

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Benjamin H. Culbertson, Circuit Court Judge

RECEIVED
JUL 24 2017
S.C. SUPREME COURT

ROMEO BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002401

APPENDIX

LARA M. CAUDY
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

RUSTON W. NEELY
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT (dated May 22-30, 2012)	1
INITIAL BRIEF OF APPELLANT	947
INITIAL BRIEF OF RESPONDENT	965
OPINION NO. 2015-UP-040 (Ct. App. filed January 21, 2015)	993
APPLICATION FOR POST-CONVICTION RELIEF	997
RETURN.....	1096
POST-CONVICTION RELIEF HEARING TRANSCRIPT (dated May 17, 2016).....	1103
ORDER OF DISMISSAL	1160
INDICTMENTS	1171

g. Trial counsel was ineffective and erred by not arguing that Applicant armed robbery was not automatically admissible under State v. Alameda.

h. Trial counsel was not effective by not objecting to the state witness, Vernetha Glenn, record custodian for Orangeburg Clerk of Court to introduce prior conviction document into evidence without sufficient notice pursuant to Rule 602(b), S.C.R.E.

i. When trial counsel urged Applicant to testify in his own defense constituted unreasonable representation.

j. Trial counsel attempted to mitigate the State attacked upon Applicant's injury and the pain Applicant testified too was unsuccessful that render counsel ineffective.

k. Was Applicant denied due process and effective assistance of counsel when his criminal proceedings was effected by Inordinate delay.

l. Trial counsel compelled Applicant against his wishes to testify violated Applicant's Fourteenth and Sixth right to effective counsel.

m. Trial counsel was not effective when he did not move for a Judgment notwithstanding verdict because state evidence was speculative in nature.

n. Indictment for criminal in possession of a weapon is insufficient, flawed and defective to statutory law

o. That trial counsel was ineffective when he failed to argue that it would be error to impeach his client upon: Prior bad act, on grounds of illegal drugs that had been subject of a armed robbery by Alex Harrison; the victim;

p. That Applicant is entitled to a new trial because the evidence and testimony characterized by Vandy Morgan and Ulysses Daniels was tailored by prosecution, was not substantiated by the state. (lead) agent, Patricia Eikhoff, so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Issue #1

- (a) That trial counsel was ineffective for not objecting to
 (b) Applicant being brought into the trial court, in shackles,
 (c) although not displayed, the clanking noise . . . see next
 page for remaining issues.
11. State concisely and in the same order the facts which support each of the grounds set out in (10): See next pages
- (a) was trial counsel ineffective for not objecting to Applicant
 (b) coming before the jury in restraints that visually inflicted
 (c) pain while testifying violated Applicant Eight Amendment
right under the Due Process Clause of the 14th . . .
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? no
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
 (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof: not applicable
- i. _____
 ii. _____
 iii. _____
 iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
 ii. _____
 iii. _____ N/A
 iv. _____
- (c) the disposition thereof:
- i. _____
 ii. _____ N/A
 iii. _____

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

(11) a. Was trial counsel ineffectively for not objecting to Applicate coming before the jury in restraints, that visually inflicted pain while approaching and exiting the stand and while testifying — violated Applicate Eight Amendment Right of the Due Process Clause of the Fourteenth Amendment,

The jury observed the Applicant walked to the stand. They also observe the Applicant picking at his legs while testifying. Applicant's trial transcript, dated May 29, 2012.

Line 19. Q: Are you a little bit nervous today?

Line 20. A: "you know, my leg is kind of numbing up on me."

Trial transcript page 681, ll. 19-20. The record reflects that Applicant's previous leg injury had healed and the only conclusion the jury could conclude that Applicant had some type of restraints on. Furthermore, it was evident that the jury did not see Applicant relying on a cane.

During Applicant testimony, trial counsel asked Applicant to "stand up."

Line 13. Q: Okay, now, if you will stand up for just a moment, if

Line 14. you're able, can you point to the area where the wound is?

Line 15. A: It's from here to there.

Trial transcript page 719, ll. 13-14. The restraints made it obvious that something extrinsic impel Applicant's moment. This act

requested by counsel unreasonably allow the jury to speculate or mislead the jury as to Applicant true condition violated the fairness of the proceeding.

Line 5. A: And I, if I sit in a position too long it locks up on
Line 6. me.

Line 7. Q. Okay.

Line 8. A. And that's why most of the time I sit with my leg out

Line 9. like when I get up in the mornings, you know, it's stuff.

Trial transcript page 720, 11. 5-9. Moreover, at the conclusion of Applicant's testimony, Applicant again had to deal with the restraints. Tr. 766. Trial counsel error and omission when he forgot that Applicant was in restraints when he approach and exist the stand. The trial Court also forgot that Applicant was in restraint and that Applicant exit the stand before the jury retired for the holiday weekend. Tr. pg. 781, 11. 16 - through Tr. pg. 782, 11. 1-2.

Applicant also contends that the restraints undermines the presumption of his innocence. Interfered with the accused's ability to communicate with his lawyer and participate in his own defense, and is an affront to the dignity of judicial proceedings. The record is silent:

1. The Court did not make any specific determination as to any justified safety or flight concerns of Applicant;

2. The restraints was not absolutely necessary;

3. The Court made no precautions to minimize any potential prejudice when the Applicant entered the Court

room, approach the witness stand, while on the witness stand and at the conclusion of his testimony and return to the defense table, and

4. The restraint was not completely padded to avoid noise.

United States v. Fernandez, 388 F.3d 687, 691 (8th Cir., 2006).

The record does reflect that:

1. When Applicant testified, the restraints cause great numbness to his legs;

2. When Applicant testified, he kept picking at the restraints while the jury observed him; and

3. When Applicant testified, it was an interference in his participation when counsel request Applicants to demonstrate in his defense.

In Roche v. Davis, 291 F.3d 413, 433 (7th Cir. 2002) trial counsel deemed ineffective because defendant was restrained throughout trial, record devoid of indication as to why counsel failed to ensure the jury would not see... and counsel failed to object to restraints. **See Attached Appendix (App.) page 7-8.**

(II) b. During Applicant's trial, the prosecutor interjected: "Alex (the victim) said, 'please don't shoot me again.' And he shot him and got up and ran." Tr. 151-152; Tr. 157, 11. 2-3.

The prosecutor elicited this testimony without proper foundation being laid for such testimony or meeting the prerequisite of subsection (1) and (2) before such testimony could be entered under the res gestae of the hearsay rule. See State v. Harrison, 298 S.C. 333, 380 S.E.2d 818 (1989).

Second, when the prosecutor elicited: "Alex said, please don't shoot me again," prosecutor lead its witness, Joe Thomas, into such testimony that violated Applicant's fourteenth Amendment due process of a fair trial.

(II) C. During trial, trial counsel interjected Rule 803(1)(c) (Present sense Impression and Excited Utterance) and 801(c) (Offer it as truth of the matter) during his cross-examination with Joe Thomas. **See Attached App. pg. 9 and 10.** Trial counsel demonstration before the jury—clearly established the excited utterance hearsay rule. Such testimony violated Applicant's procedural and substantial due process rights, that completely shift the burden from the state. Trial counsel establish the following:

1. The victim called Joe Thomas to the crime scene; Tr. 145, ll. 6. "And Alex called me. (Joe Thomas);"

2. Joe Thomas testified that "I heard a noise at the table," Tr. 151, ll. 21, then Alex's "hands hit the table ... and anyhow I (Joe Thomas) heard a shot." Tr. 151, ll. 24;

3. Trial counsel asked Joe Thomas to demonstrate (reconstruct the shooter's action) on trial counsel; before the jury. Tr. 165, ll. 7, and

4. Trial counsel did the demonstration with Joe Thomas and the victim last Impression of the startly event that cause such statement or utterance.

Line 7. Q: On his knees?

Line 8. A: Yeah. He was on his knees like this.

Line 9. Q: Okay.

Line 10. A: Just like this.

Line 11. Q: Yes, sir.

Line 12. A: And when I turned to see him, he had a gun like this.

Line 13. Q: Yes, sir.

Line 14. A: And that's when I -- somebody started yelling gun, gun,

Line 15. gun. And I rolled over back to the table, because I

Line 16. thought, I didn't know what was going on, I thought maybe

Line 17. Somebody else had a gun also. But when I got back up he had

Line 18. the gun over like this, and Alex said, don't shoot me again

Line 19. And he shot him again and he ran.

Line 20. Mr. Gipson (trial counsel): Alright. Please return to your seat.

Trial transcript page 166, 11.7.20. [Trial counsel also demonstrated with State witness, Monique S. Guinyard, see Tr. 332-333]. Moreover, these maneuver by trial counsel rang the bell. "Evidence is not admissible where it serves only to bolster the testimony that the crime occurred." State v. Rogers, 293 S.E. 505, 362 S.E.2d 7 (1987) and State v. Hudnall, 293 S.E. 97, 359 S.E.2d 54 (1987).

^{counsel}
On the contrary, ^a tried to unring that bell with the state witness, Vandy Morgan. See Attached App pg. 11-14. Trial counsel made several objections to the prosecutor's attempt to enter such testimony, eg., "I heard Alex

say, you shot me one time," of the excited utterance standard, cf. Tr. 192, ll. 17; Tr. 192, ll. 21; Tr. 193, ll. 22; Tr. 198, ll. 24 and Tr. 199, ll. 11-12. However, Vandy Morgan was across the street in a neighbor's yard and never seen a gun. Tr. 201, ll. 15.

In light of such facts, above, it was extremely prejudicial and harmless error cannot cure such error. The State in its closing, hammered home Applicant's trial counsel demonstration, Tr. 893, ll. 11-16.

(11) d. During the State's case, prosecutor offered testimony from Ulysses Daniel of a alleged discourse between Donell Ryant and Applicant to prove the truth of the matter asserted, violating Applicant's Confrontational Clause of the 14th and 6th Amendment. Moreover, violating Rule 805 and 801(c), South Carolina Rule of Evidence. Tr. 253, ll. 20-25.

Ulysses Daniel testified that: Applicant came and was asking something to Donell Ryant as to "what was he doing over there [?]" was not interlocking in nature of two statements. Id. cf. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). This testimony did not fall under a firmly rooted hearsay exception, nor did it bore guarantee of trustworthiness.

Furthermore, two months prior the incident on October 27, 2010, the prosecutor produce no evidences to support a continuous disagreement, altercation or vendetta to allow such statement to be presented to the jury. Donell Ryant

was not presented in Court as a witness to subjected him to personal examination. This testimony was inadmissible. Last, the State stress "What was he doing here" in its closing argument that effected the out-come of Applicant's trial.

(II) e. In prosecutor case in chief, presented Monique Guinyard. In her testimony, she gave a full dialogue between Alex and Applicant without the proper foundation being layed by the State. Trial counsel erred by not objecting to the improper admission of hearsay evidence that did not conform with the exception to the rule. See attached App. pg. 15-17.

(II) f. Trial counsel was fatally defective when Applicant brought it to counsel intention that two (2) jurors failed asleep; during the course of the Direct examination of SLED agent, John Roberts. Applicant touched trial counsel sleeve and point^{ed} out jurors (elderly black females) unattentive. (may report inappropriate juror behavior to the court before they render a verdict.) Tanner v. United States, 483 U.S. 107, 127, 107 S.Ct. 2739, 2751 (1987), cf. State v. Hurd, — S.Ct. —, 480 S.E.2d 94 (1996). Applicant's Six Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process.

Trial counsel failure to object was not a product of his ignorance or oversight but a deliberate tactic by-passing a Constitutional claim. This default deprived the trial court of an opportunity to correct

a — constitutional structural error without retrial, detracts from the importance of the trial itself, gives state appellate courts no chance to review such constitution error. Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986).

(11) g. Trial counsel was ineffective for not investigating the Due Process violation committed in State v. Cole, 337 S.C. 622, 629 (S.C. 2000), when the Court of Appeals undertook the Rule 609(b) balancing test itself, verses the State intention to rely on State v. Alamin, by introducing Appellate's prior armed robbery conviction. (S.C. App. 2003) 353 S.C. 405, 415, 578 S.E.2d at 37.

In Alamin, Alamin raised the following claim: Did "the Circuit Court erred when it allowed the State to introduce evidence of Alamin's prior armed robbery conviction without making a probative value / prejudicial effect analysis." Id. The decision by the South Carolina Court of Appeals, on Alamin's direct appeal, states unambiguously that the question of whether (Aggravated Force) armed robbery is a crime of dishonesty in South Carolina was a novel question. Id. Applicant contends that trial counsel failed to realize Alamin's question to the Court of Appeal, shows his proceeding was fundamentally unfair under the Due Process Clause when it held Alamin to a standard which did not even exist at the time of his trial.

State more clearly, Rule 609(a)(1) provides prior convictions can be used to impeach the accused when: (1) the crime was punishable by death or imprisonment in excess of one year, and (2) the Court determines the pro-

bative value of admitting the evidence outweighs its prejudicial effect (impact). Colb, supra.

The Court of Appeals did not balance the interest at stake of prior rulings. Furthermore, the Court of Appeal did not apply the proper standard of review, which placed Alamin in a critically disadvantaged by that decision which came three (3) years after his trial, on his own appeal.

The record reflects that trial counsel erred by not arguing that armed robbery was not automatically admission under a new ruling in State v. Bryant, 369 S.C. 511 (2006). In Bryant, the Court concluded that "a conviction for [armed] robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." See also State v. Broadnax, 2013 WL 88346 (there simply must be something beyond the basic crime). See Attached App. pg. 18-24.

(11) h. Applicant contends that counsel was not served written notice of intent to use a prior conviction over 10 years for impeachment purpose. Trial counsel erred by not requesting a In Camera hearing so that there could have agreed upon a stipulation on prior conviction document, see Appendix Exhibit pg. 18-24, to be placed into evidence, as the element of the offense. Tr. 908, 11. 17 - through Tr. 909, 11. 1-5.

The State called Orangeburg Court Clerk, Vernetha Glenn. In that testimony, Applicant contends that

Such testimony was premature Impeachment (of witness) that inbringe upon Applicant's constitutional right "not to be a witness against his self," 5th Amendment. It was prejudicial to the defense to present Clerk of record custodian as a "automatically admissible" evidence before the jury. Such submission may have influence the jury to plunder upon evidence not properly presented. See Attached App. pg. 25-26.

Trial counsel allowed the State to inber an attack upon Applicant's creditability, when in fact, Applicant was standing upon his constitutional right to remain silent and not be compelled to be a witness against himself. Horton v State, 306 S.C. 252, 411 S.E.2d 229 (1991) and State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984).

The record reflects that Applicant did not inform the defense, the State or trial Court, he was going to take the stand. At that time, the Court only advised Applicant of his right to testify. According to Rule 609(b), SCRE, the State was only premitted to submit a notice to used such conviction. This did not happen.

As alleged above in issue (7) of our Supreme Court has held that "a conviction for robbery, burglary, theft, and drug possession... is not probative of truthfulness." State v. Bryant, 369 S.C. 511, 517 (2006). Nevertheless, outside identification purpose, it was improperly premature impeachment and it violated Applicant's, Due Process Clause under the Fifth, Sixth and Fourteenth Amendment rights to a fair trial.

(11) 1. Prior to Applicant's trial, Applicant express his desire not to testify. In most Strickland cases involving truly unreasonable performance due to failure to call witnesses involved "alibi witnesses or eye witnesses critical to the determination of guilt," Tucker v. Ozmint, 350 F.3d 443, 444 (4th Cir. 2003).

As a convicted felony, it was objectively unreasonable for Applicant to testify when his Alibi witnesses whom obviously had family ties or a neighbor as his defense.

As part of errors and omissions, trial counsel failed to:

1. Conduct a pre-trial investigation;
2. To produce the video tape from the convenience store;
3. To talk to witnesses around the area, that may have seen the Applicant, and
4. Produce any phone records.

Applicant contends that the omission of objective evidence may have effected the outcome of the trial. More pacificly, trial counsel did not interview or present any person or persons whom Applicant visited at Mr. Napp's — yard on the date of incident. Tr. 703. To further support Applicant's alibi defense, trial counsel did not locate or present Erica Smith who stayed next door.

Trial counsel relied heavy upon Applicant's injury. Applicant testified that Erica Smith used to assist him because of his injury. Tr. 704.

Despite Applicant's counsel presented three (3) alibi witnesses, only one did not have a prior criminal history that could have been used as impeachment evidence. As opposed to the vast majority of the State's (fact) witnesses, at least six or seven had multiple prior convictions. Trial counsel's supposed concern about Applicant to testify and the apparent bias of having family members provide alibi witness testimony, fall apart in light of this fact.

Eventhough, trial counsel adopted an alibi defense, requiring the State to prove the Applicant's actual presence at the scene, rather than having his client take the stand to deny his presence, thus subjecting Applicant to credibility assassination on his denial.

(II) j. Trial counsel made an unsuccessful tactical maneuver to mitigate the State attack upon Applicant's gun shot injury; bolstered the State's position. Tr. 724-730. It was not favorable to negate that defense by eliciting from Applicant being provided morphine and hortab. In light of this fact, hospital use such medication to help alleviate pain and discomfort.

As open testimony from trial counsel in its direct examination with Applicant. Trial counsel immediately focus on Applicant leg injury, i.e., when the injury occurred. By such injury, how was Applicant able to go

about his daily activities (with such difficulty). Was Applicant able to do physical therapy. The record reflects:

Line 21. Q. Now, so let me ask you this, when you talk about your
 Line 22. pain level being something you could tolerate, did the
 Line 23. morphine help you tolerate that pain a whole lot better?
 Line 24. A. Oh, yes, sir.

Trial transcript page 760, 11, 21-24. Such tactic assisted the State to obtain a favorable ruling.

(11) k. Applicant was denied procedural due process by Inordinate delay within his criminal proceedings. Applicant's jury sat three and a half days listening to evidence presented by the State and defense. As Applicant's concern, his trial proceedings last a total of nine days. Between the swearing in the jury, Tr. 53, and the jury's verdict, the jury spent five and a half days outside the proceedings. As a constitutional matter, it is incumbent upon the jury to stay impartial. See Attached App. pg. 27.

After some in house matters, on May 29, 2012, the jury return, a second time after delay. Trial counsel nor the trial Court considered to question the jurors, as to inquiry whether they stayed attentive to the Court's previous instruction, by not discussing the case. As to the totality of circumstances, did any of the jury come in contact to any improper influence? Whether they seen or heard any extrinsic information that might affect their decision. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (S.C. 1999) (In a criminal prosecution,

the conduct of the jurors should be free from all extraneous or improper influences). Trial counsel was ineffective.

In addition, omission of such inquiry distorts the very structure of the trial because it creates the risk that the jury will convict the Applicant even if the State has not met its required burden of proof. Arizona v. Fulminante, 499 U.S. 219, 111 S.Ct. 1246 (1991).

As of May 29, 2012, the jury had been out four and a half days. Moreover, a holiday weekend (Tr. 769, 11.17). Such delay within a criminal proceeding [no matter how small] may have compel the jury to pre-deliberate; involuntary. Furthermore, the trial Judge stop the jury in mid-deliberation and dismissed the jury until the following morning—May 30, 2012. This delay enhanced the jury to conclude a decision outside the presence of the Applicant and other jury members.

Trial counsel did not consider, yet alone, not to speculate the juror's state of mind, when they returned. As a structural matter, it is the duty of the trial judge to assure himself that each and every juror (panel) is: impartial and independent jurors. This is distinguish from trial errors, but a structural defect in the constitution of the trial mechanism. **See Attached App pg. 29-39.**

(11) 1. Applicant clearly stated he did not want to take the stand to testify—do to the fact that:

a. He had a prior conviction; cf. State v. McAbey, 236 S.E.2d 431 and Luck v. U.S., 121 U.S. App.D.C. 151, 348 F.2d 763 (1965).

b. He stood upon his right to counsel when addressed about his mirandum rights to counsel, by the police;

c. By standing on his mirandum right, so, that, the State can carry its full burden of proof; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979) ("Reasonable doubt" has often been described as one "based on reason which arises from the evidence or lack of evidence") and In Re Winship, 397 U.S. 358, 90 S.Ct 1068 (1970) (This margin of error is reduced as to him by the process of placing on the other party the burden of... persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt).

d. He spoke specifically on this subject with counsel. It was witnessed by the defense investigator and why he did not want to take the stand.

(II) m. The State's disclosure obligation turns on the cumulative effect of all evidence favorable to the defense, **See Attached App. pg. 40-46**. A common trial tactic of defense Attorney is to discredit the caliber of the investigation. Kyles v. Whitley, 519 U.S. 419, 115 S.Ct. 1555 (1995), cf State v. Proctor, 358 S.C. 411, 595 S.E 2d 416 (S.C. 2004).

A. Cause of death couldn't be truly attributed to Applicant;

B. None practioners inappropriately tried to resuscitate, may have (interveningly) cause or attributed the death;

C. No physical evidence attributed to Applicant as to murder;

D. No forensic evidence;

E. Exculpatory evidence was not disclosed or had been destroyed:

1. Chief investigator, Patricia Eikhoff continuous non-responsive dialogue, about content of the investigation. Trial judge had to remove the jury. Tr. 866-867.

2. Cigarette butt not tested. Tr. 370

3. Blood drop in the victim's hand ^{not tested} Chief investigator admit it to belong to Applicant. Tr. 548, 11. 4-5.

4. Reco was not investigated as a suspect;

5. Finger-nail scraping not tested; Tr. 334; Tr. 368 and Tr. 540;

6. Alex hand tested positive for gun-shot residue. Tr. 554.

7. No identity in shape, size or color of the gun used.

8. Failed to move for a Schmerber order to compel the Applicant to produce hair, swab or blood. Schmerber v. California, 384 U.S. 853, 86 S.Ct. 1826 (1966) and State v. Register, 419 S.E.2d 771 (S.C. 1992).

F. Did not argue flight. Chief investigator, Patricia Eikhoff ^(9:00 am) did not call for the canines to locate suspect, when the shooter fled the scene, on foot. [Applicant depended upon a cane to move - about]. Tr. 572. Dennis Jones picked Applicant up at 10:30 p.m. at the Four Way gas station, off Six O one, Tr. 440, and

G. The State was silent of a continuous vendetta or animosity to establish intent or premeditation. On the contrary, it wrongfully introduced of 404(b), SCRE, bad acts.

The State failed to connect the dots to this motive, Applicant and Alex Harrison had been seen by multiple of witnesses around Randy Bryant home. These same witnesses did not express or implied or speculate that animosity exist from the incident five month prior.

As the last of uncontradicted piece of evidence, was: None of the witnesses denied Applicant did not have to relied upon a cane.

The entire case was contradictory, circumstantial and inconsistent. Moreover, deliberately distract the jury from the facts of the case by impugning his credibility with the introduction of a prior conviction without any justification — beyond the basic crime itself — for its introduction, State v Bryant, 369 S.C. 511 (2006).

(11) h. The underlying indictment was inherently defective, in that it declares unlawful possession of a

Firearm in the alternative, making it impossible for a defendant to prepare an adequate defense. Furthermore, it did ^{not} contain the "necessary elements of the offense intended... and sufficiently" appraises the Applicant of what he must be prepared to meet. Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995).

In South Carolina trial may be had by indictment only (on waiver thereof). State v. Tabory. The indictment is a notice document, but the defendant must be sufficiently and particularly advised of what he is called upon to answer and whether he may later plead an acquittal thereto.

Applicant contends that trial counsel did not object to the instruction to the jury when the indictment charge did not charge the violation of the offense the Applicant stood trial. Pursuant to S.C. Code of law § 16-23-490 (A) states:

"If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime as defined in section 16-1-160, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence does not apply in cases where the death penalty or a life-sentence without parole is imposed for the violent crime."

Applicant was charged under section 16-23-0500: 'Unlawful possession of a firearm by a person convicted

of violent offense; confiscation? Trial counsel was ineffective for not demanding a Bill of particulars to clarify, § 16-23-0500 firearm or ammunition involved . . . must be confiscation. This indictment (see Attached App. pg. 43) was not adequate to charge offense under § 16-23-0500, is inescapable. (Any "broadening [of] the possible based for conviction from that which appeared in the indictment,") (United States v. Miller, 471 U.S. at 138 is fatal. It is reversible per se. At Applicant trial, the indictment was definitely broaden. "A defendant must challenge the sufficiency of an indictment before the jury is sworn." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 491, 499 (2005); Edwards v. State, 312 S.C. 493 (2007). This was structural error, since the entire trial process depended upon the specificity of the term of the indictment.

In addition, South Carolina "has adopted a two-prong test for determining the sufficiency of a indictment involving a purportedly over broad time period.

1. Whether time is a material element of the offense, and
2. Whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury."

State v. Tumbleston, 376 S.C. 90, 98-99, 654 S.E.2d 849, 853-854 (Ct. App. 2007).

Applicant was arrested, November 4, 2010. Now-

ever, the true-billed indictment for possession of weapon went before the grand jury, April 11, 2012, in violation of Rule 3, South Carolina Rules of Criminal Procedure; (SCRCrim.P). In view of all the surround circumstances, trial counsel failed to move to suppress the indictment when the State did not provided adequate notice within the statutory time.

Disproportionate Sentence

Last, Applicant contend the circuit court erred in sentencing him to five years because the sentence was disproportionately insufficient. Under S.C. Code Ann. § 16-23-490 alleges the five-years sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime. See State v Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1991) ("This Court has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review"). Trial counsel of ineffective for not investigating the statute imposed and what defense to be had. See Berger v United State,

1). The accused must be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprised by the evidence at trial; and

2). That he may be protected against another prosecution for the offense.

(11) 0. A general objection which the objection is based is insufficient to preserve a question for review. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). In order to preserve for review an alleged error, the objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial court. See also Campbell v. Bi-Lo, Inc., 301 S.C. 448, 454, 392 S.E.2d 477, 481 (Ct. App. 1990) (holding where the ground for objection is not stated in the record, there is no basis for appellate review).

Trial counsel was ineffective for not objecting to the prior bad act was based upon illegal drugs, that had been subject of armed robbery by Alex Harrison and Applicant nephew. Trial counsel did not specify:

a. There is no logical relevance between the bad act and the crime Applicant was accused,

b. The victim and Applicant did not know each other in prior incident.

c. The victim committed a robbery, by taking illegal drugs from Applicant's nephew, was prejudicial and suggested an emotional or improper basis that out-weighted the probative value — wrongfully attributed to Applicant.

d. There is no evidence (nexus) between the two incidents, that show clear and convincing evidence for the application of Rule 404(b), to be admitted.

State v. Wilson, 343 S.C. 1, 545 S.E.2d 827 (S.C. 2001).

The circumstances surrounding this altercation demonstrate dangers of unreliability which, would not satisfy the requirements of confrontation clause and that, therefore, the trial court erred in admitting bad act.

Applicant denied knowing Alex. Moreover, the State did not follow-up on the question, so, that, Applicant could explain his meaning when he said "no." When the State did not allow Applicant to explain was fundamentally unfair, and must be set aside if there is any reasonable likelihood that the impeachment testimony could have effect the outcome of the jury. State v. King, 334 S.C. 504, 514, S.E.2d 578 (1999); State v. Adam, 322 S.C. 114, 470 S.E.2d 366 (1998).

(11) p. In examination of the entire proceeding do support the contention that the prosecutor had a wild deck of witnesses. A careful analysis of the evidence with the respect to the ability of the witnesses to have seen and identify the assailant, was not circumstantial but speculative and questionable.

The sole issue at trial was the identity of the shooter. It is undisputed that none of the witnesses could establish intent, animosity or motive between the victim and Applicant.

The State may argue that the function of the jury to

judge the credibility of witnesses and the weight to be given ~~to be given~~ to their testimony. State v. Shaw, 258 S.C. 236, 188 S.E.2d 186 (1972); State v. Little, 227 S.C. 60, 86 S.E.2d 875 (1955). Applicant had a full opportunity, through cross examination and argument to the jury, to exploit the inconsistencies in the State's evidence. However, the mere scintilla of evidence to support the jury's finding of guilt (beyond a reasonable doubt) is doubtful.

A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the outcome of the jury. Gibson v. State, 334 S.C. 515, 514 S.E.2d 32d (1999). Deliberate deception of a Court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice; the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Washington v. State, 324 S.C. 232, 478 S.E.2d 833.

I. Vandy Morgan Testimony:

Vandy Morgan testified for the State. At trial, Morgan changed his story about the event that occurred Wednesday, October 27, 2010. Tr. p. 205, ll. 12-13. He admitted that his initial statement to the police on the night of the incident was not the truth. Furthermore, he testified he never seen the Applicant "out there" or "anywhere in the yard." Tr. p. 203, ll. 9-11.

His justification for lying to the police was; "he was mad, he was hurt" his friend got shot. Tr. p. 205, 11. 12-13. This was unreasonable. He also admit, before the jury, that after talking to the prosecutor's agent, two month prior to trial he straighten up his statement. Tr. p. 206, 11. 6-10. The record suggests that the State had doubt about his testimony, however, went with it regardless the conflicting testimony.

The State's highlights with this testimony is Morgan decision to leave Randolph Ryant resident. Morgan testified that he saw Applicant was walking (not mentioning any cane or handicap) towards the house. He never seen a weapon. His testimony is clearly a deliberate deception and false.

II. Ulysses Daniels Testimony:

Ulysses Daniels: currently incarcerated testified for the State. The record reflect Daniels testimony was a deliberate deception. His complete description of that night was extremely uncorroborated. The State knew or should have known that it was a reasonable likelihood his testimony was false.

Daniels testified that that prior to his incarceration, he spent "almost every day" at Ryant's resident. Tr. p. 251, 11. 15-19. Soon after this testimony, the State launched into his observation of Applicant, that night. Accordingly to his narration; he spotted Applicant "standing at a distance" boldly holding a "gray

and black gun... on his right side." Tr. p. 271. On direct, he stated that he "had a gray and black Smith and Wesson on his right pocket," Tr. p. 281. At that point he told everybody (around the table) "to get on point," in which no one heard. Tr. p. 252. Moreover, he didn't see Applicant with a gun when he left. Tr. p. 270. Furthermore, he guess Alex spotted Applicant and ran toward him." Tr. p. 252. As for himself, he fled the scene, Tr. 255, not like Morgan, his justification for leaving was:

Line 9. ... had my
 Line 10, girlfriend call me, and that's when I called
 Agent Barry
 Line 11. Wilson, you know, to inform him what had
 happened, to make
 Line 12. Sure that it didn't violate my bond or whatever.

Trial transcript pg. 255, ll. 9-12. The record is void of any evidence to support his version.

Daniel and Morgan were friends of Alex, the victim. Daniel testimony clearly show he never considered to call 911, the police. The record also reflect that none of the eye witnesses knew who the shooter was, until hours after the police arrival.

Daniel's testimony was extremely prejudicial, during his testimony and demonstration with Applicant's trial counsel. He testified—without an objection that Applicant allegedly asked Donell Bryant "what was he

(Alex Harrison) doing over there." Although, seconds before the shooting, sitting "side by side" with Alex, Alex being his friend, left the scene before the police arrived; leaving his car behind. Tr. p. 263; Tr. p. 264.

III. Patricia Eikhoff Testimony:

The "central issue" in this case is Who Did It? Additionally, during the instant trial, trial counsel did not attempt to elicit testimony from the lead investigator, officer Patricia Eikhoff, the substance of which is that law enforcement generally focuses first on people closest to the victim to eliminate as possible suspects.

At trial, trial counsel attempted to cross-examine the lead investigator regarding her investigation that focused on Applicant. This evidence was relevant for purpose of examining the quality of the investigation and the State's ability to prove its case against Applicant beyond a reasonable doubt.

First, trial counsel focus on Inv. Eikhoff sixteen years of experience. Subsequently, discussed the lack of a motive, then concentrated the hardest blows for the botched police investigation. As argued in ~~m~~, above, Inv. Eikhoff did not take due care of Applicant's constitutional rights as Due Process required. (A defendant in a criminal trial has the right "to seek out the truth in the process of defending himself.") Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974).

In contravention of Chambers v. Mississippi, 410 U.S. 284 (1973), and Crane v. Kentucky, 476 U.S. 683 (1986) and the fundamental concept of Constitutional Due Process. The prosecution in the Applicant's case deliberately compromised the integrity of the fact-binding and truth-seeking process by introducing Morgan and Daniel as witnesses. This justice-subverting strategy deprived the Applicant of any ability to mount a complete defense.

At trial, Trial Transcript, dated May 25, 2012:

The Court: I'm going to just interject because I don't
Line 11. believe that that was responsive.

Line 12. Ladies and Gentlemen, I'm going to ask you to
step to

Line 13. your jury room. Do not discuss this matter or
allow anyone

Line 14. to discuss it with you. There's a matter that I
must take

Line 15. up with counsel.

* * * *

The Court: Detective Eikloff, I'm going to ask you to
Line 21. do this for me. I'm going to ask you to listen very
Line 22. carefully to the question that you are being asked, I'm
Line 23. going to ask you to answer that question. If it
is a yes or

Line 24. no answer, I'm going to ask you to answer it yes
or no. You

Line 25. may explain your answer. I don't want you to go

into a non-

Trial Transcript page 566, ll. 10-15; 20-25.

Line 1. responsive dialogue, but if you need to explain your answer

Line 2. I want you to do that. The reason that I have sent the jury

Line 3. out is because it's clear that Mr. Gipson is not going to

Line 4. abandon his question because you're not answering it, he's

Line 5. just simply going to come back around to the question, and

Line 6. you know, we have a jury here and I must be mindful of their

Line 7. time as well as everyone else's.

Trial Transcript page 567, ll. 1-7. **See Attached Appendix pg. 42-44;** for complete colloquy. Concerning the prejudice prong of Strickland, it is obvious that the defendant is more likely to prove prejudice if the prosecution's evidence is weak. United States v. Gray, 878 F.2d 702 (3d Cir. 1989) (where trial basically a credibility determination between defendant and complainant, the failure to call disinterested witnesses who would support the defendant's testimony was prejudicial).

The record is clear that, Inv. Eikhoff was a adverse witness. For example: In lack of confidence in the integration of state agencies as well as Inv. Eikhoff

own confidence in her ability to conduct a proper investigation.

i. Inv. Eikhoff arrived ten (10) p.m., Tr. p. 519 at 16, however, the first time she heard Applicant name was "over an hour" after she arrived. Tr. p. 523, ll. 1-13. Prior to that the description was "an unknown black male." Tr. p. 525, ll. 14-18. [The alleged shooting occurred about nine (9) p.m.] Tr. p. 520. This testimony is supported by her testimony at the probable cause hearing, dated January 7, 2011. Tr. p. 521. Inv. Eikhoff was non-responsive before admitting. Tr. p. 521, ll. 1-12.

ii. Inv. Eikhoff was not sure if she handle the crime scene log or another officer, [Sergeant Davis or lieutenant Culler]. Tr. p. 517, ll. 15-19.

iii. Inv. Eikhoff testified that "we did [not] have a location" to secure a search warrant, Tr. p. 529 at 9, although (1) Applicant's sister and brother-in-law reside where the shooting occurred, and (2) Applicant reside just through a path from that resident. Furthermore, there are five (5) magistrate in that location. Tr. p. 527.

iv. Thirteen officer's respond to the scene, however, none considered to get a description "of the clothes" of the shooter, Tr. p. 531, ll. 14-18, or contact the canine unit to track the shooter, who fled on foot, Tr. p. 572. Essentially, Inv. Eikhoff was the supervising officer. Tr. p. 519, ll. 1-2.

v. Inv. Eikhoff was informed that there was a

struggle between the shooter and the victim. With this information, she did not collect visual evidence in the victim's hand and finger nails. Tr. p. 540-545.

vi. Although none of the weapons was recovered in this case, eye witness account that there was two weapons at the scene; a revolver and automatic. At trial, the state presented, to the jury, that there was only two shots. At the scene, interviewing of the witnesses, there was about four or five shots heard. Tr. p. 552; Tr. p. 562.

vii. Inv. Eikhoff did not request or review the SLED findings of the gun shot residue found in the victim's hand. Tr. p. 556, 11. 19-21.

viii. Inv. Eikhoff did not request for a Schmerber hearing to compare the evidence collected by SLED. Schmerber v. California, 384 U.S. 833, 86 S.Ct. 1826 (1966); cf. State v. Register, 414 S.E.2d 171 (S.C. 1992). Tr. p. 563-564.

ix. In ^a eye witness account to a murder investigation. The attendant circumstances is important. Each and every witness was intoxicated. "About a half gallon of gin" and "Thirty-six beers" was digested. Truthfulness of these witnesses is a concern for the inconsistency and unreliability of the statements and testimony. Tr. p. 565.

To illustrate further, Ulysses Daniels finally contact Inv. Eikhoff by phone a few days after the

incident, Daniels admit to her he left the scene and contact DEA Agent Barry because he wasn't going back to the scene. Inv. Eikhoff told Daniel "that [it] was alright that we could get [his] statement at a different location, at a different time." Tr. p. 575, ^{11.19-24} Inv. Eikhoff performance in this case was clearly deliberate indifference to Applicant due process right. The record reflect Inv. Eikhoff testimony:

Line 5. A: He was willing to come in at a certain date, to give me (Eikhoff)

Line 6. -- at a certain time to give me a statement, a written

Line 7. statement. He gave me a verbal statement on the phone.

Line 8. stating this

Line 9. Q: But he was too busy to come that day?

Line 10. A: I can't say whether he was too busy or what, you know.

Trial Transcript, dated May 25, 2012.

The State knew from the start that its case for murder against the Applicant could not be honestly proved. It could not legitimately prove that the Applicant was guilty of murder as a principal. It could not substantiate that the Applicant was at the scene, that he had intent, opportunity or motive, nor that he engaged in any premeditation as to murder.

The best that the State could hope for was to construct a house of circumstantial cards (creating an

illusion of guilt), then to distract the jury's attention from all of the holes in the State's case by creating a dust cloud of doubt concerning the Applicant's credibility (when, in fact, the Applicant did not have to prove anything) by means of furtive undercurrents as to the Applicant's long-ago prior conviction [and alleged flight].

The central issue of whether the Applicant's was actually guilty of murder became obscured by the State's unfair diversionary tactics. The State's prosecution of this case be classified as deceit by design, as it charge of murder (as principal),

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

no

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

(a) which grounds have been presented: not applicable

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

previously been presented: The factual and legal basis of the claim(s)
~~(a)~~ was from either: External impediment preventing counsel
~~(b)~~ from constructing or raising the claim or counsel failure
~~(c)~~ to object by inadequate assistance or oversight.

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? no
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. Byron E. Gipson, Esq. / Johnson, Toal and Battiste, P.A.
Attorneys at Law
Post Office Box 1825
130 Centre Street
Orangeburg, S.C. 29116-1825
- ~~ii.~~ _____
- ~~iii.~~ Trial Attorney
- (b) the proceedings at which each such attorney represented you:
- i. Katherine H. Hudgins, Esq. / South Carolina Com. on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, S.C. 29211-1589
- ~~ii.~~ _____
- ~~iii.~~ Appellate Defender
19. State clearly the relief you seek in filing this application: That the Court enter judgment granting Applicant's application for Post-Conviction relief, and remanding the criminal case for a new trial.
20. Are you now under sentence from any other court that you have not challenged?
no

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Orangeburg)

I, Romeo A. Brown, 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.

Romeo Brown

SWORN to and subscribed before me this 94 13
day of March 13, 2015

J. Franklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

My Commission Expires December 16, 2019

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

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

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

Romeo Brown
Applicant

SWORN or affirmed to and subscribed before me this

13 day of March, 2015
J. Franklen
Notary Public

My Commission Expires: 12-16-2019

My Commission Expires December 16, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF Orangeburg

Romeo Anthony Brown
Plaintiff

FILE NO:

vs.

CERTIFICATE OF SERVICE

State of South Carolina

I certify that on this date, I served a copy of the *PER* in this action, dated _____, on *Melody J. Brown, Esq.*
Ass. Attorney General

☐ delivering it to him/her personally; or,

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

for South Carolina Attorney General's Office
Reuben C. Dennis Building / 1000 Assembly St. Rm. 519
[P.O. Box 11549] Columbia, South Carolina 29201-1549

☐ Other:
[See Rule 5(b)(1), SCRCPP]

MAR. 13 / 15
(Date)

Romeo Brown
(Signature)

STATE OF SOUTH CAROLINA
County of Orangeburg

IN THE COURT OF COMMON PLEAS
First Judicial Circuit

Romeo Anthony Brown
Plaintiff,

AFFIDAVIT

v.

State of South Carolina
Respondent.

Case No:

In support of the following post-conviction relief
(See South Carolina Code of Law § 17-27-20(a)(1)), pursuant
to South Carolina Code of Law §§ 17-27-40 and 17-27-50,
I, Romeo A. Brown, in caption above submits the following:

1. A true copy of Trial transcript as supporting
facts, dated May 22, 2012.

I, plaintiff, in above caption, do hereby aver the
content of this affidavit is based on personal knowledge,
contains facts admissible in evidence, and is executed by
a person who is competent to testify as to the matter's
content hence forth.

Executed on 13 March, 2015 at 386 Redemption
Road, McCormick, S.C. 29899.

Romeo Brown
Romeo A. Brown #185544

Subscribe before me this day ¹³
13 March, 2015

JC Franklin
my Commission expires: 12/6/2019

My Commission Expires December 18, 2019

THE STATE OF SOUTH CAROLINA
 County of Orangeburg

County of Common Pleas
 Honorable _____, Circuit Court
 Judge

Case No. _____

Romeo Anthony Brown,

Appellant,

versus

State of South Carolina

Respondent.

APPENDIX

Assistant Attorney General
 Melody J. Brown, Esquire
 Office of the Attorney General
 Rembert C. Dennis Building
 1000 Assembly St. Rm. 519
 Post Office Box 11549
 Columbia, South Carolina 29201-1549

Romeo Anthony Brown # 185544
 McCormick / F-3-B
 386 Redemption Way
 McCormick, S. C. 29829

Index

<u>Exhibits</u>	<u>Page</u>
1. Trial transcript, doled May 22-30, 2012	1
2. Transcript Index	2-6
Issue a	7, 8
Issue c	9, 10, 11-14
Issue e	15-17
Issue g	18-24
Issue h	18-24, 25, 26
Issue k	27-39
Issue m	40, 41
Issue p	42-44
3. Certificate	45
4. Issue n	46

COURT OF GENERAL SESSIONS
FIRST JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA

VOLUME ONE OF TWO

versus

TRANSCRIPT OF RECORD

ROMEO ANTHONY BROWN,

DATE:

MAY 22, 2012

DEPENDANT

BEFORE:

HONORABLE DIANE SCHAFER GOODSTEIN, PRESIDING JUDGE
AND A JURY.

APPEARANCES:

DONALD N. SORENSON, ESQUIRE
ASSISTANT SOLICITOR
FOR THE STATE

BYRON E. GIPSON, ESQUIRE
ATTORNEY AT LAW
FOR THE DEFENDANT

HARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF ORANGEBURG

FIRST JUDICIAL CIRCUIT

CASE NO. 2011-GS-38-0012
2012-GS-38-0792

STATE OF SOUTH CAROLINA

VOLUME ONE OF TWO

versus

TRANSCRIPT OF RECORD

ROMEO ANTHONY BROWN,

DATE:

DEFENDANT

MAY 22, 2012

BEFORE:

HONORABLE DIAKE SCHAFER GOODSTEIN, PRESIDING JUDGE
AND A JURY.

APPEARANCES:

DONALD N. SORENSON, ESQUIRE
ASSISTANT SOLICITOR
FOR THE STATEBYRON E. GIPSON, ESQUIRE
ATTORNEY AT LAW
FOR THE DEFENDANTHARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

#2
App. 2

2

I N D E X

<u>EXAMINATION OF:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
CRAIG DAVIS				
SOL. SORENSON	80		110	
MR. GIPSON		93		113
RANDOLPH RYANT				
SOL. SORENSON	115		136	
MR. GIPSON		127		
JOE LAWRENCE THOMAS, SR.				
SOL. SORENSON	139			
MR. GIPSON		158		
VANDY MORGAN				
SOL. SORENSON	180		215	
MR. GIPSON		205		220
ISAAC B. MORGAN				
SOL. SORENSON	225			
ULYSSES DANIELS, IN CAMERA				
SOL. SORENSON	234			
MR. GIPSON		238		
ULYSSES DANIELS				
SOL. SORENSON	247		278	
MR. GIPSON		260		283

#3
App.

3

I N D E X (CONTINUED)

<u>EXAMINATION OF:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
BRANDY MACK				
SOL. SORENSON	285			
MR. GIPSON		298		
MONIQUE SHAWN GUINYARD				
SOL. SORENSON	313		347	
MR. GIPSON		327		342
SABRINA ANN FELLERS				
SOL. SORENSON	345			375
MR. GIPSON		356		377
ROMEO BROWN, IN CAMERA				
THE COURT	380			
LEONARD CAIN, IN CAMERA				
SOL. SORENSON	386			
DR. JANICE ROSS				
SOL. SORENSON	392			
MR. GIPSON		405		
SUZANNE CROMER				
SOL. SORENSON	409			
MR. GIPSON		420		
JOHN ROBERTS				
SOL. SORENSON	423			
MR. GIPSON		431		

App #4

4

I N D E X (CONTINUED)

<u>EXAMINATION OF:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
VERNETHA GLENN				
SOL. SORENSON	433			
DENNIS JONES				
SOL. SORENSON	438		450	
MR. GIPSON		445		
JAMES SHUMPERT				
SOL. SORENSON	455			
MR. GIPSON		471, 498		
JAMES SHUMPERT, IN CAMERA				
MR. GIPSON		475		
PATRICIA EIKHOFF				
MR. GIPSON	509		590	
SOL. SORENSON		582		593
TAMMY RYANT				
MR. GIPSON	596			
SOL. SORENSON		604		
TEDRIKS GREEN				
MR. GIPSON	615		640	
SOL. SORENSON		623		

App # 5

5

I N D E X (CONTINUED)

<u>EXAMINATION OF:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
ERICA SMITH				
MR. GIPSON	642		661	
SOL. SORENSON		653		663
ROMEO BROWN				
MR. GIPSON	675		757	
SOL. SORENSON		721		765
JAMES SHUMPERT				
SOL. SORENSON	784			
MR. GIPSON		787		
RANDOLPH RYANT				
SOL. SORENSON	792			
MR. GIPSON		798		

App^H 6

6

I N D E X (CONTINUED)

	<u>PAGE</u>
OPENING STATEMENT BY SOLICITOR SORENSON	63
OPENING STATEMENT BY MR. GIPSON	68
CLOSING ARGUMENT BY SOLICITOR SORENSON	806
CLOSING ARGUMENT BY MR. GIPSON	817
FINAL CLOSING ARGUMENT BY SOLICITOR SORENSON	856
CHARGE BY THE COURT	895
VERDICT OF THE JURY	921
SENTENCE OF THE COURT	941

App⁷

177

1 record what I had pointed out to you earlier?

2 THE COURT: Right, yes, right.

3 SOLICITOR SORENSON: And I know Mr. Gipson, I know he
4 wouldn't intentionally do this, I'm just afraid that some of
5 the jurors had the opportunity to observe Mr. Brown walk in,
6 and it was pretty obvious that there was something going on
7 with his legs. I mean, it's clanking and he's walking like
8 the tin man. And my concern is that, you know, part of his
9 defense I think is going to be that he had something wrong
10 with his leg and couldn't have done this, and now we've got
11 a bunch of jurors that have seen him, which obviously is not
12 the condition that he is in. I mean, that bothers me a
13 little bit now, I mean, you know, if he ultimately does
14 start putting in stuff about his legs and, you know, having
15 an issue with the leg and couldn't have done this, that or
16 the other, that these jurors are going to have seen him
17 walking and said, yeah, he does have something wrong with
18 his legs, he's got braces on them or something. And I don't
19 know how to address that at this point in time, but I mean,
20 just kind of when I saw him walking in I was, like, I mean
21 ...

22 THE COURT: Well, I can assure you that Mr. Gipson will
23 not argue to the jury, you all saw him walk in over there,
24 you saw him, he's got braces on his legs.

25 MR. GIPSON: I will not say that.

1 THE COURT: I promise you he will not argue that. But
2 he has made a point that he was walking with a cane at the
3 time and, you know, he's going to ask for the medical
4 records, so that you will deal with, but I'm quite confident
5 that Mr. Gipson's not going to argue to this jury, you saw
6 how he limped in here, Ladies and Gentlemen. He's not going
7 to do that.

8 MR. GIPSON: I'm not going to do that, Your Honor.

9 THE COURT: So, again, we have one or two ways to deal
10 with that. One of them you have not addressed, and the
11 other is to just be sure he's in and seated when the jury
12 comes in. So, I just, I look for you guys to help me with
13 that.

14 Very well, anything from the defense?

15 MR. GIPSON: No, ma'am.

16 THE COURT: Thank you all.

17 (Recess for the day)

18 DATE:

19 MARCH 23, 2012

20 THE COURT: Good morning, anything before we bring our
21 jury out, from the State?

22 SOLICITOR SORENSON: No, Your Honor.

23 THE COURT: From the defense?

24 MR. GIPSON: No, ma'am.

25 THE COURT: Very well, let's have the jury, please.

Appst 9

JOE LAWRENCE THOMAS, SR., - CROSS BY MR. GIPSON

165

1 THE COURT: You may.

2 MR. GIPSON: Alright, could you just step down for a
3 moment?

4 Q. Now, if, let's -- you're alleging that Romeo Brown did
5 the shooting, correct?

6 A. That's correct.

7 Q. Alright. Can you demonstrate on me what you saw
8 happening as you turned around and saw, after the first gun
9 shot took place? If I'm Alex where would I need to be?

10 A. Well, - - -

11 Q. And get on the floor, I don't mind.

12 A. Okay. I turned toward Alex.

13 Q. Okay. And we could just, I'm just saying generally on
14 the ground.

15 A. Generally on the ground?

16 Q. Just, you tell me just, point me where I need to be and
17 I'll get there.

18 A. Right here.

19 Q. Alright. So, on my back or my side?

20 A. On your back.

21 Q. Alright. But you're saying that he was here?

22 THE COURT: Ladies and Gentlemen, you can stand up if
23 you need to, no problem. I'm going to do it, too.

24 Q. Yes, sir.

25 A. And he was just laid out.

JOE LAWRENCE THOMAS, SR., - CROSS BY MR. GIPSON

166

1 Q. Yes, sir.

2 A. And he was leaning over him.

3 Q. And when you say, he, are you saying Mr. Brown?

4 A. Mr. Brown.

5 Q. Alright.

6 A. And when he - - -

7 Q. On his knees?

8 A. Yeah. He was on his knees like this.

9 Q. Okay.

10 A. Just like this.

11 Q. Yes, sir.

12 A. And when I turned to see him, he had a gun like this.

13 Q. Yes, sir.

14 A. And that's when I -- somebody started yelling gun, gun,

15 gun. And I rolled over back to the table, because I

16 thought, I didn't know what was going on, I thought maybe

17 somebody else had a gun also. But when I got back up he had

18 the gun over like this, and Alex said, don't shoot me again.

19 And he shot him again and he ran.

20 MR. GIPSON: Alright. Please return to your seat.

21 Q. Now, so, and then at that point he got up and walked
22 away?

23 A. He got up and ran.

24 Q. Okay. He took off running?

A. That's correct.

App¹² ||

VANDY MORGAN - DIRECT BY SOL. SORENSON

194

1 jury and court reporter.)

2 THE COURT: Alright.

3 Q. Mr. Morgan, so you heard, as you testified that you
4 heard the initial gun shot, is that correct?

5 A. Right.

6 Q. And now, I believe your description was it was kind of
7 chaos at that point in time?

8 A. Right.

9 Q. Alright, did you hear somebody -- not what they said at
10 this point, but did you hear somebody yelling at that point
11 in time?

12 A. Everybody was yelling.

13 Q. Okay. Did you hear -- let me ask you this, did you hear
14 Mr. Harrison?

15 MR. GIPSON: Object to the leading, Your Honor.

16 Q. Okay. Define everybody?

17 A. I heard Alex say, you shot me one time.

18 MR. GIPSON: Object, Your Honor.

19 THE COURT: Ladies and Gentlemen, let me ask you to
20 please step to your jury room. There's a matter I must take
21 up outside your presence. Do not discuss this matter or
22 allow anyone to discuss it with you, and we will be with you
23 shortly. We won't be long.

24 (Whereupon, the jury retires
25 to the jury room and the following

VANDY MORGAN - DIRECT BY SOL. SORENSON

195

1 takes place out of the hearing
2 of the jury.)

3 THE COURT: Let me get to the rule, please. If you are
4 establishing an excited utterance as an exception to the
5 hearsay rule, you've established that this gentleman was
6 there and there was a gun shot fired, but what you have to
7 do is that you have to establish the individual, where the
8 individual was, and the, and you've got to establish that
9 the statement is made relating to a startling event or
10 condition while the declarant is under the distress of the
11 excitement caused by the event or condition. You've got to
12 lay that foundation with regards to the declarant. And you
13 can't do that by leading. So, I sustain the objection but I
14 wanted to go over the foundational part of it.

15 SOLICITOR SORENSON: I understand, but I mean, it's --
16 part of it is, I have to be able to kind of, to get him so
17 he knows who I'm talking about. I mean, because he said, I
18 don't care what anybody else was saying, I only care about
19 what the victim was saying. I'm not trying to get into what
20 everybody else was yelling out there, but I mean, so when I
21 try to get him focused in on that I get objected to for
22 leading. Otherwise, if I ask him he's going to start saying
23 what everybody is saying, and so that's why ...

24 THE COURT: Mr. Sorenson, you know, I don't -- I think
25 you know the difference between what is leading and what

App¹¹ 13

VANDY MORGAN - DIRECT BY SOL. SORENSON

196

1 isn't leading, - - -

2 SOLICITOR SORENSON: Yeah, I - - -

3 THE COURT: --- and you don't get to lead just because
4 you choose to lead and it's helpful to you. That's not the
5 rule. You've got to be able to direct -- let me give you an
6 example, could you see the victim? Where was he? What did
7 he look like? What was he doing? And how soon thereafter
8 did you see him? What, if anything, did he say? I don't
9 know, this is Evidence One O One, I mean, I know that -- and
10 you have led, and it puts the defense in a position to have
11 to object and object and object and object. I'm going to
12 ask you to please try to watch the leading. I mean, yeah,
13 it makes the trial go faster, and yeah, it puts you in
14 control, but he's entitled to object to the leading, and
15 it's been, it's been a problem.

16 Yes, sir?

17 MR. GIPSON: And Judge, just for the record, I just
18 want to make sure that I'm clear. My position is that, you
19 know, at this juncture this is crucial testimony that I'm
20 hearing for the first time after, you know, Eighteen months
21 involved in the case. So, I'd like to make sure that what's
22 being said is coming from his mouth and not what, what, you
23 know, the State wants him to be able to testify to. And
again, we can't unring the bell. When you start saying,
these things happened and these things happened that, you

App^{tt} 14

VANDY MORGAN - DIRECT BY SOL. SORENSON

197

1 know nobody's ever heard, well, I've never heard before
2 today it's extremely prejudicial especially when it's
3 hearsay and it may not be something that's able to come in,
4 and we can't unring that. And even if you have to strike
5 it, the jury still hears that kind of stuff and it puts me
6 in a precarious position.

7 THE COURT: I'm with you, I understand, I understand.
8 And I understand the objections with regards to leading.
9 You know a great trial lawyer, it takes more than one
10 objection on leading that causes them to stop. So, in any
11 event ...

12 SOLICITOR SORENSON: Well, just, I mean, my, you know,
13 yes, ma'am.

14 THE COURT: Okay. Let me have my jury.
15 (Whereupon, the jury enters
16 the courtroom and the following
17 takes place in the presence
18 of the jury.)

19 THE COURT: You may proceed.

20 SOLICITOR SORENSON: Thank you, Your Honor.

21 Q. Let's back up here, if I could, Mr. Morgan. When you
22 heard the first gun shot, heard the first gun shot, tell the
23 jury or show the jury where you were when you heard that
24 first gun shot?

25 A. Alright. I was at my car when I heard the first shot.

App¹⁵

MONIQUE SHAWN GUINYARD - DIRECT BY SOL. SORENSON

317

1 A. Wingfield Street.

2 Q. Okay. And that's here in Orangeburg?

3 A. Yes.

4 Q. Alright. So, who, who were you with, then, when you
5 went over to Randy's house that night?

6 A. I was with Joe.

7 Q. Okay. And anybody else show up at the same time as you
8 then?

9 A. No.

10 Q. Let me ask you, did Alex come over that night then?

11 A. Oh, Alex was right in front of us.

12 Q. Okay. So, he got there right before you, I guess?

13 A. Right.

14 Q. Okay. And do you remember about what time this would
15 have been by any chance or ...

16 A. Not really.

17 Q. Okay. Alright. What, when y'all got to Randy's house
18 then, tell the jury kind of just what you were doing out
19 there, Shawn?

20 A. Shucking and jiving, as usual, you know, having a good
21 time.

22 Q. Okay. Were you drinking?

23 A. Yeah, I -- well, I bought one bowling ball for me and
24 one for Joe.

25 Q. Okay. And let me ask you, had you been drinking any

Appⁿ 16

MONIQUE SHAWN GUINYARD - DIRECT BY SOL. SORENSON

318

1 earlier that afternoon or evening, before y'all went over to
2 Randy's?

3 A. No, I hadn't.

4 Q. Okay. Had Joe been drinking any in your presence - - -

5 A. No, not - - -

6 Q. --- before you went over?

7 A. --- not in my presence.

8 Q. Okay. So, when y'all were working on the struts, - - -

9 A. Right.

10 Q. --- were either one of y'all drinking?

11 A. No.

12 Q. Okay. Alright, now what -- alright, tell the jury then,
13 so y'all are over there, and did ultimately, you know,
14 something, you know, happen out there that night?

15 A. Yes.

16 Q. Okay. And about how long do you think you had been
17 there before, before the shooting occurred?

18 A. Maybe Ten or Fifteen minutes.

19 Q. Okay. And if you would, tell, tell the jury kind of
20 what, what you observed that led up, leading up to that?

21 A. I was sitting, sitting at the picnic table, and you just
22 sense when someone is walking up behind you. So, I turned
23 around, and I looked, and I spoke. And Romeo said, what is
24 he doing over here? He said, ain't I told you? That's
25 when Alex stood up. When Alex stood up he shot him. Alex

App 17

MONIQUE SHAWN GUINYARD - DIRECT BY SOL. SORENSON

319

1 looked, Alex said, Romeo, you shot me. He ran around the
2 table and grabbed him. And they was over there tussling,
3 tussling, tussling, and they ended up on the ground. I
4 heard a gun shot went off, I think once or twice more, and
5 that's all, that was it.

6 Q. Where were you at when all of this was taking place?

7 A. Trying to get up under a car.

8 Q. How far away were you from all of this when it was
9 taking place?

10 A. The first shot I maybe was about from here, halfway
11 between that table right there and where I'm sitting right
12 now.

13 Q. Okay. So, kind of this - - -

14 A. Right.

15 Q. --- four or five feet?

16 A. Four or five feet.

17 Q. Okay. And how about the second shot, where were you
18 when you heard, saw the second shot?

19 A. I was on the other side, on the right hand side of the,
20 I think that's an Oldsmobile Ninety-eight.

21 Q. Okay. And where was that vehicle at?

A. That's, if you're standing in front of the house it's on
the right hand side.

Q. Okay. Standing in front of the house facing the house
or ...

App¹ 18

666

1 Ladies and Gentlemen, I am going to ask you to be back at
2 two o'clock. Remember, do not discuss this matter or allow
3 anyone to discuss it with you, and don't read anything or
4 listen to anything about this matter on the radio,
5 television, newspapers or internet, don't have any social
6 networking about this matter, and remember to leave your
7 phones away from the courthouse. Have a wonderful lunch and
8 I'll see you at two.

9 (Whereupon, the jury leaves
10 the courtroom and the following
11 takes place out of the presence
12 of the jury.)

13 THE COURT: Anything from the State before we take our
14 lunch break?

15 SOLICITOR SORENSON: The only thing I guess I would ask
16 Your Honor is to, if you have made a ruling or wish to hear
17 at this point in time, I guess, about -- from what Mr.
18 Gipson has told the Court up at the bench was that his only
19 witness he may have left might be the defendant.

20 THE COURT: Right.

21 SOLICITOR SORENSON: So, I'm not sure if we need to
22 address my motion to be able to get into his prior armed
23 robbery conviction at this point in time. I'm sure that may
24 weigh, may or may not weigh in his decision to testify.

25 THE COURT: I understand. You know, here's, here is my

App^t 19

667

1 concern, and I'm just being quite honest with you about it,
2 and I'm going to -- let me tell you what I'm going to do is,
3 I'm going to read again State versus Alamein.

4 SOLICITOR SORENSON: It would be our position that it
5 rules that armed robbery is a crime of dishonesty, I mean,
6 that is ...

7 THE COURT: I know it does. I know it does. And here,
8 and I don't mind -- I know that it does, and it is a Court
9 of Appeals decision, and certiorari was denied on Alamein.
10 My concern about this particular offense is that, to put it
11 quite frank, you know, Weinstein on Evidence and so many of
12 the other jurisdictions in the United States are pretty
13 clear that armed robbery is not a crime involving
14 dishonesty. And let me say that, and let me cite,
15 Weinstein's Federal Evidence lists the traditional crimes of
16 dishonesty as being matters of bribery, counterfeiting,
17 forgery, or transporting forgery, fraud, fraudulent passing
18 of worthless checks, and of course, perjury. South Carolina
19 by its case law has expanded that, and I've always been a
20 little bit concerned about that, because there are very
21 states that consider robbery to be a crime of dishonesty.
22 Of course, you know, if I consider it not to be a crime of
23 dishonesty, and differ from the Court of Appeals, then that
24 puts me in the position of going against the stare decisis
25 associated with the Court of Appeals and that is always a

1 very uncomfortable place for me to be, very uncomfortable.
2 And this happens to be one of those areas of the law that I
3 have a definite opinion, but again, I am not someone that
4 typically and normally finds herself ignoring the appellate
5 courts of this state, but I am concerned about it. If I
6 was, though, if I was to determine that armed robbery was,
7 in fact, not a crime of dishonesty, then that would put me
8 into the position of weighing whether or not the probative
9 value outweighs the prejudicial effect, and I can assure
10 you, it does not. Prejudicial effect of this conviction
11 greatly outweighs any probative value, and I'm satisfied
12 with that. So, where I think you are is Alamein, that I'm
13 going to read again.

14 SOLICITOR SORENSON: And I'd also add, I mean, and it's
15 going back, and I understand your opinion regarding the
16 probative versus prejudicial effect, but we're in maybe a
17 little different situation in this case because the jury has
18 heard about the conviction. So, it's not like there's no
19 knowledge at all of it. I mean, they ...

20 THE COURT: Then why do you want to push the envelope?

21 SOLICITOR SORENSON: Well, because I think I'm allowed,
22 because you're going to limit me from what I can argue in
23 that regard at this point in time. So ...

24 THE COURT: I am. I would, I would, you're exactly
25 correct.

App 21

669

1 SOLICITOR SORENSON: And that would be why, I mean, you
2 know, if he's choosing to testify, I mean I ...

3 THE COURT: I understand, I understand, but -- I do
4 understand, and that doesn't lessen for me.

5 SOLICITOR SORENSON: I just think it puts us in a
6 little different light than if it wasn't, I mean, if it
7 wasn't out there at all, I mean, at least, I mean, it's not
8 like they're going to be shocked when they hear when he
9 takes the stand and he gets asked, do you have a prior
10 conviction for armed robbery, I mean, they've heard that
11 already. So, I mean, they're going to know that. So, I
12 mean, that I think takes a little bit of that prejudice away
13 in that regard.

14 THE COURT: I'm with you completely, but I can't ...

15 SOLICITOR SORENSON: You don't agree with me but you're
16 with me, right?

17 THE COURT: I, I, exactly, I'm with you completely, but
18 again, your best argument is Alamein because I am not
19 someone that doesn't believe in stare decisis.

20 SOLICITOR SORENSON: And they clearly, I mean, they
21 hold armed robbery as a crime of dishonesty under Six O
22 Nine, A, Two, I mean ...

23 THE COURT: Right. And may I also say that the
24 authority, both the state authority and in terms of national
25 discussion, asterisk, South Carolina Law, you know, almost

1 is a, can you believe this? But they do make the
2 discussion, particular in regards to the federal court
3 system do make note of the fact that our Court of Appeals
4 has made that determination. And again, I'm not, I'm not, I
5 don't think I am bound by stare decisis, and I believe in
6 stare decisis, so I think probably you are going to, for
7 purposes of your planning, find that today I shall not be a
8 renegade with Alamein. But gosh, I'd love to have something
9 all about it. Actually, my problem is, I went to a seminar
10 about it, so that's probably where I get all messed up, but
11 in any event, I think that's, you can probably look for me
12 to follow Alamein. And I think that the ten years, because
13 of the Eighty-five percent and because of the period of the
14 incarceration, it does lie within the ten years. And you
15 should see me up here doing the math.

16 MR. GIPSON: I haven't done the math, Your Honor, but
17 my objection would be similar, I mean, our position would be
18 that just under State versus Johnson the test about
19 impeachment of the prior value -- impeachment value of a
20 crime and the point in time of the conviction between the
21 subsequent history ...

22 THE COURT: You've got to slow down. You know she's
23 really, really good, but I know she can't pick it up that
24 good.

25 MR. GIPSON: I'm sorry. It just lists the balancing

App. 23

671

1 test from State versus Calph, and I think that balancing
2 test essentially puts us in a position where ultimately we
3 look at the prejudicial value versus probative effect, and I
4 don't think that's ...

5 THE COURT: I don't get to balance if it's a crime of
6 dishonesty. If it's not a crime of dishonesty you win on
7 the balancing, and I'll put that right out there, but the
8 dishonesty, if it is a crime of dishonesty it says, shall.
9 So, then the question is, does it lie within the ten years,
10 and of course, we know that yes, it does, because it has to
11 do with the release date, not the conviction date, although
12 early on as we adopted and began to use the federals I think
13 we did use the conviction date, but that has been changed
14 and I think probably clarified over time. So, Alamein I
15 think gets him where he wishes to be at this point. But
16 you're gonna have an appellate issue, and you'll have it if
17 you need it, should you need it.

18 MR. GIPSON: I understand. And my feeling is, Judge,
19 is as you've mentioned this, with the element of, of
20 possession of a firearm by a person convicted of a felony,
21 it's in there, and so, I mean, that's something, but in -- I
22 think the limiting instruction is something that I would
23 still request because it doesn't necessarily mean that he's
24 got a proclivity for this type of thing.

25 THE COURT: Oh, yeah.

App. #24

672

1 SOLICITOR SORENSON: You'll get two of them now.

2 THE COURT: Exactly, and I'm really looking to you to -
3 - I'm inclined, Mr. Gipson, to, if I don't verbatim giving
4 the limiting instruction you wish, it's going to be as close
5 to that as I possibly can have it be. So ...

6 MR. GIPSON: And I request something along the lines
7 of, I don't care if he was convicted of this, it doesn't
8 matter if we're here for this particular charge.

9 THE COURT: I've got it.

10 MR. GIPSON: But let me give you our request.

11 THE COURT: Absolutely. Well, you know, it's pretty
12 close to that, it's like it is to be used for this purpose
13 and this purpose only and not for propensity at all. I
14 typically just say it, it is not to be used for any sort of
15 propensity evidence. Okay, I will come back to you.

16 What I'm doing is, I am finishing the charge,
17 hopefully, over the lunch, but if -- I know y'all are not
18 going to take the whole lunch. If you could just give me
19 like Fifteen minutes I'd love to be able to go over the
20 charge so that when we're ready we can keep going if that's
21 okay with you guys.

22 SOLICITOR SORENSON: Okay. And that was, I guess, was
23 our intention just to, I mean, what -- and we don't
24 necessarily need to do this on the record.

25 THE COURT: I know. Ms. Harry Dot, go get some lunch.

APR 25

VERNETHA GLENN - DIRECT BY SOL. SORENSON

433

1 VERNETHA GLEN - DIRECT EXAMINATION

2 BY SOLICITOR SORENSON:

3 Q. Thank you Ms. Glenn. Where are you employed?

4 A. Orangeburg County Clerk of Court's office.

5 Q. Okay. And what is, what are your duties with the Clerk
6 of Court?

7 A. I'm actually one of the records custodians.

8 Q. Okay. And the Orangeburg County Clerk of Court, is part
9 of their duties keeping records of prior convictions here in
10 Orangeburg County?

11 A. Yes, yes.

12 Q. And I'm showing you State's Exhibit Number Eleven, do
13 you recognize that document?

14 A. Yes, I do.

15 Q. And is that a document that is kept in the regular
16 course of business in the Orangeburg County Clerk's office?

17 A. Yes, it is.

18 Q. Did you provide that to me at my request?

19 A. Yes, I did.

20 SOLICITOR SORENSON: Your Honor, at this time we'd
21 offer this into evidence.

22 May we approach real quickly?

23 THE COURT: Sure.

24 (Whereupon, a bench conference
25 is had out of the hearing of the

App. 26

VERNETHA GLENN - DIRECT BY SOL. SORENSON

434

1 jury and court reporter.)

2 THE COURT: Very well.

3 MR. GIPSON: But subject to those objections.

4 THE COURT: Yes.

5 COURT REPORTER: Are you putting that in now?

6 SOLICITOR SORENSON: Yes, ma'am.

7 COURT REPORTER: I need to mark it. State's Eleven.

8 (State's Exhibit Eleven

9 marked and filed.)

10 SOLICITOR SORENSON: Thank you. That's all I'd have
11 from this witness, Your Honor.

12 THE COURT: Very well. Cross-examination.

13 MR. GIPSON: The Court's indulgence very briefly.

14 THE COURT: Sure.

15 MR. GIPSON: I don't have any questions, Your Honor.

16 THE COURT: Very well. Now you can come back around
17 here and go to the other job.

18 Alright, call your next witness, please.

19 SOLICITOR SORENSON: Your Honor, could we take about a
20 five minute break, and I should be in a position to know. I
21 think I have two more witnesses but I'll have that squared
22 away shortly.

23 THE COURT: Certainly. We'll take our afternoon break,
24 Ladies and Gentlemen, is what we will do. We will take
25 Fifteen minutes. Please step to your jury room, do not

2012

May

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	See Appendix page 29	See Appendix page 30-33	24	See Appendix page 34-36	26
27	28	Jury 29 deliberations at 1:05 p.m. See Appendix page 37-41		31		

1 DATE:

2 MAY 22, 2012

3 THE COURT: For the record, the reason that I have
4 postponed the jury selection is because of the constraint
5 issue regarding the defendant. The detention facility folks
6 in Orangeburg have a different system and, of course, with
7 us having PCRs downstairs on the second floor and trying
8 this case upstairs I have interfered with the smooth
9 working of the Orangeburg security folks, and what I should
10 have done yesterday and failed to do yesterday was to
11 ascertain and find out whether or not the detention facility
12 folks here, the security people here in Orangeburg had the,
13 the under the pant restraint system, which they do not, and
14 I did not realize that until, thank goodness, Mr. Gipson
15 brought that to my attention just a few moments ago. What I
16 have done is, I have asked the Dorchester County detention
17 folks to have the under the pant restraint system sent from
18 Dorchester County which will allow us to use that restraint
19 system on the defendant in this case. It is unacceptable to
20 me, obviously, I'm not going to have him in any kind of
21 restraints which the jury could see or hear, and I don't
22 think it's prudent particularly in a courtroom of this size,
23 but there's got to be some restraint system in place.
24 Therefore, I have sent the jury to lunch early, the jury
25 panel, so that we can obtain and use the under the pant

App 29

454

1 DATE:

2 MAY 23, 2012

3 (Sequential continuation of record from Volume One.)

4 CLERK: Please place your left hand on the Bible and
5 raise your right hand.

6 (Whereupon, James Shumpert
7 is duly sworn.)

8 CLERK: Thank you. Please have a seat and state your
9 name for the record.

10 WITNESS: James Shumpert.

11 THE COURT: Your witness.

12 SOLICITOR SORENSON: Thank you, Your Honor.

13 (NOTE: Blank lines on this page do not indicate any part of
14 record has been omitted. Headers on testimony pages and
15 hard page breaks between testimony are now required by the
16 Court. See next ensuing page for sequential continuation of
17 record.)

App 30

492

1 information here in Court while Court is in session. Now,
2 don't blog, don't tweet, don't facebook, don't link in,
3 don't do any social networking, please, regarding this
4 matter. Don't do any sort of research. Again, you must
5 receive all of the information from which you will make up
6 your minds here in Court while Court is in session. You do
7 realize though when you go home this evening that the
8 curiosity is going to be heightened, but remember, you must
9 not discuss this matter or allow anyone to discuss it with
10 you, but remember, put it on the judge, don't let anybody be
11 upset with you.

12 Now, I am, we have triple contacted our folks, our
13 gentlemen, oh yeah, triple now contacted. I think he's
14 going to be fine. If you find otherwise I do expect you to
15 let me know, but I think he's now a happy camper. But if
16 you find it to be otherwise do let me know. But I think
17 that's set at this point.

18 When you return at nine o'clock Friday morning we, of
19 course, are going to get right into the trial of this
20 matter, and proceed just as you have done and as we have
21 done. Over the course of tomorrow I'd just simply ask that
22 you be mindful not to discuss this matter or allow anyone to
23 discuss it with you. It's a little more difficult when
24 we're not together. So -- yes?

25 MR. GIPSON: We just have a quick matter we need to

App "31"

493

1 discuss with you.

2 THE COURT: Yes, sure.

3 (Whereupon, a bench conference is
4 had out of the hearing of the
5 jury and court reporter)

6 COURT REPORTER: Did you say, no newspapers?

7 THE COURT: No newspapers, did I say no newspapers? I
8 don't know, but no newspapers.

9 BAILIFF: Your Honor, when counsel is finished may I
10 approach?

11 THE COURT: Sure.

12 (Whereupon a bench conference
13 is had with Bailiff out of the
14 hearing of the jury and
15 court reporter.)

16 THE COURT: Oh, yeah, y'all are doing the tour, we're
17 going to the second floor. When you return -- does
18 everybody know where the courtroom is? Yeah. You were
19 there on Tuesday, so yes.

20 BAILIFF: Your Honor, may I approach?

21 THE COURT: Yes.

22 (Whereupon, a conference is had
23 with the bailiff out of the hearing
24 of the jury and court reporter.)

25 THE COURT: The question was, can you all work

1 MR. GIPSON: Nothing, Your Honor.

2 THE COURT: Alright, we are in recess until nine
3 o'clock Friday morning.

4 (Recess for the day.)

5 DATE:

6 MAY 25, 2012

7 THE COURT: Alright, anything from the State before we
8 bring the jury out?

9 SOLICITOR SORENSON: No, ma'am.

10 THE COURT: Okay. From the defense?

11 MR. GIPSON: Not at this time, Your Honor.

12 THE COURT: Alright, very well, let's have the jury.

13 SOLICITOR SORENSON: Your Honor, do you want Lieutenant
14 Shumpert to retake the stand now or when the jury comes out?

15 THE COURT: I do, that would be great, because they
16 will expect him to be on the stand. That will be great.

17 (Whereupon, the jury
18 enters the courtroom.)

19 THE COURT: Good morning, Ladies and Gentlemen, we will
20 have just a very small, if you will, break in the action. I
21 had entered what's called a sequestration order, and you'll
22 notice it's been a little tiny bit of pause in between the
23 witnesses because the witnesses have been outside the
24 courtroom and then they come in and they testify. I messed
25 up, and Detective Eikhoff, I just had to ask her to leave

App 33

769

1 MR. GIPSON: I will absolutely, absolutely, yes, ma'am,
2 we'll do it.

3 THE COURT: Alright, Very well, alright, let me have
4 the jury.

5 (Whereupon, the jury enters
6 the courtroom.)

7 THE COURT: Ladies and Gentlemen, I'll bet you thought
8 we were finished today. Indeed we are not. So, that's what
9 we needed to do, we needed to sort of talk about our
10 schedule and it really, I do think, though, we will be able
11 to conclude on -- well, I'm not going to say we're going to
12 conclude on Tuesday because I'm not going to jinks anything
13 at all, and we will be together as long as we need to be
14 together, and that's all we need to focus on.

15 Ladies and Gentlemen, we, you know, these are the
16 choices that judges go through. Do you ruin everybody's
17 Memorial Day Weekend or not? And I tend not to do that, I
18 tend to be very mindful that you all have given us so very
19 much of your time, and the appropriate thing is to begin on
20 Tuesday. So, that's what we're going to do. We're going to
21 begin Tuesday at nine o'clock, nine o'clock Tuesday morning.

22 Now, you do realize that the curiosity is going to be
23 heightened. You know that, right? Well, put it on the
24 judge, remember, put it on the judge. Is it heightened?
25 Because again, you must not discuss this matter or allow

App. 34

497

1 the courtroom. That's my fault, I messed up this morning
2 and I forgot to do that. So, that's what just occurred in
3 case you all noticed. And it's my little snafu, but we'll
4 now proceed. Thank you.

5 (NOTE: Blank lines on this page do not indicate any part of
6 record has been omitted. Headers on testimony pages and
7 hard page breaks between testimony are now required by the
8 Court. See next ensuing page for sequential continuation of
9 record.)

App.35

772

1 JUROR LUCAS: Ms. Lucas.

2 THE COURT: Ms. Lucas. Wonderful. And you're Ms.
3 Lucas?

4 JUROR LUCAS: Yes.

5 THE COURT: Ms. Lucas, I would never let you miss --
6 your husband needs you, and obviously you have given us so
7 very much of your time, and that is why we have alternates.
8 I want to, from the bottom of my heart, thank you for all
9 the time that you have given to us this week and to this
10 process, but I am going to excuse you at this point because
11 it would be, it would be unfair for me to impose upon your
12 time anymore. And I wish your husband well, and safe and
13 healthy speed to his health.

14 JUROR LUCAS: Thank you.

15 THE COURT: Yes, thank you so much.

16 Alright, any objections to my comments to the jurors or
17 excusing the juror?

18 SOLICITOR SORENSON: Nothing from the State.

19 THE COURT: Nothing from the State. From the Defense?

20 MR. GIPSON: No, ma'am.

21 THE COURT: Very well. Alright, I will see you at nine
22 o'clock Tuesday morning everyone.

23 (Recess)

24 DATE:

25 MAY 29, 2012

App 36

915

1 you're going to gather these things and take them to our
2 jurors. Okay? And then tell them to begin.

3 BAILIFF: Do you want them to eat first or deliberate?

4 THE COURT: I want them to do both, I want them eat and
5 deliberate, okay, at the same time. They can deliberate
6 while they eat. They can multi-task, they can eat and they
7 can deliberate.

8 (Whereupon, the jury begins
9 deliberations at 1:05 p.m.)

10 (Recess)

11 THE COURT: Wait until we get Mr. Brown.
12 (Whereupon, the defendant
13 enters the courtroom.)

14 THE COURT: Alright, bring our jury out.
15 (Whereupon, the jury enters
16 the courtroom.)

17 THE COURT: Ladies and Gentlemen, the reason I brought
18 you out, the reason that I have done that is that tomorrow,
19 or this afternoon I had a previously scheduled medical
20 appointment, not just an appointment but a procedure as
21 well, and I thought surely the doctor would understand that
22 I've got a jury out, and that would be fine. Well, it wasn't
23 fine, and I am unable to reschedule, and my doctor is pretty
24 adamant that I've got to come on and get this done this
25 afternoon. So, we are going to have to stop our

App 37

916

1 deliberations at this point, and we're going to have to
2 renew them in the morning. I told him, I said, do you know
3 how upset this jury is going to be, and how concerned we're
4 all going to be? But, in fact, this action has never
5 happened to me in Fourteen years of being a judge, but there
6 comes to be a time when sometimes you've got to listen to
7 your health care provider. So, I am going to have to stop
8 at this point.

9 Now, we've got a graduation tomorrow, now who's got the
10 graduation tomorrow? No, we're okay, that's right, that was
11 my alternate that had the graduation. Very well.

12 I hate to do this, Ladies and Gentlemen, and again this
13 is new territory for me, and I apologize to you but it
14 simply cannot be, it simply cannot be -- wait a minute, just
15 hold, everybody just hold on a second. I just cannot, it
16 cannot be avoided. Now, if that causes y'all some
17 additional concerns what I'm going to ask you to do is
18 retire to your jury room, put down on a sheet of paper, you
19 know, what concerns anyone has got, and I will certainly
20 handle those before I leave, but I will need you to do that.
21 What I would like you to do is to stop your deliberations at
22 this point, we will take possession of the verdict forms and
23 your exhibits, and then reconvene your deliberations in the
24 morning. It's up to you all if you want to do nine or
25 nine:thirty. So, why don't y'all make that decision and let

1 me know. I will remain here on the bench for a little bit
2 just -- Mr. Presiding Juror, if you've got some jurors with
3 some concerns you can put that down in writing and we'll
4 make that a part of the Court's exhibit. So, if you all will
5 retire to your jury room I'm going to ask you to stop your
6 deliberations at this point, though if there are special
7 concerns if you'll put those in writing, and then we can
8 address those, and let me know if you want to start at nine
9 or nine:thirty, if you'll do that for me now. Thank you.
10 And, of course, we'll talk about, when you go home not
11 discussing this matter or allow anyone to discuss it with
12 you.

13 (Whereupon, the jury retires
14 to the jury room and the following
15 takes place out of the presence
16 of the jury.)

17 (Recess)

18 THE COURT: I don't think there are any particular
19 concerns, I'm just going to again admonish them about not
20 discussing the matter. Alright, bring the jury out.

21 (Whereupon, the jury enters
22 the courtroom.)

23 THE COURT: Alright, I understand nine o'clock, nine
24 bells. Very well. Ladies and Gentlemen, this is what the
25 procedure will be. In just a few minutes, of course, the

App. # 39

918

1 verdict form and the exhibits will be secured by our clerk
2 for the night, and then they will be replaced in your room,
3 and we will be waiting on you, but the verdict forms in your
4 exhibits as you arrive in the morning, it will be there
5 before you are there. When you arrive at nine o'clock you
6 will go directly to your jury room, when all Twelve of you
7 are present then begin your deliberations. You don't need
8 to wait for me to drop a flag or anything like that, just
9 when all Twelve of you are there you begin your
10 deliberations.

11 Now, of course, when you go home this evening the same
12 instructions will apply, do not discuss this matter or allow
13 anyone to discuss it with you. Don't read anything or
14 listen to anything, radio, television, newspaper, internet,
15 no social media about this matter, do not do any research,
16 don't do any research on the internet. You must have
17 received all of the information from which you will make up
18 your mind here in Court while Court was in session. So,
19 without further ado again I can assure you I would a whole
20 lot rather be here with you this afternoon than being with
21 some doctor, but alas, there you have it.

22 Ladies and Gentlemen, I look forward to seeing --
23 actually, I won't see you in the morning at nine o'clock
24 because you'll go right to your business, but I will
25 certainly be present, and I will see you sometime tomorrow,

App. 40

942

1 motions, do you wish to make those now?

2 MR. GIPSON: I will, just for the record, and I reserve
3 the right to make additional within the next ten days, - - -

4 THE COURT: Surely.

5 MR. GIPSON: --- but I, consider -- that the Court
6 consider acting as its ability as a Thirteenth juror in this
7 case, Your Honor. It's clear that there was testimony from
8 folks who purported, who were eye witnesses to this, and
9 their statements at points in time were inconsistent with
10 one another and it was inconsistent with that evidence that
11 the experts presented as well. And I'd say based on that
12 fact that the inconsistencies, that could have led the jury
13 to act on something other than a reasoned review of the
14 facts, and it could have led them to act based on passion
15 and based on some other stimuli that had something to do
16 with other than what it heard from this jury chair, or
17 excuse me, from this witness chair. And then, based on that
18 I'd ask that the Court consider granting a new trial just
19 based on the fact that the jury could have relied on
20 information that did not come from this courtroom.

21 THE COURT: Thank you so much, Mr. Gipson. Having
22 listened to all of the testimony that was presented during
23 this trial and having listened to both Mr. Sorenson in his
24 examination, and your examination, and both your openings
25 and your closings, it is in my mind without question that

App 41

943

1 the defense that you provided for your client was as
2 complete and replete as a defense has ever been in any case.
3 Any and all inconsistencies that are always attendant to
4 statements and always exist within a trial, you pointed them
5 out as artfully and as completely and as professionally as
6 could be done, in my mind. Your arguments, your closing
7 arguments was nothing short of extraordinary. Your defense
8 was extraordinary. The issues before this jury were as they
9 always are. Mr. Sorenson was able to put forth eye witness
10 testimony, he was able to put before this jury evidence,
11 very strong evidence and at the end of the day it was for
12 the jury to determine and make those findings of facts.
13 This is as well tried a case as there can be anywhere in
14 this country, both on behalf of the State and on behalf of
15 the Defense, and at the end of the day it was for the jury
16 to make the findings of facts as they have made them. I say
17 these words because it is with the greatest of respect that
18 I deny your motion, noting your exception thereto. It
19 simply was a case for this jury to determine, and they have
20 done so.

21 MR. GIPSON: Thank you, Your Honor.

22 THE COURT: And I note your exception thereto.

23 MR. GIPSON: Thank you, Your Honor.

24 THE COURT: Very well. Alright, I believe that will
25 conclude this matter.

PATRICIA EIKHOFF - DIRECT BY MR. GIPSON

566

1 submitted, whose blood that is right there to any reasonable
2 degree of any certainty, can you?

3 A. It's crime scene's.

4 Q. Okay. Thank you. Now, you said you were familiar with
5 the ability of footprints to be taken, shoe castings,
6 right?

7 A. Crime scene would be the person to do all those at that
8 scene in this case.

9 Q. Okay.

10 THE COURT: I'm going to just interject because I don't
11 believe that that was responsive.

12 Ladies and Gentlemen, I'm going to ask you to step to
13 your jury room. Do not discuss this matter or allow anyone
14 to discuss it with you. There's a matter that I must take
15 up with counsel.

16 (Whereupon, the jury retires
17 to the jury room and the following
18 takes place out of the presence
19 of the jury.)

20 THE COURT: Detective Eikhoff, I'm going to ask you to
21 do this for me. I'm going to ask you to listen very
22 carefully to the question that you are being asked. I'm
23 going to ask you to answer that question. If it is a yes or
24 no answer, I'm going to ask you to answer it yes or no. You
25 may explain your answer. I don't want you to go into a non-

App. 43

PATRICIA EIKHOFF - DIRECT BY MR. GIPSON

567

1 responsive dialogue, but if you need to explain your answer
2 I want you to do that. The reason that I have sent the jury
3 out is because it's clear that Mr. Gipson is not going to
4 abandon his question because you're not answering it, he's
5 just simply going to come back around to the question, and
6 you know, we have a jury here and I must be mindful of their
7 time as well as everyone else's.

8 Now, there has been also some reference to some
9 documentation, and if it's a document that you need to
10 respond to a question you can certainly ask to see that
11 document rather than struggle with information you don't
12 have before you. You are certainly entitled to have that
13 information before you if it is available, and I wanted you
14 to know that as well. My concern is, is that we're getting
15 far afield from the question being asked, the yes or no
16 response being given, and then an explanation relevant to
17 the question being given. Let me give you an example, I
18 don't remember what the question was but your answer was,
19 was that it was important what statements had been given and
20 that the individuals had testified to that information. You
21 haven't been here in Court, you clearly don't know what has
22 been testified to.

23 A. I was referring, Judge, to the affidavit that they
24 signed.

25 THE COURT: I understand that but what you said was,

App. 44

PATRICIA EIKHOFF - DIRECT BY MR. GIPSON

568

1 and those individuals have testified. Not only was it non-
2 responsive, there would be no way for you to know whether or
3 not these witnesses have testified to that information to
4 this jury or not. That's only an example of how we're
5 getting so far afield in your responses. And also, I sent
6 the jury out because I did want you to know that you're not
7 here expected to remember information. If you have it in a
8 document and the document is here in the courtroom you
9 certainly may ask for that document as well. And I wanted
10 you to know that, too. If there's a document you certainly
11 have the right to see that document. Okay?

12 | A. Yes, ma'am.

13 THE COURT: Very well. Can we take just a few minutes
14 for everyone to have a three minute comfort break? And then
15 we'll begin anew. And that means you, too. But don't talk
16 to anyone about your testimony. I know I don't need to tell
17 you that, but I do it in an abundance of caution. But only,
18 let's keep it very short, but just a short comfort break as
19 it's known in Beaufort County. Thank you all. About three
20 or four minutes.

21 (Recess)

22 THE COURT: Anything from the State before we bring the
23 jury back in?

24 SOLICITOR SORENSON: No, Your Honor.

25 THE COURT: Anything from the defense?

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

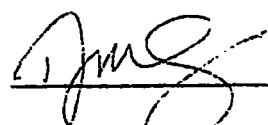
INDICTMENT
2012GS38-0792

At a Court of General Sessions, convened on April 9, 2012 the Grand Jurors of Orangeburg County present upon their oath:

**POSSESSION OF FIREARM BY PERSON CONVICTED OF A VIOLENT
CRIME**

That in Orangeburg County on or about October 27, 2010, the defendant, Romeo Anthony Brown did unlawfully possess a 45 caliber handgun. This offense occurred after the conviction of one or more violent crimes as defined by S.C. Code Section 16-1-60, to wit: 1995 conviction for Burglary 2nd Degree and/or 1999 conviction for Armed Robbery in violation of Section 16-23-500, Code of Laws of South Carolina, 1976 as amended.

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


Donald N. Serenson, Solicitor

WITNESSES

Patricia Eikhoff

DOCKET NO. 2012GS38-0792

The State of South Carolina
County of ORANGEBURG

After being fully advised as to
rights, I hereby waive present
Grand Jury.

Defendant

COURT OF GENERAL SESSIONS

April 9, 2012 TERM

I
hereby appear in my own pro
and plead guilty to the within
or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

THE STATE
vs.

Romeo Anthony Brown

Indictment for

POSSESSION OF FIREARM BY
PERSON CONVICTED OF A VIOLENT
CRIME

SC Code: 16-23-0500

[Handwritten Signature]
CLERK OF COURT
ORANGEBURG COUNTY, SC

650

WARRANT NUMBER
2012ORB7

Arrested: November 4, 2010

RETURN OF GRAND JURY
TRUE BILL

[Handwritten Signature]

APR 11 2012
for Grand Jury
11, 2012

VERDICT

n of Petit Jury

App. 45

944

CERTIFICATE

I, the undersigned, Mrs. Harry A. Walker, of Rowesville, South Carolina, Official Court Reporter for the First 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 captioned cause, relative to appeal, in the Court of General Sessions for Orangeburg County, South Carolina, on the 22nd, 23rd, 24th, 25th, 29th and 30th days of May, 2012.

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

DATE: December 13, 2012

Harry A. Walker
(MRS.) HARRY A. WALKER

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Romeo Brown, #185544,

Applicant.

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2015-CP-38-0364

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed March 16, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was indicted at the March 2011 term of the Court of General Sessions for Orangeburg County for murder (2011-GS-38-0012) and at the April 2012 term for possession of firearm by a person convicted of a violent crime (2012-GS-38-0792). Applicant was represented by Byron E. Gipson, Esq. On May 22, 2012, Applicant proceeded to trial before the Honorable Diane Schafer Goodstein. The jury found Applicant guilty as indicted. Judge Goodstein sentenced Applicant to life for murder and five (5) years' imprisonment on the possession of a firearm by a person convicted of a violent crime charge, to be served concurrently.

Applicant filed a timely notice of appeal. Kathrine Hudgins, Esquire, of the Office of Appellate Defense represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 21, 2015. State v. Brown, Op. No. 2015-UP-040 (S.C. Ct. App. filed Jan. 21, 2015). The remittitur was returned to the circuit court on March 09,

2015. Jonathan D. Walker was appointed under Rule 608 to represent Romeo Brown on this action.

Attached herewith and incorporated herein by reference are the records of the Orangeburg County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial, and Applicant's records for the Department of Corrections. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

I. Ineffective Assistance of Counsel

- a. Counsel did not object to "Applicant being brought into the trial court in shackles"
- b. Counsel did not object to testimony from Joe Thomas
- c. Counsel was ineffective requesting demonstrating by Joe Thomas
- d. Counsel failed to object to alleged hearsay
- e. Counsel did not object to testimony from Monique Guinyard
- f. Counsel failed to take Applicant's concern about jurors falling asleep seriously
- g. Counsel failed to argue armed robbery was not automatically admissible
- h. Counsel did not object to State witness Vernetha Glenn
- i. Unreasonably urged Applicant to testify
- j. Counsel failed to mitigate State attacks upon Applicant's injury
- k. Counsel "compelled Applicant against his wishes to testify violated Applicant's Fourteenth and Sixth right to effective counsel"
- l. Counsel "did not move for a judgement notwithstanding verdict"
- m. "Indictment for criminal in possession of a weapon is insufficient"
- n. Counsel "failed to argue that it would be error to impeach his client upon: prior bad act [sic]"

2. Denial of Due Process

- a. Applicant denied due process by "inordinate delay"
- b. "Applicant is entitled to a new trial because the evidence ... not substantiated by the state ... as to make the resulting conviction a denial of due process [sic]"

III.

Applicant's claim is an allegation of ineffective assistance of plea counsel. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at

117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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

IV.

Applicant also alleges due process violations. Part of these allegations, listed under Section II as 2(b), appear to be merely recitations of his grounds for ineffective assistance of counsel. Therefore, Respondent submits these allegations are without merit and incorporates its response in Part III, supra.

Applicant does specifically allege in Section II, under 2(a), that the trial's inordinate delay was a due process violation. Respondent submits such claims are likewise without merit. A due process violation only occurs "when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (citing 21 Am.Jur.2d, Criminal Law § 640 (1981)). Respondent submits the record fully demonstrates Applicant's trial procedures fully complied with the

requirements of due process. Accordingly, Respondent submits this allegation should be dismissed pursuant to Rule 12(b)(6), SCRCPP.

V.

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

VI.

Applicant must specify any claims he intends to raise at the PCR hearing. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCPP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCPP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

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

[SIGNATURE BLOCK ON NEXT PAGE]

VIII.

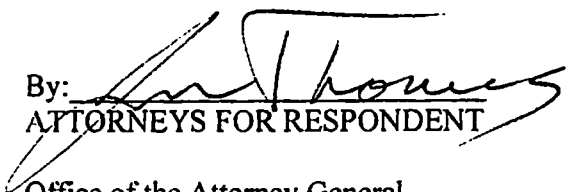
WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

for J. CLAYTON MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

_____, 2015

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

ROMEO A. BROWN, #185544

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

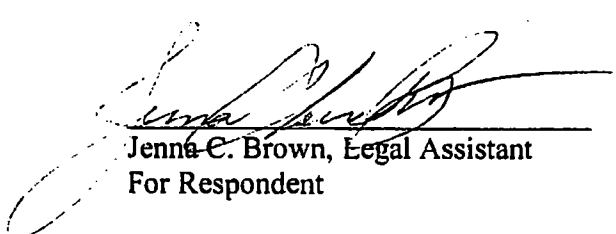
2015-CP-38-00364

AFFIDAVIT OF SERVICE BY MAIL

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

Mr. Jonathan Waller, Esquire
1315 Blanding Street
Columbia, SC 29201

DATED this 30th day of September, 2015.



Jenna C. Brown, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF ORANGEBURG
4 2015-CP-38-00364
5 Romeo Brown
6 vs.
7 State of South Carolina
8
9 Orangeburg, South Carolina
10 May 17, 2016
11 Before the Honorable Benjamin H. Culbertson
12

13 APPEARANCES
14 For the State: J. Clayton Mitchell
15 For the Applicant: Jonathan D. Waller
16
17 Reported by: Elizabeth Harris
18 Official Court Reporter
19 (Edited by Michael Watkins)
20
21
22
23
24
25

1	Romeo Brown:	6
2	Byron Gipson:	29
3	Certificate:	57

4

5

NO EXHIBITS

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: This 2015-CP-38-364, Romeo Brown versus
2 State of South Carolina. The matter is before the Court
3 on -- this is an application -- I see there's pro se
4 motions and all of that but we're here on an application,
5 is that correct, for post conviction relief?

6 MR. WALLER: Yes, sir, Your Honor. The motion for
7 evidentiary hearing if you'll flip to, I guess, the third
8 or fourth page, there is an application in there.

9 THE COURT: All right.

10 MR. WALLER: I think he filed it altogether.

11 THE COURT: All right. Hold for one second.

12 (Break in proceedings.)

13 THE COURT: And this was a conviction by trial?

14 MR. MITCHELL: Yes, sir, before Judge Goodstein.

15 THE COURT: All right. Mr. Brown if I could get you
16 to stand and raise your right hand, please.

17 (The applicant was sworn.)

18 THE COURT: Sir, your name is Romeo Brown?

19 THE APPLICANT: Yes, sir.

20 THE COURT: All right. Mr. Brown, I understand that
21 you have filed an application for post conviction relief
22 asking the Court to set aside your conviction and sentence
23 on the charges of murder and possession of a weapon by a
24 person convicted of a violent crime. As I understand you
25 received concurrent sentences of life in prison for the

1 murder and five years for the possession of a weapon during
2 the commission of a violent crime; is that correct?

3 THE APPLICANT: Yes, sir.

4 THE COURT: All right. Now, I need to go over some
5 matters with you. First of all, if I find that you are not
6 entitled to post conviction relief you will simply be
7 returned to the department of the corrections or wherever
8 you are now serving your sentence to complete whatever
9 unserved portion of your sentence remains, do you
10 understand that?

11 THE APPLICANT: Yes, sir.

12 THE COURT: All right. Now, do you understand that if
13 I do grant your request for post conviction relief then
14 your conviction and/or your sentence may be set aside and
15 your case will be sent back for further proceedings, the
16 State will start all over, it will begin from the very
17 beginning of the proceedings against you. If any charges
18 against you are reduced, dropped, dismissed or nolle
19 prossed they will be brought back against you and you could
20 be facing the original charges again, do you understand
21 that?

22 THE APPLICANT: Yes, sir.

23 THE COURT: All right. Were there any charges that
24 were nolle prossed or dismissed in this case?

25 MR. MITCHELL: No, sir, Your Honor.

1 THE COURT: All right. Now, during the past 72 hours
2 have you taken any medication, consumed any alcohol or
3 drugs or been under any influence that would affect your
4 ability to know why you're here?

5 THE APPLICANT: No, sir.

6 THE COURT: Do you understand why you're here today?

7 THE APPLICANT: Yes, sir.

8 THE COURT: Is there anything about this hearing that
9 you want to ask your lawyer or ask me before we proceed?

10 THE APPLICANT: No, sir.

11 THE COURT: All right. Have you had an ample
12 opportunity to discuss with your attorney your application
13 for post conviction relief?

14 THE APPLICANT: Yes, sir.

15 THE COURT: And do you want to proceed on that
16 application?

17 THE APPLICANT: Yes, sir.

18 THE COURT: All right. Anything -- well, before we
19 get started let's -- I don't know if I asked if you would
20 give the court reporter your names and who you represent.

21 MR. MITCHELL: Clay Mitchell for the State.

22 MR. WALLER: Jonathan Waller for Mr. Brown.

23 THE COURT: All right. Mr. Waller, anything further
24 you want placed on the record in this regard?

25 MR. WALLER: Nothing further, Your Honor.

ROMEO BROWN - DIRECT

1 THE COURT: Anything further the State wants placed on
2 the record in this regard?

3 MR. MITCHELL: No, sir, Your Honor.

4 THE COURT: All right. Mr. Waller, you can call your
5 first witness.

6 MR. MITCHELL: Thank you. I would call Romeo Brown.

7 THE COURT: All right, sir.

8 The witness, ROMEO BROWN, was first duly sworn and
9 testified as follows:

10 DIRECT EXAMINATION

11 BY MR. WALLER:

12 Q Good morning, Mr. Brown, how are you this morning?

13 A Good morning, I'm okay.

14 Q Are you all situated up there?

15 A Yes, sir.

16 Q Mr. Brown, I want to take you back, if I could, to
17 when you were first arrested on the two charges that we're
18 here talking about today. Do you remember where you were
19 arrested?

20 A Yes, sir.

21 Q Okay. And you came to find out that there was a
22 warrant out for your arrest before you were actually
23 arrested; is that right?

24 A No. I didn't know it was a warrant out for me and
25 then, you know, until a couple of days later.

ROMEO BROWN - DIRECT

1 Q Okay. But you were out of town and you learned that
2 the police were looking for you; is that right?

3 A Yes, sir.

4 Q And you came back to Orangeburg and got arrested; is
5 that right?

6 A Yes, sir.

7 Q Okay. How long after you got arrested did you get an
8 attorney on these charges?

9 A About two or three weeks, about two or three weeks,
10 something like at that.

11 Q And who was that attorney?

12 A Mr. Gipson.

13 Q And did you retain Mr. Gipson or was he appointed to
14 represent you?

15 A Paid for him.

16 Q How many times do you think you met with Mr. Gipson
17 leading up to going to trial?

18 A Maybe about six, seven times, something like that.

19 Q Okay. Do you remember your first meeting with him?

20 A Yes, sir.

21 Q Okay. Do you remember what y'all talked about at your
22 first meeting?

23 A Yes, sir.

24 Q Okay. Can you tell the Court what y'all discussed?

25 A We talked about witnesses, and when he had to get my

ROMEO BROWN - DIRECT

1 motion for discovery, and when he attained that then we
2 went through it and, you know, spoke about witnesses and
3 the crime scene and, you know, things like that.

4 Q Okay. Did y'all talk about the two charges, the
5 murder charge and the weapons charge?

6 A We spoke on the murder and the weapons charge --
7 yeah, we spoke on the weapons charge too, we spoke.

8 Q Obviously the murder was the much more serious charge.

9 A Yes, exactly.

10 Q So that was y'all's main focus?

11 A Yes, sir.

12 Q Okay. Did you and Mr. Gipson discuss your
13 constitutional rights?

14 A I don't recall that.

15 Q Okay. Did y'all talk about your right to a jury
16 trial?

17 A Yes, sir.

18 Q You had a jury trial.

19 A Yes, sir.

20 Q When you and Mr. Gipson were reviewing the discovery
21 provided to you and the evidence provided to you, what did
22 y'all talk about, the particular pieces of evidence?

23 A We spoke about -- he told me there was some DNA that
24 was taken up at the crime scene and a set of keys, and
25 mainly just about the witnesses.

ROMEO BROWN - DIRECT

1 Q Okay. And there were a lot of witnesses that gave
2 statements or talked to law enforcement; is that right?

3 A Yes, sir.

4 Q Did y'all talk about each of those witnesses
5 individually and what they were going to say?

6 A It wasn't -- well, we spoke about it and we talked
7 about them but it wasn't like -- I didn't know what they
8 was going to say and, you know, I didn't know what they
9 was going to say. But we spoke -- we talked about them,
10 and basically that's, you know, that's it, we just -- we
11 didn't speak about anyone else, you know.

12 Q Okay. And you knew some of those witnesses; is that
13 right?

14 A Yes, sir.

15 Q Some of them were your family members, they were your
16 sister and your brother-in-law.

17 A Yes, sir.

18 Q And you mentioned some DNA, I want to circle back to
19 that in a second. When you were discussing the different
20 witnesses with Mr. Gipson, did you have any other witnesses
21 or any other information that you weren't able to provide
22 to him that would help you in your defense?

23 A Yes, sir.

24 Q Okay. Who all did you tell him about?

25 A We spoke about the -- this guy named Rico, because he

ROMEO BROWN - DIRECT

1 was mentioned from one of the witness' statement, he was
2 mentioned from one of the witness' statement. And I spoke
3 with him about this area that I -- you know, that I be at
4 across the street from this gas station. I spoke with him
5 about a couple of people that was over there that can, you
6 know, that can say I was in that area at the time. And
7 the gas station videotape.

8 Q Do you know if Mr. Gipson was able to locate the
9 people you asked him to talk to?

10 A No, sir. I didn't get any feedback or anything from
11 that.

12 Q Okay. Now, some witnesses were called on your behalf
13 during your trial; is that right?

14 A Yes, sir.

15 Q Okay. Were those people that you had given Mr. Gipson
16 their names?

17 A Yes, sir, it was my nephew and my neighbor.

18 Q Your neighbor?

19 A Yes, sir.

20 Q Okay. So there were other names that you gave him
21 besides your neighbor and your nephew?

22 A Well, being that the witness had mentioned about
23 somebody else, you know, the guy Rico, you know, being in
24 their yard at the time of the crime, and that described
25 him and his car and all of that, because they was saying

ROMEO BROWN - DIRECT

1 that the suspect jumped in the white car and sped off and
2 he drives a white car, and one of the witnesses mentioned
3 his name. And the witness also mentioned a few other
4 names. And, you know, none of those people was located
5 and there wasn't any effort to locate them.

6 Q Okay. Did you and Mr. Gipson talk about this Rico
7 person and talk about the other witnesses that you wanted
8 him to -- did he tell you he couldn't locate them or tell
9 you he tried to locate them? What did y'all talk about?

10 A When we spoke about the Rico guy it was just dropped,
11 it wasn't, you know -- because I had an investigator and
12 the private investigator, he didn't mention anything about
13 locating this Rico guy either, you know.

14 Q Okay. We talked earlier, you mentioned that you and
15 Mr. Gipson discussed there was some DNA.

16 A Yes, sir.

17 Q Do you know to the best of your knowledge if
18 everything that y'all talked about was actually tested for
19 DNA?

20 A When we -- when my trial started and then that's when
21 we spoke about it, and he said he was going to check into
22 it, you know, go by SLED or something like that, and that
23 was the last time we talked about it. And then when it
24 appeared again that's when my trial was already started,
25 and that was it, that was just the last time we spoke

ROMEO BROWN - DIRECT

1 about it.

2 Q Okay. In particular there was some tissue and maybe
3 blood underneath fingernails of the victim in this case.

4 Did you and Mister -- and that was not tested for DNA. Did
5 you and Mr. Gipson discuss that tissue, the fact that it
6 was not tested?

7 A We discussed it and we still didn't get any results
8 or anything from it.

9 Q Okay. Did y'all discuss having it tested yourselves?

10 A No, sir.

11 Q Did you ask him to do any testing of the evidence that
12 was provided by the State? Did you ask him to have any of
13 it retested or anything like that?

14 A I told him I would like to know because, you know,
15 that will prove my innocence, you know, as another way of
16 proving my innocence is by finding out whose DNA it is,
17 you know. And we didn't -- I didn't get no paperwork or
18 anything on the results of it or whether it was followed
19 up through SLED or Orangeburg County or whatever.

20 Q Okay. You were identified by several of the witnesses
21 out there, some that you already testified that you knew
22 beforehand, so it wasn't just a random person picking you
23 out of a lineup, but there was some lineups done in your
24 case, is that your understanding?

25 A Yes, sir.

ROMEO BROWN - DIRECT

1 Q Okay. Did you and Mr. Gipson discuss the lineups at
2 all, the identifications that were made of you?

3 A Yes, sir. I brought it to his attention, you know,
4 that, you know, this lineup was incorrect, you know. We
5 talked about it. That didn't come up again until my trial
6 got started and that was it, it wasn't anything else in
7 between.

8 Q Okay. When you made the decision that you wanted to
9 go to trial on these charges, what did you and Mr. Gipson
10 discuss as far as getting ready and preparing for trial?
11 What were y'all going to do, and in particular what were
12 you going to be responsible for at the trial?

13 A Me, him and my investigator got together maybe two
14 days and we talked and discussed the matter of me, whether
15 I'm taking the stand or not, and they asked me whether I
16 felt comfortable in taking the stand and I told them I
17 didn't want to, and we all agreed -- we concurred to that.
18 We mainly focused on the witnesses, you know, what they
19 say or what they might say or things like that, you know,
20 during the trial or during their testimony. Nothing else
21 came up. But the investigator said that, "Yeah, you know,
22 I think that it will be a good thing if he doesn't take
23 the stand." And then about I think it was either my third
24 or fourth day -- I think my fourth day into my trial or
25 something like that, my third day, somewhere in there, Mr.

ROMEO BROWN - DIRECT

1 Gipson asked me to -- he said, you know, "I would like for
2 you to" -- while we was in court, we was in trial at the
3 time, I think we had a break or something like that and he
4 asked me, he said, "Hey, I think it's best for you to take
5 the stand, because if not then the jurors will think
6 you're hiding something, and, you know, that could be
7 against you," you know, like that. So I was just seeking
8 his advice because he's my attorney.

9 Q Okay. That was -- you said that was during the third
10 or fourth day of the trial?

11 A Yeah, something like that.

12 Q After you made that decision -- or did you make the
13 decision right then?

14 A I told him okay. Because I don't know nothing about
15 the law and he know more than I do, and I was just seeking
16 his advice because he is my attorney.

17 Q Okay. And the Judge went over your right to not
18 testify with you during the trial, do you remember that?

19 A Yes, sir.

20 Q Okay. Other than you and Mr. Gipson discussing before
21 the trial started that you were not going to testify, and
22 then during the trial telling -- you making the decision
23 that you are going to testify, did y'all prepare for your
24 testimony at all? Did y'all talk about what was going to
25 take place?

ROMEO BROWN - DIRECT

1 A No, sir. He just told me to just be relaxed and, you
2 know, just be cool about it and, you know, basically
3 that's it, because it was like, you know, in the middle of
4 the trial or, you know, like that. So I mean, it wasn't
5 no preparation, you know what I'm saying?

6 Q Did y'all have some time to discuss at the end of the
7 day or at the lunch break or before court started the next
8 day any testimony or anything like that?

9 A No, sir.

10 Q Okay. Did you -- were you aware that you were going
11 to be cross examined by the State if you testified?

12 A I kind of figured that. Watching a lot of Law and
13 Order I knew -- I kind of, you know, see that they always
14 got -- there's going to be somebody that's going to ask
15 you questions other than your attorney.

16 Q Okay. And I know the Judge went over this with you,
17 but were you aware that your prior conviction, particularly
18 just one of them, was able to use as -- against you, the
19 jury would be allowed to know that you had a prior
20 conviction for armed robbery?

21 A I was told that it wouldn't be -- it wouldn't be
22 brought up, because it was like 11 years old and after a
23 certain amount of time or something like that it wouldn't
24 be brought up, you know. But if they happened to bring it
25 up then, you know, just admit to it because I admitted to

ROMEO BROWN - DIRECT

1 it and done the time for that.

2 Q Okay. Let me ask you, when you were testifying there
3 was an issue that came up where you were asked whether you
4 knew certain people, in particular the victim in this case,
5 and you testified that you didn't know the victim. There
6 was some confusion that got explained. Will you explain to
7 this Court today when someone asked you if you know a
8 person, is that different than just knowing who they are?
9 Will you explain that a little bit?

10 A Yes, sir. When I -- you know, I know -- it's a lot
11 of people, not only just myself saying when you know a
12 person is that you know where they live, what kind of car
13 they drive, where they work, do they have any children,
14 you know, like that. And I seen the victim before, I seen
15 him before, but they're saying that if you seen them --
16 that's what the solicitor was telling me, said if you seen
17 them then that's saying that you know them and I was
18 saying I didn't know him. I didn't know his name, I
19 didn't know where he stay, I didn't know, you know,
20 whether he walk or ride a bike or things like that, I just
21 didn't know him.

22 Q So you and the solicitor weren't on the same page when
23 he was asking you questions and you were answering them,
24 you were thinking one thing and he was thinking a different
25 one?

ROMEO BROWN - DIRECT

1 A Yes, sir.

2 Q Do you think that's something that would have -- you
3 would have been able to understand more clearly if you and
4 Mr. Gipson had discussed your testimony before you took the
5 stand?

6 A Yes, sir.

7 Q Okay. During the trial, how were you restrained?
8 Obviously today you're in a jumpsuit and in shackles, you
9 weren't in a jumpsuit in shackles during your trial, or at
10 least like they are today. How were you restrained during
11 your trial?

12 A They had me -- they had some like metal like braces
13 on both of my legs, you know, like Forrest Gump, the movie
14 when he had, you know, like a brace on your legs. And if
15 I walked or if I stretched my legs or something, or if I
16 attempted to stretch them out too far then they lock and
17 you could hear the click, click, click sound. I was
18 wondering why they was putting these on me, because every
19 trial that everybody has been having, you know, every
20 murder trial that everybody has been having, they wasn't
21 restrained in any kind of way, and then the jurors used to
22 look at me and wondering what's wrong, what's going on,
23 why, you know. And then after a couple of days of that
24 then the solicitor was like, "We need to bring him in
25 before the jurors get in because, you know, that clicking

ROMEO BROWN - DIRECT

1 sound and him walking like that, obviously they know that
2 something is wrong, you know, with his legs and something
3 you know, hindering him from walking straight or walking
4 right," and things like that.

5 Q So those devices were under your pants?

6 A Yes, sir, they was under my pants. But if I -- like
7 when I was stepping up on the stand and you could hear the
8 click, clicking, you know, and I had the full -- it's a
9 little lever on the side, it's like two little things on
10 the side of them that you've got to pull in order to bend
11 the legs again, because if you don't pull those then
12 you -- the legs is straightened out and then you can't
13 walk so I had to pull them. And the jurors was like -- I
14 seen one or two of them, I think, was leaning over like
15 that, you know, looking to see, "What is that? What's
16 going on with you? What is that?" I mean, and I'm like I
17 hope -- I'm saying to myself, "I hope they ain't think I'm
18 planning no escape or nothing," because it was, you know,
19 strange.

20 Q Okay. So you couldn't see them but they made some
21 noise and you walked funny because they were on -- they
22 were restricting your movement?

23 A Yes, sir.

24 Q Before the trial started were you in that same type of
25 restraint or were you in regular kind of like you are now,

ROMEO BROWN - DIRECT

1 regular shackles?

2 A Before the trial started they brought me in in the
3 courtroom -- not in the courtroom, but they brought me to
4 the cell like this and they took the stuff off and they
5 put the restraints on me back in the holding cell, and
6 then when I entered the courtroom with the jurors there I
7 had the restraints and stuff on there like that.

8 Q Before the trial started, were you ever sitting in the
9 jury box with the big jury pool out here?

10 A No, sir.

11 Q Okay. Did you have an opportunity to watch the jurors
12 and just observe them while the trial was going on?

13 A Yes, sir.

14 Q Did you ever notice any of the jurors not paying
15 attention or falling asleep or anything like that?

16 A Yes, sir.

17 Q Can you explain to us what you saw?

18 A It was this elderly lady, and it was another lady, I
19 don't think she was old as the other, and I was witnessing
20 them, watching them and they was -- because my trial and
21 stuff been so long and they was -- kept nodding while
22 testimonies and stuff been going on, they was nodding.
23 And one lady, you could actually hear her snoring, and I
24 touched my lawyer and I whispered to him and I said, "Let
25 them know, see the lady right there? They're sleeping,

ROMEO BROWN - DIRECT

1 they" -- and he said, "All right. All right, I've got
2 it." He said, "All right, I got them," like that. But
3 nothing was mentioned. And I thought that something
4 should have been said, you know, because if you're not
5 paying attention, you know, it's my life on the line.

6 Q Okay. And do you -- and you may not remember this --
7 do you remember the Judge talking to the jury before the
8 trial started and one of the things she told them was to
9 make sure they did not fall asleep, do you remember that?

10 A Yes, sir.

11 Q Okay. Mr. Brown, I have asked all of the questions
12 that I have for you. Is there anything that you think I've
13 left out that you think the Court needs to be aware of of
14 just Mr. Gipson's representation of you?

15 A Yes, sir. I felt that he should have said something
16 to the Judge when I mentioned to him about one of the
17 witnesses had pointed out to the solicitor and told him
18 that the solicitor said he was a lawyer, and he spoke with
19 the witness a month or something like that before the
20 trial and told him what to say when he get on the stand.
21 And I whispered over to him and said, "Hey, they're
22 setting me up." He said, "I see, I see, I got it," you
23 know. And I think that there's, you know, he should
24 approach the bench to talk to the Judge and let them know
25 what was going on.

ROMEO BROWN - DIRECT

1 Q Okay. Other than that, did you feel that y'all were
2 prepared to go to trial and ready to go when the trial
3 started?

4 A Not right that moment, because I wanted the results
5 from the lab and, you know, the DNA and things like that,
6 and I figured that plays a major part in any trial because
7 you don't know who you got on the stand. The guy that
8 committed the crime could be sitting right in the
9 courtroom watching the trial and, I mean, it just that,
10 you know. I think the DNA, I wanted to know the results
11 from that and I wanted to know why -- you know, why
12 something -- why is that he didn't send the investigator
13 or somebody themselves and get some type of paperwork
14 saying that they didn't have -- from SLED headquarters,
15 the testing lab saying that they got the results and, you
16 know, I figured that things wasn't -- I mean, it should
17 have been -- we should have found out more about this, you
18 know, before we even went to trial.

19 MR. WALLER: Okay. Mr. Brown, I don't have any
20 further questions for you, please answer any questions Mr.
21 Mitchell has.

22 CROSS EXAMINATION

23 BY MR. MITCHELL:

24 Q Good morning, Mr. Brown.

25 A Good morning, sir.

ROMEO BROWN - CROSS

1 Q All right. So you went to trial on murder; is that
2 right?

3 A Yes, sir.

4 Q And you were served with notice of intent to seek life
5 without parole --

6 A Yes, sir.

7 Q -- is that correct? Now, Mr. Gipson was hired by you
8 to defend you in the case, right?

9 A Yes, sir.

10 Q And he reviewed with you, you know, different evidence
11 that the State had against you; is that right?

12 A Yes, sir.

13 Q In particular the statements of some of the witnesses,
14 right?

15 A Yes, sir.

16 Q And these were people that you knew as friends and
17 some family, right?

18 A Yes, sir.

19 Q That testified at the trial.

20 A Yes, sir.

21 Q Now, kind of like a factual background, this is kind
22 of like a cookout, there's some drinking going on, hanging
23 out at a friend's house, right?

24 A Yes, sir.

25 Q And that's what the State was alleging happened, that

ROMEO BROWN - CROSS

1 you got into an altercation with the victim and then shot
2 him twice, right?

3 A Yes, sir.

4 Q And that there were numerous witnesses to see the
5 incident occur, right?

6 A Yes, sir.

7 Q Now, part of your defense was that when the
8 investigators got there a lot of these witnesses did not
9 give them your name immediately, right?

10 A Yes, sir.

11 Q And it was kind of to show that, you know, if they
12 know Romeo Brown so well and they all know him and they all
13 hang around with him, if he did this why don't they just
14 say that immediately, right?

15 A Yes, sir.

16 Q So it took awhile for your name to get to
17 investigators, correct?

18 A Yes, sir.

19 Q And that was something that Mr. Gipson argued kind of
20 throughout the case; is that true?

21 A Yes, sir, he argued some of that.

22 Q So that was part of the strategy, right?

23 A Yes, sir.

24 Q So I guess another part of the overall strategy was
25 that you weren't there, right?

ROMEO BROWN - CROSS

1 A Yes, sir.

2 Q And you presented, I think, three witnesses in your
3 case, right?

4 A Yes, sir.

5 Q Yeah. So your nephew, your neighbor, right?

6 A Yes, sir.

7 Q Now, your nephew testified that he picked you up from
8 a gas station that night when the crime allegedly occurred,
9 correct?

10 A Yes, sir.

11 Q Okay. And then y'all then went back to the house and
12 watched, was it the World Series?

13 A Yes, sir.

14 Q You also had some problems with your leg leading up to
15 around the time of the incident; isn't that right?

16 A Yes, sir.

17 Q You had, I think, a busted blood vessel; is that
18 right?

19 A Yes, sir.

20 Q And you were walking around with a cane so you had
21 trouble getting around, correct?

22 A Yes, sir.

23 Q Because the State was alleging that you were in this
24 tussle with the victim, and it was also kind of your side
25 of the story that, you know, "I'm kind of weak and injured

ROMEO BROWN - CROSS

1 as I am, it would be tough for me to tussle around with the
2 victim;" is that right?

3 A Yes, sir.

4 Q Okay. Talk a little bit about the DNA evidence. Now,
5 the State didn't present any DNA evidence, did they? There
6 was no --

7 A No, sir. Mr. Gipson had asked them, you know, asked
8 them about it, you know, in court and trial, he asked them
9 about it. He had the pictures of it and SLED said it was
10 Orangeburg and Orangeburg saying it was SLED that had it,
11 so we didn't know who had it and where it was, you know.

12 Q So there was some confusion on who had that piece of
13 evidence and who was going to test for it, right?

14 A Yes, sir.

15 Q And Mr. Gipson questioned those witnesses on kind of
16 the who has this, where is it, why has it not been tested,
17 right?

18 A He just -- he mentioned about it and then he showed
19 the pictures to the jurors, and that was the last of that.

20 Q But there was no physical evidence tying you to the
21 gun used in the crime, right?

22 A No, sir.

23 Q They never -- the State never presented a gun as
24 evidence, did they?

25 A No, sir.

ROMEO BROWN - CROSS

1 Q Okay. So they kind of called some witnesses to say,
2 "We were unable to find any solid evidence," right? Some
3 of the State's witnesses?

4 A Yes, sir.

5 Q Now, you talked about preparing for trial and whether
6 you wanted to testify or not. Judge Goodstein went over
7 with you your rights to -- your right to testify and your
8 right not to testify, correct?

9 A Yes, sir.

10 Q She did that twice I think; isn't that right?

11 A I only recorded -- well, she only -- when they was
12 out on a break, when they was out on a break and then
13 that's when he asked me, he said, "Hey, you know, I think
14 that it's best that you testify because I don't want the
15 jurors, you know -- you don't want them thinking that
16 you're hiding something, you know, like that." And so I
17 was like, "Well, I told you I didn't want to." And he
18 said, "Well, you know, it is -- it will be in your
19 interest to do so," and that was during the break. But
20 then he went and talked to her and asked her could I be
21 sworn in like that when I was like -- when I said -- and
22 that's when everybody came back and that's when -- when
23 court started back again after the break, that's when I
24 got sworn in by Mrs. Goodstein. But she mentioned to me
25 she said, "Well, you know, you're agreeing to do this and

ROMEO BROWN - CROSS

1 that and things like that," so I was like, "Yes, ma'am,"
2 you know.

3 Q So you testified taking into account Mr. Gipson's
4 advice that it would be in your best interest to testify,
5 right?

6 A Yes, sir.

7 Q Okay. And when you testified you were able to
8 corroborate your other two witnesses' testimony that you
9 were not present at the crime, right?

10 A Yes, sir.

11 Q And that you were watching the world series with your
12 nephew, right?

13 A Yes, sir.

14 Q Okay. And you were also asked -- you were also asked
15 whether you knew the victim, right?

16 A Yes, sir.

17 Q And your answer to that was no, you don't know him,
18 correct?

19 A Yes, sir.

20 Q Okay. And that's kind of where the State argued that
21 you had then opened the door to allowing testimony about a
22 previous incident to come in.

23 A Yes, sir. Because Mr. Gipson had objected to it
24 and -- because I was trying to explain to him, to the
25 solicitor my version of, you know, knowing someone but he

ROMEO BROWN - CROSS

1 had cut me off and my lawyer, Mr. Gipson, objected to it
2 and asked the Judge could he give me a chance to explain,
3 you know.

4 Q So you were trying to explain like how close you were
5 with someone, like you know them but you don't socialize
6 with them or you don't know their family. It's kind of --

7 A I was letting them know that my version of knowing
8 someone is knowing their family and knowing where they
9 work, you know, I mean -- because I see a lot of people,
10 you know, everyday throughout the day but I don't know
11 them, I don't know them, you know. If I would have been
12 talked with them and dialogue with them then I just don't
13 know them. I could say that, yeah, I seen that person
14 before but, you know, I don't know them.

15 Q Now, when you were asked by the solicitor, Mr.
16 Sorenson, whether you knew the victim the question was,
17 "You don't know him at all?" And you said, "No, sir." And
18 that was kind of the point in contention, wasn't it, the
19 definition of no?

20 A Yes, sir. I mean, and I think Mrs. Goodstein said
21 that she kind of understood where I was coming from about
22 the knowing a person, because, I mean, I'm just being
23 honest, you know. And it's like I walk in the courtroom
24 and I seen you and walked back out and they asked me do
25 you know that man right there and I told them no, I don't

ROMEO BROWN - CROSS

1 know him. I mean, that's -- I never spoke with you and we
2 never had a conversations or anything. I don't know -- I
3 just don't know you, I mean, I'm just being honest.

4 Q Also your testimony -- you testified that you didn't
5 really do much preparation for your testimony so Mr. Gipson
6 didn't go over how that would go with you, the procedure of
7 it and that you would be cross examined?

8 A Because like I said, that was during the -- like the
9 trial had already started, we done went through two days
10 of trial and I wasn't expecting, you know, and I don't
11 think -- he wasn't expecting that either. Because if he
12 would have then I think he would have prepped me on that,
13 but we wasn't -- we already, me and him and my
14 investigator had already came to that conclusion that I
15 wasn't going to testify, that's how come he didn't, you
16 know, prep me on that.

17 MR. MITCHELL: I don't think I have any further
18 questions. Thank you, Mr. Brown.

19 THE COURT: Redirect?

20 MR. WALLER: Nothing further, Your Honor.

21 THE COURT: All right, you may step down. Applicant
22 can call their next witness.

23 MR. WALLER: We call Byron Gipson.

24 The witness, BYRON GIPSON, was first duly sworn and
25 testified as follows:

ROMEO BROWN - CROSS

1 DIRECT EXAMINATION

2 BY MR. WALLER:

3 Q Good morning, Mr. Gipson, how are you today?

4 A Fair to middling considering.

5 Q Mr. Gipson, how did you come to represent Romeo Brown?

6 A One of his family members came to me and just
7 explained the situation, and eventually we determined they
8 were going to hire me to handle this matter.

9 Q Had you ever represented him before or anything like
10 that?

11 A I had not.

12 Q If you recall, do you know how long he had been in the
13 county detention center before you went and saw him?

14 A As I was looking back through my notes it would have
15 been within a month of the arrest. I believe he was
16 arrested around the beginning of November or the end of
17 October of that year, so I would have -- I had seen him by
18 I believe right after Thanksgiving or right before
19 Thanksgiving, so it would have been around a three or four
20 week span of time.

21 Q Did you have any discovery or anything like that when
22 you went to see him the first time?

23 A I did not.

24 Q Had you filed discovery motions at that time?

25 A I filed them soon after. I can look in the file and

BYRON GIPSON - DIRECT

1 tell you the date I filed them, I don't mind.

2 Q That's okay. If you recall, and you may not, what did
3 you and Mr. Brown discuss at y'all's first meeting?

4 A I kind of have a general script that I use, and I've
5 got some notes in my file specifically to that date. But
6 generally my first meeting is always an introduction, and
7 I try to be as clear as I possibly can that, you know,
8 first of all let's just talk about the charges, you know,
9 what's being said. I'll tell you what I have seen in the
10 newspaper, and I say that kind of in a cautionary sense
11 because, you know, do I believe what the paper reports in
12 these matters? Generally no. But you have to understand
13 that your jury pool is going to come from a group of
14 people who have likely seen these stories so you need to
15 know it's out there so that we can determine, number one,
16 just what's out there and if there are going to be any
17 pretrial motions we need to file on our behalf, and also
18 just whatever rumors are floating around because sometimes
19 jurors are swayed by rumors. So we talked about those
20 things. Then we talked about his explanation of what did
21 and did not occur as a result of these allegations.

22 Q Okay. From that meeting, did y'all take a trial
23 posture from the outset?

24 A It was clear, he told me from day one he did not do
25 this and so it was clear. And it was also very clear that

BYRON GIPSON - DIRECT

1 there was not going to be a discussion about pleas and
2 things of that nature because he didn't do it.

3 Q Okay. Was he able to provide you any information as
4 far as witnesses or the alibi that y'all presented, any
5 additional information?

6 A He talked about alibi, and that was extremely
7 important because obviously in murder cases you have
8 different types of defenses and one is maybe self-defense
9 of some sort. Obviously that was not an issue here,
10 because from day one he told me he was not there. Two, he
11 told me that he had, you know, been elsewhere, obviously
12 alibi, so he explained where he had been so those became
13 important people for us to meet with or at least attempt
14 to meet with in this situation, and that's what I did.

15 Q During his testimony earlier he testified that there
16 was a gas station across the street from where he used to
17 hang out, there might have been some video from that gas
18 station. Were you able to follow-up on that and obtain any
19 video?

20 A By the time I was retained there was nothing that
21 this gas station had. Generally what you'll find with gas
22 stations, especially in some of the medium sized smaller
23 towns, they have a system, either one that records and if
24 there's nothing of substance that happens they just
25 continually record; or two, the cameras are a deterrent

BYRON GIPSON - DIRECT

1 effect so they don't really have video -- or they don't
2 have recording capability but they stick them up there so
3 people will assume. But I at this point in time -- I had
4 had cases that had taken place around this area where, you
5 know, this area where these gas stations, they did not
6 have anything that could help me, or help us.

7 Q What else did y'all do as far as preparing his defense
8 from the alibi standpoint?

9 A I brought in Danny McDaniel who is my -- well, I say
10 my investigator, it was an investigator that the family
11 hired, looked into witnesses and we met, I can assure you
12 it was more than six or seven times.

13 Q Okay. Mr. Brown discussed some testing, some DNA
14 testing.

15 A Uh-huh.

16 Q If you could, what was -- what samples were taken and
17 were those samples tested?

18 A The -- if I can answer that two ways. First of all,
19 when I defend cases I try to look at these things. First
20 of all just having had the benefit of sitting next to a
21 judge for a year before practicing, you know, as a law
22 clerk you get to see how things unfold and you get to
23 observe the courtroom, you get to observe the defense, you
24 get to observe the prosecution, observe the jury, observe
25 the gallery, you get to see those things, so that's one

BYRON GIPSON - DIRECT

1 vantage point. The second vantage point would be that of
2 a prosecutor, which I have never been. But in preparing
3 these cases you start to think of the things that a
4 prosecutor is going to be looking for to try to get a
5 conviction against a client, so I look at it from that
6 vantage point. Then I look at it from my vantage point
7 and trying to be cynical about the evidence, and then from
8 Mr. Brown, so we look at it from several different vantage
9 points. In this situation it became clear that the
10 investigation was sloppy. To me, and I'll say this, it's
11 in the transcript, the first responder, Sergeant Davis,
12 was only there to secure the crime scene, and he did the
13 best job -- he did a better job than the investigators
14 quite frankly. He had more experience than they do. He'd
15 come down from New Jersey and he'd been in Orangeburg for
16 a couple of years, he's now an investigator there, but at
17 that point in time I think he was just a road Sergeant who
18 just came to the scene and secured things, and the things
19 that he did I could not find that had even been followed
20 up on. When the investigator came in and evidence was
21 collected -- you mentioned fingernail clippings, if
22 there's an allegation of a fight to me it's elementary
23 that you're going to look for fingernail clippings and see
24 if they've been tested. So there's several pieces, tire
25 casings -- excuse me, tire casings being taken by SLED to

BYRON GIPSON - DIRECT

1 determine if they could match those up with anybody in
2 particular. Shoe prints, just several things, it's all in
3 there. I went down a long litany of things that were not
4 done, so there was not any testing done that I could find.
5 And my position was the reason why it wasn't done is
6 because it was sloppy, it just spoke to how sloppy the
7 investigation was. And if you're going to do a basic
8 investigation there's certain things you should have, and
9 without those things you can't find this man guilty
10 because there's so many pieces of the puzzle that have not
11 been brought to the table. So that was part of our
12 defense, the sloppiness of the investigation should lead
13 to reasonable doubt.

14 Q Is one of the main theories of the defense was that
15 Mr. Brown wasn't there at all?

16 A Uh-huh.

17 Q Did you and Mr. Brown have a conversation regarding
18 trying to get some independent testing done of the
19 fingernails or any of the other evidence that was collected
20 and not tested?

21 A Well, by the time we learned of those things -- well,
22 two things, it cost money to do which they did not have
23 additional funds, and quite frankly they still owe me some
24 money, but that is what it is, that's part of what we do.
25 But can it be afforded first of all, independent testing?

BYRON GIPSON - DIRECT

1 And the position was if we have a private investigator who
2 is able to gather these other witnesses and speak to
3 people and do some of these other things we have to use
4 our money more effectively. And the thing that --
5 sometimes in these cases there's some things you don't
6 want to know, and if they've not tested it you don't want
7 to get into a situation where you pay money to have
8 something tested and then something comes back and blows
9 up in your face. And so, you know, the position was
10 strategically at that point there was nothing physical
11 that drew him -- that put him at the scene. He had an
12 alibi from people who were prepared to testify in court,
13 and he'd been prepared to testify as well. He had some
14 limitations that seemingly prevented him from doing some
15 of the things that the prosecution was suggesting that he
16 had done that night, and so I felt with those things, you
17 know, running the risk of testing something I didn't think
18 that was a good way to go.

19 Q You spoke about it as limitations. He had suffered an
20 injury shortly before the incident took place.

21 A Maybe six to eight weeks before he had been injured
22 in an attack of some sort and had a scar that was -- I
23 forget which, if it was the left or the right side, I
24 think it was the right side but I yield to the record.
25 But he had some scarring that went from probably -- really

BYRON GIPSON - DIRECT

1 straight up the groin area and parallel with his leg and
2 there was a long scar, and so even at his bond hearing I
3 believe he was in a wheelchair at that point in time. I
4 did not handle the bond matter but he was in a wheelchair
5 at that point. And there were questions as to whether or
6 not he could have been in a tussle the way that they were
7 claiming this tussle occurred with the decedent.

8 Q I know that some medical records from his stay in the
9 hospital were admitted into evidence. Did y'all ever
10 discuss retaining an expert to discuss his physical
11 limitations while he was suffering from that injury or
12 healing from that injury?

13 A No. Again cost, the cost is a matter, and with the
14 lengths of that scar and him being able to testify about
15 those things, I think that was plenty in the record so a
16 jury could make an inference one way or another.

17 Q Were you made aware or ever have -- or did Mr. Brown
18 ever make you aware that any of the jurors were falling
19 asleep or nodding off that you recall?

20 A It's possible. And the way I handle those types of
21 matters is so as not to try to embarrass anybody, when
22 there is a -- if it's egregious where a person is
23 drooling, slumped over, something like that then of
24 course, you know, you want to handle that kind of thing
25 immediately. But what you do in my practice is to either

BYRON GIPSON - DIRECT

1 approach -- ask to approach or at the next break, I mean,
2 if that person -- sometimes people nod off especially
3 after lunch, you know, and especially if there are long
4 settings. My practice is to mention to the Judge, "All
5 right, there are some jurors out there that don't look
6 alert, can we just make sure?" And I'm sure if that would
7 have been a major issue that's what I would have done,
8 that's just a normal practice.

9 Q Do you recall having to approach the bench or alerting
10 the Judge at all?

11 A I don't recall, but that's my normal practice.

12 Q Okay. How was Mr. Brown restrained while he was in
13 the courtroom in the presence of the jury?

14 A As he mentioned, you know, the restraints he was
15 wearing today were not present. Judge Goodstein felt more
16 comfortable in this case having some type of shackles
17 being on him, because evidently they use those in
18 Dorchester County from time to time. I'm not a big fan of
19 them, but that was the Judge's decision and she said
20 that's what's going to happen so that's what happened.
21 The shackles went underneath the pants. Generally he was
22 seated when the jury came in, and when he was not parading
23 around it was not something that they could see by sitting
24 over here looking at him.

25 Q Okay. The invisible restraints they had that they

BYRON GIPSON - DIRECT

1 used in Dorchester, they didn't have them at the beginning
2 of the case because this was in Orangeburg, is that what
3 you recall?

4 A I'm not recalling that. It's the same circuit, so I
5 don't want to say anything that's incorrect, but I believe
6 that they made sure that those invisible restraints were
7 present, and I think they even picked a pair up and
8 brought them there. Now that you say that it's making me
9 go back in the recesses of my mind, but I'm sure that they
10 -- it's not something that we use in Orangeburg much so
11 I'm sure they would have had to transport those.

12 Q And that's what I was getting at, do you recall
13 whether he had the invisible restraints from the outset or
14 was that something that they had to have sent from
15 Dorchester to Orangeburg?

16 A I don't recall from day one. But again, its the same
17 circuit, from here to Orangeburg is 35 minutes, you know,
18 law enforcement can do it a little bit quicker, so I
19 suspect that they got them here very quickly. But I guess
20 the major question, overarching question is whether or
21 not, if he was not in the invisible restraints did the
22 jury see him in other restraints? And the answer to that
23 is no, not in my presence.

24 Q I want to ask you a little bit about the prior
25 incident that had taken place between Mr. Brown and the

BYRON GIPSON - DIRECT

1 victim in this case.

2 A Sure.

3 Q You had made a motion pretrial and I think an
4 objection during the actual trial of the case to keep that
5 out.

6 A Yes, sir.

7 Q And the Judge initially kept it out, she said it
8 didn't have any bearing, it was four or five months prior.
9 What changed her mind in your opinion to allow that
10 testimony in?

11 A And yes, I filed a pretrial motion. The reason for
12 filing that was to make sure that we protected Mr. Brown
13 all of the way through this trial, and that was filed and
14 especially in anticipation of him testifying. Because
15 that's one of the things, there was no motive that could
16 be established in this situation and so we filed that
17 pretrial motion. Judge Goodstein upheld -- or she agreed
18 that this was not something that needed to be gone into,
19 it was not going to be relevant at this point in time
20 unless the door was opened. And so absolutely without
21 question we met and we talked, meaning me and Mr. Brown,
22 we talked about those things, talked about how that
23 question needs to be answered, because there was a whole
24 pretrial scenario prior to us even beginning the trial
25 obviously. I filed probably five or six pretrial motions,

BYRON GIPSON - DIRECT

1 many of which were granted and we talked about those
2 things and their impact on trial. At pretrial by them
3 holding that out it was also -- holding that, making sure
4 that the prior incident was going to be disallowed or not
5 allowed to be gotten into. It was clear that Mr. Sorensen
6 was going to ask a question as to whether or not he knew
7 that the alleged victim in this case, that was clear, and
8 we talked about that. And honestly this nuance about know
9 or do you know somebody or are you acquainted with them,
10 you know, I can remember us having a pretrial -- just
11 between us a conversation about these things and the
12 answer is yes and move on. "Do you know the guy? Yes."
13 Knowing doesn't mean you sit down and break bread with
14 them every other day, that kind of thing, but let's not
15 sit over here, and as I like to say, sit over here and
16 debate about semantics, yes, you know them and move on,
17 that's the only question they can ask. It's similar to
18 the question, "Do you have a prior record? Were you
19 arrested in 1999 for X, Y, Z or were you convicted? Yes."
20 If you answer that question it's over and done with, but
21 if you quibble with it, then at that point the door can
22 open and it gets a lot worse. And so we discussed that in
23 depth about, you know, that prior situation, we discussed
24 that in depth. And I think that when he was asked --
25 well, I'll be quiet, you didn't ask me the other

BYRON GIPSON - DIRECT

1 questions, running off at the mouth. I'm doing what we
2 tell witnesses not to do.

3 Q Did y'all have a conversation about -- after the
4 incident was initially suppressed, or the testimony about
5 the initial incident was -- the prior incident was
6 initially suppressed, did y'all have a discussion
7 specifically about the door could be opened depending on
8 the testimony of Mr. Brown?

9 A Yes.

10 Q I want to talk a little bit about Detective Eicoff's
11 testimony.

12 A Uh-huh.

13 Q Do you recall that portion of the transcript?

14 A I recall Detective Eicoff, not the specifics. You
15 can help me recollect some of them, but I recall it. It
16 was a very sloppy investigation.

17 Q Just generally how would you characterize her
18 testimony and in response to your questions?

19 A Sloppy. And just honestly what you want from a
20 detective from the defense purpose, for defense purposes
21 is what you want. She was very honest about how callus
22 and nonchalant she was about her investigation.

23 Q Okay. Do you have the transcript up there with you?

24 A I do.

25 Q If you could, could you turn to page -- it's around

BYRON GIPSON - DIRECT

1 550? I'm not going to necessarily refer to anything
2 specific.

3 A I'm at 550.

4 Q Okay. You called Detective Eicoff as a hostile
5 witness or as an adverse witness, is that your
6 recollection? I mean, that's not page 550, it was before
7 you called her to testify.

8 A I mean, tell me what you mean. You mean in the
9 evidentiary sense of a hostile witness? I mean, tell me
10 what do you mean.

11 Q Yes. You lead her when you questioned her.

12 A Well, you're supposed to lead, it's cross
13 examination, leading is perfectly acceptable.

14 Q She was your witness is what I'm getting at.

15 A Okay.

16 Q You had to object during your direct examination a
17 couple of times to nonresponsive questions -- or
18 nonresponsive answers to your questions, do you recall
19 that, particularly page 553?

20 A Honestly I need to sit back and read this to get my
21 whole head wrapped around it again. I do see where it
22 says yes, that's unresponsive, yes, I see that. Will you
23 repeat your question?

24 Q I was leading up to the -- page 556 the Judge actually
25 sends the jury out because she's again answered

BYRON GIPSON - DIRECT

1 non-responsively to a question so I don't believe you
2 objected at that point. Did you ever make any motions to
3 strike any of her testimony or request for a curative
4 instruction based on her nonresponsive and narrative
5 testimony.

6 A I don't recall that I did that. But strategically
7 one of the reasons why you don't -- you hear people talk
8 about ringing a bell, and sometimes if something is said
9 in the courtroom and you ask for a curative instruction,
10 assuming one is necessary, then that draws the jury's
11 attention directly to something and they start trying to
12 delve into a particular matter. With her testimony as
13 you've deemed it as unresponsive as it was, you know,
14 sometimes in a jury trial the best thing to do is to allow
15 what was said in the courtroom to be what goes, because
16 you can sit here and you can read a transcript but it's
17 not going to do the same as actually being there and
18 seeing the reaction of the jury about how, you know, just
19 how nonchalant and how poor we felt just based on her
20 testimony how bad she did as a witness. So I didn't think
21 a curative instruction was necessary.

22 Q Okay.

23 MR. WALLER: Beg the Court's indulgence.

24 THE COURT: All right.

25 (Break in proceedings.)

BYRON GIPSON - DIRECT

1 Q Mr. Gipson, what was the strategy behind having Mr.
2 Brown demonstrate where his injury was located to the jury?

3 A He said he was not present, that he did not do these
4 things, but the State's position was that he did these
5 things. So that showing of the scar would just be other
6 evidence and demonstrating where he was injured would just
7 be other evidence of the fact that he was injured prior to
8 this and was very probably or possibly not able to engage
9 in the type of fight or physical activity that the State
10 says that he was.

11 Q I know the restraints weren't visible to the jury.
12 Was his movement restricted when he was asked to stand and
13 show himself to the jury?

14 A I can't tell you that his movement was restricted.
15 He was to stand straight up, and the way that the jury
16 stands and his position there, seeing the lower part from
17 mid-thigh down is just not something they can easily do,
18 so it would probably require them to stand up and look
19 over, which none of them were able to do. Because the
20 scar -- he's close to my height, the area that we're
21 talking about is from here to here, meaning mid-thigh to
22 right above the hip bone and so it didn't involve the
23 lower body in the sense of where those restraints, in my
24 opinion, would have been an issue. But I didn't hear the
25 clicking, I don't remember the clicking, I don't.

BYRON GIPSON - CROSS

1 MR. WALLER: No further questions, please answer any
2 Mr. Mitchell has.

3 CROSS EXAMINATION

4 BY MR. MITCHELL:

5 Q Good morning, Mr. Gipson.

6 A Good morning.

7 Q Can you give us a brief rundown of your professional
8 experience?

9 A I finished law school in 1996. My first job was to
10 clerk with Judge Manning, Judge L. Casey Manning for a
11 year. Soon after, I believe it was about August 12th of
12 1997, I started working with Johnson, Toal and Batiste,
13 and I've been there -- or been here since that point in
14 time.

15 Q And you've handled a number of criminal cases?

16 A Yes, sir, it's my bread and butter. To be honest
17 with you, more of the heavy types of capital cases is what
18 I do a good bit of, and I've done that starting with even
19 clerking with Mister -- well, I.S. Leevy Johnson and Bill
20 Toal, just working with them, carrying their brief cases,
21 driving them around town from '93 when I started law
22 school through -- all of the way through, and even the
23 first few years as an associate, that's what I did is
24 carry brief cases, research cases, took notes, got coffee,
25 you know, just did what was necessary and did what was

BYRON GIPSON - CROSS

1 told. And I still find myself doing that whatever I'm
2 told to do by either one of them.

3 Q So you had handled a number of murder cases before
4 this case?

5 A Yes, sir. Probably the first one was prosecuted by
6 Frank Quattlebaum who's in the back of the courtroom.

7 Q You were talking about earlier in your testimony that
8 you thought this was a trial from the get-go.

9 A Yes, sir.

10 Q And I guess he was served with notice of intent to
11 seek LWOP so that made the decision a little bit easier,
12 too. Can you give us just a very briefly rundown of like
13 the State's factual position, the position on what
14 happened?

15 A Their position was that Mr. Brown and Mister, I
16 believe it was Harrison, had had a dispute of some sort
17 several months before at the same location, and as a
18 result of that -- I say the same, I believe it was the
19 same location -- and as a result of that Mr. Brown was
20 irritated with Mr. Harrison and wanted to get back at him
21 at some point in time. They claim that that night, the
22 night that the shooting took place, there's just a bunch
23 of guys that would just kind of come out and generally
24 hang out at a picnic table that was not far from the
25 residence, I think his sister was the resident there. And

BYRON GIPSON - CROSS

1 the claim is that he walked down the street that
2 particular evening, walked up to the gentleman and had a
3 couple of words and gunshots were fired and he took off
4 running.

5 Q Now, pretrial you tried to -- well, you successfully
6 suppressed the prior incident.

7 A Yes, sir.

8 Q And that's something the State wanted to get into to
9 show they had a history, this is what led up to it kind of
10 deal?

11 A Yes, sir. We also kept out some of his prior order
12 from the early nineties. So again, those are the things
13 that you do in preparation for testimony, you know,
14 expecting that a client may very well testify and so we
15 had those things kept out about a '92 and maybe a '95,
16 some prior convictions that he had, and the most recent
17 one I think may have been 1999. And the question there
18 was by the time he actually got out of jail, had the
19 required amount of time elapsed that would allow that
20 conviction not to be talked about if he were to testify.
21 So we did all of those things so he would be fully aware
22 of what he would be facing if he chose to testify.

23 Q And he testified about that just a second ago, that
24 his prior armed robbery conviction did come in, do you
25 recall that?

BYRON GIPSON - CROSS

1 A I heard the testimony, absolutely, I believe it came
2 in. And again, you know, the simple question there and --
3 we met and talked about testimony a good bit, because the
4 feeling was, you know, "I have been to court before in
5 this situation, I pleaded guilty because I was guilty, I'm
6 going to trial because I did not do these things. I have
7 an alibi and these people will tell you where I was and
8 I'll even tell you where I was." That was his defense.

9 Q So your discussions of whether he would testify or
10 not, you -- did you advise him to testify?

11 A I advised him, and I advise all of my clients, you
12 need to be ready to testify. Because I feel like if we go
13 in there -- if we're preparing for trial, especially a
14 murder trial, we're not talking about an assault and
15 battery third degree or something where you are maxing at
16 30 days or begging for PTI, I mean, this is a situation
17 where he's fighting for his life and I think you always
18 have to be prepared to testify. Now, some people are able
19 to do it, some people are not, and I gauged just from my
20 meetings with Mr. Brown he's extremely intelligent, he's
21 well thought, well read, and my position was that he can
22 handle these things if he -- if he just goes and explains
23 the things that we've been talking about and explains what
24 he's told me happened and did not happen that night. He
25 even had -- I prepared questions, and I prepared five

BYRON GIPSON - CROSS

1 major questions that you're going to have to be able to
2 answer if you're going to testify, and one of them
3 obviously was an alibi is where were you? How can we
4 verify where you were? It was even to the point -- I was
5 kind of flicking back through my notes, we talked about
6 that World Series game between the Giants and the -- was
7 it the Rangers I believe it was that night? And even the
8 pitcher was Tim Lindsey one of those prior nights, he even
9 talked about his hair and things of that nature.

10 Q Beard?

11 A Beard -- it was pre-beard days. But, you know, I
12 even have a copy of where we went back to verify and the
13 final score, I can show the Court if he needed to, just
14 highlighting those types of things. We talked about
15 testifying, we were clear on that, and who was around,
16 where he was and where he wasn't, we talked about those
17 things.

18 Q So you definitely prepped him to testify before the
19 jury.

20 A Absolutely. That is one of the few things that I
21 tend to be -- well, I don't want to get in the court --
22 just anal about when it comes to trials, just making sure
23 that my client is ready to testify if that becomes the
24 call. But I did not force at any point in time. What we
25 do is we assess the landscape and say, "This is where we

BYRON GIPSON - CROSS

1 are, this is who has testified, these are the people that
2 we can call, and you know, and these are the things that
3 you're going to need to be able to speak about." And one
4 thing that wasn't mentioned is Mr. Brown is left-handed,
5 and so to me that's crucial in the sense that everybody
6 who testified ran up there and they said, "All right.
7 Well, the guy grabbed the gun and he had the gun in his
8 hand and he had him down on the ground and everything was
9 with the right hand." And so by Mr. Brown testifying that
10 was one of the ways that we could get into the fact that
11 he's left-handed, and to me -- it's a nuance but I think
12 it's important.

13 Q And I think we've covered the prior incident and your
14 preparation with him on that, whether he knew the victim or
15 did not. So I guess Investigator Eicoff, she was the lead
16 investigator on the case; is that right?

17 A She was.

18 Q And the State didn't even call her in their case,
19 right.

20 A As I look back at that they did not.

21 Q It was kind of a question of whether she was available
22 to testify and you were trying to serve a subpoena on her
23 and it was kind of difficult to track her down.

24 A It was. She -- I don't know if there was something
25 going on with her health at that point or if she had just

BYRON GIPSON - CROSS

1 kind of left the employ -- she was still technically
2 employed by the Orangeburg Sheriff's Department but we
3 could never secure service, but we were finally able to
4 track her down. She showed up with no case file, no
5 anything as it relates to this case.

6 Q So did you think she was a favorable witness?

7 A I'm sorry.

8 Q Did you think she was a favorable witness?

9 A Favorable in the sense that it would show how
10 sloppily, yes, it would show how sloppily they handled it,
11 and I think it came across just with her nonchalant and
12 the fact that the Court had to caution her to answer
13 questions. To me that's a death nail sometimes, if a
14 witness is that unresponsive to basic questions that there
15 are things that that witness is either hiding or just
16 doesn't know that they should know. It even goes to jury
17 charges at the end of the case when the Judge talks about
18 credibility and believability and weighing one witness
19 over many, many over one, that kind of thing. All of
20 those pieces fit perfectly with her testimony and just
21 what she didn't do.

22 Q So as far as the alibi, you were able to put up two
23 witnesses to support that along with Mr. Brown's testimony;
24 is that right?

25 A That's correct, we put two up. But I think

BYRON GIPSON - CROSS

1 ultimately his credibility came in to question when he
2 said he didn't know this person, and then the prior thing
3 that we had kept out came in, and that's when his
4 credibility became a question and I think that's what did
5 it in this case to be honest with you, that's when
6 everything went south.

7 Q Do you think that was the turning point when he said
8 he did not know the victim?

9 A I feel certain that that was the turning point.

10 Q Let's talk a little bit about how at the trial
11 questions on the victim's sobriety. What were you trying
12 to show the jury with that?

13 A Couple of things. You want to, if you can, gingerly
14 show that a decedent is not a Boy Scout necessarily, and I
15 think his blood alcohol level as I look back at my points
16 was a 19, .191 or something in that range, so he'd been
17 drinking a good bit. He'd been out there having a good
18 time and that just kind of shows if he's out there doing
19 these things, these other witnesses who he's with are
20 likely doing the same types of things, so their
21 recollection or their ability to remember certain things
22 can be called into question especially when some of them
23 get out there and say, "No, I didn't have anything to
24 drink." We have pictures of the crime scene and I think
25 there were 35 -- and I'm going back because I just saw

BYRON GIPSON - CROSS

1 this -- 35 different cans of beer that were out there, you
2 know, they were partying out there pretty good. And so
3 the question was just their ability to remember certain
4 events which was a question.

5 Q You were able to question each eye witness on how much
6 they had to drink, how much drinking was going on --

7 A Sure.

8 Q -- there was more beer runs in the process when the
9 incident happened, right?

10 A Yes, sir. And there were some Gin and some other
11 things out there too, some of the harder stuff was out
12 there too.

13 Q This is something we really haven't talked about a lot
14 is that the eye witnesses were not able to or did not give
15 Mr. Brown's name initially.

16 A Yes, sir.

17 Q So was that something you tried to get before the jury
18 or that you argued?

19 A Yes, sir.

20 Q The argument was kind of if you all know Mr. Brown so
21 well then how was it so hard for you to come up with his
22 name the night of the crime, right?

23 A Immediately. And also this is his sister's home or
24 family member's home, you know, and so yes, that was one
25 of the strategies.

BYRON GIPSON - REDIRECT

1 Q We talked about his injuries but he was also using a
2 cane to get around and had trouble with mobility?

3 A Right, he had that.

4 Q Do you think you tried this case to the best of your
5 ability?

6 A I think so. I mean, you always want to get better
7 and I always look back and try to figure out what you can
8 do better in this profession because it's a practice so I
9 want to practice better, but I do.

10 Q All right.

11 MR. MITCHELL: No further questions, thank you.

12 THE COURT: Redirect?

13 MR. WALLER: Just briefly.

14 REDIRECT EXAMINATION

15 BY MR. WALLER:

16 Q Mr. Gipson, did you file a -- did you serve a notice
17 of intent to seek an alibi defense on the prosecution?

18 A I did, I sent that to the prosecutor, you've got to
19 do that ahead of time. So I'm sure I served that on Mr.
20 Sorensen so that he would be aware, I'm sure of that.

21 Q Okay.

22 MR. WALLER: Nothing further.

23 THE COURT: All right, you may step down.

24 MR. WALLER: No further witnesses from the applicant.

25 THE COURT: All right. Does the State have anything

1 to present?

2 MR. MITCHELL: Your Honor, the State does not have any
3 witnesses.

4 THE COURT: All right. Mr. Mitchell, if you would
5 please prepare an order. The Courts's finding is that
6 defense counsel was not ineffective, in other words it was
7 not so deficient that there's a reasonable probability that
8 but for any -- but for the representation the results would
9 have been different. I'm finding there was no deficient
10 representation, nothing to indicate that anything could
11 have been done to bring about a different result. All
12 right.

13 (End of the hearing.)

14

15

16

17

18

19

20

21

22

23

24

25

1 I, the undersigned, Michael C. Watkins,
2 Official Court Reporter for the Sixth Judicial
3 Circuit of the State of South Carolina, do hereby
4 certify that the foregoing is a true, accurate and
5 complete transcript of the proceedings (as reported
6 by Elizabeth Harris and edited by Michael Watkins)
7 had and evidence introduced in the trial of the
8 captioned case relative to appeal in the Court of
9 Common Pleas for Orangeburg County, South Carolina,
10 on the 17th day of May, 2016.

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

13

14

March 6, 2017

15

16


Michael C. Watkins

17

18

Court Reporter

19

20

21

22

23

24

25

RECEIVED

MAR 17 2017

ATTORNEY GENERAL

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Romeo Brown, #185544,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2015-CP-38-0364

ORDER OF DISMISSAL

FILED FOR RECORD
WINNIE B. CLAY
2016 NOV -7 PM 12:57
CLERK OF COURT
ORANGEBURG, S.C.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 16, 2015. Respondent filed a Return on October 1, 2015, requesting an evidentiary hearing be convened. Jonathan D. Waller was appointed by the Orangeburg Clerk of Court. An evidentiary hearing was held on May 17, 2016, at the Dorchester County Courthouse. Applicant was represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial counsel Byron E. Gipson, Esquire. This Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, appellate records, the PCR application, the Return, and the transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was indicted at the March 2011 term of the Court of General Sessions for Orangeburg County for murder (2011-GS-38-0012) and at the April 2012 term for possession of firearm by a person convicted of a violent crime (2012-GS-38-0792). Applicant was represented by Counsel Gipson. On May 22,

2012, Applicant proceeded to trial before the Honorable Diane Schafer Goodstein. The jury found Applicant guilty as indicted. Judge Goodstein sentenced Applicant to life for murder and five (5) years' imprisonment on the possession of a firearm by a person convicted of a violent crime charge, to be served concurrently.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 21, 2015. State v. Brown, Op. No. 2015-UP-040 (S.C. Ct. App. filed Jan. 21, 2015). The remittitur was sent down on March 9, 2015.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

- I. Ineffective assistance of trial counsel in:
 - a. Failing to properly advise Applicant on whether to testify or not;
 - b. Failing to investigate the DNA collected at the scene;
 - c. Failing to object during Patricia Eikhoff's testimony;
 - d. Failing to object and bring to the court's attention sleeping jurors;
 - and
 - e. Failing to object to Applicant's shackles allegedly being visible to the jury.

II. APPLICABLE LAW

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

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

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Failing to properly advise Applicant on whether to testify

Applicant argues Counsel was ineffective in advising him to testify. Applicant makes this allegation because he was thoroughly impeached by the solicitor. On cross examination, Applicant stated unequivocally that he did not know the victim. (Trial Tr. p. 737). Outside the presence of the jury, the solicitor argued that Applicant had opened the door to allow him to

question Applicant on a prior incident with the victim. (Trial Tr. p. 737). Judge Goodstein allowed this line of questioning.¹ Applicant then was questioned about the prior incident and whether he struck the victim with a hand gun at the same incident location a few months prior. (Trial Tr. p. 742). Applicant denied the prior altercation. (Trial Tr. p. 742-43). On reply, the State presented witness Randy Ryant, owner of the property where the prior incident and the murder took place. Ryant explained that while Applicant knew the victim, they did not socialize. (Trial Tr. p. 792). Notably, this issue was raised on Applicant's direct appeal in the form of whether Judge Goodstein erred in allowing the State to impeach Applicant with evidence of the prior altercation.

Applicant testified that he told Counsel he did not wish to testify and that a defense investigator also told him not to take the stand. Counsel testified he reviewed the prior incident with Applicant and how he would argue that the incident was not admissible. Counsel recalled that he objected during and attempted to assuage the situation by asking Applicant to explain that "knowing" someone meant more than a casual acquaintance, essentially arguing that Applicant had a different definition of "know" than most. (Trial Tr. p. 739-41). Counsel testified that he discussed this situation with Applicant in preparing him to take the stand.

This Court finds Applicant failed to meet his burden in proving Counsel was ineffective. Counsel advised Applicant of the risks of taking the stand and how the solicitor may be able to impeach him. By stating on the stand that he did not know the victim when he had been in a similar altercation with him just months prior, Applicant allowed the solicitor to introduce strong evidence that he was not a credible witness. Applicant's testimony that he did not wish to testify is not credible. Judge Goodstein questioned Applicant on whether he understood his right to

¹ Judge Goodstein had previously ruled that the prior altercation would not be admissible.

remain silent and asked him whether would testify just prior to him taking the stand. (Trial Tr. p. 504-05).

In any event, this is a case of overwhelming evidence. Numerous people who attended the gathering at Ryant's property witnessed the shooting and identified Applicant as the assailant. These witnesses knew Applicant by name and face. Applicant cannot show that the result of the trial would have been different had Counsel failed to properly advise him of the risks of testifying in his defense.

Failing to investigate the DNA collected at the scene

Next, Applicant alleges Counsel was ineffective in failing to investigate and test the DNA collected at the incident location. Applicant testified that he was not aware of any DNA being tested. Counsel testified that he believed the investigation done in this case was sloppy and supported this conclusion with the fact that the DNA was not tested. Counsel testified that he did not have any independent testing done because there was a risk that it would come back positive. "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted).

This Court finds Applicant failed to meet his burden in proving Counsel was ineffective in not further investigating the DNA collected. This Court finds Counsel's testimony credible and persuasive on the issue. It was reasonable for Counsel not to have the DNA tested himself. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choices of tactics will not be deemed ineffective assistance.). Just as Counsel testified, if the results come back positive, then there is

the risk that the solicitor would be able to somehow present those results to the jury. Further, Counsel was able to support his theme of the case by showing that the investigation was sloppy in noting that DNA was collected but never tested.

Applicant has also failed to present any evidence to show how having the DNA tested could have benefited Applicant. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (“failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.”). The allegation rests entirely on speculation. Applicant is, therefore, unable to show any prejudice. This allegation is denied and dismissed with prejudice

Failing to object and bring to the court’s attention sleeping jurors

Applicant alleges Counsel was ineffective in failing to object and bring to the court’s attention that jurors had fallen asleep during the trial. Applicant testified that an elderly lady and another juror fell asleep during the trial. He testified that he told Counsel this when it happened. Counsel testified that, to his recollection, no jurors fell asleep but that it was possible. Counsel explained that if he had seen a juror sleeping he would have approached Judge Goodstein to ensure that the jurors were alert. The defendant bores the burden to show that a juror was actually asleep. See State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 266 (Ct. App. 1999) (analyzing the issue of a sleeping jury through a juror misconduct analysis and holding that a judge can dismiss a juror and replace the juror if the judge determines that the juror has been sleeping).

Here, this Court finds Applicant’s testimony not credible. Applicant has failed to meet his burden in proving that multiple jurors were asleep at various points in the trial. There is no mention of this in the trial transcript. It is noteworthy that no court room participants noticed any

jurors sleeping. Even if jurors were sleeping, Applicant cannot be found to have been prejudiced because there is overwhelming evidence of his guilt.

Failing to object during Patricia Eikhoff's testimony

Next, Applicant alleges Counsel was ineffective in failing to object to the nonresponsive answers given by Investigator Patricia Eikhoff who was called to testify in the defense's case. Applicant argues that Eikhoff's testimony was not responsive at certain points and believes that Counsel should have objected to her nonresponsive answers and asked for curative instruction. When being questioned on specifics regarding the weapon used, Counsel objected to Eikhoff's answer as unresponsive. (Trial Tr. p. 553). Judge Goodstein agreed and instructed her to answer the questions asked. (Trial Tr. p. 553). Later in her testimony, Judge Goodstein interjects *sua sponte* and asks the jury to return to their deliberation room and then proceeded to chastise Eikhoff for refusing to directly answer Counsel's questions.

THE COURT: Detective Eikhoff, I'm going to ask you to do this for me. I'm going to ask you to listen very carefully to the question that you are being asked. I'm going to ask you to answer that question. If it is a yes or no answer, I'm going to ask you to answer it yes or no. You may explain your answer. I don't want you to go into a non-responsive dialogue, but if you need to explain your answer I want you to do that. The reason that I have sent the jury out is because it's clear that Mr. Gipson is not going to abandon his question because you're not answering it, he's just simply going to come back around to the question, and you know, we have a jury here and I must be mindful of their times as well as everyone else's.

(Trial Tr. p. 566). On cross examination, the solicitor attempted to rehabilitate Eikhoff by asking her to explain that she was no longer an employee of the Orangeburg County Sheriff's Office and had been dealing health issues. (Trial Tr. p. 581-83).

At the hearing, Counsel explained that he called Eikhoff, the lead investigator on the case, to testify as a defense witness in an attempt to show that the investigation was sloppy and to point out that the State chose not to call her to testify. Counsel exploited Eikhoff's memory of

the case. (Trial Tr. p. 558). Counsel also questioned Eikhoff on why the DNA was not analyzed when it would seemingly just require sending the samples to SLED for testing. (Trial Tr. p. 557-59). Counsel noted that nonresponsive answers from Eikhoff would likely help Applicant's case and bring into question the credibility of the State's case.

This Court finds Counsel's handling of Eikhoff to be particularly damaging to her credibility. Applicant has not shown that Counsel was ineffective in any regard. Counsel clearly had a strategy in calling Eikhoff and allowing her to repeatedly give nonresponsive answer to his questions. Eikhoff's answers even forced Judge Goodstein to intervene, outside the presence of the jury, directing her to answer Counsel's pointed questions. Further, this Court finds there was no need for a curative instruction. This allegation is denied and dismissed.

Failing to object to Applicant's shackles allegedly being visible to the jury

Finally, Applicant alleges Counsel was ineffective in failing to object to Applicant's shackles allegedly being visible to the jury. The Court has examined the trial record and notes that the solicitor brought it to Judge Goodstein's attention that some of the jurors may have seen Applicant walk into the courtroom in an unnatural way because he was wearing leg shackles. (Trial Tr. p. 177-78). The solicitor was concerned, not that the shackles were visible, but that Counsel would use this to support his argument that Applicant could not have physically committed the crime. (Trial Tr. p. 177). At the hearing, Applicant testified that there was a clicking sound when he was walking into the courtroom and that the jurors may have noticed his unnatural gait. Counsel explained that Judge Goodstein wanted Applicant shackled but that the shackles were not visible because they were underneath his pants. Counsel was confident that the jurors never saw the restraints.

Applicant relies on Deck v. Missouri, 544 U.S. 622 (2005) in support of his allegation. Deck held that a criminal defendant has a right to remain free of physical restraints that are visible to the jury absent a trial court determination that they are justified by a state interest specific to a particular trial. This Court finds Applicant's testimony not credible on the issue. Applicant's testimony is self-serving and unsupported by any evidence before the Court. Applicant has failed to present any probative evidence that his shackles were ever visible to the jury. Even if Applicant was seen by the jurors with his movement restricted by the shackles, this worked to his advantage to support the argument that Applicant could not have physically fought the victim nor committed the crime. This Court finds Applicant failed to meet his burden.

Applicant has also failed to show how he was prejudiced in any manner. In Humbert v. State, 345 S.C. 332 (2001), the Supreme Court faced the issue of whether the PCR court erred in finding no prejudice where the applicant was wearing a jail uniform and shackles during his trial. The court held that there was not a reasonable probability that the outcome of the trial would have been different had he not been dressed in a jail uniform. Humbert v. State, 345 S.C. at 338. See Byers v. Basinger, 610 F.3d 980, 989 n.6 (7th Cir. 2010) (finding that even if a defendant proceeds to a jury trial while wearing ankle restraints, he must still prove his appearance affected the outcome of his trial); Whitman v. Bartow, 434 F.3d 968, 971-72 (7th Cir. 2006) (finding any error in having the defendant proceed to a jury trial while wearing a prison jumpsuit was harmless because the State presented overwhelming evidence of the defendant's guilt); see also Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). Applicant has failed to prove any prejudice. This allegation is denied and dismissed.

All Other Allegations

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

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 27 day of October, 2016.


BENJAMIN H. CULBERTSON
Presiding Judge

Conway, South Carolina

WITNESSES

Patricia Elkhoff

Orangeburg County Sheriff

ARREST WARRANT NUMBER
M195600

Arrested: November 4, 2010

ACTION OF GRAND JURY

TRUE BILL

MAR 16 2011

Winnifia B. Clark

Date: 3-16-11

Foreperson of Grand Jury

Date: March 16, 2011

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2011GS38-0012

The State of South Carolina

County of ORANGEBURG

COURT OF GENERAL SESSIONS

March 14, 2011 TERM

THE STATE
vs.

Romeo Anthony Brown

Indictment for ATTEST: TRUE COPY

MURDER

Winnifia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

SC Code: 16-3-10

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I
hereby appear in my own proper person
and plead guilty to the within indictment
or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED FOR RECORD
WINNIFIA B. CLARK
CLERK OF COURT
ORANGEBURG COUNTY, SC

2011 MAR 16 A 11:45

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

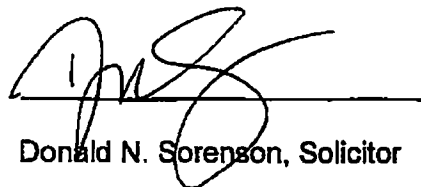
INDICTMENT
2011GS38-0012

At a Court of General Sessions, convened on March 14, 2011 the Grand Jurors of Orangeburg County present upon their oath:

MURDER

That in Orangeburg County on or about October 27, 2010, with malice aforethought, the defendant, Romeo Anthony Brown did kill one Alexander Harrison by means of shooting the victim. The victim did die as a proximate result thereof. This offense being in violation of the Common Law and Section 16-3-10, of the South Carolina Code of Laws, as amended.

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


Donald N. Sorenson, Solicitor

WITNESSES

Patricia Elkhoff

Orangeburg County Sheriff

ARREST WARRANT NUMBER
2012ORB7

Arrested: November 4, 2010

ACTION OF GRAND JURY

TRUE BILL

Date: APR 11 2012

Foreperson of Grand Jury

Date: April 11, 2012

VERDICTForeperson of Petit Jury
Date:

DOCKET NO. 2012GS38-0792

The State of South Carolina
County of ORANGEBURG**COURT OF GENERAL SESSIONS**

April 9, 2012 TERM

THE STATE
vs.

Romeo Anthony Brown

Indictment for**POSSESSION OF FIREARM BY
PERSON CONVICTED OF A VIOLENT
CRIME**Winnifred B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

SC Code: 16-23-0500

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

2012 APR 11 AM 10:59

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

INDICTMENT
2012GS38-0792

At a Court of General Sessions, convened on April 9, 2012 the Grand Jurors of Orangeburg County present upon their oath:

**POSSESSION OF FIREARM BY PERSON CONVICTED OF A VIOLENT
CRIME**

That in Orangeburg County on or about October 27, 2010, the defendant, Romeo Anthony Brown did unlawfully possess a 45 caliber handgun. This offense occurred after the conviction of one or more violent crimes as defined by S.C. Code Section 16-1-60, to wit: 1995 conviction for Burglary 2nd Degree and/or 1999 conviction for Armed Robbery in violation of Section 16-23-500, Code of Laws of South Carolina, 1976 as amended.

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


Donald N. Serenson, Solicitor