with Counsel Sanders during the first trial, but could not recall specifically whether Counsel Sanders provided notes to him. (PCR tr. p. 91 lines 4-14). Based on the foregoing, this Court finds that the Applicant has not shown that trial counsel's performance fell below "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

Furthermore, Applicant can show no prejudice as the South Carolina Court of Appeals specifically found that the admission of Vigier's prior testimony did not violate Applicant's Confrontations Clause rights. State v. Sanders, 356 S.C. 214, 588 S.E.2d 142 (Ct. App. 2003). The court held that Vigier's testimony was properly admitted during the bench trial under Rule

804(b)(1). *Id.* Therefore, this Court finds Applicant has failed to meet his burden of proof and this allegation is denied and dismissed with prejudice.

Trial Counsel was ineffective for neglecting to object to a pattern of leading by the prosecution during their direct examination of State witnesses during the Applicant's trial.

This Court finds Applicant's allegation that Trial Counsel was ineffective for neglecting to object to a pattern of leading by the prosecution during their direct examination of State witnesses during the Applicant's trial is without merit. Counsel Williams testified he does not object to leading questions by the prosecutor unless it is "really, really bad." Counsel Williams testified he could not recall any glaringly bad leading questions. (PCR tr. p. 95 line 17—p. 96 line 3). Counsel Williams testified he chose not to object to leading questions in an effort to not draw attention to the testimony presented. (PCR tr. p. 96 line 23—p. 96 line 3). Counsel Williams re-iterated he did not recall any "glaringly bad leading questions..." (PCR tr. p. 96 lines 2-3). Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds Counsel Williams articulated a valid strategic reason for not objecting to leading questions. Furthermore, Applicant failed to show sufficient prejudice as a result of counsel's alleged deficiency. As a result, this Court finds this allegation should be denied and dismissed with prejudice.

Trial Counsel was ineffective for failing to object to hearsay testimony from Dr. Joel Sexton concerning what he was told concerning the type of ammunition used in this homicide.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to hearsay testimony from Dr. Joel Sexton concerning what he was told concerning the

type of ammunition used in this homicide is without merit. Counsel Williams recalled the testimony of Dr. Joel Sexton who wrote in his notes that the bullet found on the Victim was a .22 caliber as opposed to a .25 caliber bullet. (PCR tr. p. 97 lines 1-5). Counsel Williams testified Dr. Sexton explained that he was not a ballistics expert, but over the course of his career, Dr. Sexton was able to identify various calibers of bullets. Counsel Williams recalled Dr. Sexton testifying that the ballistics expert told him it was an unusual .25 caliber bullet which explained why he initially thought the bullet was .22 caliber. (PCR tr. p. 97 lines 1-15). Counsel Williams testified Dr. Sexton's explanation was hearsay testimony and he did not object. (PCR tr. p. 97 lines 23-25). However Counsel Williams testified that Vello Paavel (Paavel), a SLED Forensic expert, testified at the bench trial that the bullet used to kill the Victim was a .25 caliber. (PCR tr. p. 107 lines 6-12).

This Court finds counsel's failure to object was reasonable under professional norms. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, Applicant has failed to show he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Counsel Williams testified that Vello Paavael, a SLED Forensic expert, ultimately testified during the bench trial that the bullet used to kill the Victim was a .25 caliber. (PCR tr. p. 107 lines 6-12). As a result, this Court finds Applicant has failed to meet his burden of proof and this allegation must be denied and dismissed with prejudice.

Trial Counsel was ineffective for failing to object to the Solicitor's misstatement of the testimony of Maurice Benning during the prosecutions summary of the evidence before the Court where the prosecutor erroneously advised the Court that Maurice Benning had testified that he heard a shot from the area around the restaurant where the record fails to support that claim.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to the Solicitor's misstatement of the testimony of Maurice Benning during the prosecutions summary of the evidence before the Court where the prosecutor erroneously advised the Court that Maurice Benning had testified that he heard a shot from the area around the restaurant where the record fails to support that claim is without merit. Applicant argues counsels were ineffective for failing to object to the solicitor's closing argument referencing the testimony of Maurice Benning (Benning). During trial, Benning testified he was walking away from the Chinese restaurant when he "heard a sound, like it was...somebody hitting, banging something against something and I started running then." (Tr. p. 285 lines 7-21). Benning further testified "when they (Michael Buckman and Applicant) came around the corner, I said, what happened, that's when I got the gun back form Mr. Sanders and that when Mike said, I shot her." (Tr. p. 287 lines 10-13). During closing arguments, the solicitor stated "he (Benning) saw Mr. Buckman with a gun, standing beside the back wall of the Chinese restaurant. And at that point he turned around and knew something was going on and a few seconds later he heard a shot. And the next thing he said was that they came running up, back to his house and indicated - Michael Paul indicated he had shot the lady." (Tr. p. 418 line 23—p. 419 line 4). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). This Court finds counsels were not ineffective for failing to object to the solicitor's closing argument as his summary of the evidence is supported by the record.

Trial Counsel was ineffective for failing to object to the Applicant sentence of 25 years for armed robbery where the Applicant was in fact charged with Attempted Armed Robbery.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to object to the Applicant sentence of twenty-five years for armed robbery where the Applicant was in fact charged with Attempted Armed Robbery was withdrawn by the Applicant. (PCR tr. p. 99 lines 23-25).

Trial Counsel was ineffective for failing to point out to the Judge that the State did not rebut claim by the Applicant that only one officer got of the car at the first Chinese Restaurant; a fact that was not disclosed in Gadson's testimony.

This Court finds that Applicant's allegation that Trial Counsel was ineffective for failing to point out to the judge that the State did not rebut claim by the Applicant that only one officer got of the car at the first Chinese Restaurant; a fact that was not disclosed in Gadson's testimony is without merit. Counsel Williams recalled that he did not see how it could benefit Applicant to point out to Judge Barber during the bench trial that the State failed to rebut Applicant's testimony that only one officer got out of the car at the scene of the homicide. (PCR tr. p. 102 lines 4-16; p. 103 lines 13-16; p. 109 lines 16-20). This Court finds Counsel's judgment on this matter to be reasonable. Based on the foregoing, this Court finds that the Applicant has not shown that trial counsel's performance fell below "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, the Applicant has failed to show sufficient prejudice from any alleged deficiency of counsel. As a result, this Court finds this allegation is denied and dismissed with prejudice.

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Trial Counsel was ineffective for failing to request that the Trial Court publish on the record all of the law to be applied by the Court in reaching a decision on the Applicant's case.

This Court finds Applicant's allegation that Trial Counsel was ineffective for failing to request that the Trial Court publish on the record all of the law to be applied by the Court in reaching a decision on the Applicant's case is without merit. Counsel Williams testified that he could not recall asking the judge to place on the record the law he deemed applicable to the case nor did he feel it was necessary to have Judge Barber place the applicable law on the record. (PCR tr. p 104 lines 4-11; tr. p. 110 lines 8-11). This Court agrees with Counsel Williams that it was unnecessary for the trial court to give itself on the record instructions prior to reading a verdict. Nor is this court aware of anything requiring the trial court to do so. Based on the foregoing, this Court finds that Applicant has not shown trial counsel's performance fell below "professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Furthermore, Applicant failed to show sufficient prejudice from any alleged deficiency of counsel. As a result, this Court finds this allegation is denied and dismissed with prejudice.

Trial Counsel provided the Applicant ineffective assistance of counsel when they waived the right to make a comprehensive closing argument summarizing the evidence and arguments in favor of the defense.

This Court finds Applicant's allegation that Trial Counsel provided the Applicant ineffective assistance of counsel when they waived the right to make a comprehensive closing argument summarizing the evidence and arguments in favor of the defense was withdrawn. (PCR tr. p. 137 lines 14-25).

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present

any evidence regarding such allegations. Accordingly, this Court finds Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

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

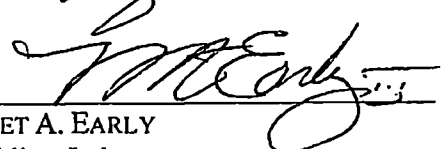
This Court notes that that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 18th day of August, 2014.

Bamber, South Carolina


DOYET A. EARLY
Presiding Judge
Second Judicial Circuit

NOTICE OF SUSPENSION

Case No. 99-178-GA

Notice Issued: September 19, 2001

Brenda K. Sanders, P-37845, Detroit, Michigan, by the Attorney Discipline Board affirming an order of suspension by Tri-County Hearing Panel #27.

1. Suspension - 60 days.
2. Effective September 19, 2001.

The hearing panel found that respondent had committed acts of professional misconduct warranting discipline, specifically: That respondent signed her clients' names to an affidavit without their consent or knowledge; caused the affidavit to be notarized by someone who was not a registered notary; and knowingly made a false statement in her response to the Grievance Administrator's Request for Investigation. Respondent's conduct was in violation of MCR 9.103(C); 9.104(1)-(5); MCR 9.113(A); and Michigan Rules of Professional Conduct 3.3(a)(1) and (4); 3.4(b); 8.1(a); and 8.4(a)-(c).

The hearing panel ordered that respondent's license be suspended for 60 days. The respondent filed a petition for review and a review hearing was held before the Attorney Discipline Board. On March 30, 2001, the Board issued an order affirming the hearing panel's order of suspension. On April 20, 2001, the respondent filed an application for leave to appeal with the Supreme Court. On August 28, 2001, the Supreme Court denied respondent's application for leave to appeal and stayed the effective date of discipline for 21 days. Costs were assessed in the amount of \$1,415.21.

January 27, 2010

140202

In re:

HON. BRENDA K. SANDERS
Judge, 36th District Court.

SC: 140202
RFI Nos. 2008-17918
2008-17919

The Judicial Tenure Commission has issued a Decision and Recommendation, to which the respondent, 36th District Court Judge Brenda K. Sanders, consents. It is accompanied by a settlement agreement, in which the respondent waived her rights, stipulated to findings of fact and conclusions of law, and consented to a sanction that would be no less than a public censure and no greater than a public censure and a 42-day suspension without pay.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

[E]verything else being equal:

- (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
- (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
- (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
- (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
- (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
- (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just

result in such a case, is more serious than misconduct that merely delays such discovery;

(7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the following stipulated findings of fact of the Judicial Tenure Commission, which, following our de novo review, we adopt as our own:

1. Respondent is, and at all material times was, a judge of or a judicial candidate for, the 36th District Court in Detroit, Michigan.
2. As a judge, and as a candidate for a judge, Respondent is subject to all the duties and responsibilities the Michigan Supreme Court imposed on her, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.

Count I

Inappropriate Political Activity While a Judge or Judicial Candidate

3. On November 4, 2008, Respondent was elected to the position of judge of the 36th District Court for a six-year term that began January 1, 2009.
4. On December 8, 2008, Respondent signed the Oath of Office for Judge of the 36th District Court.
5. While she was still a candidate for judge, Respondent also filed to run for Mayor of Detroit in a special nonpartisan Detroit mayoral primary to complete the term of former Mayor Kwame Kilpatrick.
6. After becoming a judge, Respondent remained a candidate on the ballot in the February 24, 2009 special primary.
7. According to campaign rules, Respondent was unable to timely remove her name from the ballot for the mayoral primary.
8. Notwithstanding having been elected to the position of judge, Respondent actively participated in certain campaign activities for the special February 24, 2009 primary.
9. On December 16, 2008, Respondent filed a Statement of Organization form for mayoral candidate committees which listed the name of her committee: "Committee to Elect Brenda K. Sanders for Mayor" and identified her as Treasurer and Designated Record Keeper.

10. Respondent completed a Metro Times questionnaire which appeared on January 28, 2009, in the Metro Times, a local newspaper, entitled "Detroit Mayoral Candidate Questionnaire: Brenda K. Sanders."

11. Respondent also appeared on "Flashpoint: Straight Talk from the Candidates," a televised commercial-free program in which she discussed her platform for mayor, which aired on Sunday, February 1, at 8:30 a.m., and which continued to be accessible to viewers on the station's web site, ClickOnDetroit.com.

12. Respondent campaigned as a judge during her televised campaign appearance as a mayoral candidate, referring to her "former" career as an attorney and her status as a "new face in our local government."

13. Respondent knew, or should have known, that as a judicial candidate and as a judge, she was and is subject to the rules governing political and campaign conduct as provided in Canon 7 of the Michigan Code of Judicial Conduct [MCJC] and the Michigan Constitution 1963, art 6.

Count II

Inappropriate Campaign Conduct/ Soliciting Contribution

14. On April 29, 2008, Respondent filed and signed a Statement of Organization Form for Candidate Committee, in which she identified herself, Brenda K. Sanders, as candidate for the position of 36th District Judge, as well as Treasurer and Designated Record Keeper.

15. On the form Respondent listed her own phone number, fax number, e-mail address, mailing and street address as the contacts for her committee.

16. On September 5, 2008, Respondent filed an Amended Schedule 1A – Itemized Contributions Form and Post Primary Campaign Finance Statements, which continued to list her as the Treasurer and Designated Record Keeper of her own campaign.

17. On her website, www.brendaksanders.com, Respondent solicited donations to her campaign of which she was manager and treasurer "Please send donations to The Committee to Elect Brenda K. Sanders," by check, PayPal or "Email Funds to Brendak1233@yahoo.com."

18. As a judicial candidate, Respondent knew or should have known that Canon 7B(2) of the Michigan Code of Judicial Conduct prohibits a candidate for judicial office from acting as treasurer or personally soliciting or accepting campaign funds.

19. As a judicial candidate, and as stated in the Candidate Committee Manual, Respondent knew or should have known that a judicial candidate may not serve as a treasurer or record keeper of the candidate's committee.

20. As a judicial candidate, Respondent knew or should have known that the Bureau of Elections Campaign Financial Disclosure Information specifically provides that "Judicial Canons do not allow a judicial candidate to serve as their own treasurer."

We also adopt the Commission's conclusion that these facts demonstrate, by a preponderance of the evidence, that respondent breached the standards of judicial conduct and constituted misconduct in office, as defined by 1963 Mich Const, art 6, § 30, and MCR 9.205:

1. conduct in violation of 1963 Mich Const, art 6, § 21, which provides that a judge of a court of record shall be ineligible to be nominated for or elected to an elective office other than a judicial office during the period of his service and for one year thereafter;
2. failure to resign judicial office before becoming a candidate either in a party primary or in a general election for non-judicial office, in violation of Canon 7A(3);
3. failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to Canon 1;
4. making speeches on behalf of a non-judicial candidate (herself) or publicly endorsing a candidate for non-judicial office, in violation of Canon 7A(1)(b);
5. personal solicitation of campaign funds, in violation of Canon 7B(2)(a);
6. conduct involving impropriety and the appearance of impropriety, in violation of Canon 2A, which erodes public confidence in the judiciary;
7. conduct prejudicial to the administration of justice, in violation of MCR 9.104(A)(1);
8. conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2); and
9. conduct that violates the Michigan Rules of Professional Conduct, contrary to MCR 9.104(A)(4).

After reviewing the recommendation of the Judicial Tenure Commission, the settlement agreement, the standards set forth in *Brown*, and the above findings of fact and conclusions of law, we accept the recommendation of the Commission and ORDER that Honorable Brenda K. Sanders be publicly censured and suspended without pay for 21 days, effective 21 days after the date of this order. This order stands as our public censure.



Calvin R. Davis

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LAW OFFICE OF



DEC 16 2014

SCOTLAND
APPELLATE**TARA DAWN SHURLING, PA**

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December 16, 2014

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk
Post Office Box 11330
Columbia, South Carolina 29211-1330

Re: Tunzy Sanders, #255493 v. State of South Carolina; 2006-CP-06-106.

Dear Mr. Shearouse:

I recently received the Court's ruling on SCCID's request to conflict out of the above captioned appeal. I apologize for not writing the Court concerning this matter sooner. About a month ago I was out of work for a week with a bad virus. I no sooner got well than I caught the flu. I am just now getting back to work after two weeks out with the flu.

I enclose a copy of an affidavit of indigency executed by this client. I am sending the original to the Appellate Division of SCCID for their records.

Another matter has come up which I need to bring to the Court's attention. I was hired by this client's family and dealt primarily with his sister, Brenda Sanders. This client won an earlier direct appeal based on the trial court's exclusion of Ms. Sanders as one of her brother's lawyers. On retrial, Ms. Sanders was co-counsel for Mr. Sanders at a bench trial. Whether Mr. Sanders entered a knowing and voluntary waiver of his right to a jury trial was one of the key issues in this PCR action. At the time I was hired I was advised that Ms. Sanders was a judge with the 36th District Court in Detroit Michigan. I actually called her at her office on occasion, and she wrote me on her office letterhead at least once. I interviewed her carefully prior to the hearing in this case, and she appeared to candidly discuss with me what she recognized to be her oversights with regard to this decision in the trial court. I did not, as would be my usual practice, have a paralegal or investigator witness this interview. Given the fact that she was very forthright in acknowledging her errors and omissions, and the fact that she was a District Court Judge, I did not feel it was necessary.

At the PCR hearing held in this matter I was greatly surprised by the vague testimony given by Ms. Sanders, and by the fact that her testimony was not consistent with what she had previously told me. After the decision in the circuit court, I wrote the client and Ms. Sanders. She subsequently called my office on a day when I was not available. Apparently when my paralegal, Suzanne Graham, asked when I might return her call, she said, "anytime." My paralegal was shocked by this response because Ms.

The Honorable Daniel E. Shearouse
December 16, 2014
Page 2 of 3

Sanders had always been very difficult to reach by phone in the past. She had always cited her busy court schedule as the reason it was difficult to reach her by phone or have her return my calls in a timely manner. To her credit, my paralegal became suspicious of this response and proceeded to Google Ms. Sanders. I attach copies of what she found and gave to me. As the Court can see, Ms. Sanders has apparently been under investigation. These materials indicate that she was being investigated in a number of matters, and that her mental health had been called into question. As the Court will see, it has been reported that she was suspended without pay on December 9, 2014, and that on that same date, she apparently retired from the bench.

I am not certain how I should handle this issue. Inasmuch as I did not become aware of these matters until after the ruling in the current PCR action, I have considered that I could simply file another PCR on this client's behalf pursuant to S. C. Code Ann. § 17-27-45(C). It would however seem to be a waste of judicial resources to have the current PCR appeal heard in light of these revelations. Also, I am not certain I could file another PCR Application while the current appeal is pending, and if I wait until after the PCR appeal, his one year under § 17-27-45 (C) might be deemed to have run.

I am currently trying to determine what official records I can get access to regarding the investigation in Michigan. When I get as much documentation as I can concerning this matter, I intend to ask that the PCR appeal be stayed and that I, as circuit court counsel, be granted leave to file a motion in the lower court asking that this PCR be reopened for further hearing in light of these discoveries. If, as the material enclosed indicates, Ms. Sanders is suspected of having paranoid delusions, I don't think I, as an officer of the Court, can ignore this development. This factor, coupled with the fact that she may have been under investigation at the time of the PCR hearing held in this case, may have impacted her testimony in this case. I hasten to point out, lest I be accused of slandering Ms. Sanders, that I have no first hand knowledge concerning these matters. I make absolutely no representations concerning the truth of any of the matters reported herein.

If this in any way alters the Court's view concerning the request by SCCID to conflict out of this PCR appeal, I will certainly understand. While I am not asking to be court-appointed in this matter, I always serve at the pleasure of the Court and would, of course, be willing to handle the appeal if the Court were to decide it is best for me to do so. If not, I will ask appellate counsel, at SCCID, to consent to my request for a stay and leave to file a motion in the circuit court. I have already discussed this unusual situation with Bob Dudeck at SCCID, and opposing counsel at the Office of the Attorney General. I am copying each of them on this correspondence.

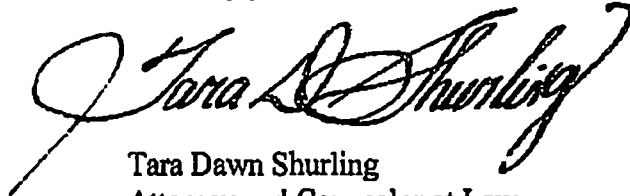
One last thing; I have not yet discussed these new revelations with my client. Given the sensitive nature of these issues, I prefer not to do so by mail. For this reason, I am not copying him on this correspondence. I will go see him as soon as I can, and will advise the Court immediately if he were to direct me not to pursue this issue. Given the fact that this is a murder case, with a sentence of life without parole, I can't imagine that he would not want me to pursue this issue.

I will advise the Court of the status of my investigation as soon as possible. Unfortunately, due to the holidays, it may be after the first of the year before I can obtain the information I need. For now, I appreciate the Court's time in considering this lengthy letter.

The Honorable Daniel E. Shearouse
December 16, 2014
Page 3 of 3

With my wishes for you and your staff to have a very Merry Christmas, I remain,

Sincerely yours,

A handwritten signature in black ink, reading "Tara Dawn Shurling". The signature is fluid and cursive, with the first name "Tara" being more prominent and the last name "Shurling" following in a similar style.

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg

Enclosures

cc: Robert Michael Dudek, Chief Attorney, Appellate Division of SCCID (w/enclosures) ✓
David Spencer, Assistant Attorney General (w/enclosures)
Daniel Gourley, Assistant Attorney General

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. BRENDA K. SANDERS
Judge, 36th District Court
421 Madison Avenue
Detroit, Michigan 48226

Formal Complaint No. 95

DECISION AND RECOMMENDATION FOR DISCIPLINE

At a session of the Michigan Judicial
Tenure Commission held on March 16,
2015, in the City of Detroit

PRESENT:

Hon. David H. Sawyer, Chairperson
Hon. Pablo Cortes, Vice-Chairperson
Hon. Nancy J. Diehl, Secretary
Hon. Monte J. Burmeister
David T. Fischer
Hon. Nanci J. Grant
Hon. Michael M. Hathaway
Thomas J. Ryan, Esq.
Melissa B. Spickler

I. Introduction

The Judicial Tenure Commission of the State of Michigan ("Commission") files this recommendation for discipline against Hon. Brenda K. Sanders ("Respondent"), who at all material times was a judge of the 36th District Court ("the Court") in the City of Detroit, State of Michigan. This action is taken

pursuant to the authority of the Commission under Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.203.

On or about January 6, 2015, the Commission received findings of fact and conclusions of law from the Master appointed by the Supreme Court to hear evidence in this matter. Having reviewed relevant portions of the hearing transcript, the exhibits, and the Master's report, and having considered the oral arguments of counsel, the Commission concludes, as did the Master, that the Examiner has established by a preponderance of the evidence that Respondent has a mental disability that prevents the performance of her judicial duties. The Commission further concludes that Respondent has committed misconduct in office by failing to cooperate with the Commission in its investigation and by making intentional misrepresentations to the Commission and to others.

For the reasons set forth herein, the Commission recommends that the Supreme Court remove Respondent from the office of judge of the 36th District Court on the basis of her mental disability and judicial misconduct. The Commission further recommends that Respondent be prohibited from seeking judicial office until she demonstrates that she no longer suffers from a mental disability that prevents the performance of judicial duties. In addition, the Commission recommends that the Supreme Court order Respondent to pay costs, fees, and expenses in the amount of \$19,852.34, pursuant to MCR 9.205(B), based

on her intentional misrepresentations and her misleading statements made to the Commission.

II. Procedural Background

On or about September 9, 2014, the Commission filed a Formal Complaint against Respondent, alleging (1) lack of mental fitness, (2) fraud in securing a long-term leave of absence, (3) failure to cooperate with the Commission, and (4) misrepresentations. Along with the Formal Complaint, the Commission filed a Supplemental Petition for Interim Suspension Without Pay, requesting that Respondent immediately be suspended without pay on the basis that she fraudulently obtained a leave of absence from her employment.

In March, 2014, pursuant to MCR 9.207(E), the Commission requested that Respondent submit to independent medical examinations (IMEs) with a psychiatrist, Dr. Norman S. Miller, and an orthopedic surgeon, Dr. Stephen Mendelson. On July 17, 2014, after Respondent failed to cooperate to schedule the psychiatric IME, the Michigan Supreme Court issued an order directing the Commission to schedule an IME within 30 days for the purpose of determining whether Respondent suffered from any psychiatric disorders and whether Respondent lacked the requisite fitness to serve as a judge. The order required that Respondent cooperate with the psychiatrist and that she provide information that the psychiatrist reasonably requested.

On September 18, 2014, the Michigan Supreme Court suspended Respondent without pay “until such time as she shows cause why she should not be held in contempt for failing to obey the July 17, 2014, order of this Court to cooperate with the independent medical examiner and provide such information as the independent medical examiner shall reasonably request.”

In October, 2014, the Commission filed an Amended Formal Complaint, making only minor changes to the Amended Complaint. Thereafter, the Michigan Supreme Court appointed Hon. Michael F. Sapala as Master, to conduct a public hearing on the allegations in the Amended Formal Complaint. The Master held a public hearing on December 8, 9, and 10, 2014. Respondent did not appear at the public hearing. In the Master’s Findings of Fact and Conclusions of Law, issued on January 6, 2015, the Master concluded that the Examiner proved each count of the Amended Formal Complaint by a preponderance of the evidence. The Commission heard objections to the Master’s report at a hearing held on February 9, 2015.

III. Standard of Proof

The standard of proof applicable in judicial disciplinary matters is the preponderance of the evidence standard. *In re Ferrara*, 458 Mich 350, 360; 582 NW2d 817 (1998). The Examiner bears the burden of proving the allegations in the Complaint. MCR 9.211(A). The Commission reviews the Master’s findings de

novo. *In re Chrzanowski*, 465 Mich 468, 480-481; 636 NW2d 758 (2001). Although the Commission is not required to accept to the Master's findings of fact, it may appropriately recognize and defer to the Master's superior ability to observe the witnesses' demeanor and comment on their credibility. Cf. *In re Lloyd*, 424 Mich 514, 535; 384 NW2d 9 (1986).

IV. Findings of Fact

The Commission adopts the Master's findings of fact. The following findings provide the basis for our conclusion regarding the appropriate sanction.

In September, 2013, Respondent requested a medical leave of absence from the 36th District Court, indicating that she was 100% disabled by "infirmity in both my right and left knees." Respondent's request further indicated that two surgeries on her knees were imminent, and that she would know the dates for the surgeries by October 1, 2013. On the basis of Respondent's representations, Judge Nancy Blount, chief judge of the 36th District Court, granted Respondent's request for a paid medical leave of absence, effective September 20, 2013. Respondent never informed Judge Blount of the dates for the surgeries and, in fact, no surgeries were ever performed.

On or about December 20, 2013, Respondent sent a letter to U.S. Attorney Barbara McQuade, requesting an investigation into certain events that occurred at the 36th District Court. Among other allegations in the letter, Respondent alleged

(1) that two judges “suddenly died under suspicious circumstances in the last two years¹ . . . because they spoke out against some of the wrongs that were being committed at the court,” (2) that a newspaper tried to name her as a suspect in the deaths, (3) that the Republican Party and the Michigan Supreme Court were involved in having her evicted from her residence, (4) that the Michigan Supreme Court and the Judicial Tenure Commission had been engaged in a constant attempt to slander and defame her name, (5) that she had been “medically harmed” because her doctors had been influenced by her employer, and (6) that her “e-mail accounts, bank accounts, cell phones, etc. have been hacked and are currently being tracked.” Respondent also noted that she feared for her safety, that she possessed a concealed weapon permit, and that she legally carried a weapon. On January 21, 2014, on the basis of safety concerns arising out of Respondent’s letter to the U.S. Attorney’s Office, the 36th District Court placed Respondent on paid administrative leave.

In March, 2014, pursuant to MCR 9.207(E), the Commission requested that Respondent submit to an independent medical examination (IME) with an orthopedic expert, Dr. Stephen Mendelson. Dr. Mendelson performed an IME on May 22, 2014. Dr. Mendelson concluded that Respondent suffered from

¹ As noted by the Master, Respondent appears to be referring to the deaths of Judge Willie Lipscomb, who died as a result of an accident, and Judge George Chatman, who died as the result of an apparent suicide.

“[b]ilateral degenerative arthritis of knees,” but that Respondent did not have an orthopedic condition that required absence from work. Dr. Mendelson noted that knee replacements were a reasonable option to treat Respondent’s condition, but not a necessity.

In March, 2014, the Commission also requested that Respondent submit to an independent mental examination (IME) by Dr. Norman S. Miller, a board-certified psychiatrist. Dr. Miller was available to conduct the examination on eleven different dates between April and June, 2014. Three dates were scheduled for the examination – April 10, June 4, and June 12, 2014. The evidence showed that Respondent was aware of the dates. Respondent failed to appear for any of the three scheduled appointments with Dr. Miller.

On July 17, 2014, the Michigan Supreme Court ordered that Respondent undergo an IME with a psychiatrist within 30 days. In violation of the Supreme Court’s order, Respondent failed to cooperate to schedule the psychiatric IME. As a result, Dr. Miller was unable to personally interview Respondent. Nevertheless, after reviewing Respondent’s December 20, 2013, letter to the U.S. Attorney, numerous e-mails sent by Respondent, medical records, and other documents, Dr. Miller concluded that Respondent suffered from a psychotic disorder, manifested by delusional ideation. Dr. Miller further concluded that, due to her delusions, Respondent could not interpret reality correctly and could not make rational

decisions. Dr. Miller opined that Respondent's "insight and judgment are too impaired because of her delusions, to render opinions not only in court but elsewhere, but particularly in court as a judge."

In addition to the conduct noted above, the evidence showed, and the Master concluded, that Respondent made the following intentional misrepresentations:

- a. In her July 3, 2014 Answer to the Commission's Petition for Interim Suspension, Respondent falsely stated that she was never instructed to bring her medical records to the March 31, 2014 examination with Dr. Mendelson.
- b. In her July 22, 2014 Answer to the Commission's 28-day letter, Respondent falsely stated that she provided Dr. Mendelson with the requested medical records on March 31, and that she did not know why the March 31, 2014 examination was not performed on that date.
- c. In her Amended Answer to the Amended Formal Complaint,² Respondent falsely stated that the March 31, 2014 examination with Dr. Mendelson was cancelled "because it was not clear to Dr. Mendelson's office as to what party was paying for the examination."
- d. In her Amended Answer to the Amended Formal Complaint, Respondent falsely stated that she appeared for an examination with Dr. Mendelson on April 17, 2014.
- e. In her July 22, 2014 Answer to the Commission's 28-day letter, Respondent falsely stated that she could not attend the April 10, 2014 examination with Dr. Miller because she had knee surgery scheduled for that date.
- f. In September, 2013, Respondent falsely told her employer that she required a long-term medical leave of absence due to imminent knee surgeries.

² Contrary to MCR 9.209(B), Respondent's Amended Answer to the Amended Formal Complaint was not verified, and was signed only by her attorney.

- g. Respondent filed a motion in the U.S. District Court for the Eastern District of Michigan for an emergency stay of proceedings in a summary proceedings case against her. In the motion, Respondent falsely stated that she was “scheduled to be recovering in the hospital” when her eviction was scheduled to be executed.
- h. On or about January 14, 2014, Respondent filed a Motion for Installment Payments in a summary proceedings action against her in the 36th District Court.³ In the motion, Respondent falsely claimed that she was “expecting to have two immediate surgeries.”

V. Conclusions of Law

The Commission concludes that the Examiner has established by a preponderance of the evidence that Respondent suffers from a mental disability that prevents the performance of her judicial duties, as set forth in Count I of the Amended Formal Complaint. Mich Const 1963, art VI, §30; MCR 9.205(B). This conclusion is supported by Dr. Norman Miller’s opinion that Respondent suffers from a psychotic disorder that affects her ability to interpret reality and make rational judgments.

The Commission is not persuaded that the Examiner established by a preponderance of the evidence that Respondent’s conduct in securing the leave of absence from her employment amounted to fraud, as alleged in Count II of the Amended Formal Complaint. The Commission does not disagree with the

³ In 2012, the summary proceedings action was reassigned to Judge Zelenak in the 25th District Court.

Master's factual finding that Respondent intentionally misrepresented the reason for her leave of absence request, but concludes, on the basis of its finding that Respondent suffered from disabling mental illness throughout the time she was on leave, that the facts did not support a finding of fraud.

Finally, the Commission concludes that the Examiner has established by a preponderance of the evidence a factual basis for the allegations set forth in Counts III and IV of the Amended Formal Complaint. A preponderance of the evidence at the formal hearing showed that Respondent failed to cooperate with the Commission in its investigation, and that Respondent made intentional misrepresentations to the Commission, to her employer, and to courts in which she was involved in litigation.

Respondent's conduct breached the standards of judicial conduct, and she is responsible for the following:

- a. Mental disability that prevents the performance of judicial duties, Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205(B);
- b. Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;
- c. Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;

- d. Failure to establish, maintain, enforce, and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to MCJC, Canon 1;
- e. Irresponsible or improper conduct that erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;
- f. Conduct involving impropriety and appearance of impropriety, contrary to MCJC, Canon 2A;
- g. Failure to respect and observe the law and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary contrary to the Code of Judicial Conduct, Canon 2B;
- h. Conduct that is contrary to justice, ethics, honesty or good morals, contrary to MCR 9.104(3);
- i. Conduct that violates the standards or rules of professional conduct adopted by the Supreme Court, contrary to MCR 9.104(4);
- j. Conduct that is prejudicial to the proper administration of justice, in violation of MCR 9.104(1);
- k. Conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2);
- l. Failure to submit to a mental examination requested by the Commission and ordered by the Michigan Supreme Court, in violation of MCR 9.207(E).

VI. Disciplinary Analysis

On the basis of the Commission's conclusion that Respondent suffers from a mental disability that prevents the performance of her judicial duties, the

Commission recommends that Respondent be removed from judicial office. The Commission recommends that the removal be effective September 18, 2014, the date of the interim suspension, through the balance of the term of office to which Respondent was elected in November, 2014. The Commission further recommends that Respondent be prohibited from seeking judicial office until she demonstrates that she no longer suffers from a mental disability that prevents the performance of judicial duties.

In considering a sanction for Respondent's misconduct in office, the Commission appreciates the difficulties associated with mental illness and recognizes that Respondent's mental illness may have been an underlying factor in the misconduct discussed above. Nevertheless, the Commission is charged with preserving the integrity of the judicial system and the public's confidence in the courts. On the basis of the evidence that Respondent has committed misconduct in office by failing to cooperate with the Commission and by making intentional misrepresentations to the Commission, to her employer, and to courts in which she was involved in litigation, the Commission offers the following evaluation of the factors set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999), for assessing proposed sanctions for such misconduct.

A. The *Brown* Factors

- (1) ***Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.***

The evidence revealed a pattern of dishonesty. The evidence showed that Respondent secured a leave of absence from work on the basis of false representations that she was physically disabled from working and that she was to have imminent surgeries. In addition, the evidence showed that Respondent made intentional misrepresentations to the Commission in her Answer to the Amended Formal Complaint. Respondent also made false statements in motions she filed in courts in the 36th District Court and the bankruptcy court. Respondent's pattern of making false statements in judicial proceedings weighs in favor of a more severe sanction.

(2) *Misconduct on the bench is usually more serious than the same misconduct off the bench.*

The evidence did not show that Respondent engaged in misconduct on the bench. Therefore, this factor does not weigh in favor of a more severe sanction.

(3) *Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.*

Respondent ignored the Michigan Supreme Court's order requiring her to submit to a psychiatric IME, which prevented the independent psychiatrist from personally interviewing her. In addition, Respondent made intentional misrepresentations that prejudiced the actual administration of justice in this case and in others. Respondent's pattern of making false statements in judicial

proceedings for the purpose of prejudicing the administration of justice weighs in favor of a more severe sanction.

- (4) *Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.*

As discussed above, Respondent's misconduct implicated the actual administration of justice in this case and in other judicial proceedings in which Respondent was a party.

- (5) *Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.*

The evidence showed that Respondent engaged in premeditated and deliberate misconduct. While mental illness may have been an underlying factor, Respondent deliberately made misrepresentations for the purpose of securing some advantage – whether it be a paid medical leave of absence from her employment, a delay in the IMEs requested in this proceeding, or a stay in eviction proceedings. This factor weighs in favor of a more serious sanction.

- (6) *Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.*

Respondent's failure to comply with the Michigan Supreme Court's order requiring her to submit to a psychiatric IME prevented the independent psychiatrist from personally interviewing her for his evaluation. Respondent's

misrepresentations obstructed the discovery of the truth in the cases in which they were made. This factor weighs in favor of a more serious sanction.

- (7) *Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.*

The evidence does not show that Respondent's actions caused the unequal application of justice on the basis of a class of citizenship. Accordingly, this factor does not weigh in favor of a more severe sanction.

In sum, our consideration of the totality of all seven *Brown* factors weighs in support of the imposition of a more severe sanction.

B. The Basis for the Level of Discipline and Proportionality

In determining an appropriate sanction in this matter, the Commission is mindful of the Michigan Supreme Court's call for "proportionality" based on comparable conduct. Based on the facts, the Commission believes that removal from office is an appropriate and proportional sanction for Respondent's misconduct.

The primary concern in determining an appropriate sanction is to "restore and maintain the dignity and impartiality of the judiciary and protect the public." *In re Ferrara*, 458 Mich 350, 372, 582 NW2d 817 (1998). Respondent's misconduct included making misrepresentations to the Commission, to her

employer, and to courts in which she was involved in litigation. Dishonesty in these circumstances erodes the public's confidence in the judiciary. See *In re Noecker*, 472 Mich 1, 13; 691 NW2d 440 (2005) ("Central to our decision to remove respondent is our conclusion that respondent misled the police, the public, and the JTC about his drinking on March 12, 2003.") Therefore, the Commission concludes Respondent's misconduct warrants removal from judicial office.

VII. Assessment of Costs, Fees, and Expenses

As noted, the Commission finds that Respondent made intentional misrepresentations and misleading statements to the Commission. Accordingly, the Commission requests that Respondent be ordered to pay the costs, fees, and expenses incurred by the Commission in prosecuting the complaint. See MCR 9.205(B). The Examiner has submitted an affidavit showing costs, fees, and expenses incurred by the Commission in the amount of \$19,852.34. Therefore, the Commission requests an assessment of costs, fees, and expenses in the total amount of \$19,852.34.

VIII. Conclusion and Recommendation

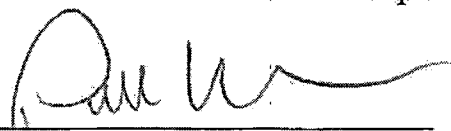
The Commission concludes that Respondent suffers from a mental disability that prevents the performance of her judicial duties. The Commission further concludes that Respondent committed misconduct in office.

On the basis of her mental disability and judicial misconduct, the Commission recommends that Respondent be removed from office, effective September 18, 2014, through the balance of the term for which she was elected in November, 2014. The Commission further recommends that Respondent not be permitted to seek judicial office until she demonstrates that she no longer suffers from a mental disability that prevents the performance of judicial duties.

In addition, on the basis of the Commission's findings that Respondent made intentional misrepresentations and misleading statements to the Commission, the Commission recommends that Respondent be ordered to pay an assessment of costs, fees, and expenses in the total amount of \$19,852.34.

JUDICIAL TENURE COMMISSION



HON. DAVID H. SAWYER
Chairperson

HON. PABLO CORTES
Vice-Chairperson

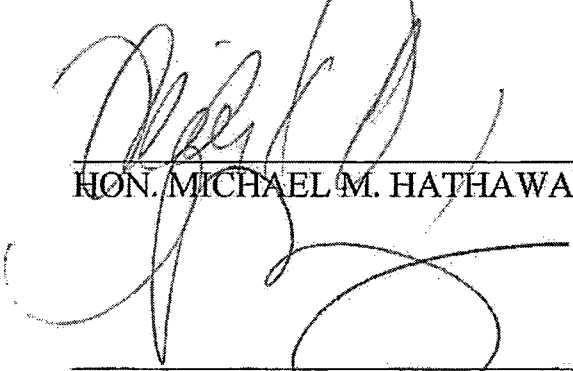
NANCY J. DIEHL, ESQ.
Secretary

HON. MONTE J. BURMEISTER

DAVID T. FISCHER

HON. Nanci J. GRANT

HON. MICHAEL M. HATHAWAY

THOMAS J. RYAN, ESQ.

MELISSA B. SPICKLER

Order

Michigan Supreme Court
Lansing, Michigan

July 1, 2015

Robert P. Young, Jr.,
Chief Justice

150039

Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein,
Justices

In re:

HONORABLE BRENDA K. SANDERS
Judge, 36th District Court
Detroit, Michigan

SC: 150039
JTC: Formal Complaint
No. 95

BEFORE THE JUDICIAL TENURE COMMISSION

On order of the Court, the Judicial Tenure Commission having issued a Decision and Recommendation, and the Respondent 36th District Court Judge Brenda K. Sanders having withdrawn her petition to reject or modify the Commission's Decision and Recommendation, we accept in part the recommendation of the Judicial Tenure Commission. With respect to Count I of the Formal Complaint, we accept the determination that the Respondent suffers from a mental disability that prevents the performance of her judicial duties. As a result, we ORDER that the Respondent be removed from office.

In December 2013, Respondent sent a letter to U.S. Attorney Barbara McQuade, requesting an investigation into certain events that occurred at the 36th District Court. She alleged that two judges had died under mysterious circumstances and that a newspaper tried to name her as a suspect in the deaths, that the Republican Party and this Court were involved in having her evicted from her residence, that this Court and the Judicial Tenure Commission had been engaged in a constant attempt to slander and defame her name, that she had been "medically harmed" because her doctors had been influenced by her employer, and that her "e-mail accounts, bank accounts, cell phones, etc. have been hacked and are currently being tracked." Respondent also noted that she feared for her safety, that she possessed a concealed weapon permit, and that she legally carried a weapon. Additionally, Respondent failed to cooperate in the scheduling of an independent psychiatric examination, including disobeying an order of this Court that she undergo such an examination. A board certified psychiatrist concluded that, due to her delusions, Respondent could not interpret reality correctly and could not make rational decisions. The psychiatrist opined that Respondent's "insight and judgment are too impaired because of her delusions, to render opinions not only in court but elsewhere, but particularly in court as a judge."

On that count, we adopt the conclusions of the Judicial Tenure Commission:

* * *

The Commission concludes that the Examiner has established by a preponderance of the evidence that Respondent suffers from a mental disability that prevents the performance of her judicial duties, as set forth in Count I of the Amended Formal Complaint. Mich Const 1963, art VI, §30; MCR 9.205(B). This conclusion is supported by Dr. Norman Miller's opinion that Respondent suffers from a psychotic disorder that affects her ability to interpret reality and make rational judgments.

* * *

Respondent's conduct breached the standards of judicial conduct, and she is responsible for the following:

- a. Mental disability that prevents the performance of judicial duties, Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205(B).

We also accept the determination that the Respondent committed misconduct as described in Counts III and IV of the Formal Complaint. As we conduct our de novo review of this matter, in particular the recommended sanction pertaining to the findings of misconduct, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000). We adopt the findings and conclusions of the Judicial Tenure Commission. Respondent at all relevant times was a judge of the 36th District Court. In September 2013 Respondent falsely told her employer that she required a long-term medical leave of absence due to imminent knee surgeries. Although the medical leave was granted, the surgeries were never performed. Respondent made numerous intentional misrepresentations to the Judicial Tenure Commission regarding her medical condition and efforts to treat it, including efforts to schedule an independent medical examination. She also made false statements to the Commission regarding the scheduling of an independent psychiatric examination. Respondent also made false statements in pleadings filed in federal court and in the 36th District Court.

The standards set forth in *Brown* are also being applied to the following conclusions of the Judicial Tenure Commission, which we adopt as our own:

[T]he Commission concludes that the Examiner has established by a preponderance of the evidence a factual basis for the allegations set forth in Counts III and IV of the Amended Formal Complaint. A preponderance of the evidence at the formal hearing showed that Respondent failed to cooperate with the Commission in its investigation, and that Respondent made intentional misrepresentations to the Commission, to her employer, and to courts in which she was involved in litigation.

Respondent's conduct breached the standards of judicial conduct, and she is responsible for the following:

* * *

- b. Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;
- c. Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205;
- d. Failure to establish, maintain, enforce, and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to MCJC, Canon 1;
- e. Irresponsible or improper conduct that erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;
- f. Conduct involving impropriety and appearance of impropriety, contrary to MCJC, Canon 2A;
- g. Failure to respect and observe the law and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary contrary to the Code of Judicial Conduct, Canon 2B;
- h. Conduct that is contrary to justice, ethics, honesty or good morals, contrary to MCR 9.104(3);
- i. Conduct that violates the standards or rules of professional conduct adopted by the Supreme Court, contrary to MCR 9.104(4);
- j. Conduct that is prejudicial to the proper administration of justice, in violation of MCR 9.104(1);

- k. Conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or-reproach, contrary to MCR 9.104(2);
- l. Failure to submit to a mental examination requested by the Commission and ordered by the Michigan Supreme Court, in violation of MCR 9.207(E).

After reviewing the recommendation of the Judicial Tenure Commission, the standards set forth in *Brown*, and the above findings and conclusions, we ORDER that for the misconduct described in Counts III and IV of the Formal Complaint, the Honorable Brenda K. Sanders be removed from office.

We also find that under the unique circumstances of this case an award of costs under MCR 9.205(B) would not be appropriate.



a0624

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 1, 2015


Clerk

WITNESSES

S.L.E.D. - Padgett

DOCKET NO. 98-GS-06- 180

The State of South Carolina

County of Barnwell

COURT OF GENERAL SESSIONS

July 20, Term 1998

ARREST WARRANT NUMBER

F 157090

THE STATE

vs.

Tunzy Sanders

ACTION OF GRAND JURY

True Bill

Dany Couch

Foreperson of Grand Jury
Date: July 20, 1998

7/20/98

VERDICT

Guilty

Indictment for

MURDER

SC Code 16-03-0010

CDR Code 116

Class FEL-EXM

Mary Holland

Foreperson of Petit Jury

Date: *January 14, 1999*

Guilty

J. Z. Ball Circuit Court Judge 2/08/01

STATE OF SOUTH CAROLINA)
)
COUNTY OF BARNWELL)

INDICTMENT

At a Court of General Sessions, convened on July 20, 1998 the
Grand Jurors of Barnwell County present upon their oath:

MURDER

That Tunzy Sanders did in Barnwell County on or about December 11, 1997, with
malice aforethought, kill one Minh Nguye Chapman by means of shooting the victim
with a pistol and said victim died as a result thereof, all in violation of Section 16-3-10,
South Carolina Code of Laws, (1976, as amended).

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


for BARBARA R. MORGAN SOLICITOR

105700 110. 123

WITNESSES

B.P.D. - Gantt

ARREST WARRANT NUMBER

DIRECT

ACTION OF GRAND JURY

True Bill

Ermit C. Olson

Foreperson of Grand Jury
Date: January 11, 1999

VERDICT

Guilty

Arion Bellard

Foreperson of Petit Jury
Date: January 14, 1999

Guilty 23. 11 24/99 Circuit Court House

DOCKET NO. 99-GS-06-078

The State of South Carolina

County of Barnwell

COURT OF GENERAL SESSIONS

January 11, TERM 1999

THE STATE

vs.

Tunzy Sanders

Indictment for

**ATTEMPTED ARMED OR
ALLEGED ROBBERY**

SC Code: 16-11-0330

CDR Code: 0026

Class FEL-C(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

DATE:

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

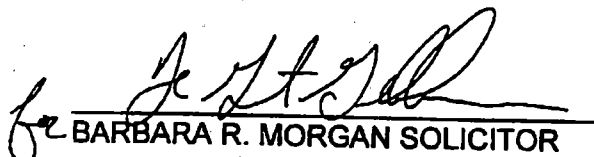
INDICTMENT

At a Court of General Sessions, convened on January 11, 1999 the Grand Jurors of Barnwell County present upon their oath:

ATTEMPTED ARMED OR ALLEGED ROBBERY

That Tunzy Sanders did in Barnwell County on or about December 11, 1997, while armed with a deadly weapon, attempt to feloniously take from the person or presence of Minh Chapman, by means of force or intimidation goods or monies of the China Express Restaurant, all in violation of §16-11-330, 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.


for BARBARA R. MORGAN SOLICITOR

WITNESSES

B.P.D. - Gantt

ARREST WARRANT NUMBER

DIRECT

ACTION OF GRAND JURY

TRUE BILL

Emmit C. Odum

Foreperson of Grand Jury

Date: January 11, 1999

VERDICT

Guilty

Drissy Pollard

Foreperson of Petit Jury

Date: January 14, 1999

Guilty

DR. L. L. Gantt (B.P.D.)

DOCKET NO. 99-GS-06-079

The State of South Carolina

County of Barnwell

COURT OF GENERAL SESSIONS

JANUARY 11, TERM 1999

THE STATE

vs.

TUNZY SANDERS

Indictment for

CRIMINAL CONSPIRACY

SC Code: 16-17-410

CDR Code: 049

Class FEL-F

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

DATE

STATE OF SOUTH CAROLINA)
COUNTY OF BARNWELL)

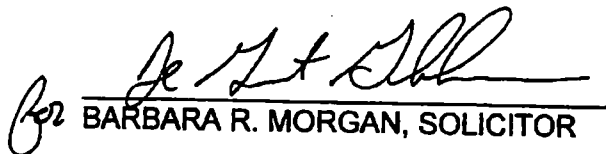
INDICTMENT

At a Court of General Sessions, convened on January 11, 1999 the Grand Jurors of Barnwell County present upon their oath:

CRIMINAL CONSPIRACY

That TUNZY SANDERS and MICHAEL P. BUCKMON and MAURICE BENNING did in Barnwell County, on or about December 11, 1997 unlawfully unite, combine, conspire, confederate, agree and have tacit understanding with each other and/or others for the purpose of committing the crime of Armed Robbery, in violation of Section 16-17-410, *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.


BARBARA R. MORGAN, SOLICITOR