

**VOLUME II OF II**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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MAY 24 2012

Appeal from Orangeburg County  
Edgar W Dickson, Circuit Court Judge

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**SC Supreme Court**

ANDRE KING,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

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**A P P E N D I X**

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1 intent to kill because that indictment is possession of  
2 a weapon during the commission of certain crimes

3 So you have to find him guilty of one of those  
4 crimes before you can find him guilty of possession of a  
5 weapon during the commission of certain crimes I will  
6 explain that to you more fully in more greater detail  
7 later in my charge

8 He may be convicted or acquitted on the murder  
9 and/or on the assault and battery with intent to kill,  
10 and you will be asked to write a separate verdict of  
11 guilty or not guilty for each indictment

12 I remind you that the fact the Defendant was  
13 arrested, charged, and indicted in this case is not  
14 evidence in this case and cannot be considered by you as  
15 evidence of guilt in this case, nor does it create any  
16 presumption or inference of guilt

17 These documents, these indictments, are simply  
18 the formal written instruments which contain the charges  
19 made against the Defendant These are the formal  
20 documents by which this case was brought into court

21 The Defendant has pled not guilty to these  
22 indictments, and that plea puts the burden on the State  
23 to prove the Defendant guilty A person charged with  
24 committing a criminal offense in South Carolina is never  
25 required to prove himself innocent

1           I charge you that it is an important rule of  
2 the law that a defendant in a criminal trial, no matter  
3 what the seriousness of the charge may be, will always  
4 be presumed to be innocent of the crime for which the  
5 indictment was issued unless guilt has been proven by  
6 evidence satisfying you of that guilt beyond a  
7 reasonable doubt

8           This presumption of innocence does not end  
9 when you begin your deliberations, but it accompanies  
10 the Defendant throughout the trial until you reach a  
11 verdict of guilt based on the evidence satisfying you of  
12 that guilt beyond a reasonable doubt

13           The presumption of innocence is like a robe of  
14 righteousness placed about the shoulders of the  
15 Defendant which remains with the Defendant until it has  
16 been stripped from the Defendant by evidence satisfying  
17 you of the Defendant's guilt beyond a reasonable doubt

18           The presumption of innocence is not a mere  
19 legal theory. It is not just a legal phrase. It is a  
20 substantial right to which every defendant is entitled,  
21 unless you the jury are satisfied from the evidence of  
22 the Defendant's guilt beyond a reasonable doubt

23           The State has the burden of proving the  
24 Defendant guilty beyond a reasonable doubt. Some of you  
25 may have served as jurors in civil cases where you were

1 told that it is only necessary to prove that a fact is  
2 more likely true than not true, such as by the greater  
3 weight or preponderance of the evidence

4 In criminal cases the State's proof must be  
5 more powerful than that It must be beyond a reasonable  
6 doubt Proof beyond a reasonable doubt is proof that  
7 leaves you firmly convinced of the Defendant's guilt

8 There are very few things in this world that  
9 we know with absolute certainty, and in criminal cases  
10 the law does not require proof that overcomes every  
11 possible doubt

12 If based on your consideration of the evidence  
13 you are firmly convinced that the Defendant is guilty of  
14 the crime charged, you must find the Defendant guilty  
15 If, on the other hand you think there is a real  
16 possibility that the Defendant is not guilty, you must  
17 give the Defendant the benefit of the doubt and find him  
18 not guilty

19 I remind you that during this trial, you and I  
20 have certain duties to perform As the trial judge, it  
21 is my responsibility to preside over the trial of this  
22 case, and I also have the added duty to rule on the  
23 admissibility of the evidence offered during the trial

24 You are to consider only the competent  
25 evidence before you If there was any testimony ordered

1 stricken from the record in this case during this trial,  
2 you must disregard that testimony You are to consider  
3 only the testimony which has been presented from the  
4 witness stand and any exhibits which may be a part of  
5 the record in this case

6 I have the additional duty to charge you the  
7 law applicable to this case As the presiding judge, I  
8 am the sole judge of the law of this case, and it is  
9 your duty as jurors to accept and to apply the law as I  
10 now state it to you

11 If you already have any idea as to what the  
12 law is or what the law ought to be and it does not agree  
13 with what I now tell you the law is, you must abandon  
14 your idea because you are sworn to accept the law and  
15 apply the law exactly as I state it to you

16 In every case tried in this court before a  
17 jury, the jury becomes the sole and exclusive judge of  
18 the facts in a case A trial judge cannot intimate,  
19 state, comment on or make any statement to a trial jury  
20 about the facts in a case

21 Since you are the sole judge of the facts in  
22 this case, you are not to infer from what I have said  
23 during the progress of this trial in ruling upon the  
24 admissibility of the evidence or otherwise or anything  
25 that I now say during the course of this instruction to

1 you that I have any opinion about the facts in this  
2 case

3 The law does not allow me to have an opinion  
4 about the facts in this case This is a matter solely  
5 for you the jury to determine As jurors it is your  
6 duty to determine the effect, the value, the weight, and  
7 the truth of the evidence presented during this trial

8 There are two types of evidence which are  
9 generally presented during a trial, direct and  
10 circumstantial evidence Direct evidence is the  
11 testimony of a person who claims to have actual  
12 knowledge of a fact, such as an eyewitness It is  
13 evidence which immediately establishes the main fact to  
14 be proven

15 Circumstantial evidence is proof of a chain of  
16 facts and circumstances indicating the existence of a  
17 fact It is evidence which immediately establishes  
18 collateral facts from which the main fact may be  
19 inferred

20 Circumstantial evidence is based on inference  
21 and not on personal knowledge or observation Now, the  
22 law makes absolutely no distinction between the weight  
23 or value to be given to either direct or circumstantial  
24 evidence, nor is a greater degree of certainty required  
25 of circumstantial evidence than of direct evidence

1           You should weigh all of the evidence in this  
2 case After weighing all of the evidence if you are not  
3 convinced of the guilt of the Defendant beyond a  
4 reasonable doubt, you must find the Defendant not  
5 guilty If after weighing all of the evidence you are  
6 convinced of the guilt of the Defendant beyond a  
7 reasonable doubt, you must find the Defendant guilty

8           Necessarily you must determine the credibility  
9 of the witnesses who have testified in this case  
10 Credibility simply means believability It becomes your  
11 duty as jurors to analyze and to evaluate the evidence  
12 and determine which evidence convinces you of its truth

13           In determining the believability of the  
14 witnesses who have testified in this case, you may  
15 believe one witness over several or several over one  
16 You may believe a part of the testimony of a witness and  
17 reject the remaining part of the testimony of that same  
18 witness

19           You may believe the testimony of a witness in  
20 its entirety or reject the testimony of a witness in its  
21 entirety You may consider whether any witness has  
22 exhibited to you any interest, any bias, prejudice or  
23 other motive in this case You may also consider the  
24 appearance and manner of the witness while on the  
25 witness stand

1           The rules of evidence, as I have told you  
2 earlier, do not ordinarily permit witnesses to testify  
3 to opinions or conclusions. An exception to this rule  
4 exists for witnesses we call expert witnesses.

5           A witness, who by education and experience,  
6 has become an expert in some art, science, profession or  
7 calling may state an opinion as to relevant and material  
8 matter in which the witness claims to be an expert and  
9 may also state the reasons for the opinion.

10           You should consider any expert opinion  
11 received in evidence in this case and like any other  
12 evidence, give it the weight you think it deserves. If  
13 you decide that the opinion of an expert is not based on  
14 sufficient education or experience or if you conclude  
15 that the reasons given in support of the opinion are not  
16 sound or that the opinion is outweighed by other  
17 evidence, you may disregard the opinion entirely.

18           An expert's testimony is to be given no  
19 greater weight than that of other witnesses simply  
20 because the witness is an expert. Further, you are not  
21 required to accept an expert's opinion even though it is  
22 not contradicted.

23           A statement alleged to have been made by the  
24 Defendant has been admitted into evidence in this case.  
25 While the Court has determined that the statement is

1 admissible, I instruct you that you make the final  
2 decision as to whether or not the Defendant made the  
3 statement

4 If the Defendant did make the statement, you  
5 must determine whether the statement was made by the  
6 Defendant voluntarily and of his own free will This  
7 means that the statement was not caused by pressure,  
8 force, fear, threats, coercion or intimidation or by  
9 hope or promise of leniency or a reward of any kind

10 In determining whether the statement was  
11 voluntary, you should consider both the characteristics  
12 of the Defendant and the details of the questioning  
13 Some of the factors you may consider or must consider  
14 are

15 The age of the Defendant, the Defendant's  
16 education or lack of education, the Defendant's mental  
17 ability or capacity, the Defendant's I Q or  
18 intelligence, the Defendant's background and  
19 environment, the place and length of detention, the  
20 nature of the questioning and the advice or lack thereof  
21 to the Defendant of his constitutional rights, including  
22 but not limited to

23 The right to remain silent, that any statement  
24 could be used against him in a court of law, the right  
25 to have a lawyer present, that if he could not afford a

1 lawyer, a lawyer would be appointed to represent him  
2 without any cost and that he could stop making a  
3 statement at any time You must carefully consider all  
4 of the surrounding circumstances before you give any  
5 weight to an alleged statement

6 The State has the burden of proving beyond a  
7 reasonable doubt that the alleged statement was  
8 voluntary If you determine it was, you may give the  
9 statement any further consideration that you deem  
10 proper

11 You must decide what weight, if any, should be  
12 given to the alleged statement If you determine the  
13 alleged statement was not the free and voluntary  
14 statement of the Defendant you should not consider the  
15 statement at all

16 You have heard evidence that the Defendant was  
17 convicted of a crime, other than the one for which the  
18 Defendant is now on trial This evidence may be  
19 considered by you, if you conclude it is true, only in  
20 deciding whether the Defendant's testimony is believable  
21 and for no other purpose You must not consider the  
22 Defendant's prior record as any evidence of the  
23 Defendant's guilt on the charge we are trying today

24 In order to establish criminal liability,  
25 criminal intent is required For example, the mental

1 state required to be proven by the State for a  
2 particular crime might be purpose, intent, knowledge,  
3 recklessness, or criminal negligence

4 Criminal intent must be proven by the State  
5 beyond a reasonable doubt Criminal intent is always a  
6 matter that must be determined by the jury from the  
7 circumstances surrounding the situation

8 There is no way to mathematically prove  
9 intent There is no way that medical science can  
10 dissect a person's brain and determine what the person  
11 had in mind

12 So the law says that criminal intent may be  
13 inferred from the circumstances shown to have existed  
14 This is how you make a determination of whether or not  
15 the element requiring intent was present

16 It is not necessary to establish intent by  
17 direct and positive evidence, but intent may be  
18 established by inference in the same way as any other  
19 fact, by taking into account the acts of the parties and  
20 all the facts and circumstances of the case

21 Ladies and gentlemen, criminal intent is a  
22 mental state a conscious wrongdoing It is up to you  
23 to determine what the Defendant intended to do based on  
24 the circumstances shown to have existed

25 Criminal intent can arise from action or

1 failure to act It may arise from negligence,  
2 recklessness or an indifference to duty or to  
3 consequences that are considered by the law to be the  
4 equivalent of criminal intent

5 Now ladies and gentlemen, I appreciate your  
6 continued complete and undivided attention I am now  
7 going to begin with the substantive charges I will  
8 cover them in the order of murder, the lesser-included  
9 offense of voluntary manslaughter, then assault and  
10 battery with intent to kill, then self-defense, and then  
11 I will cover possession of a firearm during the  
12 commission of certain crimes

13 The Defendant is charged with murder The  
14 State must prove beyond a reasonable doubt that the  
15 Defendant killed another person with malice  
16 aforethought

17 Malice is hatred, ill will or hostility  
18 towards another person It is the intentional doing of  
19 a wrongful act without just cause or excuse and with an  
20 intent to inflict an injury or under circumstances that  
21 the law will infer an evil intent

22 Malice aforethought does not require that  
23 malice exist for any particular time before the act is  
24 committed But malice must exist in the mind of the  
25 Defendant just before and at the time the act is

1 committed Therefore, there must be a combination of  
2 the previous evil intent and the act

3 Malice aforethought may be express or  
4 inferred These terms express and inferred do not mean  
5 different kinds of malice, but merely the manner in  
6 which malice may be shown to exist, that is either by  
7 direct evidence or by inference from the facts and  
8 circumstances which are proved

9 Express malice is shown when a person speaks  
10 words which express hatred or ill will for another or  
11 when the person prepares beforehand to do the act which  
12 was later accomplished For example, lying in wait for  
13 a person or any other acts of preparation going to show  
14 that the deed was within the Defendant's mind would be  
15 express malice

16 Malice may be inferred from conduct showing a  
17 total disregard for human life Inferred malice may  
18 also arise when the deed is done with a deadly weapon  
19 A deadly weapon is any article, instrument or substance  
20 which is likely to cause death or great bodily harm

21 Whether an instrument has been used as a  
22 deadly weapon depends on the facts and circumstances of  
23 each case The following are examples of instruments  
24 which may be deadly weapons

25 A pistol, a shotgun, a rifle, a dirk, a

1 dagger, a knife, a slingshot, metal knuckles, razor,  
2 gasoline, a fire bomb, Molotov cocktail, lighter fluid  
3 A gun may be a deadly weapon even if it is not  
4 operating

5 If the Defendant with malice aforethought  
6 attempts to kill another person but by mistake injures  
7 or kills a different person, the Defendant still has the  
8 intent to kill

9 The intent to kill is merely transferred from  
10 the original person the Defendant attempted to kill to  
11 the actual person the Defendant killed The Defendant  
12 would be guilty of murder just as if the attempt had  
13 resulted in the death of the person the Defendant  
14 attempted to kill

15 Now, under our law, under the theory that the  
16 greater includes the lesser, there is voluntary  
17 manslaughter That is included within the charge of  
18 murder

19 To prove voluntary manslaughter, the State  
20 must prove beyond a reasonable doubt that the Defendant  
21 took the life of another in sudden heat of passion based  
22 on sufficient legal provocation Both heat of passion  
23 and sufficient legal provocation must be present at the  
24 time of the killing to constitute voluntary  
25 manslaughter

1           Sudden heat of passion may for a time affect a  
2 person's self-control and temporarily disturb a person's  
3 reason. The sudden heat of passion must be the type  
4 that would make an ordinary person unable to coolly  
5 reflect on his actions and would produce an  
6 uncontrollable impulse to do violence.

7           Sufficient legal provocation must be the type  
8 that would make a person of ordinary reason and caution  
9 become enraged and to lose control temporarily. The  
10 provocation needed for voluntary manslaughter must come  
11 from some act of or related to the victim.

12           Words alone, however vulgar or insulting, are  
13 not enough to be legal provocation. Where death is  
14 caused by the use of a deadly weapon, the words must be  
15 accompanied by some overt threatening act which could  
16 have produced the heat of passion.

17           The exercise of a legal right, no matter how  
18 offensive it is to another, is never sufficient legal  
19 provocation for voluntary manslaughter. If the heat of  
20 passion had cooled or if there was enough time between  
21 the provocation, if any, and the killing for the passion  
22 of a reasonable person to cool, the killing would not be  
23 voluntary manslaughter.

24           In deciding whether a reasonable person would  
25 have had enough time to cool off, you should consider

1 all the circumstances surrounding the killing You may  
2 consider the nature of the provocation, if any, the  
3 Defendant's mental state and physical state, and the  
4 circumstances and relationships between the parties

5 The law does not reduce from murder to  
6 manslaughter every homicide committed in the heat of  
7 passion It must be passion justly excited by legal  
8 provocation

9 If an adequate legal provocation does not  
10 exist, the killing, even in the heat of passion, is  
11 murder and not manslaughter Heat of passion alone will  
12 not suffice to reduce murder to voluntary manslaughter

13 Ladies and gentlemen, that is the charge on  
14 murder and voluntary manslaughter The next charge,  
15 this next indictment, would have to be considered  
16 separately and distinctly from the murder and voluntary  
17 manslaughter indictment

18 The next indictment would be assault and  
19 battery with intent to kill The Defendant has been  
20 charged with assault and battery with intent to kill  
21 This is the indictment as to Monique Green

22 In order to prove assault and battery with  
23 intent to kill, the State must prove beyond a reasonable  
24 doubt that the Defendant committed an unlawful act of a  
25 violent nature to the person of another with malice

1   aforethought

2           An assault occurs when a person unlawfully  
3   attempts or offers to commit a violent injury upon  
4   another person and had the present ability to complete  
5   the attempted injury

6           An assault is the intentional creation of a  
7   reasonable fear of immediate bodily harm   It is not  
8   necessary that the attempted injury or harm actually  
9   take place

10           For example, if I walk up to you and when we  
11   are at arm's length, I draw back to hit you, that is an  
12   assault   A battery is the unlawful touching of another  
13   person by a person who has committed the assault   An  
14   unlawful touching can be caused by a part of the  
15   accused's body or by any object the accused puts in  
16   motion

17           A battery is the completion of the assault by  
18   using or applying force to another person, however  
19   slight, in a rude, angry or resentful manner without  
20   legal justification for doing so   In using my earlier  
21   example, if I carry through the assault by hitting you,  
22   then that is the battery

23           Malice is hatred, ill will or hostility  
24   towards another person   It is the intentional doing of  
25   a wrongful act without just cause or excuse and with an

1 intent to inflict an injury or under circumstances that  
2 the law will infer an evil intent

3 Malice aforethought does not require that  
4 malice exist for any particular time before the act is  
5 committed, but malice must exist in the mind of the  
6 Defendant just before and at the time the act is  
7 committed Therefore, there must be a combination of  
8 the previous evil intent and the act

9 Malice aforethought may be express or  
10 inferred These terms express and inferred do not mean  
11 different kinds of malice, but merely the manner in  
12 which malice may be shown to exist That is either by  
13 direct evidence or by inference from the facts and  
14 circumstances which are proved

15 Express malice is shown when a person speaks  
16 words which express hatred or ill will for another or  
17 when the person prepared beforehand to do the act which  
18 was later accomplished

19 Again, for example, lying in wait for a person  
20 or any other act of preparation going to show that the  
21 deed was within the Defendant's mind would be express  
22 malice Malice may be inferred from conduct showing a  
23 total disregard for human life Inferred malice may  
24 also arise when the deed is done with a deadly weapon

25 If facts are proven beyond a reasonable doubt

1 sufficient to raise an inference of malice to your  
2 satisfaction, this inference would be simply an  
3 evidentiary fact to be considered by you, along with the  
4 other evidence in the case, and you may give it the  
5 weight you decide it should receive

6           A specific intent to kill is not an element of  
7 assault and battery with intent to kill, but there must  
8 be a general intent to commit serious bodily injury  
9 Intent means intending the result which actually occurs,  
10 not accidentally or involuntarily Intent may be shown  
11 by acts and conduct of the Defendant and other  
12 circumstances from which you may naturally and  
13 reasonably infer intent

14           Evidence of the character of the assault, the  
15 character of the instrument used, the manner in which it  
16 was used, the purpose to be established and the  
17 resulting wound or injuries may be considered in  
18 determining the intent with which the assault was  
19 committed

20           Intent may be inferred when it is demonstrated  
21 that the Defendant voluntarily and willfully commits an  
22 act, the natural tendency of which is to destroy  
23 another's life

24           Ladies and gentlemen, that is the charge on  
25 assault and battery with intent to kill There is no

1 lesser-included offense in that charge Again, I  
2 appreciate your continued complete and undivided  
3 attention

4 I am now going to cover the charge on  
5 self-defense Then I will go into possession of a  
6 weapon during the commission of a violent crime The  
7 Defendant has raised the defense of self-defense

8 Self-defense is a complete defense, and if it  
9 is established, you must find the Defendant not guilty  
10 The State has the burden of disproving self-defense by  
11 proof beyond a reasonable doubt

12 If you have a reasonable doubt of the  
13 Defendant's guilt after considering all of the evidence,  
14 including the evidence, if any, of self-defense, then  
15 you must find the Defendant not guilty

16 On the other hand, if you have no reasonable  
17 doubt of the Defendant's guilt after considering all  
18 evidence, including the evidence of self-defense, then  
19 you must find the Defendant guilty

20 The following elements are required to  
21 establish self-defense First, the Defendant must be  
22 without fault in bringing on the difficulty If the  
23 Defendant's conduct was the type which was reasonably  
24 calculated to and did provoke a deadly assault, the  
25 Defendant would be at fault in bringing on the

1 difficulty and would not be entitled to an acquittal  
2 based on self-defense

3           The second element   The second element of  
4 self-defense is that the Defendant was actually in  
5 imminent danger of death or serious bodily injury or  
6 that the Defendant actually believed he was in imminent  
- 7 danger of death or serious bodily injury

8           If the Defendant was actually in imminent  
9 danger, it must be shown that the circumstances would  
10 have warranted a person of ordinary firmness and courage  
11 to strike the fatal blow to prevent death or serious  
12 bodily injury

13           If the Defendant believed he was in imminent  
14 danger of death or serious bodily injury, it must be  
15 shown that a reasonably prudent person of ordinary  
16 firmness and courage would have had the same belief

17           In deciding whether the Defendant actually was  
18 or believed he was in imminent danger of death or  
19 serious bodily injury, you should consider all the facts  
20 and circumstances surrounding the crime, including the  
21 physical condition and characteristics of the Defendant  
22 and the victim

23           The Defendant does not have to show that he  
24 was actually in danger   It is enough if the Defendant  
25 believed he was in imminent danger and a reasonably

1 prudent person of ordinary firmness and courage would  
2 have had the same belief

3           The Defendant has the right to act on  
4 appearances even though the Defendant's belief may have  
5 been mistaken. It is for you to decide whether the  
6 Defendant's fear of immediate danger or death or serious  
7 bodily injury was reasonable and would have been felt by  
8 an ordinary person in the same situation. Words  
9 accompanied by hostile acts may, depending on the  
10 circumstances, establish self-defense

11           And, finally, there is no other way to avoid  
12 danger. The final element of self-defense is that the  
13 Defendant had no other probable way to avoid the danger  
14 of death or serious bodily injury than to act as the  
15 Defendant did in this particular instance

16           If the Defendant was in his place of business,  
17 the Defendant had no duty to retreat before acting in  
18 self-defense. It would have to -- the other elements  
19 would also have to be met. The Defendant had no duty to  
20 retreat if by doing so the danger of being killed or  
21 suffering serious bodily injury would increase

22           A person cannot be required to make an exact  
23 calculation as to the degree or amount of force which  
24 may be needed to avoid death or serious bodily injury  
25 Therefore, in self-defense the Defendant has the right

1 to use the force needed to avoid death or serious bodily  
2 injury

3 The force used in self-defense does not have  
4 to be limited to the degree or amount of force used by  
5 the victim. The Defendant has the right to use so much  
6 force as appeared to be necessary for complete self  
7 protection and which a person of ordinary reason and  
8 firmness would have believed to be needed to prevent  
9 death or serious bodily harm

10 If the Defendant is justified in firing the  
11 first shot, the Defendant is justified in continuing to  
12 shoot until it is apparent that the danger to his life  
13 and body has ceased. Ordinarily a defendant is not  
14 justified in shooting or employing a deadly weapon after  
15 the adversary has been disarmed or disabled

16 Finally -- this charge will not be as long as  
17 the other two -- on possession of a weapon during the  
18 commission of a violent crime. Then I will give you the  
19 form of the verdict

20 The Defendant is also charged with possession  
21 of a weapon during the commission of or attempt to  
22 commit a violent crime. The State must prove beyond a  
23 reasonable doubt that the Defendant was in possession of  
24 a firearm or visibly displayed what appeared to be a  
25 firearm during the commission of a violent crime

1           A firearm means any machine gun, automatic  
2 rifle, revolver, pistol or any weapon which will or is  
3 designed to or may be readily converted to expel a  
4 projectile

5           In order to find the Defendant guilty of  
6 possession of a weapon during the commission of a  
7 violent crime, you must first find the Defendant guilty  
8 of either committing a violent crime or attempting to  
9 commit a violent crime   Murder and voluntary  
10 manslaughter and assault and battery with intent to kill  
11 are violent crimes

12           Madame Bailiff, would you hand this form,  
13 please, to our jury foreperson so she will have it while  
14 I go over it with her

15           BAILIFF   Yes, sir

16           THE COURT   Madame Forelady, I have had the  
17 bailiff hand you -- and I will explain this form to you  
18 You will have it in front of you while I do it, as I go  
19 over the form of verdict to the jury

20           As you will see, the last case I tried was in  
21 McCormick County   I apologize, I did not notice that it  
22 did not have State of South Carolina, County of  
23 Orangeburg   I will correct that before it goes to the  
24 jury room with you

25           But you will see the caption of the case,

1 State of South Carolina versus Andre J King It will  
2 also have -- I don't know my counties, and I don't know  
3 my numbers either -- in the Court of General Sessions of  
4 the First Judicial Circuit I will also change that  
5 It has the appropriate indictment numbers and verdict  
6 form

7 You will consider the murder/voluntary  
8 manslaughter indictment and the assault and battery with  
9 intent to kill indictment separately and distinctly If  
10 you will notice it says Please check and circle the  
11 appropriate verdict below and follow the accompanying  
12 circumstances carefully

13 Number one, murder/voluntary manslaughter, we  
14 the jury by unanimous consent find the Defendant -- and  
15 on that you have three possible forms of verdict as to  
16 the charge of murder

17 If, after considering all of the evidence and  
18 applying it to the law as I have charged you the law is,  
19 you find the State has proved the Defendant guilty of  
20 murder beyond a reasonable doubt, I would ask you to  
21 check to the left of guilty of murder and then circle  
22 that, the check and guilty of murder

23 Under murder you have that lesser-included  
24 offense of voluntary manslaughter If, after  
25 considering the evidence and applying the evidence to

1 the law in the case, you determine that the State has  
2 proved its case and that the Defendant is guilty of  
3 voluntary manslaughter beyond a reasonable doubt, you  
4 would check to the left of voluntary manslaughter and  
5 circle that. On that same indictment if you find the  
6 State has failed to prove its case beyond a reasonable  
7 doubt, you would find the Defendant not guilty.

8 Ladies and gentlemen, both as to the  
9 murder/voluntary manslaughter, assault and battery with  
10 intent to kill, and possession of a weapon during the  
11 commission of a violent crime, there is no significance  
12 whatsoever in the order in which I have listed these  
13 possible forms of verdict. It's just that one must be  
14 listed before the other. So there is no significance  
15 whatsoever to that.

16 As to the assault and battery with intent to  
17 kill, you would do the same. You would consider that  
18 indictment separately and distinctly. If, by unanimous  
19 consent, you find the Defendant -- it's either guilty or  
20 not guilty of assault and battery with intent to kill.  
21 That is the charge as to Monique Green.

22 Now, as to the charge of possession of a  
23 weapon during the commission of a violent crime, you may  
24 only consider that charge if you have found the  
25 Defendant either guilty of murder or guilty of voluntary

1 manslaughter or guilty of assault and battery with  
2 intent to kill before you would even consider possession  
3 of a weapon during the commission of certain crimes or a  
4 violent crime

5 If he is found not guilty of murder/voluntary  
6 manslaughter, if he is found not guilty, and not guilty  
7 of assault and battery with intent to kill, obviously  
8 you would not consider possession of a weapon during the  
9 commission of a violent crime

10 If you find him guilty of a violent crime or  
11 two violent crimes, whatever, you would then consider  
12 the possession of a weapon, and you may find him guilty  
13 or not guilty of that

14 Your verdict must be a unanimous one All 12  
15 of you must agree on the verdict Your verdict cannot  
16 be based on sympathy, passion, prejudice, emotion or any  
17 other consideration not in evidence in this case

18 Madame Forelady, when the jury agrees on the  
19 verdict and you have checked the appropriate boxes and  
20 you have circled it, you would then sign -- if you would  
21 initial that first page -- and then sign and date that  
22 second page You will see that, but if you would also  
23 put your initials on that first page

24 Then if you would knock on the jury room door  
25 and inform the bailiff you have reached a verdict At

1 that time we will receive you back into the courtroom  
2 I will ask if you would leave that form with the bailiff  
3 when you leave

4 You must go to your jury room I must confer  
5 with the attorneys one last time outside of your  
6 presence before you will be allowed to begin your  
7 deliberations

8 What will happen now is you will go to your  
9 jury room I will confer with the attorneys I will  
10 either have to bring you out here and charge you  
11 additionally or I will have the evidence sent in, along  
12 with the verdict form

13 The alternates -- everybody on the primary 12  
14 all appear healthy and in good shape I would have the  
15 alternates brought out Then you would be informed to  
16 begin your deliberations

17 With that being said, Madame Forelady, ladies  
18 and gentlemen of the jury, if you would step to your  
19 jury room, please

20 (The jury retires to the jury room)

21 THE COURT Any additions or exceptions,  
22 Solicitor?

23 MR JEFFRIES Nothing from the State, Your  
24 Honor

25 THE COURT Mr Brown?

1 MR BROWN Nothing from the defense

2 THE COURT I proofed everything I just  
3 didn't realize that if this is Thursday, I must be in  
4 Orangeburg I will get my form of verdict, and y'all  
5 are welcome -- I made copies for y'all I didn't get  
6 them to you in advance

7 I don't send in the indictments If y'all  
8 would check the evidence, please, the exhibits As soon  
9 as I get this form cleared up, I will bring the  
10 alternates out and tell the jury to begin their  
11 deliberations Thank you very much

12 MR SCOTT Thank you, Your Honor

13 MR BROWN Thank you, Your Honor

14 (Pause)

15 THE COURT As far as the firearm, I think  
16 that is 4, and the ammunition is 5 and 6 They will not  
17 go in there at the same time If the jury needs 5 and 6  
18 to examine, they can request it Do you have any  
19 objection if the bailiff tells them that?

20 MR BROWN No objection

21 THE COURT I have already told them that  
22 once, but the firearm and ammunition does not go in at  
23 the same time If they want the ammunition, the firearm  
24 comes out Thank you very much

25 Are the exhibits correct now, Mr Solicitor?

1 MR SCOTT Yes, Your Honor

2 THE COURT Mr Brown?

3 MR BROWN Yes, sir, Your Honor

4 THE COURT If you would bring the alternates,

5 Madame Bailiff

6 (The alternates return to the courtroom and  
7 are excused)

8 (The jury commences its deliberation at  
9 11 25 a m )

10 (The following occurred at 12 35 p m )

11 THE COURT Did you have some other members of  
12 the family that you need to wait for?

13 MR JEFFRIES They are going to retrieve

14 Ms Green We will be ready to go then

15 THE COURT Is she on the way?

16 MR JEFFRIES She is, Your Honor

17 THE COURT Is she in the courthouse?

18 MR JEFFRIES I believe she is right

19 downstairs

20 (Pause)

21 MR JEFFRIES The State is prepared for the  
22 jury

23 THE COURT Madame Bailiff, if you would bring  
24 our jury please

25 BAILIFF Yes, sir

1 (The jury returns to open court to report its  
2 verdict)

3 THE COURT Madame Clerk

4 CLERK Madame forelady, have you and your  
5 jury reached a unanimous verdict?

6 FOREMAN Yes, ma'am

7 CLERK Please pass it to the bailiff

8 (Hands to Court)

9 THE COURT It appears our verdict is in  
10 proper form

11 Madame Clerk, you may publish the verdict  
12 (Whereupon the verdicts of the jury are  
13 published as follows)

14 CLERK We call the Court's attention to  
15 Indictment Number 2006-GS-38-1393, 1394, and 1395 To  
16 the charge of murder we find the Defendant guilty To  
17 the charge of assault and battery with intent to kill,  
18 we find the Defendant guilty To the charge of  
19 possession of a weapon during the commission of certain  
20 crimes, we find the Defendant guilty

21 THE COURT Madame Clerk, publish please what  
22 they find the Defendant guilty of under murder/voluntary  
23 manslaughter

24 CLERK We find the Defendant guilty of  
25 murder

1 THE COURT Thank you

2 Madame Forelady and ladies and gentlemen of  
3 the jury, if this is your verdict, so indicate by  
4 raising your right hand

5 (All jurors so indicate)

6 THE COURT All hands are raised Thank you  
7 You may put your hands down

8 Anything further for the jury, Solicitor?

9 MR JEFFRIES Nothing from the State, Your  
10 Honor

11 THE COURT Anything further from the jury  
12 from the defense?

13 MR BROWN Could we poll the jury, Your  
14 Honor?

15 THE COURT All right Madame Clerk

16 CLERK I am just going to start on this side  
17 (indicating) I will ask you two questions The first  
18 question is going to be Was this your verdict? And is  
19 it still your verdict?

20 Ma'am, was this your verdict, Madame Forelady?

21 JUROR Yes

22 CLERK Is it still your verdict?

23 JUROR Yes

24 CLERK Ma'am, was this your verdict?

25 JUROR Yes

|    |       |                               |
|----|-------|-------------------------------|
| 1  | CLERK | Is it still your verdict?     |
| 2  | JUROR | Yes                           |
| 3  | CLERK | Ma'am, was this your verdict? |
| 4  | JUROR | Yes                           |
| 5  | CLERK | Is it still your verdict?     |
| 6  | JUROR | Yes                           |
| 7  | CLERK | Sir, was this verdict?        |
| 8  | JUROR | Yes, ma'am                    |
| 9  | CLERK | Is it still your verdict?     |
| 10 | JUROR | Yes, ma'am                    |
| 11 | CLERK | Ma'am, was this your verdict? |
| 12 | JUROR | Yes                           |
| 13 | CLERK | Is it still your verdict?     |
| 14 | JUROR | Yes                           |
| 15 | CLERK | Sir, was this your verdict?   |
| 16 | JUROR | Yes                           |
| 17 | CLERK | Is it still your verdict?     |
| 18 | JUROR | Yes                           |
| 19 | CLERK | Ma'am was this verdict?       |
| 20 | JUROR | Yes                           |
| 21 | CLERK | Is it still your verdict?     |
| 22 | JUROR | Yes                           |
| 23 | CLERK | Sir, was this your verdict?   |
| 24 | JUROR | Yes                           |
| 25 | CLERK | Is it still your verdict?     |

1 JUROR Yes  
2 CLERK Sir, was this your verdict?  
3 JUROR Yes  
4 CLERK Is it still your verdict?  
5 JUROR Yes  
6 CLERK Sir, was this your verdict?  
7 JUROR Yes  
8 CLERK Is it still your verdict?  
9 JUROR Yes  
10 CLERK Sir, was this your verdict?  
11 JUROR Yes  
12 CLERK Is it still your verdict?  
13 JUROR Yes  
14 CLERK Ma'am, was this your verdict?  
15 JUROR Yes  
16 CLERK Is it still your verdict?  
17 JUROR Yes  
18 CLERK Thank you  
19 THE COURT All jurors have been polled  
20 Anything further, Mr Brown?  
21 MR BROWN Yes, Your Honor, a motion  
22 THE COURT All right Anything further for  
23 the jury?  
24 MR BROWN Oh, nothing, Your Honor, I'm  
25 sorry

1 THE COURT Thank you Mr Brown

2 Madame Forelady, and ladies and gentlemen of  
3 the jury, I never commend nor criticize a jury for the  
4 verdict because you are the judges of the facts As I  
5 told you during the charge, we have different duties and  
6 responsibilities during the trial of the case

7 However, I will say that the times I have  
8 observed you, you have been very attentive to all the  
9 parties in the case, to the witnesses to the attorneys  
10 to the Court That s very important because you cannot  
11 determine what the true facts are if you don't stay  
12 focused and attentive

13 You listened to all the parties, you applied  
14 the facts as you find them to be to the law as I  
15 indicated to you the law was, and reached a verdict that  
16 speaks the truth

17 If you ever find yourself part of the  
18 system -- I hope know you never do I hope that whoever  
19 sits on that jury, as I say if you are a witness or  
20 anything, and I hope you never find yourself part of the  
21 system that, those jurors will be just as attentive and  
22 focused and hard working as you have been throughout the  
23 trial of this case

24 You may now be excused from your jury service  
25 for this term of court It has been my pleasure and my

1 privilege to serve in Orangeburg County with y'all this  
2 week I will look forward to coming back and serving  
3 again one day again in Orangeburg County

4 You are now excused You are protected from  
5 jury service in a State court of record for the  
6 remainder of this calendar year You have that  
7 disqualification You have a two-year exemption from a  
8 State circuit court of record I imagine the check is  
9 the mail Is that right, Madame Clerk?

10 CLERK Will be

11 THE COURT The check will be in the mail  
12 Again, it has been my pleasure and my privilege to be  
13 here with y'all in Orangeburg You are now excused  
14 You may remain if you want to witness the sentencing or  
15 you are now excused for the remainder of the week

16 (The jury is excused)

17 THE COURT Mr Brown

18 MR BROWN Thank you, Your Honor May it  
19 please the Court At this time we would move for the  
20 verdict to be set aside and ask for a new trial based on  
21 my prior motions, specifically my motion for directed  
22 verdict We would also ask for judgment notwithstanding  
23 the verdict based on my prior motions and renew all my  
24 prior motions

25 THE COURT Thank you very much, Mr Brown I

1 will respectfully deny your motion for judgment  
2 notwithstanding the verdict and your renewed motion for  
3 directed verdict

4 I would reaffirm all my trial rulings and my  
5 judgment as far as a directed verdict, both at the end  
6 of the State's case and at the end of the Defendant's  
7 case As I say, I respectfully deny your motions Any  
8 others?

9 MR BROWN None, Your Honor

10 THE COURT Is there reason why sentence  
11 should not be imposed at this time?

12 MR BROWN We have none

13 THE COURT You may come around, Mr King  
14 Solicitor, do you have anything additional in  
15 regard to sentencing?

16 MR SCOTT Your Honor, you have heard  
17 Mr King's prior record We have spoken with the  
18 family They do not care to address Your Honor Your  
19 Honor has heard all the facts in this case I do have  
20 three proposed sentencing sheets

21 THE COURT All right

22 (Hands to Court)

23 THE COURT Mr Brown, I would be glad to hear  
24 from you

25 MR BROWN Thank you, Your Honor May it

1 please the Court My client Andre is 31 years old He  
2 went through the 11th grade at Holly Hill, Roberts He  
3 has his G E D

4 His family does sit out here in the audience,  
5 his mother Your Honor, we would, understanding this is  
6 quite an emotional situation, Andre has told me he does  
7 not wish to address the Court, but we would ask for the  
8 mercy of the Court

9 THE COURT Thank you Anything further,  
10 Mr Brown?

11 MR BROWN Nothing, Your Honor

12 (Pause)

13 THE COURT Mr King, what a tragic senseless  
14 act Indictment 2005-GS-38-1395, Andre J King, murder,  
15 the jury having returned a verdict of guilty, the  
16 Defendant is committed to the South Carolina Department  
17 of Corrections for a determinate term of his life  
18 without parole

19 2005-GS-38-1393, assault and battery with  
20 intent to kill, the Defendant is committed to the South  
21 Carolina Department of Corrections for a determinate  
22 term of 20 years

23 And 2005-GS-38-1394, possession of a weapon  
24 during the commission of a violent crime, the Defendant  
25 is committed to the State Department of Corrections for

1 a determinate term of five years

2 Good luck to you, Mr King

3 Solicitor, anything further?

4 MR SCOTT No, Your Honor I'm not sure it's  
5 necessary, but do we need to point out whether it's  
6 concurrent or consecutive?

7 THE COURT I have checked them concurrent

8 MR SCOTT Thank you, Your Honor

9 MR JEFFRIES Thank you, Your Honor

10 THE COURT Thank you

11 \*\*\* END OF REQUESTED TRANSCRIPT OF RECORD \*\*\*

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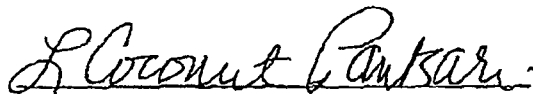
25

## C E R T I F I C A T E

I, the undersigned L Coconut Pantsari Official Reporter for the First Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal, in the Criminal Court for Orangeburg County, South Carolina on the 10th through the 13th days of September, 2007

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

January 11, 2008



Court Reporter

WITNESSES

LT RONDA BAMBERG

Arresting Agency  
Orangeburg Co Sheriff Dept

ARREST WARRANT NUMBER

H661272  
Arrested Jul 11 2005

ACTION OF GRAND JURY

TRUE BILL

*Mary J. Zeigler*  
Foreperson of Grand Jury  
Date September 14 2005

Date SEP 14 2005  
VERDICT

Foreperson of Petit Jury  
Date

DOCKET NO 2005GS38-1393

The State of South Carolina

County of

ORANGEBURG

COURT OF GENERAL SESSIONS

September 12, 2005 TERM

THE STATE  
VS

Andrae J King

Indictment for

ASSAULT AND BATTERY WITH INTENT  
TO KILL

SC Code 16-3-620  
CDR Code 0014  
Class FEL-C(V)

After being fully advised as to my legal rights I  
hereby waive presentment to the Grand Jury

Defendant

I  
hereby appear in my own proper person and  
plead guilty to the within indictment or to

Defendant

Witness

C C C PLS AND G S

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ORANGEBURG )

INDICTMENT  
2005GS38-1393

At a Court of General Sessions, convened on September 12, 2005 the Grand Jurors of Orangeburg County present upon their oath

**ASSAULT AND BATTERY WITH INTENT TO KILL**

That Andrae J King, did in Orangeburg County, on or about July 9, 2005, with malice aforethought did commit an assault and battery, upon the victim, Monique Green, by means of shooting victim with a gun, with intent to kill the said victim This offense being a violation of Section §16-3-620 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

Thomas B Scott, III

Thomas B Scott, III SOLICITOR

WITNESSES

LT RONDA BAMBERG

Arresting Agency  
Orangeburg Co Sheriff Dept

ARREST WARRANT NUMBER

H661273  
Arrested Jul 11, 2005

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date September 14 2005 SEP 14 2005

VERDICT

Foreperson of Petit Jury  
Date

DOCKET NO 2005GS38-1394

The State of South Carolina

County of

ORANGEBURG

COURT OF GENERAL SESSIONS

September 12, 2005 TERM

THE STATE  
VS

Andrae J King

Indictment for

POSSESSION OF A WEAPON DURING  
THE COMMISSION OF CERTAIN  
CRIMES

SC Code 16-23-490  
CDR Code 0549  
Class FEL-F

After being fully advised as to my legal rights I  
hereby waive presentment to the Grand Jury

Defendant

I  
hereby appear in my own proper person and  
plead guilty to the within indictment or to

Defendant

Witness

C C C PLS AND G S

STATE OF SOUTH CAROLINA  
ORANGEBURG COUNTY CLERK OF COURT

SEP 14 2005

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ORANGEBURG )

INDICTMENT  
2005GS38-1394

At a Court of General Sessions, convened on September 12 2005 the Grand Jurors of Orangeburg County present upon their oath

**POSSESSION OF A WEAPON DURING THE COMMISSION OF CERTAIN  
CRIMES**

That Andrae J King, did in Orangeburg County, on or about July 9, 2005, while committing the violent crime of murder, and/or assault and battery with intent to kill, have in his possession and/or did visibly display a firearm during the commission of the aforementioned crime(s) and as a result violated Section 16-23-490, Code of Laws of South Carolina 1976, as amended

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

Thomas B. Scott, III

Thomas B Scott, III SOLICITOR

WITNESSES

LT RONDA BAMBERG

Arresting Agency  
Orangeburg Co Sheriff Dept

APREST WARRANT NUMBER

H661271

Arrested Jul 11 2005

ACTION OF GRAND JURY

TRUE BILL

*Tracy G. Ziegler*  
Foreperson of Grand Jury

Date September 14, 2005 SEP 14 2005

Date  
VERDICT

Foreperson of Petit Jury  
Date

DOCKET NO 2005GS38-1395

The State of South Carolina

County of

ORANGEBURG

COURT OF GENERAL SESSIONS

September 12, 2005 TERM

THE STATE  
vs

Andrae J King

Indictment for

MURDER

SC Code 16-03-10  
CDR Code 0116  
Class FEL-EXM

After being fully advised as to my legal rights I  
hereby waive presentment to the Grand Jury

Defendant

I  
hereby appear in my own proper person and  
plead guilty to the within indictment or to

Defendant

Witness

C C C PLS AND G S

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ORANGEBURG )

INDICTMENT  
2005GS38-1395

At a Court of General Sessions, convened on September 12, 2005 the Grand Jurors of Orangeburg County present upon their oath

**MURDER**

That Andrae J King, did in Orangeburg County, on or about July 9, 2005, with malice aforethought, kill one Matthew Jenkins by means of shooting victim with a gun, and the said victim did die as a proximate result thereof This offense being in violation of the Common Law of South Carolina, and Section 16-3-10 of the Code of Laws of South Carolina, as amended

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

Thomas B Scott, III

Thomas B Scott, III SOLICITOR

COUNTY OF ORANGEBURG  
STATE VS

INDICTMENT/CASE#

ANDRAE J KING

2005-GS-38 1393

AKA

A/W# H661272

Race B

Sex M

Age

Date of Offense 7/9/05

DOI

SS

S C Code § 16-3-620

Address

CDR Code # 0014

City State Zip

SENTENCE SHEET

DL#

SID#

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS  
TO **ASSAULT AND BATTERY WITH INTENT TO KILL**

in violation of § 16-3 620 of the S C Code of Laws bearing CDR Code # 0014

☐ NON VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS (CSC  
w/minor 1<sup>st</sup> or Lewd Act)☐ §17 25 45

The charge is ☒ As Indicted ☐ Lesser Included Offense ☐ Defendant Waives Presentment to Grand Jury \_\_\_\_\_ (Defendant initial)  
The plea is ☒ Without Negotiations or Recommendation ☐ Negotiated Sentence ☐ Recommendation by the State  
ATTEST

Thom B Scott, III  
Solicitor

Defendant

Attorney for Defendant

WHEREFORE the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,  
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years  
and/or to pay a fine of \$ \_\_\_\_\_ provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_ plus  
costs and assessments as applicable\* the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina  
Department of Probation Parole and Pardon Services standard conditions of probation which are incorporated by reference  
☒ CONCURRENT or ☐ CONSECUTIVE to sentence on  
☐ The Defendant is to be given credit for time served pursuant to S C Code §24-13-40 to be calculated and applied by the State  
Department of Corrections  
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S C Code §17 25-135

## SPECIAL CONDITIONS

☐ RESTITUTION ☐ Heard ☐ Waived ☐ Ordered

Total \$ \_\_\_\_\_ plus 20% fee \$ \_\_\_\_\_

Payment Terms

☐ set by SCDPPPS

Recipient

|                                        |         |          |
|----------------------------------------|---------|----------|
| Fine                                   | \$      |          |
| \$14-1 206 (Assessments 107 5%)        | \$      |          |
| \$14-1-211(A)(1) (Conv Surcharge)      | \$100   | \$100.00 |
| \$14-1 211(A)(2) (DUI Surcharge)       | \$100   | \$       |
| \$56-5 2995 (DUI Assessment)           | \$12    | \$       |
| \$35 13 (Public Def/Prob)              | \$500   | \$       |
| \$73 3 1B TP (Law Enforce Funding)     | \$25    | \$25.00  |
| \$33 7 1B TP (Drug Court Surcharge)    | \$100   | \$       |
| \$50 21-114(BUI Breath Test Fee)       | \$50    | \$       |
| \$56-5-2942(J) (Vehicle Assessment)    | \$40/ea | \$       |
| 3% to County (if paid in installments) | \$      | \$       |
| TOTAL                                  | \$      | \$128.75 |

PTUP

\_\_\_\_\_ days/hours Public Service Employment

Obtain GED

Attend Voc Rehab or Job Corp

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd in equal consecutive weekly/monthly

pmts of \$ \_\_\_\_\_ beginning

\$ \_\_\_\_\_ paid to Public Defender Fund

Other

☐ Appointed PD or appointed other counsel, \$35 13 TP  
Requires \$500 be paid to Clerk during probation

Court Reporter

PRESIDING JUDGE

Judge Code

Sentence Date

ATTEST TRUE COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF ORANGEBURG

INDICTMENT/CASE#

STATE VS

2005-GS-38-1394

ANDRAE J KING

A/W# H661273

AKA

Date of Offense 7/9/05

Race B

Sex M

Age

S C Code § 16-23-490

DOB

SS#

CDR Code # 0549

Address

City State Zip

DL#

SID#

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO **POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME**

in violation of § 16-23-490 of the S C Code of Laws bearing CDR Code # 0549

☒ NON VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1<sup>st</sup> or Lewd Act) ☐ §17 25 45

The charge is ☒ As Indicted ☐ Lesser Included Offense ☐ Defendant Waives Presentment to Grand Jury \_\_\_\_\_ (Defendant initial)  
The plea is ☒ Without Negotiations or Recommendation ☐ Negotiated Sentence ☐ Recommendation by the State  
ATTEST

Thom B Scott, III  
Solicitor

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Attorney for Defendant

WHEREFORE the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_ provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_ plus costs and assessments as applicable\* the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation Parole and Pardon Services standard conditions of probation which are incorporated by reference

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on

☐ The Defendant is to be given credit for time served pursuant to S C Code §24-13 40 to be calculated and applied by the State Department of Corrections

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S C Code §17 25-135

## SPECIAL CONDITIONS

☐ RESTITUTION ☐ Heard ☐ Waived ☐ Ordered

Total \$ \_\_\_\_\_ plus 20% fee \$ \_\_\_\_\_

Payment Terms \_\_\_\_\_

☐ set by SCDPPPS \_\_\_\_\_

Recipient \_\_\_\_\_

Fine \$ \_\_\_\_\_

\$14 1-206 (Assessments 107 5%) \$ \_\_\_\_\_

\$14 1 211(A)(1) (Conv Surcharge) \$100 \$ 100.00

\$14 1-211(A)(2) (DUI Surcharge) \$100 \$ \_\_\_\_\_

\$56 5 2995 (DUI Assessment) \$12 \$ \_\_\_\_\_

\$35 13 (Public Def/Prob) \$500 \$ \_\_\_\_\_

\$73 3 1B TP (Law Enforce Funding) \$25 \$ 25.00

\$33 7 1B TP (Drug Court Surcharge) \$100 \$ \_\_\_\_\_

\$50-21 114(BUI Breath Test Fee) \$50 \$ \_\_\_\_\_

\$56 5 2942(J) (Vehicle Assessment) \$40/ea \$ \_\_\_\_\_

3% to County (if paid in installments) \$ \_\_\_\_\_

TOTAL \$ 128.75

PTUP

\_\_\_\_\_ days/hours Public Service Employment

Obtain GED \_\_\_\_\_

Attend Voc Rehab or Job Corp \_\_\_\_\_

May serve W/E beginning \_\_\_\_\_

Substance Abuse Counseling \_\_\_\_\_

Random Drug/Alcohol Testing \_\_\_\_\_

Fine may be pd in equal consecutive weekly/monthly

pmts of \$ \_\_\_\_\_ beginning \_\_\_\_\_

\$ \_\_\_\_\_ paid to Public Defender Fund

Other \_\_\_\_\_

☐ Appointed PD or appointed other counsel, §35 13 TP

Requires \$500 be paid to Clerk during probation

Chamie L. Harris  
Court Reporter

F. Coconut  
Clerk of Court/Deputy Clerk

PRESIDING JUDGE John M. Thompson

Judge Code \_\_\_\_\_

Sentence Date 13 September 07

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF ORANGEBURG

INDICTMENT/CASE#

STATE VS

2005-GS-38-1395

ANDRAE J KING

A/W# H661271

AKA

Date of Offense 7/9/05

Race B

Sex M

Age

S C Code § 16-3-10

DOB - -

SS#

CDR Code # 0116

Address

City State Zip

DL#

SID#

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS  
TO **MURDER**

in violation of § 16-3-10 of the S C Code of Laws bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS☐ Mandatory GPS (CSC  
w/minor 1<sup>st</sup> or Lewd Act)☐ §17 25 45The charge is ☒ As Indicted ☐ Lesser Included Offense ☐ Defendant Waives Presentment to Grand Jury \_\_\_\_\_ (Defendant initial)The plea is ☒ Without Negotiations or Recommendation ☐ Negotiated Sentence ☐ Recommendation by the State

ATTEST

Thom B Scott, III  
Solicitor

Defendant

Attorney for Defendant

WHEREFORE the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,for a determinate term of WOP days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years

and/or to pay a fine of \$ \_\_\_\_\_ provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_ plus

costs and assessments as applicable\* the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation Parole and Pardon Services standard conditions of probation which are incorporated by reference

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

## SPECIAL CONDITIONS

☐ RESTITUTION ☐ Heard ☐ Waived ☐ Ordered

PTUP

Total \$ \_\_\_\_\_ plus 20% fee \$ \_\_\_\_\_

\_\_\_\_\_ days/hours Public Service Employment

Payment Terms

☐ set by SCDPPPS

Obtain GED

Attend Voc Rehab or Job Corp

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd in equal consecutive weekly/monthly

pmts of \$ \_\_\_\_\_ beginning

\$ \_\_\_\_\_ paid to Public Defender Fund

Other

☐ Appointed PD or appointed other counsel, §35 13 TP

Requires \$500 be paid to Clerk during probation

Recipient

\*Fine

§14-1-206 (Assessments 107 5%)

§14 1 211(A)(1) (Conv Surcharge)

§14-1 211(A)(2) (DUI Surcharge)

§56 5-2995 (DUI Assessment)

§35 13 (Public Def/Prob)

§73 3 1B TP (Law Enforce Funding)

§33 7 1B TP (Drug Court Surcharge)

§50-21-114(BUI Breath Test Fee)

§56 5 2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

|         |    |        |
|---------|----|--------|
|         | \$ |        |
|         | \$ |        |
| \$100   | \$ | 100.00 |
| \$100   | \$ |        |
| \$12    | \$ |        |
| \$500   | \$ |        |
| \$25    | \$ | 25.00  |
| \$100   | \$ |        |
| \$50    | \$ |        |
| \$40/ea | \$ |        |
|         | \$ | 375    |
|         | \$ | 128.75 |

PRESIDING JUDGE

Judge Code

Sentence Date

Court Reporter

Clerk of Court Deputy Clerk

2010-CP-38-1137549

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of OrangeburgAndre King 258599  
Full name and prison number (if any) of Applicant

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

**INSTRUCTIONS - READ CAREFULLY**

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

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

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

- 1 Place of detention Lieber Corp. Inst., po Box 205  
Ridgeway, SC
- 2 Name and location of Court which imposed sentence Orangeburg County General Session
- 3 Name(s) of co-defendant(s) (if any) NONE
- 4 The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed
  - (a) 05-65-38-1393, 1395, poss of a weapon, murder
  - (b) assault/battery w/ intent to kill

- (c) \_\_\_\_\_
- 5 The date upon which sentence was imposed and the terms of the sentence
- (a) Sept 13, 2007 5 years weapons
- (b) Same 20 years Assault/Batter w/E kill
- (c) Same Life without parole Murder
- 6 Check whether a finding of guilty was made
- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty ☒ \_\_\_\_\_
- (c) after a plea of nolo contendere \_\_\_\_\_
- 7 Did you appeal from the judgment of conviction or the imposition of sentence?  
yes
- 8 If you answered "yes" to (7) list
- (a) the name of each Court to which you appealed
- I South Carolina Court of Appeals
- II \_\_\_\_\_
- III \_\_\_\_\_
- (b) the result in each such Court to which you appealed
- I denied relief
- II \_\_\_\_\_
- III \_\_\_\_\_
- (c) the date of each such result
- I April 26, 2010
- II \_\_\_\_\_
- III \_\_\_\_\_
- (d) if known citations of any written opinion or orders entered pursuant to such results
- I 2010-UP-254
- II \_\_\_\_\_
- III \_\_\_\_\_
- 9 If you answered 'no' to (7) state your reasons for not so appealing
- (a) N/A
- (b) \_\_\_\_\_

- (c) \_\_\_\_\_
- 10 State concisely the grounds on which you base your allegation that you are being held in custody unlawfully
- (a) Ineffective Assistance of Counsel
- (b) Denial of 6<sup>th</sup> Amendment
- (c) Denial of 14<sup>th</sup> Amendment
- 11 State concisely and in the same order the facts which support each of the grounds set out in (10)
- (a) Counsel failed to perform pretrial investigation and
- (b) object to numerous trial errors that denied
- (c) petitioner his right to a fair 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 N/A
- II \_\_\_\_\_
- III \_\_\_\_\_
- IV \_\_\_\_\_
- (b) the name and location of the Court in which each was filed
- I N/A
- II \_\_\_\_\_
- III \_\_\_\_\_
- IV \_\_\_\_\_

(c) the disposition thereof

I

*N/A*

II

III

IV

(d) the date of each such disposition

I

*N/A*

II

III

IV

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

I

*N/A*

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?

*first filing Post Conviction Relief*

- 15 If you answered 'yes' to (14) identify

(a) which grounds have been presented

I

*N/A*

II

III

(b) the proceedings in which each ground was raised

I

*N/A*

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)

*first filing of PCR*

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

(a)

(b)

(c)

(d)

(e)

your arraignment and plea? *yes*

your trial if any? *yes*

your sentencing? *yes*

your appeal if any from the judgment of conviction or the imposition of sentence? *yes*

preparation presentation or consideration of any petitions motions or applications with respect to this conviction which you filed?

*yes*

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

(a)

i

ii

iii

the name and address of each attorney who represented you

*Michael R. Culkin Jr. Esq.*  
*Andrew J. Brown Esq.*

*SAME*

~~same~~ *Robert Sacket Esq.*  
*Office of Appellate Defense*

(b)

i

ii

iii

the proceedings at which each such attorney represented you

*trial*

*Sentencing*

*Direct Appeal*

19 State clearly the relief you seek in filing this application

vacate Sentences and Conviction and demand  
for new Trial

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

No

STATE OF SOUTH CAROLINA )

County of Dorchester )

VERIFICATION

I Andie King 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

Andie King

SWORN to and subscribed before me this

day of

64th  
August 2010

Sylvia Jones (L S)  
Notary Public

My Commission Expires

1/24/2018

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

I Andre Lino 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.

Andre Lino  
Applicant

SWORN or affirmed to and subscribed before me this

6th day of August 2010

Sylvia Jones  
Notary Public

My Commission Expires 1/24/2018

STATE OF SOUTH CAROLINA                    )    IN THE COURT OF COMMON PLEAS  
COUNTY OF ORANCEBURG                    )

Andre King #258599                         )    Ca/No 2010-Cp-38-1137  
Petitioner,                                         )  
          -V-                                         )    **AMENDED POST CONVICTION RELIEF**  
State of South Carolina                         )    **APPLICATION PURSUANT TO**  
Respondent,                                         )    **RULE 15, SCRPC**  
\_\_\_\_\_ )

COMES NOW, Andre King, b, and through attorney of record who respectfully moves this Honorable Court to amend the above captioned case number in the Original application pursuant to Rule 15, SCRCiv.P

Respectfully Submitted,

/s/ Andre King  
Andre King

IS SUP (A) WAS COUNSEL INEFFECTIVE FOR CONCEDED PETITIONER'S GUILT IN CLOSING ARGUMENT TO THE JURY?

### FACTS

At the onset of the trial the Court told the jury that the Defendant has pled [not guilty] to these indictments. The State therefore has the burden of proving each of the elements of the indictments beyond a reasonable doubt [Tr p 111, l 15-18]

During closing summation to the jury the Solicitor made the following argument as was recorded

The first thing the Defendant is charged with murder. You have heard the definition. Murder is defined as the unlawful killing of another with **malice** aforethought, either express or **implied** [Tr p 466, L 23-25, p 467, L 1]

As you were told in the beginning, an example of **implied malice** is the use of a deadly weapon. You have to ask yourself: Is there any question that a nine-millimeter pistol is a deadly weapon? Because if you find that he was in possession and used a nine-millimeter pistol to commit this unlawful killing, that's malice, which makes him guilty of murder [Tr p 467, L 24-25, p 468, L 1-6]

Again, you had an example of express malice, 'Monique Green has to die'. And express malice with the use of a deadly weapon -- I'm sorry -- implied malice with the use of a deadly weapon [Tr p 472, L 13-16]

It is essential for the State to prove **malice**, in such that Petitioner was charged with murder and assault and battery with intent to kill. Both offenses carry the [same] elements, and the

only difference between the two offenses is that someone dies as a result of the assault and battery with intent to kill. The Solicitor has successfully told the jury that they could imply malice simply from the fact that Petitioner had a nine-millimeter pistol and the jury had to look no further to find malice.

Coming directly after the Solicitor's just finished argument, Petitioner's counsel made the following argument as was recorded:

But we are [not contesting] the assault and battery with intent to kill on Monique Green. We are [not contesting that charge]. We are [not contesting the weapons charge] [Tr p 482, L 15-18]

Ladies and gentlemen, it is our position -- we apologize to Ms. Green. Clearly we do not contest the assault and battery with intent to kill or the weapons charge [Tr p 485, L 17-20]

As is seen supra, counsel has just overrode Petitioner's plea of [not guilty] as simply told the jury, 'yes, Petitioner is guilty' (emphasis supplied). Coming directly after Counsel's admissions regarding the guilt of Petitioner, the Solicitor Mr. Jeffries made the following statement to the jury as was recorded:

Jeffries: Mr. Brown got up here and told you they are **not contesting** the assault and battery with intent to kill. They concede that. They are **not contesting** the [Tr p 486, L 11-14]

As is seen above the Solicitor exploited counsel's concession to maximum by telling the jury that 'counsel conceded to the guilt of the assault and battery with intent to kill and the weapons charge and that **malice is implied** simply because Petitioner was in possession of a pistol

The Solicitor further argued that malice could be implied simply from the use of a deadly weapon and to maximize the argument the Solicitor told the jury it would be an insult to the victim's family to find Petitioner guilty of voluntary manslaughter [Tr p 496, L 23-25, p 497, L 1]

Counsel's concession to the jury regarding factual issues in dispute opened the door for the solicitor to argue the following to the jury

Either version you believe, he is guilty of murder because he had malice in his heart. You heard the express malice. She has got to die. Again, implied malice is the use of a deadly weapon [Tr p 496, L 23-25, p 497, L 1]

To find him guilty of voluntary manslaughter would be an insult to the family of Matthew Jenkins [Tr p 497, L 19-21]

I submit if you speak the truth, the only truthful verdict you can bring in this case is he is guilty of **murder**, he is guilty of assault and battery with intent to kill, and he is guilty of possession of a weapon during a violent crime [Tr p 499, L 17-21]

Coming directly after closing summation of both counsels the trial court [again] told the jury "the Defendant has pled [not guilty] to these indictments, and that plea puts the burden on the State to prove the Defendant guilty [Tr p 500, L 21-24]

Petitioner asserts that that State's burden was not only substantially lightened but completely removed when counsel conceded that there was no doubt, Petitioner is guilty. Petitioner asserts that he was denied the effective assistance of trial counsel when counsel [overrode] his plea of [not guilty] and told the jury there was no reasonable doubt concerning Petitioner's guilt and innocence and as a result Petitioner was denied his Fourteenth Amendment right to a fair trial.

#### DISCUSSION

Petitioner asserts that he was denied his right to the effective assistance of counsel when his court appointed attorney conceded in his argument to the jury that there was reasonable doubt regarding factual issues in dispute.

The adversarial process protected by the Sixth Amendment requires that the accused has counsel acting in the role of an advocate. Angers v. California, 87 S Ct 1346 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted even if the defense may have demonstrated errors, the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. United States v. Cronin, 465 U.S. 416 556-57, 104 S Ct 1145-46.

Petitioner further asserts that a criminal defendant is also protected from unfairness in the criminal process by the due process requirement that his guilt be "proved beyond a reasonable doubt."

The United States Supreme Court has explicitly held "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 90 S Ct 1068 (1970). The Supreme Court has also stated that due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. Speiser v Randall, 38 S Ct 1332 (1958). When a defense attorney concedes that there is [no reasonable doubt] concerning factual issues in dispute, i.e. whether or not Petitioner is guilty of the crimes he is on trial for, the Government has not been held to its burden of persuading the jury that the defendant is guilty.

The Supreme Court further recognized in Cronic that there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Cronic 104 S Ct at 2046. The Court identified the complete denial of counsel or the deprivation of effective representation at a critical stage of an accused's trial as justifying a presumption of prejudice. Id. 104 S Ct at 2017.

The Strickland test requiring a showing of prejudice caused by counsel's ineffectiveness, is applicable (1) in cases where

The record reflects that an attorney's errors or omissions occurred during an inept attempt to present a defense, or that he/she engaged in an unsuccessful maneuver that was intended to assist the defendant in obtaining a favorable ruling (citing U.S. v. Swanson, 943 F.2d 1070, 1073 (1991)).

Petitioner asserts that counsel's conduct caused a complete breakdown in the adversarial system of justice in this case that compels this Court to apply the Cronic exception to the Strickland requirement of a showing that the outcome of the trial would have been different without counsel's errors or omissions. See Cronic, 104 S.Ct. at 204. Counsel's concession in his argument to the jury that Petitioner was **no doubt guilty** of the assault and battery with intent to kill charge, or the weapons charge [Tr. p. 482, l. 15-18], overrode Petitioner's plea of not guilty and told the jury that they could convict Petitioner and not feel bad about it. Clearly, counsel's concession opened the door for and also allowed the jury to convict Petitioner of murder as well as the assault and battery with intent to kill and the weapons charge. Clearly, counsel's concession undermined the integrity of the trial itself. The Supreme Court instructed in Cronic that if counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. Cronic, 104 S.Ct. at 204.

Counsel's statements to the jury was not merely a negligent mistake in an attempt to further Petitioner's cause. In concession that Petitioner was guilty of the assault and battery

with intent to kill and the weapons charge was a clear abandonment of the defense of Petitioner at a critical stage of the criminal proceeding.

In Herring v. New York, 95 S Ct 2550 (1975), the Supreme Court recognized the importance of the opening and closing argument to a criminal defendant. The Court found that a New York law which allowed every judge in a non-jury criminal trial to deny counsel any opportunity to make a closing argument deprived the accused of his constitutional right to the assistance of counsel. Id. 95 S Ct 2556.

A lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding one of the factual issues that are in dispute has utterly failed to subject the prosecution's case to meaningful adversarial testing. U.S. v. Cronin, 104 S Ct. at 2047. The tenth Circuit has recognized that an attorney who adopts and acts upon a belief that his client should be convicted fails to function as the Government's adversary. Osborne v. Millinger, 861 F.2d 1124 (10 Cir. 1988) (quoting Cronin 104 S Ct. at 2051). In the instant case counsel's statement conveyed to the jury his belief was that Petitioner was guilty (emphasis supplied). Here counsel failed to function as the Government's adversary during closing summation to the jury. The action of counsel made it irrelevant to charge the jury with doubt as to whether or not the Government told the jury, Petitioner is guilty of assault and battery with intent to kill and the weapons charge thus leaving only the

charge of murder for the jury to consider, yet counsel's admission that Petitioner is guilty of assault and battery with intent to kill and the weapon charge clearly told the jury Petitioner was guilty of murder as well, as the only difference between murder and assault and battery with intent to kill is that someone actually dies. Counsel's concession clearly gave the jury an easy nook to hang a guilty verdict on the murder charge as well. Here, counsel in effect said Petitioner is guilty of all the offense within which he is charged and members of the jury should find Petitioner guilty and not feel bad about it. This argument by counsel not only fails to uphold the responsibility of defense counsel, but it is also wrong from another standpoint. As there are many cases that uphold admonitions by the trial courts that defense counsel is not to inform the jury of his opinion of the guilt or innocence of the accused.

Customarily this is when defense counsel asserts, in effect "I believe this man is innocent because otherwise I would not be here defending him." This is universally held to be an improper argument. See United States v. Young, 105 S.Ct. 1012 (1984) (defense counsel like the prosecutor must refrain from interjecting personal beliefs into the presentation of his case). United States v. Warfield, 700 F.2d 420 (11th Cir. 1983) (lawyer's assertion of personal opinion during trial is an example of improper advocacy). United States v. Singer, 660 F.2d 1295 (6th Cir. 1981) (a personal expression of a defendant's culpability which an extraneous and irrelevant issue before the jury is

objectionable), United States v. Alanis, 611 F.2d 123 (5th Cir.) (an attorney may not express his personal opinion regarding a defendant's guilt), United States v. Bess, 593 F.2d 749 (6th Cir. 1979) (personal opinions of counsel have no place at trial'), United States v. Cair, 544 F.2d 1113 (1st Cir. 1976) (it is, of course, elementary that statements of counsel as to personal belief or opinions are improper)

Here trial counsel is just as much invading the province of the jury as well as denying Petitioner his Due Process Rights to a fair trial. The defense counsel had several options on what to say in reviewing the evidence that would have been helpful to Petitioner. Counsel could have emphasized that in our system of justice a defendant can only be found guilty if his guilt is found beyond a reasonable doubt, and why that is an important factor in our system of justice. He could have then said: You members of the jury you have heard the evidence in this short trial and if you listened closely, the State has not proven murder, assault and battery with intent to kill, and possession of a weapon.

Of course it is up to you to evaluate the evidence and perform your vital responsibilities in determining whether the State has prov[ed] its case beyond a reasonable doubt. Or counsel could have simply pointed out the inconsistencies and weaknesses in the prosecution's case.

Counsel certainly was not obligated nor ethically authorized to tell the jury what he did, and to do so denied Petitioner any

meaningful defense at a critical stage of the trial. Petitioner argues this issue under the standard set forth in U.S. v. Cronin, 104 S.Ct. 2039 to 2051, therefore no prejudice has to be specified, yet the prejudice incurred is readily apparent by counsel's closing argument which denied Petitioner a fair trial and the right to the effective assistance of counsel.

For the aforementioned reasons Petitioner respectfully prays this Court will grant the requested relief of a new trial.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S JURY INSTRUCTIONS THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF DUE PROCESS.

ISSUE (C) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY THEY COULD ACCEPT OR REJECT THE INFERENCE OF MALICE FROM THE USE OF A DEADLY WEAPON?

To save the Court's time, Petitioner will argue these issues together since the facts of one encompass the other

#### FACTS

Petitioner asserts that he was denied the effective assistance of counsel when counsel failed to object to the trial court's jury instructions that shifted the burden of proof

Petitioner asserts that the evidence presented during trial presented a jury question on self-defense and therefore it was error to charge the jury that malice may be inferred from the use of a deadly weapon. This error was compounded by trial counsel [twice] ~~conceding~~ to the jury that Petitioner was [not contesting] the weapons charge, or the assault and battery with intent to kill [Tr p 482, L 15-18, p 485, L 17-20] (emphasis supplied)

In opening summation the Prosecution argued the following as was recorded

Murder is the unlawful killing of another with malice aforethought, either express or implied. The key to that phrase, ladies and gentlemen, is the word malice. What does malice mean? [Tr p 119, L 21-25, p 120, L 1]

The law recognizes implied malice. Suffice to it to say, the mere use of a deadly weapon by itself is evidence of malice [Tr p 120, L 14-15]

The other point of law I want to talk about is assault and battery with intent to kill is an unlawful act of violent injury to the person of another with malice aforethought, express or implied. Basically it South Carolina's version of attempted murder [Tr p 120, L 23-25, p 121, L 1-3]

As is seen supra the Prosecution has successfully told the jury they could find Petitioner guilty of murder simply because the law recognizes implied malice from the mere use of a deadly weapon. The Prosecution further argued the following in closing summation:

The first thing the Defendant is charged with is murder. You have heard the definition. Murder is defined as the unlawful killing of another with malice aforethought, either express or implied. It's the killing of another with malice aforethought, either express or implied [Tr p 466, L 23-25, p 467, L 1-3]

As you were told in the beginning, an example of implied malice is the use of a deadly weapon. You have to ask yourself is there any question that a nine-millimeter pistol is a deadly weapon? Because if you find that he was in possession and used a nine-millimeter pistol to commit this unlawful killing, that's malice, which makes him guilty of murder [Tr p 467, L 24-25, p 468, L 1-6]

And express malice with the use of a deadly weapon -- I'm sorry -- implied malice from the use of a deadly weapon [Tr p 472, L 14-16]

And implied malice is the use of a deadly weapon [Tr p 496, l 25 p 497 L 1]

As is seen supra in the Prosecution's opening and closing summation the Prosecution belabors that the law implies malice from the use of a deadly weapon. Coming directly after the Prosecution's closing the Trial Court instructed the jury on the offense of murder as was recorded.

The Defendant is charged with murder. The State must prove beyond a reasonable doubt that the Defendant killed another person with malice aforethought.

Malice is hatred, ill will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury under the circumstances that the law will infer an evil intent.

Malice aforethought does not require malice to exist for any particular time before the act is committed. But malice must exist in the mind of the Defendant just before and at the time the act is committed. Therefore, there must be a combination of a previous evil intent and the act.

Malice aforethought may be express or inferred. These terms express and inferred do not mean different kinds of malice, but merely the manner in which malice may be shown to exist, that is either by direct evidence or by inference from the facts and circumstances which are proved.

Express malice is shown when person

speaks words which express hatred or ill will for another or when the person prepares beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the Defendant's mind would be express malice.

Malice can be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm.

Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. The following are examples of instruments which may be deadly weapons: A pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a slingshot, metal knuckles, razor, gasoline, a firebomb, Molotov cocktail, lighter fluid. A gun may be a deadly weapon even if it is not operating.

If the Defendant with malice aforethought attempts to kill another person but by mistake injures or kills a different person, the Defendant still has the intent to kill.

The intent to kill is merely transferred from the original person the Defendant attempted to kill to the actual person the Defendant killed. The Defendant would be guilty of murder just as if the attempt had resulted in the death of the person the Defendant attempted to kill. [1r p 511, L 13-25, p 512, L 1-25, p 513, L 1-14]

#### DISCUSSION

Petitioner asserts that trial counsel's performance was deficient because counsel failed to object to the jury instructions that shifted the burden on the murder charge that

resulted in a "mandatory" presumption when the trial Court failed to instruct the jury they either **accept or reject** the inference of malice from the use of a deadly weapon See State v Peterson, 287 S C 244, 335 S.E.2d 800 (1985)

In Sandstrom v Montana, 442 U S 510 (1979), the United States Supreme Court held that a jury instruction creating a mandatory presumption regarding malice was violative of a defendant's due process rights as it impermissibly shifted the burden of proof from the State to the accused. Further, in adopting the holding in Sandstrom, the South Carolina Supreme Court determined that a mandatory presumption of malice charge, rather than one creating a permissive inference, constitutes reversible error. Carter v. State, 301 S C 396, 392 S E 2d 184 (1990) citing State v Elmore, 279 S C 417, 308 S E 2d 781 (1983)

The Court in Carter further found trial counsel to be ineffective in failing to object to such a charge Carter v State, 392 S E 2d at 185. The South Carolina Supreme Court held in High v State, 300 S.C 88, 386 S E 2d 463 (1989), such a mandatory presumption of malice has been prohibited at least since 1979, when Sandstrom v Montana [citation omitted] was decided. See also Carter v State, supra (counsel ineffective in failing to object to malice instruction even though case was tried prior to State v Elmore, supra)

The Fourteenth Amendment requires that the state prove every element of every crime charged beyond a reasonable doubt. The

accused is deprived of his due process rights if the burden of proof is shifted, requiring him to prove lack of an element such as malice Sandstrom to determine whether a jury instruction denies the accused of his due process rights 'depends upon the way in which a reasonable juror could have interpreted the instruction' Sandstrom, 442 U S at 514. The rule in this State is clear, "a judge should make it clear to the jury that it is free to accept or reject these permissive inferences depending on its view of the evidence Peterson, 335 S E 2d at 602 Elmore, 308 S E 2d 181 (1983)

In the instant case it cannot be contested that when the trial Court charged the jury on the offense of murder the Court not only echoed the Prosecution's just finished closing argument that the jury could "infer malice simply from the use of a deadly weapon", yet, the Court failed to instruct the jury they were free to **accept or reject** the inference based upon their view of the evidence. Petitioner asserts that was counsel ineffective for failing to object to the burden shifting jury instructions on malice that denied Petitioner his Sixth Amendment Right to the effective assistance of counsel and his due process rights to a fair trial.

For the aforementioned reasons, Petitioner respectfully prays this Honorable Court will grant the requested relief of a new trial.

ISSUE (D) WAS COUNSEL INEFFECTIVE FOR FAILING TO REQUEST A KING INSTRUCTION?

FACIS

Petitioner asserts he was denied the effective assistance of trial counsel when counsel failed to request the trial Court give the King charge

During the trial of Petitioner the trial Court charged the jury on the crimes of MURDER and MANSLAUGHTER See [Tr.p 511, L.14-25, p 512, L 1-25, p 513, L 1-25, p 514, L 1-25, p 515, L.1-17]

Petitioner further asserts counsel's failure to request the King instruction denied Petitioner the benefit of reasonable doubt and denied him a fair trial that is protected under the Fourteenth Amendment

DISCUSSION

In State v King, the Court held that where the offenses of murder and manslaughter are submitted, the jury must be instructed that "if they had any reasonable doubt as to whether the defendant was guilty of murder or manslaughter, it was their duty to resolve that doubt in his favor, and find him guilty of the lesser included offense " 158 S C 251, 291, 155 S E 409, 426 (1930) See, also State v Jackson, 389 S E 2d 650 (S C 1990), accord Carter v State, 392 S E 2d at 185, wherein counsel was found ineffective for failing to request the King

charge In the instant case counsel did not request such an instruction and failure constitutes ineffective assistance of counsel I Therefore, Petitioner respectfully prays this Court will grant the requested relief of a new trial

ISSUE (E) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S JURY INSTRUCTIONS ON SELF-DEFENSE THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF DUE PROCESS?

#### FACTS

During the trial of Petitioner, the Trial Court charged the jury on the crimes of Murder and Manslaughter, as well as on Self-defense. During the self-defense charge the judge gave the following instructions:

I am now going to cover the charge on self-defense. Then I will go into possession of a weapon during the commission of a violent crime. The Defendant has raised the defense of self-defense.

Self-defense is a complete defense, and if it is established you must find the defendant not guilty. The State has the burden of disproving self-defense by proof beyond a reasonable doubt.

If you have reasonable doubt after considering all of the evidence, including the evidence, if any, of self-defense, then you must find the defendant not guilty.

On the other hand, if you have no reasonable doubt of the Defendant's guilt after considering all the evidence, including the evidence of self-defense, then you must find the Defendant guilty. [Tr. p. 519, L. 4-19]

Petitioner asserts that it is upon "the State to prove every element of the offense charged" and that Petitioner was [not required] to prove anything (emphasis supplied). Especially whether he acted in self-defense, as that was a fact to be determined by the jury. Yet, the trial Court told the jury that

[if Petitioner] had established self-defense, they (the jury) could find him not guilty. This charge to the jury regarding self-defense must be considered by the jury along with all the other instructions given to the jury, including, but not limited to the instructions on malice and although certain portions of the malice charge may not be incorrect, it is so deceased with burden shifting presumptions that it violates due process and the holdings of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979), and counsel should have objected.

#### DISCUSSION

Petitioner asserts that under South Carolina law it is impossible for a jury to find that the State has proven beyond a reasonable doubt each element of the crime, and still acquit Petitioner by finding that he acted in self-defense. For if the State has proven beyond a reasonable doubt, each element of the crime and still acquit Petitioner by finding that he acted in self-defense, the State proves beyond a reasonable doubt that Petitioner killed the victim (Matthew Jenkins) with malice, or by a wrongful act without just cause or excuse, self-defense cannot be proven by any of the evidence presented.

The inverse is also true under South Carolina law, therefore the trial judge's charge placed the burden on Petitioner to prove that he acted in self-defense. Invariably places the burden on Petitioner to prove his innocence, and to disprove that he acted with malice, an essential element of the crime of murder. In essence, this charge by the trial court requiring Petitioner to

prove self-defense by established evidence requires Petitioner (negative facts on the crime [malice] which the State is required to prove) in order to convict Petitioner of murder. See Patterson v New York, 95 S Ct at 2325 Further it runs afoul of the principle of Martin v Ohio, 107 S Ct 1098, and Patterson 95 S Ct 1881 and In re Winship, 90 S Ct 1068 (which requires the State bear the burden of proof beyond a reasonable doubt on every element of the crime charged) In Davis v United States, 16 S.Ct. 353, the Court said "In order for the prosecution to obtain a conviction the State must prove beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged

In the instant case the Judge committed plain error once he told the jury that 'malice is defined as a wrongful act without just cause or excuse, then told the jury that Petitioner had to establish that he acted in self-defense by evidence submitted during trial, thus clearly placing the burden on Petitioner to prove he acted with just cause or excuse in order for the jury to consider self-defense See Patterson, supra, Martin, supra

Any error in the trial Court's instructions regarding self-defense is reversible error See Wynn v Mahoney, 600 F 2d 448 (4th Cir 1979)(because proof of self defense constitutes an absolute defense in that it renders the homicide justifiable, any error in the trial court's instructions concerning self-defense is prejudicial)

Before the decision in Wynn supra, the Supreme Court set the standard for error in Chapman v. California, 87 S Ct 824 (1967) was applicable to jury instructions that violate the principles of Sandstrom v. Montana, 99 S Ct 2450 and Francis v. Franklin, 105 S Ct 1965 (1985). Petitioner asserts that because of the likeness between Sandstrom and Franklin, the plain error standard of Chapman should be applied in this case.

As to the due process violation, which will have to be viewed on a **separate and independent** ground, Petitioner argues that in considering that the trial Court instructed the jury that the burden of proof was upon the State to prove malice, an essential element of murder beyond, beyond a reasonable doubt. However, if the jury chose to obey that instruction, they would need to ignore the judge's further instructions that [Petitioner must prove self-defense], a legal justification for killing, by **established** evidence Thomas v. Leeke, 725 F 2d 256 State v. Martin, 57 S E 2d 55 (1949). There can be no doubt that these instructions were conflicting, confusing and shifted the burden to Petitioner to prove that he did not act with malice, but in self-defense.

Here there can be no doubt of the error in the trial Court's instructions to the jury which clearly establishes ineffective assistance of counsel issue for failing to object to the faulty jury instruction that resulted in plain error. The failure of counsel to object did amount to a deficient performance when considering the instructions given together in this case. There is a reasonable probability that had counsel objected there is

a reasonable probability the results of the trial would have been different

Furthermore, had counsel of at least lodged an objection and preserved this meritorious issue for appellate review there is a reasonable probability the result of the appeal would have been different as well

For the aforementioned reasons Petitioner respectfully prays this Court will grant a new trial

CONCLUSION

WHEREFORE, Petitioner believes through the issues presented citations of authorities relied on and his statement of facts he has shown unto this Honorable Court that he is entitled to the requested relief sought herein Petitioner respectfully prays this Court will grant the requested relief of a new trial

Resoectfully Submitted,

/s/ Andre King

Andre King

|                          |   |                                    |
|--------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA  | ) |                                    |
|                          | ) | IN THE COURT OF COMMON PLEAS       |
| COUNTY OF ORANGEBURG     | ) |                                    |
|                          | ) | 2010-CP-38-1137                    |
|                          | ) |                                    |
| Andre King, #258599,     | ) |                                    |
|                          | ) |                                    |
| Applicant,               | ) |                                    |
|                          | ) |                                    |
| v                        | ) | <b>RETURN</b>                      |
|                          | ) | (Appointment of Counsel Requested) |
| State of South Carolina, | ) |                                    |
|                          | ) |                                    |
| Respondent               | ) |                                    |

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The Respondent, making its Return to the application for post conviction relief (PCR) filed August 9, 2010, 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 Orangeburg County Clerk of Court. The Applicant was indicted at for Murder (2005-GS-38-1395), Assault and Battery with Intent to Kill ("ABWIK") (2005-GS-38-1393), and Possession of a Weapon During Commission of a Violent Crime (2005-GS-38-1394). Michael Culler, Esquire, and Andrew Brown, Esquire, represented him. On September 10-13, 2007, Applicant proceeded to a jury trial before the Honorable Knox McMahon. Applicant was found guilty, and on September 13, 2007, Applicant was sentenced to life imprisonment for Murder, to twenty (20) years for ABWIK, and to five (5) years for Possession of a Weapon During Commission of a Violent Crime, sentences to be served concurrently.

A Notice of Appeal was filed and an appeal perfected- Applicant's conviction and sentence was affirmed State v King, Op No 2010-UP-254 (S C Ct App filed April 26, 2010)

Attached herewith and incorporated herein are the records of the Orangeburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the appellate records, and the trial transcript The Respondent reserves the right to amend this Return upon receipt of any relevant materials

## II

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

- 1 Ineffective assistance of counsel
  - a "Counsel failed to perform pre-trial investigation and object to numerous trial errors that denied Petitioner his right to a fair trial "
- 2 "Denial of 6<sup>th</sup> Amendment "
- 3 "Denial of 14<sup>th</sup> Amendment "

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing S C Code §17-27-50 All amendments should be made well in advance of an evidentiary hearing by counsel of record Rule 11, SCRPC

## III

For purposes of this Return, Respondent interprets Applicant's allegations and allegations of ineffective assistance of counsel In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his application Butler v State, 286 S C 441, 334 S E 2d 813 (1985) Where the application alleges ineffective assistance of counsel as a ground for relief, 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.

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

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

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

Respectfully submitted

ALAN WILSON  
Attorney General

JOHN W McINTOSH  
Chief Deputy Attorney General

SALLEY W ELLIOTT  
Assistant Deputy Attorney General

MARY S WILLIAMS  
Assistant Attorney General

By   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
P O Box 11549  
Columbia, SC 29211

Feb 4, 2011

|                          |   |                              |
|--------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA  | ) |                              |
|                          | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG     | ) |                              |
|                          | ) |                              |
|                          | ) | 2010-CP-38 1137              |
|                          | ) |                              |
| ANDRE KING, 258599,      | ) |                              |
|                          | ) |                              |
| Applicant,               | ) |                              |
|                          | ) |                              |
| vs                       | ) | AFFIDAVIT OF SERVICE BY MAIL |
|                          | ) |                              |
| STATE OF SOUTH CAROLINA, | ) |                              |
|                          | ) |                              |
| Respondent               | ) |                              |
|                          | ) |                              |

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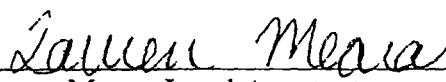
1 I am an employee of the Respondent in the above-captioned action

2 Regular communication by mail exists throughout the State of South Carolina and that this  
is a proper circumstance of service by mail

3 I have this day served a copy of the Return in the above-captioned matter on the following  
person by depositing same in the United States mail, postage prepaid

**Charles T Brooks, III, Esquire**  
**Law Office of Charles T Brooks, III**  
**309 Broad Street**  
**Sumter, SC 29150**

DATED this 7th day of February, 2011

  
 Lauren Meara, Legal Assistant  
 For Respondent

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF ORANGEBURG

FIRST JUDICIAL CIRCUIT

ANDRE KING,

CASE NO 2010-CP-38-01137

APPLICANT

)  
 ) POST CONVICTION  
 ) RELIEF HEARING  
 ) TRANSCRIPT OF RECORD

versus

) DATE

STATE OF SOUTH CAROLINA,

) MARCH 8, 2011

DEFENDANT

BEFORE

HONORABLE EDGAR W DICKSON, PRESIDING JUDGE

APPEARANCES

CHARLES BROOKS, ESQUIRE

ATTORNEY AT LAW

FOR THE APPLICANT

MARY WILLIAMS, ESQUIRE

ASSISTANT ATTORNEY GENERAL

FOR THE STATE

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

I N D E X

| <u>WITNESS</u> | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|----------------|---------------|--------------|-----------------|----------------|
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| Andre D King |  |  |  |  |
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|           |   |  |  |  |
|-----------|---|--|--|--|
| Mr Brooks | 8 |  |  |  |
|-----------|---|--|--|--|

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|-------------|--|----|--|--|
| Ms Williams |  | 14 |  |  |
|-------------|--|----|--|--|

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|----------------|--|--|--|--|
| Michael Culler |  |  |  |  |
|----------------|--|--|--|--|

|             |    |  |    |  |
|-------------|----|--|----|--|
| Ms Williams | 16 |  | 26 |  |
|-------------|----|--|----|--|

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| Mr Brooks |  | 22 |  |  |
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E X H I B I T S

| <u>NUMBER</u> | <u>DESCRIPTION</u> | <u>ID</u> | <u>EV</u> |
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|      |  |  |  |
|------|--|--|--|
| NONE |  |  |  |
|------|--|--|--|

1 DATE

2 March 8, 2011

3 THE COURT What's next, Mr - - -

4 MS WILLIAMS Andre King

5 THE COURT --- Andre King? Okay And Mr Culler is  
6 here for that Okay, good Alright, while we're waiting, Ms  
7 Harry Dot, this is 2010-CP-38-1137 I have Mr King's  
8 submitted post conviction relief application I've got copies  
9 of the sentencing sheets, his record, I've got a copy of the  
10 briefs that were filed on appeal, I have a copy of an  
11 unpublished Opinion by the Court of Appeals, and I have a copy  
12 of the transcript of the trial that was heard in front of  
13 Judge McMahan September Tenth through Thirteenth of Two  
14 thousand and seven Is there anything else I need in the  
15 record, Mr Brooks?

16 MR BROOKS That's it, Judge

17 THE COURT Okay Any objection to these being made a  
18 part of the record? Mr Brooks?

19 MR BROOKS Yes, sir

20 THE COURT No objection to these being made?

21 MR BROOKS No objection

22 THE COURT Okay Thank you, sir Alright

23 MR BROOKS I'm just waiting on my client

24 THE COURT Okay

25 (Whereupon, Mr King

1 enters the courtroom )

2 MR BROOKS Judge, we do have a motion

3 THE COURT Yes, sir

4 MR BROOKS Judge, after talking to my client, he

5 respectfully asks the Court for a continuance in this matter

6 My client, he's got a lot of paperwork He just indicated to

7 me that he just wasn't mentally prepared to go ahead and have

8 this matter handled today

9 THE COURT Alright How long has he known about it, Mr  
10 Brooks?

11 MR BROOKS I guess, as far as, how long has he known  
12 about his PCR or how long he was coming here?

13 THE COURT How long has he known about this hearing  
14 date?

15 MR BROOKS Let's see here, I sent the letter on  
16 February Seventh, I have a letter where I sent to him that we  
17 were going to be in Court on Monday, March Seventh Of  
18 course, we, you know, Ms Williams kind of juggled things  
19 around, so we're here for Tuesday, the Eighth

20 THE COURT Right But he's known for a month?

21 MR BROOKS Yes, sir

22 THE COURT Okay And I understand there's a lot of  
23 paperwork, but tell me again what's the reason for a  
24 continuance?

25 MR BROOKS My client has felt, in the course of our

1 conversations, he just wanted me to ask the Court that he just  
2 wasn't, he felt he just wasn't mentally ready for the rigors  
3 of testifying and what's being asked, and as far as going  
4 forward asking the Court for his post conviction relief

5 THE COURT Okay Alright Mr Brooks, is Mr King on  
6 any kind of medication?

7 MR BROOKS Not that I'm aware of

8 THE COURT Okay Is he, has he been ill?

9 MR BROOKS No, sir

10 THE COURT Okay Anything else you want to talk with me  
11 about that?

12 MR BROOKS I just want to put that motion on the  
13 record

14 THE COURT Alright, sir Alright And Ms Williams,  
15 anything you want to say in response to that?

16 MS WILLIAMS Your Honor, we're prepared to go forward  
17 today

18 THE COURT Okay Alright Mr King, you've had a  
19 month, you know, you've known about this hearing that was  
20 going to come up for at least a month Is that correct?

21 MR KING Yes, sir

22 THE COURT Okay And this case was tried in September  
23 of Two thousand and seven

24 MR KING Yes, sir

25 THE COURT Okay And you're seeking relief, post

1 conviction, -- you're seeking relief from that jury trial and  
2 we have time scheduled today so that we can go forward and  
3 hear your problems about this The attorney that represented  
4 you at that hearing is present in Court, he's taken off from  
5 his schedule to be here The attorney that you hired is here,  
6 and Mr Brooks, you're prepared to go forward, is that  
7 correct?

8 MR BROOKS And long to, Judge

9 THE COURT Yes, sir, that's what I thought And so, Mr  
10 King, I appreciate your request for a continuance However,  
11 without anything other than the reasons that I've been given,  
12 you know, if you're not ill, you've had a month to get ready,  
13 if you're not under any medication so you know what you're  
14 doing here today, the Court's ready to go forward, and we are  
15 going to go forward Do you understand that?

16 MR KING Yes, sir

17 THE COURT Okay Alright, sir Alright, so I will deny  
18 your motion for a continuance Thank you, Mr Brooks

19 MR BROOKS And Your Honor, - - -

20 THE COURT Yes, sir

21 MR BROOKS --- at this time we would call Mr King to  
22 the stand

23 THE COURT Okay Mr King, if you'd please come up  
24 here, please, sir Okay He'll bring whatever -- do you want  
25 to take whatever -- okay Now, when you get there if you'll

1 put your left hand on the Bible, please, sir, and then if  
2 you'll listen to Ms Wilson  
3 (Whereupon, Andre Dance King  
4 is duly sworn )

5 CLERK State your full name for the Court Reporter and  
6 have a seat

7 WITNESS Andre Dance King

8 THE COURT Alright, thank you, Mr King If you'll have  
9 a seat and get comfortable, please, sir?

10 MR BROOKS Are you ready, Judge?

11 THE COURT Whenever you are, Mr Brooks

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

ANDRE D KING - DIRECT EXAMINATION BY MR BROOKS

8

1 ANDRE D KING, DIRECT EXAMINATION

2 BY MR BROOKS

3 Q Mr King, have you got your papers situated?

4 A Yes

5 Q Alright, now, just for background information, you went to  
6 trial on these charges, you had Mr Culler and Mr Brown as  
7 your two lawyers in your case?

8 A Yes, sir

9 Q And you were convicted, and you received a life sentence,  
10 is that correct?

11 A Yes, sir

12 Q Okay And, of course, you are here today and you want a  
13 new trial, is that right?

14 A Yes, sir

15 Q Okay Now, Mr Culler and Mr Brown, they were Court  
16 appointed, is that correct?

17 A Yes, sir

18 Q Through the Public Defender's Office here?

19 A Yes, sir

20 Q Okay Now, tell the Court what you think that they didn't  
21 do in representing you so we can get you a new trial?

22 A Alright One of my issues, I think the counsel was  
23 ineffective for conceding in the closing arguments to the jury  
24 about conceding to my guilt At the onset of my trial the  
25 Trial Court had told the jury that I had not pleaded to none

1 of these indictments, and therefore, the State had the burden  
2 to prove, the burden to prove each of the elements beyond a  
3 reasonable doubt During closing summations to the jury the  
4 Solicitor made the following arguments "The first thing the  
5 defendant here is charged with is murder You have heard the  
6 definition Murder is defined as the unlawful killing of  
7 another malice aforethought, either expressed or implied "  
8 Then he was like, "As you were told in the beginning, an  
9 example of implied malice is the use of a deadly weapon You  
10 have to ask yourself is there any question that a nine  
11 millimeter pistol is a deadly weapon, because if you find that  
12 the defendant was in possession and used a nine millimeter  
13 pistol to commit this unlawful killing, that's malice, which  
14 makes him guilty of murder "

15 Q And you say your lawyer should have objected to that?

16 A Yes, sir He should have objected to that, because it was  
17 essential for the State to prove malice and such that murder  
18 and assault and battery with intent to kill the same elements

19 Q And that was, you felt that that was an erroneous  
20 instruction by the Judge, and unfavorable, and more  
21 importantly, prejudicial to you, is that correct?

22 A Yes, sir

23 Q And you feel that Mr Culler and Mr Brown should have  
24 jumped and vigorously objected, is that right?

25 A Yes, sir

1 Q Okay Anything else?

2 A Yes, sir

3 Q What's the next issue?

4 A The next issue, right, these two issues kind of, they kind  
5 of go together with each other, you know

6 Q Okay, that's fine Let it rip

7 A Counsel was ineffective for failing to object when the  
8 Trial Court failed to instruct the jury that it could either  
9 accept or reject the inference of malice from the use of a  
10 deadly weapon And also, the other one is like, counsel was  
11 ineffective for failing to object to the Trial Court's jury  
12 instructions that shifts the burden of proof in the violation  
13 of due process During my trial, right, evidence was  
14 presented during the trial that warrant me a self-defense  
15 charge on the question to the jury, and it was error to charge  
16 the jury that malice may be inferred from the use of a deadly  
17 weapon

18 Q Okay

19 A And in opening

20 Q You're saying your lawyer should have objected to that,  
21 right?

22 A Yes, sir

23 Q Okay And wasn't there something, wasn't there an issue  
24 you had about the lesser included offense of manslaughter?

25 A Yeah

1 Q Tell the Court about that issue, you felt Mr Culler and  
2 Mr Brown didn't do an effective job of making sure that that  
3 was raised or, in regards to whether or not there was enough  
4 evidence, remember we talked about that, you said that if they  
5 didn't find murder, if there was one person hold out on  
6 murder, that they should go and find you guilty of  
7 manslaughter?

8 A Yeah Could you give me a minute, sir? Let me find the  
9 right place Yeah, I've got it Failed in saying -- counsel  
10 was ineffective for failing to request a King instruction  
11 where during the trial, the Trial Judge had instructed the  
12 jury that on the crimes of murder and manslaughter, and  
13 anytime that -- when the two offenses are submitted to the  
14 jury it's, if they have, they supposed to instruct the jury  
15 that if they have any reasonable doubt of the lesser included  
16 offense, it's their duty to resolve that in his favor and find  
17 him guilty of the lesser included offense

18 Q And you're saying that charge wasn't given?

19 A No, sir, that charge wasn't given

20 Q And that was failure by your lawyers to ask for that, is  
21 that correct?

22 A Yes, sir

23 Q Okay Anything else?

24 A And it's also another issue It was, counsel was  
25 ineffective for failing to object to the Court's jury

ANDRE D KING - DIRECT EXAMINATION BY MR BROOKS

12

1 instructions on self-defense that shifted the burden of proof  
2 in the violation of duty process During the trial the Trial  
3 Court charged the jury on the crimes of murder and  
4 manslaughter as well as self-defense The Trial Court Judge  
5 gave the following the instruction "I'm now going to cover  
6 the charge of self-defense, then I will go into possession of  
7 a weapon during the commission of a violent crime The  
8 defendant has raised the defense of self-defense Self-  
9 defense is a complete defense and if it is established you  
10 must find the defendant not guilty The State has the burden  
11 of disproving self-defense by proof beyond a reasonable doubt  
12 If you have any reasonable doubt after considering all the  
13 evidence, including the evidence, if any, of self-defense,  
14 then you must find the defendant not guilty On the other  
15 hand, if you have no reasonable doubt of the defendant's guilt  
16 after considering all the evidence, including the evidence of  
17 self-defense, then you must find the defendant guilty "

18 Q Okay And you feel that's a wrong instruction because it  
19 shifted the burden, is that right?

20 A Yes, because it was upon the State to prove every element  
21 of the offense charged

22 Q And to disprove -- it's the burden of the State to  
23 disprove your self-defense, is that right?

24 A Yes, sir

25 Q Okay Alright, we've those issues out there, is there

ANDRE D KING - DIRECT EXAMINATION BY MR BROOKS

13

1 anything else you want to tell the Judge about Mr Culler and  
2 Mr Brown representing you?

3 A That's it, that's it right there

4 MR BROOKS Alright, answer any questions that Ms  
5 Williams has

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ANDRE D KING - CROSS-EXAMINATION BY MS WILLIAMS

14

1 ANDRE D KING - CROSS-EXAMINATION

2 BY MS WILLIAMS

3 Q Mr King, you gave a statement in this case, is that  
4 correct, a written statement?

5 A Yes, ma'am

6 Q And you also testified at your trial, is that correct?

7 A Yes, ma'am

8 Q And during that testimony you admitted that you had shot  
9 Ms Monique, is that correct?

10 A Yes, ma'am

11 Q You didn't have any reason why you had done that other  
12 than you were nervous, is that right?

13 A Yes, ma'am

14 Q Okay And your only issue during your trial testimony was  
15 self-defense with regard to Mr Jenkins, is that correct?

16 A Yes, ma'am

17 Q Okay And you admitted that this was your gun?

18 A Yeah

19 Q Okay And that you had fired two shots in the club?

20 A Uh-huh

21 Q That you had fled from the scene in your vehicle?

22 A Yeah

23 Q And you admitted all of that during the trial, is that  
24 correct?

25 A Yeah

1 MS WILLIAMS I don't think I have any other questions

2 THE COURT Alright Anything on redirect?

3 MR BROOKS No, sir

4 THE COURT Alright Thank you, Mr King, you may step  
5 down

6 COURT REPORTER He dropped some of his papers

7 THE COURT Mr Brooks will get them

8 MR BROOKS Judge, that's the applicant's case

9 THE COURT Okay Thank you, sir

10 Alright, Ms Williams

11 MS WILLIAMS Your Honor, I will call Michael Culler

12 THE COURT Okay, Mr Culler

13 Have you got everything, Mr Brooks?

14 MR BOOKS I do

15 THE COURT Okay Thank you, sir

16 (Whereupon, Michael Culler

17 is duly sworn )

18 THE COURT Ms Williams, your witness

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MICHAEL CULLER - DIRECT EXAMINATION BY MS WILLIAMS

16

1 MICHAEL CULLER - DIRECT EXAMINATION

2 BY MS WILLIAMS

3 Q Mr Culler, if you'll tell me briefly about your legal  
4 experience?

5 A I was in the Public Defender's Office from, I guess it was  
6 late Nineteen ninety through Two thousand and seven, during  
7 which time I had Mr King's case along with Andrew Brown And  
8 obviously, I've tried a number of murders, death penalty  
9 cases, things of that nature

10 Q Alright Tell me about your preparation for Mr King's  
11 trial?

12 A We did a number of things Obviously, we met with Mr  
13 King early on He had given a statement that he just  
14 testified about, and we were concerned about that And  
15 really, the thrust that came down to whether there were any  
16 witnesses that could help us develop whether there was some  
17 threat that Mr King felt existed from the victim, Matthew  
18 And I made a lot of notes, I won't reference all of them, but  
19 one that was particularly difficult for us was a June the  
20 Fifth of O-seven visit that I made with Mr Brown and our  
21 investigator at that time, Marion Brothers, to Eutawville  
22 where we met with a Mr Richburg who owned this club Mr  
23 Richburg had been present because there had been some  
24 difficulty about a group of people trying to get into the club  
25 that night There was a birthday party going on and Mr King,

1 Crab, would not let them into the club, and so these girls had  
2 gone over to Mr Richburg's house which was right next door to  
3 the club, and Mr Richburg had returned So he, unfortunately  
4 for us, was present when a lot of things happened He told us  
5 in that interview that he had seen Crab come out of the club,  
6 go to his car, then he saw Crab go into the club A few  
7 minutes later he heard gun shots Crab came running out of the  
8 club with the gun in his hand Mr Richburg then called Nine  
9 One One We met with Crab that day, Andrew Brown and I did,  
10 and related to him that we had had this unfortunate meeting  
11 with Mr Richburg, and that there was a lot of conflict in his  
12 statement that he had given with regard to any problems with  
13 Matthew For example, same day, six/five of o-seven, I made  
14 notes of a meeting with Mr King regarding the conflict in his  
15 statement and his self-defense claim He had stated, quote,  
16 "We was alright " Quote, "I didn't mean to shoot him "  
17 versus the claim of self-defense So, we said, well, who can  
18 help us develop this theory that Matthew Jenkins, I believe it  
19 was, was, you know, a threat to you, or that you had seen him  
20 with a weapon, because your statements don't indicate that  
21 And he gave us a lot of names I do have a stack of subpoenas  
22 that are not filled out My memory is that we had Mr  
23 Brothers, again the investigator, go and interview a number of  
24 these people, and although I don't have a specific run down, I  
25 did on Friday, September the Fourteenth of O-seven, do a memo

MICHAEL CULLER - DIRECT EXAMINATION BY MS WILLIAMS

18

1 after, I guess, all of this that we had -- none of the  
2 witnesses said that they were willing to help us regarding  
3 Matt's reputation, or this dead man's reputation for violence,  
4 or that he had a weapon And so, we investigated everybody  
5 that Mr King made us aware of that may have helped or that he  
6 said -- you know, it was very unusual I mean, even the Trial  
7 Judge said, his defense is kind of a moving target I think  
8 in the record at one point Judge McMahan said that when trying  
9 to decide what to charge, because on the one hand he says he  
10 didn't have any problems with this guy, this guy was like a  
11 brother to him He writes this very sincere apology to the  
12 family for killing him And on the other hand, you know, he  
13 was afraid and the guy came running at him So, in addition  
14 to that, you know, we reviewed everything, we went through the  
15 gun shot residue which, of course, Mr King had had ample  
16 opportunity to wash his hands as he had driven down to  
17 Summerville and had his unfortunate chase with law enforcement  
18 down there And in addition, I think we had gotten from Dr  
19 Ross, the pathologist, the concession that, Number One, the  
20 entrance wound was here, and it was going upward, and I can't  
21 describe that any better, Ms Harry Dot, it was to the  
22 forehead, and at the angle the trajectory was going up, and I  
23 had gotten a concession I think from Dr Ross that that could  
24 be developed from someone charging In addition, in her  
25 report she had stated that the gun shot was, I think it was

1 intermediate, and she characterized it on direct that five  
2 feet or something like that, and on cross we got her to admit  
3 that it was more likely two feet or less That's not  
4 something I came up with on my own, we had employed Don Gurnt,  
5 who had formerly been a homicide investigator for SLED, to  
6 review the case and try to help us develop some sort of cross  
7 So, that's some of the things that we did We met with Mr  
8 King multiple times We wrote letters to Mr King, we met  
9 with his mother, his family, I remember very specifically  
10 meeting with them and going through these statements, like,  
11 she played me so she has to die, which Mr Jeffries made a  
12 very strong center point of his closing argument, and that  
13 that was not going to be helpful I think that Mr King is  
14 very sorry that this happened I think he was probably drunk  
15 based on the testimony, I think it was Laquinn Cason, that he  
16 had been drinking gin all day when he left the house to go to  
17 the club, and he unfortunately had, you know, a hand gun and  
18 this happened

19 Q Would it be fair to characterize the trial strategy as  
20 really going after the murder charged because there wasn't  
21 much of a defense - - -

22 A Right

23 Q --- with the ABWIK?

24 A Right

25 Q Okay

1 A I think that's fair

2 Q And with regard to the ABWIK, did that have anything to do  
3 with the fact that he admitted, and never denied shooting Ms  
4 Monique Green, the victim?

5 A Yeah, I mean, he really didn't deny -- you know, in the  
6 file there's a letter, you know, where Crab wrote to me that  
7 his guilt doesn't really explain the circumstances And I  
8 pointed out to him, I said, you know, I understand there's  
9 circumstances, but you understand you're guilty? And he wrote  
10 me a very, or someone in the jail wrote me a very nice letter  
11 explaining how the law of manslaughter really didn't apply  
12 here And, you know, why I was wrong about my attempt to do  
13 that So, you know, it unusual

14 Q This case was tried in Two thousand seven At that time  
15 were you aware of an implied malice charge being a pretty  
16 standard thing?

17 A Yes

18 Q Has that changed since then?

19 A You know, I think that, as Mr King stated, the inference  
20 was there to be drawn, and in fact, in this letter that he  
21 wrote me it was very clearly stated, you know, that it could  
22 be rejected or the jury could conclude that because he used a  
23 deadly weapon malice was implied Again, a very articulate  
24 letter

25 Q And did you see objections in the, he pointed to a self-

1 defense charge, a manslaughter charge, did you see any  
2 objections there that you felt where the instructions had gone  
3 astray from the standard instructions?

4 A No We had -- I do remember when I read through the  
5 transcript, at least part of it, particular with regard to the  
6 charges, that we went through those pretty thoroughly, Mr  
7 Brown and I think Mr Jeffries and maybe Mr Scott and I It  
8 seemed like Mr Scott had a point about Charge Number Four, I  
9 can't remember what it was For some reason I remember that

10 Q Okay

11 MS WILLIAMS Your Honor, I believe that's all I have

12 THE COURT Alright, Mr Brooks

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MICHAEL CULLER - CROSS-EXAMINATION BY MR BROOKS

22

1 MICHAEL CULLER - CROSS-EXAMINATION

2 BY MR BROOKS

3 Q Mr Culler, do you remember how long you were on this case  
4 prior to going to trial?

5 A How long I was involved in it?

6 Q Yes, sir

7 A It looks like we opened the file in the Public Defender's  
8 Office July the Twenty-fifth, and the discovery was filed  
9 shortly thereafter So, what I've got, and it can't be  
10 reflected, but I've got a legal file with notes across the  
11 front, the back, and inside both margins with jail visits and  
12 conferences I'm fairly certain that Mr Brown was with me  
13 for a lot of that if not all of it, as well as multiple visits  
14 with Mr Brothers, our investigator So, to answer your  
15 question, I think we had it about two years before it went to  
16 trial

17 Q Alright And I read in the transcript where Mr King  
18 testified?

19 A He did, he did He was absolutely determined to tell his  
20 story, although we had told him, and I told him in letters  
21 that that was not something that would be productive for him  
22 because, on the one hand I received letters explaining to me  
23 that voluntary manslaughter doesn't really apply, but on the  
24 other he's giving a statement saying, this gentleman didn't  
25 threaten him in any way And so, self-defense doesn't seem to

1 apply, which I don't know that Mr King, I can't really  
2 explain that

3 Q Was there every any plea negotiations in this case?

4 A There were There were plea negotiations We talked, by  
5 which I mean myself and Mr Brown, and no doubt, Mr Scott and  
6 Mr Jeffries talked about a plea, and I have a letter in my  
7 file from the Twenty-fifth of July, Two thousand and seven,  
8 stating that "Mr Scott plans to try your case in September,  
9 and just a guess about the plea at this point, because I think  
10 the plea had been, I think it was twenty-five years I have  
11 that reference somewhere, that the plea would probably be  
12 twenty-five to thirty years at a range of about eighty-five  
13 per cent, but I will try to get a specific offer from the  
14 Solicitor As I have said multiple times, I believe the  
15 evidence in this case not good for you, and that you will be  
16 found guilty of murder and assault and battery with intent to  
17 kill The penalties would be" I set those out "I do not  
18 see anything to reduce the charges to manslaughter or self-  
19 defense There are" all capital letters, "NO WITNESSES who  
20 will say the dead man had a gun at anytime that night " And  
21 then I go through some of the inconsistencies "I have worked  
22 hard to get you to understand what a bad position you are in  
23 here I will try some more but not much This is your life  
24 If you want to ignore and go forward with the trial that is  
25 your choice It will be a choice you will regret I will

MICHAEL CULLER - CROSS-EXAMINATION BY MR BROOKS

24

1 meet with you next week, hopefully with your family so we can  
2 discuss this dangerous situation If I were you I would be  
3 very concerned about what will happen to you at trial Think  
4 about it, Crab " So, yes, there was an offer and we  
5 continually tried to get him to accept any kind of offer we  
6 could up until -- that's dated the Twenty-fifth of July, so it  
7 was right up to the trial in September we were trying to work  
8 something, and he just didn't want to do it He would not --  
9 could not do it, I think I think his statement was that  
10 Twenty-five years was forever

11 Q Did you go over his potential testimony before he went to  
12 trial?

13 A Oh, we did We discussed all sorts of things and  
14 encourage him that that would not be helpful But he really,  
15 Mr Brooks, I think -- he had written a letter which we advise  
16 him not to write, apologizing to the family and explaining how  
17 sorry he was for killing this young man, and how they had been  
18 friends and they had never had any problems, and you know, I  
19 think he just felt compelled to get on the witness stand and  
20 tell his story And without seeming, he was not a crafty  
21 person who was trying to choreograph some event where he would  
22 be found not guilty, it was almost like he just wanted to be  
23 able to get that out

24 Q Okay

25 MR BROOKS I beg the Court's indulgence No other

1 questions, Judge

2 THE COURT Anything on redirect?

3 MS WILLIAMS Just briefly

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MICHAEL CULLER - REDIRECT EXAMINATION BY MS WILLIAMS

26

1 MICHAEL CULLER - REDIRECT EXAMINATION

2 BY MS WILLIAMS

3 Q Just briefly, did you discuss that trial strategy of  
4 pursuing the murder charge and, did you discuss trial strategy  
5 with him prior to this?

6 A I'm absolutely sure that we did, but I would say that  
7 would be, have been parenthetical to the continual struggle to  
8 get him to accept some plea But there's no question we would  
9 have done that

10 MS WILLIAMS I don't have any further questions

11 THE COURT Anything on recross?

12 BROOKS No, sir

13 THE COURT Okay Thank you, Mr Culler, you may step  
14 down

15 MS CULLER Thank you

16 THE COURT Any other witnesses?

17 MS WILLIAMS No, sir I think that would be the  
18 State's case, Your Honor

19 THE COURT Alright What I'll do is, unless y'all want  
20 to make some arguments, what I'll do is, I will review the  
21 records and I'll get back to y'all with my decision Okay?

22 MR BROOKS Thank you, Judge

23 THE COURT Thank you Appreciate it

CERTIFICATE

I, THE UNDERSIGNED, MRS HARRY A WALKER, OF ROWESVILLE,  
SOUTH CAROLINA, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL  
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT  
THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF  
RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN  
THE POST CONVICTION RELIEF HEARING IN THE CAPTIONED CAUSE,  
RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR  
ORANGEBURG COUNTY, SOUTH CAROLINA, ON THE EIGHTH DAY OF MARCH,  
2011

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL,  
NOR INTEREST TO ANY PARTY HERETO

DATE NOVEMBER 29, 2011

Harry A. Walker

(MRS ) HARRY A WALKER

|                          |   |                              |
|--------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA  | ) |                              |
|                          | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG     | ) |                              |
|                          | ) | 2010-CP-38-1137              |
| Andre King #258599,      | ) |                              |
|                          | ) |                              |
| Applicant,               | ) |                              |
|                          | ) |                              |
| v                        | ) | <b>ORDER OF DISMISSAL</b>    |
|                          | ) |                              |
| State of South Carolina, | ) |                              |
|                          | ) |                              |
| Respondent               | ) |                              |

2011 JUL 18 P 2 33  
FILED  
CLERK OF COURT  
ORANGEBURG COUNTY SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 9, 2010. An evidentiary hearing into the matter was convened on March 8, 2011, at the Orangeburg County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks, III, Esquire. The Respondent was represented by Mary S. Williams of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Michael Culler, Esquire ("Counsel"). This Court had before it the records of the Orangeburg County Clerk of Court, the trial transcript, and the Applicant's records from the South Carolina Department of Corrections.

#### PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. The Applicant was indicted for Murder (2005-GS-38-1395), Assault and Battery with Intent to Kill (ABWIK) (2005 GS-38-1393) and Possession of a Weapon During Commission of a Violent Crime (2005 GS-38-1394). Michael Culler, Esquire, and Andrew Brown

1 of 9

*[Signature]*

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ORANGEBURG COUNTY SC

Esquire represented him. On September 10-13, 2007, Applicant proceeded to a jury trial before the Honorable Knox McMahon. Applicant was found guilty, and on September 13, 2007, Applicant was sentenced to life imprisonment for Murder, to twenty (20) years for ABWIK and to five (5) years for Possession of a Weapon During Commission of a Violent Crime, sentences to be served concurrently.

A Notice of Appeal was filed and an appeal perfected. Applicant's conviction and sentence was affirmed. State v. King, Op. No. 2010-UP-254 (S.C. Ct. App. filed April 26, 2010).

In his application for post-conviction relief (PCR), Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. "Counsel failed to perform pre-trial investigation and object to numerous trial errors that denied Petitioner his right to a fair trial."
2. "Denial of 6<sup>th</sup> Amendment"
3. "Denial of 14<sup>th</sup> Amendment"

At hearing on March 8, 2011, Applicant also alleged that counsel was ineffective in regard to his closing argument, that counsel failed to object to the jury charge on malice, that counsel failed to request a jury charge, and that counsel failed to object to the jury charge on self-defense.

### 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 at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80.

### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984), Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, supra). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735.

(1997) (citing Strickland)

*Summary of Facts Adduced at Trial*

On June 9, 2005, two individuals were shot at A Touch of Class nightclub in Eutawville. Applicant's ex-girlfriend, Monique Green ("Green") was airlifted and survived the bullet wound she sustained which entered her face and exited her neck. Green's cousin, Matthew Jenkins ("Jenkins") died at the scene from a gunshot wound to the head.

Applicant owned the nightclub, and Green had formerly been a bartender there. Applicant and Green had recently ended their lengthy relationship. Green went to the nightclub with friends, but the group was asked to leave. They complied but returned later. Upon returning to A Touch of Class, Green remained in the car until Jenkins approached her. Jenkins assured her that another owner of the club had consented to her coming in and escorted her in, holding her hand. Applicant attempted to prevent them from entering, but Jenkins and Green proceeded past him.

Applicant briefly exited the building, returning with a pistol. According to witnesses, Applicant pushed his way through the club, first firing upon Jenkins then turning the gun on Green. Green stated that she heard the gun "click" when Applicant attempted to fire at her a second time. Applicant then left the nightclub in his green Lexus. Upon arriving at his apartment, Applicant instructed his friend LaQuyn Cason ("Cason") to get her kids, ages three and four, and get into the car. Cason complied. Applicant had earlier told Cason that Green "played him and she [Green] had to die." (Tr. p. 225 line 1.)

As the car pulled away from the apartment complex, police attempted to stop the vehicle. Applicant pulled over then told Cason that he was not going to prison and that he would kill the

police officers Cason implored him not to do so because her children were in the car. Applicant then sped away leading police on a high speed chase disregarding traffic laws and running one to idblock. Spikes and police ramming Applicant's vehicle eventually ended the chase. Applicant was arrested. He had attempted to dispose of the weapon beneath the car and ammunition was found in Applicant's pocket. Ballistics matched the weapon recovered beneath Applicant's car to that used in the attack on Jenkins and Green.

In a statement to police given after a night's rest to overcome the effects of alcohol, Applicant admitted his animosity toward Green had prompted the shooting. Applicant claimed in the statement that he did not mean to shoot Jenkins. Approximately one year after the incident, Applicant wrote to Jenkins' family, apologizing for his actions and assuring them that Jenkins had been an innocent party in the incident. At trial Applicant for the first time stated that he shot Jenkins in self-defense. Applicant claimed that Jenkins had moved his hands in a threatening manner as if he were about to hit Applicant, Applicant had not seen a weapon.

#### *Closing Argument*

Applicant asserts that Counsel was ineffective because he conceded Applicant's guilt in closing argument. In closing, Counsel made the following statement:

Ladies and gentlemen, it is our position – we apologize to Ms [Monique] Green. Clearly we do not contest the assault and battery with intent to kill or the weapons charge. But look at the evidence hold the State to their burden which is to prove guilt beyond a reasonable doubt.

At the end of the day what I said to you on Tuesday is we ask you to find my client not guilty of murder. Thank you.

(Tr p 485 lines 17-25. See also Tr p 482 lines 15-18.) At PCR hearing Counsel noted that in

Applicant's statement he had admitted to shooting Green. Based on the overwhelming evidence involving the shooting of Green, Counsel had no viable defense to argue against the ABWIK charge. In his own testimony, Applicant did not deny shooting Green. Counsel felt that the only viable option was to seek acquittal or a lesser-included offense on the murder charge.<sup>1</sup>

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. See for example Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992), Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005), McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Given the evidence presented at trial, I find Counsel's strategy was reasonable. The Applicant has not shown that counsel was deficient in that choice of tactics. Therefore, I find no error by Counsel in his statement in closing argument. Moreover, in light of the overwhelming evidence of Applicant's guilt, Counsel's closing statement did not affect the outcome of the trial.

#### *Inference of Malice*

Applicant attributes error in Counsel's failure to object to the solicitor's arguments on malice and failure to object to the trial court's charge on malice. Applicant states that Counsel should have made objections based on the inference of malice from use of a deadly weapon.

At the close of evidence, the defense moved for a directed verdict based on failure to show malice in the shooting of Jenkins. (Tr. p. 398-400.) Noting that evidence of both express malice (Applicant's statement that Green had to die) and implied malice (use of a gun) existed, the trial

---

<sup>1</sup> At PCR hearing, Counsel noted that he had strongly advised Applicant to accept a plea offer due to the overwhelming evidence against him. Counsel advised Applicant in discussing the plea that self-defense and/or conviction of voluntary manslaughter were not likely to be successful. Nonetheless, Applicant chose to proceed with his right to a jury trial.

court denied the motion. There was also discussion regarding the doctrine of transferred intent, applying evidence of Applicant's statement about Green and his statement that Jenkins was mistakenly shot (Tr pp 450-453)

In closing argument, the solicitor argued that both express malice and implied malice were present in this case (Tr p 467, line 18 – p 469 line 19 p 472, lines 3 – 16, p 490, lines 5-11, p 493, line 21 – p 494 line 1, p 496, line 23 – p 497 line 1) The trial court charged the jury on the offenses of murder and ABWIK, noting the requirement of malice aforethought (Tr p 511, line 13 – p 512, line 2) The trial court charged that malice may be express or inferred (Tr p 512, line 3 – p 513 line 4) The trial court also gave a charge on transferred intent (Tr p 513, lines 5-14)

Applicant asserts Counsel erred in failing to object to the solicitor's arguments and the court's jury charge on inference of malice from use of a deadly weapon. On October 12, 2009, the South Carolina Supreme Court held "a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide." State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009). Applicant was tried on September 10-13, 2007, more than two years before the ruling in Belcher on October 12, 2009. Belcher "represents a clear break from our modern precedent" approving of the jury charge on inference of malice from use of a deadly weapon expressly overruling some twenty-six (26) cases decided over the course of more than 100 years, ranging in date from 1894 to 2006. 385 S.C. at 612, 685 S.E.2d at 810. The charge given in Applicant's case was, at the time of his trial, the sanctioned charge on the law, and the solicitor's arguments reflected the same. Because the Belcher decision posed a clear break from long

established precedent some two years after Applicant's trial Counsel was not unreasonable in failing to pose this objection Gilmore v. State, 314 S C 453, 445 S E 2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial) (overruled on other grounds by Brightman v. State, 336 S C 348, 520 S E 2d 614 (1999))

This court further notes that evidence that would reduce, mitigate excuse or justify the homicide was only presented as to Jenkins. There was evidence of both express and implied malice with regard to Jenkins. Applicant's statement and letter to Jenkins' family contrasted to his trial testimony, and no other evidence of self-defense was presented.<sup>2</sup> Therefore, even had the implied malice arguments and charge not been given, it is unlikely that the outcome of trial would have been different. For all these reasons, I find Applicant has failed to carry his burden in this regard.

#### *Failure to Request King Charge*

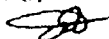
Applicant was charged with Murder, and the court gave an instruction on the lesser included offense of Voluntary Manslaughter. Applicant argues that Counsel erred in failing to request a jury charge stating that if the jury had any doubt between the greater and lesser offense, they should resolve such doubts in favor of the defendant. In Brightman v. State, 336 S C 348, 520 S E 2d 614 (1999), the South Carolina Supreme Court held that the King charge is unnecessary in light of the modern general reasonable doubt charge which instructs the jury to resolve doubts in favor of the defendant. Therefore, I find Counsel was not ineffective in this regard.

#### *Self-Defense Charge*

Applicant argues that Counsel was deficient in failing to object the trial court's charge on self-defense as burden-shifting. In its jury charge, the court noted that the State had the burden of

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At PCR hearing, Counsel testified that an investigator was retained and efforts were made to procure evidence of any



disproving self-defense by proof beyond a reasonable doubt. When read as a whole, the jury charge on self-defense was a proper statement on the law. Therefore, Counsel was not unreasonable in this regard.

### Other Allegations

No other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

### CONCLUSION

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

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed Rule 243, SCACR, for appropriate procedures after notice has been timely filed.

### IT IS THEREFORE ORDERED

- 1 That the Application for Post-Conviction Relief must be DENIED AND DISMISSED WITH PREJUDICE, and
- 2 The Applicant must be remanded to the custody of the Respondent

AND IT IS SO ORDERED this 8<sup>th</sup> day of July 2011



EDGAR W. DICKSON  
Presiding Judge  
First Judicial Circuit

Orangeburg, South Carolina

thru it made by Jenkins or his reputation for violence. After extensive interviews, investigators were unsuccessful.

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