

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Appeal from Greenville County  
John C. Hayes, III, Circuit Court Judge

---

DAVID STEVENSON BOYD, II,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002560

---

APPENDIX

---

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## Jury Charge

1       decide that the opinion of an expert witness is not  
2       based on sufficient education and experience or if  
3       you conclude that the reasons given in support of  
4       the opinion are not sound or that the opinion is  
5       outweighed by other evidence, you may disregard the  
6       opinion entirely. An expert witness' testimony is  
7       to be given no greater weight than that of other  
8       witnesses simply because the witness is an expert.  
9       Further, you are not required to except an expert's  
10      opinion even when it is not contradicted.

11           I instruct you and I emphasize that the fact  
12      that the defendant did not testify is not a factor  
13      to be considered by you in any way in your  
14      deliberation and in your consideration on the  
15      question of the guilt or innocence of the defendant.  
16      It must not be considered by you in any manner  
17      whatsoever. A defendant has the constitutional  
18      right to remain silent. The assertion of this right  
19      must not be considered by you in your deliberations.  
20      I repeat. Under your oath, you are to draw no  
21      conclusion whatsoever from the fact that the  
22      defendant did not testify in this case. The fact  
23      that the defendant did not testify should not even  
24      be discussed in the jury room. The burden of proof,  
25      as I stated it to you, is on the state. The

STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	Case No(s) : 2009GS2302385,
	)	2009GS2302386,
State of South Carolina,	)	2009GS2302388,
	)	2009GS2302389
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
David Stephenson Boyd, II	)	
	)	
Defendant.	)	

January 09-13, 2012  
 Greenville, South Carolina

**B E F O R E :**

**HONORABLE LETITIA H. VERDIN, Judge.**

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

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**Volume 3 of 3**

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Records are  
 taken and  
 produced via



Jury Charge

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1 defendant is not required to prove his innocence.  
2 The burden of proof remains on the State to prove  
3 guilty beyond a reasonable doubt.

4 An issue in this case is the identification of  
5 the defendant as the person who committed the crime  
6 charged. The State has the burden of proving  
7 identity beyond a reasonable doubt. You must be  
8 satisfied beyond a reasonable doubt of the accuracy  
9 of the identification of the defendant before you  
10 may convict the defendant.

11 Identification testimony is an expression of  
12 belief or an impression by a witness. You must  
13 determine the accuracy of the identification of the  
14 defendant. You must consider the believability of  
15 each identification witness in the same way as any  
16 other witness. You may consider whether the witness  
17 had an adequate opportunity to observe the offender  
18 at the time of the offense. This will be affected  
19 by things like how long or short a time was  
20 available, how far or close the witness was, the  
21 lighting conditions and whether the witness had the  
22 chance to see or know the person in the past.

23 Once again, I instruct you the burden of proof  
24 on the State extends to every element of the crime  
25 charged and this specifically includes the burden of

1 proving beyond a reasonable doubt the identity of  
2 the defendant as the person who committed the crime.  
3 If, after examining the testimony, you have a  
4 reasonable doubt as to the accuracy of the  
5 identification, you must find the defendant not  
6 guilty.

7 In order to establish criminal liability,  
8 criminal intent is required. For example, the  
9 mental state required to be proven by the State for  
10 a particular crime might be purpose, intent,  
11 knowledge, recklessness or criminal negligence.  
12 Criminal intent must be proven by the State beyond a  
13 reasonable doubt.

14 Criminal intent is always a matter that must be  
15 determined by the jury from the circumstances  
16 surrounding the situation. There is no way to prove  
17 criminal intent to a mathematical certainty. The  
18 law says that criminal intent may be inferred from  
19 the circumstances shown to have existed. This is  
20 how you make a determination of whether or not the  
21 element requiring intent was present. It is not  
22 necessary to establish intent by direct evidence.  
23 Intent may be established by inference in the same  
24 way as any other fact, by taking into consideration  
25 the acts of the parties and all the facts and

Jury Charge

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1 circumstances of the case.

2 Criminal intent is a mental state of conscious  
3 wrongdoing. It is up to you to determine that the  
4 defendant intended -- what the defendant intended to  
5 do based on the circumstances shown to have existed.  
6 Criminal intent can arise from action or failure to  
7 act. It may arise from negligence, recklessness or  
8 an indifference to duty or to consequences that is  
9 considered by the law to be the equivalent of  
10 criminal intent.

11 The defendant has been charged with Assault and  
12 Battery with Intent to Kill. In order to prove  
13 Assault and Battery with Intent to Kill, the State  
14 must prove beyond a reasonable doubt that the  
15 defendant committed an unlawful act of a violent  
16 nature to the person of another with malice  
17 aforethought. An assault occurs when a person  
18 unlawfully attempts or offers to commit a violent  
19 injury upon another person and had the present  
20 ability to complete the attempted injury. An  
21 assault is the intentional creation of reasonable  
22 fear of immediate bodily harm.

23 It is not necessary that the attempted injury  
24 or harm actually take place. For example, if I walk  
25 up to you and when we are within arm's reach, I draw

1 back to hit you, that is an assault. A battery is  
2 the unlawful touching of another person by a person  
3 who has committed the assault. An unlawful touching  
4 can be caused by a part of the accused's body or by  
5 any object that the accused puts in motion. A  
6 battery is the completion of the assault by using or  
7 applying force to another person, however slight, in  
8 a rude, angry or resentful manner without legal  
9 justification for doing so. Using my earlier  
10 example, if I carried the assault through by hitting  
11 you, then that is a battery.

12 Malice is hatred, ill-will or hostility towards  
13 another person. It is the intentional doing of a  
14 wrongful act without just cause or excuse and with  
15 an intent to inflict an injury or under  
16 circumstances that the law will infer an evil  
17 intent. Malice aforethought does not require that  
18 malice exist for any particular time before the act  
19 is committed. But malice must exist in the mind of  
20 the defendant just before and at the time the act is  
21 committed. Therefore, there must be a combination  
22 of the previous evil intent and the act.

23 Malice aforethought may be expressed or  
24 inferred. These terms, expressed and inferred, do  
25 not mean different kinds of malice, but merely the

## Jury Charge

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1 manner in which the malice may be shown to exist.  
2 That is either by direct evidence or by inference of  
3 the facts and circumstances which are proved.

4 Expressed malice is shown when a person speaks  
5 words which express hatred or ill-will for another  
6 or when a person prepared beforehand to do the act  
7 which was later accomplished. For example, lying in  
8 wait for a person or any other act of preparation  
9 going to show that the deed was within the  
10 defendant's mind would be expressed malice. Malice  
11 may be inferred from conduct showing total disregard  
12 for human life.

13 Inferred malice may also arise when the deed is  
14 done with a deadly weapon. A deadly weapon is any  
15 article, instrument or substance which is likely to  
16 cause death or great bodily harm. Whether an  
17 instrument has been used as a deadly weapon depends  
18 on the facts and circumstances of each case. The  
19 following are examples of instruments which may be  
20 deadly weapons: a pistol, a shotgun, a rifle, a  
21 dirk, a dagger, a knife, a slingshot, metal  
22 knuckles, a razor, gasoline, a fire bomb or Molotov  
23 cocktail and lighter fluid. Excuse me. A gun may  
24 be a deadly weapon even if it is not operating.

25 In order for you to find the defendant guilty

1 of Assault and Battery with Intent to Kill, you must  
2 be satisfied beyond a reasonable doubt that if the  
3 victim had died, the defendant would have been  
4 guilty of murder.

5 The defendant is charged with Armed Robbery.  
6 In order to prove this offense, the State must first  
7 prove beyond a reasonable doubt that the defendant  
8 took personal property from the person or presence  
9 of another person. Property is in the presence of a  
10 person if it is within the person's reach,  
11 inspection, observation or control so that the  
12 person could, if not overcome with violence or  
13 prevented by fear, keep possession of the property.

14 The State must also prove beyond a reasonable  
15 doubt that the defendant carried the property away  
16 intending to permanently deprive the owner of the  
17 property and to keep the property for the  
18 defendant's own use. The slightest removal of the  
19 property or the complete possession of the property,  
20 even for an instant, by the defendant is sufficient  
21 to show a taking and carrying away of the property.  
22 The taking and carrying away of the property must  
23 have been done with violence or by putting the owner  
24 of the property in fear of violence.

25 Finally, the State must prove beyond a

## Jury Charge

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1 reasonable doubt that the defendant was armed with a  
2 deadly weapon during the robbery. A deadly weapon  
3 is any article, instrument or substance which is  
4 likely to cause death or great bodily harm. Whether  
5 an instrument has been used as a deadly weapon  
6 depends on the facts and circumstances of each case.  
7 Again, the following are examples of instruments  
8 which may be deadly weapons: a pistol, a shotgun, a  
9 rifle, a dirk, a dagger, a knife, a slingshot, metal  
10 knuckles, a razor, gasoline, a fire bomb or Molotov  
11 cocktail and lighter fluid. A gun may be a deadly  
12 weapon even if it is not operating.

13 As to the charge of the -- excuse me. As to  
14 the charge of Armed Robbery, the defendant is  
15 charged with Possession of a Weapon during the  
16 Commission of or Attempt to Commit a Violent Crime.  
17 Armed Robbery is a violent crime. The State must  
18 prove beyond a reasonable doubt that the defendant  
19 was in possession of a firearm or visibly display  
20 what appeared to be a firearm during the commission  
21 of a violent crime. A firearm means any machine  
22 gun, automatic rifle, revolver, pistol or any weapon  
23 which is designed to or maybe readily converted to  
24 expel a projectile. In order to find the defendant  
25 guilty of possession of a weapon during the

1 commission of a violent crime, you must first find  
2 the defendant guilty of either committing a violent  
3 crime or attempting to commit a violent crime.

4 The defendant is charged with Receiving Stolen  
5 Goods. The State must prove beyond a reasonable  
6 doubt the defendant bought, received, or possessed  
7 goods, chattels or other property and the defendant  
8 knew or had reason to believe that the property was  
9 stolen. Whether the defendant knew or had reason to  
10 believe that the property was stolen may be shown by  
11 direct or circumstantial evidence. The State may  
12 prove that the defendant knew or had reason to  
13 believe that the property was stolen by showing that  
14 the defendant knew facts that would make a  
15 reasonable person believe that the property was  
16 stolen.

17 I will give you a copy of these instructions in  
18 written form. During your deliberations, you may  
19 refer to the instructions to guide your decision  
20 making. You must consider the instructions as a  
21 whole and not follow some and ignore others. Please  
22 return the instructions to the court at the time  
23 your verdict is rendered.

24 Ladies and Gentlemen, your verdict must be a  
25 unanimous one.

Jury Charge

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1           Mr. Foreperson, when the jury agrees on the  
2 verdict, you will fill out the verdict form provided  
3 and sign and date it. Then knock on the jury room  
4 door and inform the bailiff that you have reached a  
5 verdict. At that time, we will receive you back in  
6 the courtroom.

7           I ask that you will -- well, before I do that,  
8 I want to go over the verdict form briefly with you.  
9 You're going to have a verdict form with you in the  
10 jury deliberation room. I'm going to step down and  
11 speak to you about this verdict form. If I don't  
12 fall, we're in good shape.

13           All right. This is your verdict form on which  
14 your unanimous verdict will be written. There are  
15 three different questions here that you must answer.  
16 The first is as to Assault and Battery with Intent  
17 to Kill, you will either find the defendant not  
18 guilty or guilty and mark the same. As to the -- as  
19 to Armed Robbery and Possession of a Weapon during  
20 the Commission of a Violent Crime, you may find  
21 three different verdicts as to that. Not guilty of  
22 armed robbery, guilty of armed robbery but not in  
23 possession of a weapon during the commission of a  
24 violent crime or guilty of armed robbery and in  
25 possession of a weapon during the commission of a

1 violent crime. Your unanimous verdict will be the  
2 choice of one of those three. You will mark the  
3 same.

4 Finally, the third one as to the indictment for  
5 Possessing or Receiving Stolen Goods, you will find  
6 not guilty of possessing or receiving stolen goods  
7 or guilty of possessing or receiving stolen goods.  
8 Once you've reach a unanimous verdict, Mr.

9 Foreperson, you will sign and date it and, as I  
10 said, knock on the jury deliberation room door.

11 I'm going to ask that you now return to your  
12 jury room, but do not begin deliberations until you  
13 are told by the bailiff to do so. There are some  
14 brief matters I need to take up with the attorneys.  
15 One of them will be getting together all of our  
16 exhibits to make sure that you have them in the jury  
17 deliberation room. When you receive the verdict  
18 form and all of the exhibits and a copy of my  
19 charge, which I have signed on each page, then you  
20 will know that that is your signal to begin  
21 deliberations. Thank you.

22 (WHEREUPON, the jury exits at approximately  
23 11:40 a.m.)

24 THE COURT: All right. Any objection to my  
25 charge from the State?

Verdict

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1 MR. FRETWELL: No exception from the State.

2 THE COURT: All right. Anything from the  
3 defense?

4 MR. JOHNSON: No objection.

5 THE COURT: All right then. I'll ask that  
6 you all look at the exhibits, make sure we get  
7 together all the exhibits that need to go back to  
8 the jury deliberation room. Then I will give them a  
9 copy of the verdict form and my charge on the top.  
10 All right.

11 MR. JOHNSON: Thank you, Your Honor.

12 THE COURT: Thank you.

13 (WHEREUPON, jury deliberation is held from  
14 approximately 11:56 a.m. to 1:48 p.m.)

15 THE COURT: All right. It's my understanding  
16 that the jury's got a verdict. Let me -- before I  
17 bring the jury back in, let me just say, I know this  
18 is an emotional case all the way around. I say to  
19 anybody in the courtroom who thinks that they can't  
20 sit here and listen to this verdict, whatever this  
21 verdict may be, uh, and conduct yourself like you  
22 supposed to in a courtroom. If you think you can't,  
23 I'm going to go ahead and ask you to leave now. I  
24 say that to anybody.

25 Uh, but the last thing, this jury has been

1 intent and focused and listened to this evidence on  
2 both sides and I think has put a lot into it. The  
3 last thing they need from either side of the aisle  
4 here is to have any type of emotion or reaction to  
5 it. I'm just not going to permit that. I'm not  
6 going to permit the jury to be subjected to anything  
7 like that. All right.

8 (WHEREUPON, the jury enters at approximately  
9 1:51 p.m.)

10 THE COURT: All right. Mr. Foreperson, it's  
11 my understanding that you all have reached a  
12 verdict; is that correct?

13 THE JUROR: That's correct.

14 THE COURT: All right. Would you please hand  
15 the verdict form to the bailiff?

16 (WHEREUPON, the verdict form is passed up.)

17 THE COURT: My instructions back from the  
18 jury and we will mark those as a Court's exhibit.  
19 The verdict form appears to be in order.

20 Madam Clerk, will you publish it please.

21 THE CLERK: Your Honor, in the case of 2009-  
22 GS-21 -- excuse me, 23-9989, the State of South  
23 Carolina versus David Stephenson Boyd for Assault  
24 and Battery with Intent to Kill. We, the jury,  
25 unanimously find the defendant guilty of Assault and

Verdict

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1 Battery with Intent to Kill. Number two, as to  
2 Indictment 2009-GS-23-9988 for Armed Robbery and  
3 Possession of a Weapon during the Commission of a  
4 Violent Crime, we, the jury, unanimously find the  
5 defendant guilty of Armed Robbery and in Possession  
6 of a Weapon during the Commission of a Violent  
7 Crime. Number three, as to Indictment 2009-GS-23-  
8 1985 for Possessing or Receiving Stolen Goods, we,  
9 the jury, unanimously find the defendant guilty of  
10 Possessing or Receiving Stolen Goods. This signed  
11 by Mr. Gully, our foreman.

12 Ladies and Gentlemen of the jury, if you agree  
13 these are your verdicts you reached in your  
14 deliberation room, would you please raise your right  
15 hand.

16 (WHEREUPON, each juror responds.)

17 THE COURT: All right. Any matters we need  
18 to take up from the State before releasing the jury?

19 MR. FRETWELL: No, Your Honor.

20 THE COURT: All right. Anything from the  
21 defense before releasing the jury?

22 MR. JOHNSON: No, ma'am, Your Honor.

23 THE COURT: All right. Uh, Ladies and  
24 Gentlemen, I appreciate your service in this case.  
25 I'm going to step back to the jury deliberation room

1 to excuse you in just one moment. I'll ask you to  
2 please step back there with the bailiff at this  
3 point.

4 (WHEREUPON, the jury exits at approximately  
5 1:53 p.m.)

6 THE COURT: All right. Uh, we'll move next  
7 to the sentencing phase. As we get ready to do  
8 that, I'm going to step back and just release the  
9 jury. All right. I certainly do not discuss any  
10 matters with the jury. I just thank them for their  
11 service and let them go.

12 MR. JOHNSON: All right. Thank you.

13 THE COURT: I'll be right back in if y'all  
14 want to get ready for that.

15 (WHEREUPON, a short recess is taken.)

16 THE COURT: All right. Uh, well, I believe  
17 I've heard the facts thoroughly in this case.  
18 However, if there is anything else from the State  
19 including any prior criminal record, I'll be happy  
20 to hear from you.

21 MR. FRETWELL: Yes, Your Honor. May it  
22 please the Court?

23 THE COURT: Yes, sir.

24 MR. FRETWELL: Your Honor, first of all,  
25 Investigator Chris Miller is here on behalf of the

1 Sheriff's Office and would like to address the court  
2 very briefly on behalf of the Sheriff's Office.

3 THE COURT: Yes, sir.

4 MR. FRETWELL: Also --

5 THE COURT: Go ahead. No. Go ahead.

6 MR. FRETWELL: Your Honor, also, uh, I  
7 believe that the, uh, --Mr. Dill also wants to  
8 address the court at the appropriate time along with  
9 his wife, Tammy, just very briefly.

10 THE COURT: All right. Very well. All  
11 right.

12 Yes, sir.

13 INVESTIGATOR CHRIS MILLER: I would just like  
14 to say that, uh, this investigation took a lot of  
15 hours away from the sheriff's office, took a lot of,  
16 uh, deputies, put the community at bay, affected the  
17 community and just like the court to recognize the  
18 work that we put into this and what it cost.

19 THE COURT: Yes, sir. All right. And I  
20 thank you, sir, for being here and throughout the  
21 trial.

22 Mr. Dill?

23 MR. DAVID DILL: Uh, I just got a couple of  
24 things I want to say.

25 THE COURT: Yes, sir.

1           MR. DAVID DILL:     I just -- the guilty verdict  
2           just came back and basically proved that he's been a  
3           liability to society. On that day, I was just at  
4           Applebee's just to meet my fiancé at the time. All  
5           I was trying to do is a good deed, to be a good  
6           citizen at the time. I followed the van and on the  
7           phone with 911.

8                     It looked like to me everything was  
9           intentional. It was proven he was not on drugs. To  
10          me, everything was done intentionally. The van was  
11          stolen. And for me being shot, it had to be  
12          intentional. If somebody had been on drugs or  
13          something, you know, I could have sort of understood  
14          what led them to do it.

15                    But if it wasn't for David Weiner, I would be  
16          most likely dead today. Again, the sheriff's  
17          department did a great job. They treated me great.  
18          They took care of me. The FBI also did a good job.  
19          I'm not a good fan of lawyers, but he's good enough.  
20          Mr. Fretwell and Johnson both did a great job and  
21          took care of their clients. That's basically all I  
22          just wanted to say. I just, again, want to thank  
23          the Sheriff's Office and I want to thank the court  
24          and the jury for the verdict they came up with.

25                    I lost a lot of time with my family during that

1 year. I was very sick and in bed. I lost my job.  
2 I'm just now getting better. The last year, I've  
3 been sort of getting better. I'm going to be on  
4 medicine for the rest of my life for things that  
5 can't be fixed.

6 THE COURT: Yes, sir. I will say to you that  
7 I'm very thankful that the worst did not happen. I  
8 am very thankful that it did not happen. I think  
9 everyone who heard your testimony and heard the  
10 doctor's testimony understand that you're lucky to  
11 be here today. As you said, you were just trying to  
12 do the right thing.

13 In addition, Mr. Boyd is lucky that you are  
14 here today. Of course, he had no hand in the good  
15 turn out of this, but he's very lucky that you are  
16 here today as well. I thank you, sir, for being  
17 here. I've seen you throughout the trial. I thank  
18 you for being here throughout the trial.

19 Ma'am, will you tell me your name please?

20 MRS. TAMMY DILL: Tammy.

21 THE COURT: Tammy. All right. Yes, ma'am.

22 MRS. TAMMY DILL: I just want to go into a  
23 little bit about the kind of suffering that David  
24 has had since he got shot.

25 THE COURT: Yes, ma'am.

1           **MRS. TAMMY DILL:**    I held this man while he  
2           curled up into a fetal position because of anxiety  
3           of hearing rain, hearing thunder, being at a  
4           restaurant and looking out and seeing big windows  
5           because he was shot in a truck that had big windows,  
6           watch him have anxiety attacks so bad -- we've been  
7           sitting in church and the anxiety attacks hit him so  
8           bad that the preacher had to stop service and call  
9           the entire church to pray for him. This is just  
10          part of the recovery and the things that David has  
11          been through.

12                    He has an eight-year-old daughter that when we  
13           told her two weekends ago that her daddy had to go  
14           back to trial, went home and started having  
15           nightmares. All of this was totally unnecessary.  
16           We have had extensive testing... The man had never  
17           been sick. He tells me he didn't get sick until he  
18           met me and got shot. Had never been sick.

19                    I've had to walk him through the process  
20           because I'm a cancer survivor, this is how things  
21           have to be done, David. They are doing this to  
22           eliminate this to do this. They've had to check his  
23           heart. He's got permanent tachycardia. Was beating  
24           160 beats a minute until they could figure out that  
25           it was because of the nerve damage that that bullet

1 hit. Nothing wrong with his heart. He'll be on  
2 medicine the rest of his life. His sentence won't  
3 end. I pray that you just take that into  
4 consideration when you do give the sentence today.

5 **THE COURT:** Thank you, ma'am, for being here.  
6 I appreciate your words on behalf of your husband.  
7 Any prior record?

8 **MR. FRETWELL:** There is, Your Honor. Your  
9 Honor, there is a 2004 conviction for Receiving  
10 Stolen Goods greater than 1000, 2005 Burglary in the  
11 second degree and also Grand Larceny.

12 **THE COURT:** Armed Robbery carries a minimum  
13 of 10 years up to a maximum of 30 years. Is that  
14 correct?

15 **MR. FRETWELL:** That's correct, Your Honor.

16 **THE COURT:** And Assault and Battery with  
17 Intent to Kill carries 0 to 20; is that correct?

18 **MR. FRETWELL:** That's correct, Your Honor.

19 **THE COURT:** And Receiving Stolen Goods, that  
20 carries up to 10. It's indicted as a third property  
21 offense. That carries up to 10 years; is that  
22 correct?

23 **MR. FRETWELL:** That's correct, Your Honor.  
24 Just for the court and for the record, the 2004,  
25 2005 larceny charges are the predicate charges for

1           that particular charge:

2           **THE COURT:**     I see.

3           **MR. FRETWELL:**    It does carry 10 years, Your  
4           Honor.

5           **THE COURT:**    All right. All right. Mr.  
6           Johnson, I want to initially say that I don't think  
7           anybody could have argued more vigorously for their  
8           client or put up such a thoughtful defense as what  
9           you did. I will say that to you initially. I know  
10          that the trial did not turn out as you and your  
11          client had hoped, but I'll certainly hear from you  
12          as to sentencing.

13          **MR. JOHNSON:**    Thank you, Your Honor, both for  
14          the compliments and for hearing us out at this point  
15          in time. Uh, I guess this has gone on for quite a  
16          while. Throughout the whole thing, I can tell you  
17          that David has been nothing but pleasant with me.  
18          We both just worked towards getting his day in court  
19          for something that he has asserted he did not do.  
20          He's now asserted his right to trial and we respect  
21          the jury's decision at this point in time, Your  
22          Honor, and we just ask for the mercy of the court.  
23          We ask, of course, that I know in the past the  
24          concept suggested that -- to sum it up, we ask that  
25          you not hold against him his asserting his right to

1 have a trial.

2 THE COURT: Certainly not.

3 MR. JOHNSON: We ask for the mercy of the  
4 court. I've spoken with him. I do not know if  
5 there's anything he'd like to say. However, I  
6 think, throughout this trial, you heard a lot about  
7 what happened from various witnesses and things of  
8 that nature. We just, uh, ask you to consider those  
9 things. Going forward, we ask for the mercy of the  
10 court.

11 THE COURT: All right. I thank you, sir, for  
12 the words on behalf of your client. We did not  
13 discuss this earlier. Of course, I know today has  
14 been a busy day with closings and everything, but I  
15 will give you 10 days to file any motions certainly  
16 that you think are appropriate to file.

17 Mr. Boyd, is there anything you would like to  
18 say?

19 MR. BOYD: No, ma'am, not at this time.

20 THE COURT: Okay. I understand.

21 MR. FRETWELL: May it please the Court, Your  
22 Honor?

23 THE COURT: Yes, sir.

24 MR. FRETWELL: The defendant has been in jail  
25 since the arrest on December the 10th of 2008.

1           THE COURT:     Do you know approximately how  
2 long that is? December, that would be two years  
3 and --

4           MR. JOHNSON:     That's three years.

5           THE COURT:     Three years. I'm sorry. Wrong  
6 year.

7           MR. FRETWELL:    I believe if you will put his  
8 start date, he'll receive credit from the time that  
9 he began his incarceration. The Department of  
10 Corrections will calculate that.

11          THE COURT:     Tell me the date again.

12          MR. FRETWELL:    It's 12/10/2008.

13          THE COURT:     Okay. (Pause.)

14          Mr. Boyd, I think I've told you, in speaking to  
15 Mr. Dill, my feelings about this. And this is that  
16 but for -- uh, but for the lucky nature of the fact  
17 that Mr. Dill lived, you'd be standing here, uh, --  
18 you'd be facing much different charges. Much  
19 different charges. Uh, I do take into account  
20 although you do have some record it is not an  
21 extensive record. I do take into account that you  
22 are young. The most painful thing in the world is  
23 to sit here and sentence someone who is young, but I  
24 have to sentence you for what you did.

25          So far as the armed robbery is concerned, I'm

1 going to give you 20 years. I'll give you credit  
2 from December the 10th of 2008. That is consecutive  
3 to the Assault and Battery with Intent to Kill. I'm  
4 going to give you the maximum punishment on it. I  
5 believe that the circumstances of it are  
6 particularly egregious. 20 years and that is, as I  
7 said, consecutive to the armed robbery. Concurrent  
8 10 years and third property offense on the Receiving  
9 Stolen Goods and the Possession of a Weapon during a  
10 Violent Crime, five years and that is concurrent. I  
11 wish you to best of luck; sir.

12 Mr. Dill, I wish you continued recovery. All  
13 right. Thank you.

14 MR. FRETWELL: Thank you.

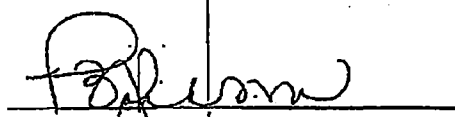
15 (WHEREUPON, the proceedings conclude at  
16 approximately 2:09 p.m.)

CERTIFICATE

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Greenville, South Carolina, on this 10th day of July, 2012.

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



Teresa B. Johnson  
Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 David Stevenson Boyd II (ID#: 00349271) )  
 Full name and prison number (if any) of Applicant, )  
 )  
 v. PAT: )  
 Debbie Butcher )  
 )  
 State of South Carolina )  
 )

IN THE COURT OF COMMON PLEAS

2014-CP-23- 05952

APPLICATION FOR

POST-CONVICTION RELIEF

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL W. WICKENSIMMER  
 2014 APR 30 PM 3 10

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Perry Correctional Institution, 430 Oaklawn Road, Pelzer, South Carolina 29669.
2. Name and location of Court which imposed sentence Greenville County, State of South Carolina, Court of General Sessions
3. Name(s) of co-defendant(s) (if any) NONE.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2009GS2302385
  - (b) 2009GS2302386
  - (c) 2009GS2302388
  - (d) 2009GS2302389

5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 2009GS2309988; ABWIK; 1-13-2012; 20 years CS (Credit Time Served from December 10, 2008)
- (b) 2009GS2309988 Armed Robbery; 1-13-2012; 20 years CS
- (c) 2009GS2309988; Possession of a weapon during a violent crime; 1-13-2012; 5 years CC
- (d) 2009GS2301985; Enhancement/property offense; 1-13-2012; 10 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (b) the result in each such Court to which you appealed:
- i. Denied
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. October 30, 2013
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

- (a) Ineffective assistance of Counsel
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

(a) Failure to call aliby witness:Failure to properly object to evidence submitted by the prosecution; Failure to fully investigate and obtain evidence.

- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

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

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

- (a) the specific nature thereof:
  - i. Ineffetive assistance of counsel
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. South Carolina Court of Appeals
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

iv. \_\_\_\_\_

(c) the disposition thereof:

i. Denied

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

(d) the date of each such disposition:

i. October 30, 2013

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

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

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

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

Yes

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

(a) which grounds have been presented:

i. ineffective assistance of counsel

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. Appeal

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

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

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

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

- (a) the name and address of each attorney who represented you:
  - i. Brian Johnson, 305 East North Street Suite 123, Greenville, SC 29601
  - ii. Brian Johnson, 305 East North Street Suite 123, Greenville, SC 29601
  - iii. Robert M. Pachak, South Carolina Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211-1589
- (b) the proceedings at which each such attorney represented you:
  - i. Trial
  - ii. Sentencing
  - iii. Appeal

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

Set aside my conviction and remand for a new trial.

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

No

STATE OF SOUTH CAROLINA )  
 )  
County of Greenville )

VERIFICATION

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

David Stevenson Boyd II

SWORN to and subscribed before me this \_\_\_\_\_  
day of October, 2014.

[Signature] (L.S.)  
Notary Public

My Commission Expires: 4-27-16

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2014-CP-23-5952
COUNTY OF GREENVILLE	)	
	)	
David Stevenson Boyd, II,	)	
S.C.D.C. No. 349271,	)	
	)	
Applicant,	)	
	)	<b>RETURN</b>
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed October 30, 2014, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the December 2009 term of General Sessions for possessing or receiving stolen goods (third property offense) (2009-GS-23-1985), armed robbery (2009-GS-23-9988, count 1), possession of a weapon during commission of a violent crime (2009-GS-23-9988, count 2), and assault and battery with intent to kill (ABWIK) (2009-GS-23-9989). Brian P. Johnson, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On January 13, 2012, the Honorable Letitia H. Verdin sentenced the Applicant to concurrent terms of 10 years for possessing or receiving stolen goods (third property offense), 20 years for armed robbery, 5 years for possession of a weapon during commission of a violent crime. Judge Verdin levied a

20 year sentence for ABWIK, which was to be consecutive to the armed robbery sentence.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders<sup>1</sup> brief. The Court of Appeals dismissed the appeal. State v. Boyd, Op. No. 2013-UP-401 (S.C. Ct. App. filed October 30, 2013). The Remittitur was sent on November 15, 2013.

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

## II.

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

1. Ineffective assistance of counsel.
  - a. Failure to call alibi witness.
  - b. Failure to properly object to evidence submitted by the prosecution.
  - c. Failure to fully investigate and obtain evidence.

## III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial

---

<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an

evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

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

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held on the issues raised in the PCR application.

Respectfully submitted,

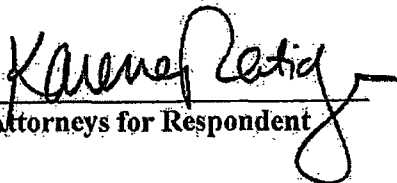
ALAN WILSON  
Attorney General

JOHN W. MCINTOSH  
Deputy Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General

P.O. Box 11549  
Columbia, S.C. 29211

By:

  
Attorneys for Respondent

March 30, 2015

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

2014-CP-23-5952

DAVID STEVENSON BOYD, II, 349271 )  
Applicant, )

vs )

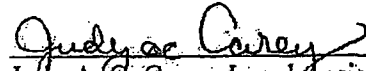
AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA, )  
Respondent. )

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

**Deborah J. Butcher, Esquire  
The Camden Law Firm, PA  
Post Office Box 610  
Camden SC 29021**

DATED this 30th day of March, 2015.

  
\_\_\_\_\_  
Judy A. Carey, Legal Assistant  
For Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

DAVID S. BOYD, II, )  
 )  
 APPLICANT, )  
 )  
 -VS- )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 RESPONDENT. )  
 \_\_\_\_\_ )

2014-CP-23-05952

TRANSCRIPT OF RECORD

DECEMBER 5, 2016  
GREENVILLE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN C. HAYES, III

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

ATTORNEY FOR APPLICANT:

R. MILLS ARIAIL, JR., ESQ.

ATTORNEY FOR RESPONDENT:

PATRICK SCHMECKPEPER  
ASSISTANT ATTORNEY GENERAL

SUSAN W. HUDGINS  
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
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1 (Whereupon court convened at 9:51 am)

2 **MR. SCHMECKPEPER:** Your Honor, may it please the Court?

3 **THE COURT:** Yes, Mr. Schmeckpeper.

4 **MR. SCHMECKPEPER:** This is David Boyd versus the State  
5 of South Carolina, 2014-CP-23-5952. The Applicant was  
6 indicted in December of 2009 for receiving stolen goods,  
7 armed robbery, possession of a weapon during the commission  
8 of a violent crime and assault and battery with intent to  
9 kill. He was represented by Brian Johnson.

10 The Applicant was found guilty following a jury trial.  
11 And on January 13th, 2012 Judge Verdin sentenced him to  
12 concurrent terms of ten years for possession -- for  
13 receiving stolen goods, twenty years for armed robbery, five  
14 years for possession of a weapon during the commission of a  
15 violent crime.

16 The Applicant was further sentenced to twenty years for  
17 armed robbery, for attempted murder or assault and battery  
18 with intent to kill. And that was to be -- that was set to  
19 be run consecutive to the armed robbery sentence.

20 Following a notice of appeal the Office of Appellate  
21 Defense perfected an Anders brief, which the Court of  
22 Appeals dismissed on October 30th, 2013. The remittitur was  
23 sent November 15th, 2013. This application was filed  
24 October 30th, 2014.

25 Your Honor, at this time I believe the Applicant has a

1 motion to make.

2 **THE COURT:** Okay.

3 **MR. ARIALL:** Your Honor, I represent Mr. Boyd in this  
4 matter. This case involves an armed robbery of a bank and a  
5 subsequent chase afterwards. There were some -- he had sent  
6 me a letter, I think, about the last week or so indicating  
7 he wanted to amend his PCR, gave me numerous issues he  
8 wanted to.

9 One of the issues is the bringing up of an alibi  
10 witness, which I had no knowledge of previous to this. I've  
11 asked him, give me the information in regards to it. He's  
12 notified me in the back right now there was an Amy Foster  
13 who he says is an alibi witness.

14 He doesn't have any contact information for her. He's  
15 never sent me her name prior to this or any contact  
16 information for her. I have not been able to inquire from  
17 Mr. Johnson or anybody as to who this individual is and what  
18 she may have to do with my investigation in regards to the  
19 case so that I can tell him whether or not she's going to be  
20 helpful or not.

21 And he says there was some indication that she was  
22 threatened with charges and didn't want to testify. So I  
23 clearly need to look into this before -- and he's raised  
24 this to me and wanted a continuance so that I could be able  
25 to discuss it with her.

1           He's also asked me to obtain the services of a dye pack  
2 expert, which I've got to go over with him whether or not we  
3 can do that, whether or not that's necessary. And it was my  
4 understanding, and I've got to discuss it with him, that  
5 there was testimony at trial through his own attorney  
6 regarding a dye pack expert from the FBI. So I've got to  
7 inquire as to whether or not we need that and be able to  
8 take the appropriate route with that.

9           Just based on those issues alone, and his request for  
10 that, he wants me to look at this alibi witness, I'm  
11 requesting a continuance. I think this is the first request  
12 I've made for a continuance on this. I got this case, I  
13 don't know how long ago, but I haven't asked for a  
14 continuance before on it, Your Honor.

15           **THE COURT:** Well, Mr. Schmeckpeper.

16           **MR. SCHMECKPEPER:** Your Honor, the State opposes a  
17 continuance. This case was filed in October 30th, 2014,  
18 over two years ago. This case came before Judge McMahon in,  
19 I believe, July of 2016. At that time he was represented by  
20 Debbie Butcher.

21           The Applicant made several of the same -- several  
22 complaints about Ms. Butcher saying he didn't want to go  
23 forward with her. Judge McMahon relieved Ms. Butcher at  
24 that time, and I think Mr. Ariail was appointed following  
25 that.



DAVID BOYD, II - DIRECT EXAMINATION BY MR. ARIAIL

8

1 A. All right.

2 Q. Good. I want to take you through a little bit of  
3 understanding about the background of this case so that we  
4 can get a little bit of understanding. Mr. Johnson  
5 represented you, is that correct?

6 A. Yes, sir.

7 Q. Okay. The charges as you've heard them, he represented  
8 on all those charges that you went to trial on, is that  
9 correct?

10 A. Yes, sir.

11 Q. Okay. Now, as part of your representation how long --  
12 when you were arrested for these charges did you get out on  
13 bond?

14 A. No, sir.

15 Q. Okay. So you were incarcerated the entire time?

16 A. Yes, sir.

17 Q. Okay. How long after you were incarcerated did he, I  
18 guess, did you have a discussion with him about your  
19 charges?

20 A. Throughout the first year of incarceration it was just  
21 mainly him gathering discovery material from the solicitor's  
22 office. It wasn't until late 2009, early 2010 that, you  
23 know, I guess the case was coming about as far as proceeding  
24 with a plea or a trial.

25 Q. Okay. So how many times did you think you talked to

DAVID BOYD, II - DIRECT EXAMINATION BY MR. ARIAIL

9

1 him about the case?

2 A. Prior to my first trial we discussed the case. We  
3 discussed my options prior to the first trial.

4 Q. Okay. But my question is how many times do you think  
5 you discussed this case with him?

6 A. I actually -- actually we had visitation with my  
7 previous attorney, had a visitation log. That's something  
8 else that I wanted to bring about to the Court's attention.  
9 But I actually had a visitation log. I know prior -- in  
10 between the first and second trial me and my trial attorney  
11 spoke once.

12 Q. Okay.

13 A. In between first trial.

14 Q. I'll ask again, how many times before your first trial  
15 did you and Mr. Johnson talk?

16 A. Before the first trial?

17 Q. Yes.

18 A. I can't give you a adequate number.

19 Q. You think it's five times?

20 A. Probably more than that the first time, yeah.

21 Q. Ten times?

22 A. I'm not going to say ten, but more than five.

23 Q. Okay. But during that time y'all discussed the  
24 evidence in your case, right?

25 A. Yes.

DAVID BOYD, II - DIRECT EXAMINATION BY MR. ARIAIL

10

1 Q. Okay. Did he go over what evidence the solicitor's  
2 office had and what they were potentially going to use  
3 against you at trial?

4 A. Right. To the first trial, yes.

5 Q. Okay. So did he tell you what offenses you were facing  
6 and what they had to prove?

7 A. Yes, sir.

8 Q. Okay. Did he tell you what the evidence was that they  
9 could use against you?

10 A. Yes, sir.

11 Q. Okay. Did he explain to you, you know, what the --  
12 what you were looking at time-wise and all that?

13 A. Yes, sir.

14 Q. Okay. Did y'all try to work out a plea deal or  
15 anything along those lines?

16 A. A plea was offered, but I was reluctant to accept the  
17 plea because the way I was told defense would play out.

18 Yeah.

19 Q. So say that again. I didn't understand ---

20 A. I was relying on a particular defense strategy, the  
21 reason why I declined a plea offer.

22 Q. Okay. So you -- explain that to me. I mean, y'all got  
23 a plea offer. What was your plea offer for?

24 A. I think the first plea offer was -- it wasn't a time,  
25 then it was from like eleven to thirteen, and if I declined,

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1 thirteen to sixteen if I'm correct.

2 Q. So you had multiple plea offers, I guess?

3 A. Yes, sir.

4 Q. Okay. So you decided to decline those, right?

5 A. Yes, sir.

6 Q. And what was the reason why you wanted to decline  
7 those?

8 A. I wanted to put -- I had a defense, you know. I had a  
9 defense that I wanted to be pursued. I had a defense.

10 Q. Okay. What was your defense?

11 A. I had multiple alibi witness. I wanted to rely on  
12 certain experts to testify favorable to me at trial and here  
13 today.

14 Q. Okay. So you had an expert you wanted to testify in  
15 regards to the dye pack? Is that what you wanted?

16 A. Yes, sir. At trial and today.

17 Q. All right. You had an expert to testify at trial,  
18 correct?

19 A. It was a State expert, yes, that was subpoenaed by my  
20 defense attorney.

21 Q. But your attorney called Jason Brewer, I think, to the  
22 stand to testify about the dye, is that correct?

23 A. Originally it was a State expert, yes.

24 Q. Okay. Now what I understand is one of your defenses,  
25 and that's why I want to go through a little bit of your

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1 strategy about this, which you discussed, but one of the  
2 defenses was you didn't have was an armed robbery at the  
3 bank and the dye -- a dye pack went off in a car and there  
4 were some allegations of whether that was on your hands or  
5 not, is that correct?

6 A. That's one of them, yes, sir.

7 Q. Okay. And you were basically calling an expert to be  
8 able to testify that there was no dye on your hands?

9 A. Not on my hands, but me also.

10 Q. Correct. In your clothes, on ---

11 A. Yes.

12 Q. --- your body, your person, all that?

13 A. Yes.

14 Q. Okay. Now, didn't Mr. Johnson call Mr. Brewer in your  
15 case?

16 A. Yeah, but Mr. Brewer was not employed through the dye  
17 pack company. He was just merely a State expert that wasn't  
18 subpoenaed for the second trial.

19 Q. Yeah, but he worked at the FBI, correct?

20 A. Yes.

21 Q. And he testified that he did numerous reports and there  
22 was no dye that they detected, correct?

23 A. Yes.

24 Q. Okay. So I'm trying to understand what you want Mr.  
25 Johnson to do in addition to showing that there was no dye

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1 in that.

2 A. There was different -- Mr. -- Jason Brewer and Donald  
3 Dickinson was two different type of experts.

4 Q. Okay.

5 A. You see, Jason Brewer was a State expert, like I say,  
6 that wasn't subpoenaed the same trial from the solicitor  
7 office, but he done solutions test and stuff like that at  
8 the request of the State. Donald Dickinson and Greg Lynch  
9 were 3SI security pack experts. They would testify they was  
10 experts in that aspect.

11 Q. Okay.

12 A. Jason Brewer couldn't testify to dye pack activation.  
13 He was only a expert to analyze -- analyze and do solution  
14 tests.

15 Q. Okay.

16 A. So it was a different type of expert. But he was  
17 subpoenaed through -- for the defense.

18 Q. Okay. So what I'm understanding you wanted was an  
19 expert to talk about dye pack activation?

20 A. Yes. A favorable -- a favorable defense expert.

21 Q. Okay. A favorable defense expert. And Mr. Lynch, did  
22 y'all -- was he one of those or did y'all discuss calling  
23 him?

24 A. Prior to the first trial -- prior to the first trial my  
25 trial attorney, Brian Johnson and Tom Hoskins, interviewed

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1 Greg Lynch through a telephone, interviewed by telephone on  
2 speaker phone.

3 Q. Okay.

4 A. It was my understanding that his testimony was  
5 favorable to me.

6 **THE COURT:** I hate to stop -- you wanted your expert to  
7 testify about dye pack ...

8 A. Activation.

9 **THE COURT:** Aggravation. Okay. Aggravation as to  
10 what?

11 **MR. ARIAIL:** He's saying activation.

12 A. Yeah.

13 **THE COURT:** Activation.

14 A. Activation, yeah.

15 **THE COURT:** Okay. Gotcha.

16 Q. That's what Mr. Lynch, you said, was going to testify  
17 as to when the dye pack activated or how it would happen  
18 when it activated, is that correct?

19 A. Yes.

20 Q. So did you discuss that with Mr. Johnson about calling  
21 him?

22 A. Well, actually he discussed it with me. During, like I  
23 say, with the second trial he wasn't subpoenaed through the  
24 State. So my attorney was to subpoena him for the second  
25 trial to give this favorable testimony.

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1 Q. Okay. So he wasn't -- did y'all discuss why he didn't  
2 want to subpoena him?

3 A. Yeah. Originally the reason was that he didn't want to  
4 lose closing arguments. You know, he wanted, you know, the  
5 State witness -- he wanted to retain the right to go last  
6 with closing argument.

7 Q. Okay. Now, and what I want to understand -- you've got  
8 numerous grounds that you've listed. And I want to work  
9 back through them. But that's one of the main things we've  
10 talked about was this expert testimony with regard to the  
11 dye pack. So what I'm understanding is you wanted someone  
12 called about dye pack activation. That's what you ---

13 A. At trial and today.

14 Q. At trial and today. Okay. And Mr. Johnson and you had  
15 a discussion. Did he say, well, I don't feel like, I mean,  
16 what was the basis -- I'm trying to understand what the  
17 basis was for not calling Mr. ---

18 A. From my understanding at the last minute Greg Lynch  
19 didn't respond well to a defense subpoena. I had no -- if  
20 he know his testimony would have helped me, I'm not sure,  
21 but I was told he didn't respond well to a defense subpoena.

22 Q. Okay. Now I'm going to work through -- you gave me a  
23 list of things that I have submitted. And I want to  
24 understand a little bit about it just to make sure -- you  
25 indicate there was some issue that you had in regards to the

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1 Jackson v. Denno hearing. What I understand is you had a  
2 first trial that ended in a mistrial.

3 A. Yes, sir.

4 Q. Okay. All of the previous rulings that were done in  
5 that trial were carried over ...

6 A. To the second trial.

7 Q. To the second trial.

8 A. Yes, sir.

9 Q. So I want to understand what you believe Mr. Johnson  
10 did in regards to the Jackson v. Denno hearing that was  
11 ineffective.

12 A. I was told -- I was told that because the trial ended  
13 in mistrial and the second trial was a new trial that my  
14 attorney was supposed to, you know, not demand, but request  
15 a new Jackson versus Denno hearing since it was a new trial.

16 Q. Okay. So you believe that -- and that's what I'm  
17 understanding that I know he consented to, if I'm not  
18 mistaken, to allow all the previous rulings to be -- in the  
19 first trial to be applicable to the second trial, is that  
20 correct?

21 A. Yes, but the trial judge during the second trial said  
22 she couldn't overrule a previous judge's rulings.

23 Q. Okay. What you're saying is and what I'm understanding  
24 is you think he should have objected and had a new Jackson  
25 v. Denno hearing?

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1 A. That's -- yes, sir.

2 Q. Okay. That's what your basis is. Do you think he  
3 should -- I mean, are you saying he should have done that  
4 for all rulings or ...

5 A. I think -- I think all rulings should have been, you  
6 know, debated further in the second trial.

7 Q. Okay. You sent me some stuff in regards to failure to  
8 object. And you said you [sic] should have requested a  
9 lesser included offense in regards to this case. What do  
10 you mean by -- what did you want ---

11 A. I was told that evidence presented that, you know,  
12 warrants a lesser included offense, then, you know, it  
13 should be, I guess, brought up, like made a motion or a jury  
14 charge. I'm not sure how to formulate that, but I was told  
15 ---

16 Q. Okay. You don't have any specific things that he could  
17 have asked for right now that you think he should have asked  
18 for on the charge?

19 A. Lesser included offense? Well, assault and battery  
20 with intent to kill to assault and battery high and  
21 aggravated.

22 Q. Okay. That's one right there. Okay.

23 A. Yes, sir.

24 Q. And you said I was never -- you indicated on the plea  
25 offer I was never advised to take the plea or go to trial.

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1 What do you mean by that?

2 A. Like I say, just from people, you know, trying to  
3 consult with you being incarcerated, whatever, I was told  
4 that, you know, as an attorney, well, they advocate for you.  
5 Like, they supposed to strongly advise you whether, you  
6 know, to take a plea or proceed to trial.

7 Q. But you said you turned down the plea because you  
8 didn't want it, is that right?

9 A. I turned down the plea because I thought I was going to  
10 proceed with a fair trial, you know, as far as testing the  
11 prosecution's case in chief and afforded my alibi witness,  
12 favorable defense, all that.

13 Q. Okay. So -- and I want to make sure I'm summarizing  
14 all this because I -- this is your one chance to be able to  
15 do this. And the one thing that we've talked about is that  
16 dye pack expert. Are there other things that you wanted Mr.  
17 Johnson to do or submit as part of the trial that he didn't  
18 do?

19 A. Say that -- can you say that one more time? My mind  
20 went everywhere.

21 Q. You've testified you wanted an expert in regard to dye  
22 pack activation.

23 A. Yes, sir.

24 Q. He didn't do that.

25 A. Yes, sir.

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1 Q. Are there other things that you asked him to do that he  
2 didn't do in your trial that you felt that he was  
3 ineffective?

4 A. I mean, it's actually a lot. It's multiple things, you  
5 know, that I really wanted to bring forth, you know, to the  
6 trial courts. Like, one example is, like, two doctors  
7 testified there was something red on my hand. You know, I  
8 don't know if you know the facts of the case. I was ---

9 Q. Right.

10 A. --- surrounded by officers from second -- from shooting  
11 to -- throughout the course of weeks, you know what I'm  
12 saying? I wanted Mr. Johnson just to ask any of the  
13 officers, any of the FBI, any of the SLED did they see  
14 anything red on my hands.

15 Q. Okay.

16 A. That's what I wanted to ask.

17 Q. And I read, I mean, I've gone through the transcript.  
18 I mean, there was a point in time where he indicates, I  
19 think, in closing argument that -- he said none of the  
20 doctors saw or had some issues seeing stuff on your hand.  
21 Do you remember that?

22 A. Say that again.

23 Q. I mean, when he says the doctors didn't see anything on  
24 your hand, I mean, he got some cross examination out in  
25 regards to that. Do you remember that?

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1 A. Yeah, but I wanted him to be more specific. I wanted a  
2 yes or no. Just a yes or no.

3 Q. Okay. But what I'm asking is did he go into and  
4 inquire about whether or not they saw the dye on your hands?

5 A. I don't know for sure. I don't know for sure. I know  
6 the -- the officer that handcuffed me asked did you handcuff  
7 him alluding to the fact that did he have the opportunity to  
8 see anything red on my hands. I know that, but like I said,  
9 I wanted a specific yes or no.

10 Q. Okay. So you wanted more specific ---

11 A. Yes or no.

12 Q. --- cross examination or ---

13 A. Any officer -- from any officer or anybody I came in  
14 contact with, I wanted just to ask a specific yes or no.  
15 Did they see anything red that wasn't consistent with blood  
16 on my hands?

17 Q. Okay. And that -- 'cause your theory of the case and I  
18 think one of the strategies was that there was no dye on you  
19 or on your hands?

20 A. Period.

21 Q. Period. Okay. And you -- so tell me -- I mean, I'm  
22 going through. You're saying he didn't cross examine or  
23 inquire about that dye enough. He also didn't call a dye  
24 pack activation expert. What other things do you want him  
25 to do to be able to draw out that strategy?

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1 A. The strategy on the dye ---

2 Q. Yeah.

3 A. --- and the doctors. Well, I had multiple occasions at  
4 the Greenville County Detention Center where, you know,  
5 because of my injury I was rushed back and forth. And on  
6 the third -- first and third instance when this happened, I  
7 actually came in contact with both doctors that testified in  
8 my trial. And if reviewed, investigated properly, in my  
9 medical records I'm sure that it shows I came in contact  
10 with these doctors multiple times throughout my  
11 incarceration at Greenville County Detention Center.

12 On the third occasion is when the conversation  
13 happened. And if investigated properly you will probably  
14 see that on the third occasion is when we had this  
15 conversation because it was more focused around my charge  
16 than my medical. I had my family call doctor and complain,  
17 I mean, the hospital and complain because, you know, they  
18 was focused on what I'm charged with, accused of than the  
19 actual medical issue. And I know it's in my medical  
20 records.

21 Q. Okay. So what I'm understanding is you were asking him  
22 to inquire more into your medical records to see whether or  
23 not there were specific references to dye?

24 A. No, to show the fact that I've seen these doctors on  
25 multiple occasions. It's in my medical records. That's

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- 1 something I wanted to bring forth today also, ---
- 2 Q. And ---
- 3 A. --- medical records.
- 4 Q. --- I'm trying to understand. You wanted him to bring
- 5 that forward to be able to show that those doctors had seen
- 6 you on multiple occasions, ---
- 7 A. Yes.
- 8 Q. --- and that they didn't reference anything about dye?
- 9 A. Well, -- well, I put -- I put -- I complained to my
- 10 family to let the hospital know ---
- 11 Q. Right.
- 12 A. --- let them know this.. I don't know if the hospital
- 13 got a human resource or something, but we complained about
- 14 this. Not on December 10th, 2008.
- 15 Q. Right. Okay. Now, there were some issues that you
- 16 raised in regards to whether or not Mr. Johnson went into
- 17 and reviewed, I guess, pretrial comments by Mr. Dill
- 18 beforehand. Do you remember a discussion about that?
- 19 A. I do.
- 20 Q. And that was in regards to the number of shots, I
- 21 guess, that were fired, is that correct?
- 22 A. Yes, sir.
- 23 Q. Tell me what you and Mr. Johnson wanted to discuss or
- 24 wanted to go into and inquire about that.
- 25 A. Post trial?

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1 Q. Well, no. During this same -- did y'all have a  
2 discussion about that talking about, hey, you know, he's --  
3 Mr. Dill ---

4 A. We ---

5 Q. --- said one thing ---

6 A. We did. We did, but it was in passing. I didn't --  
7 before being found guilty I didn't know how important that  
8 would have been to challenging my conviction. I briefly  
9 brought his attention that, you know, I remember David Dill  
10 making a comment to either Fox Channel News or WYFF 4 that  
11 he vaguely remembered being shot once, but through a course  
12 of being found guilty in both trials it said shot multiple  
13 times.

14 Q. Okay. And then was there any inquiry into that or any  
15 discussion between you and him in regards to he said one  
16 thing during trial and one thing before trial?

17 A. You mean between me and Mr. Johnson?

18 Q. Yes.

19 A. It was -- like I say, it was in passing. I really  
20 didn't think much of it prior to trial because I didn't know  
21 -- I didn't know how significant it was, you know? I did  
22 bring it to his attention, but, you know.

23 Q. Okay. Now, you submitted a document to me and I've  
24 gone off this document. And I want to go -- are you looking  
25 at it now?

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1 A. I don't know.

2 Q. Is this the one you sent to me? That's the one you had  
3 all your amendments to your PCR? You sent it to me, and I  
4 just got it about three or four days ago?

5 A. I mean, yeah, I was just notified of the court date,  
6 yeah.

7 Q. Okay. Was that the -- is that the document that you  
8 put together about your issues?

9 A. I mean, it's based off some of the things in the  
10 transcript and some of the things in my discovery that I  
11 want to bring forth.

12 Q. Okay. But this is the document right here, correct?

13 A. Yes, sir.

14 Q. Okay.

15 **MR. ARIAIL:** Your Honor, this is an exhibit that he put  
16 or a document that he put together for me, and I provided  
17 Mr. Schmeckpeper a copy. I'd just ask that it be included  
18 as a record as an amended PCR application that included most  
19 of the stuff he's testified to. But I just want to make  
20 sure I have it as part of the record to be able to make the  
21 -- a complete record here.

22 **THE COURT:** All right. Mr. Schmeckpeper.

23 **MR. SCHMECKPEPER:** And, Your Honor, I do have one  
24 objection. I got this on Friday, and I've been able to  
25 review a good bit of it. But I do have -- Your Honor, I

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1 object to it coming in because it came in Friday and hasn't  
2 been filed.

3 In addition, I have objections to at least one specific  
4 allegation, and that's ineffective assistance of appellate  
5 counsel on the grounds that -- because I got this Friday I  
6 haven't had time to subpoena appellate counsel to be here.

7 **MR. ARIAIL:** And, Your Honor, I would exclude from that  
8 the appellate counsel issue based on this if the document  
9 can be entered into evidence.

10 **THE COURT:** All right. I'll allow it into evidence.  
11 And I'll allow it in as an amended -- amendment to the  
12 application. Although it's not timely, I'll still, without  
13 objection basically, allow it to be entered as an exhibit  
14 and treated as an amended application.

15 **MR. ARIAIL:** Thank you, Your Honor.

16 (Whereupon Plaintiff's exhibit 1 was marked and  
17 admitted into evidence)

18 Q. Now, Mr. Boyd, I've gone through -- you've sent me  
19 numerous letters, and we've gone through and we've discussed  
20 a lot about this case. The reason I asked you to pull all  
21 this together is to summarize a lot of the different issues  
22 we had. And I've tried to go through and put as much as I  
23 can based on our discussions and my review and looking at  
24 all the evidence and the transcript.

25 Are there other things that you want to raise that are

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1 part of this that I have not asked you about at this point  
2 in time? Remember, if they're a part of this document, this  
3 will be part of the record; you understand that?

4 A. So what you have is part of the record? I don't have  
5 to say failure to object jury charge? I don't have to say  
6 that?

7 Q. No. What I'm saying is you don't have to read it. If  
8 it's -- and what I'm trying to get at is you've put it as  
9 part of this amended PCR application, it is part of the  
10 record and Judge Hayes will be able to review it. We don't  
11 have to recite it again. It'll be a part of the record. So  
12 if there are other things that are outside of this is what  
13 I'm asking that you have not presented, this is the time to  
14 do it because this is what I have tried to go through and  
15 summarize exactly what you may -- put as part of the record.

16 A. Okay.

17 Q. Okay?

18 A. I mean, any part of my transcript is going to be part  
19 of the record also?

20 Q. The transcript's part of the record.

21 **THE COURT:** The transcript's in the record.

22 A. Okay.

23 **THE COURT:** The transcript ---

24 A. Both transcripts, from the first trial and second ---

25 **THE COURT:** Well, I don't know about the first trial.

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1 I've got to -- apparently not. I've got January of 2012.

2 A. The other one was July of 2011.

3 **THE COURT:** Don't have that.

4 **MR. ARIAIL:** Your Honor?

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

6 **MR. ARIAIL:** I've just discussed with Mr. Schmeckpeper,  
7 apparently we've got the three volumes that were for the  
8 second trial. The first trial ended in a mistrial. It is  
9 not a part of the record.

10 What we've agreed to do is order that and make it a  
11 part of this record to make sure that the issues he has in  
12 regards to the rulings and all that will be made a part of  
13 the record if we can get that transcript added in. I think  
14 we're going -- we've agreed to, I guess, hold the record  
15 open until we can get that transcript and submit it, if  
16 that's okay, Your Honor.

17 **THE COURT:** Mr. Schmeckpeper.

18 **MR. SCHMECKPEPER:** I have no problem with that if it's  
19 still available. My understanding in talking with the  
20 solicitor just now is that trial was held in the summer of  
21 2011. I don't even know if it's something the court  
22 reporter can still produce.

23 **THE COURT:** All right. Well, since this is the only  
24 opportunity, I will allow it. I don't know how it would  
25 come into play because his appeal -- his PCR was

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1 specifically from his second trial, which he was found  
2 guilty. But as a precaution and to make sure that  
3 everything he has a desire to be examined is examined, I'll  
4 leave the record open for that transcript if it is  
5 available.

6 Q. All right. Mr. Boyd, you've heard that, we're going to  
7 try to get that transcript as part of the record. Are there  
8 other things that are outside this document that you would  
9 like to tell the Court about or does that cover what you  
10 have asked me to put forward?

11 A. I mean, -- I mean, it might be. I mean, like I say, we  
12 consulted as much as we could with the time allowed, you  
13 know. So ...

14 Q. And I put in all the stuff that you put as part of this  
15 letter, which is a summary of what we've discussed pretty  
16 much, correct?

17 A. Basically.

18 Q. Okay.

19 **MR. ARIAIL:** Your Honor, I have no further questions of  
20 this witness.

21 **THE COURT:** Mr. Schmeckpeper.

22 **MR. SCHMECKPEPER:** Your Honor, may it please the Court?

23 **Cross Examination by Mr. Schmeckpeper:**

24 Q. Good morning, Mr. Boyd.

25 A. All right.

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1 Q. Now you said, I think, correct me if I'm wrong, you met  
2 with your attorney five to ten times in preparation for  
3 trial, you went over the evidence, the offenses, what the  
4 case [sic] had to prove?

5 A. Prior to the first trial, yes, sir.

6 Q. Your theory and your counsel's theory during the trial  
7 was there was no dye on your hands or on your body from the  
8 ---

9 A. First or second trial? Yeah, both trials.

10 Q. That was your theory of defense?

11 A. Yes, sir. One of them.

12 Q. And so just correct me if I'm wrong. Your counsel --  
13 your attorney did hire an expert, did subpoena an expert  
14 from the FBI to pretty much say you didn't have ink on you?

15 A. Say that again.

16 Q. Your attorney brought an expert in to your second trial  
17 from the FBI?

18 A. Yes, Jason Brewer. Yeah.

19 Q. And that expert pretty much said that his tests didn't  
20 show any bank dye on you?

21 A. Yes. Yes. But he was originally a State witness, yes,  
22 sir.

23 Q. And you're saying he should have brought an extra  
24 expert to say something else?

25 A. I mean, like I say, he was an expert in dye analysis,

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1 not dye activation. He couldn't -- he couldn't, you know,  
2 give the explanation of why no dye on me, you know? So he  
3 was only expert in one area and not the other.

4 Q. And you also said counsel was ineffective for failing  
5 to request another Jackson v. Denno hearing. And you're  
6 pretty much saying that your statement was not voluntary?

7 A. Yes, sir.

8 Q. And what was your statement?

9 A. It was some accusations made by David Weiner that I  
10 asked him to kill me. And that's ---

11 Q. That's after he'd shot you?

12 A. Yeah. Yes.

13 Q. And is that the -- is that the statement you say was  
14 involuntary?

15 A. Yes, sir.

16 Q. Are you saying it was involuntary or that you didn't  
17 say it?

18 A. Involuntary -- no, no, he misconstrued my words.  
19 That's my -- that's my position. Yeah. I didn't ask him to  
20 kill me. I asked was he trying to kill me. Not as in will  
21 you kill me, but are you trying to kill me?

22 Q. You asked him a question?

23 A. Yes, sir.

24 Q. And he misconstrued your question?

25 A. Yes, sir. It was in my first trial transcript.

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1 Q. But how does that go towards whether or not your  
2 statement was voluntary?

3 A. I think it -- I think -- if I remember correctly, I  
4 think my defense counsel argued to the totality of the  
5 circumstances or something like that because of the fact  
6 that the gun was pointed on me, you know?

7 Q. But you did ask a question to the officer?

8 A. I asked a question? Yeah, I asked him if he was trying  
9 ---

10 Q. Is what you're saying?

11 A. --- to kill me. Yeah. Yes, sir. I don't know if he  
12 might have been prejudiced or something.

13 Q. And there are other statements too, I think. So the  
14 first time you asked him was he trying to kill you. And the  
15 other time you asked for a soda?

16 A. Yes, sir.

17 Q. And those are the statements you're alleging weren't  
18 voluntary?

19 A. Involuntary. I don't know how you ---

20 Q. Should have been stricken by a Jackson v. Denno  
21 hearing.

22 A. Yeah, yeah. We wanted suppressed, period. I guess it  
23 was harmful.

24 Q. But in both those cases you were asking the officer for  
25 something according to your -- according to you?

DAVID BOYD, II - CROSS EXAMINATION BY MR. SCHMECKPEPER

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1 A. Yes, sir.

2 MR. SCHMECKPEPER: I beg the Court's indulgence.

3 (Pause)

4 Q. Just to clarify your previous testimony, and I think  
5 Mr. Ariail went over this with you a good bit. You said  
6 there were previous offers. You didn't take those offers  
7 because you wanted to pursue a defense strategy that your  
8 counsel may have told you about?

9 A. Yes, sir.

10 Q. Do you have the record in front of you?

11 A. I mean, -- I mean, I'm looking at it. Like I say, this  
12 is my first PFCR [sic] hearing. So I don't know if we  
13 supposed to address all the issues. I'm not -- I'm not  
14 sure. I'm not sure. As far as what he submitted as, you  
15 know, amended PCR application, I'm not sure if we're  
16 supposed to address all them or not.

17 Q. One of your allegations in your amended application is  
18 failure to consult defendant. You did testify that you met  
19 with your attorney five to ten times and you discussed the  
20 evidence in the case, correct?

21 A. Prior to the first trial, yes, sir. During -- in  
22 between the first and the second trial I met with my  
23 attorney once. And I do -- I did have it, like I say,  
24 previous PCR counsel has that. And I made a request for it.  
25 It's on paper, time, State -- time, date or whatever.

DAVID BOYD, II - CROSS EXAMINATION BY MR. SCHMECKPEPER

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1           **MR. SCHMECKPEPER:** Your Honor, I have no further  
2 questions.

3           **THE COURT:** Redirect.

4           **MR. ARIAIL:** No, Your Honor.

5           **THE COURT:** All right. You can step down and have a  
6 seat.

7           A. Your Honor, I have a question. Do I -- do I or my  
8 attorney supposed to make a motion for 59(e) or something  
9 like that? I'm not sure. I wasn't told.

10          **THE COURT:** Well, the way that works is that if I rule  
11 in favor of the State, that is if I deny your application  
12 for Post Conviction Relief, then your attorney can file at  
13 that time a rule 59(e) motion requesting -- calling to the  
14 Court's attention matters that it, that he, you thought I  
15 overlooked or misapplied. That'll have to be done after I  
16 issue an order.

17          If I rule in your favor, then you would not need to  
18 rule -- not need a rule 59(e) motion because you would have  
19 won, so to speak. So it's premature. A rule 59(e) motion  
20 has no applicability to anything until I issue an order.  
21 Okay?

22          A. I didn't know. That's why I asked.

23          **THE COURT:** Okay. All right. Call your next witness.

24          **MR. ARIAIL:** Yes, Your Honor. I call Brian Johnson to  
25 the stand.



**BRIAN JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL**

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1 discuss with him, I guess, the facts and evidence that was  
2 against him?

3 A. Extensively, yes, sir.

4 Q. Okay. And did you -- he was at the law enforcement  
5 center, I guess, at that time?

6 A. Yes, sir.

7 Q. Did y'all take down discovery and discuss it with him  
8 and ---

9 A. Yes, sir.

10 Q. Okay. And did you have -- I guess one of the main  
11 things in this was and clearly revolves around this dye pack  
12 or dye packs that went off during this armed robbery.

13 A. Sure.

14 Q. He's raised some issues in regards to having experts  
15 testify on his behalf regarding dye pack activation. I know  
16 you had Jason Brewer testify as to, I guess, dye pack  
17 testing. Do you remember having a conversation with him  
18 regarding having an expert for dye pack activation versus  
19 dye pack testing?

20 A. Yes, sir. It's not necessarily activation. It has  
21 more or less to do with the attachment of the dye to you.

22 Q. Got it.

23 A. And so when he's talking about activation, you know  
24 when the dye pack activates, how it attach and what's the  
25 likelihood that it would have attached. So like the whole

BRIAN JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL

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1 thing there is if -- the higher the chance or the higher the  
2 probability that the dye would have attached the -- with  
3 what we know to be the results as far as Jason Brewer, and I  
4 think there was a State tester as well saying that there was  
5 no dye there. So the high probability that it would have  
6 attached, the better chance he had of saying, listen,  
7 there's no dye on me, so I didn't do this.

8 Q. Got it. Okay. Now, -- and maybe I jumped out too far  
9 in this thing to going to the dye pack. Your discussion  
10 with him, what was your, I guess, y'all's defense or defense  
11 theory that y'all were going to put forward at trial?

12 A. Primarily that there was no dye on him.

13 Q. Okay. So to be able to say there was no dye on him  
14 would be to say that he wasn't in the car, and didn't take  
15 the money, and wasn't the one that was, I guess, shooting at  
16 Mr. Dill, is that correct?

17 A. Yes, sir, because when -- there was witness testimony  
18 that when he was driving -- whoever -- whoever was --  
19 whoever did it was driving down the road, there was dye  
20 coming through the windows and there was dye all over the  
21 money. And so if the dye packs went off you would have  
22 expected -- I'm inside the car, there was dye on the seats  
23 and stuff. So it was kind of like to where if I'm sitting  
24 in this chair and there was dye on the edges, you know, ---

25 Q. Right.

BRIAN JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL

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1 A. --- on the edges of the chair, so that whoever was  
2 sitting in the chair there would be some dye on too.

3 Q. Okay. Did you ever, I mean, so your theory was there's  
4 no dye on him, that I'm going to advance that to the jury  
5 and say he couldn't have been in the car and wasn't the one,  
6 is that pretty much it?

7 A. Correct.

8 Q. Okay. So there was, I mean, clearly substantial other  
9 evidence. There was a video at the bank. There was a, you  
10 know, a bandana that was found with his DNA on it that was  
11 used at the bank. There was some pants that had a feather  
12 or had some stuff that matched him. Did you discuss that --  
13 if a bank -- if a dye pack theory doesn't work, then the  
14 jury is going to have this other evidence to be able to  
15 potentially convict you?

16 A. Well, to be clear, I encouraged him to accept the plea  
17 offer. I thought it was very good. I thought that the  
18 offer -- there were tiered offers. And I'm sorry, I'm not  
19 -- I don't remember the date and time, but I think he had  
20 like a month to accept a certain amount and then he had like  
21 the next month he had a certain amount of time, and he  
22 declined.

23 I did think that he should have accepted the plea based  
24 upon the totality of all the evidence and not just the dye  
25 because there were issues with that, that the clothes were

BRIAN JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL

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1 filthy and there was some issues with actually being able to  
2 test it. But -- so there is -- I did recommend that he  
3 plea.

4 Q. Okay. Now, did you -- did y'all discuss this, I mean,  
5 you called Jason Brewer during your case?

6 A. I did.

7 Q. Okay. And did you -- I'm just a little confused  
8 because he wanted another expert called -- called, I guess,  
9 this Mr. Lynch?

10 A. Greg Lynch from 3SI.

11 Q. Okay. Do you -- what was the difference between those  
12 two experts and how was that going to add to the case?

13 A. Greg Lynch worked for 3SI. And he was actually just  
14 like a salesperson. He wasn't really an expert per se, but  
15 he sold the stuff. And what -- obviously, if I sell dye  
16 packs and I'm going to tell you if you used this dye pack  
17 it's going to attach.

18 However, I talked to him a couple of times and the more  
19 I talked to him the less -- the less sure he was of the  
20 possibility of attachment of the dye. So it -- so he was --  
21 if I'd called him and he'd -- he'd basically testified that  
22 I'm not sure if the dye would have been on him.

23 And so I didn't want to call him because, you know,  
24 what -- I think what people know is that if the dye pack --  
25 when all that -- you can't get that dye off. I think people

BRIAN JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL

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1 just kind of know that. And so I wanted to rely upon that  
2 rather than have him there and say, well, no, that's not  
3 really how it works.

4 Q. Right.

5 A. And so I didn't call him.

6 Q. Is dye -- are the dye packs used more for the money or  
7 for the person to attach to? I mean, I ---

8 A. Primarily the money.

9 Q. Okay. So you were concerned if you called him to trial  
10 he might not testify it can get on the person and that would  
11 hurt your case?

12 A. Correct.

13 Q. Okay. So you felt that Brewer testifying that, I  
14 guess, he did three or four reports and there was no dye  
15 found on him, that helped your case?

16 A. That's right. Because Brewer said he could find it  
17 because there was -- there was State people who -- there's  
18 too much mud. And Brewer was like, uh-uh, like if it was  
19 there, I'm going -- I'm going to get it.

20 Q. Okay.

21 A. And so that's why I called him from the FBI.

22 Q. Okay. Now, there was a -- raised this issue in regards  
23 to an alibi witness. Do you remember an Amy Foster?

24 A. Well, we looked into some stuff there that I didn't  
25 think basically -- it wasn't going to be reliable.

**BRIAN JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL**

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1 Q. Okay. And when you mean -- when you looked into it,  
2 what was the issue with that?

3 A. Well, I don't know if she would have said that he was  
4 with me -- I had indications to believe that she wasn't  
5 telling the truth.

6 Q. Okay. So you didn't believe that you could call her as  
7 a witness and put her on the stand if she was going to  
8 perjure herself?

9 A. That's correct.

10 Q. Okay.

11 **THE COURT:** What was the name?

12 **MR. ARIAIL:** Amy Foster, Your Honor.

13 Q. So you spoke with her at some point in time?

14 A. I can't recall specifically if I did or if I got --  
15 because a lot of times if I've got a witness I'll get my  
16 investigator to talk to them because I can't testify. But  
17 if they say something to them and they recant their  
18 statement I can -- I can call my investigator to basically  
19 give a prior inconsistent statement. So I just -- and I  
20 apologize, but I recall that she wasn't going to be  
21 reliable.

22 Q. Okay. And if she had provided an alibi to him that was  
23 reliable you would have called her to the stand?

24 A. I sure would have.

25 Q. Okay. As part of this -- and I know this is a little

BRIAN JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL

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1 different case because you had a mistrial on the first case.  
2 And there were some motions made and a Jackson v. Denno  
3 hearing in the first case. My understanding was you  
4 consented to or all the previous rulings in the prior case  
5 were held and were applicable to the second case, is that  
6 right?

7 A. Well, I'm not going to -- I don't wish to personify it  
8 as I consented to it, but that's what the judge wanted to  
9 do.

10 Q. Got it. Okay. So it was basically those rulings were  
11 made a part of the second case?

12 A. Correct.

13 Q. Okay. And the Jackson v. Denno, it had already  
14 happened in the first case and was made ---

15 A. It was pretrial.

16 Q. Pretrial. Okay. Got you. So that was put as part of  
17 the second case when y'all went back and did those, ---

18 A. Yes, sir.

19 Q. --- is that right? Okay. The medical -- and I'm  
20 trying to understand the doctors. The doctors testified  
21 during the trial. And he's indicated that he wanted to be  
22 -- some more examination or additional information with  
23 regards to how many times he saw those doctors in the  
24 medical records. Did y'all have a discussion of how he  
25 wanted to use that or how it could help y'all?

BRIAN JOHNSON - DIRECT EXAMINATION BY MR. ARIAIL

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1 A. Well, I had -- I had a hope that -- that it would --  
2 make reference to it so that I could argue it. And so I  
3 didn't want to ask him the question because I didn't  
4 necessarily know how they would answer it. So I -- so I  
5 didn't -- I didn't want to dig too deep there, ask one  
6 question too many when I already had the fact, I think, to  
7 argue.

8 Q. Okay. Now, explain to me how you were using that. I  
9 was trying to understand exactly what he was trying -- what  
10 y'all wanted to get out ---

11 A. Well, again, with regards to the dye, if we have a  
12 situation where -- as witnesses described with the dye  
13 coming out of the car and, again, as I -- that's kind of  
14 related to what I just described. And with the dye being in  
15 the money, he would have had to, you know, try to get his  
16 hands on some of the money, you know, the dye would have  
17 been on his hands. If all these people who arrested him,  
18 all these people don't even make note of it, then it must  
19 not have -- it must not have been there. It must mean that  
20 he wasn't there. He wasn't the person who robbed the bank  
21 because it's not on him.

22 Q. Okay.

23 A. Excuse me.

24 Q. Okay. So that was -- your main theory was if they  
25 can't put the dye on him, on his person, then we're going to

**BRIAN JOHNSON - CROSS EXAMINATION BY MR. SCHMECKPEPER**

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1 argue to the jury that he couldn't be the one that was  
2 driving that car ---

3 A. Correct. Correct.

4 Q. Now, this issue in regards to David Dill and some  
5 pretrial comments about what he said to Fox News and what he  
6 testified to, do you remember any of that?

7 A. Well, there might have been some different statements  
8 about how many times he was shot. And I don't -- I don't  
9 really recall that as a issue necessarily. I know that it's  
10 my inclination not to draw too much attention to that, the  
11 fact that he was shot because we're saying that my client  
12 didn't do it in the first place.

13 Q. Okay.

14 **MR. ARIAIL:** I have no further questions, Your Honor.

15 **THE COURT:** Cross.

16 **Cross Examination by Mr. Schmeckpeper:**

17 Q. Good morning, Mr. Johnson.

18 A. Good morning.

19 Q. I've just got a couple of questions for you. If you  
20 would, would you mind just putting on the record for the  
21 Court your experience in criminal law.

22 A. Well, I started at the public defender's office. I did  
23 some real estate back in the day, but primarily public  
24 defender's office. And I left there. Almost shortly  
25 thereafter I had David's trial. And -- but we did one -- we

BRIAN JOHNSON - CROSS EXAMINATION BY MR. SCHMECKPEPER

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1 did one in 2011, in the summer of 2011. And we started it  
2 in July. And then we did another one in 2012. And by that  
3 point in time I had been at the public defender's office for  
4 four or five years.

5 Q. This wasn't your first general sessions trial?

6 A. No.

7 Q. Your first armed robbery, a violent crime?

8 A. No.

9 Q. And I think we went over a little bit or you went over  
10 a little bit a meeting that you had with the Applicant, he  
11 said five or ten times before the first trial. Do you  
12 remember kind of the number of meetings that you had?

13 A. I don't. And we tried to get that file. It was  
14 extensive. But I met with -- David and I never had -- never  
15 really had issues as far as like arguing with each other or  
16 being dissatisfied with one another. And so I met with him  
17 almost as often as -- when something new would come in, I'd  
18 go see him.

19 Q. That kind of leads me to my next question. Did you  
20 feel that you met with him enough?

21 A. Yes.

22 Q. Enough to be prepared for trial?

23 A. Yes.

24 Q. And enough kind of to know what his feelings were on  
25 your representation of him?

**BRIAN JOHNSON - CROSS EXAMINATION BY MR. SCHMECKPEPER**

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1 A. Yes.

2 Q. Now getting into the specific allegations that were  
3 raised, I mean, I think you've touched on a lot of them. I  
4 think you testified as to your reasonings for calling one  
5 expert about the dye and not the other?

6 A. Yes.

7 Q. And it was that the second expert just didn't seem like  
8 he added too much to the case?

9 A. Well, I don't even know that he would have qualified as  
10 an expert.

11 Q. The second potential witness?

12 A. Yeah, potential witness. But we were going to -- I was  
13 going to try -- if he was going to say something favorable,  
14 I was going to try it.

15 Q. And that Amy Foster, the alibi witness, that I think  
16 the Applicant wanted to call, you didn't think would be  
17 reliable or honest?

18 A. No, sir.

19 **MR. SCHMECKPEPER:** I beg the Court's indulgence, Your  
20 Honor.

21 (Pause)

22 Q. Did you request a lesser included offense in this case?

23 A. Not that I recall.

24 Q. Do you remember thinking that -- do you remember  
25 thinking there might have been a basis for assault and

BRIAN JOHNSON - CROSS EXAMINATION BY MR. SCHMECKPEPER

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1 battery of a high and aggravated nature rather than assault  
2 and battery with intent to kill?

3 A. I suppose that -- I suppose that, obviously, as a  
4 lesser included, those elements could potentially be there.  
5 I -- I don't know that -- I don't think it was -- we weren't  
6 -- there's some instances where you say there was a fight or  
7 a shooting and I did it, but it wasn't that serious. In  
8 this instance we were saying that he didn't do it.

9 Q. You presented evidence in this case, right?

10 A. Yes.

11 Q. You didn't present any evidence that you think would  
12 have mitigated assault and battery with intent to kill or  
13 you weren't focusing on mitigating assault and battery with  
14 intent to kill?

15 A. No. I -- I didn't want to focus on the shooting at  
16 all. I really didn't want to -- I wanted to focus more on  
17 the dye. I wanted to make everything about the dye and the  
18 fact that the dye was not there.

19 Q. So it wasn't this wasn't that bad of an assault, it was  
20 that he didn't commit it?

21 A. That's right because I don't -- I don't, I mean, the  
22 victim -- I didn't -- I didn't think that would have been a  
23 wise decision.

24 **MR. SCHMECKPEPER:** Your Honor, I have no further  
25 questions. Thank you, Mr. Johnson.

BRIAN JOHNSON - REDIRECT EXAMINATION BY MR. ARIAIL

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1           THE COURT: Any redirect?

2           MR. ARIAIL: Yes, Your Honor, just a couple of  
3 questions.

4           Redirect Examination by Mr. Ariail:

5           Q. In regards to an expert witness did you have a  
6 discussion with Mr. Boyd in regards to getting, I guess,  
7 outside Mr. Brewer, getting your own expert witness to be  
8 able to testify on his behalf?

9           A. Well, I also had an expert for the dogs. There was a  
10 dog chase where the dogs tracked. And that was part of the  
11 case because they kind of were able to put it together, I  
12 think, effectively enough to where the dogs kind of tracked  
13 as to the remote area where -- where David was found.

14          Q. Okay.

15          A. And so I got Ilia (phonetics) Bridgeman. I got the  
16 money, I talked to him, had him in there, had him in here  
17 basically listening to testimony. And he -- if I'd called  
18 him he'd have said, yeah, they did everything and they found  
19 him.

20          Q. Okay.

21          A. And so I didn't call him.

22          Q. Okay. But for the dye pack, I mean, I know y'all used  
23 Brewer. Did y'all have a discussion about let's get us a, I  
24 mean, because what he's told me is he wants a favorable  
25 expert witness to testify on his behalf about the dye pack.

**BRIAN JOHNSON - REDIRECT EXAMINATION BY MR. ARIAIL**

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1 Did you have -- did y'all look for someone outside Mr.  
2 Brewer or anything ---

3 A. Well, other than -- other than talking to the people at  
4 3SI. And I talked to Greg. And I actually talked to one of  
5 the technicians too. His name escapes me, I'm sorry. But I  
6 didn't -- I didn't think that was going to be a good route  
7 because I don't think their testimony would have helped.

8 Q. Okay.

9 **MR. ARIAIL:** I have no further questions, Your Honor.

10 **MR. SCHMECKPEPER:** Nothing from the State, Your Honor.

11 **THE COURT:** You can step down and be excused.

12 **MR. JOHNSON:** Thank you, Judge.

13 **MR. ARIAIL:** Your Honor, that is our case.

14 **MR. SCHMECKPEPER:** Your Honor, I don't have any -- I  
15 don't have any further witnesses. I'd be happy to give you  
16 an argument if you'd like or answer any questions, but  
17 otherwise I don't have anything further.

18 **THE COURT:** Well, I don't know that I need any -- any  
19 further arguments. I mean, I know what the issues are, at  
20 least what the issues he's framed. And I think I can go  
21 from there and waiting on the transcript will, of course,  
22 hold this up. But hopefully you can find out fairly  
23 promptly as to whether or not it is available and fairly  
24 promptly thereafter generate it so we can take care of this.  
25 All right.

1 . . . . . (Hearing Ended at 10:46 am)

2 . . . . . (End of Requested Transcript of Record)

## Certificate of Reporter

I, The undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 5th day of December 2016.

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

February 14, 2017

*S/Susan W. Hudgins*

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Circuit Court Reporter

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 David Stevenson Boyd, II, )  
 )  
 SCDC No. 349271. )  
 )  
 Applicant, )  
 )  
 vs. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2014-CP-23-5952

ORDER

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL D. WICKER  
 2016 DEC 21 AM 9 41

Applicant filed this application for Post-Conviction Relief October 30, 2014. This matter was heard December 5, 2016. Applicant was represented by R. Mills Ariail, Jr., Esquire. The State was represented by Patrick Schmeckpeper, Esquire.

Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the December 2009 term of General Sessions for possession or receiving stolen goods (third property offense) (2009-GS-23-1985), armed robbery (2009-GS-23-9988, count 1), possession of a weapon during commission of a violent crime (2009-GS-23-9988, count 2), and assault and battery with intent to kill (ABWIK) (2009-GS-23-9989). Brian P. Johnson, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On January 13, 2012, the Honorable Letitia H. Verdin sentenced the Applicant to concurrent terms of 10 years for possessing and receiving stolen goods (third property offense), 20 years for armed robbery, and 5 years for possession of a weapon during commission of a violent crime. Judge Verdin levied a 20 year sentence for ABWIK, which was to be consecutive to the armed robbery sentence.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, perfected the appeal in the form of an *Anders*<sup>1</sup> brief. The Court of Appeals dismissed the appeal. *State v. Boyd*, Op. No. 2013-UP-4-1 (S.C. Ct. App. filed October 30, 2013). The Remittitur was sent on November 15, 2013.

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

1. Ineffective assistance of counsel.
  - a. Failure to call alibi witnesses.
  - b. Failure to properly object to evidence submitted by the prosecution.
  - c. Failure to fully investigate and obtain evidence.

By way to two handwritten supplements to his application, Applicant has raised additional issues addressed herein below.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this

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<sup>1</sup> *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967).

presumption in order to receive relief. See *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2052).

Applicant's primary issue revolves around testimony concerning the absence of dye on Applicant's person or clothing at the time he was apprehended. A dye pack was placed in a bag with money stolen from the Bank of Travelers Rest on December 10, 2008<sup>2</sup>. (Trial Record p. 91, ll. 22-24 and p. 100 l. 14 through p. 101, l. 6). Red smoke from the dye pack was seen coming out of the driver's side of a minivan thought to be the robber's getaway vehicle. (Trial Record p. 128, l. 5 through p. 129, l. 13). Traces of what appeared to be dye were found in the minivan (Trial Record p. 589, ll. 14-16) and dye packs were found in the minivan<sup>3</sup>. (Trial Record p. 586, ll. 7-9).

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<sup>2</sup> There is additional testimony in the record reflecting the dye packs being placed in the robber's bag with the bank's money.

<sup>3</sup> There is additional testimony in the record reflecting red dye and dye packs were found in the subject minivan.

Just 7

Applicant claims trial counsel was ineffective for not calling an expert witness to testify as to the activation of dye packs. Applicant claims such an expert would have been beneficial to his case as no dye was found on his person or his clothing.<sup>4</sup> Applicant also claims trial counsel should have called his treating doctors to testify that they saw no red dye on his body during their treatment.<sup>5</sup>

The record is clear that dye packs were placed in a plastic bag at the Bank of Travelers Rest with the bank money. The record is also clear that the getaway vehicle emitted red smoke when being followed and that there was evidence of dye and actual dye packs inside the getaway vehicle. Further, the evidence is clear that at no point was the presence of red dye detected on Applicant's person or his clothing. This point was hammered home by Applicant's trial counsel. (Trial Record p. 948, ll. 5-8; p. 952, ll. 22 through p. 957, l. 12).

Applicant called no witnesses at his hearing to testify on the issue of dye pack activation. Applicant claims trial counsel knew this was a potential issue and, in fact, discussed the issue with a witness, Mr. Lynch (the court has no way of knowing if this witness would qualify as an expert on dye pack activation, in fact, trial counsel testified that Mr. Lynch was not really an expert). Trial counsel testified that he discussed the activation issue with Mr. Lynch and a technician from the dye pack producer's company. Trial counsel testified that the more he talked with Mr. Lynch, the less sure he was that Lynch would be of any help and finally decided Mr. Lynch's testimony would not have been helpful. This decision was, trial counsel testified, fortified by his discussion with the technician. This was an acceptable trial strategy. Where counsel articulates valid reasons for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.

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<sup>4</sup> Since this is a point conceded by the State, supporting transcript citations are not set forth.

<sup>5</sup> Applicant had been shot when apprehended (Trial Record p. 469, l. 26 through p. 470, l. 16).

*J. A. H. f*

*Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992); *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. *Ingle v. State*, 348 S.C. 467, 506 S.E.2d 401 (2002). Additionally, Applicant did not call either Mr. Lynch nor the technician at his hearing. Therefore, the Court is unable to analyze whether either testimony would have been beneficial to Applicant.

Applicant testified he had an alibi witness, Amy Foster. Ms. Foster did not testify at Applicant's hearing and Applicant did not testify as to what her testimony would be which would constitute an alibi. Trial counsel himself, or through his investigator, talked with Ms. Foster prior to trial. Trial counsel testified that he did not believe Ms. Foster and could not put her on the stand and allow her to perjure herself. Trial counsel did not testify to the substance of what Ms. Foster intended to testify to, but he did state that if she had been reliable he "sure would have called her." This was also an acceptable trial strategy. Additionally, Applicant did not call Ms. Foster as a witness at his hearing. Therefore, the Court is unable to analyze whether her testimony would have been beneficial to Applicant.

Applicant testified that a Mr. Dill, who had followed the getaway vehicle from the bank and was shot by its driver, testified that he had been shot multiple times after telling some news agency that he had been shot once. Trial counsel would not be ineffective for not presenting evidence as to the number of shots which struck Mr. Dill. The number of shots Mr. Dill suffered was relevant in no way to the issue of Applicant's guilt, nor was it exculpatory. Additionally, Applicant presented no evidence, other than his own testimony, that Mr. Dill said he was shot once at some juncture and shot more than once at others. To the extent his is a claim of ineffective assistance of counsel, it is unfounded.

J. H. S.

In a somewhat weird twist from the numerous post-conviction relief applications from guilty pleas, Applicant in essence claims trial counsel was ineffective for not coercing him to enter a plea of guilty. This is, of course, without merit. Additionally, Applicant testified he wanted a trial and was expecting a favorable result based on expert testimony (presumably as to dye pack activation), his alibi (the existence of which has not been proved), and the absence of dye on his person or clothes at the time of his arrest.

Applicant alleges trial counsel was ineffective for not requesting a charge on a lesser offense from assault and battery with intent to kill such as assault and battery of a high and aggravated nature. Trial counsel testified that under the facts he did not think Applicant was entitled to a lesser included charge. Trial counsel also testified that such a charge would water down their defense which was that they have the wrong guy based on the absence of dye on Applicant's person or clothing. This was an acceptable trial strategy.

In his exhibit 1 from his post-conviction relief application, at number 3 therein, Applicant asserts that trial counsel was ineffective for not objecting to the trial judge's charge on the inference of malice from the use of a gun. This claim is predicated on Applicant's claim that the charge was improper as there was evidence in the record of mitigating circumstances. The mitigating evidence Applicant presents is the issue of the number of shots testified to by Mr. Dill. The number of shots fired by an assailant does not remotely, at least in this case under these facts, rise to the level of mitigation evidence. The trial judge's charge correctly reflected the applicable law. Trial counsel was not ineffective for not objecting to a correct charge on the law.

Applicant claims ineffective assistance of counsel based on a lack of issue preservation. Applicant has presented no evidence that any errors by the trial judge, if any, were not preserved for appellate review. This issue is without merit.

JHHC

Applicant alleges trial counsel was ineffective for not consulting with him between his first and second trial. Applicant testified trial counsel, prior to the first trial, met with him between 5 and 10 times, discussed the State's evidence with him, went over the State's offers, went over the elements of the charges pending against him, and discussed the sentences attached to those charges. Trial counsel acknowledges he met with Applicant only once between the two trials. It cannot be said that trial counsel was ineffective for not meeting more often with Applicant between his trials. Trial counsel testified that if a new development occurred between trials he would have discussed it with Applicant and trial counsel testified affirmatively that he was prepared for trial. A review of the record and the testimony of trial counsel at the hearing negates any claim that trial counsel was ineffective relative to his preparation for trial. Additionally, Applicant has not shown any prejudice resulting from the minimal between-trial contacts by trial counsel. This claim is without merit.

Applicant asserts trial counsel was ineffective in failing to subpoena "favorable witnesses." This issue is couched, as above, as to Ms. Foster and Mr. Lynch. No other witness is named nor were any witnesses called to testify on Applicant's behalf at his post-conviction relief hearing. This issue is without merit.

Applicant claims trial counsel failed to "fully investigate and obtain evidence." There is nothing in the record to support this claim.

Applicant generally argues his conviction and sentence was in violation of several amendments to the United States Constitution. Such claim is too general to address.

Jo H #7

Applicant asserts trial counsel was ineffective for failing to object to a "void indictment for armed robbery." Applicant has presented no evidence that such indictment (2009-GS-23-9989) lacked validity. This claim is baseless.

Applicant seems to argue that trial counsel should have objected to the introduction of charges related to the Bank of Travelers Rest as it is a federally chartered bank. This claim is baseless.

Applicant alleges trial counsel was ineffective for not requesting a *Jackson v. Denno*<sup>6</sup> hearing regarding certain statements attributable to Applicant by law enforcement officers. Detective Weiner and Officer Heger testified at trial as to two instances of statements by Applicant subsequent to his arrest, which are set forth hereinbelow. These statements were subject to a *Jackson v. Denno* hearing at Applicant's first trial. The trial judge at the first trial determined these statements were "freely, voluntarily, and intelligently made." (Trial Record p. 19, ll. 7-14). This statement by counsel for the State, Allen O. Fretwell, Esquire was in the context of alerting the trial judge to "issues that were decided in the last case, we wanted the opportunity to put these issues on the record at this point." (Trial Record p. 18, l. 23 through p. 19, l. 3). Solicitor Fretwell, after making the above statement, stated to the court "I believe we're mostly in agreement on what those issues are." (Trial Record p. 19, ll. 1-5). After making this presentation to the trial judge, the solicitor invited Applicant's trial counsel to "...weigh in at the appropriate time." (Trial Record p. 19, ll. 5-6).

After the above, the following colloquy was exchanged by the trial judge and Applicant's trial counsel:

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<sup>6</sup> *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964).

JAH 8

The Court: All right. Very well. We're in good shape on that. All right. Any matters we need to take up and put any objections on the record?

Mr. Johnson: Uh, things are pretty much as he stated as far as how thing played previously. I don't know, at this time, is it appropriate to reiterated arguments with regards to those objections?

The Court: I think it would be -- I think if you want just in the interest of time. You've made those arguments. Since I can not rule on them again, if you made those arguments previously, then if you just want to state, renew your objection and very briefly state your grounds for it, I think is the interest of time, that will protect the record.

\* \* \*

Mr. Johnson: With regards to the statements made by my client to, uh, Detective Weiner at the time of his shooting, at the time he was shot, uh, again, I think that, uh, it violates his 14<sup>th</sup> Amendment right to due process. I say that in the totality of the circumstances, the statement must be voluntary. One of the main examples given with regards to that type of thing is the threat of physical violence. He was shot three times. He had a gun held on him. I think under the totality of the circumstances, most certainly, that was an involuntary statement.<sup>7</sup>

\* \* \*

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<sup>7</sup> Trial counsel did not mention the statement to Officer Heger. That statement about Applicant wanting a soda is encompassed as preserved by the trial judge's remarks as to Judge Welmaker's previous rulings.

*John #9*

The Court: All right. Well, your objections are noted for the record. Of course, Judge Welmaker's previous rulings stand. As to the things he has not yet – he did not rule upon the previous trial, we'll address those as we come to them.

(Trial Record p. 23, l. 8 through p. 26, l. 14).

One of the statements at issue was made to Detective Weiner. At the scene of his arrest, Detective Weiner testified Applicant stated "He says just look me in the eye and kill me. Just get it over with." (Trial Record p. 470, ll. 15-16). The other statement was made to Officer Heger at the hospital while Applicant was being treated for gunshot wounds. Officer Heger testified that "he [Applicant] gave me a name. I can't recall what it was. But then any other question after that he would just request a soda. He wasn't answering any questions after that." (Trial Record p. 525, ll. 2-13). Applicant's request for a soda is not incriminating in any way.

Trial counsel was not ineffective for not requesting a *Jackson v. Denno* hearing at the second trial. Judge Verdin made it clear the rulings from the first trial would "stand" for the second trial and noted trial counsel's objections. Trial counsel, prior to the trial judge's statements of record, had vigorously argued that the statement by his client should not be allowed into the record as it was obtained in violation of Applicant's right to due process.<sup>8</sup>

The record was completely protected by trial counsel and any issues as to the voluntariness of the statements were preserved for appellate review. That is all that is required for effective assistance by trial counsel. Applicant's claims as to trial counsel's failure to request a *Jackson v. Denno* hearing at Applicant's second trial is without merit.

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<sup>8</sup> As earlier noted, while trial counsel's argument was directed to the statements to Detective Weiner, the trial judge let stand all of the first trial judge's rulings.

J #10

I find, applying the *Strickland*, supra, and *Cherry*, supra, tests to Applicant's trial counsel's performance, that Applicant has failed in his burden of proof. Applicant has not proven by the greater weight or preponderance of the evidence that trial counsel's representation was below the range of competence required in criminal cases. I affirmatively find trial counsel's performance was well within the range of competence required in criminal cases.

I affirmatively find trial counsel's representation of Applicant was reasonable under prevailing professional norms.

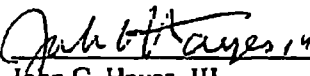
Trial counsel's representation of Applicant in no way worked to Applicant's prejudice.

Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

December 13<sup>FE</sup>, 2016  
Greenville, South Carolina

  
John C. Hayes, III  
Presiding Judge #11

WITNESSES

Mary Fields *WF*

Greenville County Sheriffs Office

12/11/2008

ARREST WARRANT NUMBER

1477005

ACTION OF GRAND JURY  
**TRUE BILL**

*Jim Mack*  
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-23-

AOF

The State of South Carolina

001107

County of Greenville

COURT OF GENERAL SESSIONS

December

TERM 2009

1-13-12

THE STATE

vs.

DAVID STEVENSON BOYD, II

Indictment for

0014

ASSAULT AND BATTERY WITH INTENT TO  
KILL

VIOLATION §16-03-0620



WITNESSES

Mary Fields *[Signature]*

Greenville County Sheriffs Office

12/11/2008

ARREST WARRANT NUMBER  
I477006 and I477007

ACTION OF GRAND JURY  
**TRUE BILL**

*[Signature]*  
FOREMAN GRAND JURY

*Foreperson of Grand Jury*

VERDICT

*Foreperson of Petit Jury*

*Date:*

DOCKET NO. 2009-GS-23-  
AOF

017700

The State of South Carolina

County of Greenville.

COURT OF GENERAL SESSIONS  
**December**  
TERM 2009

1-13-12

THE STATE

vs.

DAVID STEVENSON BOYD, II

Indictment for  
0139 and 0549

ARMED ROBBERY and POSSESSION OF A  
WEAPON DURING THE COMMISSION OF A  
VIOLENT CRIME

VIOLATION §16-11-0330 and §16-23-0490

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

INDICTMENT FOR  
ARMED ROBBERY and POSSESSION OF A WEAPON DURING  
THE COMMISSION OF A VIOLENT CRIME

At a Court of General Sessions, convened on **DEC 15 2009** the Grand Jurors of Greenville  
County present upon their oath:

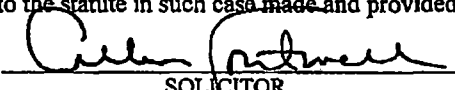
**COUNT I**

That DAVID STEVENSON BOYD, II did in Greenville County, on or about the 10th day of December 2008, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods or monies described as: U.S. CURRENCY, belonging to BANK OF TRAVELERS REST. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

**COUNT II**

That DAVID STEVENSON BOYD, II did in Greenville County, on or about the 10th day of December 2008, possess or visibly display a handgun during the commission or attempted commission of a violent crime, to wit: ARMED ROBBERY. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

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

  
SOLICITOR

WITNESSES

Mary Fields *WF*

Greenville County Sheriffs Office

1/8/2009

ARREST WARRANT NUMBER

1477255

ACTION OF GRAND JURY  
**TRUE BILL**

*Jim Mack*  
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2009-GS-23-

AOF

The State of South Carolina

001985

County of Greenville

COURT OF GENERAL SESSIONS

December

TERM 2009

1-13-12

THE STATE

vs.

DAVID STEVENSON BOYD, II

Indictment for

2367

THIRD PROPERTY OFFENSE: POSSESSING OR  
RECEIVING STOLEN GOODS

VIOLATION §16-13-0180 and §16-1-57

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

INDICTMENT FOR  
THIRD PROPERTY OFFENSE: POSSESSING OR RECEIVING  
STOLEN GOODS

DEC 15 2009

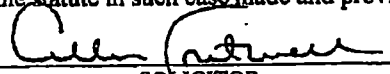
At a Court of General Sessions, convened on

the Grand Jurors of Greenville

County present upon their oath:

That DAVID STEVENSON BOYD, II did in Greenville County, on or about the 10th day of December 2008, having previously been convicted of at least two offenses for which the term of imprisonment is contingent upon the value of the property involved, willfully and unlawfully receive, buy or possess stolen goods, chattels, or other property belonging to VERONICA CEPEDA, such goods being valued at more than One Thousand Dollars (\$1,000), described as follows: 1995 FORD WINDSTAR VAN. DAVID STEVENSON BOYD, II knew or had reason to believe the goods, chattels, or property to be stolen. This is in violation of §16-13-0180 and §16-1-57 of the South Carolina Code of Laws (1976) as amended.

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

  
SOLICITOR