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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Berkeley County

Eugene C. Griffith, Jr., Circuit Court Judge

DONSURVI CHISOLM,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001735

APPENDIX

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STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF BERKELEY	)	COURT OF GENERAL SESSIONS
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 10-GS-08-1426 et al
	)	
Donsurvi Chisolm,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within HEARING was held in above-captioned action on October 16, 2012, before The Honorable R. Markley Dennis, Jr., in Courtroom 4D of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by Counsel, as follows:

APPEARANCES:

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1 SOLICITOR: Your Honor, this is the
2 State versus Donsurvi Chisolm. This is a
3 Berkeley County case. The defendant and the
4 State have agreed to handle this guilty plea
5 here in Charleston County.

6 THE COURT: Okay.

7 SOLICITOR: It is in Indictment
8 Numbers 2010-GS-08-1424, indictment for assault
9 and battery with intent to kill; Indictment
10 2010-GS-08-1425, an indictment for murder; and
11 Indictment 2010-GS-08-1426, an indictment for
12 possession of a firearm during the commission of
13 a violent crime.

14 We are here today for the defendant's
15 guilty pleas regarding these charges. We have
16 agreed to a negotiated sentence of life in
17 prison.

18 THE COURT: Okay.

19 ASHLEY PENNINGTON: And I think that
20 we should add, Your Honor, that the murder is
21 under *Alford*. In other words, we would say that
22 because the State is not seeking the death
23 penalty, and that was an explicit part of our
24 negotiation -- this is sort of exactly like that

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1 classic Alford case where we would stipulate and
2 agree that the evidence is capable of proving
3 murder but that my client is not entering a
4 plea, as we would conventionally know it, to the
5 murder. He would be pleading to assault and
6 battery with intent to kill and use of a firearm
7 in the course of a violent crime. I believe --
8 so that the court will also know the picture,
9 bring it into perfect focus, he's already doing
10 life without parole on a Dorchester County
11 murder conviction. I believe the recommendation
12 or negotiation is for concurrent to that.

13 THE COURT: Okay. Sounds like it is
14 pretty logical. Are there any other statements
15 concerning the benefit for an Alford? The State
16 is not pursuing death and they had considered
17 pursuing death?

18 SOLICITOR: Absolutely. Should this
19 not go forward, we have death notices here and
20 we are prepared to serve them.

21 THE COURT: Okay. So that is a
22 realistic benefit, then?

23 SOLICITOR: Absolutely.

24 THE COURT: From the standpoint of
25 the Alford concept?

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1 SOLICITOR: Yes, sir.

2 THE COURT: Are there any other
3 stipulations such as waiving appeal rights or
4 waiving PCR rights?

5 ASHLEY PENNINGTON: No, sir.

6 THE COURT: The State agrees with
7 that?

8 SOLICITOR: Yes, sir.

9 THE COURT: All right. Thank you.
10 You are Donsurvi Chisolm?

11 DEFENDANT: Yes, Your Honor.

12 THE COURT: Good morning, Mr.
13 Chisolm.

14 DEFENDANT: Good morning.

15 THE COURT: You are here with your
16 lawyer, Mr. Pennington?

17 DEFENDANT: Yes, sir.

18 THE COURT: And first I would -- and
19 I am sure that you have discussed this with your
20 lawyer. The first thing that I notice on the
21 sentencing sheets that bear your signature
22 indicating your desire to enter a plea to the
23 charges, I notice that it is a Berkeley County
24 case.

25 DEFENDANT: Yes, Your Honor.

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1 THE COURT: And Your Honor has
2 explained to you that it would be your right to
3 have this matter resolved and heard in Berkeley
4 County?

5 DEFENDANT: Yes, Your Honor.

6 THE COURT: You've elected to go
7 forward with the plea here today; is that
8 correct, sir?

9 DEFENDANT: That's correct.

10 THE COURT: And you are therefore
11 understanding -- fully understand that you are
12 waiving venue insofar as the venue being located
13 in Berkeley County?

14 DEFENDANT: That's correct.

15 THE COURT: Are you today under the
16 influence of any alcohol or any type of
17 medication?

18 DEFENDANT: No, Your Honor.

19 THE COURT: Have you consumed any
20 alcohol or taken any medication in the last
21 twenty-four hours?

22 DEFENDANT: No, Your Honor.

23 THE COURT: Have you been treated in
24 the past for any emotional problems, any mental
25 illness?

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1 DEFENDANT: No, Your Honor.

2 THE COURT: I am going to ask you,
3 sir, if you would raise your right hand?

4 DEFENDANT: (Complies).

5 THE COURT: Do you solemnly swear or
6 affirm that your responses to my questions will
7 be the truth and nothing but the truth, so help
8 you God?

9 DEFENDANT: I affirm, Your Honor.

10 THE COURT: Thank you so much, sir.
11 You have had the opportunity to discuss these
12 charges with Mr. Pennington?

13 DEFENDANT: Yes, Your Honor.

14 THE COURT: He's advised you of the
15 nature of the charges, of each charge, and that
16 is the elements of the charge? What the State
17 would have to prove to obtain a conviction?

18 DEFENDANT: Yes, Your Honor.

19 THE COURT: He has also advised you
20 of the possible punishment?

21 DEFENDANT: Yes, Your Honor.

22 THE COURT: And he has also advised
23 you of the concept of what's involved with a
24 negotiated sentence?

25 DEFENDANT: Yes, Your Honor.

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1 THE COURT: It is one of those
2 unusual situations where we have where unlike a
3 recommendation, which I am at liberty to either
4 accept or reject, the negotiated sentence
5 differs in that respect -- in one respect. I am
6 not at liberty to do anything other than to
7 accept it or reject it. Do you understand that?

8 DEFENDANT: Yes, Your Honor.

9 THE COURT: I can't modify it. I
10 can't add to it. I can't subtract. I have to
11 accept what the proposed negotiated sentence is
12 in its entirety. Do you understand that?

13 DEFENDANT: Yes, Your Honor.

14 THE COURT: So in a strange way, this
15 is one of those matters in a criminal dispute
16 where both sides are coming before the court and
17 asking, 'Judge, we have worked out the sentence
18 and we want you to impose this sentence.' Is
19 that your understanding, sir?

20 DEFENDANT: Yes, Your Honor.

21 THE COURT: So today, in an unusual
22 sort of way, you're saying, 'Judge, I want you
23 to sentence me to life in prison.'

24 DEFENDANT: Yes, Your Honor.

25 THE COURT: Indictment 2010-GS-08-

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1 1425 charges you with the offense of murder.

2 You understand that?

3 DEFENDANT: Yes..

4 THE COURT: And you understand that
5 the State would have to prove that you killed
6 the individual with malice aforethought?

7 DEFENDANT: Yes.

8 THE COURT: You're entering this
9 plea, apparently, under the principle of North
10 Carolina versus Alford; is that correct?

11 DEFENDANT: Yes, sir.

12 THE COURT: And you have discussed
13 with your lawyer what that means?

14 DEFENDANT: Yes, Your Honor.

15 THE COURT: As he said, a classic
16 Alford -- in Alford, the defendant, as I recall,
17 really did not know if he was guilty or not. He
18 was incapacitated by, I think, ingestion of some
19 alcohol or drug that prevented him from really
20 being aware of whether he did the crime or not.

21 That's sort of evolved over the years
22 and we use it in a case -- some of us do, some
23 of us don't. I am not that has if it meets all
24 the requirements.

25 The other is that 'I am not guilty, I

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1 didn't do it but' -- "but", and this is a big
2 catch. '...but based on what the State is
3 prepared to prove if I go to trial, I think that
4 there is a reasonable probability that I would
5 be found guilty beyond a reasonable doubt. To
6 avoid the potential consequence of harsher
7 punishment, I am going to enter this guilty plea
8 because I have a benefit that I want to accept
9 and take advantage of.' Is that true, so far,
10 with you?

11 DEFENDANT: Yes, Your Honor.

12 THE COURT: And the benefit to you,
13 sir, is to avoid the death -- the possible death
14 sentence, is that correct?

15 DEFENDANT: Yes, sir.

16 THE COURT: Because you understand
17 that if the State were to serve you notice that
18 an option would be life without parole?

19 DEFENDANT: Yes, Your Honor.

20 THE COURT: But you want to avoid
21 that? The death sentence, in its entirety?

22 DEFENDANT: Yes.

23 THE COURT: Do you understand that I
24 could still sentence you to life, thirty years
25 to life in this situation thirty years is taken

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1 -- anything under Life is taken off the table
2 because of the negotiated sentence. Do you
3 understand that?

4 DEFENDANT: Yes, Your Honor.

5 THE COURT: Understanding then that
6 you will have a conviction after today for
7 murder, notwithstanding an Alford plea,
8 understanding that if I accept the negotiated
9 sentence that I would impose life without
10 parole, what is your plea? Guilty or not
11 guilty? Excuse me. Guilty under Alford, or not
12 guilty?

13 DEFENDANT: Guilty under Alford, Your
14 Honor.

15 THE COURT: Okay. Indictment 2010-
16 GS-08-1424 charges you with assault and battery
17 with intent to kill. Your lawyer has explained
18 to you that the nature of that offense -- that
19 is, the elements, and the fact that I could
20 sentence you to twenty years for that?

21 DEFENDANT: Yes, Your Honor.

22 THE COURT: And I assume that all of
23 these will be twenty years, run concurrently; is
24 that correct, is that the deal?

25 ASHLEY PENNINGTON: That's our

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1 understanding, Your Honor.

2 THE COURT: Very well. Do you
3 understand that if I accept the negotiated
4 sentence that I would impose a twenty-year
5 sentence and run it concurrently with
6 Indictments 10-GS-08-1425?

7 DEFENDANT: Yes, Your Honor.

8 THE COURT: How do you plead?

9 DEFENDANT: Guilty.

10 THE COURT: Indictment 2010-GS-08-
11 1426 charges you with being in possession of a
12 firearm or knife during the commission of a
13 violent crime. Your lawyer has explained that
14 crime to you?

15 DEFENDANT: Yes, sir.

16 THE COURT: The nature of that crime?

17 DEFENDANT: (Affirmative nod).

18 THE COURT: And the fact that I could
19 sentence you to five years for that. That's
20 like the life sentence, a day-for-day sentence;
21 do you understand?

22 DEFENDANT: Yes, sir.

23 THE COURT: How do you plead?

24 DEFENDANT: Guilty.

25 THE COURT: Mr. Chisolm, are you

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1 totally satisfied with your lawyer?

2 DEFENDANT: Yes, Your Honor.

3 THE COURT: Do you have any
4 complaints at all about how he has handled your
5 case?

6 DEFENDANT: No, Your Honor.

7 THE COURT: Do you know of any other
8 promises that the State has made to you other
9 than those stated in the record as being the
10 negotiated sentence?

11 DEFENDANT: No, Your Honor.

12 THE COURT: Mr. Pennington, have you
13 had the opportunity, sir, to discuss this matter
14 fully with your client?

15 ASHLEY PENNINGTON: I have, Your
16 Honor.

17 THE COURT: As he has indicated to
18 me, you have advised him of the nature of each
19 offense; is that correct?

20 ASHLEY PENNINGTON: Yes, sir, I
21 have.

22 THE COURT: And you have advised him
23 of the possible punishments as well?

24 ASHLEY PENNINGTON: I have.

25 THE COURT: And he has requested

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1 after a review of the investigations that you
2 have conducted on his behalf, he advised you and
3 requested that you negotiate a sentence or the
4 best arrangement that you could for him?

5 ASHLEY PENNINGTON: Yes, sir.

6 THE COURT: The record now reflects
7 the results of your efforts in that regard; is
8 that true?

9 ASHLEY PENNINGTON: Yes, sir, it is.

10 THE COURT: First, I would ask you do
11 you concur with your client's decision to enter
12 the guilty pleas in the two cases?

13 ASHLEY PENNINGTON: Yes, sir, I do.

14 THE COURT: Based on your
15 investigation?

16 ASHLEY PENNINGTON: Yes, sir.

17 THE COURT: And do you also, based on
18 your investigation, concur with his assessment
19 of the evidence concerning the murder charge?

20 ASHLEY PENNINGTON: Yes, sir, we
21 have looked at the evidence, we have listened to
22 recorded interviews of the key witnesses that
23 have been done, actually, within the solicitor's
24 office. They have been provided and I have gone
25 over those in detail. I am satisfied that they

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1 would be able to meet the burden of proof beyond
2 a reasonable doubt on murder.

3 THE COURT: So there is no question
4 that there is a significant benefit to your
5 client by my accepting the negotiated sentence?

6 ASHLEY PENNINGTON: That's correct,
7 Your Honor.

8 THE COURT: Mr. Chisolm, is all of
9 that correct, sir?

10 DEFENDANT: Yes, Your Honor.

11 THE COURT: You realize, sir, and
12 understand that if accept your plea that you
13 will not have a jury trial in any of these
14 cases?

15 DEFENDANT: Yes, Your Honor.

16 THE COURT: You realize and your
17 lawyer has explained to you that it would be the
18 burden of the State to prove your guilt beyond a
19 reasonable doubt and that in order to do that
20 they would have to present witnesses, and the
21 jury could assess the credibility and believ-
22 ability of each witness. Do you understand
23 that?

24 DEFENDANT: Yes.

25 THE COURT: Because we are not going

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1 to have a trial, because you are pleading
2 guilty, you will not now have the opportunity to
3 confront those witnesses and challenge that
4 testimony. Do you realize that, sir?

5 DEFENDANT: Yes, sir.

6 THE COURT: Also a very valuable
7 right and a very significant right is the right
8 of every person accused of committing a criminal
9 offense, such as you are today, to not have to
10 prove anything, to not have to present any
11 evidence. In fact, you do not have to testify,
12 you do not have to say a word. Do you
13 understand that, sir?

14 DEFENDANT: Yes, Your Honor.

15 THE COURT: By entering your guilty
16 plea and by answering my questions here today,
17 you are giving up that Constitutional right as
18 well?

19 DEFENDANT: Yes, sir.

20 THE COURT: Has anyone threatened
21 you, sir, to get you to plead guilty or plead
22 guilty under Alford?

23 DEFENDANT: No, Your Honor.

24 THE COURT: Other than the promises
25 contained in the negotiated plea, have any other

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1 promises been made to you to make you plea
2 guilty, to enter the negotiated pleas?

3 DEFENDANT: No, Your Honor.

4 THE COURT: In those cases where you
5 have admitted your guilt, is there any question
6 of our guilt based on your discussion with your
7 lawyer and your assessment of the evidence?

8 DEFENDANT: No, Your Honor.

9 THE COURT: I want you to listen
10 closely as the solicitor as she tells me the
11 facts. Solicitor, thank you very much. If you
12 would, please. ?

13 SOLICITOR: Thank you, Your Honor.
14 The facts that I will present to you are those
15 that we have gleaned from several witnesses who
16 were present at the time of the shooting. And
17 I used the word "gleaned" because the witness
18 statements have been inconsistent, have been all
19 over the place. It is unclear if that is
20 because of all the alcohol that was involved at
21 the time, possible drug use or because there is
22 something more than we just don't know about.
23 That was one of the concerns that we had moving
24 into the death penalty aspect of this.

25 This occurred on April 1st of 2010 in

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1 Berkeley County. At that time, in the Spring of
2 2010, the Defendant, his brother Dansa, who is
3 here today and will address the court, his
4 nephew, Dansa's son M.S., who is fourteen at
5 the time, and two other brothers, the Kampinskis
6 (phonetic), lived together in a house in Goose
7 Creek.

8 On April the 1st, earlier in the
9 afternoon and on into the evening, the defendant
10 and his brother, Dansa, were working together on
11 producing rap songs at the Goose Creek home.

12 As I mentioned, they were there, the
13 Kampinski brothers there, in and out, as well as
14 the defendant's girlfriend, whose name was/is
15 Crystal Graves. It appears that all of them
16 were drinking heavily during that time.

17 At some point, the defendant and his
18 brother, Dansa, began arguing. They had a
19 relationship like many families have where there
20 was rivalries, there were feuds that went back
21 for years. It's unclear what they were arguing
22 about. I am not sure that they know what they
23 were arguing about. As I mentioned, they were
24 drinking heavily.

25 We have a few minutes of video that was

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1 taken sometime before the shooting. It shows
2 the defendant antagonizing Dansa, his brother.
3 It's one of those situation that I think many of
4 us have seen where the brother Dansa remained
5 calm, stood there while the defendant was in his
6 face continually trying to provoke his brother.
7 Fortunately, Dansa kept his calm and just stood
8 there and took it. Again, that video is just a
9 few minutes and we aren't sure how long before
10 the shooting occurred that this video was taken.
11 But it gave some insight as to how -- as to what
12 was going on with that relationship that night.

13 At some point after the video, the two
14 men wrestled. The witnesses say that they went
15 in the yard and, you know, fought as they were
16 known to do; sometimes to keep in shape, but --
17 brothers, I guess, do these sorts of things.
18 Again, it's unclear whether that wrestling at
19 that time was out of anger or out of their sort
20 of mutual training exercises that they did, but
21 they did wrestle that evening.

22 Once they separated, at some point the
23 defendant walked out of his bedroom and shot
24 Dansa in the face. Dansa dropped to the floor,
25 was bleeding profusely.

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1 Dansa's fourteen-year-old son M.S. came from down the hall, out of a bedroom, asking the defendant if he had shot his daddy. At that point, the defendant shot M.S. in the neck. It severed his carotid artery and killed him immediately.

2 The brother, Dansa, was airlifted to MUSC. M.S. was dead there at the scene.

3 The defendant fled and was not apprehended until some thirteen days later, when he was found in California. He gave a statement admitting shooting Dansa. He was vague about shooting M.S.

4 We have had an opportunity -- the Berkeley County Sheriff's Office interviewed the witnesses who were there -- the girlfriend, the two brothers. As I mentioned, their statements were inconsistent and not forthcoming. The investigators in my office and I have had an opportunity to interview them again, as well. Their stories evolved. I still don't think that we have the full picture but I do think that we have enough that we could convict the defendant of murder. Whether or not we could obtain the death penalty based on the question marks that

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1 are still there was a concern of mine.

2 Obviously I had discussed the death
3 penalty aspect of this case with Dansa, the
4 father of M.S. , who is also the ABWIK victim,
5 and with M.S. 's mother, Crystal, who is also
6 here and will address the court. They
7 vacillated between wanting the death penalty,
8 not wanting the death penalty, and in the end
9 decided that they would rather go forward with
10 this sure thing of life in prison and cut out
11 off -- although it doesn't eliminate the
12 possibility of appeals, it certainly lessens the
13 chance of success on appeal.

14 THE COURT: Thank you. The facts
15 stated by the Solicitor, with respect to the
16 action against Dansa Chisolm, having a firearm,
17 are those correct?

18 DEFENDANT: Yes, Your Honor.

19 THE COURT: The facts concerning the
20 shooting of M.S. , those are facts that
21 you believe that the State is prepared to call a
22 witness or witnesses who will testify to those
23 facts?

24 DEFENDANT: Yes, I believe that's
25 correct, that they would call witnesses who

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1 would testify to those facts.

2 THE COURT: And you believe that once
3 a jury hears that testimony and a full
4 disclosure from all those witnesses, notwith-
5 standing the potential inconsistencies and the
6 ability to challenge those inconsistencies, you
7 believe that a jury would most probably find you
8 guilty of murder?

9 DEFENDANT: I believe that's a strong
10 possibility and I am not willing to take that
11 chance.

12 THE COURT: Have you truthfully
13 responded to all of my questions, sir?

14 DEFENDANT: Yes, sir.

15 THE COURT: And fully responded to
16 all of them?

17 DEFENDANT: Yes, Your Honor.

18 THE COURT: You realize and
19 understand that I will be relying on your
20 responses this morning?

21 DEFENDANT: Yes, sir.

22 THE COURT: You want me to do that?

23 DEFENDANT: Yes, Your Honor.

24 THE COURT: The decision to enter the
25 pleas in this case, be it an Alford plea or a

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1 guilty plea, that is your decision; is that
2 correct?

3 DEFENDANT: Yes, Your Honor.

4 THE COURT: One that you make freely,
5 knowingly, after having had full opportunity to
6 consider all the aspects of this case? Is that
7 correct?

8 DEFENDANT: Yes, Your Honor.

9 THE COURT: And are you totally
10 satisfied with your lawyer and your lawyer's
11 advice?

12 DEFENDANT: Yes, Your Honor.

13 THE COURT: I find that there is
14 certainly a factual basis to support the guilty
15 pleas and certainly a factual basis to support
16 an understanding and assessment to support the
17 Alford plea. I find that Mr. Chisolm has had
18 the benefit of very competent counsel. He has
19 indicated that he is totally satisfied with his
20 representation. I therefore find the guilty
21 pleas and the Alford plea to be freely,
22 voluntarily, knowingly and intelligently made
23 and entered.

24 I will accept the pleas.

25 Now, Mr. Pennington, from your client's

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1 perspective, I will be happy to hear why I
2 should impose the negotiated sentence, sir.

3 ASHLEY PENNINGTON: If Your Honor
4 pleases, I will just round out the picture since
5 this is a negotiated matter.

6 My client is thirty-two. He served in
7 the U.S. military, he was abroad in Afghanistan
8 for six months. He came back, his family
9 noticed that he had become more agitated, more
10 easily disagreeable. It's clear from an
11 assessment that we did last night, because I had
12 Dr. Leonard Mobley, M.D. who is a trained
13 forensic psychiatrist here in the lowcountry,
14 see my client yesterday at the detention center
15 for three hours. That was an effort to rule out
16 any major mental illness but to also look for
17 potential mitigation. While he does not have
18 the classic symptoms of post-traumatic stress
19 disorder, he did -- Dr. Mobley would report that
20 in the process of being taught how to kill that
21 this increased his suspicion, his anxiety, his
22 aggressiveness.

23 As the solicitor has mentioned, you
24 can see from the video that these folks were
25 extremely intoxicated. All the parties, you can

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1 see them coming out of the videos. As I think
2 this court obviously knows, there is a dis-
3 inhibiting effect of alcohol that makes one do
4 foolish and stupid behaviors. It's no comfort
5 but I can't imagine that this would have
6 happened in a sober setting. I think -- it
7 appears to be more an impulse.

8 From my client's history, I will report
9 to the court that he was convicted in Dorchester
10 county for murder in a case -- in a case that
11 was going on at the time that this happened. He
12 was on electronic monitoring at the time. He
13 was actually hosting his brother and his son.
14 They had up to this point a close relationship,
15 although there was the rivalry that was
16 involved. This is just inexplicable. It's hard
17 to imagine how it would go but for the alcohol
18 and perhaps some of the history.

19 My client is estranged from his wife
20 with whom he has four daughters, ages four, six,
21 eight and ten.

22 He has a GED. From his military
23 service, he came out and went to Tech and got a
24 year of post-high school college.

25 It is my sense that Donsurvi, who I

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1 call "Donnie", is well above average in
2 intelligence. He's someone who has obviously
3 made bad choices. But I think that this plea
4 today is a very powerful attempt to him to bring
5 some reconciliation to the family and to not
6 belabor what has been an awful ordeal for
7 everyone in the courtroom.

8 Present in the courtroom, in addition
9 to his brother, is their mother, Ms. Fairlyn
10 Basden (phonetic) -- who was seated -- there she
11 is right there, with her hand up. Also two of
12 his sisters: Eju Havna (phonetic), who drove up
13 from Florida, and Quantis Saul (phonetic), who
14 is also present in the courtroom.

15 Again, what my words -- my words are
16 not going to change anything. I don't want to
17 belabor this more because I know it's been a
18 terribly, terribly -- the family -- the victims
19 are all part of this same family, a loving
20 family who came, I believe, originally from
21 Louisiana, came here and had certainly bright
22 prospects, as did of course the lovable
23 fourteen-year-old M.S. 1, who you are going to
24 hear a lot about, who I believe my client was
25 also very fond of. It's just a terrible

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1 tragedy.

2 But we certainly implore the court,
3 under all these circumstances -- we believe that
4 we've provided an adequate factual basis and
5 under the circumstances, we would ask the court
6 to accept the negotiation.

7 THE COURT: Solicitor, is there
8 anything further from the State?

9 SOLICITOR: Yes, sir, Your Honor. As
10 I mentioned, the other victim, Dansa, the
11 brother of the defendant, would like to address
12 the court, as well as the mother of M.S. .

13 THE COURT: Yes.

14 SOLICITOR: You have her victim
15 impact statement and the photographs that she
16 handed up.

17 THE COURT: I do.

18 SOLICITOR: And I believe two others.
19 This is Dansa Chisolm, Your Honor.

20 THE COURT: Mr. Chisolm, good
21 morning, sir.

22 DANSA CHISOLM: (Tenders).

23 THE COURT: I have pictures of him.

24 DANSA CHISOLM: I wanted to say to
25 Mr. Chisolm that this is hard for everyone in my

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1 family. It's a loss on both ends. It's the
2 loss of a child and it's the loss of a brother.

3 We had a good relationship. I didn't
4 come here to belittle Mr. Chisolm, I didn't come
5 here to throw him under the bus. He was my
6 brother.

7 I know that he hears me even though I
8 am addressing you. I would like him to
9 apologize in some form or fashion, in time, it
10 need not be today, to M.S.'s mom, to his mom,
11 to our family and, most importantly, to himself.
12 This has ruined his life.

13 I forgive my brother. I will be strong
14 in this and I still love my brother. I ask that
15 everybody find the strength that I have to
16 continue on with life. I ask that Mr. Chisolm
17 that as you pass the juveniles and young men
18 that will be in the prison that you give some
19 type of mentorship to them, that you let them
20 know that you made a poor decision, and that the
21 opportunities that they to come back to society,
22 that they learn something from you. That you
23 will be a benefit to the society that you live
24 in.

25 Whether he took the death penalty

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1 tomorrow, twenty years from now, the harsh
2 reality is that he is going to die in prison.
3 That's not something that I sit easy with
4 because that's my brother.

5 I thank you for the opportunity that
6 you allowed me to speak.

7 THE COURT: Yes, sir, Mr. Chisolm.
8 Thank you for being here, sir. I'm sorry that
9 you have to be here under these circumstances,
10 sir.

11 EJU HAVNA CHISOLM: My first name is
12 Eju Havna, my last name is Chisolm. We were a
13 very, very close family. I, too, forgive my
14 brother, I love my brother. I want him to talk
15 to my other brother one day because he deserves
16 to know, detail by detail, exactly what happened
17 and why.

18 Mostly, I want to apologize on behalf
19 of my family to Crystal. We've all known each
20 other since teenagers. Crystal was a good mom,
21 she loved M.S. and her other kids very much.
22 They were very, very close. I don't know of any
23 other teenager, boy or girl, who would talk to
24 their mom almost every day for at least an hour,
25 every day. M.S. knew that he was loved by

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1 his mother and my brother. Crystal, I am so
2 sorry -- (crying, emotional). I am so sorry,
3 Crystal, that my brother did that to your son,
4 to my nephew, to my brother, to my mother.
5 I'm sorry -- (crying, emotional) -- to his wife,
6 who has four little girls, who adored him. He
7 was equally as good a father as my brother was
8 to M.S. .

9 It's just torn this family apart, Your
10 Honor. That's the truth. It's torn us up.
11 That's all I can say. You seem like a very fair
12 judge, I appreciate you letting him into this
13 court. Thank you so much.

14 THE COURT: Thank you, ma'am.

15 QUANTIS SAUL: Good morning.

16 THE COURT: Good morning.

17 QUANTIS SAUL: My name is Quantis
18 Chisolm Saul (phonetic). I am the younger
19 sister of my brothers. You know, like everyone
20 else, the reality of this is that he is my
21 brother and I love him. You know what we did as
22 kids. We did some crazy things as kids, doing
23 whatever. I can't imagine how this happened, in
24 my quite moments it's hard for me to cope and
25 understand or fathom what has happened. So

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1 being that you are where you are and you have
2 that time to reflect, my best advice is to use
3 that time to seek God's face. Do you hear me?
4 Believe that person that your kids pray that you
5 are, because you have beautiful girls who love
6 you.

7 Donsurvi has a good heart. He did what
8 he did, and I know that alcohol was a big part
9 of this. When they get alcohol in their system
10 unfortunately everything goes out the window.
11 Me, myself, I was a happy drunk. But you have
12 some people who drink and just get belligerent.

13 Donsurvi, we love you. We forgive you.
14 But seek God's faith and have peace.

15 THE COURT: Thank you, ma'am.

16 INDIA CHISOLM: My name is India
17 Chisolm. This is my uncle and -- I only have
18 two uncles. And when I was growing up, he
19 wasn't always there but that was my favorite
20 uncle -- my favorite. He knew more about me
21 than these people standing behind me. What he
22 did to my brother, I forgive him. I will never
23 forget that but I forgive him. This has torn us
24 apart. At nineteen years old, I work two jobs,
25 I go to school, I live alone. I just hope that

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1 he can live with himself. That's it.

2 THE COURT: Thank you, ma'am.

3 SOLICITOR: One more, Your Honor.

4 THE COURT: Okay.

5 TRACY BLANDING: Good morning. My
6 name is Tracy Blanding and I am Donsurvi's aunt,
7 Dansa's aunt. I helped raise these boys.
8 M.S. was my great nephew. I carried him
9 around, that was his child. I love you guys, I
10 forgive you but I ask you, please, -- (emotional
11 and crying), it hurts so bad. My mother passed
12 last year and she's wanted life for all her
13 grandchildren. My prayer today is that God will
14 be there for you -- be there so much that you
15 can feel him, that you can just feel him. And,
16 Baby, just know that this is hard. This is so
17 hard. I pray so hard for my sister, she is such
18 a good mother and she did her best -- she raised
19 five beautiful children. You know, sometimes in
20 life we made a mistake -- I mean, you know, you
21 just do something and you lose sight. When you
22 lose sight of God, that's it. But, Baby, I love
23 you. I will continue praying for you. I am
24 hoping to see you before I go back home. God
25 bless you. God bless all of us.

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1 THE COURT: Thank you, ma'am.

2 SOLICITOR: That's all, Your Honor.

3 THE COURT: Very well.

4 FAIRLYN BASDEN: I would like to
5 speak on behalf of my son.

6 THE COURT: I am going to allow --
7 just one second, ma'am. Thank you very much --
8 now, Mr. Pennington, I will be happy to hear
9 from anyone on behalf of Mr. Chisolm.

10 ASHLEY PENNINGTON: Ms. Fairlyn
11 Basden (phonetic) is his mother -- the mother of
12 both of these young men.

13 THE COURT: Thank you. Yes, ma'am,
14 thank you for your patience. Good morning.

15 FAIRLYN BASDEN: I thank everybody
16 here for being here for Donsurvi. Yes, as
17 everyone has said, this has been very hard on
18 me. But we are a family. This incident, we
19 don't understand.

20 But what I will say is that those two
21 sons of mine, they loved each other. They grew
22 up knowing that they were not allowed to fight
23 each other, that was just not allowed. They
24 could wrestle and play but they were -- they
25 knew that you had to love, take care of and

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1 protect your brother. Dansa was the big brother
2 and he always protected Donsurvi.

3 There came a situation where I M.S.
4 came to live with us. He lived with us for a
5 short period. Dansa then decided to go to
6 barber shop. I got a phone call from Donsurvi
7 saying, 'Mom, I M.S. and Dansa are going to
8 come live with me because Dansa is going to
9 school right around the corner from me. I want
10 you to know that I am going to be the big
11 brother, I am going to make sure that he goes to
12 school every day. I am not going to let him
13 slack or anything like that. I got it, I got to
14 take care of Dansa and I've got to take care of
15 M.S. ' Those were his words. Those words
16 came from his heart.

17 A situation came where we have lost
18 M.S. . Donnie loved M.S. . Donnie and
19 M.S. looked so much alike that -- if you saw
20 their baby pictures you'd be like, 'who am I
21 looking at?'

22 I apologize to Crystal and Crystal's
23 family because Crystal is a very wonderful woman
24 and a very wonderful mother. She laid the
25 foundation for M.S. . M.S. was a sweet

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1 child, a special child, a very humble little
2 boy, not any trouble. He didn't have a problem
3 with anyone. He was a good kid. Dansa picked
4 up the foundation that Crystal had already laid
5 so that M.S. would learn how to be a man
6 under his father's care. That was M.S.'s --
7 excuse me -- that was Dansa's sole reason for
8 getting M.S., you know. 'My father wasn't
9 there but I wanted M.S. to know that I was
10 there. I am going to give to him what wasn't
11 given to me by my father.'

12 We embraced that. We tried to help
13 M.S. -- M.S., Donsurvi, Dansa, Crystal.
14 I mean, she never kept M.S. from us. There
15 was a relationship with his grandmother and
16 everyone. We all just got along. There was no
17 betrayal, there was no anger.

18 We don't know this thing that happened.
19 We don't know this thing that came on Donsurvi.
20 Donsurvi, himself, the person that we knew,
21 Donsurvi is a loving person.

22 Yes, he went to the Army. He came
23 back, he came back very different. We didn't
24 recognize the changes. We may have waited too
25 late to try to get him help. When this thing

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1 happened, it was going to be the first time in
2 years that our entire family was going to
3 celebrate Easter together. This happened the
4 Thursday right before Easter. It broke our
5 hearts, it just slapped us in the face.

6 I know in my heart that there is no way
7 that he would have taken M.S.'s life
8 knowingly. I know that he had an evaluation and
9 that the evaluation states that he had stress.
10 Well, I've been a nurse -- I didn't do that type
11 nursing but I have friends that work in the VA,
12 work in mental health and stuff like that and
13 when I share the information with them, they
14 said that it leans more towards post-traumatic
15 stress disorder. We know that the person that
16 committed these violent acts was not the person
17 that we knew. We know that something was
18 critically off.

19 Donnie knows, though -- Donnie loves
20 his family. He loves his family, he loves his
21 brother and his brother loves him. I apologize
22 to society because he was not reared to do what
23 happened. We're not that type of family.

24 Thank you for giving us the
25 consideration to be able to see Donnie, whereas

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1 we won't be able to see M.S. .

2 THE COURT: Thank you, ma'am.

3 Mr. Pennington, anything else?

4 ASHLEY PENNINGTON: I have nothing
5 further, Your Honor.

6 THE COURT: Mr. Chisolm, do you wish
7 to say anything, sir?

8 DEFENDANT: I would like to apologize
9 to everybody involved. I regret the events that
10 took place that day. If I could trade my life
11 for them, I would. But, I can't. The only
12 thing that I can do is spend the rest of my life
13 in prison and try -- try to just show that I am
14 sorry, that I didn't intend for none of this to
15 happen. I am so sorry to everybody. I can't
16 talk anymore.

17 (VARIOUS FAMILY MEMBERS SPEAK OUT TO DEFENDANT)

18 THE COURT: We need to have order,
19 please, in the court. Given everything that I
20 have heard, I think the negotiated sentence is a
21 fair and reasonable resolution of this matter.
22 Obviously I see the issues on both sides.

23 Mr. Chisolm, I trust what you said. I
24 understand what you just said. I hope and pray
25 that you will find that peace that your sister

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1 asked you to seek, so that you can help somebody
2 else understand that when they make those
3 decisions to drink, to do those things that we
4 are free in our society to do that there is an
5 incredible responsibility that attaches.

6 Unfortunately, when we don't honor that and we
7 act as you did on this particular occasion there
8 are extreme consequences. Sir, I think the best
9 that can be done in this situation is to accept
10 and honor what you have requested me to do.

11 The sentence of the court on 2010-GS-
12 08-1425, that's the murder indictment, is life
13 without parole; the sentence of the court on
14 2010-GS-08-1424, assault and battery with intent
15 to kill, is twenty years and it is concurrent,
16 you are to be given credit for the time that you
17 have served towards that sentence; the sentence
18 on Indictment 2010-GS-08-1426 is five years,
19 concurrent, and likewise credit for time that
20 you have served. Good luck to you, sir.

21 ASHLEY PENNINGTON: And, Your Honor,
22 just for the record, the date of his arrest was
23 April 14th, 2010. Obviously it is life without
24 parole but for purposes of calculating the time
25 served.

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1 THE COURT: April 14th?

2 ASHLEY PENNINGTON: Yes, sir, 2010.

3 THE COURT: I will write that on the
4 sheet. Thank you.

5 (HEARING CONCLUDED)

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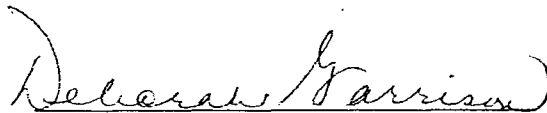
State of South Carolina v. Donsurvi Chisolm
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CERTIFICATE OF REPORTER

I, the undersigned, Deborah Garrison,
official court reporter for the 9th Judicial
Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true,
accurate and complete transcript of the hearing
held before The Honorable R. Markley Dennis,
Jr., on October 16, 2012;

I further certify that I am neither kin nor
counsel to any of the parties and have no
interest in the outcome of this action.



Deborah Garrison
Circuit Court Reporter
9th Judicial Circuit

Charleston, South Carolina
April 30, 2013

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of Rockley)2013 CP-08-422Dariusz Chazelm #342831)

Full name and prison number (if any) of Applicant)

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Litcher Corr Inst.
2. Name and location of Court which imposed sentence Rockley County General Sessions
(9th Cir) venue moved to Charleston County General Sessions (9th Cir)
3. Name(s) of co-defendant(s) (if any) Kristen E. Graves
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010GS0801424
 - (b) 2010GS0801425

(c) 2010050801426

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 10/16/2012 life w/o parole

(b) 20 yrs - concurrent

(c) 5 yrs - concurrent

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty

(c) after a plea of nolo contendere ☒

7. Did you appeal from the judgment of conviction or the imposition of sentence?

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. SC Court of Appeals

ii.

iii.

(b) the result in each such Court to which you appealed:

i. Dismissed due to lack of sufficient moving for appeal.

ii.

iii.

(c) the date of each such result:

i. 2/11/13

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i.

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) 6th Amend. Violation of right to self representation / prohibition against hybrid representation
- (b) Ineffective assistance of counsel / involuntary plea
- (c) Violation of Due Process
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) The defendant's right to proceed pro se was impeded without request and a
- (b) plea was entered in a forum that forced hybrid representation. But for this formality
- (c) and counsel's ineffectiveness the defendant would have proceeded to trial.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No -
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No -
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No -
- (d) any other petitions, motions or applications in this or any other Court? No -
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

2013 CP-08-422

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

No -

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

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

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

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

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

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. D. Ashby Braxton
101 Meeting St., 5th Floor
ii. Charleston, SC 29401
iii. _____

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

i. Pre-hearing
ii. _____
iii. _____

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

2013 CP-08-420

Reverse and remand for trial.

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

no

STATE OF SOUTH CAROLINA)

County of Durham)

VERIFICATION

I, Don Survi Chisolm, 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.

SWORN to and subscribed before me this 13th
day of February, 2013.

Ludheen Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

MAINTENANCE
CLERK OF COURT
BERKELEY COUNTY, SC

2013 FEB 18 AM 9:29

FILED

2013 CP-08-422

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

I, Don Scott Chisolm, 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.

Don Scott Chisolm
Applicant

SWORN or affirmed to and subscribed before me this

13th day of February, 2013.

Ludheen Bryant
Notary Public

My Commission Expires: May 26, 2020

MARK P. DUNN
CLERK OF COURT
BERKELEY COUNTY, SC

2013 FEB 18 AM 9:29

FILED

STATE OF SOUTH CAROLINA
COUNTY OF BERKLEY

IN THE COURT OF COMMON
PLEAS

DonSurvi Chisolm #347831
Applicant

C/A# 2013-CP-08-422

State of South Carolina
Respondent

Amendment to Application for
Post Conviction Relief

MARY E. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2014 AUG 18 PM 3:15

FILED

The applicant, Don Survi Chisolm, requests this Honorable Court allow
for an amendment to his original application for Post Conviction
Relief. In addition to his original claim the applicant sets forth the
following;

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

(b) My conviction and sentence violates United States and/or South Carolina
Constitution because applicant recieved ineffective assistance of counsel
prior to, and during, pleading to the above referenced indictment. Therefore
rendering applicants pleading involuntary.

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

LEGAL MAIL

DC

II.

(b) Mr. Pennington did not inform applicant of current laws governing self defense. Though he did inform applicant of Castle Doctrine which did not apply, counsel did not brief nor discuss with applicant the possibilities of, and/or, laws governing self defense, accident, or involuntary manslaughter. All of which, by law, applicant would have been entitled to pursue in regards to his defense. Also in this regard Mr. Pennington did not examine evidence, interview witnesses, or actively investigate applicants case in pursuit of exculpatory evidence that would strengthen any possible affirmative defense. Mr. Pennington's advice was therefore not up to date and fell below professional norms and Constitutional Standards. Based upon counsels advice applicant could not have made a fully informed opinion and therefore his plea was involuntary and invalid.

Respectfully submitted,

D.S.A.

Dun Sui Chisom

Pro Se Applicant

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
	)	
	)	2013-CP-08-0422
	)	
DonSurvi Chisolm, #347831,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed February 18, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. The Applicant was indicted at the August 2010 term of the Berkeley County Grand Jury for assault and battery with intent to kill (ABWIK) (2010-GS-10-1424), murder (2010-GS-08-1425), and possession of a weapon during the commission of a violent crime (2010-GS-08-1426). The Applicant was represented by D. Ashley Pennington, Esquire.

On October 16, 2012, the Applicant pled guilty as indicted. The Applicant was sentenced by the Honorable R. Markley Dennis to a negotiated sentence of life without parole for murder, twenty years for ABWIK, and five years for possession of a weapon during the commission of a violent crime. The sentences are to be served concurrently. The Applicant filed a timely Notice of Appeal. His appeal was dismissed and the Remittitur was issued on February 28, 2013.

II.

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

1. Ineffective assistance of counsel.
 - a. "Defendant's right to proceed *pro se* was impeded without request and a plea was entered in a form that forced hybrid representation. But for this formality and counsel's ineffectiveness, the Defendant would not have proceeded to trial."
2. Involuntary guilty plea.
3. Constitutional violations.
 - a. 6th amendment right to self-representation/ prohibition against hybrid representation.
 - b. Violation of due process.

III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was

deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under 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).

The 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 the record does not conclusively refute. Accordingly, 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.

The Applicant alleges that he did not plead guilty freely and voluntarily. The Respondent submits this allegation has no merit. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leake, 282 S.C. 131, 318 S.E.2d 360 (1984).

The Respondent submits the transcript reflects that the pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the

truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). The Respondent submits the Applicant should not be allowed to depart from the truth of the statements he made during his guilty plea hearing.

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given the Applicant's burden of proof and the analysis to be applied to this claim, the Respondent submits that the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it should therefore, be treated as such. Accordingly, this allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. 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).

V.

The Respondent construes Applicant's remaining claims as infringements upon the Applicant's constitutional rights. However, the Applicant does not explain with any specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction

Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985).

Before the Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). This allegation is so vague that it is impossible for the State to respond. Since the Applicant has not made the minimum *prima facie* showing, the Court should dismiss this ground for failure to comply with the Uniform Post-Conviction Procedure Act.

VI.

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

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

[Signature on the following page.]

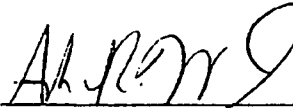
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
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Senior Assistant Deputy Attorney General

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By: 

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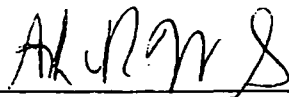
December 9, 2014

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	
	)	
	)	2013-CP-08-0422
	)	
DonSurvi Chisolm, #347831,	)	
	)	
Applicant,	)	
	)	
v.	)	AFFIDAVIT OF SERVICE
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

I, Ashleigh R. Wilson, certify that I have served the within Return on Rodney Davis, Counsel for the Applicant, by way of hand delivery.

I further certify that all parties required by the Rule to be served have been served.

Tuesday, December 9, 2014

By: 
 Ashleigh R. Wilson
 Assistant Attorney General
 Office of the Attorney General
 Post Office Box 11549
 Columbia, SC 29211
 (803) 734-3737

ATTORNEY FOR RESPONDENT :

1 STATE OF SOUTH CAROLINA)
2) Court of Common Pleas
COUNTY OF CHARLESTON) Case No. 2013-CP-08-0422
3 _____)
4 DON SURVI CHISOLM,)
5 Plaintiff,)
6 vs.) Transcript of Record
7 THE STATE OF SOUTH CAROLINA,)
8 Defendant.)
9 _____) DATE: February 19, 2015

10
11 B E F O R E:

12 The Honorable Eugene C. Griffith, Jr.

13
14 A P P E A R A N C E:

15 RODNEY D. DAVIS
Attorney for the Plaintiff

16 ASHLEIGH R. WILSON
17 Assistant Attorney General for the
State of South Carolina

18
19 Karen V. Andersen, RMR, CRR, CSR
20 Circuit Court Reporter

21

22

23

24

25

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1 MS. WILSON: May it please the Court. Your Honor,
2 this is Ashleigh Wilson for the State of South Carolina.
3 This is Donsurvi Chisolm vs. The State, Docket No.
4 2013-CP-08-0422. Mr. Chisolm was indicted in August 2010 for
5 assault and battery with intent to kill, murder, and
6 possession of weapon during the commission of a violent
7 crime.

8 He was represented on the charges by Mr. Ashley
9 Pennington. He pled guilty on October 16th, 2012, to the
10 charges as indicted. He pled guilty under Alford to the
11 murder charge. And in exchange for his guilty plea to life
12 for murder, the State decided not to seek death in his case.
13 So that was a benefit that he received from that.

14 He was, as I said, represented by Ashley Pennington.
15 Sentenced by Judge Dennis to 20 years for assault and battery
16 with intent to kill. And I believe that was a negotiated 20
17 years. He got life without parole for murder and five years
18 negotiated for the possession of a weapon during the
19 commission of a violent crime.

20 He filed an application for post-conviction relief
21 on February 18th, 2013. And right before that, he also filed
22 an appeal, which was dismissed. The remittitur was issued
23 for that on February 28th, 2013. And so he filed -- the
24 State filed the return on December 8th, 2014.

25 And Mr. Chisolm is here and present, represented by

1 Mr. Davis. And the State would just ask that the Court
2 advise Mr. Chisolm of the remedy in proceeding today,
3 considering that if he were to go back on these charges, that
4 it was probably likely the State might seek death again. So
5 we just ask that you do that, Your Honor.

6 THE COURT: All right. Now, Mr. Chisolm, how far
7 did you come today?

8 MR. CHISOLM: Three hours away, from McCormick.

9 THE COURT: That's a good haul. That's not from my
10 way. I'm up from Newberry County, holding court this week.
11 I guess they bring in the guys away from here that have
12 nothing to do with this to hear cases like this. So I'm 8th
13 Circuit holding court in Charleston County Circuit. Glad to
14 be here.

15 You understand you filed an application called
16 post-conviction relief? What it, in a nutshell, says is, I
17 believe something was done procedurally wrong, I wouldn't
18 have done it but for some error or inappropriate advice from
19 my attorney.

20 If your application is granted and you prove your
21 case, the relief you are asking for is a new trial. And when
22 you get that, everything is back on the table for the State
23 and for you. So if you are successful in proving your
24 application, you are back to facing the charges, just like
25 you were the day before that case was called to trial and/or

1 the day before you pled guilty. Do you understand?

2 MR. CHISOLM: Yes, Your Honor.

3 THE COURT: Okay. And so you are aware, apparently,
4 there was some factual basis that the State had the ability
5 to seek the death penalty in your case, and they abandoned
6 that when they accepted your plea. Do you understand if they
7 still have those factual bases for these charges, they could
8 yet again notify you that they will seek the death penalty on
9 your charges if you were granted a new trial. Do you
10 understand that?

11 MR. CHISOLM: Yes, sir.

12 THE COURT: You still want to go forward?

13 MR. CHISOLM: Yes, Your Honor.

14 THE COURT: Very well.

15 All right. Mr. Davis.

16 MR. DAVIS: Thank you, Your Honor. We will call
17 Mr. Chisolm as a witness.

18 DON SURVI CHISOLM,
19 having been duly sworn, testifies as follows:

20 THE CLERK: Sir, for the record, if you will please
21 state your name, spelling your last name.

22 MR. CHISOLM: My name is Don Survi Chisolm,
23 C-h-i-s-o-l-m.

24 DIRECT EXAMINATION

25 BY MR. DAVIS:

1 Q. Mr. Chisolm, we had just a brief conversation with
2 the judge. But can you, for the record, tell the Court what
3 it is that you pled to and how you pled?

4 A. I pled to a life sentence, 20 years on the assault
5 and battery with intent to kill and five years on the
6 possession of a weapon during the commission of a violent
7 crime.

8 Q. And was that a straight guilty plea or was it a
9 guilty plea under Alford?

10 A. It was a guilty plea under Alford.

11 Q. And did you understand at the time of the plea what
12 pleading under Alford covered?

13 A. Yes.

14 Q. For the record, can you explain briefly to the judge
15 what you understood the Alford plea to provide you?

16 A. To my understanding at the time, the Alford plea
17 was, I wasn't necessarily pleading guilty, because I was
18 adamant that I was not guilty of the crime of murder. But
19 the Alford plea was, in essence, saying that based on the
20 evidence or the circumstances at the time, that I believed if
21 I went forward, there was a great possibility that the State
22 could convict me. And even though I was not guilty, I would
23 plead under Alford. And though it was under Alford, I had to
24 say it was a guilty plea.

25 I still was pretty adamant that I was not guilty,

1 but that was the only way to solve the issue, I guess, at
2 that time, if that's the correct way to say it.

3 Q. And, again, it was stated on the record prior to
4 your testimony, but I would like you to testify about this.
5 You were aware that there were discussions prior to your
6 conviction about the State possibly seeking to make this a
7 capital case, a death penalty case, if you went to trial.
8 Are you aware of that?

9 A. I was aware, but at the time, as you said, the
10 discussions, they was going back and forth. They never
11 definitely said they were going to do it, but it was a
12 back-and-forth, back-and-forth issue. When I finally -- the
13 day they brought me up, okay, that was at the last minute at
14 the time that I was told that if I didn't take the plea, then
15 I would get served that day. But before it was back and
16 forth, back and forth, I didn't ask to actually come to the
17 plea hearing. I was told that I was to come to the court
18 that day and that if I didn't take the plea, I was getting
19 served. So I took the Alford. I took the Alford plea. I
20 wasn't guilty, but ...

21 Q. One of the benefits of the plea is that notice did
22 not get served you on; is that correct?

23 A. Exactly, yes.

24 Q. When you filed your PCR application, you listed
25 several complaints about your attorney that assisted you on

1 the case. I would like to go through those now for the
2 Court. All right?

3 One of the things that you claimed is that
4 Mr. Pennington failed to thoroughly investigate your case.

5 A. Yes.

6 Q. Can you expand a little bit on that for the judge?
7 Explain what your complaint about that is.

8 A. I asked that the witnesses be interviewed. The
9 State interviews, they had at least for each witness, at a
10 minimum, they had two interviews. Statements were changing.
11 So I wanted to have the benefit of my lawyer investigate the
12 witnesses as well to see if the statements changed further
13 for my benefit. Because at the time, even the State's -- the
14 statements that they made to the State investigators showed a
15 tendency to help me for self-defense and -- self-defense
16 possibly and voluntary manslaughter or possibly an
17 accident -- I don't know if conviction is the right word
18 or -- outcome to my case.

19 So I wanted further evidence to possibly help me or
20 just more in-depth interviews to get our side of the story,
21 you know, or get a further understanding of it. He never did
22 the interviews. He never got any interviews from -- as far
23 as I was told, because I never received any transcript of an
24 interview. He never told me that he did the interviews with
25 either Russ Kapinski, Clint Kapinski, Kristen Graves, Dansa

1 Chisolm or any important witness in the case.

2 Q. I'm going to go back just a second for the Court and
3 for the record. Is it fair to characterize the incident that
4 led to your arrest as a dispute in your residence between
5 family members?

6 A. Yes.

7 Q. Is that a fair summary of the incident?

8 A. Yes.

9 Q. And following the dispute in your residence, two
10 family members of yours were injured by gunshot wounds?

11 A. Yes.

12 Q. One died from those injuries?

13 A. Yes.

14 Q. The individuals you mentioned, Ms. Graves, she was a
15 witness to the incident?

16 A. Yes.

17 Q. And then Mr. Russell Kapinski?

18 A. Was a witness to the incident as well.

19 Q. And for the record, that's K-a-p-i-n-s-k-i. And
20 then Clint; Kapinski as well, correct?

21 A. Yes.

22 Q. And then Dansa Chisolm?

23 A. Yes.

24 Q. Had you asked Mr. Pennington to individually speak
25 with these witnesses?

1 A. Yes.

2 Q. Are you aware whether he did or not?

3 A. As far as I was told, he never interviewed anyone.

4 And I never received any confirmation that anyone was
5 interviewed.

6 Q. But you are aware that the State had interviewed
7 them on at least two occasions?

8 A. Yes. They interviewed Clint Kapinski twice, Kristen
9 Graves twice, Dansa Chisolm once, and Russell Kapinski on
10 three occasions.

11 Q. Other than interviewing -- independently
12 interviewing these witnesses, are there any other complaints
13 about Mr. Pennington's investigation or lack of investigation
14 you would like to tell the Court about?

15 A. Yes. I also asked him if he could subpoena medical
16 records from the -- or subpoena -- to subpoena any type of
17 records for me that might help. I had medical records in
18 California that would help prove that I got injured during
19 the events. And that would help prove one of the grounds of
20 self-defense for the Protection of Person and Property Act,
21 that I feared great bodily injury.

22 And I actually did receive great bodily injury. And
23 I wanted those records subpoenaed so I could prove that. And
24 the only way to get those was either a subpoena -- or at the
25 time, I guess, the only way I knew that you could get them

1 was to subpoena the medical records from the place that I was
2 incarcerated in California when I was arrested before they
3 extradited me back here. But he never subpoenaed those
4 records. I had to get them myself probably about a year ago.

5 Q. To extend a little further on that, you were
6 actually in custody in California, correct?

7 A. Yes, I was. That's why I was apprehended.

8 Q. For this incident?

9 A. Yes.

10 Q. But while in custody, you did seek and receive
11 medical treatment; is that right?

12 A. Yes.

13 Q. And it was for a shoulder injury, correct?

14 A. Yes.

15 Q. Right or left?

16 A. Left shoulder.

17 Q. Okay. And that injury was sustained how?

18 A. In a fight with my brother.

19 Q. When?

20 A. At the time of the incident.

21 Q. You ultimately obtained your records from San
22 Bernardino County Sheriff's Department, correct?

23 A. Yes.

24 Q. You did following -- after your plea, you obtained
25 them?

1 A. Yes. It took a minute, but I eventually got them.

2 Q. But you had requested Mr. Pennington to obtain these
3 prior to the plea; is that correct?

4 A. Yes.

5 Q. And are you aware of whether he accomplished that or
6 not?

7 A. He never got them. If he did, then I never received
8 them. I never received the confirmation that he got them.

9 Q. And connected altogether, those records were
10 important, or could have been important because it would lead
11 to helping you at trial in what sense?

12 A. It shows that I was -- okay. It shows that I got
13 injured during the incident at the house. I was -- me and my
14 brother have had issues for a long time. Okay? When things
15 transpired at the house and Russ brought out guns, I had one.
16 My brother grabbed one. At the time, obviously, you know, I
17 grabbed the gun because he grabbed the gun, but it was
18 obviously because I feared that something was going to
19 happen.

20 The events transpired after I did what I felt
21 necessary to protect myself from my brother. We still got in
22 a fight. What I'm being clear, after I shot my brother, we
23 still got in a fight and he still injured me. He still did
24 what I feared that he was going to do and he actually
25 dislocated my shoulder.

1 Q. And that would have been part of a self-defense
2 and/or accident claim?

3 A. Yes, yes.

4 Q. Continuing from that then, one of the other
5 complaints is a failure of Mr. Pennington to properly
6 research, not just investigate, but research your case. Can
7 you explain a little more detail to the judge your complaints
8 about that?

9 A. Okay. At the time, I really felt that I had
10 self-defense. I asked Mr. Pennington about that. He told me
11 he researched, I believe, the Castle Doctrine. And he
12 discussed with me at Lieber the Castle Doctrine, saying that
13 I didn't have the grounds to -- I didn't meet the proper
14 grounds for the Castle Doctrine. And I reviewed it with him,
15 and that was correct. But he did not tell me about the
16 Protection of Persons and Property -- Protection of Persons
17 And Property Act.

18 I reviewed that after it was brought to my attention
19 some time after my plea. I actually meet every ground for
20 the Protection of Persons And Property Act. Through the
21 statements of all of the witnesses, even from the State's
22 standpoint, I meet every ground. I didn't bring the events
23 upon myself. I didn't -- I can't remember. If you give me
24 the paper, I can actually go -- can I see that paper for a
25 second so I can go through it and say it correctly?

1 MR. DAVIS: May I approach, please?

2 THE COURT: Sure.

3 MR. DAVIS: I don't think I need to make it an
4 exhibit. Basically, I'm handing him simply the statute that
5 he's discussing.

6 A. As I was saying, he discussed the Castle Doctrine
7 with me. I did not meet those grounds. I understood that at
8 that time. He did not discuss with me the Persons and
9 Properties Act. I meet every ground of that.

10 On ground number one, I guess in the deadly forces
11 used, the individual against whom the deadly force is used
12 has a right to be in or is a lawful resident of the dwelling,
13 residence or occupied vehicle, including, but not limited to,
14 owner, lessee or titleholder.

15 It was my house. Okay? My name was on the lease.
16 I just finished paying the rent for three months. I was in
17 my house.

18 But to go further into it, my brother lived there as
19 well. But I'm still protected under the law. As I
20 understood it from the cases that I looked at, I was still
21 protected under the law, even with both of us living in the
22 house. If there was a conflict or if there was something to
23 happen, I was still protected because I was in my house.

24 THE COURT: So I understand, the residence was
25 shared?

1 MR. DAVIS: Correct, Your Honor.

2 THE COURT: Okay. Thank you.

3 A. We were in a shared residence. And I knew I met
4 those grounds. I did not bring forth the conflict. Okay?
5 There was an argument. The argument was started from my
6 brother. He was arguing with me about what was going on. We
7 had music -- we had some music that we were doing. We were
8 arguing about the direction of the music. This was stated in
9 the statement by Kristen Graves. She said that my brother
10 started the argument.

11 The statement from Russ Kapinski said my brother
12 started the argument. Also, a statement from Kristen Graves,
13 a statement from Russell Kapinski and a statement from Clint
14 Kapinski said on at least two occasions, I tried to get away
15 from my brother. I tried to get away from the argument. I
16 went into Clint's room and locked myself in his room.

17 Another statement says that I went outside to get
18 away from my brother. The third statement said that I went
19 into my room to get away from my brother.

20 Russ Kapinski -- in the statement from Kristen
21 Graves, she states that Russ Kapinski went and grabbed two
22 guns, brought them into the kitchen area. My brother grabbed
23 the gun. I grabbed the gun to protect myself. My brother
24 came to me, tried to frisk me to take the gun away from me.
25 And I still went away from him and locked myself in the room.

1 So I at no point was trying to bring on the conflict
2 or further the conflict. I was actually trying to get away
3 from him. Of course, I armed myself because I felt I was
4 going to get hurt, but I was trying to get away from him. I
5 locked myself in two different rooms, went outside of my own
6 residence, and stayed in there.

7 Statement from Kristen Graves states that while in
8 my room, my brother kept coming to my room door, opening the
9 door, yelling. My brother was armed at this time. I was
10 pretty sure that he was armed because I saw him armed. After
11 I went in the room -- the last thing I saw, he was armed.
12 But he kept coming to my door, opening my door, yelling in
13 the door, you know, trying to get me to come out of the room,
14 and things of that nature.

15 At some point, obviously, I eventually came out of
16 the room and what happened happened, but throughout the whole
17 time, I was in fear that I was either going to get shot or
18 worse. But, like I said, I tried to get away from him three
19 times. Where can I go? I'm in my own house. I have no duty
20 to retreat from my own house, even though I tried to retreat
21 three times. That happened.

22 After it happened, my brother still injured me. He
23 still got up. We got in a fight. He dislocated my shoulder.
24 And before he dislocated my shoulder, after what happened
25 with me and him, when I was getting away from him, backing

1 away from him, I heard a loud noise to the left -- I'm sorry,
2 to my right. While I was backing up, I backed into something
3 and turning at the same time.

4 I'm not actually sure -- because we were all
5 intoxicated at the time -- if the weapon in my hand went off
6 first while I was dropping it or if I started to drop it and
7 it went off. But that is when my nephew got shot. That was
8 an accident, you know. It was just an accident, period. I
9 was defending myself, though, against my brother.

10 The Protections of Persons and Property Act says
11 that if I was engaged in self-defense against my brother,
12 that even if I was armed with a weapon, that's -- even if I
13 was armed with -- illegally armed with a weapon, I guess, it
14 wouldn't -- I need to see that paper, please.

15 THE COURT: Rephrase your question. Just give me a
16 summary of the facts.

17 MR. DAVIS: I understand.

18 BY MR. DAVIS:

19 Q. You gave sort of facts. Let's move on further.

20 A. Okay.

21 Q. You've now researched, since your conviction, about
22 the Protection of Persons and Property Act, correct?

23 A. Yes.

24 Q. But the information about that defense, were you
25 aware of it prior to your plea?

1 A. No, I was -- no, not at all.

2 Q. Had you been aware of that statute and the
3 possibility of claiming that as a defense, would you have
4 pled guilty?

5 A. There's absolutely no way I would have pled guilty
6 if I was made aware that I was entitled to self-defense, that
7 I was entitled to an accident --

8 Q. Let's deal with just Protection of Persons and
9 Property Act. Had you been aware of that, had you been told
10 that by your attorney prior to the plea, would you have pled
11 guilty?

12 A. No, absolutely not.

13 Q. You mentioned there just a second ago Mr. Pennington
14 did discuss the Castle Doctrine of self-defense to you; is
15 that right?

16 A. Yes.

17 Q. Did he discuss, other than murder -- did he discuss
18 murder and the elements of murder with you?

19 A. Yes.

20 Q. What the State would have had to prove to convict
21 you of murder?

22 A. Yes.

23 Q. Did he discuss any lesser-included options to murder
24 if you had gone to trial?

25 A. No.

1 Q. Have you studied about those since your conviction?

2 A. Yes.

3 Q. If you had been told about the possibility of a
4 verdict of a lesser-included offense going to trial, would
5 you have pled guilty?

6 A. No, absolutely not.

7 Q. You used the word a bit ago a couple times
8 "accident". Did your attorney and you discuss the
9 possibility of accident as a defense?

10 A. No.

11 Q. Did not discuss prior to the plea?

12 A. No.

13 Q. Had you discussed that as an option prior to the
14 plea, would you have pled guilty?

15 A. Absolutely not.

16 Q. Are you aware of whether Mr. Pennington did research
17 on those different defenses or not?

18 A. If Mr. Pennington did research on those, I was never
19 made aware of it or received any type of confirmation.

20 Q. In your application, in our discussions, you
21 complained about -- we talked about failure to investigate,
22 talked about failure to do certain research. You also
23 mentioned failing -- of your attorney failing to give you
24 information concerning your defenses. I believe we kind of
25 tied that in while we've been discussing others. Is there

1 anything else as to that issue, the failing to discuss
2 defenses with you that you have not yet been able to explain
3 to the Court?

4 A. We didn't discuss the involuntary manslaughter
5 either, that lesser-included offense, that I could face that
6 if the jury believed that it wasn't an accident, that I could
7 possibly be convicted of involuntary manslaughter, which is
8 greatly a lesser sentence than 30 years or a life sentence.
9 It's actually a five-year sentence.

10 Q. You also want to claim that you were given
11 inadequate advice. I think we discussed that in the
12 explanation of these other defenses --

13 A. Yes.

14 Q. -- and issues. But is there anything as to
15 inadequate advice that you would like to add to the record?

16 A. Just that the Castle Doctrine was completely the
17 wrong statute to discuss with me. He should have discussed
18 Protection of Persons and Property, the possibility of an
19 accident, the possibility of involuntary manslaughter. I
20 wasn't fully aware or made fully aware what possibilities
21 that I had or what options that I had in going forward with a
22 trial or -- in going forward with a trial.

23 Q. For a moment, I'm going to reference another matter
24 that you had. There was -- you had a trial in Dorchester
25 County on a separate charge, correct?

1 A. Yes.

2 Q. Mr. Pennington was not your attorney on that, was
3 not involved in that, was he?

4 A. No.

5 Q. In fact, when you went to trial, were you
6 represented, or did you represent yourself?

7 A. I represented myself.

8 Q. By request?

9 A. Yes.

10 Q. On this charge out of Berkeley County now, these
11 charges out of Berkeley County, were you, for some period of
12 time, representing yourself in these charges?

13 A. Yes.

14 Q. Can you explain to the Court how you recall
15 Mr. Pennington becoming involved in the case?

16 A. I'm going to start back just a second. I was
17 representing myself in Berkeley County. I went to three
18 hearings in order to be able to proceed pro se. I originally
19 was scheduled to go to trial pro se in Berkeley County for
20 the December of 2011, I believe. In December of 2011, Ashley
21 Pennington -- this is after -- I'm sorry. This is after my
22 Dorchester County conviction, I went to Lieber Correctional
23 Institute.

24 In December of 2012, the month that I was supposed
25 to have trial in Berkeley County pro se, Ashley Pennington

1 came to Lieber Correctional Institute and informed me that,
2 obviously, I wasn't going to trial, and that the State would
3 possibly be seeking the death penalty. He also informed me
4 that he was -- or made me believe that he was sent with the
5 approval of Judge Dennis and that he possibly would be taking
6 over my case.

7 From there, he actually took over my case. I never
8 actually asked that Ashley Pennington take over my case. I
9 never went in open court and requested that the judge take
10 away my pro se status or reassign me a public defender. As
11 far as I was made aware, through Ashley Pennington, he was
12 kind of approved by Judge Dennis to take over my case. And
13 they just took over my case. They just stopped my pro se
14 status.

15 Q. Did you ever notify the Court that you wished to
16 have an attorney?

17 A. No.

18 Q. Did you ever contact the Public Defender's Office to
19 request that they represent you?

20 A. No.

21 Q. Did you ever seek out a private attorney of your
22 choice to represent you on this matter?

23 A. No. At the time, I was pretty adamant about being
24 pro se.

25 Q. Had Mr. Pennington not arrived and indicated to you

1 that he was assuming representation, would you have gone
2 forward pro se on these charges?

3 A. Yes.

4 Q. What influence, if any, did Mr. Pennington being
5 involved in your case affect your decision to enter this
6 Alford plea?

7 A. As far as I believe, if Mr. Pennington never took
8 over my case, I would have never went to a plea hearing. It
9 would never happened. I would have still been trying to go
10 to trial. I still would have had to research my own case.
11 Whether I would have found the correct information or not, I
12 don't know, but we would have been going to trial.

13 Q. It's Mr. Pennington that negotiated with the State
14 about these charges?

15 A. What's that?

16 Q. It's Mr. Pennington that negotiated with the State
17 about these charges?

18 A. Yes, he negotiated with the State. I never made any
19 efforts to take a plea. The efforts that I made was to go to
20 trial. Actually, I asked for a faster, speedy trial.

21 Q. So the ultimate agreement that you entered on the
22 record under the Alford plea was arranged by Mr. Pennington?

23 A. Yes.

24 MR. DAVIS: Your Honor, if I could have just one
25 moment.

1 Briefly, Your Honor.

2 BY MR. DAVIS:

3 Q. You referenced statements of witnesses previously.

4 You were given copies of those statements?

5 A. Yes.

6 Q. Your complaint is that Mr. Pennington did not

7 interview them independently; is that correct?

8 A. Yes.

9 Q. But even based on what is contained in the State's

10 version of the witness statements, do you believe there's

11 evidence to support defenses?

12 A. Yes.

13 Q. Possible defenses?

14 A. Yes.

15 Q. What ones are apparent by the reading of the

16 statements that the State obtained?

17 A. I'm sorry? Rephrase that for me.

18 Q. What defenses are apparent to you by reading the

19 statements that the State obtained?

20 A. Self-defense and accident -- I'm sorry, and as a
21 possibility of involuntary manslaughter. Those two kind of

22 go hand-in-hand. It's basically up to the jury, but all

23 three of those you can glean from the State's statements --

24 I'm sorry, the State's version of the statements, I guess.

25 MR. DAVIS: Thank you, Mr. Chisolm.

1 Your Honor, that's all the questions I have.

2 THE COURT: Will you clarify something for me?

3 There had been comments about explanation of the Castle
4 Doctrine, and then statute of defense of Person and Property.
5 Does he distinguish that as two separate acts? I thought it
6 was one compilation of the old common law and then expanded
7 to Protection of Persons beyond the Castle, but it's all in
8 one statute. Am I wrong on that?

9 MS. WILSON: No. The statute says that the
10 Protection of Person and Property Act codifies the common law
11 of Castle Doctrine.

12 THE COURT: All of this started years and years ago.

13 MR. DAVIS: May I go into that a little bit?

14 THE COURT: Sure, do that, because I want to make
15 sure he's understanding.

16 BY MR. DAVIS:

17 Q. The judge is asking about, obviously, the act that
18 you have in front of you, the copy of the statute. Can you
19 clarify to the judge what about that statute was not
20 discussed by Mr. Pennington when he did go over the Castle
21 Doctrine with you?

22 A. When he went over the Castle Doctrine with me, I
23 don't know if it was -- I know she just said there's an old
24 and a new merged together. When he went over the Castle
25 Doctrine with me, I'm assuming that it had to be the older

1 version because it basically only said -- it was only
2 pertaining to what a person could do to protect their self in
3 their home. And there was like one or two things in there
4 that I didn't qualify for.

5 And when I actually read the Protection of Persons
6 and Property Act, the stipulations were completely different
7 from what Mr. Pennington presented me with. And from this
8 one, I actually qualified for all the grounds.

9 I had -- I believe in my paperwork, I had the
10 differences between the two, like the one that he gave me and
11 what I actually wound up reading later on. Because the one
12 that he gave me did not look anything like what I wound up
13 reading. It was just clearly, if it happened in your home,
14 you could protect yourself in your home or your vehicle for
15 this reason, that reason. And I think it only had four --
16 maybe four reasons.

17 And the version of the Protections of Persons and
18 Property Act I read had five and it was different. There was
19 a difference between the two, Your Honor.

20 THE COURT: Okay.

21 BY MR. DAVIS:

22 Q. When Mr. Pennington did discuss self-defense, the
23 Castle Doctrine version you are discussing, did he explain
24 that that would be a defense presented to the jury and the
25 jury would have to make the decision on that?

1 A. I don't recall if he was specific in that way. But
2 I said self-defense and he was pretty much specific, you
3 don't have self-defense, it would fall under Castle Doctrine,
4 and you do not qualify for the Castle Doctrine.

5 Q. On your research of the Protection of Person and
6 Property Act, you understand you are entitled to a pretrial
7 hearing on whether you have immunity or not?

8 A. I understand that now, yes.

9 Q. Was that discussed then?

10 A. No, that was not discussed at the time.

11 MR. DAVIS: Your Honor, out of abundance of caution.

12 BY MR. DAVIS:

13 Q. Is there paperwork here that would help in your
14 testimony?

15 A. Yes. I would love to see that real quick if I
16 could.

17 Q. Have you had an opportunity to review your notes?

18 A. Yes.

19 Q. Is there anything additionally you want to add as
20 far as your complaint in this post-conviction relief?

21 A. Yes. I just wanted to clarify that on the
22 investigation end, that I not only asked for the subpoena of
23 my medical records, I asked for the private investigator as
24 well, if he could possibly obtain my medical records some way
25 or do the interview some way, just wanted to clarify that

1 point as well. And I never received any confirmation that
2 that request was fulfilled.

3 Q. Mr. Chisolm, any other complaints that you want to
4 put on the record as far as what led to your entering this
5 guilty plea?

6 A. No, sir.

7 MR. DAVIS: Thank you, Your Honor. No other
8 questions.

9 THE COURT: Ms. Wilson.

10 MS. WILSON: Just briefly, Your Honor.

11 CROSS-EXAMINATION

12 BY MS. WILSON:

13 Q. Good morning, Mr. Chisolm.

14 A. Good morning.

15 Q. You've talked about, basically, Mr. Pennington kind
16 of not researching, investigating the law surrounding
17 self-defense and the Protection of Person and Property Act.
18 And you testified about having this altercation with your
19 brother; is that correct?

20 A. Yes, ma'am.

21 Q. But the person who was ultimately murdered in this
22 case, it wasn't your brother; is that correct?

23 A. Yes, ma'am.

24 Q. You also kind of talk a little bit about
25 Mr. Pennington coming to see you. After Mr. Pennington came

1 to talk to you in the prison, you agreed to have him
2 represent you; is that correct?

3 A. In what way? What do you mean I agreed?

4 Q. He talked to you about your case, I'm assuming, and
5 then you agreed to go forward with him as your lawyer?

6 A. No. Mr. Pennington made me aware that it was with
7 the approval of Judge Dennis that he be assigned to my case
8 because it was possibly going to be a death penalty case.
9 So ...

10 Q. Okay. So you thought Mr. Pennington was assigned to
11 your case?

12 A. Yes, by the judge.

13 Q. So you proceeded all the way, ultimately, to your
14 guilty plea with Mr. Pennington, right?

15 A. Yes.

16 Q. And as a result of having Mr. Pennington represent
17 you, you received a benefit because he negotiated for a
18 guilty plea on your behalf for the State, right?

19 A. Yes.

20 Q. And do you recall telling the Court during your
21 guilty plea that you were satisfied with Mr. Pennington?

22 A. Yes.

23 MS. WILSON: Thank you.

24 MR. DAVIS: No redirect, Your Honor.

25 THE COURT: All right. You may step down.

1 MR. DAVIS: Your Honor, the plaintiff will rest on
2 the testimony of Mr. Chisolm.

3 THE COURT: All right.

4 Ms. Wilson, do you want to call anybody?

5 MS. WILSON: The State will call Mr. Ashley
6 Pennington.

7 ASHLEY PENNINGTON,
8 having been duly sworn, testifies as follows:

9 THE CLERK: For the record, if you will please state
10 your name, spelling your last name.

11 THE WITNESS: My name is Ashley Pennington,
12 P-e-n-n-i-n-g-t-o-n.

13 DIRECT EXAMINATION

14 BY MS. WILSON:

15 Q. Good morning, Mr. Pennington.

16 A. Good morning.

17 Q. Can you just kind of briefly kind of replay for the
18 Court how long you've been practicing law; what your current
19 role is?

20 A. Okay. I was admitted to the bar in South Carolina
21 in 1980. And I am currently the circuit defender for
22 Berkeley and Charleston County. Previously, I had been in
23 private practice. Before that, I served as 11 years as the
24 Charleston County public defender. Before that, I had been
25 deputy public defender. Before that, I had been a federal

1 defender in Chicago. Before that, I've been a Richland
2 County public defender.

3 Q. So, essentially, most, if not all of your career,
4 you've been a criminal defense attorney?

5 A. That is correct.

6 Q. And can you kind of replay for us how you became
7 aware of Mr. Chisolm's case and how you came to represent
8 him?

9 A. Okay. In the fall of 2011, there was a status
10 conference that was held where we were pulling together old
11 cases in Berkeley County and having a solicitor/public
12 defender discussion case by case to see what was going on
13 with those cases. And in that session that was held at
14 Moncks Corner, Solicitor Wilson announced that there was a
15 case where the defendant was pro se, a DonSurvi Chisolm,
16 where she was intending to file a notice to seek the death
17 penalty, and was I aware of that, and that she suspected that
18 he was going to need representation if that occurred.

19 I was unaware of that case other than having read
20 about it in the newspaper. I then asked my deputy public
21 defender in Berkeley County, Patty Kennedy, about the case.
22 It turned out that she had been representing Mr. Chisolm.
23 And there had been a series of hearings where, essentially,
24 she had been relieved of representation. He had opted to go
25 pro se.

1 Based on what I was advised in the fall of 2011,
2 after he had been approved to be pro se, I made the decision
3 to drive to Lieber Correctional where he was serving a life
4 sentence on a murder case that -- a trial where he had
5 represented himself in Dorchester County, and sit down with
6 him and make sure that he understood the stakes that he was
7 facing and that the State had stated to me, what seemed to be
8 an authentic intent of seeking the death penalty.

9 So, we met in the large visitation room there at the
10 Lieber Correctional. I explained who I was. I explained
11 that I was aware that he was acting pro se. I expressed my
12 concern that because of the fact that the State was going to
13 seek the death penalty, that he, in all probability, needed
14 representation, and was he interested in having
15 representation. I asked him that question.

16 Q. Okay. And what was his response?

17 A. He indicated immediately and unequivocally that he
18 was interested in representation, that he was unhappy with
19 the way things had turned out when he represented himself in
20 Dorchester County, and that he would appreciate the
21 assistance. And that was in a meeting -- I have -- I'm
22 basing that on my notes that go back to a meeting at the
23 penitentiary on December the 19th, 2011.

24 Q. Okay. And after that, did you file any paperwork or
25 anything with the court to assume representation?

1 A. That day I made a note to myself. It was a to-do
2 list. We had a very, very lengthy meeting that day where I
3 got a lot of biographical history, as well as sort of the
4 first pass at the facts of the case, and made a list. And
5 the first was "get appointed - Judge Dennis."

6 And then beside it is a yellow sticky note that says
7 "file notice of appearance" and checkmark.

8 I, frankly, cannot recall the sequence of events
9 that occurred. However, as I mentioned to you, I was there
10 on December 19th, 2011. On December 20th, 2011, I sent an
11 e-mail to Scarlet Wilson, Brian Alfaro, who is the deputy in
12 Berkeley County, Adrian Deju (ph.) who was the assistant
13 public defender who had the case in Berkeley County, and
14 Scarlet's deputy here in Charleston, saying: I met with
15 DonSurvi Chisolm on Monday at Lieber. "Donny" is now
16 requesting me represent him on his Berkeley
17 murder/ABWIK/pistol charges. I will ask Judge Dennis to
18 reappoint our office while he is here January 3rd. I will
19 keep the case. I will be getting Patty's old file and begin
20 reviewing discovery so that I can discuss the case
21 intelligently with you.

22 The next day, I signed what was: This is to advise
23 the Court that I, Ashley Pennington, have assumed
24 representation of DonSurvi Chisolm on the above-referenced
25 charges -- the same charges we are talking about today.

1 That shows that it was filed in Berkeley County
2 December 29th, 2011. The problem that I have is, I don't
3 know the answer to the question, did I or did I not speak
4 with Judge Dennis. Circumstances suggest that I may well
5 have, but I can't testify under oath clearly that I did or
6 did not talk to Judge Dennis about resuming representation or
7 whether or not he wished or did not wish to have a hearing or
8 an order. But I did -- we are not -- it's not a custom and
9 practice in my office to file a written notice of
10 representation. So something triggered me to do that. I
11 just can't say what it was.

12 Q. Okay. And you've talked about a little bit
13 giving -- receiving the file from Patty Kennedy. And so
14 after you received it, did you have to file any regular Rule
15 5 motions, or had she done that already?

16 A. I believe she had, but I can't remember clearly. I
17 have to go through my file to see if I filed something
18 separately. I may well have. I just can't recall.

19 Q. And over the course of your representation of
20 Mr. Chisolm, do you recall how many times you met with him?
21 Was it pretty frequently?

22 A. He remained at Lieber the entire time. I have notes
23 from most of my interviews. It appears that in terms of
24 in-depth conversations, we probably had at least a half dozen
25 or more in-depth meetings, punctuated by letters,

1 correspondence, those kinds of things.

2 And I had meetings also with members of his family
3 who were clearly involved in the trauma of the death of his
4 nephew, the shooting of his brother. It involved his mother
5 and other family that were involved in the case.

6 Q. Now, once you received the file from Patty Kennedy
7 and kind of reviewed its contents, did you go over the
8 discovery materials that were contained in the file with
9 Mr. Chisolm?

10 A. Yes, I did.

11 Q. And did you talk to him about the elements of the
12 charges he was facing and what the State had to prove to
13 convict him?

14 A. I did.

15 Q. Did he kind of run through his version of facts as
16 well after you discussed kind of what the State's evidence
17 was?

18 A. Yes, he did.

19 Q. And did you talk to him about possible defenses?
20 And let's kind of walk through your talks with him on that,
21 since the bulk of his claims are about defenses you didn't
22 speak with him about.

23 A. Okay. Again, this was years ago, so I'm having to
24 refresh my memory from my notes. To the extent that I
25 remember events clearly, you will recall I began my

1 representation in December of 2011 and had an in-depth
2 interview at that time.

3 I see from my notes from an interview at the jail,
4 or I should say, the prison, July 16th, 2012, that he
5 indicated to me that Clint Kapinski was the one who shot
6 M.S. , rather than the description that we received here
7 today.

8 He acknowledged that he shot Dansa, his brother, and
9 that his brother had dislocated his shoulder earlier that day
10 when they had been engaged in a wrestling fight over
11 disagreements they had about music. He indicated that he and
12 his brother were highly intoxicated that day. He had given
13 me a long history of what had been a sibling rivalry that was
14 made worse by the fact that he was -- felt picked on by his
15 older brother for years and years and years, and that this
16 had been festering and building for years and years.

17 In terms of the specifics of the details of how it
18 went down between the two brothers, he never disputed the
19 fact that he shot Dansa in the face, who is his older
20 brother, and that that then triggered his nephew, Dansa's
21 son, to come out of the bedroom area of this property.

22 You have to understand that this was DonSurvi's home
23 and his brother and nephew were guests in this home. And
24 they had been living there for a period with DonSurvi's
25 blessing.

1 So M.S. came out of the bedroom. And it was
2 clear to me that the sticking point in this case was chiefly
3 the homicide of M.S. , and exactly what the circumstances
4 were, who did what, when and how to him. So he and I
5 discussed in-depth that the key to understanding the facts of
6 the case was going to be which witnesses would be available
7 and what they would testify to.

8 And we focused in-depth on Kristen Graves, Russell
9 Kapinski and Clint Kapinski, as well as his brother Dansa as
10 witnesses. His brother survived the shooting and gave a
11 description of the events to some degree. Although he had
12 suffered a head injury, fortunately, he had come through it
13 relatively unscathed.

14 And I had an interest in locating and interviewing
15 these witnesses. The State had the advantage in that
16 apparently they were in touch with them and ultimately
17 reinterviewed them on camera in their Solicitor's Office in a
18 video-recorded interview. So that, fortunately, for us, we
19 were able to see this interview by Miss Graves from July
20 17th, 2012, as well as a series of interviews with both Clint
21 Kapinski, and then interviews, multiple interviews, ending
22 with an August 16th, 2012, interview by Russell Kapinski.

23 For the first significant period in our -- my
24 representation, there was a sense that it was possible that
25 the State would not be able to locate Russell Kapinski, I

1 believe. Apparently, he was from Belize, if I'm not
2 mistaken. And the question was whether or not he had fled
3 the United States and was somewhere else and was going to be
4 unavailable to testify. So it became a fairly critical and
5 important event that he surfaced.

6 When he surfaced, he was interviewed and said
7 that -- he calls him Don or Donny, my client -- Mr. Chisolm,
8 came out of the bedroom. There had been an argument
9 previously. Dansa hurt Don's finger. They had been
10 wrestling, arguing about their music, because they were in
11 the music business together.

12 According to Russell Kapinski, says he's standing in
13 the kitchen, that the female Kristen is there: I'm standing
14 from me to you when Dansa is talking to Don. Don comes out
15 and says something, and then shoots Dansa in the face. As
16 soon as he shoots him in the face, I run over to Dansa, who
17 is slumped against the wall. I'm talking to Dansa, etc. I
18 hear a second shot. I go to the other room, which is -- this
19 is an open floor plan in that section, as I understand it,
20 where there is a combination living area and kitchen with a
21 countertop in-between.

22 And he then describes -- now I'm quoting Russell
23 Kapinski. Russell says: I see M.S. there. There's no
24 one else there.

25 And he sees M.S. has been shot in the upper

1 portion of his neck. And he starts CPR on him.

2 So, that dovetailed, unfortunately, for our case
3 with the circumstances that had been described. Kristen
4 Graves had given a statement on July 17th where she said that
5 she did not see Dansa with a gun. She said, according to her
6 rendition, that Don shot Dansa. And then she began to
7 scream. Don told her to be quiet or shut up. M.S. came
8 into the kitchen asking Mr. Chisolm why he had shot his
9 father. And Don shot him.

10 There was a question about whether or not M.S.
11 was saying something and whether Don shot him again. And,
12 frankly, I can't remember from the forensics whether there
13 was one or two gunshot wounds. We would have to go back and
14 pull that.

15 So you get now multiple witnesses who are talking
16 about my client being directly involved in the shooting death
17 of M.S. . There were other comments that were in there
18 that were inculpatory, that I don't necessarily need to get
19 into unless someone wants to ask me about it, that were made
20 by Ms. Graves.

21 And then there was the interview with Clint
22 Kapinski. That one was less important to me. I don't think
23 that he was as directly involved in terms of being a visible
24 witness, but I would have to review it more closely to be
25 certain of that. I have lots of notes here.

1 Why don't I stop and see if that answers your
2 questions.

3 Q. Based on your review of all that your statements and
4 that evidence and your discussions with Mr. Chisolm about it,
5 were you able to develop any defenses that you could present
6 at trial?

7 A. We did discuss self-defense and voluntary
8 manslaughter as potential matters, because that's just sort
9 of the standard boilerplate of our practice. I think that
10 Mr. Chisolm is correct, I don't ever remember going through
11 the details of the Persons and Property Protection Act or
12 offering to him the option of seeking a motion hearing to
13 seek immunity, for a couple of different reasons. One is
14 that I didn't see the essential elements of not being at
15 fault and bringing on the difficulty or reasonable
16 provocation by his brother or by M.S. in the two assaults.
17 So that it didn't seem like a close question to me on the
18 question of whether or not we could derive the immunity that
19 the act provides.

20 The second reason was -- is that the State was, in
21 some ways, breathing down our neck and saying that, for them,
22 they had been working on this case for some time. Now,
23 Solicitor Wilson had expressed that she was concerned that
24 there was a gun found. And there was a question of whether
25 or not M.S. , the son, who I think was about 11 or 12 --

1 that may be the wrong age, but -- let's see. He was
2 approximately that age, 14. M.S. was 14. There was some
3 question as to whether or not there could be some sort of
4 confusion about who shot who in the latter half of this case.

5 And I think that they were concerned, and maybe
6 probably the principle reason they didn't go death in this
7 case was a little bit of factual uncertainty about exactly
8 where the guns went.

9 The second piece was an ambivalence by the family,
10 who at various stages were either in favor of seeking capital
11 punishment or then ultimately chose not to seek capital
12 punishment.

13 Something that is important to understand in the
14 sequence of the events is that in my notes, I met with
15 Mr. Chisolm at the Lieber prior to these re-interviews by the
16 solicitor. And in that context -- if I may find my notes
17 again. I don't want to misquote anything. I thought I had
18 notes from May. I apologize to the Court. I saw it earlier,
19 but I don't trust my memory enough to be -- I will just drop
20 that. You can ask questions, and if I find the point I was
21 going to make, I will make it.

22 Q. Okay. Thank you. So, based on your testimony, you
23 didn't recall speaking to Mr. Chisolm about that because you
24 didn't think that would really be a viable defense to go
25 after any type of immunity based on the Protections of

1 Persons and Property Act?

2 A. My sense is that the -- that act simply adopts the
3 common law, which relates to this -- with certain new
4 immunities that are acquired or new potential to seek
5 immunity that's acquired. And plus, it expands it to
6 settings outside the home. Here we were dealing with a
7 situation where under the old common law, Mr. Chisolm would
8 not have any duty to retreat. So we were dealing with
9 essential elements of self-defense that relate to being not
10 at fault in bringing on the difficulty and the
11 reasonableness -- the sense of threat of serious bodily
12 injury or death and the corresponding reasonableness of his
13 response to that threat.

14 And so, that was the analysis that I employed with
15 him, which I felt still is good law and is really
16 incorporated into that act. So I understand where he's
17 coming from about not talking about the act, but I think we
18 covered self-defense as it exists in our state.

19 Q. Now, so after your talks with him, I guess had he
20 gone to trial, you would have pursued a defense based on
21 self-defense; is that correct, or what would you have
22 presented to the jury?

23 A. This is where my recollection of the events are that
24 around the summertime, roughly May, June of 2012, prior to
25 the plea, it was clear that Mr. Chisolm was now -- we had

1 done work on his unrelated Dorchester case to rule out the
2 possibility that that case was going to be potentially
3 reversible for the failure to -- for after-discovered
4 evidence. And I worked on that with him. We were able to
5 rule that out.

6 We began to focus more intensively on this. And I
7 was getting unambiguous signals that my client was interested
8 in seeking a plea rather than going to trial facing the death
9 penalty as early as the summer and even prior to these
10 interviews. But we obtained the interviews, which did put it
11 into even sharper and more firm clarity that there would be
12 evidence there from which a jury could find both malice
13 murder and assault and battery with intent to kill against
14 his older brother. So we began to move in the direction of a
15 plea.

16 Had we been boxed in somehow by the State's decision
17 to serve the death notice and not offer us any potentiality
18 of a plea, I would have listened closely to what my client
19 told me about the facts as they were rendered. And we would
20 have gone with whatever theory seemed to fit the facts based
21 on what the witnesses said and whether or not he chose to
22 testify. That's the best answer I could give you.

23 Q. Okay. And leading up to his kind of indication that
24 he wanted to plead guilty, what type of investigation did you
25 have to do in this case? He kind of indicates that you

1 didn't, I guess, personally interview the witnesses, the
2 several witnesses and members of his, I guess, family that
3 were in the situation that were present, you didn't interview
4 them. Was that something you needed to do, thought you
5 needed to do as part of your investigation? And, kind of,
6 what did you do investigation-wise?

7 A. Well, it's something that, naturally, you would like
8 to do if they are available. We didn't know where to find
9 them and were, frankly, hoping that the State didn't either,
10 and that the case would get weaker and perhaps result in even
11 more beneficial impact or results for him.

12 I did find my notes, by the way.

13 So back to the question. I'm sorry. What was your
14 question?

15 Q. Oh, just if you felt the need to independently
16 interview the witnesses and did you hire an investigator?
17 What did you do as far as investigation of his case aside
18 from those witnesses?

19 A. The Public Defender's Office in Charleston has
20 investigators, so I can -- I don't have to retain
21 investigators when I'm doing investigations. And, in fact, I
22 used one of my investigators to go interview a witness in the
23 Berkeley matter that I've referred to tangentially.

24 MR. CHISOLM: Dorchester.

25 A. But in answer to your question, I've made a list of

1 to-dos, which included a variety of tasks. It did not seem
2 to me that we decided that the thing to do was to go out and
3 stir the pot and try to find these witnesses at the outset.
4 I think we were waiting to see whether or not the State could
5 produce the witnesses. And when they did and we got the
6 recorded interviews, that seemed to satisfy both my client
7 and my curiosity about what they would say.

8 I don't recall having really solid leads on where to
9 find them. I had that Clint may have been in Maryland -- I'm
10 sorry. Russell may have been in Maryland; that's Russell
11 Kapinski. Clint could have been in Belize. I think I did
12 look for Kristen, but I cannot recall clearly how much effort
13 or whether or not I got warm enough to be able to make an
14 attempt to interview her.

15 But the simple answer to the question is, I did not
16 interview them and we relied on the interviews that the State
17 provided us by DVD.

18 Q. Mr. Chisolm also talks about him discussing with you
19 subpoenaing records about his shoulder injury in California.
20 Is that something y'all discussed and something you were
21 interested in doing?

22 A. The answer is yes. He did discuss it with me. I
23 don't see that I put it on my to-do list. And I'm not sure
24 why. It would have been a very reasonable thing to have if
25 we went to trial to show the extent to which he was in pain

1 as a by-product of the earlier fight that he had had with his
2 brother. But my -- and that would have been its relevance,
3 would have been that, according to the notice that I took at
4 the time, the shoulder injury was not sustained after the
5 gunshot wound. It was before, where they had been in a
6 fight, they had been wrestling.

7 He was both hurting and angry, had departed into the
8 bedroom, according to the witnesses, and then came out armed
9 and shot his brother.

10 So while it would have been highly relevant to,
11 perhaps, provocation in the event of a manslaughter scenario,
12 and I still think it is highly relevant to that, had we had
13 to go to trial, fortunately, the brother didn't die.

14 And then we have the dangling problem of the
15 brother, the nephew, which is his brother's son, who was shot
16 to death. And we have various descriptions of who did what.
17 It was never articulated to me, as it was said today in the
18 courtroom, that Mr. Chisolm acknowledged shooting his nephew
19 by accident. And so that would have been interesting to
20 pursue, but that was not presented to me.

21 MS. WILSON: Beg the Court's indulgence.

22 BY MS. WILSON:

23 Q. Mr. Pennington, after you presented the State's plea
24 offer to Mr. Chisolm and he decided he wanted to plead
25 guilty, did you talk to him about the consequences of

1 pleading guilty and what constitutional rights he would be
2 giving away by pleading guilty?

3 A. I believe that I covered everything except for I do
4 not recall discussing with him his right to appeal. However,
5 I got a whispered message from him immediately after the plea
6 to file an appeal, so I did so.

7 Q. During the guilty plea proceeding, did he ever
8 indicate he didn't understand anything?

9 A. No. I had what I considered to be a very friendly,
10 frank, and unambiguous relationship with DonSurvi. It seemed
11 to me that he understood clearly and frankly what was going
12 on with the case, what the evidence was, and was making
13 decisions that both affected him and his family with what
14 seemed to me a fairly clear mind.

15 Now, at the very end, I would say a week or ten days
16 before the scheduled guilty plea, I visited with him at
17 Lieber and he asked -- he said, shouldn't there be a mental
18 health evaluation? And so at the 11th hour, I asked Dr.
19 Bill Mulbry to conduct a competency eval' with Mr. Chisolm,
20 which I believe was accomplished either the day before the
21 plea or even -- maybe even concluded that morning prior to
22 the plea. And it confirmed that there was no significant
23 mental illness that would impair any kind of competency.

24 MS. WILSON: Thank you, Mr. Pennington.

25 CROSS EXAMINATION

1 BY MR. DAVIS:

2 Q. Mr. Pennington, let me get straight to one of the
3 bigger issues, the self-defense issue. Why did you believe
4 it wasn't a viable defense in this case?

5 A. As to the murder or as to the ABWIK or both?

6 Q. To both.

7 A. Okay. The sequencing of the events, the most
8 credible evidence that we had to go on was the notion that he
9 had come out of the bedroom angry after having been in a
10 fight with his brother. And I do not recall any credible
11 evidence that he, Dansa, the older brother, was armed with a
12 pistol or threatening any kind of imminent serious bodily
13 injury or threat. And that the jury was inclined or more
14 likely to believe the description of the witnesses that this
15 was a -- not an action designed to protect one's self.

16 THE COURT: Older brother to him, what's his name?

17 THE WITNESS: Dansa, D-a-n-s-a.

18 THE COURT: And his name is?

19 THE WITNESS: DonSurvi.

20 THE COURT: So older brother came out of the
21 bedroom?

22 THE WITNESS: No. It's reverse, Your Honor. Older
23 brother is in the kitchen. After there had been this fight
24 between the two of them, Donny goes into the back bedroom.
25 And as I understand the testimony of the witnesses, they

1 indicated -- or not testimony, the interview of the
2 witnesses, they would say -- would have said that he came out
3 armed and shot his brother in the face with basically no
4 immediate provocation.

5 THE COURT: Other than the preceding fight?

6 THE WITNESS: Correct.

7 THE COURT: Okay. Continue on.

8 BY MR. DAVIS:

9 Q. Are you aware of statements that it was Russell
10 Kapinski that introduced the weapons to the altercation?

11 A. You would have to refresh me about where you are
12 referring to. I do see in Kristen Graves's interview, July
13 17th, 2012. I noted that Russ brought two guns into the
14 room. He put one on the counter, looked like an Uzi.
15 Sometime during this, Don got ahold of the gun and put it in
16 his pocket.

17 Q. That is exactly -- thank you. That is exactly what
18 we were referring to.

19 A. She also says that she never saw Dansa with a gun.

20 Q. Just to clarify one thing, when you first began
21 testifying on direct, you referenced a note where my client
22 had indicated that another individual had committed one of
23 the shootings. Is that your recollection?

24 A. You are asking me did my client report that to me?

25 Q. Yes, in your initial interview with him.

1 A. It was -- there was an interview --

2 Q. That Clint on July 16th -- I'm sorry. I will direct
3 you. July 16th, the jail visit, 2012, one of your first
4 comments was that he had informed you that Clint Kapinski had
5 shot M.S. . Do you recall that?

6 A. Correct.

7 Q. Do you recall following that, though, in subsequent
8 discussions, he cleared that up, cleared up the fact that it
9 was not Clint that fired the weapon?

10 A. When you are saying did my client correct it for me
11 and say that: That's wrong, it was really me?

12 Q. Correct. Correct. Correct.

13 A. I don't recall it that way.

14 Q. From the time of the filing of your notice of
15 representation, that was December -- it was clocked on the
16 29th, signed by you, I guess, on the 21st of December 2011;
17 is that correct?

18 A. Yes, sir.

19 Q. And then his plea is October 16th of 2012?

20 A. Right.

21 Q. And I think you've referenced this, but the case had
22 age to it before you came in to it?

23 A. That's correct.

24 Q. The State was pushing to try to get it resolved
25 pretty quickly, one way or the other?

1 A. My experience has been that when they get ready,
2 they get ready. In other words, I was put on notice early
3 on, serious case, this guy is going to need a lawyer more
4 than likely. I was very much trying to catch up and -- which
5 was a bit of a struggle. And then we had the diversion of
6 looking at the Dorchester case, which we were able to get
7 some time to do.

8 I can't remember if I discussed that at all with the
9 other side, but I was playing for time because the dominant
10 concern in the first half of my representation was, is he
11 going to get out from under the Dorchester life in prison?
12 And that's what we worked on very heavily. And then we
13 turned back to this more deeply.

14 Q. Ten months is a rather quick disposition of a murder
15 case, murder and ABWIK case?

16 A. Yes. I mean, for me, yes.

17 Q. I want to go back just briefly about the witnesses.
18 Certainly, you did not independently talk to them. Can you
19 be a little more clear of your recollection of the attempts
20 to locate them, if any? Because you did testify at some
21 point the strategy was, if they are not around, that improves
22 our case. But could you expand a little bit on what attempts
23 you made to locate them?

24 A. You know, Mr. Davis, I looked at my notes. I can't
25 say that I've read every word. I have this impression, and I

1 wouldn't put a lot of weight on it, but it's an impression
2 that I was interested in finding particularly the female,
3 Kristen Graves, and made some attempts to figure out where I
4 could find her and interview her.

5 I had the impression from talking to my client that
6 the Kapinskis were gone, and didn't really have a clue as to
7 where to go find them. And was a little bit surprised when
8 they turned up and gave these interviews.

9 And in some ways, as a trial lawyer, it puts to bed
10 issues that I had in my mind, because even though my client
11 had said he was interested in a plea prior to those
12 interviews, you would like to know what witnesses are going
13 to say.

14 So in answer to your question, I was interested in
15 particularly any witness that I could find, but I don't
16 recall having any meaningful leads as to the Kapinskis. I
17 can't say with regard to Ms. Graves.

18 Q. In 2011 and 2012, you were the circuit solicitor for
19 both Charleston and Berkeley Counties, correct?

20 A. Yes, sir.

21 Q. Your main office is here in Charleston County?

22 A. Yes, sir.

23 Q. Where you maintain your office?

24 THE COURT: Can I ask, you said circuit defender or
25 circuit solicitor?

1 MR. DAVIS: Defender.

2 THE WITNESS: Circuit defender.

3 THE COURT: He said solicitor.

4 MR. DAVIS: I apologize. I apologize.

5 BY MR. DAVIS:

6 Q. I believe you testified that while this was a
7 Berkeley County case, you utilized the services of
8 investigators from Charleston office?

9 A. That's correct. There was no investigator at that
10 time in Berkeley.

11 Q. It's accurate that on each of these statements, an
12 address and phone number is listed for the witnesses on the
13 statements?

14 A. You are talking about the original statements by law
15 enforcement?

16 Q. Certainly original ones, but then also the
17 subsequent one in July of 2012 as well.

18 A. I have a DVD. And then there were notes. And so
19 the Kristen Graves, I don't see an address.

20 With regard to Clint, yes, indeed, there is an
21 address in Savannah, Georgia.

22 And with regard to Russell, there is an address in
23 Moncks Corner, both an address and a phone number for each.

24 Q. Back to your initial involvement in the case, thank
25 you, I had access to your file. I appreciate that. So I

1 have the note that you referenced, the to-do note: Get
2 appointed, J. Dennis. And then a Post-It note to file: File
3 notice of appearance.

4 You certainly filed a notice of appearance with the
5 Clerk of Court. Do you recall having an order of appointment
6 from either Judge Dennis or another circuit court judge?

7 A. If I had an order of appointment, I would have had
8 it in the file. So I don't think there is one.

9 Q. Do you recall there being an actual hearing
10 conducted to reverse the prior order where he was allowed to
11 proceed pro se?

12 A. No, I don't believe there was such a hearing.

13 Q. Ultimately, this was a negotiated plea and an Alford
14 plea, correct?

15 A. Correct.

16 Q. Because Mr. Chisolm still maintained that he did not
17 commit the crimes he was accused of?

18 A. Correct.

19 MR. DAVIS: Your Honor, if I may have a moment.

20 Thank you, Mr. Pennington.

21 No other questions, Your Honor.

22 MS. WILSON: Nothing from the State.

23 THE COURT: You may step down.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: Anything else?

1 MR. DAVIS: No, just summary when it's appropriate,
2 Your Honor.

3 THE COURT: I will hear you.

4 MR. DAVIS: Thank you, Your Honor. Judge,
5 ultimately, I will start at the very beginning. This was an
6 Alford plea, which in and of itself suggests that Mr. Chisolm
7 was not admitting the guilt as to the elements of both the
8 crimes. Certainly, we understand that there was an advantage
9 negotiated, the possibility of the State filing -- intent to
10 seek the death penalty that was not filed.

11 We've heard lots of testimony about potential
12 defenses at trial. He understands the risk that would have
13 been in place. He understands -- he understood it then,
14 understands it today. You went over that at the beginning of
15 this hearing.

16 However, we have two major arguments I will separate
17 out. First, it's clear from the record that he had a
18 separate trial on separate charges in Dorchester County. And
19 he proceeded pro se, as was his wishes. He was originally
20 represented by the Berkeley County Public Defender's Office,
21 again, partly from Mr. Pennington's office, but someone other
22 than Mr. Pennington in Berkeley County. Mr. Chisolm sought
23 and obtained an order removing them, relieving them from
24 representing him so he can proceed pro se on these charges.

25 The testimony is there was never a hearing conducted

1 to overturn that prior order. There was no order appointing
2 Mr. Pennington to this case, simply a letter or notice from
3 him that he is now on the case. Of course, you heard
4 Mr. Pennington's answer how that happened. Conversely, you
5 heard Mr. Chisolm's testimony that he believed Mr. Pennington
6 was simply appointed by the court. So it was a court order,
7 not by his choosing.

8 So our first main argument is that that, for lack of
9 a better term, taints the entire process and prevented
10 Mr. Chisolm from going forward pro se, which he would have
11 preferred to do, and it affected everything else.

12 Ultimately, I think it was from Mr. Chisolm, I asked
13 what influence Mr. Pennington being involved in his case had.
14 Well, it arranged the entirety of the plea. Mr. Pennington
15 negotiated the entirety of his plea. So, clearly, we
16 presented but for Mr. Pennington being involved by his own
17 volition and against Mr. Chisolm's wishes, this plea would
18 not have happened. It was the involvement of the attorney,
19 the negotiation by the attorney, discussions by the attorney
20 that ultimately led to the plea.

21 Had Mr. Chisolm been allowed to proceed pro se,
22 which he had requested, and the order had superseded, this
23 plea would not have happened. And so we would argue we
24 established the elements required under Strickland for a
25 granting of his post-conviction relief request on that ground

1 alone.

2 Then you've heard testimony about once
3 Mr. Pennington was involved in the case. I think it's
4 undisputed that an independent interview of the essential
5 witnesses was not completed. Why we believe that is
6 important is, it goes to the failure to communicate to
7 Mr. Chisolm the possibility and the potential of success on a
8 self-defense claim. Clearly, the devil's in the details.
9 The exact sequence of events, words that were spoken, actions
10 of parties become very crucial in a self-defense claim.

11 In this case, the statements given to law
12 enforcement were relied on. Even though there were multiple
13 statements and they did conflict, they were relied on. There
14 was no further investigation as to the exact details that can
15 be crucial in a self-defense claim.

16 Continuing from that, Mr. Chisolm has testified that
17 while they discussed self-defense as a trial defense, there
18 was no discussions of his opportunity for protection under
19 the immunity provisions of the Protection of Person and
20 Property Act. They never discussed the possibility of
21 requesting that hearing, the immunity hearing prior to trial,
22 and having that as a possible defense. He did not have the
23 benefit of that option when he entered this plea. So we
24 think, put on the record that that caused the plea to happen.
25 Had he been aware of potential immunity hearing, that he

1 would not have pled guilty.

2 This is a rather quick resolution from the time
3 Mr. Chisolm (sic) gets involved. I've practiced almost 20
4 years, in fact, in Mr. Pennington's office and as a
5 solicitor. Ten months for a murder case, including one that
6 could be possibly death penalty case, to resolve is rather
7 quick. We understand there's age to this, but I believe
8 Mr. Pennington testified that the State was pushing it. When
9 they are ready, they are ready. So there was a time issue
10 and a time pushed by the State as well. And we feel that
11 certainly contributes to the lack of thorough investigation
12 and the advice to accept this Alford plea.

13 I believe I already said it, but, again, the fact
14 that it was an Alford shows that Mr. Chisolm was not
15 admitting to the elements of both of these offenses, which I
16 think lends credence to the fact that this was something that
17 was not of his original choosing.

18 So we believe the testimony as presented, the record
19 reflects the fact that he was not adequately advised of all
20 his potential defenses: Accidents; lesser-included defenses
21 to murder; self-defense, not just as a defense at a trial,
22 but self-defense as potential immunity.

23 What was provided to him and what was not provided
24 to him were all a product of Mr. Pennington being involved in
25 the case. Ultimately, given the fact that he was aware if he

1 did not plead on the date in question, the State intended to
2 serve death penalty notice, Mr. Chisolm did ultimately enter
3 the Alford plea. We showed today there were facts and
4 opportunities that he did not become aware of until after the
5 plea that he has testified to that, clearly, had he known, he
6 would not have entered this plea.

7 So, Your Honor, based on the insertion of
8 Mr. Pennington as attorney without proper order of the court
9 and then his conduct during representation of the case, we
10 believe we've met our burden. And we ask you to grant
11 Mr. Chisolm's release -- relief on his post-conviction relief
12 application. Thank you.

13 THE COURT: All right. Ms. Wilson.

14 MS. WILSON: Briefly, Your Honor, the State would
15 ask you dismiss this application for post-conviction relief.
16 And we, namely, stand on the testimony of Mr. Pennington in
17 support of that request.

18 Just briefly, in response to his testimony regarding
19 the, I guess, insertion of Mr. Pennington as counsel to
20 represent him, Your Honor, there's nothing indicated in the
21 record that Mr. Chisolm wanted to proceed pro se after
22 Mr. Pennington filed his notice of representation in this
23 matter. The State would just argue that he abandoned or
24 waived any desire or any choice to represent himself. So by
25 proceeding with Mr. Pennington all the way through the

1 resolution of this matter by a guilty plea, for 10 months, he
2 never filed any motion to relieve Mr. Pennington.

3 And the guilty plea record is also going to be
4 indication of his desire to proceed pro se. He also told the
5 Court that he was satisfied with being represented by
6 Mr. Pennington in his guilty plea transcript on page 12.

7 With regard to the investigation of these witnesses,
8 it's the State's position that Mr. Chisolm can't be
9 successful in this claim because we don't know what
10 additional investigation or interview with these witnesses
11 would have yielded to benefit Mr. Chisolm.

12 And, also, Mr. Pennington testified that initially
13 when the State was unable to find these witnesses, he didn't
14 necessarily want to undercover the witnesses for the State to
15 have access to.

16 Also, Your Honor, Mr. Pennington testified further
17 that once the State -- once these witnesses surfaced and the
18 State was able to interview them via video, he and
19 Mr. Chisolm at the time were satisfied and didn't feel the
20 need for any additional interviewing or to speaking to those
21 witnesses based on the testimony that they gave in their
22 video.

23 With regard to the claim about discussing available
24 defenses, it's the State's position that Mr. Pennington gave
25 credible testimony that he discussed self-defense and

1 lesser-included defenses with Mr. Chisolm, but that he did
2 not think that discussions with regard to receiving the
3 immunity provision or the Protection of Persons and Property
4 Act was necessary because he didn't think that it would be
5 successful based on the facts that were presented in
6 evidence.

7 And just based on that, Your Honor, the State would
8 ask that you deny and dismiss this application for
9 post-conviction relief with prejudice.

10 THE COURT: All right. I'm inclined to request
11 proposed orders. How much time do you all want?

12 MS. WILSON: The State would ask for 45 days.

13 MR. DAVIS: I will too.

14 THE COURT: Whatever time y'all ask for, I would
15 like. 45 is fine. If you want 46, you can have that.

16 MS. WILSON: That is fine, Your Honor.

17 Thank you, Your Honor.

18 (Whereupon, the proceedings are adjourned.)
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25

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter
certified Realtime Reporter, and Notary Public for the State
of South Carolina at Large, do hereby certify that the
foregoing transcript is a true, accurate and complete
Transcript of Record of the proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.

Witness my hand, I have hereunto affixed my official
seal this 3rd day of December, 2015, at Charleston,
Charleston County, South Carolina.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter
My Commission expires:
September 14, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

DonSurvi Chisolm, #347831,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2013-CP-08-0422

NANCY D. DOWNS
CLERK OF COURT
BERKELEY COUNTY, SC

2015 JUL 14 PM 4:53

FILED
DW**ORDER OF DISMISSAL**

Presiding Judge:

Applicant's Attorney:

Respondent's Attorney:

Plea Counsel:

Date of Hearing:

The Honorable Eugene C. Griffith, Jr.

Rodney Davis, Esquire

Ashleigh R. Wilson, Esquire

D. Ashley Pennington

February 19, 2015

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed February 18, 2013. The Respondent made its Return on December 8, 2014. An evidentiary hearing into the matter was convened on February 19, 2015 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Rodney Davis, Esquire. Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. The Applicant's plea counsel, D. Ashley Pennington, Esquire, also testified at the hearing. This Court had before it the guilty plea transcript, the records of the Berkeley County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the PCR application, the Respondent's Return thereto, and the Applicant's appellate records.

SCM 4/13

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Berkeley County. The Applicant was indicted at the August 2010 of the Berkeley County Grand Jury for assault and battery with intent to kill (ABWIK) (2010-GS-08-1424), murder (2010-GS-08-1425), and possession of a weapon during the commission of a violent crime (2010-GS-08-1426). D. Ashley Pennington, Esquire, represented the Applicant. The Applicant pled guilty pursuant to Alford in exchange for the State not seeking the death penalty. Pursuant to a negotiated plea agreement, the Honorable R. Markley Dennis sentenced the Applicant to confinement for life without parole for murder, twenty years for ABWIK, and five years for possession of a weapon. The sentences were run concurrently. The Applicant filed a timely notice of appeal for his guilty plea. The Court dismissed his appeal and the remittitur was issued on February 28, 2013.

ALLEGATIONS

The Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Applicant's right to proceed *pro se* was impeded without request and a plea was entered in a forum that forced hybrid representation. But for this formality and counsel's ineffectiveness, the Applicant would have proceeded to trial.
2. 6th amendment right to self-representation/prohibition against hybrid representation.
3. Involuntary guilty plea.
4. Violation of due process.

At the hearing, the Applicant waived all grounds for relief except ineffective assistance of counsel for the following reasons:

1. Ineffective assistance of counsel.
 - a. Counsel impeded Applicant's right to proceed *pro se*.
 - b. Counsel failed to properly research the Protections of Persons and Property Act.
 - c. Counsel failed to interview witnesses.
 - d. Counsel failed to discuss lesser included offenses.

e. Counsel failed to subpoena the Applicant's medical records.

This Court finds all claims raised in the application and not addressed in this order are hereby deemed abandoned. This Court finds the Applicant has failed to present any evidence or testimony regarding such claims. Therefore, they are hereby denied and dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Summary of the Testimony

The Applicant was present and testified he pled guilty to a life sentence under Alford. He testified he understood what Alford meant and pled guilty so that the State would not seek the death penalty. The Applicant testified the incident that led to his arrest was a dispute in his residence with his family. He testified at the conclusion of the dispute two family members were shot and one died.

The Applicant testified he previously represented himself at trial in Dorchester County. He testified he was set to go to trial and represent himself on the Berkeley charges. He testified trial counsel came to talk to him in prison and told him the State might seek the death penalty. The Applicant testified trial counsel made him believe that Judge Dennis approved of counsel taking over representation in his case. He testified he never asked the court to have trial counsel take over his case and never told the court he wanted an attorney. The Applicant testified he

proceeded with trial counsel representing him. He also testified he received a benefit by having trial counsel represent him and he recalled telling the plea court he was satisfied with counsel's representation during his guilty plea.

The Applicant testified counsel failed to properly research his case. The Applicant testified he felt he had a self-defense claim. He testified trial counsel told him he researched the Castle Doctrine and that his case did not meet the grounds for the Castle Doctrine. The Applicant testified trial counsel did not tell him about the Protection of Persons and Property Act. He testified the altercation during the incident was with his brother, but the person who was killed was not his brother. He testified shooting his nephew was an accident. Applicant testified he was not aware of the Protection of Persons and Property Act and that if he had been aware of the statute he would not have pled guilty.

The Applicant also testified counsel failed to discuss lesser included offenses with him. He testified if he had been advised of the possibility of being convicted of a lesser offense he would not have pled guilty. The Applicant testified he was not fully aware of the possibilities and options in going forward at trial.

The Applicant testified trial counsel did not investigate his case. He testified he asked counsel to interview the witnesses since they were giving conflicting testimony. The Applicant testified counsel never interviewed the witnesses or received any transcripts from interviews. He testified the State interviewed the witnesses several times. The Applicant testified he was given copies of the witness statements.

The Applicant testified he asked trial counsel to subpoena medical records from California to help prove that he was injured during the dispute. He testified counsel never subpoenaed the records. The Applicant testified while in California he received treatment for a

shoulder injury. He testified he shot his brother and his brother still was able to injure him.

Also present and testifying was D. Ashley Pennington, Esquire. Counsel testified he has been practicing criminal law in South Carolina since 1980 and he is the current chief public defender for the 9th circuit. Counsel testified he learned of the Applicant's case in fall 2011 in a meeting with the Solicitor about old cases. He testified he learned the Applicant was representing himself and the State was seeking death.

Counsel testified he drove to the prison to make sure the Applicant understood that the State was seeking death on his charges. He testified when he spoke with the Applicant, the Applicant indicated he was interested in his representation and that he was unhappy about representing himself in the prior trial. Counsel testified he assumed representation of the Applicant after filing a notice of representation.

Counsel testified he met with the Applicant at the prison. He testified they had six or more in-depth meetings, they corresponded by mail, and he spoke with the Applicant's family. Counsel testified he reviewed the discovery material with the Applicant. He testified he discussed with the Applicant the elements of the charges he was facing and what the State was required to prove to convict him. He testified they also discussed the Applicant's version of facts. Counsel testified he and the Applicant discussed the details of the incident and that Applicant never disputed shooting his brother. He testified the sticking point was the shooting of the Applicant's nephew.

Counsel testified he and the Applicant discussed the State's witnesses and their testimony. Counsel testified he used a private investigator and made a list of things he wanted to investigate. He testified he did not know where to find witnesses and hoped the State could not find them either. He testified they did not have leads on how to find the witnesses and did not

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want to "stir the pot" to find the witnesses. Counsel testified initially they thought the State would be unable to locate Russell Kapinski and that he would be unavailable to testify. He testified ultimately Kapinski was located and his testimony was consistent with its theory of the case. Counsel testified Kapinski said the Applicant came out of the bedroom and shot his brother in the face and then he heard a second shot, after which he found the nephew shot in the neck in another room. Counsel testified multiple witnesses said the Applicant was directly involved in the nephew's death. Counsel testified the State re-interviewed the witnesses and video recorded them. Counsel and the Applicant reviewed the recorded interviews.

Counsel testified he discussed self-defense and voluntary manslaughter with the Applicant as is his standard practice. He testified self-defense would not have been a viable defense since the most credible evidence showed the Applicant was angry after a fight with his brother and there was no evidence of the Applicant's brother being armed or threatening anyone. He testified further it was unlikely the jury would believe the Applicant was acting with provocation.

Counsel testified he did not recall going through the details of the Protection of Persons and Property Act with the Applicant and he did not offer an immunity hearing. Counsel testified he did not see the essential elements of no fault and reasonableness. He testified he did not think the Applicant could prove immunity from the Act. Counsel testified the Protection of Persons and Property Act adopted the common law and expanded it to settings outside of the home. He testified they were dealing with essential self-defense elements. Counsel testified he felt his advice to the Applicant about the Castle Doctrine was still good law.

Counsel testified they discussed getting the victim's medical records about his shoulder, but that would have been something he would have done had the Applicant gone to trial. He

testified the injury would have shown he was in pain and angry before his brother sustained the gunshot wound. Counsel testified further this would have been relevant to the element of provocation, however, the brother involved in the altercation was not the person killed. Counsel testified the Applicant never acknowledged shooting the nephew accidentally.

Counsel testified after it was clear his Dorchester conviction would stand, he got signals from the Applicant that he was interested in pleading guilty. He testified after obtaining the recorded interviews, it was clear the Applicant would be convicted, thereafter and he began to move into the directions of a plea.

Ineffective Assistance of Counsel

The Applicant alleges that he received ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 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. The 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 to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong,

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attorney performance is measured by its "reasonableness under professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. 668). 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." Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969); Dover v. State, 304 S.C. 433, 434, 405 S.E.2d 391, 392 (1991). When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Lecke, 282 S.C. 131, 318 S.E.2d 360 (1984)). When a defendant pleads guilty on the advice of counsel, the plea may only be attacked through a claim of ineffective assistance of counsel. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2002) (citations omitted).

As an initial matter, this Court finds the Applicant's testimony was not credible. This Court finds the testimony of trial counsel to be credible. This Court finds further Counsel is a criminal practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant,

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Counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, Applicant's version of the facts, and possible defenses or lack thereof. The record reflects that Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. The Applicant told the plea court that he was satisfied with his attorney and that no one had threatened him or promised him anything to plead guilty. This Court finds that Applicant understood the terms of his negotiated sentence.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

Failure to investigate

Applicant first claimed Counsel failed to investigate his case. Applicant claimed he asked Counsel to interview witnesses because the witnesses gave conflicting statements to law enforcement. Applicant also claimed Counsel failed to subpoena medical records from California to prove Applicant was injured during the dispute, which could show provocation.

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have

been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Applicant provided no witnesses at the PCR hearing which would have contradicted the State's case which was presented at the guilty plea. Therefore, Applicant can prove no prejudice for Counsel's alleged failure to call witnesses on Applicant's behalf.

"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." Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998).

While Counsel testified he thought the medical records could be relevant to show provocation at trial, Applicant failed to provide a copy of these records at the PCR hearing. As such, Applicant has failed to meet his burden of proving Counsel's ineffectiveness for failing to investigate and subpoena the medical records or any resulting prejudice. Thus, these allegations are dismissed.

Failure to Research

Applicant also claims Counsel was ineffective for failing to research the Protection of Persons and Property Act (PPPA) because Applicant thought he had a claim for self-defense. Applicant testified Counsel told him he had researched the Castle Doctrine and that he did not satisfy the grounds for self-defense. Applicant also testified Counsel never discussed with him the PPPA and that had Applicant known about the PPPA, he would not have pled guilty but insisted on going to trial.

To the contrary, Counsel testified he discussed the elements of self-defense with Applicant. While Counsel stated he did not specifically recall going over the details of the PPPA, he testified he did not find the essential elements of no fault and reasonableness in Applicant's case. Counsel also testified he did not believe Applicant could not gain immunity from a hearing on the PPPA. Counsel further testified the PPPA essentially codified the Castle Doctrine and expanded it to settings outside of the home and trusted that his advice to Applicant concerning the Castle Doctrine was correct.

This Court finds Applicant's testimony concerning Counsel's failure to research the PPPA not credible, while finding Counsel's testimony credible. This Court also finds Counsel adequately researched the applicable and provided sound legal advice to Applicant. Thus, this allegation is dismissed.

Failure to apprise Applicant of lesser included offenses

Applicant further claims Counsel failed to discuss with him the lesser included offenses of murder. Applicant testified had he known about the possibility of a lesser included offense, he would not have pled guilty. Specifically, Applicant stated Counsel did not discuss involuntary manslaughter.

Once again to the contrary, Counsel testified he discussed self-defense and voluntary manslaughter with the Applicant as is his standard practice. He testified self-defense would not have been a viable defense since the most credible evidence showed the Applicant was angry after a fight with his brother and there was no evidence of the Applicant's brother being armed or threatening. He testified further it was unlikely the jury would believe the Applicant was acting with provocation.

This Court finds Applicant's testimony concerning Counsel's failure to apprise Applicant

of lesser included offenses not credible, while finding Counsel's testimony credible. Therefore, Applicant has failed to meet his burden of proof as to this allegation.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test, specifically that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that counsel committed either errors or omissions while representing the Applicant. The Applicant failed to show that counsel's performance was deficient. Therefore, this Court need not address prejudice. Applicant's complaints concerning counsel's performance are without merit and are denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in the application in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present sufficient evidence or testimony regarding such allegations. Accordingly, this Court finds the Applicant abandoned such allegations. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Applicant was not prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

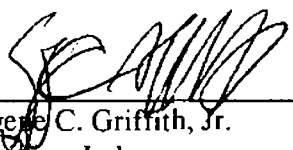
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been

timely served and filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 2nd day of July, 2015



Eugene C. Griffith, Jr.
Presiding Judge
9th Judicial Circuit

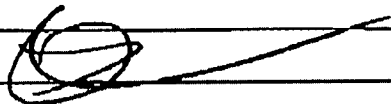
Newberry, South Carolina.

ALF2010-06-01238

WITNESSES

John Peters

Berkeley County Sheriff's Office



AGENCY CASE NUMBER

1004013692

ARREST WARRANT NUMBER

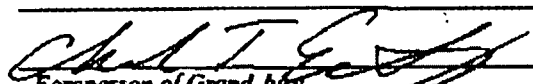
M331243

DATE OF ARREST

June 16, 2010

ACTION OF GRAND JURY

True Bill



Foreperson of Grand Jury
Date: 8-11-10

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2010-GS-08-1424

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

August Term 2010

THE STATE

vs.

Donsurvi Chisolm

B/M

Indictment for

Assault and Battery With Intent to Kill

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

2010 AUG 11 PM 2:23

FILED
JH

131

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on August 11, 2010 the Grand Jurors of Berkeley County present upon their oath:

Assault and Battery With Intent to Kill

That Donsurvi Chisolm did in Berkeley County on or about the 1st day of April, 2010 with malice aforethought, did commit an unlawful act of a violent nature upon the victim, Donsa Chisolm, to wit: the Defendant did shoot said victim in his facial area. This action is in violation of Section 16-03-0620 of the South Carolina Code of Laws (1976), as amended.

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

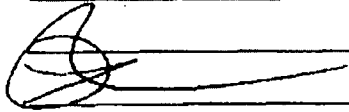

BRYAN A. ALFARO
DEPUTY SOLICITOR

ALF2010-06-01238

WITNESSES

John Peters

Berkeley County Sheriff's Office



AGENCY CASE NUMBER

1004013692

ARREST WARRANT NUMBER

M325223

DATE OF ARREST

June 16, 2010

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: 8-11-10

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2010-GS-08- 1425

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

August Term 2010

THE STATE

vs.

Donsurvi Chisolm

DOB:

B/M

Indictment for

Murder

FILED
2010 AUG 11 PM 2:24
MARY P. SNOW
CLERK OF COURT
BERKELEY COUNTY, S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on August 11, 2010 the Grand Jurors of Berkeley County present upon their oath:

Murder

That Donsurvi Chisolm did in Berkeley County on or about the 1st day of April, 2010, feloniously, willfully and with malice aforethought, kill and murder one M.S. by means of a gunshot wound and said M.S. did die in Berkeley County as a proximate result on April 1, 2010. This action is in violation of Section 16-03-0010, South Carolina Code of Laws (1976), as amended.

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

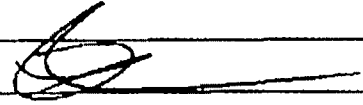

BRYAN A. ALFARO
DEPUTY SOLICITOR

ALF2010-06-01238

WITNESSES

John Peters

Berkeley County Sheriff's Office



AGENCY CASE NUMBER

1004013692

ARREST WARRANT NUMBER

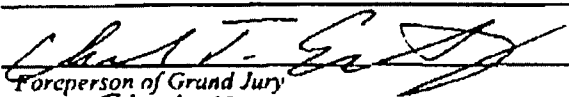
M331244

DATE OF ARREST

June 16, 2010

ACTION OF GRAND JURY

True Bill



Foreperson of Grand Jury

Date: 8-11-10

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2010-GS-08-1426

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

August Term 2010

THE STATE

vs.

Donsurvi Chisolm

DOB: [REDACTED]

B/M

Indictment for

Possession of a Firearm During the
Commission of a Violent Crime

MASS P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

2010 AUG 11 PM 2:23

FILED



STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

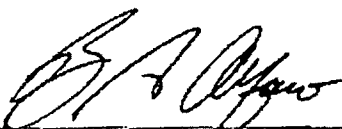
INDICTMENT

At a Court of General Sessions, convened on August 11, 2010 the Grand Jurors of Berkeley County present upon their oath:

Possession of a Firearm During the Commission of a Violent Crime

That in Berkeley County, South Carolina, on or about April 1, 2010, the Defendant, Donsurvi Chisolm, did possess a firearm or visibly display what appeared to be a firearm during the commission, or attempted commission, of Assault and Battery With Intent to Kill, a violent crime. This is in violation of Section 16-23-490 of the South Carolina Code of Laws, (1976) as amended.

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



BRYAN A. ALFARO
DEPUTY SOLICITOR