

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

VOLUME II OF II

RECEIVED

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S.C. SUPREME COURT

Certiorari to Horry County

Honorable Roger E. Henderson, Circuit Court Judge

MICHAEL A. LIVINGSTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001739

APPENDIX

TAYLOR D GILLIAM
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHNNY ELLIS JAMES, JR.
Assistant Attorney General
Attorney General Office
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

PAGES 501-770

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED AUGUST 11, 2015.....	1
APPLICATION FOR POST-CONVICTION RELIEF (2012-CP-26-4207)	638
RETURN (2012-CP-26-4207)	649
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED OCT. 28, 2014.....	654
ORDER OF DISMISSAL (2012-CP-26-4207)	720
APPLICATION FOR POST-CONVICTION RELIEF (2016-CP-26-1750)	728
RETURN (2016-CP-26-1750).....	735
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED MAY 22, 2017.....	741
ORDER OF DISMISSAL (2016-CP-26-1750)	758
INDICTMENTS	765

1 out in the woods rotting away?

2 A. Yes sir.

3 Q. Had y'all even found the -- uh -- Fido at this point?

4 A. Yes sir. We -- We had found Fido at that point.

5 It was after the -- in the initial
6 stages of the investigation that the informant came forward
7 with the information.

8 Q. And you also talked with a fellow by the name of -- uh
9 -- Tyrone Hart; correct?

10 A. If I could refer -- review my notes? I believe I did.

11 Q. The second page -- uh -- bottom paragraph.

12 A. I didn't speak to Tyrone. I actually drove him home
13 after other investigators interviewed him.

14 Q. Oh, Okay.

15 A. Uh --

16 Q. All right. So you didn't --

17 A. No sir, I didn't con --

18 Q. -- You never talked with Tyrone?

19 A. I didn't conduct a formal interview with Tyrone Hart.

20 Upon review my notes:

21 Uh -- After the interview was
22 concluded with the other investigator, Tyrone Hart came to
23 my office -- uh -- and we started up general conversation,
24 where I did ask him:

25 Who would want to hurt Ervin Graham?

1 Uh -- And he indicated Amp.

2 MR. JOYE:

3 Objection, hearsay.

4 THE COURT:

5 Sustained.

6 MR. RICHARDSON:

7 Hearsay?

8 Okay. All right.

9 RECROSS-EXAMINATION BY MR. RICHARDSON CONTINUED:

10 Q. So you were able to talk with -- uh -- Tyrone --

11 A. Yes sir, I did.

12 Q. -- Hart? But you didn't interview him?

13 A. Correct.

14 Q. And he was able to give you some information?

15 A. Yes sir.

16 MR. RICHARDSON:

17 All right. I believe that's all I
18 have.

19 Uh -- If you'd answer any redirect?

20 THE COURT:

21 Anything further, Mr. -- uh -- Joye?

22 REDIRECT EXAMINATION BY MR. JOYE:

23 Q. And you'd developed information from a confidential
24 informant?

25 A. Yes sir.

1 Q. And pursuant to that information -- uh -- y'all were
2 under the impression that the body of Ervin Graham had been
3 burned up; correct?

4 A. No sir. I -- I don't have any -- anything that I was
5 under the impression of that.

6 I -- I didn't attend the autopsy.

7 I don't know what injuries Mr. Graham
8 sustained.

9 Q. No sir. I'm asking you what information you had
10 developed through the confidential informant?

11 And you certainly can refresh your
12 memory through your notes.

13 A. (Reviews Notes.) No sir. Nothing in my notes
14 indicates that the informant indicated -- uh -- Mr. Graham
15 had been burned up.

16 Q. You didn't speak to the confidential informant?

17 A. Yes, I did. Detective Clark and I conducted the
18 interview with her.

19 MR. JOYE:

20 Uh -- Give me one second, Your Honor.

21 WHEREUPON: Mr. Joye confers off the
22 record with Mr. Richardson at counsel table.

23 Your Honor, I can't -- What I'm
24 looking for, I can't put my hands on.

25 But, suffice it to say:

1 I'm -- I'm done.

2 THE COURT:

3 Okay. All right.

4 Mr. Richardson, anything on redirect?

5 MR. RICHARDSON:

6 No.

7 THE COURT:

8 Or re-cross.

9 MR. RICHARDSON:

10 No.

11 THE COURT:

12 All right. Thank you, sir.

13 You may step down, Mr. Troxell.

14 MR. JOYE:

15 I would call one final witness.

16 THE COURT:

17 All right.

18 MR. JOYE:

19 I call Investigator Robert --

20 THE COURT:

21 Deal.

22 MR. JOYE:

23 -- Deal. I'm sorry.

24 MR. RICHARDSON:

25 He's already been under oath.

Recall of Investigator Deal by Defense

505

1 THE COURT:

2 Yes, Mr. Deal, I remind you:

3 You are still under oath.

4 WITNESS:

5 Yes, Your Honor.

6 WHEREUPON: INVESTIGATOR ROBERT DEAL,
7 BEING DULY SWORN EARLIER WHEN HE TESTIFIED FOR THE STATE,
8 NOW BEING CALLED BY THE DEFENSE, TESTIFIED FURTHER UNDER
9 OATH AS FOLLOWS:

10 DIRECT EXAMINATION BY MR. JOYE:

11 Q. Investigator Deal, you have a great deal of familiarity
12 with weapons?

13 A. That's correct.

14 Q. And is it possible to shoot a three hun -- a 357 magnum
15 cartridge out of a .38 or vice versa?

16 A. That's correct. The calibers are somewhat similar to
17 each other. They can be fired -- uh --

18 Q. Can you shoot either one out of either gun?

19 A. That's correct.

20 Q. Now with respect to a 45 caliber gun and a 9
21 millimeter, can you shoot a 9 millimeter out of a 45 caliber
22 gun?

23 A. It is possible.

24 MR. JOYE:

25 Thank you, sir. Nothing further.

1 CROSS-EXAMINATION BY MR. RICHARDSON:

2 Q. That isn't what happened in this case, though, is it,
3 Detective Deal?

4 A. I'd have to re -- uh -- relate to agent DeFreese's
5 report from SLED to clarify that answer.

6 MR. JOYE:

7 Your Honor, I don't believe he can do
8 that.

9 MR. RICHARDSON:

10 Well, he --

11 THE COURT:

12 Well, let's see what Mr. Richardson's
13 going to ask him next. I mean --

14 CROSS-EXAMINATION BY MR. RICHARDSON CONTINUED:

15 Q. Were you in here for Agent DeFreese's testimony?

16 A. Yes, I was.

17 Q. Uh -- Did you hear anything in that testimony that --
18 uh -- you disagreed with?

19 A. I didn't hear anything to disagree with Agent
20 DeFreese's statement.

21 Q. Well, did you understand what Agent DeFreese was
22 talking about with regards to the slide; and that having to
23 have been a 9 millimeter?

24 A. I understood that Agent DeFreese stated that:

25 On the 9 millimeter cartridges,

1 that the breach face -- uh -- indentions and markings were -
2 - uh -- the same on both casings.

3 And additionally, the 40 caliber
4 Smith & Wesson -- uh -- cartridge casings also had the same
5 identical breach face markings -- uh -- for the 40.

6 So we had two distinct firearms at
7 that scene.

8 Q. And he identified it as all of the shots coming from
9 one 40; correct?

10 A. All the 40 caliber casings, he stated, came from the 40
11 caliber handgun.

12 MR. JOYE:

13 I'm going to object. I believe the
14 testimony --

15 THE COURT:

16 I -- I think this is way beyond
17 redirect -- re-cross, and --

18 MR. JOYE:

19 I think it --

20 THE COURT:

21 -- and Detective -- I mean -- uh -
22 - Mr. DeFreese has testified.

23 And we don't need to have another
24 witness tell us what Mr. DeFreese testified to.

25 Mr. DeFreese's testimony is in the

1 record.

2 MR. JOYE:

3 Your Honor, just so the jury --

4 THE COURT:

5 I sustain the motion.

6 MR. JOYE:

7 -- is not misled, I believe the --
8 the testimony was that:

9 The same gun was used to fire the 9
10 millimeter casings; and the same gun was used to fire the 40
11 caliber casings.

12 THE COURT:

13 Do you want me to swear you in, Mr. -
14 - Mr. Joy?

15 MR. JOYE:

16 No, I just -- I --

17 THE COURT:

18 All right.

19 MR. JOYE:

20 Thank you, Judge.

21 MR. RICHARDSON:

22 I have --

23 THE COURT:

24 That's enough. Okay.

25 MR. RICHARDSON:

Defense Rests

509

1 I have no further questions for
2 Officer Deal.

3 MR. JOYE:

4 No further questions, Your Honor.

5 THE COURT:

6 Step down.

7 MR. JOYE:

8 Judge, at this time the defense would
9 rest.

10 THE COURT:

11 All right.

12 Mr. Joye, I'm going to have to ask
13 question your -- your -- uh --

14 MR. JOYE:

15 Yes sir, Your Honor.

16 THE COURT:

17 -- your client on one point; but --
18 uh -- uh -- I'm going to do that outside the presence of the
19 jury.

20 What I'm going to do is -- uh --
21 adjourn for the day.

22 I promised you that you'd be out of
23 here by 5:30; and you're going to be.

24 Uh -- Tomorrow morning, we're going
25 to re-adjourn -- I mean, re-commence this trial.

1 It will involve closing arguments and
2 my charge on the law.

3 And hopefully within an hour or so
4 after you get back in, you have this for your deliberations;
5 all right.

6 Be back at 9:30.

7 (WHEREUPON: The jury empanelled in
8 the case withdrew from the courtroom at 4:10 PM, August 12,
9 2009; and was no longer present during the following
10 proceedings.)

11 THE COURT:

12

13 All right.

14 Mr. Livingston, you are still under
15 oath and I'll remind you of that.

16 I have explained to you -- uh -- your
17 rights under the Fifth Amendment; your right to remain
18 silent.

19 Would you like for me to explain that
20 to you again?

21 DEFENDANT:

22 No, Your Honor.

23 THE COURT:

24 You understand what your rights are?

25 DEFENDANT:

1 Yes, Your Honor.

2 THE COURT:

3 Now, have you had an opportunity to
4 confer with your client (sic) concerning whether or not you
5 will testify in this case or not testify?

6 DEFENDANT:

7 Yes, Your Honor.

8 I have chosen not to testify in this
9 case.

10 THE COURT:

11 And I meant "with your lawyer."

12 But have you -- uh -- You have
13 decided not to testify?

14 DEFENDANT:

15 Yes, Your Honor.

16 THE COURT:

17 That is your decision?

18 DEFENDANT:

19 Yes, Your Honor.

20 THE COURT:

21 And you've had all the time you need
22 to think about it?

23 DEFENDANT:

24 Yes, Your Honor.

25 THE COURT:

1 Are you freely and voluntarily
2 waiving your right to testify in this trial?

3 DEFENDANT:

4 Yes, Your Honor.

5 THE COURT:

6 Are you freely and voluntary ex --
7 voluntarily exercising your right to remain silent?

8 DEFENDANT:

9 Yes, Your Honor.

10 THE COURT:

11 All right. Thank you very much.

12 All right, gentlemen; anything else?

13 MR. RICHARDSON:

14 No sir.

15 THE COURT:

16 Okay.

17 Mr. Joye; anything else?.

18 MR. JOYE:

19 No sir.

20 THE COURT:

21 All right.

22 We'll be back in here at 9:30 in the
23 morning ready to argue.

24 You have copies of my proposed
25 charge.

1 If you have any additions or
2 deletions, please submit them in writing first thing in the
3 morning; okay.

4 MR. RICHARDSON:

5 Okay.

6 MR. JOYE:

7 Thank you, Judge.

8 MR. RICHARDSON:

9 Thank you.

10 THE COURT:

11 Okay.

12 Uh -- Actually, gentlemen, let's have
13 you back in my -- in my --

14 MR. JOYE:

15 9:15?

16 THE COURT:

17 -- 9:15 in my chamber -- my chambers.

18 (WHEREUPON: The court was declared
19 in recess at 4:12 PM, August 12, 2009.)

20 (WHEREUPON: The court was called to
21 order by the Bailiff at 9:31 AM, August 13, 2009; and all
22 pertinent parties, along with their counsel, were back and
23 present in the courtroom.)

24 BAILIFF:

25 All rise.

1 THE COURT:

2 Thank you. Please be seated.

3 Okay.

4 I have provided you with copies of my
5 proposed charge.

6 I advised you that this morning I
7 wanted to hear from you on that.

8 So I will hear from the State first.

9 MR. RICHARDSON:

10 Thank, Your Honor.

11 Uh -- The only thing that I would ask
12 to include -- and I've passed a copy to you and to -- uh --
13 Mr. Joye -- is -- uh -- a charge on felony murder inference.

14 I believe that -- uh -- the charges
15 would include:

16 Armed robbery.

17 Possession of a weapon during the
18 commission of a violent crime.

19 And murder.

20 Uh -- And certainly, it would appear
21 that any one of those would be felonies.

22 THE COURT:

23 And I'm inclined to do that.

24 I'd actually already -- uh -- asked
25 Aaron -- uh -- about felony murder.

1 Uh -- The charge that I had -- and I
2 don't know if this is the one you passed up -- but, it's
3 certainly the one from our charge book:

4 If one intentionally kills another
5 during the commission of a felony, the inference of malice
6 may arise. If facts are proved beyond a reasonable doubt
7 sufficient to raise an inference of malice to your
8 satisfaction, this inference would simply be an evidentiary
9 fact to be taken into consideration by you along with all
10 other evidence in the case. And you may give it the weight
11 that you decide it should receive.

12 That is the felony murder -- uh --
13 inference or -- or -- uh -- charge and that I am accustomed
14 to giving.

15 Mr. -- uh -- Joye, let me hear from
16 you on that issue.

17 MR. JOYE:

18 Your Honor, if that -- if that be
19 true, then I would ask for a mere presence charge.

20 I didn't request it; but I didn't
21 know I had a -- this particular charge coming.

22 So conceivably, if Michael Livingston
23 was merely present at the time that someone shot him, that
24 doesn't make Michael Livingston guilty of anything.

25 And in fact, what we have to deal

1 with here is:

2 If -- If -- If they believe that
3 Michael was present, he's no more merely present than Kal
4 Hill is.

5 THE COURT:

6 Well, Kal Hill's also been charged;
7 hasn't he?

8 MR. JOYE:

9 No sir.

10 THE COURT:

11 Okay.

12 MR. RICHARDSON:

13 No sir.

14 THE COURT:

15 All right.

16 Mr. Richardson, let me hear you on
17 that.

18 MR. RICHARDSON:

19 Your Honor, I believe that -- uh --
20 that is covered in the hand of one, hand of all charge -- uh
21 -- basically saying that:

22 Mere knowledge that another person is
23 going to commit a crime, even if the Defendant is present
24 when the crime is committed, is not sufficient to convict
25 the -- uh -- Defendant as -- as the principle.

1 THE COURT:

2 How about that, Mr. -- uh -- Joye?

3 Doesn't that pretty much cover that
4 particular charge?

5 MR. JOYE:

6 Well, Judge, I -- I think we probably
7 need to go into it a little bit more; that -- that merely
8 being present at the commission of a crime.

9 Uh -- I think it needs a -- a little
10 bit --

11 THE COURT:

12 Mr. -- uh -- Richardson, then you
13 don't dispute the necessity of some mere presence charge?

14 It's just that you felt that it's
15 adequately covered in: Hand of one; hand of all.

16 Is that your position?

17 MR. RICHARDSON:

18 Yes sir.

19 THE COURT:

20 All right.

21 Then, I'll go ahead and I'll give my
22 -- uh -- mere presence charge -- uh -- on that.

23 Uh -- And the charge that I will
24 give:

25 Mere presence at the scene is not

1 sufficient to prove someone guilty of a crime.

2 The Defendant's presence where a
3 crime is being committed or mere association with a person
4 who commits a crime does not make a Defendant an accomplice,
5 or an aider or abettor to -- of the person committing the
6 crime.

7 The burden is on the State to prove
8 every element of the crime charged.

9 If you find after reviewing all of
10 the evidence, that the State has proved that the Defendant
11 was only present at the scene of a crime; and that they have
12 not proved beyond a reasonable doubt -- uh -- any other
13 participation in the crime, then you must find that the
14 Defendant was not guilty.

15 Uh -- The law is that proof of -- uh
16 -- there's an error there -- that proof of a person's
17 presence at the scene of a crime is not sufficient to find
18 someone guilty.

19 I think they should be "mere proof of
20 presence; okay. (To law clerk.)

21 Was that sufficient for your
22 purposes, Mr. Joye?

23 MR. JOYE:

24 Yes sir, Your Honor.

25 THE COURT:

1 All right.

2 Mr. Richardson -- uh -- I will add
3 that -- uh -- to the charge.

4 There are -- I think, certainly if
5 the jury did not believe -- uh -- the witnesses -- uh -- the
6 Defense would be entitled to that. And they could make a
7 finding that perhaps he was present.

8 Okay, gentlemen; are you ready to
9 argue?

10 MR. JOYE:

11 Your Honor, I believe at this time I
12 would -- uh -- renew my previous motion for directed verdict
13 -- uh -- on the grounds that -- uh -- that:

14 Uh -- There is absolutely no evidence
15 from which to infer the guilt of my client, other than the
16 testimony -- uh -- that's been presented of the four -- uh
17 -- actual alleged eyewitnesses.

18 And that they are -- uh -- any and
19 all of the stories are incredible and inconsistent with one
20 another -- uh -- that we would state to a level that:

21 There is no evidence that Michael
22 Livingston's guilty of this murder.

23 THE COURT:

24 All right, sir.

25 And I would respectfully decline your

1 motion.

2 Of course, it's not for me in a
3 directed verdict -- on a directed verdict motion -- to
4 determine the weight or sufficiency of the evidence; but
5 merely the present of evidence.

6 And if the evidence presented by the
7 State is believed -- is believed by the jury -- and we must
8 look at it in the light most favorable to the nonmoving
9 party -- but, if it is believed by the -- uh -- the jury;
10 there's not only evidence; there's overwhelming evidence --
11 uh -- if it is believed.

12 And there again, that would be a
13 matter for the jury.

14 Uh -- All right.

15 Anything further, gentlemen?

16 MR. RICHARDSON:

17 Your Honor, if I could -- uh -- I --
18 If I could revisit that mere presence charge --

19 THE COURT:

20 Yes sir.

21 MR. RICHARDSON:

22 -- once again.

23 THE COURT:

24 All right. I'll allow it.

25 MR. RICHARDSON:

1 My only -- uh -- My only problem is
2 that:

3 At least half of the hand of one;
4 hand of all charge deals with mere presence; the whole last
5 page of your charge there and going in on the second page.

6 So about half of the thing is mere
7 presence.

8 My only problem is, is if -- if they
9 here it there, and then turned around and hear a separate
10 charge on mere presence, then the whole of -- uh -- hand of
11 one; hand of all is covered up in basically two arguments on
12 mere presence.

13 THE COURT:

14 I think the way that it's written,
15 the jury can distinguish the fact that -- between a -- a
16 purely mere presence charge and one in which I am talking
17 about the hand of one; hand of all.

18 They do overlap.

19 But I -- I'm -- Out of an abundance
20 of caution, I am going to charge both ways.

21 MR. RICHARDSON:

22 Thank Your Honor.

23 THE COURT:

24 Mr. -- uh -- Joye, if you -- or, if
25 you're through with your chairs -- uh --

1 MR. JOYE:

2 No sir, Your Honor.

3 They're just for --

4 THE COURT:

5 They're there for a purpose, then?

6 MR. JOYE:

7 Yes sir. I didn't --

8 THE COURT:

9 Well, I didn't want you having Mr. --

10 MR. JOYE:

11 I moved them back.

12 THE COURT:

13 I didn't want you having Mr. -- uh --
14 Richardson stumbling over them.

15 MR. JOYE:

16 Well, he --

17 THE COURT:

18 Mr. Richardson, are you going to open
19 and close?

20 Or are you just going to close?

21 MR. RICHARDSON:

22 I'll just close, Your Honor.

23 THE COURT:

24 All right. Okay.

25 MR. JOYE:

1 We thought -- uh -- Investigator
2 Deal's got a new pair of pants on.

3 So we figured we'd try to get those
4 too.

5 THE COURT:

6 Well, you could, I think, Mr. Deal --
7 uh -- chalk that up as a business expense at the end of the
8 year.

9 Okay.

10 (WHEREUPON: Counsel for each party
11 conferred off the record with The Court at the bench at 9:39
12 AM, August 13, 2009.)

13 THE COURT:

14 All right.

15 Ms. King, bring in the jury.

16 (WHEREUPON: The jury empanelled in
17 the case was escorted back into the courtroom at 9:41 AM,
18 August 13, 2009; and was in fact present during the
19 following proceedings.)

20 THE COURT:

21 Good morning ladies and gentlemen of
22 the jury.

23 I hope that Mr. Roth had some
24 refreshments for you this morning.

25 JURORS:

1 Yes sir.

2 THE COURT:

3 And you're all ready to go.

4 As we -- uh -- indicated yesterday,
5 we are now through with the presentation of evidence in this
6 case, as -- uh -- both sides have rested.

7 And now, we are going to argue and
8 charge.

9 Uh -- What that means is that each
10 side will have an opportunity to discuss with you, or -- or
11 speak to you about their position in this case.

12 Let me remind you that what you hear
13 in a closing argument is not evidence.

14 Of course the attorneys may comment
15 on the evidence and talk about the evidence as they view
16 that evidence from their position in the case.

17 But if they say or -- or mention
18 anything, or comment on the evidence in such a way that you
19 as a juror did not see or hear, disregard that.

20 For you must make your decision in
21 this case based purely on the evidence that you heard from
22 this witness stand or saw in the form of exhibits.

23 Now the order will be:

24 First the Defense will -- will argue
25 -- uh -- its position to you.

Closing Arguments by Counsel

525

1 That will be followed by the State.

2 The State will have the final argument.

3 Then, I will instruct you as to the
4 law.

5 And just like they have the -- uh --
6 right to comment on the -- on the facts of the case; but you
7 are the ultimate determiner -- uh -- of the facts, I have to
8 give you the law.

9 And you will be guided by the law as
10 I give it to you at the end of the closing arguments.

11 Mr. Joye, are you ready to go
12 forward?

13 MR. JOYE:

14 Yes, Your Honor.

15 THE COURT:

16 All right.

17 MR. JOYE:

18 Madam Forelady; ladies and gentlemen
19 of the jury; not guilty.

20 Not guilty.

21 Michael Livingston sits here today:
22 not guilty.

23 His mere presence and his silence
24 here is just as strong as if he yells it from the mountain
25 top; that:

1 I'm innocent.

2 And under the laws of this country,
3 and the laws that were ultimately part of our judicial
4 system and have served us for 233 years, if we want to start
5 with July 4th, 1776; concepts that are so near and dear to
6 us as Americans, that we fight and die for these concepts.

7 Concepts such as: beyond a reasonable
8 doubt.

9 Beyond a reasonable doubt. What does
10 that mean?

11 Well, even if you were to get in
12 here, and go into your jury room and say:

13 Maybe he's guilty.

14 "Maybe" makes the scales of justice
15 move a little bit one way or the other.

16 He might be guilty.

17 Well, maybe that's got a little bit
18 more heft to it one way or the other.

19 Even if you say:

20 Probably guilty.

21 That ain't good enough.

22 That ain't good enough.

23 Only if you believe beyond a
24 reasonable doubt -- beyond a reasonable doubt:

25 Michael Livingston shot Ervin Graham

1 July 30th of 2007.

2 Only if you believe it beyond a
3 reasonable doubt in examining all the evidence and all of
4 the testimony that you have with you.

5 There is one thing that I tell you
6 that you have to take in your jury room.

7 Only one thing.

8 You cannot presume any of this
9 evidence has anything to do with anything.

10 You cannot presume that these folks
11 were telling the truth, which we obviously know they
12 weren't.

13 The only thing that you can presume
14 when you go into that jury room:

15 Michael Livingston is innocent.

16 That's the way our system works.

17 He is innocent until someone removes
18 -- till the 12 of you unanimously remove that presumption of
19 innocence from him.

20 Ladies and gentlemen, the
21 prosecution, Mr. Richardson, spent a great deal of time -- a
22 great deal of time explaining to you, through Investigator
23 Deal, the scene that they found off of Bombing Range Road
24 back up in the words.

25 He spent a lot of time explaining to

1 you the different gunshots, et cetera; where shell casings
2 were found; where was this; where was that.

3 But what did he tell you?

4 Zero physical evidence pointing to
5 Michael Livingston.

6 None.

7 Zero.

8 Could they have tested for thumb
9 prints, which Investigator Deal told you could very well
10 have been burnt into the round that was fired out of the
11 gun?

12 Could they have tested those and
13 maybe seen Michael Livingston prints?

14 I submit to you:

15 They couldn't; because his prints
16 weren't on it.

17 But could they have tested to try to
18 show you?

19 Yes. Didn't do that.

20 Were they able to bring a single
21 fingerprint to show you from inside the car that Michael
22 Livingston was ever there?

23 No. Couldn't do that.

24 Did they bring in a detective to tell
25 you how he investigated the case?

Closing Arguments by Counsel

529

1 No. Didn't do that.

2 We did. We had to bring in one of
3 the detectives that worked this case.

4 So, where does that leave us?

5 That leaves us with the stories that
6 you heard from this witness chair.

7 Now, no question about it, Dr.
8 Proctor said that there was 4 shots -- uh -- to Ervin
9 Graham's head, 3 of which are through and through.

10 By "through and through," I mean they
11 had both entrance and exit wounds.

12 Two right here.

13 Basically, I believe both of them
14 pretty much though came out pretty close to right here.

15 Two right here, one of which came out
16 over here.

17 Well, excuse me. I'm sorry.

18 A-1 went here.

19 And I think -- uh -- unfortunately --
20 uh -- Dr. Proctor got his numbering a little bit mixed up.

21 But A-1 to here, out the fore --
22 forehead.

23 B-1. B-1, entry. B-2 exit.

24 C and D; C exited here on the side of
25 the head.

1 Now what could he tell you?

2 He could tell you that 3 rounds --
3 only one of which he could -- that he recovered -- in the
4 skull -- that being -- Investigator Deal, their expert, says
5 is a .40 caliber projectile -- .40 caliber projectile, which
6 Coaty Deas says he fired into his head.

7 What we have to do is:

8 Try to match the science to the
9 testimony.

10 And I submit to you that:

11 You cannot.

12 You absolutely cannot.

13 What did Tony Wilson say?

14 What did he admit to?

15 Yeah, I lied.

16 I continued to lie.

17 I was interviewed over 4 times.

18 The Detectives would come in. They'd
19 have to come back in and clean up a discrepancy.

20 He lied.

21 He continued to lie.

22 He lied to you.

23 He said:

24 I'm a liar.

25 What he did admit to, was:

Closing Arguments by Counsel

531

1 He was a liar; a thief; a drug
2 dealer; and a drug addict; okay.

3 So then they bring out Coaty Deas.
4 Coaty Deas -- Oh, by the way:
5 Let's go back to Tony Wilson a
6 minute.

7 He's found with the .38 involved in
8 this particular incident on July 30th.

9 He's found on August 7th or 8th, in
10 possession of that .38.

11 Also in possession of drugs; the same
12 of which type that they said actually came from the murder
13 of Ervin Graham.

14 Also, he admitted to going to
15 someone's house and shooting it up, because his name had
16 been mentioned as being responsible in the murder of Ervin
17 Graham.

18 Coaty Deas.

19 Oh, and -- excuse me.

20 Let's go back to Tony.

21 I'm sorry. I keep thinking of these
22 things that Tony did.

23 Tony told you:

24 He wasn't looking for anything.

25 And yet, I had to show him the

1 contract he had with the Solicitor's office, with Mr.
2 Richardson, to -- We don't know what kind of Deal Tony is
3 going to get.

4 But it's not in this case, see.

5 Because, by Tony's own self-serving
6 statement, he was merely present at the time it happened.

7 And the Judge is going to charge you
8 on mere presence.

9 Because if your merely present,
10 you're not guilty of anything.

11 So, he said:

12 He didn't want any deals.

13 Do you believe that?

14 Do you believe that Tony Wilson came
15 up here simply because he wanted to do the right thing?

16 He would tell you whatever you wanted
17 to hear.

18 Same with Coaty Deas.

19 He signed a contract with the
20 government.

21 He told you:

22 He didn't know anything about a
23 contract.

24 He didn't sign any contract; until I
25 showed him his name on the line.

Closing Arguments by Counsel

533

1 He admitted to you: he was a drug
2 dealer.

3 He admitted to you: reluctantly all
4 be it, okay -- He admitted to you that:

5 He was a drug dealer.

6 When faced with the inevitable, he
7 admitted he was a drug dealer.

8 He admitted he was a thief.

9 He admitted he was an armed robber.

10 He admitted -- More importantly than
11 any of it, he admitted he was a liar.

12 Not only was he a liar; he was proved
13 to be a liar in this courtroom in what he told you.

14 And let's -- let's also talk about
15 how Coaty says he shot -- If you remember Coaty's testimony,
16 Coaty says:

17 I shot through the window, and shot
18 Ervin Graham in the left side of the face.

19 Investigator Deal told you:

20 Ervin Graham's head was back here
21 between these -- between the seats.

22 What side of the head would you
23 possibly be able to shoot of Ervin Graham if he's laying
24 this way, shooting from the driver's side window?

25 It doesn't make sense, see.

1 It doesn't make sense.

2 Left side of the face.

3 If he's laying between the seats, his
4 head's pointed in the back direction.

5 It doesn't work.

6 Better than that:

7 Where is the projectile?

8 Where is one of the .40 caliber shots
9 that went through and through his head?

10 I don't know.

11 I would assume it would have to be in
12 that vehicle.

13 Because, if he shot right here into
14 the face of Ervin Graham, that projectile had to go
15 somewhere.

16 They didn't find it.

17 If you believe everybody who says:

18 Michael Livingston shot Ervin Graham
19 in the back of the head.

20 Where are those projectiles?

21 Ladies and gentlemen, I've taken the
22 liberty of marking up where any kind of shell casing or
23 projectile was found.

24 This is the front of the vehicle.

25 If it was shot backwards to forwards,

1 where are the projectiles?

2 Where are the bullets?

3 Through and through.

4 That means:

5 3 shots went through Ervin Graham's
6 head.

7 And yet, you have zero projectiles.

8 Now, here's what Coaty Deas also
9 testified to:

10 That the window was busted and there
11 was blood and matter on the inside of the windshield.

12 I'll submit to you:

13 That's a shot into the front of the
14 windshield.

15 Whoops; excuse me.

16 And further, we had a Crime Scene
17 Investigator that took a picture of each and every little
18 scintilla -- each and every little bit and piece of
19 evidence.

20 Would you don't see is:

21 A picture of the windshield from the
22 inside.

23 And I'm going to submit to you:

24 If -- If you say that this projectile
25 came from the back of the head and out the front into the

1 windshield, there would have been blood and brain matter, as
2 Coaty Deas says, on the windshield.

3 No pictures.

4 That would be extremely valuable
5 information for you guys to have.

6 Because when you go back there, it's
7 beyond a reasonable doubt, by all of you.

8 Kal Hill; wow.

9 How incredible was that?

10 All of a sudden in the middle of a
11 trial -- First, he doesn't want to cooperate at all.

12 Didn't know nothing about nothing;
13 which was a lie.

14 He then says:

15 I was held up at gunpoint because
16 they thought I'd broken into Michael Livingston's house.

17 And held up at gunpoint by Chadd
18 Wilson.

19 Chadd Wilson says:

20 I don't know what in the world he's
21 talking about. He's one of our homeys.

22 Does it make sense?

23 Can you believe him?

24 He's an admitted liar.

25 Heck, he makes his own crack.

Closing Arguments by Counsel

537

1 He tells you:
2 Uh -- I smoke crack.
3 That makes him a crackhead.
4 Chadd Wilson.
5 Look at Chadd Wilson.
6 He's scary.
7 You want to see somebody who's scary?
8
9 Chadd Wilson is scary.
10 Chadd Wilson says:
11 I had a .38 caliber weapon and a .45
12 caliber weapon.
13 What did Investigator Deal tell you?
14 A .45 caliber weapon can shoot a 9
15 millimeter projectile.
16 So we start talking about the guns.
17 We got, perhaps, the mention of a 9
18 millimeter; a .45; two .38s; and a .40 caliber.
19 We can't have a single expert; not
20 the expert from SLED; not the ex -- not Dr. Proctor; not
21 Robert Deal; no one can tell you what gun, except for the
22 .40 caliber, killed Ervin Graham.
23 Now again, we still don't have the
24 projectiles.
25 Nowhere.

1 We got projectile and casings -- We
2 got projectiles and casings back here; not up here.

3 We got a picture.

4 That's a shot into; not a shot out
5 of.

6 Where is the blood evidence that they
7 say -- that Coaty Deas says existed?

8 I'm telling you:

9 It's not there. And we don't have it
10 because it doesn't exist.

11 Ladies and gentlemen, my friend, Mr.
12 Richardson, is going to get up here; and he's going to you:

13 Don't believe him. It's all smoke
14 and mirrors.

15 Don't follow Mr. Joye down that
16 rabbit path and into some rabbit hole.

17 Stay on the path.

18 Stay on the path of a guilty verdict.

19 Use your commonsense.

20 Well, I'm going to tell you:

21 Your common sense says:

22 Reasonable doubt.

23 Your common sense says:

24 Michael Livingston's innocent.

25 You use your commonsense everyday.

1 Use your commonsense in evaluating
2 the witnesses.

3 They want you to convict by and
4 through the testimony from 4 witnesses; two of whom are
5 codefendants; one of whom is charged in a -- in a related
6 armed robbery -- I mean, excuse me -- burglary and assault
7 and battery of a high and aggravated nature; and the fourth
8 of which was threatened with 360 to life unless he said --
9 and it was suggested to him -- that Amp did it.

10 I submit to you:

11 Most people when told that they can
12 go down 360 -- 360 months to life -- will tell you whatever
13 you want to hear.

14 And that in fact's what happened
15 here.

16 They had it in their mind who had
17 done it from day one.

18 They didn't go from that crime scene
19 forward and find the guilty party.

20 They went from what they believed
21 early on and worked their way backwards trying to connect
22 the dots to Michael Livingston.

23 Because, remember what Detective
24 Troxell told you; he said:

25 Well, we already knew he did it.

1 Well, how could he know?

2 He wasn't there.

3 All he can do is listen to what
4 somebody tells him.

5 You know, to convict Michael
6 Livingston in this case -- in this case, what you would have
7 to do -- necessarily have to do -- is:

8 Believe beyond a reasonable doubt 4
9 people that you wouldn't trust to carry your wallet across
10 this room; 4 people that you wouldn't dare loan your car to
11 go to the store; 4 people that you wouldn't leave in a room
12 alone with your wife, husband, or child.

13 Not guilty is the only verdict in
14 this case; the only verdict.

15 Why?

16 Because it's the right verdict.

17 (Begins to move chairs he has been
18 using to demonstrate.)

19 MR. RICHARDSON:

20 You can leave those, Scott?

21 MR. JOYE:

22 What?

23 MR. RICHARDSON:

24 You can leave those.

25 MR. JOYE:

Closing Arguments by Counsel

541

1 Okay.

2 THE COURT:

3 Are you done?

4 MR. JOYE:

5 Yes sir.

6 THE COURT:

7 Mr. Richardson.

8 MR. RICHARDSON:

9 Thank Your Honor.

10 Ladies and gentlemen -- uh -- my job
11 here is actually two parts;, one of which is to instruct you
12 on the law; and the other is to give a closing segment like
13 -- uh -- Mr. Joye is doing of what I believe the facts would
14 show, or the evidence would show.

15 And I'm going to really -- uh --
16 shortcut the stuff on the law, which is unusual.

17 But we agreed, with Mr. Joye from the
18 beginning, that there could be no doubt that Ervin Graham
19 was murdered.

20 There ain't no doubt that what took
21 place to him wasn't an accident. It was pure, cold-blooded,
22 murder.

23 We agreed on that from the beginning.

24 We agreed that he was the victim of
25 an armed robbery.

1 In other words, someone had taken his
2 truck, his drugs, money -- uh -- his gun.

3 We agreed on that.

4 And we also agreed that:

5 A weapon was used during the
6 commission of a violent crime.

7 So all of the elements that most
8 juries would have to hash out:

9 Whether or not there was malice or
10 ill will?

11 All of that stuff is pretty much
12 agreed by just what you -- you've -- uh -- already heard.

13 So I'm going to spend the bulk of
14 these next few minutes on what we can know for a fact; what
15 we can know simply by looking at the evidence.

16 And Mr. Joye is right:

17 I'm going to ask you not to -- uh --
18 not to run down any wild goose chases.

19 Uh -- This case has been fairly
20 complicated.

21 And believe me, it was -- it was a
22 lot more complicated than what you guys got.

23 But part of the reasoning there:

24 We could have stopped this entire bit
25 of testimony about what took place at Bombing Range Road.

Closing Arguments by Counsel

543

1 We could have stopped it right there.
2 And all the elements would have been met for murder; for
3 armed robbery; and for use of a weapon; just on what you
4 heard there.

5 But we didn't stop there, because we
6 wanted you to have every bit of the evidence.

7 We wanted you to have the evidence,
8 not only from there, but the stuff that took place -- uh --
9 down this deserted road.

10 Didn't try to hide or object when
11 they got into stuff about a prior -- uh -- burglary to a
12 house.

13 I wanted you to have all of that.
14 Because I also told you at the
15 beginning that:

16 These young men, you may not like --
17 uh -- these witnesses.

18 But keep in mind:
19 The State didn't pick those
20 witnesses.

21 Michael Livingston picked those
22 witnesses.

23 Michael wit -- Michael Livingston
24 picked the people that he would have around when he
25 committed such a heinous act.

1 And I told you at the beginning:

2 Had he broken into a school and done
3 something like that, you would've had teachers and students
4 to come up here and tell you about it.

5 Had he broken into a church, you
6 would have deacons and song leaders.

7 But when you kill a -- a drug dealer
8 in front of other drug dealers, you're going to get drug
9 dealers for witnesses.

10 And it would have been more
11 incredible if these young men and women had come in a suit;
12 or we had tried to dress them up to say:

13 Hey, I've never broken a dish.

14 Uh -- I was actually on my way to
15 church; and this is what I saw.

16 They didn't.

17 I mean, goodness gracious, you had
18 one guy to take this stand in his prison uniform. We didn't
19 try to dress him up.

20 You had another one to come in and
21 say:

22 Guess what, not only did he do it,
23 but I did it too. I shot him, myself.

24 You had another guy that says:

25 I'm not backing off of my -- uh --

Closing Arguments by Counsel

545

1 part of the responsibility.

2 I was there. I was there the entire
3 time. And I helped move the body.

4 I helped shoot the vehicle up.

5 I was a player in it.

6 And yeah, I would like some help at
7 the end of the day. But nobody's promised me anything.

8 I'm not saying:

9 Not me.

10 I'm saying:

11 Me, him, and him.

12 And think about this:

13 The person pointing that finger; that
14 same person, when they try to say: biased, and liars, and
15 everything else, that same guy said:

16 We run around when we were little
17 kids.

18 We run around when we were in diapers
19 together.

20 We road bikes when we were pre-teens.

21 You tell me where this guy comes off
22 trying to frame a cousin that he grew up sharing the same
23 yard with?

24 As hard as Chadd Wilson was, he told
25 you:

1 I love him. And I hate it. But I
2 love him.

3 And Tony loves him.

4 There ain't a grand conspiracy to
5 frame that man.

6 It's not there.

7 They don't want to be here.

8 They don't want to be here.

9 They don't want to be testifying
10 against their cousin.

11 Nobody does.

12 Had they not been charged, it is very
13 true that they wouldn't be up here testifying against their
14 cousin.

15 But they got caught.

16 And they said:

17 I am guilty.

18 They haven't pled; but they said:

19 I'm guilty.

20 And at some point, I found sitting
21 right over there; and I hope the State will look back at
22 what I have done and help me some.

23 Because, 12 men and women just like
24 you -- 13, with the alternate -- are going to sit and worry
25 about Coaty Deas; and they're going to sit and worry about

Closing Arguments by Counsel

547

1 Chadd Wilson; and they're going to sit and worry about Tony;
2 the whole crowd of them.

3 And some other attorney is going to
4 be saying:

5 Not me; but them.

6 So don't worry about them.

7 Their day is coming.

8 You can't get caught up on all of
9 these side chases about:

10 What's going to happen with them?

11 Sure, they hope that something good
12 happens, or they wouldn't be doing it.

13 Now let's talk about things that
14 we've got to know; got to know, without a shadow of a doubt.

15 And we -- not even beyond a
16 reasonable doubt, but beyond a shadow of a doubt, the man
17 that told you that:

18 I've done -- I don't remember -- 6 to
19 a thous -- 600 to a thousand autopsies, an expert, said:

20 There are 4 bullet holes in this
21 victim's head.

22 And any one of those 4 would've
23 killed him.

24 He would have died anyway.

25 He said:

1 There is a distinct pattern as to
2 these bullet holes:

3 Two on the left side of the head; and
4 two straight above the right eye.

5 The left side of the head; A-1 comes
6 out up here in a motion from here to here when it leaves the
7 skull.

8 Where is the projectile?

9 I don't know.

10 I can't tell you.

11 What I can tell you is that:

12 Projectile two took a path from here
13 to here.

14 Two bullet holes in the left side of
15 the head.

16 Stop there just for a minute --
17 minute.

18 Now these boys that you heard from,
19 remember, they're not saying:

20 Not me; him.

21 But they're saying:

22 Me and him.

23 They said that:

24 Michael Livingston walked up behind
25 the victim and shot him twice in the head; every one of

1	them.
---	-------

2 Well, Chadd didn't.

3 Chadd said:

4 I heard one shot.

5 | But every other one of them said:

6 I heard two shots.

7 Michael was standing right here and

8 | fired: bam.

9 And then they said:

10 He walked around, and then: bam.

11 Two shots; back of the head.

12 | Now another thing that they tell you

13 | is that -- of course Mr. Joye don't want you to believe

14 anything of anything -- but every one of them tell you this

15 | part of the story:

16 That Tony's standing here at the

17 window, talking to Mr. Graham; right?

18 | If Mr. Graham's here in the driver's

19 | seat -- which everybody said he was in the driver's seat --

20 | where is he going to be facing when someone is talking him

21 | -- to Tony?

22 | Where is he going to be facing when

23 | somebody opens the back door with the intention of shooting

24 | two bullets in his head?

25 He's either going to be looking at

1 Tony here, or looking back here; either way, exposing the
2 left side of his head.

3 And that's where the two shots went.

4 And Dr. Proctor ain't got no reason
5 to lie to you.

6 He's told you:

7 I don't know any of the witnesses.

8 I don't know any of the Defendants.

9 I don't know nobody.

10 But I can tell you that:

11 Two shots come in here.

12 And before we move on, you've heard
13 these boys.

14 I told you to begin with, you may not
15 like them.

16 But you've got to believe that these
17 boys ain't -- none of them are going to be Rhodes Scholars.

18 Ain't none of them smart enough to
19 concoct a story that's going to conform with that part of
20 the evidence.

21 Think about what the boys that never
22 left and went to the dumpsite said.

23 Tony and Kal, both of them said:

24 I heard two shots.

25 Now if somebody was feeding it like

1 Mr. Joye has hung his hat on:

2 It all broke through Kal.

3 If Kal hadn't been fed the name Amp,
4 it would have never come up.

5 Well Kal, if they were going to feed
6 him, wouldn't they have said:

7 Look, boys, we've got 4 entrance
8 wounds. Why don't we go ahead and clean up this story right
9 now. There's 4 entrance wounds.

10 But Kal said:

11 No. There's -- All I know about is
12 two.

13 I know two to the left side of his
14 head; actually the back part of his head.

15 He said:

16 I saw his brains splatter out.

17 I saw all of this.

18 He didn't concoct this entire story.

19 If he did, at some point he must have
20 been smart enough to plant two 9 millimeter shell casings.

21 Because that's pretty damning for the
22 Defense.

23 That chart that they drove up -- uh
24 -- or drew up and marked up, shows but two shell casings in
25 that entire vehicle.

1 There's a lot of projectiles and
2 numerous shots. But only two shell casings.

3 Now, what does that tell you?

4 Because physical evidence ain't going
5 to lie.

6 Both of those shell casings were 9
7 millimeters; correct?

8 Two 9 millimeters in that car.

9 That tells you that:

10 That 9 millimeter would have had to
11 have been in the car, or so close to the car that the
12 injection would have put both of those in the vehicle.

13 There ain't no other way for it to
14 have happened, unless somebody had gathered up those
15 particular two and stuck them variously into the car.

16 No other way.

17 Only two shell casings in that entire
18 car. And those were 9 millimeters.

19 And whose 9 millimeter?

20 We know that that 9 millimeter was
21 Michael Livingston's.

22 And how do we know it?

23 Because Coaty Deas come in and said:

24 I know that 9 millimeter well.

25 Yeah, I didn't want to come in here

1 and testify.

2 I didn't want to be involved.

3 But I'm the one that gave him the 9
4 millimeter a month or so ago.

5 How did I get it? I stole it from
6 somebody.

7 I'm a thief and a robber, and every
8 other thing; a liar just like Mr. Joye said.

9 But I'm telling you the truth when I
10 say I stole it.

11 Why would you lie about stealing a
12 gun, when Mr. Joye kept saying:

13 Look here, son, do you know that what
14 you're admitting to could get you federal time?

15 You're a -- a felon with a -- with a
16 -- with a record.

17 How in the world could you possess a
18 gun; much less steal one?

19 I'm telling you:

20 I stole the gun and I gave it to
21 Michael.

22 And when asked about that, I was
23 like:

24 Well, you gave it to him?

25 Did you sell it to him?

1 No, I ain't give him nothing. He
2 gave me crack cocaine in exchange for it.

3 Look, when you really should get --
4 uh -- suspicious of the State, or some grand conspiracy, is
5 when we bring in all of these great people that say:

6 Not me. I ain't broke a dish.

7 But -- uh -- yeah, I saw him do it.

8 This guys saying:

9 Yeah, I -- I sell drugs. I use
10 drugs. I'm a liar.

11 Hey, put all that petty stuff aside.
12 I shot a dude in the face twice.

13 Scary?

14 Scary enough?

15 Well, it should be.

16 He sat right up here on the stand and
17 said:

18 Yeah, I shot him in the face.

19 Who's going to make that up?

20 Why would you make that up?

21 I shot him in the face.

22 Mr. Joye said:

23 Well, it's impossible to shoot the
24 guy in the face if he's laying over the seat.

25 It's impossible for anyone of you or

Closing Arguments by Counsel

555

1 me or anybody to come in here and say:

2 I shot him in the face.

3 I shot him.

4 Nobody's going to tell that on their
5 self if they ain't done it.

6 And nobody knew nothing about Coaty
7 Deas until Coaty Deas come in and said it.

8 We knew about two gunshot wounds.

9 But were puzzled:

10 Where in the world did these other
11 two gunshot wounds come from?

12 Apparently, somebody blowing up and
13 shooting up the car, must have shot him.

14 Coaty Deas said:

15 No. I was there. Michael -- I had
16 picked up his gun as soon as I got the car.

17 Michael said shoot him. I shot him.

18 Did you just shoot him once?

19 No. He said shoot him again. And I
20 shot him again.

21 The -- The red herring and stuff that
22 I was telling you about -- the goose chases:

23 I cannot honestly tell you how that
24 body was found over here like this. I don't know.

25 And none of y'all can know.

1 I mean, the body was in there for
2 what; 9 or 10 days?

3 He had stiffened up like a board.

4 The doctor says that his skin had
5 fell off; his teeth had come out; his eyes were gone; and
6 his hair was gone.

7 There ain't no telling how he got
8 moved from here to there.

9 Maybe one of the boys moved him.

10 Now, they said they didn't. But
11 somehow, he got from here to here. I can't answer that.

12 I can tell you one thing that we all
13 know; and we've got to know beyond a shadow of a doubt:

14 You might move from here to here in a
15 slumping fashion as your body deteriorates.

16 But your feet don't move from here to
17 here across that well. You can't do that.

18 He didn't wake up like dry bones and
19 move his legs back across.

20 So that tells us that:

21 Ervin Graham was dead before he ever
22 left Bombing Range Road.

23 I mean, your common sense tells you
24 that:

25 You don't get into a car with

1 somebody that's alive and leave his feet sitting right there
2 where he could step on the gas, or step on the brake, or
3 anything to cause chaos in the vehicle.

4 He was as dead as he was going to get
5 before he ever left Bombing Range Road.

6 That's how it was easy to get that
7 .40 from him.

8 That's why his legs were still there.
9 It's pure speculation.

10 And I told you I wasn't going to do
11 that; but I would suggest to you that:

12 If he's seated here, and he's been
13 pushed over, even if he was sitting up like this -- pushed
14 over on that rest, how could his face have got down like
15 this?

16 Speculation.

17 But two shots from a .40 caliber
18 pistol certainly should move your face and your body from
19 some distance; wouldn't you think?

20 The force of two .40 caliber pistols
21 coming in, you -- you don't think that would move the body
22 in some way?

23 I don't know.

24 But it's certainly going to do
25 something.

1 Somehow, he got turned over, because
2 that's how they found him.

3 Maybe the pushed him over there.

4 Maybe the .40 caliber pushed him over
5 there.

6 But we know for a undeniable fact,
7 that was 4 bullet holes in his head.

8 And the only way to have known about
9 these two, was those people that were at the scene; and
10 said:

11 I saw Tony talking to him.

12 And I saw Michael come up from
13 behind, open the door, and: bam.

14 He stepped back, and: bam.

15 All of them saw that.

16 Now, we also know that:

17 The people with the information
18 narrowed substantially after that.

19 We know Coaty Deas drove because
20 Coaty told you he was driving -- that he drove.

21 There's nobody that would admit to
22 driving a vehicle if they hadn't done it.

23 Why put your -- People minimize.

24 They lie to minimize.

25 They don't lie to enhance what

1 they've done.

2 But Coaty said:

3 I drove.

4 And Michael sat right there.

5 And Chadd sit right back here.

6 And Chadd said:

7 I didn't even want to look at the --

8 the bloody body up there; so I was riding like this.

9 Now, all of them tell you that:

10 Coaty wasn't from there.

11 Coaty didn't live around there.

12 Coaty don't know these back roads.

13 Coaty needs instruction.

14 And who knew these back roads?

15 Who knew that this fire trail was

16 down here?

17 Chadd knew it. Because Chadd said:

18 When we were little boys, we were

19 riding back there to a golf course.

20 Chadd said:

21 Me and Michael and Tony, we'd ride

22 our bikes back there.

23 We were back there a good bit.

24 Said:

25 Even as a child, I was back in these

1 woods.

2 Michael grew up right beside him.

3 And Chadd said:

4 We rode together as children.

5 Why you going to make that up?

6 Back 20, 30 years ago.

7 Michael knew this location. And

8 that's how they dumped the body.

9 That was a -- A outsider doesn't find
10 this location.

11 Coaty Deas didn't come up with that
12 on his own.

13 Like I told you, the information
14 trail narrows substantially there.

15 Kal wasn't there anymore.

16 Tony wasn't there anymore.

17 Nobody knows what happened at the
18 dumpsite except those that were there.

19 And what did they tell you?

20 Officer Deal come in and said:

21 I found two 9 millimeter projectiles
22 in this -- I mean, not projectiles, I'm sorry -- casings in
23 the car.

24 But I found so many .40 caliber
25 outside the vehicle.

1 Didn't find any casings inside; but I
2 found a bunch outside.

3 Tony and Coaty told you something
4 that nobody else in the world could have known.

5 The only people that could have known
6 it is Tony, Coaty, and Amp.

7 And those two told you something that
8 nobody else could have known.

9 They said:

10 W got there. Coaty shot him twice.

11 And we went back about 30 yards -- 30
12 feet -- 30 yards -- I don't remember -- but, we went back
13 and fired into the back of the vehicle trying to get the
14 vehicle to blow up.

15 I told you that:

16 Nobody is going to win any
17 scholarships -- uh -- for their thought process.

18 But who makes that up?

19 Who's cunning enough to figure out:

20 Uh -- I'll tell you what:

21 Let's plant evidence in these bushes
22 that would appear that we would be truthful on all this
23 other stuff.

24 They told you:

25 We were trying to blow it up.

1 Coaty said:

2 That Amp tried to pay him in money or
3 drugs to go back and set fire to the vehicle.

4 Wanted all the evidence gone.

5 Wanted all of it gone.

6 But you ended up -- you know -- with
7 the workings of -- uh -- larvae and -- and a hundred and
8 some degree heat and everything else; it ended up being a
9 lot of it gone anyway.

10 Uh -- And you know as far as there
11 being blood in the vehicle, another place that they want you
12 to go off on, on:

13 Why in the world didn't you get any
14 blood?

15 They said that the guy -- certainly,
16 your -- even your common sense will tell you:

17 If you take 4 bullet holes to the
18 head, you're going to leave blood; right?

19 So they've come back and said:

20 Even though we know that it was the
21 victim's blood because the -- what used to be blood was on
22 the seat, we couldn't tell you that it was even human DNA.

23 All we could tell you is:

24 That at some point, that had been
25 DNA.

Closing Arguments by Counsel

563

1 But it was decomposed.

2 I mean, we could've went back,
3 probably, and -- and drilled through bone marrow like they
4 did with the lady that they found in the woods a while back.

5 But again, the identity -- excuse me
6 identification is not at issue.

7 Whose blood it was is fairly
8 understood.

9 The blood is the victim's.
10 He's the one with 4 holes in the
11 head.

12 You don't need somebody from SLED to
13 come in and tell you that that's probably his blood.

14 But what they scraped up, they
15 couldn't get anything off of.

16 So we know that.

17 We also know that:

18 There was 3 guns involved in this
19 shooting; two with regard to the victim; two coming from a 9
20 millimeter, with the shell casings in the vehicle; two
21 coming from a .40 caliber weapon that belonged to the
22 victim, by Coaty Deas.

23 Those .40 cal, I would submit to you,
24 came in here -- uh -- C and D.

25 And one lodged at the back of the

1 head, which was a .40.

2 And they knew that to be a .40.

3 The other ones went through and
4 through.

5 So we know that that calibrated as a
6 .40.

7 We know that the -- the -- the shell
8 casings for a nine were in -- right where they said they
9 would be; right at the back; pow pow; two 9 casings inside.

10 So we know those two.

11 But nobody could figure out where a
12 .38 come in.

13 Couldn't find anything else from a
14 .38. There was no casings that were anywhere nearby.

15 But Chadd said:

16 Yeah, I had a .38.

17 I had a .45 too; but I shot a .38.

18 And we said:

19 Well, what happened to the nine?

20 The last time I saw the nine, it was
21 on the dryer with the drugs and the money.

22 What happened to the -- uh -- the --
23 uh -- the .40 that belonged to the victim?

24 It was on the dryer.

25 Amp collected all the guns.

Closing Arguments by Counsel

565

1 Why wasn't the .38 there?

2 The .38's my gun. I ain't getting
3 rid of my gun.

4 He didn't get rid of the .45 either.

5 How did the .38 get here?

6 I loaned it to my brother. And he
7 got caught. Tony got caught.

8 That shows you how the guns would
9 float around.

10 I mean, you got a nine that was
11 stolen off of some guy; ends up with Coaty Deas; and then
12 sold to the -- uh -- Defendant for drugs.

13 You got a .38 that was borrowed by a
14 brother; ends up in North Myrtle Beach.

15 But yeah; it shouldn't be any great
16 suspense that these don't show up.

17 The -- The only other time that a --
18 that a .40 was ever seen was at Amp's grandma's house -- uh
19 -- under a cinderblock.

20 So we know that 3 guns were used.

21 Now they've tried to confuse the
22 issue with:

23 Well, maybe -- wouldn't it be
24 possible for somebody to role up in here and have -- shoot
25 one particular weapon from another; or this from that?

1 But Dan DeFreese says:

2 Look, the same gun that fired the
3 nine fired both nines.

4 And the same gun that fired the .40
5 fired all the .40s.

6 And the -- the markings on the shell
7 casings tell you that.

8 So that -- that's just == you know --
9 some sort of a -- a wild rabbit hole, as Mr. Joye refers to.

10 That whole thing about the AK-47:
11 That ain't got a thing to do with
12 this case.

13 I think it's interesting that they
14 said:

15 Well, if you want to know, it's
16 Michael's -- it's Amp's AK-47.

17 We've got into a good bit of trouble
18 with the -- uh -- people that would support Graham. And we
19 armed ourselves.

20 And isn't it interesting that he
21 would go over there and pick up the AK-47 -- uh -- and
22 certainly go back to D-Block's house.

23 Because I -- I told you also at the
24 beginning of this:

25 We're going to go on a -- to a place

Closing Arguments by Counsel

567

1 -- and I apologize to you.

2 I -- you know -- a place where nobody
3 tells nothing; where people are dead for over a week; and
4 nobody except -- uh -- the -- the Defendant's (sic) mama,
5 and his family had reported him missing.

6 All these people; they make a big
7 deal out of:

8 Why didn't you come forward?

9 Ain't nobody come forward.

10 The man lay out in a car for 9 days
11 rotting. And everybody kept this horrible secret until a
12 few people got arrested.

13 Look, nobody had to come to them and
14 say:

15 Uh -- Hey, Amp did it.

16 The police didn't -- Hey, is Amp big
17 enough for the police -- every one of them to put their job
18 on the line so that they can form a conspiracy against Amp?

19 Is Amp bad enough that cousins; that
20 swore doctors together, would say:

21 It's him.

22 I hate to say it, but it's him.

23 It's me and it's him.

24 But you can believe that.

25 You've got to believe that. They

1 ain't coming in here on no stranger.

2 They're talking about their flesh and
3 blood, who they dearly love.

4 If they wanted to pick out a
5 scapegoat, your common sense tells you that:

6 They ain't going to pick out just any
7 -- uh -- a family member.

8 It'd be like picking out their mom,
9 or their daddy.

10 They said:

11 This kid that I grew up with; Amp.

12 Why?

13 Because he did it.

14 There's no other reason to say it but
15 he did it.

16 I mean, come up and say:

17 Johnny Cash did it.

18 Or -- Or -- Or Calvin.

19 Put it on Calvin.

20 Somebody else did it; it's not my
21 cousin.

22 But they told you, Yeah.

23 Three or four people that knew what
24 nobody else in the world knew, and all of them tell the same
25 story.

Closing Arguments by Counsel

569

1 Now, make them out to be liars on
2 peripheral things:

3 I've already told you:

4 People will minimize their part.

5 But that plumb line:

6 Who shot Ervin Graham?

7 Everyone of them, you remember:

8 Amp did it.

9 This might be the only time you've
10 ever served on a jury. But you've seen enough TV to know:

11 How many times do you ever get three
12 or four eyewitnesses to a murder?

13 And then for somebody to say:

14 They ain't got nothing.

15 They ain't got nothing.

16 Your cousins turned you in.

17 Your flesh and blood has turned you
18 in.

19 How is that nothing?

20 These boys wouldn't have their cousin
21 arrested and go through this for nary a thing in the world;
22 except for the fact that he did it.

23 And they did it.

24 They're as guilty as he is.

25 We know for a fact that a phone in

1 Ervin Graham's vehicle was used to dial Amp's home at 6:57;
2 and that that phone connection was for 41 seconds.

3 We know it.

4 The evidence cannot lie.

5 There was a connection between the
6 two of them minutes before the victim ends up dead.

7 Coincidence?

8 We know about the lack of vitals.

9 We know that Ervin Graham was dead
10 before he left.

11 We know Coaty Deas drove the vehicle.

12 We know that there were three guns
13 used; all of these things.

14 And that's why I wanted to focus on
15 things that had to happen; things that you had to believe.

16 Because, again, those boys aren't
17 going to win any Cub Scout type awards.

18 The time to get nervous is when we
19 start dressing them up and saying:

20 Hey -- uh -- everybody gives the same
21 story.

22 But remember; that plumb line is the
23 same.

24 That's the same for everyone of them:

25 I watched it with my eyes: Bam, bam.

Closing Arguments by Counsel

571

1 Who else could've come up with the
2 idea of two extra bullets?

3 If Coaty, or the crowd had been
4 lying; and saying:

5 Not me. Not me. Not me.

6 Then we would have had Dr. Proctor
7 come in and said:

8 Two bullets here. Two 9 millimeter's
9 here. Two bullets here. .40 caliber at the back.

10 I don't know where these bullets come
11 from.

12 That same chart that you can look at;
13 that backs it up too.

14 Officer Deal says that:

15 The bulk of all those .40 caliber
16 cartridges were found back here where they tried to blow it
17 up.

18 But there are two .40 caliber
19 cartridges up here, right where Coaty said they would be, at
20 the front of the vehicle.

21 Not inside the vehicle; but in front
22 of the vehicle.

23 He couldn't have made that up.

24 There ain't no way to be that smart
25 in putting around evidence.

1 The only logical conclusion is that:
2 With regard to the underlying fact of
3 who killed Ervin Graham, it was Michael Livingston.

4 It was Amp.

5 It was Juvie (phonetic).

6 There's no other way for it to have
7 been.

8 No grand conspiracy.

9 No people coming in and making up
10 stories against flesh and blood. That didn't happen.

11 The only logical conclusion is that:

12 That man is a murderer.

13 He's an armed robber.

14 And he used a weapon during the
15 commission of a violent crime.

16 No other way.

17 And the rest of them are too. The
18 rest of them are just as guilty.

19 Judge Hyman is going to talk with you
20 about all of those charges.

21 But he's also going to tell you:

22 Hand of one; and hand of all.

23 In other words, it's very possible --

24 Now, in this case you got 4 entrance wounds and 3 exit
25 wounds; and it's very possible for two people with one gun

1 and only one bullet -- just like Barney Fife, one bullet --
2 to commit the same murder.

3 I'd submit to you that:

4 If we could prove Tony knew what was
5 going on when he stood up at this -- uh -- front windshield;
6 if he was standing there talking to him to distract him,
7 he's just as guilty of murder; because he gained the
8 attention so that someone else could come in and kill him.

9 So we know by their own testimony
10 that Chadd, who was seated right here, he's guilty of it.

11 He knew about it beforehand.

12 And he played a part in the moving of
13 the body and trying to blow it up.

14 He played a part in it from the
15 beginning.

16 We know that Coaty played a part in
17 it. He knew about it too.

18 They gathered round that tree.

19 And -- And Amp was saying:

20 I'm mad. I'm mad. I'm going to kill
21 Fido or F. I.

22 Coaty's just as guilty.

23 Had Coaty never fired a shot, Coaty's
24 just as guilty.

25 So leave them up to another jury; and

1 another set of -- uh -- complications where people are going
2 to say:

3 Not my guy; but them.

4 You've got more than enough on your
5 plate with this.

6 But Judge Hyman's going to tell you
7 that:

8 The hand of one is the hand of all.

9 In other words, if we go together to
10 a store; and I say:

11 Hey, how about go in there and rob
12 that girl of some money.

13 I'm going to sit out here and drive
14 the getaway car.

15 And you run in. And nobody's ever
16 even talked about a murder.

17 But you run in, pull a gun up to her,
18 take her money and shoot her.

19 Guess who is just as guilty of that
20 murder?

21 Me.

22 I never had a gun.

23 I never walked inside.

24 I'm just as guilty.

25 So if you believe that Amp fired one

1 shot, like Chadd said; two shots, like everybody else said;
2 nobody said that he fired 4 shots; but if you believe he
3 fired any of the 4; or if you believe he fired none, but he
4 took place in the planning of it and the disposal, he's just
5 as guilty as the rest.

6 Ain't no way to clean it up. If the
7 rest of them are guilty, he's guilty too.

8 He's going to also tell about felony
9 murder; Judge Hyman; in that:

10 If you kill somebody, like the store
11 clerk I was talking about, in the commission of a robbery,
12 you, as a jury, can infer that there was malice.

13 Because taking on such a heinous
14 crime as armed robbery and somebody dies, then you can infer
15 -- or a jury later can infer that that person had malice
16 aforethought.

17 Malice, he'll tell you, is just ill
18 will, or -- or a general disregard for human life.

19 And there is certainly ill will here.

20 But even more, can you imagine the
21 value of -- of Ervin Graham's life?

22 Nothing. Nothing.

23 Shot and left in a wooded area to
24 rot.

25 If that's not a general disregard for

1 human life, there's never been such a case.

2 But you don't even have to rely on
3 that; because there's clearly malice.

4 And the Judge is going to tell you
5 that:

6 If you use a firearm, you can infer
7 malice by the use of a deadly weapon.

8 In other words, if I fire a shot, I
9 expect the consequences to be that somebody could die. And
10 that's murder. The killing -- Let me show you -- I -- I
11 spent the good bit of money on some photographs, so I at
12 least want to -- uh -- show you what I got.

13 And I promise you, I'm almost
14 through.

15 This is -- What it'll tell you about
16 -- And Judge Hyman does something that -- that most Judges
17 won't do. He will give you -- uh -- a copy of his charges;
18 so you can go back and reread this.

19 This is a simplification of it -- but
20 killing -- ain't no doubt that man was killed -- of a person
21 -- ain't no doubt that Ervin Graham was a person; right --
22 with malice aforethought.

23 Now malice means: ill will, general
24 disregard -- I've already told you what that -- what that
25 is.

1 Aforethought means: even a second of
2 planning. That critical second right before you pull the
3 trigger; that's aforethought.

4 It doesn't have to be laying in wait
5 like a sniper. It could be developed in a -- in a snap.

6 And he'll tell you that; right before
7 you pull the trigger.

8 And that malice could be expressed:

9 I'm going to kill Johnny. I'm so mad
10 with Johnny. Or implied by the use of a deadly weapon.
11 Either way. And that's murder.

12 You know, if I had figured out that
13 he was going to give you this, I probably wouldn't have
14 spent the money on the -- the charge.

15 Oh, one other -- The killing of
16 another person malice aforethought; or one intentionally
17 kills another during the commission of a felony; there's an
18 inference of malice that could arise.

19 Just because he was also charged with
20 armed robbery, the inference of malice or ill will could
21 arise.

22 He's going to give you that also.

23 Okay, this chart is for armed
24 robbery. You know what armed robbery is; taking or
25 attempting to take, and carrying away, i.e., the vehicle;

1 i.e., the drugs; the -- uh -- money.

2 Let me come back to that money in
3 just second.

4 Of another: Ervin Graham is another.
5 Personal property of course.

6 Uh -- With the intent to deprive of
7 possession.

8 Well, if he's dead, he ain't going to
9 use it anyway; but intending to deprive him, or take
10 something away from him by use of force.

11 Couldn't be more force than a bullet
12 to the head.

13 Threat or intimidation while armed
14 with a deadly weapon.

15 And he'll tell you:

16 A pistol is a deadly weapon. A knife
17 is a deadly weapon. A stovepipe could be a deadly weapon.

18 Let me go back to the money before I
19 do one last thing.

20 Remember that receipt found on him?

21 Uh -- This goes to the armed robbery.

22 But there was a receipt found on him
23 where he had spent some money at Champs Sports. But -- uh
24 -- when the police come up, he didn't have no money on him.

25 And we know that he had at least some

1 money, because he had paid, I believe with a hundred dollar
2 bill, and he had received change back from that.

3 Now I think that you could poss --
4 you could infer that he had more money. He had a hundred.
5 Now, certainly it's possible that he had went and got a
6 Pepsi and -- and some nabs or something on the way and spent
7 down to where there was no money, no change left.

8 But I would say to you that it's
9 impractical.

10 And I don't want you to -- to -- to
11 believe that the purpose of this was to rob him.

12 It was ill will. The robbery just
13 came as an after thought.

14 The robbery, for the most part, came
15 to go park that body and let it rot, and get away from
16 grandma's house.

17 And that was the important part about
18 -- uh -- this story that everybody concocted about it taking
19 place at Lacey's place; to keep grandma out of it; to keep
20 her house, in case there was some sort of civil thing coming
21 along. They didn't want grandma's stuff involved.

22 So even when they started telling the
23 story, they didn't -- uh -- they didn't throw grandma's
24 house into it until later. But there was a purpose for such
25 lies.

1 But, one last thing, Michael -- and I
2 want -- I didn't want you to get confused.

3 My whole purpose in the closing,
4 opening, and the witnesses, was to give you as much
5 information as possible; but to not confuse you.

6 Michael is Amp or Juvie (phonetic).

7 Chadd is Roster.

8 Tony is Lope, which actually, Antonio
9 came back as a modification of antelope; and that was
10 modified to Lope.

11 And Coaty Deas goes by C.

12 And this -- uh -- side guy that you
13 didn't hear very much about is Albert Anthony Jenson
14 (phonetic) and D-Block.

15 So -- uh -- I know it could be
16 confusing with regards to who was who; but that -- that's
17 who the -- the players are.

18 Please, Scott called it. I mean, Mr.
19 Joye called it. He was right.

20 I do not want you to be confused.

21 I do not want to go back there and
22 get off on -- on -- on a tangent that means nothing.

23 I let this stuff in because I wanted
24 you to have the entire story.

25 The problem with that is that:

Closing Arguments by Counsel

581

1 That people sometimes will get caught
2 up on -- on of these wild goose chases.

3 It's not about that.

4 It's clear.

5 Everything here points to Michael
6 Livingston, murderer, armed robber; and that he possessed a
7 weapon in the commission of a violent crime.

8 And you had no fewer than 4
9 eyewitnesses.

10 And those eyewitnesses, even if you
11 don't want to believe everything they had to say, you've got
12 believe the physical evidence.

13 You've got to believe if -- if he
14 says:

15 I did this.

16 And you see this beside it, you got
17 to believe it.

18 I mean, they didn't plan it.

19 They didn't come up with all that.

20 I thank you for your patience.

21 I know I -- I -- I went over anything
22 I would want to hear.

23 But again -- uh -- the whole thing
24 was to try to make it less confusing as possible.

25 Now, I want you to listen to Judge

1 Hyman.

2 I want you to go back and review
3 those charges.

4 See if anything I've been telling you
5 was untruthful.

6 And then, hash it over. And come
7 back with the only verdict that can make sense.

8 The only verdict that's going to do
9 justice in this case is a verdict of guilty.

10 Not one guilty; but 3 guilties:

11 Murder, armed robbery, and commission
12 of a violent crime with a deadly weapon.

13 That's the only one that's going to
14 speak the truth.

15 Thank you so much. And -- uh -- I
16 appreciate your patience.

17 THE COURT:

18 Ladies and gentlemen of the jury --
19 uh -- as has been mentioned, I engage in a practice that's a
20 little different from most Judges.

21 I understand how difficult it can be
22 sometimes to absorb all the law that may be applicable to a
23 case.

24 So -- uh -- what I do is:

25 I reduce my charge on the law to

1 writing and I provided you with a copy of it.

2 I've been blessed over these years
3 with an excellent Law Clerk, Ms. Aaron Bailey, who's seat --
4 seated here at my -- my right shoulder.

5 And -- uh -- this is her -- her last
6 trial. She's leaving me. But beyond her, is Ms. Claire
7 Hall, who's going to take her place. And I'm sure that
8 she's going to be just as -- as good.

9 But they assist me in reducing these
10 legal concepts to writing.

11 COURT REPORTER:

12 Could get a few minutes to change
13 this; because they went so long.

14 THE COURT:

15 Yeah; okay. You have to have a new
16 file set up, huh?

17 COURT REPORTER:

18 Yes sir.

19 THE COURT:

20 He was running out of time.

21 COURT REPORTER:

22 It won't take but a second.

23 WHEREUPON: The court reporter
24 changed out his digital computer files at 10:51 AM, August
25 13, 2009, and the proceedings continued as follows:

1 THE COURT:

2 Are we ready?

3 COURT REPORTER:

4 Yes sir.

5 THE COURT:

6 All right.

7 Uh -- As I said, I have reduced it to
8 writing with the help of my law clerks; and we have put it,
9 the charge, in laymen's terms; terms that I believe that a
10 lay person could understand.

11 Now our Supreme Court has said it's
12 all right for me to do that so long as I charge you -- or
13 provide you with a verbatim copy of the charge that I give
14 you on the law.

15 So you will note, probably, that I am
16 reading -- uh -- from my charge. But I will give you this
17 charge verbatim for you to use during your deliberations.

18 Now I remind you that during this
19 trial, you and I have certain duties to perform.

20 As the trial Judge, it is my
21 responsibility to preside over the trial of this case.

22 I also have the duty to rule on the
23 admissibility of evidence offered during the trial.

24 You are to consider only the
25 competent evidence before you.

1 If there was any testimony ordered
2 stricken from the record in this case during the trial, you
3 must disregard that testimony.

4 You are to consider only the
5 testimony which has been presented from this witness stand,
6 any exhibits which have been made a part of the record in
7 this case, and any stipulations or agreements of counsel.

8 I have the additional duty to charge
9 you the law applicable to this case.

10 As the presiding Judge, I am the sole
11 Judge of the law -- uh -- of this case. And it is your duty
12 as jurors to accept and apply the law as I now state it to
13 you.

14 If you already have an idea as to
15 what the law is or what the law ought to be, and it does not
16 agree with what I now tell you the law is, you must abandon
17 this idea, because you are sworn to accept the law and apply
18 the law exactly as I state it to you.

19 In every case tried in this courtroom
20 before a jury, the jury becomes the sole and exclusive judge
21 of the facts in the case.

22 A trial judge cannot intimate, state,
23 comment on, or make any statement to a trial jury about the
24 facts in a case, since you, the jury, are the sole judges of
25 the facts in the case.

1 You are not to infer from what I have
2 said during the progress of this trial in ruling upon the
3 admissibility of evidence or otherwise, or anything that I
4 say now during the course of this instruction to you, that I
5 have any opinion about the facts of this case.

6 The law does not allow me to have an
7 opinion about the facts in this case.

8 This is a matter solely for you, the
9 jury, to determine.

10 As jurors, it is your duty to
11 determine the effect, the value, weight, and truth of the
12 evidence presented during this trial.

13 Now the indictment charges the
14 Defendant with murder, armed robbery, and possession of a
15 weapon during the commission of a violent crime.

16 I remind you that the fact that the
17 Defendant was arrested charged and indicted in this case is
18 no evidence in this case and cannot be considered by you as
19 evidence of guilt in the case.

20 Nor does it create any presumption or
21 inference of guilt.

22 This document, or these documents,
23 are simply the formal written instruments -- and I'm
24 speaking of the indictments -- the formal written
25 instruments which contain the charges made against the

1 Defendant.

2 Uh -- This is the formal documents --
3 They are the formal documents by which the case is brought
4 into the court.

5 The indictments in this case allege
6 several different offenses against the Defendant.

7 The charges are:

8 Indictment Number 1: Murder.

9 Indictment Number 2: Armed robbery.

10 Indictment Number 3: Possession of a
11 weapon during the commission of a violent crime.

12 Each indictment charges a separate
13 and distinct offense.

14 You must decide each indictment
15 separately on the evidence and the law applicable to it,
16 uninfluenced by your decision as to any other indictment.

17 The Defendant may be convicted or
18 acquitted on all or any of the offenses charged.

19 You will be asked to write a separate
20 verdict of guilty or not guilty for each indictment.

21 The Defendant has pled not guilty to
22 these indictments.

23 And that plea puts the burden on the
24 State to prove Defendant guilty.

25 A person charged with committing a

1 criminal offense in South Carolina is presumed -- uh -- to
2 be innocent and is never required to prove himself innocent
3 -- innocent.

4 I charge you that:

5 It is an important rule of law that
6 the Defendant in a criminal trial, no matter what the
7 seriousness of the charge may be, will always be presumed to
8 be innocent of the crime for which the indictment was
9 issued, unless guilt has been proved by evidence satisfying
10 you of that guilt beyond a reasonable doubt.

11 This presumption of innocence does
12 not end when you begin your deliberations. But it
13 accompanies the Defendant throughout the trial, until you
14 reach a verdict of guilt based on evidence satisfying you of
15 that guilt beyond a reasonable doubt.

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

21 The presumption of innocence is not a
22 -- a mere legal theory. It is not just a legal phrase. It
23 is a substantial right to which every Defendant is entitled,
24 unless you, the jury, are satisfied from the evidence of the
25 Defendant's guilt behind a reasonable doubt.

1 The State has the burden of proving
2 the Defendant guilty beyond a reasonable doubt.

3 Some of you may have served as jurors
4 in civil cases where you were told that it is only necessary
5 to prove that a fact is more likely true than not, such as:
6 by the greater weight, or by the preponderance of the
7 evidence.

8 In criminal cases, the State must
9 prove -- the State's proof must be more powerful than that.

10 It must be beyond a reasonable doubt.

11 Proof beyond a reasonable doubt is
12 proof that leaves you firmly convinced of the Defendant's
13 guilt.

14 There are very few things in this
15 world that we know with absolute certainty.

16 And in criminal cases, the law does
17 not require proof that overcomes every possible doubt.

18 If, based on your consideration of
19 the evidence, you are firmly convinced that the Defendant is
20 guilty of the crime charged, you must find the Defendant
21 guilty.

22 If on the other hand you think there
23 is a real possibility that Defendant is not guilty, you must
24 give the Defendant the benefit of the doubt and find him not
25 guilty.

1 What is it reasonable doubt in the
2 law?

3 A reasonable doubt is:

4 The kind of doubt that would cause a
5 reasonable person to hesitate to act.

6 There are two types of evidence which
7 are generally presented during a trial: direct evidence and
8 circumstantial evidence.

9 Direct evidence is the testimony of a
10 person who claims to have actual knowledge of a fact, such
11 as an eyewitness. It is evidence which immediately
12 establishes the main fact to be proved.

13 Circumstantial evidence is proof of a
14 chain of facts and circumstances indicating the existence of
15 a fact.

16 It is evidence which immediately
17 establishes collateral facts from which the main fact may be
18 inferred.

19 Circumstantial evidence is based on
20 inference, and not on personal knowledge or observation.

21 The law makes absolutely no
22 distinction between the weight or value to be given to
23 either direct or circumstantial evidence.

24 Nor is a greater degree of certainty
25 required of circumstantial evidence than of direct evidence.

1 You should weigh all of the evidence
2 in the case.

3 After weighing all of the evidence,
4 if you are not convinced of the guilt of the Defendant
5 beyond a reasonable doubt, you must find the Defendant not
6 guilty.

7 Necessarily, you must determine the
8 credibility of witnesses who have testified in this case.

9 Credibility is simply means
10 believability.

11 It becomes your duty as jurors to
12 analyze and to evaluate the evidence and determine which
13 evidence convinces you of its truth.

14 In determining the believability of
15 witnesses who have testified in this case, you may believe
16 one witness over several witnesses; or several of one.

17 You may believe a part of the
18 testimony of a witness and reject the remainder of the
19 testimony of that same witness.

20 You may believe the testimony of a
21 witness in its entirety. Or reject the testimony of a
22 witness in its entirety.

23 You may consider whether any witness
24 has exhibited to you any interest, prejudice, bias, or other
25 motive in this case.

1 You may also consider the appearance
2 and manner of a witness while on the witness stand.

3 The rules of evidence ordinarily do
4 not permit an ex -- excuse me -- a witness -- to testify to
5 opinions or conclusions.

6 An exception to this rule exists for
7 witnesses we call: expert witnesses.

8 A witness who by education and
9 experience has become an expert in some art, science,
10 profession, or calling, may state an opinion as to relevant
11 and material manner -- uh -- matter -- in which the witness
12 claims to be an expert; and may also state the reasons for
13 that opinion.

14 You should consider any expert
15 opinion received in evidence in this case, and like any
16 other evidence, give it the weight you think it deserves.

17 If you decide that the opinion of an
18 expert is not based on sufficient education and experience,
19 or if you conclude that the reasons given in support of the
20 opinion are not sound, or that the opinion is outweighed by
21 other evidence, you may disregard the opinion in its
22 entirety.

23 An expert witnesses' testimony is to
24 be given no greater weight than that of other witnesses ,
25 simply because the witness is an expert.

1 Further, you are not required to
2 accept an expert's opinion, even though it is not
3 contradicted.

4 I instruct you and emphasize that:

5 The fact the Defendant did not
6 testify is not a fact that could be considered by you in any
7 way in your deliberations and in your consideration of the
8 question of guilt or innocence of the Defendant.

9 It must not be considered by you in
10 any manner whatsoever.

11 A Defendant has a constitutional
12 right to remain silent. And the assertion of this right
13 must not be considered by you in your deliberations.

14 I repeat:

15 Under your oath, you are to draw no
16 conclusion whatsoever from the fact that the Defendant in
17 this case did not testify.

18 The fact that the Defendant did not
19 testify should not even be discussed in the jury room.

20 The burden of proof, as I -- as I
21 have stated to you, is on the State.

22 The Defendant is not required to
23 prove his or her innocence. The burden of proof remains on
24 the State to prove guilt beyond a reasonable doubt.

25 An issue in the case -- uh -- is the

1 identification of the Defendant as the person who committed
2 the crime charged.

3 The State has the burden of proving
4 identity beyond a reasonable doubt.

5 You must be satisfied beyond a
6 reasonable doubt of the accuracy of the identification of
7 the Defendant before you may convict the Defendant.

8 Identification testimony is an
9 expression of belief or impression by a witness.

10 You must determine the accuracy of
11 the identification of the Defendant.

12 You must consider the believability
13 of each identification witness in the same way as any other
14 witness.

15 You may consider whether the witness
16 has had an oppor -- adequate opportunity to observe the
17 offender at the time of the offense.

18 This will be affected by things like:
19 How long, or short of time, was
20 available?

21 How far or close the witness was?
22 The lighting conditions.

23 And whether the witness had the
24 chance to see or know the person in the past?

25 Once again, I instruct you:

1 The burden of proof is on the State
2 -- or on the State extends to every element of the crime
3 charged.

4 And this specifically includes the
5 burden of proving beyond a reasonable doubt the identity of
6 the Defendant as the person who committed the crime.

7 If after examining the testimony, you
8 have a reasonable doubt as to the accuracy of the
9 identification, you must find the Defendant not guilty.

10 There has been evidence presented
11 that the -- that witnesses have made prior statements which
12 are not consistent with the witnesses' present testimony.

13 You may use this evidence to decide
14 whether to believe the witness.

15 You may also use evidence of the
16 earlier contradictory statement to determine the truth of
17 those statements.

18 It is up to you to decide whether to
19 believe the earlier statement or the testimony given at
20 trial.

21 If a witness is shown to have
22 knowingly testified untruthfully concerning any material
23 matter, you may consider this in determining to trust --
24 whether to trust the witnesses' testimony as to other
25 matters.

1 You may reject all testimony of that
2 witness; or give all, or part of the testimony, the weight
3 you think it deserves.

4 A person who has had -- has a prior
5 -- uh -- past criminal record is competent to testify during
6 a trial.

7 A past record does not affect the
8 ability of that witness to testify.

9 The past record may only be
10 considered by you, if at all, in determining the witnesses'
11 believability.

12 Remember, you are the sole judges of
13 the facts in the case, and of the believability of any and
14 all of the witnesses.

15 If a crime is committed by two or
16 more pers -- people -- who are acting together in committing
17 a crime, the act of one is the act of all.

18 A person who joins with another to
19 commit an unlawful act is criminally responsible for
20 everything done by the other person which happens as a
21 probable or natural consequence of the acts done in carrying
22 out the common plan and purpose.

23 For example:

24 Two people can be guilty of killing
25 another person when only one of the two had a gun; there was

1 only one bullet; and only one of the two fired the shot that
2 caused the death.

3 If two or more people are together,
4 acting together, assisting each other in committing the
5 offense, the act of one is the act of all.

6 Or, as it is sometimes said:

7 The hand of one is the hand of all.

8 Prior knowledge that a crime is going
9 to be committed, without more, is not sufficient to make a
10 person guilty of that crime.

11 Mere knowledge that another person is
12 going to commit a crime, even if the Defendant is present
13 when the crime is committed, is not sufficient to convict
14 the Defendant as a principle.

15 Guilt as a principle is shown by
16 actual or constructive presence at the scene as a result of
17 prior arrangement.

18 Therefore, a finding of a prior
19 arranged plan or common scheme is necessary for a finding of
20 guilt as a principle.

21 The State must prove beyond a
22 reasonable doubt by competent evidence the theory of the
23 hand of one is the hand of all.

24 A principle in a crime is one who
25 either actually commits the crime or his -- who is present,

1 aiding, abetting, or assisting in committing the crime.

2 When a person doesn't act in the
3 presence of, and with the assistance of the -- of another,
4 the act is done by both.

5 Where two or more acting with a
6 common plan or intent are present at the commission of a
7 crime, it does not matter who actually commits the crime.

8 All are guilty.

9 The hand of one is the hand of all
10 present at the commission of a crime means:

11 To be sufficiently near to aid and
12 abet and assist in the commission of the crime.

13 However, mere presence at the scene
14 of a crime is not sufficient to convict one as a principle
15 on the theory of aiding and abetting.

16 Intent is also a necessary element;
17 for there must have been a common design or intent to commit
18 the crime. And the crime must have been committed pursuant
19 thereto, with the person aiding and abetting by some overt
20 act.

21 Intent means:

22 Intending the result which actually
23 occurred; not accidentally or involuntarily.

24 Intent may be shown by acts and
25 conduct of the Defendant and other circumstances from which

1 you may naturally and reasonably infer intent.

2 The State must prove these elements
3 beyond a reasonable doubt.

4 As I said, mere -- mere presence at
5 the scene is not sufficient to prove someone guilty of a
6 crime.

7 A defendant's presence where a crime
8 is being committed, or mere association with a person who
9 commits a crime, does not make a defendant an accomplice, or
10 an aider or abettor of the person committing the crime.

11 The burden is on the State to prove
12 every element of the crime charged.

13 If you find, after reviewing all the
14 evidence, that the State has proved that the Defendant was
15 only present at the scene of a crime, and that they have not
16 proved beyond a reasonable doubt any other participation in
17 the crime, then you must find the Defendant not guilty.

18 The law is that:

19 Proof of mere presence at the scene
20 of a crime is not sufficient to find someone guilty.

21 The Defendant is charged with armed
22 robbery.

23 In order to prove this offense, the
24 State must prove beyond a reasonable doubt that:

25 The Defendant took personal property

1 from the person or presence of another person.

2 Property is in -- uh -- the presence
3 of a person, if it is within the person's reach, inspection,
4 observation, or control, so that the person could, if not
5 overcome with violence or prevented by fear, keep possession
6 of the property.

7 The State must also prove beyond a
8 reasonable doubt that:

9 The Defendant carried the property
10 away, intending to permanently deprive the owner of the
11 property; and to keep the property for the Defendant's own
12 use.

13 The slightest removal of the property
14 or the complete possession of the property, even for an
15 instant, by the Defendant, is sufficient to show a taking
16 and carrying away of the property.

17 The taking and carrying away of the
18 property must have been done with violence; or by putting
19 the owner of the property in fear of violence.

20 Finally, the State must prove beyond
21 a reasonable doubt that:

22 The Defendant was armed with a deadly
23 weapon during the robbery.

24 A deadly weapon is:

25 Any article, instrument, or

1 substance, which is likely to cause death or great bodily
2 harm.

3 Whether an instrument has been used
4 as a deadly weapon depends on the facts and circumstances of
5 each case.

6 The following are examples of
7 instruments which may be deadly weapons:

8 A pistol, a shotgun, a rifle, a dirk,
9 dagger, or knife; a slingshot, metal knuckles; a razor,
10 gasoline, a firebomb, a Molotov cocktail -- uh -- or lighter
11 fluid.

12 A gun may be a deadly weapon, even if
13 it is not operating.

14 The Defendant has also charged with
15 the offense of murder.

16 The State must prove beyond a
17 reasonable doubt that:

18 The Defendant killed another person
19 with malice aforethought.

20 Malice is: hatred, ill will, or
21 hostility towards another person.

22 It is the intentional doing of a
23 wrongful act without just cause or excuse; and with the
24 intent to inflict an injury under circumstances -- uh --
25 that the law will infer -- uh -- an evil intent.

1 Malice aforethought does not require
2 that malice exist for any particular time before the act is
3 committed.

4 But malice must exist in the mind of
5 the Defendant just before and at the time the act is
6 committed.

7 Therefore, there must be a
8 combination of the previous -- uh -- ill intent and the act.

9 Malice aforethought may be expressed
10 or inferred.

11 These terms expressed and inferred do
12 not mean different kinds of malice, but merely the manner in
13 which malice may be shown to exist; that is, either by
14 direct evidence or by inference from the facts and
15 circumstances which are proved.

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

20 For example:

21 Lying in wait for a person or any
22 other actor or preparation going to show that the deed was
23 within the Defendant's mind, would be expressed malice.

24 Malice may be inferred from conduct
25 showing a total disregard for human life.

1 Inferred malice may also arise when
2 the deed is done with a deadly weapon.

3 A deadly weapon is:

4 Any article, instrument, or
5 substance, which is likely to cause death or great bodily
6 harm.

7 Whether an instrument has been used
8 as a deadly weapon depends on the facts and circumstances of
9 the case.

10 The following are examples of
11 instruments which may be deadly weapons:

12 And again:

13 A pistol, a shotgun, a rifle, a dirk,
14 a dagger, a knife, a slingshot, metal knuckles, a razor,
15 gasoline, a firebomb, or Molotov cocktail, or lighter fluid.

16 A gun to be a deadly weapon, even if
17 it is not operating.

18 If one intentionally kills another
19 during the commission of a felony, the inference of malice
20 may arise.

21 If facts are proved beyond a
22 reasonable doubt sufficient to raise an inference of malice
23 to your satisfaction, this inference would simply be an
24 evidentiary fact to be taken into consideration by you along
25 with all other -- other evidence in the case. And you may

1 give it the weight that you decide it should receive.

2 Finally, the Defendant is -- is
3 charged with the possession of a weapon during the
4 commission, or attempt to commit, a violent crime.

5 The State must prove beyond a
6 reasonable doubt that:

7 The Defendant was in possession of a
8 firearm, or visibly displayed what appeared to be a firearm,
9 during the commission of a violent crime.

10 A firearm means:

11 Any machine gun, automatic rifle,
12 revolver, pistol, or any other weapon which is designed to,
13 or may readily be converted to, expel a projectile.

14 In order to find the Defendant guilty
15 of possession of a weapon during commission of a violent
16 crime, you must find the Defendant guilty of, either
17 committing a violent crime, or attempting the commission of
18 a violent crime.

19 Murder and armed robbery are violent
20 crimes.

21 Ladies and gentlemen, finally:

22 There are two possible verdicts which
23 you may return on each indictment in this case; that is,
24 either guilty or not guilty.

25 There is no significance whatsoever

Judge's Charge on the Law

605

1 in the order which I state these possible verdicts.

2 It's simply that I must state one to
3 you first.

4 Your verdict must be a unanimous
5 verdict.

6 Madam Foreperson, when the jury
7 agrees on a verdict, you will write the verdict on the
8 verdict forms which I'm providing -- uh -- for you.

9 Then you will knock on the door and
10 inform the bailiff that you have reached a verdict.

11 And at that time, we will receive you
12 back into the courtroom.

13 Now I have -- uh -- prepared verdict
14 forms for you to use in this case.

15 They are very simple.

16 We have a verdict form for each
17 charge.

18 We have a verdict form for the charge
19 of murder. And it simply says:

20 As to the charge of murder, we the
21 jury unanimously find the Defendant -- and again, circle
22 your verdict: guilty or not guilty.

23 And again, there is no significance
24 whatsoever to the order in which they are shown on the
25 verdict form.

1 And then, Madam Forelady, you will
2 sign the verdict form.

3 I likewise have a verdict form for
4 armed robbery.

5 Again: guilty or not guilty.

6 Simply circle your verdict when you
7 have reached a unanimous verdict.

8 And you will sign the verdict form.

9 Finally, as to the verdict form for
10 murder -- armed robbery, I have prepared a special -- or
11 excuse me -- possession of a weapon during the commission of
12 a violent crime, I have prepared a special verdict form.

13 This informs you that if, or in the
14 event you have found the Defendant not guilty of murder,
15 not guilty of armed robbery, you no longer consider the
16 charge of possession of a firearm during the commission of a
17 violent act.

18 If you have found -- uh -- him guilty
19 of either charge, you may proceed with this indictment.

20 And again, you would simply circle
21 your verdict.

22 Is that clear?

23 FOREPERSON:

24 (Nods in the affirmative.)

25 THE COURT:

1 Now, I'm going to ask you to return
2 to your jury room.

3 I -- uh -- may have some -- uh --
4 matters to take up with -- with the attorneys.

5 They may have some objection to the
6 charge that I have given you.

7 As I have told you, I am going to
8 submit to you my charge on the law.

9 I am going to, at this time, have the
10 transcript of the charge that I just delivered marked by the
11 -- uh -- Court Reporter as Court's Exhibit 2.

12 Uh -- As soon as I have determined
13 whether there needs to be an addition, or I need to recharge
14 you, I will submit this to you with the other exhibits.

15 You may refer to it during your
16 deliberations.

17 I'm going to ask you not to begin
18 your deliberations until I send word.

19 The way I will do that is this:

20 I will send Mr. Roth into the jury
21 room with the exhibits.

22 When I am ready for you to begin your
23 deliberations, he will deliver the exhibits to you. And he
24 will inform you that you are to begin your deliberations.

25 Now Madam Forelady, let me remind you

1 that we're -- uh -- about a quarter after 11:00 now.

2 Uh -- I am sure that you are going to
3 want lunch.

4 Let Mr. Roth know that.

5 I don't know when you want your
6 lunch; but we'll certainly provide lunch for you.

7 Uh -- But remember, it takes -- uh --
8 anywhere from 45 minutes to an hour for us to have it
9 prepared somewhere and have it brought to you.

10 So that might be something that you
11 want to take up -- uh -- as soon as you get into your jury
12 room -- uh -- and sort of make those arrangements.

13 If you want to eat later, that's find
14 -- uh -- also.

15 Uh -- We'll just let you -- uh --
16 decide that.

17 But again -- uh -- it does take
18 anywhere from 45 minutes to an hour to -- to get a
19 restaurant to prepare 12 meals, and get it transferred --
20 transported over here; okay.

21 All right. Thank you.

22 Mr. Roth, would you take this jury
23 into its juryroom.

24 (WHEREUPON: The jury empanelled in
25 the case withdrew from the courtroom at 11:19 AM, August 13,

1 2009; and was no longer present during the following
2 proceedings.)

3 THE COURT:

4 Madam -- uh -- Madam Alternate, you
5 have -- uh -- completed your service.

6 I want you to -- uh -- I want you to
7 stay with me for, oh, a half hour or so -- uh -- at -- at
8 least until I'm sure that I have this to the jury.

9 Uh -- Where is Ms. King, my other --
10 Ms. King?

11 BAILIFF:

12 Yes sir.

13 THE COURT:

14 Would you take the alternate and make
15 sure she's comfortable somewhere, segregated from the rest
16 of the jury.

17 Don't let me forget her now.

18 We want to -- want to keep her about,
19 oh -- uh -- 30 minutes or so to make sure that -- as soon as
20 I have the exhibits back to the jury, she is free to go.

21 I -- I would like to see her though,
22 before we -- uh -- she leaves; okay.

23 Thank you.

24 ALTERNATE JUROR:

25 You're welcome.

1 THE COURT:

2 (WHEREUPON: The alternate withdrew
3 from the courtroom at 11:20 AM, August 13, 2009; and was no
4 longer present during the following proceedings.)

5 THE COURT:

6 All right.

7 I'm going to provide both counsel
8 with verdict forms. And let you look at it.

9 Does anyone have any additions or
10 exceptions to the charge?

11 From the State?

12 MR. RICHARDSON:

13 No sir.

14 MR. JOYE:

15 No sir.

16 THE COURT:

17 From the Defense? None?

18 MR. JOYE:

19 No sir. If I could just look at
20 this, then we'll send it on in.

21 THE COURT:

22 All right. We're going to be at
23 ease for a few minutes.

24 I would like for the attorneys to go
25 through the exhibit list and let's make sure we've got them

1 all.

2 COURT REPORTER:

3 Your Honor, we're missing one marked
4 exhibit; but it was never entered. And nobody could ever
5 find it, so we're missing that one.

6 THE COURT:

7 Was that that list?

8 COURT REPORTER:

9 No. It was a photo, exhibit 7.
10 We've got the Court's Exhibit list, but it won't go back
11 either.

12 THE COURT:

13 Okay. Uh --

14 MR. JOYE:

15 Here's something that's a little bit
16 of the concern, I think.

17 COURT REPORTER:

18 Well, it's already in evidence.

19 MR. JOYE:

20 Well I know. But -- But --

21 COURT REPORTER:

22 Is this for the record?

23 MR. JOYE:

24 Yeah; just real briefly.

25 Judge, these are the evidence.

1 Unfortunately, I don't believe
2 there's anything to tie any numbers to anything.

3 So I'm kind of --

4 THE COURT:

5 Well, when --

6 MR. JOYE:

7 -- just a little confused --

8 THE COURT:

9 When they were referred to in the
10 testimony and they're admitted into evidence, they're into
11 evidence.

12 MR. JOYE:

13 Oh, I understand. I just -- But it
14 -- You understand what -- kind of what I'm saying?

15 THE COURT:

16 Not at all. Don't have a clue.

17 MR. JOYE:

18 Well, you got numbers that don't have
19 any significance of anything.

20 THE COURT:

21 I -- Well -- Yeah, but they're in
22 now, and so we can't amend them.

23 MR. JOYE:

24 Well -- you know -- I guess it does.
25 Because we've got other pictures with -- uh -- so there is

1 a tie-in, more or less; okay.

2 COURT REPORTER:

3 Once they're in, they're in.

4 MR. JOYE:

5 Yeah, I understand it. But you just

6 -- And I was trying to remember how we tied them -- the

7 numbers to anything.

8 THE COURT:

9 All right. So you got all the --

10 all the exhibits; everything that's going in? How about the

11 verdict forms. The verdict forms and the charge.

12 DEPUTY BROOKS:

13 Are they ready, Judge?

14 THE COURT:

15 Yeah, they're ready. Brooks, hand

16 them the verdict forms and the charge separately; okay.

17 DEPUTY BROOKS:

18 Absolutely.

19 WHEREUPON: The exhibits were

20 checked, agreed upon, and sent to the jury, along with the

21 verdict forms, through the bailiff at 11:29 AM, August 13,

22 2009, and the jury was instructed to begin deliberations.

23 THE COURT:

24 I'm going to release the alternate,

25 Scott.

1 MR. JOYE:

2 Yes sir.

3 THE COURT:

4 Okay.

5 How about telling them to bring that
6 alternate in.

7 BAILIFF:

8 Okay.

9 THE COURT:

10 Ms. Muller, thank you so much for
11 your service. Uh -- You -- uh -- The case has been
12 submitted to the jury now. You are excused.

13 ALTERNATE:

14 Thank you.

15 THE COURT:

16 You are -- It was wonderful having
17 you here. We appreciate your service.

18 You're welcome to stay with us. I'll
19 even make them go get your lunch too, if you'd like to stay
20 and visit. But you're certainly free to go now.

21 Thank you again for your service.

22 ALTERNATE:

23 Thank you very much.

24 THE COURT:

25 All right. All right. The

1 court's at ease.

2 (WHEREUPON: The court was declared
3 in recess at 11:30 AM, August, 2009.)

4 WHEREUPON: The Court was informed at
5 2:03 PM, August 13, 2009, that the jury had reached a
6 verdict.

7 (WHEREUPON: The court was called to
8 order by the Bailiff at 2:08 PM, August 13, 2009; and all
9 pertinent parties, along with their counsel, with the
10 exception of Mr. Richardson, were back and present in the
11 courtroom.)

12 BAILIFF:

13 Order in The Court. All Rise.

14 THE COURT:

15 Thank you. Thank you. Please -- uh
16 -- take your seats.

17 Let me remind everyone here that --
18 uh -- I am -- uh -- presiding over this court; that I have
19 been informed that there is a verdict.

20 I do not know what that verdict is.

21 Uh -- However, when this verdict is
22 returned, I will not tolerate any outburst from any
23 spectators or anyone else in the courtroom.

24 If you feel that you cannot contain
25 yourself, you need to -- uh -- remove yourself from the

1 courtroom at this time; because I'm instructing these
2 officers, first of all to seal the courtroom as the jury
3 comes in.

4 I'm not going to allow anybody in and
5 out while -- uh -- I'm trying to take the verdict.

6 And then I'm going to ask them to
7 take anyone who expresses any -- uh -- emotion; or if
8 there's any outburst, I'm going to have that person taken
9 into custody; and I will deal with you.

10 I have the right to hold you in
11 contempt and I will certainly do so.

12 So if you think that you're not able
13 to contain yourself -- uh -- when this verdict is returned,
14 regardless of what it may be, please remove yourself from
15 the courtroom at this time.

16 Okay.

17 All right. Mr. Brooks, bring in the
18 jury.

19 Where is Mr. Richardson?

20 MS. ELDER:

21 He's on his way, Your Honor.

22 MR. JOYE:

23 Okay.

24 THE COURT:

25 We wouldn't want to -- uh -- proceed

1 without Mr. Richardson.

2 WHEREUPON: Mr. Richardson entered
3 the courtroom at 2:10 PM, August 13, 2009.

4 (WHEREUPON: The jury empanelled in
5 the case was escorted back into the courtroom at 2:11 PM,
6 August 13, 2009; and was in fact present during the
7 following proceedings.)

8 THE COURT:

9 Madam Forelady, have you reached a
10 verdict?

11 FOREPERSON:

12 Yes, Your Honor.

13 THE COURT:

14 And is that -- Is it a unanimous
15 verdict?

16 FOREPERSON:

17 Yes sir, it is.

18 THE COURT:

19 Madam Clerk?

20 WHEREUPON: The Clerk receives the
21 verdict from the foreperson and hands it to the Court.

22 THE COURT:

23 Publish the verdict.

24 CLERK:

25 Indictment Number 2008-GS-26-2912,

1 the State of South Carolina versus Michael Anthony
2 Livingston.

3 As to the charge of murder, we the
4 jury unanimously find the Defendant: Guilty.

5 Indictment Number 2009-GS-26-2658,
6 the State of South Carolina versus Michael Anthony
7 Livingston.

8 As to the charge of armed robbery, we
9 the jury unanimously find the Defendant: Guilty.

10 Indictment Number 2009-GS-26-2658,
11 the State of South Carolina versus Michael Anthony
12 Livingston.

13 As to the charge of possession of a
14 weapon during the commission of a violent crime, we the jury
15 unanimously find the Defendant: Guilty.

16 Signed by Foreperson Jennifer Spicer,
17 dated August 13th, 2009.

18 Ladies --

19 THE COURT:

20 Would -- I'm sorry.

21 CLERK:

22 Ladies and gentlemen of the jury, if
23 this is your verdict, so signify by raising your right hand.

24 WHEREUPON: Each juror raised their
25 right hand in agreement with the verdict.

Verdict and Sentencing, Etc.

619

1 CLERK:

2 Thank you.

3 THE COURT:

4 Let the record reflect that all
5 jurors responded affirmatively by raising their right hand.

6 THE COURT:

7 Would you like to review the form of
8 the verdict?

9 MR. JOYE:

10 No, Your Honor.

11 MR. RICHARDSON:

12 No sir.

13 THE COURT:

14 All right.

15 Any reason why sentence should not be
16 imposed at this time?

17 MR. RICHARDSON:

18 None from the State, Your Honor.

19 MR. JOYE:

20 None from Defense, Your Honor.

21 THE COURT:

22 Any further polling required by the
23 Defense?

24 MR. JOYE:

25 In an over abundance of caution, Your

1 Honor, I would ask that the jury be polled.

2 THE COURT:

3 All right.

4 MR. JOYE:

5 Uh -- I have been in an experience
6 when that's come back a little different.

7 THE COURT:

8 All right. Madam Clerk.

9 CLERK:

10 When I call your name, if you will
11 please stand.

12 Juror Number 11, Tobrina Bailey.

13 WHEREUPON: The juror stood to be
14 polled.

15 CLERK:

16 Is this your verdict?

17 JUROR:

18 Yes.

19 CLERK:

20 Is it still your verdict?

21 JUROR:

22 Yes.

23 CLERK:

24 Thank you.

25 168, Lee Greene?

Verdict and Sentencing, Etc.

621

1 WHEREUPON: The juror stood to be
2 polled.

3 Is this your verdict?

4 JUROR:

5 Yes.

6 CLERK:

7 Is it still your verdict?

8 JUROR:

9 Yes.

10 CLERK:

11 Number 37, Michael Brandt?

12 WHEREUPON: The juror stood to be
13 polled.

14 CLERK:

15 Is this your verdict?

16 JUROR:

17 Yes.

18 CLERK:

19 Is it still your verdict?

20 JUROR:

21 Yes.

22 CLERK:

23 74, Jessica Clauser Grobarcik?

24 WHEREUPON: The juror stood to be
25 polled.

1 CLERK:

2 Is this your verdict?

3 JUROR:

4 Yes.

5 CLERK:

6 Is it still your verdict?

7 JUROR:

8 Yes.

9 CLERK:

10 Thank you.

11 194, Angela Inman?

12 WHEREUPON: The juror stood to be

13 polled.

14 Is this your verdict?

15 JUROR:

16 Yes.

17 CLERK:

18 Is it still your verdict?

19 JUROR:

20 Yes.

21 CLERK:

22 Thank you.

23 121, Donna Edwards?

24 WHEREUPON: The juror stood to be

25 polled.

Verdict and Sentencing, Etc.

623

1 CLERK:

2 Is this your verdict?

3 JUROR:

4 Yes.

5 CLERK:

6 Is it still your verdict?

7 JUROR:

8 Yes.

9 CLERK:

10 Thank you.

11 32, Timothy Bogart?

12 WHEREUPON: The juror stood to be

13 polled.

14 CLERK:

15 Is this your verdict?

16 JUROR:

17 Yes.

18 CLERK:

19 Is it still your verdict?

20 JUROR:

21 Yes.

22 Thank you.

23 115, Crystal Doyle?

24 WHEREUPON: The juror stood to be

25 polled.

1 Is this your verdict?

2 JUROR:

3 Yes.

4 CLERK:

5 Is it still your verdict?

6 JUROR:

7 Yes.

8 CLERK:

9 Thank you.

10 38, Alayna Branton?

11 WHEREUPON: The juror stood to be
12 polled.

13 CLERK:

14 Is this your verdict?

15 JUROR:

16 Yes ma'am.

17 CLERK:

18 Is this still your verdict?

19 JUROR:

20 Yes ma'am.

21 360, Jennifer Spicer?

22 WHEREUPON: The juror stood to be
23 polled.

24 Is this your verdict?

25 JUROR:

Verdict and Sentencing, Etc.

625

1 Yes.

2 CLERK:

3 Is this still your verdict?

4 JUROR:

5 Yes.

6 359, Nancy Snyder?

7 WHEREUPON: The juror stood to be

8 polled.

9 CLERK:

10 Is this your verdict?

11 JUROR:

12 Yes.

13 CLERK:

14 Is this still your verdict?

15 JUROR:

16 Yes.

17 Thank you.

18 81, Anna Coppotelli?

19 WHEREUPON: The juror stood to be

20 polled.

21 CLERK:

22 Is this your verdict?

23 JUROR:

24 Yes.

25 CLERK:

1 Is this still your verdict?

2 JUROR:

3 Yes.

4 Thank you.

5 WHEREUPON: All jurors having been
6 polled, they each confirmed their verdict.

7 THE COURT:

8 All right, sir.

9 Mr. Richardson anything from the
10 victim; or the victim's family?

11 MR. RICHARDSON:

12 Yeah.

13 MR. JOYE:

14 Your Honor, at the appropriate time,
15 I'd like to make the appropriate motions.

16 THE COURT:

17 Okay. I'll -- I'll -- I'll let you
18 do it now; okay.

19 I'm going to let him make his motions
20 at this time.

21 MR. RICHARDSON:

22 Yes sir.

23 THE COURT:

24 Okay.

25 MR. JOYE:

1 Your Honor, I would move -- uh -- for
2 the Court to -- for a motion for a new trial -- uh -- based
3 on the fact that we feel that there would be an
4 insufficiency of the evidence; and with the Court as the
5 13th juror -- uh -- that no reasonable juror -- jury could
6 come to this conclusion.

7 Uh -- Your Honor, we would just then,
8 at this point in time, ask for a new trial.

9 THE COURT:

10 And I would respectfully deny your --
11 your request for a new trial.

12 I think that there was overwhelming
13 evidence by which the State -- I mean, that this jury could,
14 if believed -- uh -- return the verdict to support these
15 verdicts.

16 Thank you, sir.

17 MR. JOYE:

18 Thank Your Honor

19 THE COURT:

20 All right. I'll hear from the
21 victim's family.

22 VICTIM'S MOTHER:

23 My name's Kinserfield (phonetic); K -
24 a-e-l; and I am Fido's mother.

25 Sir, I do not know what Ervin did to

1 deserve this.

2 Whatever he did, he didn't -- Nobody
3 else mother ain't standing up here.

4 For two years, my heart has not
5 healed.

6 He didn't take Ervin away; he took
7 part of me.

8 He's left -- Ervin left two children
9 that he never got to see; a little girl and a little boy.

10 He left a nephew that his brother got
11 killed 11 months before.

12 He left a brother and a sister.

13 He left a aunt and a uncle.

14 So he didn't just kill Ervin.

15 He killed us too.

16 And the thing that's so bad about it,
17 that we all are related.

18 And I hate it for his family.

19 But they can still see him.

20 I couldn't even see Ervin for the
21 last time.

22 I couldn't even give my son a decent
23 burial, because they decided to let him rot away to nothing.

24 And Your Honor, I would like to have
25 mercy on his mother; because I know, as a mother, how her

1 heart might feel.

2 But I don't want you to have mercy on
3 him; because he didn't have mercy on my child.

4 I didn't choose for Ervin to go out
5 in the streets.

6 I worked two or three jobs to take
7 care of my kids.

8 But when they got to be adults, it
9 was up to them what they did.

10 But I didn't choose that for him.

11 That's all I can say.

12 Thank you.

13 THE COURT:

14 Thank you.

15 Anything further, Mr. Richardson?

16 MR. RICHARDSON:

17 I don't believe so, Your Honor.

18 THE COURT:

19 Well, I -- I'll hear from the State.

20 MR. RICHARDSON:

21 Your Honor -- uh -- it's been a long
22 trial. A lot's already been said. Uh -- I don't -- There's
23 nothing else that needs to be said.

24 I will pass up the -- uh --
25 sentencing sheets.

1 THE COURT:

2 All right; thank you, sir.

3 All right.

4 Mr. -- uh -- Richardson, does the
5 Defendant have a record?

6 MR. RICHARDSON:

7 Your Honor, the only thing is:

8 He has a -- uh -- distribution of
9 crack cocaine from 2008.

10 THE COURT:

11 Okay.

12 And that was after this actually;
13 wasn't it?

14 MR. RICHARDSON:

15 Yes sir.

16 THE COURT:

17 Okay.

18 MR. RICHARDSON:

19 Uh -- It was before this.

20 MR. JOYE:

21 Very -- Very close to the same time
22 proximity, Judge.

23 THE COURT:

24 Okay.

25 MR. RICHARDSON:

1 He's got pending charges for the same
2 thing that come after; but no --

3 THE COURT:

4 All right.

5 Uh -- Mr. Joye, let me hear from you
6 in mitigation.

7 THE COURT:

8 Your Honor -- uh -- I've represented
9 Michael for a long time in this case.

10 Uh -- He has a family.

11 He's a relatively young man.

12 Uh -- Your Honor, this is a tough day
13 for him.

14 It's a tough day for his family.

15 It's a tough day for the Graham
16 family. I understand that.

17 Judge, we would just ask that -- uh
18 -- The Court would -- uh -- extend him the mercy of the
19 minimum sentence possible of 30 years.

20 That's a long time, Judge.

21 And he'll be an older man -- a much
22 older man when he gets out.

23 So we just ask that you -- uh -- in
24 considering his sentence, consider the min -- the minimum in
25 this case.

1 THE COURT:

2 All right.

3 Mr. Livingston, I'll hear from you,
4 if you would like to say anything to me.

5 DEFENDANT:

6 Your Honor, I been from -- From day
7 one -- From day one, Your Honor, I been telling them who did
8 it.

9 And Jimmy Richardson's steadily
10 coming after me after I done told him all this stuff -- what
11 happened.

12 He's steady coming after me for no
13 reason.

14 I told them who did it.

15 Coaty Deas, him and Chadd Wilson was
16 the trigger man. And they've put me there.

17 I even told him:

18 Yes. I was there. But I did not kill
19 that man.

20 And he's steady coming after me.

21 I even talked to him. He told me
22 that he knows I didn't kill this man.

23 I don't understand why they found me
24 guilty for something I didn't do.

25 I didn't pull no triggers, Your

1 Honor.

2 Then this man got on the stand and
3 said that he shot this man.

4 Now my life is gone for no reason.

5 Well, it's for a reason; for me being
6 there to witness and not calling the police when it
7 happened; but it's still gone for 30 years for no reason.

8 I just want you to have mercy on me,
9 Your Honor.

10 Will you please do that, sir?

11 THE COURT:

12 Anything further, Mr. Livingston?

13 DEFENDANT:

14 No sir.

15 THE COURT:

16 Mr. Livingston, this jury has
17 convicted you.

18 This jury has found that by the
19 evidence in this case beyond a reasonable doubt, that you
20 committed one of the most heinous crimes that I have had to
21 preside over.

22 Uh -- This person, regardless of what
23 he may have done, or had done, or may have done, did not
24 deserve to be shot in the back of the head, and then, his
25 body mutilated later.

1 This case cries out to me.

2 It says:

3 Life is cheap in Poplar.

4 In the Poplar community, life is
5 cheap.

6 Well, life is not cheap. It's not
7 cheap in this courtroom, Mr. Livingston.

8 This is a cold, brutal murder; as
9 brutal as any I have ever seen.

10 The sentence of the Court for the
11 offense of murder is:

12 That you be confined to the State
13 Department of Corrections for the balance of your life.

14 As to the -- uh -- offense of armed
15 robbery, the sentence of the Court is:

16 That you be confined to the State
17 Department of Corrections for a period of 30 years.

18 As to the possession of a weapon
19 during the commission of a violent crime, it is the sentence
20 of the Court:

21 That you be confined for 5 years to
22 the State Department of corrections.

23 These are all to run concurrent.

24 Thank you, sir.

25 Good luck to you.

1 THE COURT:

2 Ladies and gentlemen of the jury, let
3 me say that I again think for your willingness to
4 participate in this process.

5 This case, as I said earlier, would
6 never have been resolved, had it not been for your
7 willingness to serve.

8 I believe that all during this trial
9 you paid close attention to the -- the evidence and the
10 witnesses who testified.

11 And you have deliberated in such a
12 fashion that your verdict is substantially supported by this
13 record. And I thank you for your -- your service.

14 I can tell you right now that I know
15 how difficult it is to serve as a juror in a case like this.

16 I hope you can appreciate how
17 difficult it is for me to do what I do when you return a
18 verdict of guilty.

19 I get no pleasure whatsoever in
20 passing a sentence like I just passed -- passed.

21 However, you have determined what the
22 facts were in this case.

23 You have told me what happened.

24 And my sentence, I hope, reflects the
25 severity of this offense and -- and the position that the

1 State takes upon this type of action.

2 Thank you again for service.

3 I appreciate y'all being here.

4 I hope that I see you in the future.

5 If you hate -- hope -- uh -- happen
6 to run into me anywhere, please don't hesitate to remind me
7 that you served on my jury.

8 I love to have jurors come back up
9 and talk with me -- uh -- uh -- after they have served.

10 I hope that it's been a -- a learning
11 experience for you.

12 I hope that it is one that you'll
13 remember -- uh -- throughout your life.

14 Thank you again.

15 You're excused.

16 WHEREUPON: There being nothing
17 further officially in this matter, these proceedings were
18 closed at 2:24 PM, August 13, 2009.

19

20

21

22

23

24

25

CERTIFICATE

I, the undersigned, H. Eugene Buckner, CVR, Official Court Reporter at Large in and for the State of South Carolina, do hereby certify that the foregoing proceeding was taken on the 11th, 12th, and 13th day of August, 2009;

That the within judicial proceedings are, to the best of my ability, an accurate and verbatim transcription of the hearing;

I further certify that I'm neither Counsel nor Solicitor to any of the parties in said suit, nor interested in the event of the cause.

IN WITNESS WHEREOF, I've hereunto set my hand and seal this 1st day of November, 2009.

H. Eugene Buckner

H. EUGENE BUCKNER, CVR
OFFICIAL COURT REPORTER AT LARGE
15TH JUDICIAL DISTRICT
STATE OF SOUTH CAROLINA

FORM 5

STATE OF SOUTH CAROLINA)

County of Horry)

IN THE COURT OF COMMON PLEAS

Michael Livingston #330593)

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

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS TO READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legible 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 Lee County Correctional Institution
2. Name and location of Court which imposed sentence Horry County Courthouse in Horry County
3. Name(s) of co-defendant(s) (if any) Chadd Wilson, Tony Wilson, Coaly Doss, Kal Hill
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2008-GS-2602912

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Horry County
2012 MAY 25 PM 4:12
MELANIE HUGGINS
CLERK OF COURT

- (b) 2009-GS-26026S8
- (c) 2009-GS-26026S9
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 13, 2009
- (b) Life plus 30 plus 5, ran concurrent
- (c) _____
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 Ayes@ 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. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. February 29, 2012
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered Ano@ 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) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached Amendments
- (b) Leave Open to Amend
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____

- iv. _____
- (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (d) the date of each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____

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

no

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

- (a) which grounds have been presented:

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

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

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

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) See Attach Amendment Application
 - (b) First PCR Application
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? YES
 - (b) your trial, if any? YES
 - (c) your sentencing? YES
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Scott Joye - 3575 Highway 17 Business, Murrells Inlet, SC 29576
 - ii. Robert Durdet - South Carolina Commission on Indigent Defense
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Scott Joye - Arraignment
 - ii. Scott Joye - Trial - Sentencing
 - iii. Robert Durdet - Direct Appeal

12

4207

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

Sentence Reversed And Remanded to be Vacated

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

No

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Bishopville)

VERIFICATION

I, _____, 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.

Michael R. Wright

SWORN to and subscribed before me this 24
day of May 2012.

Debra S. Smith (L.S.)
Notary Public

My Commission Expires: 11-4-2015

FILED
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MELANIE HUGGINS-WARD
2012 MAY 25 PM 4:12
CLERK OF COURT

12

4207

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

I, _____, 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.

Michael Livingston
Applicant

SWORN or affirmed to and subscribed before me this

24 day of May, 2012.

Debra Sires
Notary Public

My Commission Expires: 11-4-2015

FILED
CLERK OF COURT
MELANIE HUGGINS-WARD
2012 MAY 25 PM 4:12
CLERK OF COURT

ISSUE #1**INEFFECTIVE ASSISTANCE OF COUNSEL**

1. Trial Counsel was ineffective for not impeaching the state testimony at trial.

RELEVANT FACTS

1. Mr. Jove said that the affidavits were not relevant to the case. When the affidavits clearly states that Coatv Deas shot the victim, not Michael Livingston.
 2. Mr. Jove said he didn't have copies of the affidavits t Co-defendant Chadd Wilson wrote Michael Livingston, which clearly a (Brady vs. Maryland violation).
- * See Exhibits A,B,C,D,E,F, See Trial Transcript pg. 430

CLERK OF COURT
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HUGGINS
COUNTY

ISSUE #2**INEFFECTIVE ASSISTANCE OF COUNSEL**

1. Trial Counsel was ineffective for failing to interview the state's witness.

RELEVANT FACTS

1. Kal Hill been perjuring himself on direct examination with Mr. Richardson, and that was a booby - trap that Mr. Jove had no clue of.
 2. Mr. Jove asked for a mistrial, cause he didn't interview the witness Kal Hill. Mr. Jove said he didn't have any knowledge about the statements, Mr. Hill made on stand.
 3. The Judge denied the motion for mistrial, cause he said Mr. Jove had enough time to interview the witness.
- * See Trial Transcript pg. 191-196

ISSUE #3**INEFFECTIVE ASSISTANCE OF COUNSEL**

1. Trial Counsel was ineffective for not subpoenaing the defendant witness to testify at trial, for the defense.

RELEVANT FACTS

1. Mr. Jove didn't dubpeoned any of the defendant witness's at trial.

Witnesses: Trell Bryant
Matthew "Bubba" Moore
Drell Livingston
Jamar Wilson
Lamar Vereen

Exhibit "C"

2 May 68

Man what's up. Shit me, I'm tired of sitting here. You know them people just trying to hold us. They got C fingerprints and still haven't arrest him. What kind of evidence they need. We shouldn't ~~have~~ have to tell them. Man whatever will help us get home. It ain't shit happen for me. They won't even let me go up for a bond. I'm tired of just sitting her. And a lot of people starting to tell me C did it. Then this dude Great telling me they tried to get him for it. Them people don't know nothing they mind as well make it drug related which it is. Dude was wanted by a lot of people, I heard, for all that rubbing he did. And behind that gang shit. If your lawyer can help then put him to work. I haven't been writing cause I don't have any paper. Then I'm stressing a little bit. Sitting in here listening to everybody say about they charges. Keep ya head up cuz I'm praying for both of us. One day we'll make it through this shit. Let me know what's up!

What Up

What's going on man? I'm ready for this
shit to get over with. Man I'm stressing
to much going through this. Man C
be holding me down by bringing my
girl. This shit ain't going to help
nobody. C did it but they not going
to arrest him. Cause they need three
witnesses. I heard people saying he
did it but none of them is going
to talk. C did it, so they need
to convict him so we can go home.
C was in good with the dude and he
had the girl given him information.
That's why he caught that charge
cause A Block was putting it out there
that he did it. Man holla at ~~me~~ me.
When you hear something good. I tired
of sitting here waiting.

Respondent, making its Return to the Application for post conviction relief (PCR) filed May 25, 2012, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2008 term of the Horry County Grand Jury for murder (2008-GS-26-2912), armed robbery (2008-GS-26-2658), and possession of a weapon during the commission of a violent crime (2008-GS-26-2659). Scott Joye, Esquire, represented Applicant.

On August 13, 2009, Applicant was tried and found guilty as indicted before the Honorable Larry B. Hyman Jr., who sentenced Applicant to life imprisonment on the murder charge, thirty years imprisonment for armed robbery, five years imprisonment on the weapon charge, with all charges running concurrently. On information and belief, Applicant appealed and his conviction and sentence were affirmed on February 29, 2012.

Attached herewith and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction, and Applicant's SCDC records, and the transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective Assistance of Counsel

III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. 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 counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second,

counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Respondent submits that 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, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

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

V.

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

VI.

WHEREFORE, having made its Return, the State requests that the Application be denied and the matter dismissed with prejudice.

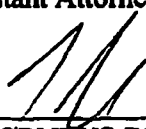
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

TYSON ANDREW JOHNSON, SR.
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

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

9/24, 2012.

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

2012-CP-26-4207

MICHAEL LIVINGSTON, #330593)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,)

Respondent.)

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

Charles T. Brooks, III, Esquire
 309 Broad St.
 Sumter, SC 29150

DATED this 24th day of September, 2012.


 Norma Bigbee, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
2 COUNTY OF HORRY) NO: 2016-CP-26-01750

3 PCR HEARING

4
5 B E F O R E: The Honorable John C. Hayes
6 October 28, 2014

7 MICHAEL A. LIVINGSTON,
8 Petitioner,
9 vs.

ORIGINAL

10 STATE OF SOUTH CAROLINA,
11 Respondent.
12 -----

13 APPEARANCES:

14 Steven Fowler, Esq.
15 For the Petitioner.

16
17 Joshua Thomas, Esq.
18 For the Respondent.

19

20

21 Court Reporter:
22 Natalie Dahl, RPR

23

24

25

26

I-N-D-E-X

WITNESS

PAGE

MICHAEL LIVINGSTON

Direct Examination by Mr. Fowler.....	5
Cross-Examination by Mr. Thomas.....	33
Redirect Examination by Mr. Fowler.....	36
Recross-Examination by Mr. Thomas.....	38

R. SCOTT JOYE, ESQ.

Direct Examination by Mr. Thomas.....	38
Cross-Examination by Mr. Fowler.....	47
Redirect Examination by Mr. Thomas.....	55
Recross-Examination by Mr. Fowler.....	56

ALEXIS SKILES

Direct Examination by Mr. Thomas.....	57
Cross-Examination by Mr. Fowler.....	59

E-X-H-I-B-I-T-S

PETITIONER'S EXHIBITS

MARKED ADMITTED

A	Letter	12	12
B	Letter	16	16

CALL OF THE CASE
P-R-O-C-E-E-D-I-N-G-S

MR. THOMAS: This is Michael Livingston versus South Carolina, 2012-CP-26-4207. Mr. Livingston was indicted in August of 2008 for murder, and then in July of 2009 for armed robbery and possession of a weapon during the commission of a violent crime, represented on those charges by Scott Joye. He did go to trial in front of Judge Hyman on August 11th through the 13th, 2009 and was convicted as indicted. Judge Hyman sentenced him to life on the murder charge, and a concurrent 30 years on the armed robbery and five years on the possession of a weapon. There was an appeal filed by Robert Dudek of the Office of Appellant Defense. It was an Anders. The Court of Appeals dismissed that case in unpublished opinion 2012-UP-137. Appellant filed this PCR on May 25, 2012 alleging ineffective assistance of counsel. He's represented by Steve Fowler, and the State is ready to proceed.

THE COURT: Mr. Fowler, in a nutshell.

MR. FOWLER: Your Honor, if you have a copy of the application --

THE COURT: I have it right here.

MR. FOWLER: There is three issues that he brought up, all under the ineffective assistance of

CALL OF THE CASE

1 counsel. What we would like to do is take a look at
2 the transcript. There were various things said under
3 oath or during the trial that we think are relevant.
4 We have documentation that we think is relevant. Our
5 contention is that but for some act by his prior
6 attorney, things may have been different, and that is
7 our contention today. We hope to show that, and we
8 certainly appreciate anything you can provide in terms
9 of separating things here.

10 THE COURT: It says ineffective for not
11 impeaching State's testimony of State's witnesses,
12 failing to interview State's witnesses, and the third
13 was not subpoenaing defendant's witnesses.

14 MR. FOWLER: Yes, sir.

15 THE COURT: Do you want to go through -- quite
16 frankly, I usually have someone on the stand pointing
17 out matters in the record which are a concern, but
18 since it is of record, if you -- unless there is an
19 objection from the State -- want to go through and
20 start either by putting your client up, if you plan to
21 put him up, or you can start by going through the
22 transcript and pointing out issues where they are and
23 what they are.

24 MR. FOWLER: Yes, sir. We would like to put up
25 Mr. Livingston at this time.

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 THE COURT: All right. Come up and be sworn.

2 (MICHAEL LIVINGSTON, having been duly sworn,
3 testified as follows:)

4 THE CLERK: State your name and spell your last
5 for the Court.

6 THE WITNESS: Michael Livingston,
7 L-I-V-I-N-G-T-O-N.

8 DIRECT-EXAMINATION

9 BY MR. FOWLER:

10 Q Mr. Livingston, can you tell me a little bit --
11 before we start. You are familiar with the case we're
12 here on, it was held the 11th day of August 2009; is
13 that correct?

14 A Yes, sir.

15 Q Are you familiar with the transcript that has
16 come from that hearing?

17 A Yes, sir.

18 Q In your application for post-conviction relief
19 filed on May 25, 2012, you basically bring up three
20 issues, and the Judge has gone over that this morning,
21 but for safety's sake, we'll review it. One is that
22 the trial counsel was ineffective for not impeaching
23 the State's testimony at trial; is that correct?

24 A Yes, sir.

25 Q Secondly, trial counsel was ineffective for

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 failing to interview State's witnesses?

2 A Yes, sir.

3 Q And, finally, trial counsel did not subpoena the
4 defendant witness to testify at trial for the defense;
5 is that correct?

6 A Yes, sir.

7 Q All right.

8 MR. FOWLER: Once again, we do have this
9 transcript, Your Honor, that is part of the record,
10 and I would like to approach the witness?

11 THE COURT: You may.

12 MR. FOWLER: Before I approach the witness, let
13 me give some context.

14 Q There was testimony in that trial of Chad Wilson;
15 is that correct?

16 A Yes, sir.

17 Q Now, tell me a little bit about who Chad Wilson
18 is in the context of this case, and perhaps even as a
19 friendship or whatever relationship, if there is one
20 between you and he?

21 A Chad Wilson is my cousin.

22 Q Now, why was he testifying at this case in 2009?

23 A He was a codefendant, too.

24 Q So he had his own charges against him; is that
25 correct?

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 A Yes, sir.

2 Q Now, in the transcript he is being -- he offers
3 testimony; is that correct?

4 A Yes, sir.

5 Q And have you read the testimony before?

6 A Yes, sir.

7 MR. FOWLER: Now, if I may approach, Your Honor?

8 THE COURT: Yes.

9 Q (MR. FOWLER) On Page 430, Line 10, could you read
10 the five phrases starting from Line 10 to Line 15?

11 A Mr. Joye said: Judge, objection, Your Honor. I
12 don't -- I don't have copies of the letters maybe were
13 written, and I just don't know where this is going with
14 him.

15 Q All right. Okay. Now, tell me a little bit
16 about Mr. Joye mentioning the letters. What letters
17 are you referring to -- what letters is he referring
18 to?

19 A In 2008, May, Mr. Chad Wilson wrote me letters
20 saying that Cody Deas is the one that shot the victim
21 in this case, and he said --

22 THE COURT: Who shot him?

23 THE WITNESS: Cody Deas. My other codefendant.

24 Q (MR. FOWLER) Does he have a nickname?

25 A "C".

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 Q As in the letter "C"?

2 A Yes, sir.

3 Q So on Page 430, Mr. Joye, according to the
4 transcript, says he doesn't have copies of the letters
5 that maybe were written, and I just don't know where
6 this is going with him, correct?

7 A Yes, sir.

8 Q There was further transcript discussion on this;
9 is that correct?

10 A Yes, sir.

11 Q And it continues on at least to Page 432; is that
12 right?

13 A Yes, sir.

14 MR. FOWLER: If I may approach?

15 THE COURT: Okay.

16 Q (MR. FOWLER) If you could read a little more. We
17 don't want to try the patience of the Court, but 5
18 through 22, if you could start there. And this is --
19 go ahead.

20 A Mr. Joye said: I believe we supplemented that
21 there is going to be -- there is going to be straight
22 issues about the letters.

23 And the Court said: Okay. All right. The
24 Solicitor indicates that he's not -- not going to go
25 into that.

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 Mr. Richardson said: And if you want to strike
2 and have him not talk about these letters.

3 Mr. Joye said: No. No, sir, but I told him.

4 Mr. Richardson: Okay.

5 Mr. Joye said: And just maybe the Judge wants to
6 go into that, but it's not relevant to this case.

7 Q Okay. On Line 22 of that page, Page 432, what is
8 he referring to as not relevant in this case?

9 A The letters.

10 Q Now, you mentioned the letters, the letters and
11 what have you. You included the letters in your
12 application to the post-conviction relief, correct?

13 A Yes, sir.

14 Q And the substance -- there's accompanying
15 envelopes with it, but the texts are listed as Exhibit
16 C and Exhibit D; is that correct?

17 A Yes, sir.

18 Q Now, it is your contention that you felt that
19 these were relevant to the case?

20 A Yes, sir.

21 MR. FOWLER: Your Honor, these are already in the
22 post-conviction relief application, but I would like
23 to speak to my client about it.

24 THE COURT: Okay.

25 Q (MR. FOWLER) Do you recognize that name there?

MICHAEL LIVINGSTON - DIRECT EXAMINATION

- 1 A Yes, sir.
- 2 Q What is it?
- 3 A Chad Wilson.
- 4 Q And what is the date on this envelope loan?
- 5 A May 5, 2008.
- 6 Q Who is it addressed to?
- 7 A Michael Livingston.
- 8 Q What is the address?
- 9 A 4150 J. Reuben Long Avenue, Conway, South
10 Carolina.
- 11 Q Was this a letter from Mr. Wilson to you?
- 12 A Yes, sir.
- 13 Q Did he send it -- it is basically to the same
14 address. Was it a --
- 15 A It came through the mail.
- 16 Q So this is some kind of document showing that
17 there is a letter?
- 18 A Yes, sir.
- 19 Q Now, on Exhibit C, which already has been in the
20 application, and we can read it to the Court if you
21 would like, but I think if you could just take a look
22 at this. There are some -- if you can spell out a word
23 if it is vulgarity or whatever you feel comfortable
24 with, as far as I'm concerned, whatever Your Honor goes
25 with. Can you read this? It is a couple paragraphs

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 long starting from there all the way down.

2 MR. THOMAS: Your Honor, I mean, if it is part of
3 the record already, I don't think we need to reread
4 it. I object to that.

5 THE COURT: Overrule the objection. Go ahead.

6 Q (MR. FOWLER) Start from Exhibit C to the end.

7 A Exhibit C, 2nd day of May -- May 2, 2008. Man,
8 what's up? It's me. I'm tired of sitting here. You
9 know them people are just trying to hold us. They have
10 "C's" fingerprints and still haven't arrested him.
11 What kind of evidence do they need? We shouldn't have
12 to tell them. Man, whatever will help us get home. It
13 ain't -- it ain't happened for me. They won't even let
14 me go up for a bond. I'm tired of just sitting here,
15 and a lot of people starting to tell me that "C" did
16 it. Then this dude telling me they tried to get him
17 for it. Them people don't know nothing. They might as
18 well make it drug related, which it is. Dude is wanted
19 by a lot of people, and I heard from all that robbing
20 he did. And behind that, that gang -- that gang hit.
21 If your lawyer can help, then put him to work. I
22 haven't been writing because I don't have any paper,
23 then I'm stressing a little bit sitting here listening
24 to it, everybody cry about their charges. Keep your
25 head up, Cuz. I'm praying for both of us. One day

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 we'll make it through this. Let me know what's up.

2 Q And also on the back of it there is a stamp
3 saying it is J. Reuben Long?

4 A Yes, sir.

5 Q So there was a letter, according to this, and
6 there was a letter sent to you from --

7 A Yes, sir.

8 MR. FOWLER: Your Honor, I would like to enter
9 this into evidence. I provided one to opposing
10 counsel.

11 MR. THOMAS: To the extent it is already a part
12 of the record, no objection.

13 (Petitioner's Exhibit A marked and admitted.)

14 Q (MR. FOWLER) Now, you read this letter, got this
15 letter in May of 2008?

16 A Yes, sir.

17 Q In this letter -- and like opposing counsel said,
18 it is already a part of the record -- there is a
19 statement saying: A lot of people starting to tell me
20 "C" did it; is that correct?

21 A Yes, sir.

22 Q When you got this letter, what did that mean to
23 you? What was your impressions of "a lot of people
24 starting to tell me "C" did it"?

25 A He was telling me what people were saying.

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 Q So in your opinion, were there other things --
2 other persons that might have been relevant to this?

3 A No, just "C".

4 Q So you're thinking "C" did it. Okay. Very good.

5 In terms of this, do you feel like -- now, this
6 is Letter C, and there is also a Letter D that we'll
7 get to, hopefully with the Court's indulgence. Do you
8 feel like your attorney should have had a copy of this
9 letter?

10 A Yes, sir.

11 Q Why do you feel that way?

12 A Because it would have put reasonable doubt that
13 Chad was testifying against me.

14 Q And he did eventually testify against you,
15 correct?

16 A Yes, sir.

17 Q In this trial?

18 A Yes, sir.

19 Q So if your attorney had this, he could have
20 possibly used this to contradict "C" or Wilson's
21 testimony?

22 A Yes, sir.

23 Q Your application for relief states -- and we're
24 going down the same path, just different language on
25 this, just a heads up. You also state there was

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 another letter?

2 A Yes, sir.

3 Q And that is listed as Exhibit D in your
4 application?

5 A Yes, sir.

6 MR. FOWLER: If I may approach?

7 THE COURT: You may.

8 Q (MR. FOWLER) What is this?

9 A Another letter from Chad Wilson.

10 Q Is this the front of the envelope?

11 A Yes, sir.

12 Q What is the date stamp?

13 A May 15, 2008.

14 Q Who is it from?

15 A Chad Wilson.

16 Q And, once again, for clarity's sake --

17 A [REDACTED], Conway.

18 Q Who is it addressed to?

19 A Michael Livingston.

20 Q What is that address?

21 A [REDACTED], Conway, South Carolina.

22 Q Very good. And there is also a date stamp on

23 page 3 of this exhibit, correct?

24 A Yes, sir.

25 Q Now, are you familiar with this writing?

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 A Yes, sir.

2 Q This is Exhibit D and -- Court's indulgence, it
3 is already a part of the record, but we would like to
4 proceed with this at this point. Could you read this
5 to the Court?

6 A Exhibit D: What's up? What's going on, Man?
7 I'm ready for this "S" to get over with. Man, I'm
8 stressing too much going through this. Man, "C" be
9 holding me down by bringing my girl. This "S" ain't
10 going to help nobody. "C" did it, but they are not
11 going to arrest him because they need three witnesses.
12 I heard people saying that he did it, but none of them
13 is going to talk. "C" did it, so they need to convict
14 him so we can go home. "C" was in good with the dude,
15 and he had the girl giving him information, that's why
16 he caught that charge, cause D Block was putting it out
17 there that he did it. Man, holler at me when you hear
18 something good. I'm tired of sitting here waiting.

19 Q So you are familiar with this letter?

20 A Yes, sir.

21 Q And this looks like Mr. Wilson's writing?

22 A Yes, sir.

23 MR. FOWLER: I would like to enter this as
24 Exhibit B.

25 MR. THOMAS: No objection.

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 THE COURT: Without objection.

2 (Petitioner's Exhibit B marked and admitted.)

3 Q (MR. FOWLER) So as Exhibit C in your application, a
4 letter dated May 5th, and we have a letter dated
5 May 15; is that correct?

6 A Yes, sir.

7 Q In this Exhibit D it says, quote, "C" did it, but
8 they not going to arrest him, end quote?

9 A Yes, sir.

10 Q And it also goes, Cause they need three
11 witnesses, right?

12 A Yes, sir.

13 Q All right. So you are telling me that you had
14 two letters that were given to you by Wilson, sent to
15 you by Wilson through the mail?

16 A Yes, sir.

17 Q With a date stamp that pointed the finger at
18 someone else, correct?

19 A Yes, sir.

20 Q Do you think this was something that your
21 attorney should have gone into during the trial?

22 A Yes, sir. It would have showed reasonable doubt
23 to Chad Wilson's testimony at trial.

24 Q As to the actual possession of these letters, did
25 your attorney possess these letters, to the best of

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 your knowledge?

2 A No. He ain't showed none of this at trial.

3 THE COURT: I can't understand you.

4 THE WITNESS: He didn't show none of them at
5 trial. He said he lost them.

6 Q (MR. FOWLER) There was no -- on either one of the
7 letters, there was no confronting Wilson on the
8 witness stand at this trial?

9 A No, sir.

10 Q And you also quoted earlier that Mr. Joye did not
11 have copies of the letters in the transcript?

12 A Yes, sir.

13 Q Do you feel like that it was prejudicial to you
14 that your attorney did not cross-examine or present
15 these letters to Wilson on the stand during his
16 testimony?

17 A Yeah, it's prejudice.

18 Q Do you feel like it would have been a reasonable
19 thing to do for your attorney to present these letters
20 to Wilson showing him this on the stand?

21 A Yes, sir.

22 Q Do you think that this ultimately may have made a
23 difference in your -- in the verdict?

24 A Yes, sir.

25 Q Why?

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 A Because, for one, it says who did it. They are
2 pointing the finger at Cody Deas, he goes by "C," which
3 I didn't pull the trigger. It would have showed the
4 jury who did it.

5 Q Now, let me -- while we're still on this issue on
6 who did it, and what have you. Was there any kind of
7 powder test done on you, on your hand, or anything like
8 that to show that you fired any kind of weapon?

9 A No, sir.

10 Q So just to clarify, your attorney never had any
11 kind of test done on you to show any kind of powder
12 residue on your hands?

13 A No, sir.

14 Q Was -- did the State ever do anything -- did the
15 State perform any gun residue test on you?

16 A No, sir.

17 Q Do you think that would have been a good thing to
18 do?

19 A Yes, sir.

20 Q Why?

21 A Because it would have showed that I didn't pull
22 no trigger, I didn't shoot no gun.

23 THE COURT: Can I interrupt to help me? Was he
24 arrested on the day of the incident, or later?

25 THE WITNESS: A couple days later.

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 MR. FOWLER: Yes, sir.

2 Q (MR. FOWLER) To continue on the judge's question,
3 you were arrested a few days later?

4 A No. I turned myself in.

5 Q But in your opinion, do you think it would have
6 been a good idea to have some kind of a residue test?

7 A Yes, sir.

8 Q Say it again?

9 A Yes, sir.

10 Q Tell me about the discovery in this case. Are
11 you familiar with what the term "discovery" means?

12 A Yes, sir.

13 Q What does it mean?

14 A All the paperwork, going through all the stuff,
15 getting ready for my trial.

16 Q When you say "all the stuff," are you talking
17 about legal documents and things of that sort?

18 A Yes, sir.

19 Q Did you and your attorney ever go over any kind
20 of discovery in this case?

21 A No, sir.

22 Q Now, what charges were you up on again?

23 A Murder, armed robbery and possession of a
24 firearm.

25 Q So you were up on murder, armed robbery and other

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 charges, and yet you and your attorney never sat down
2 and went over the State's evidence against you?

3 A No, sir.

4 Q To your knowledge, did he ever file discovery
5 requests with the State?

6 A Not to my knowledge.

7 Q And he never -- let me phrase it this way. Did
8 he provide you any kind of copies of any discovery
9 requests or letters to the State asking for any kind of
10 discovery?

11 A No, sir.

12 Q Do you think that would have been a good thing to
13 go over with before trial, any documentation that the
14 State might have had against you?

15 A Yes, sir.

16 Q Moving to issue No. 2 in your application for
17 post-conviction relief: The trial counsel was
18 ineffective for failing to interview the State's
19 witness. What witness are you referring to there?

20 A Kal Hill.

21 Q Who is Kal Hill?

22 A He was a codefendant.

23 Q So he had charges up against him as well, right?

24 A No, sir.

25 Q What happened there?

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 A They didn't charge him.

2 Q Okay. You initially said he was a codefendant,
3 correct?

4 A Yes, sir.

5 Q Did they drop the charges against him?

6 A They just didn't bring it up. It is in the trial
7 transcript.

8 Q Okay. Are you familiar with why they did not
9 charge him?

10 A No, sir.

11 Q So you never received any kind of information
12 stating why the -- and let me be clear. The charges
13 were dropped against Kal Hill?

14 A No, they never brought them up.

15 Q Why would they have potentially charged him?

16 A I don't know, but he was there, and he's the one
17 that took the stuff off the dude, he's the one that
18 robbed him.

19 Q So you are saying that Kal Hill, perhaps, had
20 something to do with some -- let me phrase this
21 correctly. So you are saying that Kal Hill was in the
22 vicinity at the time of the incident, correct?

23 A Yes, sir.

24 Q And you are saying that it's logical that the
25 State might have charged him with some kind of crime?

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 A Yes, sir.

2 Q Now, in terms of the transcript, we've gone over
3 this earlier, you have mentioned that you are familiar
4 with the transcript, correct?

5 A Yes, sir.

6 Q Now, on Page 191 of the transcript --

7 MR. FOWLER: If I may approach?

8 THE COURT: You may.

9 Q (MR. FOWLER) There is a couple of paragraphs here,
10 and then later on on a couple preceding pages. We'll
11 be short, but we'll try to get in as much as we can
12 here. On Page 191, could you start at -- well, excuse
13 me, on Page 190 starting with Mr. Richardson, starting
14 on Line 13.

15 A Mr. Richardson said: Yes, sir, Your Honor.
16 What's he doing, and I may sure step in this whole
17 thing, but what he's talking about is when Amp
18 (phonetic) originally started, that Fido (phonetic)
19 broke into his house, he is saying I didn't tell the
20 police because I was threatened earlier by Amp and Chad
21 and Cody, and I don't think Tony was there, but, um,
22 those boys threatened me, therefore I wasn't going to
23 tell the police what -- what I knew.

24 The Court said: What did those boys threaten him
25 for? I mean, what --

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 Mr. Richardson said: They thought they broke
2 into his house, thought he had broken into Amp's house
3 some time prior to the murder.

4 Mr. Joye said: Judge, I'm going to ask for a
5 mistrial. I had no knowledge about this. I've been
6 through every single piece of paper, every single
7 tape, and all of the sudden I'm standing in here and
8 something -- about something I don't know, which I
9 would absolutely go -- which would absolutely go to
10 the credibility of Chad, Cody and Tony Deas.

11 Q And if you would, continue reading to the bottom.

12 A If they held somebody at gunpoint three days
13 prior to the murder, I ought to know about it.

14 The witness said: Ain't nobody going to tell you
15 everything.

16 The Court said: Please, let's let Mr. Richardson
17 respond.

18 Q So on Page 191 of the transcript is a discussion
19 by your attorney, correct?

20 A Yes, sir.

21 Q And he says what you put on the record and what
22 is on the transcript, that he said he had no knowledge
23 of this?

24 A Yes, sir.

25 Q And then later in that discussion he says that if

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 they held somebody at gunpoint three days prior to the
2 murder, I ought to know about it?

3 A Yes, sir.

4 Q Who do you think -- he said, I ought to know
5 about it, quote, end quote. Whose responsibility was
6 that to know about it?

7 A His.

8 Q Do you think that him not knowing about this
9 alleged holdup, or what have you, do you think that was
10 prejudicial to you and him not talking about that?

11 A Yes, sir.

12 Q Once again, in your application you mentioned 191
13 through 196. There also is a couple other things in
14 here that I think is relevant, and we won't read the
15 entire matter as you and I have discussed previously,
16 but there are a couple of highlights that are relevant
17 here. You feel like, based on your application, the
18 entire section of 191 to 196 is relevant?

19 A Yes, sir.

20 Q Let's take a look --

21 MR. FOWLER: If I may approach?

22 THE COURT: You may.

23 Q (MR. FOWLER) On Page 193, if you could read from
24 there to Line 6 on Page 194.

25 A Mr. Joye said: Your Honor, if that being true,

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 then Mr. Richardson has subordinate perjury by letting
2 him get up there and saying the reason he lied was
3 because he didn't want to get nobody in trouble, not
4 because he was threatened, so then he would have been
5 perjured himself on direct examination with
6 Mr. Richardson, with the Solicitor's Office. This
7 isn't -- this thing isn't -- this thing is a booby trap
8 that I had no clue of and should have been told about.
9 If, in fact, the gun was held to somebody -- to some
10 witness' head in this case -- hold up.

11 Q Yeah. Take your time.

12 A If the fact the gun was held to some witness in
13 this case head at some point in time, I ought to know
14 that, Judge. In all difference (sic) to my friend,
15 Mr. Richardson, I've got to ask for a mistrial.

16 Here is what Mr. Richardson said: We can't
17 anticipate that what Kal is going to testify to.

18 Q So in summary, basically he is saying that there
19 was an episode with Kal Hill that he did not know about
20 it?

21 A Yes, sir.

22 Q And, basically, he said that also he had no clue
23 of it, correct?

24 A Yes, sir.

25 Q And he should have been told about it?

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 A Yes, sir.

2 Q Did anything ever come of his move for a mistrial
3 on this? Did he formally move for a mistrial, to the
4 best of your knowledge?

5 A He tried, but the judge wouldn't grant him a
6 mistrial because he said Mr. Joye had enough time to
7 interview Mr. Kal Hill before trial.

8 Q And since you brought that up, let's complete
9 this -- or at least continue on briefly with it. Where
10 does he say that? On Page 194, Page 23 to Line 14 on
11 195?

12 A The Court said: Yes, sir.

13 Mr. Joye said: Judge, I have -- I've known about
14 this since I got the case.

15 Q Let's go back. Go to Line 14 on Page 194 where
16 it says "the Court."

17 A The Court said: Mr. Joye, have you had -- have
18 you had -- how long have you known about this
19 particular witness, Mr. Joye?

20 Mr. Joye said: Oh, how long have I known about
21 the witness?

22 The Court said: Yes, sir.

23 Mr. Joye said: I've known about him since I got
24 the case.

25 Q And briefly go to the top of 195, the top,

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 picking up on Line 1.

2 A He said -- the Court said: All right. Have you
3 -- have you had anyone interview the witness?

4 Mr. Joye said: No, sir, I haven't.

5 The Court said: All right. I'm going to deny
6 the motion then for a mistrial.

7 Q Okay. So spelling out on Pages 194 and 195 is
8 Mr. Joye, basically, saying that he knew about this
9 witness until -- from the time he got the case; is that
10 correct?

11 A Yes, sir.

12 Q And also on Page 195 the Court -- meaning the
13 judge -- asked him, Have you had anyone interview this
14 witness; is that correct?

15 A Yes, sir.

16 Q And Mr. Joye said, No, sir, I haven't?

17 A Yes, sir.

18 Q Okay. Do you feel like that was prejudicial to
19 you in terms of Mr. Joye not having someone -- his
20 agent or someone, his employee or himself, interview
21 this witness?

22 A Yeah, that was prejudice because he didn't do his
23 job. If he did, he would know what was going on.

24 Q Do you feel like he had a duty to interview Kal
25 Hill?

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 A Yes, sir.

2 Q Just to finish up this segment.

3 MR. FOWLER: It's an additional paragraph, Your
4 Honor. If I may approach the witness?

5 Q Let's look at Page 196. Page 195, Line 23, to
6 Line 16 on 196. Starting right there with Mr. Joye.

7 A Well, Mr. Richardson and I certainly wasn't
8 trying -- trying to --

9 The Court said: You didn't bring it up.

10 Mr. Richardson said: I asked him questions.

11 The Court said: You didn't bring it up. You
12 didn't --

13 The Court said: You didn't bring it up. You
14 didn't bring it up. Mr. Richardson and you have
15 provided what was in your case in chief. The witness
16 was available, and not a victim or anything, and the
17 witness was certainly available. I'm not going to
18 grant a mistrial on this.

19 Q And he goes on to say he won't do a mistrial.
20 So, basically, so far as in this Issue No. 2 that you
21 brought up, the issue was Kal Hill potentially had been
22 purging himself on direct examination with
23 Mr. Richardson, correct?

24 A Yes, sir.

25 Q And Mr. Joye, by his own admission, said it was a

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 booby trap?

2 A Yes, sir.

3 Q And he said he did not interview Mr. Hill?

4 A Yes, sir.

5 Q And Mr. Joye, according to your application, did

6 not have any knowledge about the statements Mr. Hill

7 made on the stand, correct?

8 A Yes, sir.

9 Q And even the Court indicated in the transcript

10 that there was enough time for Mr. Joye to interview

11 this witness?

12 A Yes, sir.

13 Q You are saying this witness was a very important

14 -- the knowledge of this witness and what happened to

15 him as stated in this transcript was a very important

16 part of your defense, correct?

17 A Yes, sir.

18 Q Moving on to Issue 3: Trial counsel was

19 ineffective for not subpoenaing defendant's witnesses

20 to testify at trial and for defense.

21 You and I spoke earlier about this, and there is

22 several issues here, and each one of them have their

23 own unique aspect to this case; is that correct?

24 A Yes, sir.

25 Q You list -- I'll spell it -- T-R-E-L-L Bryant.

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 Who is Trell -- is that the correct pronunciation?

2 A Yes, sir.

3 Q What is his -- why was he -- why should he have
4 been subpoenaed as a witness for you in this case?

5 A Because he was there.

6 Q When you say "he was there," do you think he had
7 firsthand knowledge of the situation?

8 A Yes, sir.

9 Q Do you think that could have been helpful to you
10 in your trial?

11 A Yes, sir, because he could have told them who
12 pulled the trigger.

13 Q You list Matthew Bubba Moore; who is that?

14 A My little cousin.

15 Q How old -- you said "little cousin," so how old
16 is he?

17 A He's about 20 something now.

18 Q So he's majority?

19 A Yes, sir.

20 Q Now, why would Matthew Bubba Moore have been a
21 good witness?

22 A Same thing, he would have told who had pulled the
23 trigger.

24 Q Are you saying that Matthew Bubba Moore was
25 there?

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 A Yes, sir.

2 Q And you are saying that he had firsthand
3 knowledge of the events at that time?

4 A Yes, sir.

5 Q You also list D-R-E-L-L Livingston, Drell
6 Livingston?

7 A That is my brother.

8 Q And how old was he, roughly, at the time?

9 A At the time, he was about 19.

10 Q So all of these witnesses you list were above the
11 age of majority?

12 A Yes, sir.

13 Q Now, Drell Livingston, why should he have been
14 potentially called as a defense witness for you?

15 A Because he was there, too.

16 Q Are you saying he had firsthand knowledge?

17 A Yes, sir.

18 Q Are you saying that he could have been
19 potentially a good witness for you in this matter?

20 A Yes, sir.

21 Q Jamar Wilson, why should he have been subpoenaed?

22 A He was there, too.

23 Q And you were saying that he had firsthand
24 knowledge?

25 A Yes, sir.

MICHAEL LIVINGSTON - DIRECT EXAMINATION

1 Q And, finally, Lamar Vereen. Was he there at the
2 time also?

3 A Yes, sir.

4 Q So you are saying there is at least five people
5 above the age of 18 who were there that night and could
6 have been helpful to you in this matter?

7 A Yes, sir.

8 Q Were any of them interviewed in this case?

9 A No, sir.

10 Q Do you think your attorney should have contacted
11 -- well, let me rephrase that. Did your attorney
12 contact them in any way?

13 A No, sir.

14 Q Did your attorney show any documentation to you
15 where he did contact them?

16 A No, sir.

17 Q So these people were potential witnesses for you,
18 and none of them were subpoenaed or brought in?

19 A No, sir.

20 Q Are you familiar with the case of Strickland
21 versus Washington?

22 A Yes, sir.

23 Q That basically states that but for type
24 argument -- that if your attorney -- that if it had not
25 been but for your attorney on certain aspects, the

MICHAEL LIVINGSTON - CROSS-EXAMINATION

1 trial outcome could have been different?

2 A Yes, sir.

3 Q Do you think that the apparent ignoring of the
4 letters, the ignoring of Kal Hill, the apparent
5 ignoring of various witnesses, do you feel that was
6 prejudicial to you?

7 A Yes, sir.

8 Q And do you feel like all of those factors, that
9 if each one of those had been gone into a little better
10 or a little bit more, that it could have been a
11 different outcome for you at trial?

12 A Yes, sir.

13 Q Do you have anything else -- with the Court's
14 indulgence -- do you have anything else you would like
15 to mention to the Court on this case on any of these
16 issues or anything you would like to say to the Court?

17 A No, sir.

18 MR. FOWLER: Your Honor, that is all we have.

19 CROSS-EXAMINATION

20 BY MR. THOMAS:

21 Q Mr. Livingston, did you retain Mr. Joye, or was
22 he appointed?

23 A Appointed.

24 MR. FOWLER: Objection, Your Honor, relevance.

25 THE COURT: Overrule the objection.

MICHAEL LIVINGSTON - CROSS-EXAMINATION

1 MR. FOWLER: Thank you, Your Honor.

2 Q (MR. THOMAS) When was he appointed to the case; do
3 you remember?

4 A At first I had Randall Mullins, then about 2008
5 they appointed me to him.

6 Q So in '08. How many meetings did you have with
7 him before you went to trial?

8 A About two. That was just for a bond hearing and
9 trying to get me to sign a plea.

10 Q And you testified already that you never went
11 over any of the evidence in the case with him?

12 A No, sir.

13 Q So if you never went over evidence, you probably
14 never went over any defenses you would have?

15 A All he said when he came to see me one time, he
16 said only person he was worried about was Kal Hill, he
17 was going to be a problem at my trial.

18 Q Did you tell him at that point that you held Kal
19 Hill at gunpoint?

20 A I didn't hold him at gunpoint.

21 Q So Kal Hill made that story up?

22 A Yes, sir.

23 Q Did you ever give Mr. Joye any of these names of
24 these witnesses you said he should have investigated?

25 A Yes, sir.

MICHAEL LIVINGSTON - CROSS-EXAMINATION

1 Q So you gave him names and contact info?

2 A Yes.

3 Q Did you give those letters to Mr. Joye?

4 A No. Mr. Randall Mullins was my attorney at the
5 time the letters came through, but he said -- when I
6 talked to Mr. Randy Mullins, he said that he forwarded
7 everything to Mr. Joye.

8 Q And you never asked Mr. Joye?

9 A He had the letters. I asked him before.

10 Q Just to know that I have the time line right, you
11 were arrested on this incident on August 10th, is that
12 about right, of 2007?

13 A August 10, 2007.

14 Q And they alleged it happened on July 30th?

15 A No. I would say August 1st -- no, July 31st or
16 August 1st.

17 Q Is that when you remember it happening, or is
18 that when the State said it happened?

19 A No, that is when it happened.

20 Q So you were arrested eight or nine days later?

21 A Yes, sir. I turned myself in.

22 Q Well, yeah. Mr. Deas was arrested and charged
23 with the same thing you were?

24 A Yes, sir.

25 Q And he admitted on the stand that he shot the

MICHAEL LIVINGSTON - REDIRECT EXAMINATION

1 victim, just after he was already dead?

2 A Yes, sir.

3 MR. THOMAS: Thank you, that is all I have.

4 REDIRECT-EXAMINATION

5 BY MR. FOWLER:

6 Q Let's go over some things. You said Randy

7 Mullins was your initial attorney?

8 A Yes, sir, when I first got arrested.

9 Q How did the change over from Mr. Mullins to Mr.
10 Joye go? Was this -- explain it to me. How exactly
11 did it -- how did you move from Mr. Mullins as an
12 attorney to Mr. Joye as an attorney?

13 A Mr. Mullins wrote me a letter one day and told me
14 that Mr. Scott Joye would be my attorney, and that is
15 all I know. He said he would forward everything to Mr.
16 Joye.

17 Q You received a letter from Mr. Mullins saying he
18 was forwarding everything to Mr. Joye?

19 A Yes.

20 Q And you are also saying that Mr. Mullins --
21 Attorney Mullins had those letters that you referenced
22 as C and D?

23 A As soon as they came through the mail, he came
24 and picked them up from the jailhouse.

25 Q So do you -- was it a reasonable assumption that

MICHAEL LIVINGSTON - REDIRECT EXAMINATION

1 Mr. Joye received those letters through the transfer
2 from Mr. Mullins to him?

3 A Yes, sir.

4 Q You said there was -- that you had just a couple
5 of meetings with Mr. Joye?

6 A Yes, sir.

7 Q And in one of those you said that he wanted you
8 to sign a plea?

9 A Yes, sir.

10 Q Tell me about that meeting.

11 A He came in and said the State offered me a plea.
12 The first plea was 15 to 20, and he said he'll try to
13 get it on the 15 side. It was in front of Judge John.
14 I told him I won't sign no plea because I didn't pull
15 no trigger, I didn't kill the victim, and then I went
16 back to the jailhouse.

17 Q After that meeting, do you know if Mr. Joye filed
18 any request for discovery with the court?

19 A I don't know.

20 Q In your opinion, do you recall that Mr. Joye
21 wanted you to sign the plea?

22 A In my heart, yes, sir, go ahead and get it over
23 with.

24 Q You said later that Deas admitted to shooting the
25 victim; is that correct?

MICHAEL LIVINGSTON - RECROSS-EXAMINATION

1 A Yes, sir.

2 Q You were charged with murder as well?

3 A Yes, sir. Hand of one is hand of all.

4 Q But Mr. Deas was the one that apparently fired
5 the trigger?

6 A Yes, sir.

7 MR. FOWLER: Nothing further.

8 THE COURT: Recross?

9 RECROSS-EXAMINATION

10 BY MR. THOMAS:

11 Q Just one question. Based on the last question,
12 were you there when Mr. Deas shot the victim?

13 A Yes, sir.

14 THE COURT: You can step down.

15 MR. FOWLER: After conferring with my client, we
16 have no further witnesses.

17 THE COURT: State.

18 MR. THOMAS: State calls Scott Joye to the stand.

19 (SCOTT JOYE, having been duly sworn, testified
20 as follows:)

21 THE CLERK: Have a seat. State your full name
22 for the Court and spell your last name.

23 THE WITNESS: I'm Richard Scott Joye.

24 DIRECT-EXAMINATION

25

R. SCOTT JOYE - DIRECT EXAMINATION

1 BY MR. THOMAS:

2 Q Thank you for being here, Mr. Joye. Can you give
3 us a brief overview of your experience as a lawyer
4 practicing criminal law?

5 A I spent some years clerking for the Honorable
6 Sydney T. Floyd, who was a resident judge from this
7 circuit from '95 to '96. From '97 to the end of '98, I
8 was an assistant solicitor in the 14th Judicial
9 Circuit, primarily in Beaufort County. I opened my law
10 practice pretty close to 16 years ago -- actually next
11 week, because my son turns 16 tomorrow, and I opened my
12 practice here the week after.

13 Q And how did you become involved in
14 Mr. Livingston's case?

15 A I got a call from Orrie West, who was the chief
16 public defender here. She said that a conflict had
17 arisen between Randy Mullins and Mr. Livingston
18 primarily, I believe, because there was a drug deal
19 involving Mr. Livingston later on. I don't really
20 remember. Maybe it was a drug client of Mr. Mullins',
21 that he conflicted out the case. He couldn't represent
22 both because one would be testifying against
23 Mr. Livingston, either in the drug case or murder case,
24 and I don't remember which.

25 Q And so I'm assuming you didn't file the Rule 5

R. SCOTT JOYE - DIRECT EXAMINATION

1 Brady; that would have been Mr. Mullins?

2 A You know, I'm not certain whether we did or not,
3 but Mr. Mullins certainly filed it, and it was an
4 ongoing discovery request. Discovery was ongoing right
5 up until trial. I think Jim Richardson, Solicitor
6 Richardson, gave me a list of who was coming and what
7 was likely to be said by those particular individuals.

8 Q So I guess -- what did the State provide you in
9 discovery?

10 A I don't believe there was anything that they
11 didn't supply me. Quite frankly, this was not a
12 physical evidence case. This was a case in which -- in
13 which it was all testimonial, and it was all
14 eyewitnesses.

15 Q So you had copies of all of the statements from
16 the witnesses?

17 A Oh, yes, and the video/audio tapes from all
18 witnesses.

19 Q Did you ever get a chance to review all of that
20 with Mr. Livingston?

21 A Yeah. We went in there and talked with him at
22 great length and, you know, obviously everybody in this
23 case -- Solicitor Richardson said it best -- everyone
24 in this case was drug dealers, and that was who was
25 testifying, and as such, they had given numerous

R. SCOTT JOYE - DIRECT EXAMINATION

1 statements a little bit all over the map. Chad Wilson,
2 who was like a brother to Michael, had given a
3 statement, and they kept going back to him, but he
4 clearly pointed to Michael as the initial shooter.
5 They grew up about 15 feet from each other in the same
6 yard, I mean they were like brothers.

7 Q And Mr. Wilson, I guess -- how did the case
8 break; was it Mr. Wilson or Mr. Hill --

9 A It was an accumulative effect. Hill got a
10 significant break on something. I tried to make some
11 hay with that for some reason, and I don't know why,
12 but I wanted to think that Mr. Hill did have an
13 attorney.

14 Q Because you cross-examined him on all of his
15 pending --

16 A Yeah. Absolutely. The story -- I could have
17 interviewed him from now until forever, and the story
18 about the kidnapping, which Mr. Livingston says didn't
19 happen, you know, it looked to me, and it seemed to me,
20 that it was made up at that point in time. I was --
21 but, actually, I don't think it was, because it seemed
22 to me that Solicitor Richardson knew about it. I was
23 really kind of surprised. I would have thought it
24 would have been relevant, it would have been a
25 discovery violation, and that is part of why I moved

R. SCOTT JOYE - DIRECT EXAMINATION

1 for a mistrial.

2 Q Let's back up and walk through that. You moved
3 for a mistrial?

4 A I did.

5 Q Do you know what the issue on appeal was?

6 A I would assume that that was it.

7 MR. THOMAS: May I approach?

8 THE COURT: You may.

9 A You know, if I remember correctly, too, I wanted
10 to think that Mr. Livingston said that Mr. Hill
11 wouldn't testify.

12 Q (MR. THOMAS) I guess that is what I need to get to;
13 why didn't you interview Kal Hill?

14 A The truth is I want to think that Mr. Livingston
15 thought that Kal Hill would never testify.

16 Q Did you have any conversation with anyone else
17 about what Mr. Hill's testimony might be?

18 A No. I had a memo from Jimmy Richardson basically
19 laying out what he thought the substance of Kal Hill's
20 testimony would be. Solicitor Richardson and I went to
21 the scene and tried to mark out where the tree was that
22 he said he was standing beside to see if we could see
23 where the incident actually occurred. The whole story
24 about the kidnapping thing was just -- I thought it was
25 incredulous.

R. SCOTT JOYE - DIRECT EXAMINATION

1 Q And you pointed that out in your arguments?

2 A I think I -- in spades, I believe.

3 Q Backing up a little bit, you had plenty of
4 opportunities to meet with Mr. Livingston before trial?

5 A I did. In fact, I told him that this case was
6 about what the jury believed in terms of testimony and
7 that he and I -- the truth was that there were three or
8 four -- well, four admitted drug abusers -- drug
9 dealers, thieves, who were going to testify.

10 Q And during your conversations, what was his, sort
11 of, explanation for what went on that day?

12 A That Cody Deas shot him.

13 Q That was your defense strategy?

14 A Yeah. Michael didn't have anything to do with
15 it. But then we had some conversations about Chad
16 having shot him, because of the way that the bodies
17 lined up in the vehicle and the whole blood spatter.
18 This was an issue that kind of came up. My paralegal,
19 who is seated back there, Alexis Skiles, was trying the
20 case with me, and she raised an issue about the fact
21 that I think a 9-millimeter round will go in a .40
22 caliber gun, and that someone else had the .40 -- one
23 way or the other. I can't remember which way it went
24 exactly, but one will fire -- either a .40 or .45 will
25 fire a 9-millimeter, or a 9-millimeter won't fire a

R. SCOTT JOYE - DIRECT EXAMINATION

1 .45. I think that is how it works. In this case, we
2 thought that was a big deal because of the slugs that
3 -- the only slug that was found was a 9-millimeter, and
4 it was clear that Cody Deas had a .45.

5 Q So I guess the ultimate question then is if your
6 theory of defense was someone else shot him, why were
7 those letters from Chad Wilson --

8 A The truth was that the prosecution wanted to
9 enter them, which I think that they were going to say
10 that they were -- the letters sounded like neither one
11 of them were there, when clearly both of them were
12 there. But the letters kind of said, you know, I don't
13 know why we're even mixed up in this thing, Cody shot
14 him, that is what everybody is saying. It's not saying
15 Cody shot him and I saw it, it is saying, you know, the
16 word on the street is Cody shot him. Well, if you were
17 there, you would know that Cody shot him. It was clear
18 that -- clear today that Michael clearly was there.
19 It's clear that Chad was there. But the letters kind
20 of were -- I thought it was something where they were
21 going to go into trying to get out of Chad, hey, they
22 were trying to cooperate against each other -- I mean
23 cooperate, put it on Cody and not Michael.

24 Q So you did have a copy of the letters beforehand?

25 A Yeah, I had copies of the letters, but I didn't

R. SCOTT JOYE - DIRECT EXAMINATION

1 know when he first went to introduce it, and it would
2 have been discovery. I would have already had had it
3 in discovery, but I didn't know exactly what was
4 coming. So I don't think that Jimmy handed them to me
5 at the time -- contemporaneous time of the testimony,
6 and I was able to see them and then I had the
7 objection. I just felt that they were -- I felt that
8 he would use them to say these guys are cooperating
9 together and how close they are, and yet here he is
10 still testifying against his cousin that he grew up
11 with.

12 Q And I want to get this straight. So there was
13 never any indication -- I mean, Mr. Livingston was
14 truthful that he was there when it happened?

15 A Yeah.

16 Q Did you discuss with him the hand-of-one theory,
17 all of that stuff?

18 A At great length. At great length. The part
19 about meeting with Mr. Livingston twice is just utter
20 hog wash. Again, my paralegal is sitting back there
21 and she'll be happy to testify, because I know at least
22 three, four times she went with me and met with
23 Mr. Livingston.

24 Q Regarding these other witnesses he's testified
25 to, did he ever give you those names? Did you hear of

R. SCOTT JOYE - DIRECT EXAMINATION

1 those people?

2 A He mentions that he wanted character witnesses,
3 which I told him if we put in character witnesses, then
4 his character is in play and his -- the prior issue
5 with the drug -- prior drug issue would come in.

6 Q So did he ever tell you there was someone named
7 Trell Bryant that was at the location?

8 A Not that I remember.

9 Q Did he tell you that Bubba Moore was there?

10 A Not that I remember.

11 Q Drell Livingston?

12 A No. Heck, I told him, you know, if he hadn't --
13 particularly if it is your own brother, he could have
14 picked up the phone and called me and said I was there,
15 or a family member call and say, hey, his brother was
16 there.

17 Q It's redundant, but never heard of Jamar Wilson
18 being there?

19 A No.

20 Q Lamar Vereen?

21 A Nope.

22 Q Did he ever tell you that there was anybody there
23 -- I mean the police obviously didn't think these
24 people were involved; is that right?

25 MR. FOWLER: Objection.

R. SCOTT JOYE - CROSS-EXAMINATION

1 THE COURT: Sustain the objection.

2 Q Did you have any indication from discovery that
3 these people were involved in this incident?

4 A Nope. Nobody else mentioned these people either
5 in any of the incident reports. The only name I seem
6 to remember was Bubba Moore, and I don't know why. I
7 don't remember in what context. If he had given me a
8 list of names of people who were going to say that
9 somebody else did it, and he didn't have anything to do
10 with it, we would have gotten money for an investigator
11 to talk to him.

12 MR. THOMAS: Thank you. I'll let you answer any
13 questions Mr. Fowler has.

14 CROSS-EXAMINATION

15 BY MR. FOWLER:

16 Q Good morning, Mr. Joye.

17 A Good morning.

18 Q Couple of things you brought up on direct
19 examination, and we'll work our way through this. You
20 stated you've been an attorney for 16 years?

21 A Correct.

22 Q You are in your own practice rather. And you
23 have a paralegal that is with you here?

24 A Uh-huh.

25 Q That you've had working on this case. Now, you

R. SCOTT JOYE - CROSS-EXAMINATION

1 said that there was a conflict potentially with Mullins
2 and -- Attorney Mullins and the public defender's --

3 A No. Mr. Mullins -- since in private practice in
4 North Myrtle Beach, Mr. Mullins at some point in time
5 represented someone who was going to be a witness
6 either in the drug case or in the murder case, I don't
7 remember which.

8 Q How did the discovery transfer and the documents
9 from Attorney Mullins' office to your place?

10 A I think I rode up there and got them.

11 Q Did you file any subsequent supplement requests?

12 A I honestly can't say I did. I mean, discovery is
13 an ongoing process, and when it was transferred to me,
14 it still would have been ongoing. I continue to get
15 discovery through -- until the time of trial.

16 Q But you didn't have the letters, correct? I
17 think your statements in the transcript --

18 A No, I had seen the letters. In there I didn't
19 know what he was talking about until we were able to
20 find it. If you notice there, we went off the record
21 and I went to where we were and what that was about.

22 Q Well, just let me ask this. In terms of Page 430
23 where it says -- and this was read, and it is on the
24 transcript -- Mr. Joye: Judge, objection, Your Honor.
25 I don't -- I don't have copies of the letters that

R. SCOTT JOYE - CROSS-EXAMINATION

1 maybe were written, and I just don't know where this is
2 going with them.

3 So are you telling me that you had them or you
4 didn't, or what were you telling the judge?

5 A What I was --

6 Q If I can ask the question. You told the judge in
7 that context on the record that you didn't have them,
8 today you are telling the Court that you do have them;
9 which one is it?

10 A I didn't have them presented to me at defense
11 counsel table contemporaneous with him handing the
12 letters to --

13 Q -- but you --

14 A -- to Chad Wilson. I did not have the letters
15 contemporaneous, and that is what that is saying.

16 Q Okay. All right. So you are saying there was an
17 additional context that you didn't add to the judge in
18 that case? You said I don't have the letters, and you
19 are saying now there was additional context to it?

20 A I don't think -- I think, you know, you wouldn't
21 have had to say it. You would have had to have been
22 there, Mr. Fowler. The fact of the matter is I -- when
23 he went to present them, he had not presented them to
24 me, so I did not have copies, I didn't know what he was
25 handing him. That is what we were talking about.

R. SCOTT JOYE - CROSS-EXAMINATION

1 Q Okay. I was just going by the statement in the
2 transcript. Secondly, you stated that my client saw
3 the video. Now, you have a paralegal working on the
4 case. You've got a practice for 16 years. Did you
5 take any notes of the date and time that he saw the
6 video?

7 A That he would have seen the video?

8 Q Yeah.

9 A I would have -- I would have written down my
10 time, because obviously it is an appointed case and I'm
11 paid by time, client meeting, you know, the whole deal.
12 No, I wouldn't have written down I watched the video
13 with my client. I would have said meeting at the jail
14 with my client for an hour-and-a-half, two hours,
15 whatever it would have been.

16 Q So you are saying that you have time logs that
17 show how many times you met with my client, correct?

18 A Yeah. I don't know that I brought them today.
19 Had they been subpoenaed, I would have brought them.

20 Q Even on your own volition, you didn't bring them
21 to show how many times you met with him, correct?

22 A I don't know if they are in that box of materials
23 or not. They could be, but they could not be, I don't
24 know.

25 Q I mean, I'm certainly -- whatever the Court

R. SCOTT JOYE - CROSS-EXAMINATION

1 indulges, if you do have evidence to the contrary, we
2 would be more than happy -- me and my client would be
3 more than happy to see them and have them documented.

4 A Well, I guess it could have been subpoenaed as to
5 how many times I went to see him at the jail, but that
6 didn't happen either, so, you know, I certainly met
7 with him on numerous occasions.

8 Q But you don't have any specific documentation of
9 those numerous occasions?

10 A No, I don't.

11 Q You stated on direct that Mr. Livingston thought
12 that Kal Hill would not testify; is that correct?

13 A Yes.

14 Q But he did testify, right?

15 A Oh, absolutely.

16 Q And he testified for a great length of time in
17 the trial?

18 A Absolutely.

19 Q Well, now, Mr. Livingston is not an attorney,
20 correct?

21 A I don't believe he is, no.

22 Q You're the attorney appointed?

23 A Absolutely.

24 Q So isn't it your responsibility to determine, you
25 know -- you see that Kal Hill is testifying and then

R. SCOTT JOYE - CROSS-EXAMINATION

1 you said, well, you thought that he wasn't testifying,
2 I mean, shouldn't there have been -- there's some
3 responsibility there in terms of knowing what -- who
4 was on the witness stand and what their potential
5 documentation could be of my client's involvement,
6 correct?

7 A I would say so. I believe Mr. Livingston assured
8 me he wouldn't be testifying, so there wasn't any
9 reason to, you know -- wait, let me answer it this way.
10 Had I felt there was a need, I would have hired an
11 investigator to speak to him, and I would have hired an
12 investigator for this purpose, and this purpose only.
13 Had, in fact, Mr. Hill told me some statement and then
14 that changed on the record in court, it would either
15 had to have been a witness or investigator, I couldn't
16 have both.

17 Q But it is your responsibility to find out who is
18 testifying for the State in the trial?

19 A Oh, I had -- absolutely. I have a memo from
20 Mr. Richardson telling me who was going to testify and
21 what he anticipated they will testify to.

22 Q And Mr. Livingston is not the end all of be all
23 in terms of who the State puts on for their trial,
24 correct? I mean, it is not him who says --

25 A It is a matter of trial strategy, and a lot of

R. SCOTT JOYE - CROSS-EXAMINATION

1 times there are judgment calls you make during the
2 course of the trial.

3 Q So you are saying that not interviewing Kal Hill
4 was a judgment call on your part?

5 A Yes.

6 Q In the terms of the letters, the May -- exhibit
7 -- well, for our purposes, our Exhibit A and B in the
8 application, it is listed as C and D, where does it say
9 that they were not involved? I mean, is there any
10 specific language to them not being involved in this
11 case? I don't see any language saying we're not there.
12 It is somewhat of just a conversation between two
13 inmates through the mail?

14 A (Witness examines document.)

15 (A brief pause in the proceedings.)

16 A A lot of people starting to tell me "C" did it.
17 That would be Exhibit B line -- starting about Line 6
18 or 7.

19 Q (MR. FOWLER) Did you say D or C -- well, on the
20 application?

21 A A -- well, it is Exhibit C.

22 Q Got you. But none of that language states
23 verbatim we are not there, we didn't do it. It
24 basically points the finger at "C"?

25 A Dude was wanted by a lot of people I heard for

R. SCOTT JOYE - CROSS-EXAMINATION

1 all of that robbing he did.

2 That is kind of like I don't know anything about
3 it, and I don't know who did it. I was there, but I
4 don't know anything about it.

5 Q But that's not --

6 MR. FOWLER: If we could strike the last
7 statement by the witness. I mean, there is no --

8 Q (MR. FOWLER) Mr. Joye, there's no explicit language
9 in there saying that the writer was not at the scene
10 of the accident, correct?

11 A Absolutely. It was only by implication that they
12 didn't seem to know anything about what happened after
13 having given statements saying Michael did it.

14 Q Okay. Earlier you said there was some question
15 about a .45 and a 9-millimeter, or a 9-millimeter and a
16 .45 gun; could you expand on that?

17 A Yeah. We called Robert Deal back to the stand to
18 testify to that because he was the ballistics person in
19 the case, and there was Cody Deas -- which, by the way,
20 Cody admitted he shot him twice, but there was a
21 question about somebody shooting him a second time with
22 a second gun. I think there was -- the only slug, I
23 believe, that was found was a 9-millimeter slug, and
24 there was some question whether Cody or Chad -- and,
25 again, trial was a long time ago and I'm not -- I

R. SCOTT JOYE - REDIRECT EXAMINATION

1 certainly -- I spent a little time reviewing the file,
2 but not in any depth. I do know that that issue arose
3 and we were trying to put somebody -- the word was that
4 I think Michael always carried a 9-millimeter, and we
5 were trying to establish that, hey, this slug that was
6 found in that body could have been fired by someone
7 else and not Michael Livingston.

8 MR. FOWLER: If I may have a moment with my
9 client?

10 THE COURT: Yes.

11 (A brief pause in the proceedings.)

12 MR. FOWLER: Nothing further after conferring
13 with my client.

14 THE COURT: Redirect?

15 REDIRECT-EXAMINATION

16 BY MR. THOMAS:

17 Q Mr. Joye, I know you said you don't have your
18 time logs in front of you. Do you think they might be
19 in your file? Would it help you to look at that file,
20 or could you tell us from memory that you know you met
21 with him several times?

22 A Oh, good, gosh. Yes, several times. I am not
23 about to go into a murder having met someone twice.
24 That's not happening; not in a million years. We went
25 through extensive -- you know, this case was just like

R. SCOTT JOYE - RECROSS-EXAMINATION

1 Solicitor Richardson said in the closing argument, we
2 had a bunch of drug dealers accusing another drug
3 dealer of killing a drug dealer over a drug deal, that
4 is what this case was about.

5 MR. THOMAS: Thank you. Mr. Joye.

6 RECROSS-EXAMINATION

7 BY MR. FOWLER:

8 Q Some of those times you met with my client was to
9 sign a plea?

10 A I did not go in there and say here -- and quite
11 frankly, there wasn't no signing a plea. There was no
12 paperwork to sign. But, yes, we talked about it. We
13 talked about pleas at length, trial, trial strategy.

14 MR. FOWLER: Thank you. One last question.

15 Q (MR. FOWLER) You said Mr. Richard -- Solicitor
16 Richardson said it is about drug dealers, drug dealers
17 and drug dealers; in criminal law, that happens quite
18 a bit?

19 A Absolutely.

20 Q So this is not --

21 A This is not an unusual case.

22 MR. FOWLER: Thank you.

23 THE COURT: Redirect?

24 MR. THOMAS: Nothing.

25 THE COURT: You can step down. Thank you. I

ALEXIS SKILES - DIRECT EXAMINATION

1 appreciate your time.

2 MR. THOMAS: Beg the Court's indulgence one
3 second. State calls Alexis Skiles to the stand.

4 (ALEXIS SKILES, having been duly sworn,
5 testified as follows:)

6 THE CLERK: State your name and spell your last
7 for the court, Alexis Skiles, S-K-I-L-E-S.

8 DIRECT-EXAMINATION

9 BY MR. THOMAS:

10 Q Thank you for being here. If you could,
11 Ms. Skiles, just tell us what your employment is.

12 A I'm employed by the Law Office of Joye Nappier
13 Risher & Hardin, specifically as a criminal defense
14 paralegal for Mr. Joye.

15 Q And how long have you been doing that?

16 A Seven years.

17 Q And were you involved in Mr. Joye's defense of
18 Mr. Livingston?

19 A Yes, I was.

20 Q What was your involvement in that case, just
21 generally?

22 A Reviewing evidence. The closer we got to the
23 actual trial itself, assisting him in visiting with our
24 client, reviewing tapes, things of that nature.

25 Q And do you recall how many times Mr. Joye -- let

ALEXIS SKILES - DIRECT EXAMINATION

1 me ask you this. Who keeps Mr. Joye's calendar?

2 A Myself, him and one other assistant.

3 Q So do you recall how many times Mr. Joye would
4 have went and visited Mr. Livingston?

5 A Specifically, no, but it was -- it was quite a
6 few times.

7 MR. FOWLER: Objection, Your Honor, that is not
8 -- quite a few times, not a specific number.

9 THE COURT: You can cross-examine her.

10 MR. FOWLER: Thank you, Your Honor.

11 Q (MR. THOMAS) And did you ever come with him on any
12 of those visits?

13 A Yes, I did.

14 Q And on those visits, when you accompanied him,
15 what did you all discuss with Mr. Livingston?

16 A Trial preparations, evidence that had been
17 received.

18 Q Were you present at the trial?

19 A Yes, I was.

20 Q Could you explain what Mr. Joye was talking about
21 earlier with this discrepancy in the caliber, and I
22 guess he said you brought it up, the difference between
23 the 9-millimeter and the .40 caliber?

24 A I do. I remember speaking about it behind the
25 door in the cell, and it was a discussion about whether

ALEXIS STILES - CROSS-EXAMINATION

1 or not the 9-millimeter could be fired from a .40
2 versus the .45. There was also the question asked
3 about the .357 round out of a .380?

4 MR. THOMAS: Thank you. That is all I have for
5 you.

6 CROSS-EXAMINATION

7 BY MR. FOWLER:

8 Q How many times did you go to jail to meet with my
9 client?

10 A I specifically remember twice.

11 Q Do you have any records showing that?

12 A No.

13 Q How many times did you show the video -- how many
14 times did you show -- any video to my client? Was
15 there a video in this case? I think on Attorney Joye's
16 direct, or what have you, there was a mention of a
17 video. Was there any VHS, DVD, anything like that in
18 this case?

19 A There were interviews.

20 Q When, specifically, did you or Mr. Joye show
21 those interviews to my client?

22 A I never specifically showed them.

23 MR. FOWLER: If I may have a moment? Nothing
24 further. That is the State's case.

25 THE COURT: All right. Any brief comment? I

ALEXIS STILES - CROSS-EXAMINATION

1 think I have what the issues are.

2 MR. FOWLER: Yes, sir -- well, let me say this,
3 Your Honor. Mr. Livingston is here with his family
4 today. He has been, in my opinion, open and generous
5 with his time and I think he really did a good job in
6 terms of articulating to me -- and I hope to the
7 Court -- the issues. The thing about it is we have a
8 transcript that is relevant here, Your Honor. We have
9 issues of the attorney in question saying I don't have
10 the letters, and then today it is, well, I'm adding
11 context to it. We have letters from one codefendant
12 to the other that, in my opinion, were
13 mischaracterized. In my opinion, there is no language
14 saying, you know, they did it, we didn't do it. These
15 letters should have been entered, should have been
16 more effectively drawn and presented, in my opinion,
17 for the defense of my client on this original trial,
18 Your Honor.

19 Also, Kal Hill, it was stated today that, oh,
20 Mr. Livingston said Kal Hill was not going to testify.
21 Well, that's great. They could have said Santa Clause
22 was not going to testify. Kal Hill was not
23 interviewed, according to the transcript. He was a
24 relevant person, a very important person, and even in
25 the transcript Mr. Joye said there was issues about

ALEXIS STILES - CROSS-EXAMINATION

1 what should have been said or done. Well, it is not
2 Mr. Livingston's final responsibility to interview
3 certain clients. That is Mr. Joye as an officer of
4 the court and his staff who he has brought here today.

5 Your Honor, there is also mention that there were
6 persons that should have been potentially brought.
7 There is no documentation -- brought as witnesses.
8 There is no document showing that Mr. Joye said that
9 these are not good character witnesses, and what have
10 you. Your Honor, we feel like -- with all due
11 respect -- that these actions in the transcript meet
12 the Strickland test in terms of being prejudicial to
13 my client. I feel like -- and my client stated this
14 on the record as well, Your Honor -- that reasonable
15 things were not done. The letters, Kal Hill's
16 testimony, other potential witnesses. We just ask
17 that you consider my client's application, you
18 consider our request and you move forward with a
19 verdict favorable to my client.

20 THE COURT: All right. I'm trying to digest all
21 of this. I'm a little confused on the letters. It
22 appears that the State was offering the letters, and
23 you are now saying the defense offered the letters?

24 MR. FOWLER: Your Honor, what we are saying is
25 that there was a -- in the transcript -- that somehow

ALEXIS STILES - CROSS-EXAMINATION

1 either Mr. Mullins did not --

2 THE COURT: Let me stop you there. I'm not
3 talking about whether he had them or not. I got the
4 impression that your client's position was -- go back.
5 I haven't read it entirely, but it appeared to me
6 since Mr. Joye was objected, that the State was trying
7 to put the letters into evidence. Just a moment ago
8 you said, as I understand your argument, they would
9 have been helpful to the defense. Are you now saying
10 that regardless of whether he had the letters or not,
11 the letters should have come in and the letters would
12 have benefited your client?

13 MR. FOWLER: Your Honor, I feel like --

14 THE COURT: Your client can't have it both ways.

15 MR. FOWLER: I guess the point is there is
16 language in there that said that "C" did it.

17 THE COURT: Which is complete hearsay?

18 MR. FOWLER: But it is also a document between
19 the two, and we presented the letters, Your Honor.

20 THE COURT: That still begs my question. My
21 question is simple. Is he complaining that -- does
22 your client argue that the letters should have come
23 in, because you said a moment ago they would have
24 helped him, or that the letters should not have come
25 in?

ALEXIS STILES - CROSS-EXAMINATION

1 MR. FOWLER: Our ultimate argument is that his
2 attorney on the record said that he did not have those
3 letters, and because he did not -- he said in bold
4 print here, I don't have copies of the letters that
5 maybe were written. He said he had context to it, but
6 it was not reflected in the transcript. Whether they
7 were beneficial for my client or not beneficial, that
8 seems to be a problem, because going on this
9 transcript, this official court document, that is
10 something that should have been gone into with by my
11 client at that time at that trial. We're not
12 retrying, we're just talking about Mr. Joye's defense.
13 When I see bold letters, I don't know where this is
14 going with him, that's a red flag to me, and at that
15 time, that decision should have been made, not
16 necessarily now.

17 THE COURT: Well, I still haven't gotten my
18 answer to my question, and that is does your client --
19 did I -- is he now arguing that the letters should
20 have come in? He's nodding affirmatively. I don't
21 know if that is your position, but your client is
22 nodding affirmatively, so it your position that they
23 should not have come in?

24 MR. FOWLER: My position -- I've explained my
25 position, Your Honor, that he should have had it. My

ALEXIS STILES - CROSS-EXAMINATION

1 understanding is that they should have come in, and I
2 think that is reasonable based on what I discussed
3 with my client.

4 THE COURT: Thank you. Mr. Thomas.

5 MR. THOMAS: Briefly, Your Honor, I know Mr. Joye
6 was pretty adamant. He had a copy of the letters
7 beforehand. He explained his strategic reasons for
8 not wanting to put them in. He thought it was not
9 helpful or beneficial to the case. At the end of the
10 day, Your Honor, I'm not sure they are admissible. I
11 know we admitted them for the purposes of our hearing,
12 but it is hearsay in there and clearly offered for the
13 truth of the matter asserted. So I'm not sure they
14 would be admissible even, but he clearly testified he
15 had a strategic reason for wanting to keep those out.

16 As far as Mr. Hill's interview, I mean, he talked
17 about, one, his information talking to his client
18 about this case was that Mr. Hill probably wouldn't
19 testify. Even moving beyond that, Your Honor, he had
20 a copy of Mr. Hill's statement. He had a copy of what
21 he had gone over with with the Solicitor. He
22 discussed Mr. Hill's testimony with the Solicitor, and
23 even Mr. Hill in his testimony -- and it is on Page
24 191 at Line 22 through 23 -- he says, hey, ain't
25 nobody going to tell you everything. So we have no

ALEXIS STILES - CROSS-EXAMINATION

1 indication that Mr. Hill, even if he was interviewed,
2 would have disclosed this information.

3 I will note that Mr. Joye did object to it coming
4 in extraneously and moved for mistrial, and that was
5 on the grounds on appeal. So that was addressed
6 already. Just as far as the last issue, the third
7 issue, failure to call other witnesses. Again, one,
8 the Applicant never informed Mr. Joye of them; and,
9 two, nobody has testified from that list. So we would
10 submit that the Applicant has not met his burden.

11 THE COURT: I'll take it under advisement. Thank
12 you.

13 (Whereupon, the proceedings concluded.)
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ALEXIS STILES - CROSS-EXAMINATION

1 State of South Carolina)

2 County of Horry)

3
4 I, Natalie Dahl, Official Court Reporter for the
5 State of South Carolina, do hereby certify that the
6 foregoing is a true, accurate and complete Transcript
7 of Record of the proceedings had and evidence
8 introduced in the matter of the captioned case,
9 relative to appeal, in the Court of Common Pleas for
10 Horry County, South Carolina, on the 28th day of
11 October, 2014.

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

14
15 October 6, 2017

16
17 
18

19 Natalie Dahl, RPR

20 Court Reporter
21
22
23
24
25

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Michael Livingston,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C.A. No.: 2012-CP-26-4207

ORDER

This is a Post-Conviction Relief Proceeding

Horry County
14 NOV 17 PM 12:59
CLERK OF COURT

This is an Application for post-conviction relief (PCR) filed May 25, 2012. The undersigned heard this case on October 28, 2014. Steven Willard Fowler, Esquire, represented the Applicant. The State was represented by Josh Thomas, Esquire.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the May 2008 term of the Horry County Grand Jury for murder (2008-GS-26-2912), armed robbery (2008-GS-26-2658), and possession of a weapon during the commission of a violent crime (2008-GS-26-2659). Scott Joye, Esquire, represented Applicant.

On August 13, 2009, Applicant was tried and found guilty as indicted before the Honorable Larry B. Hyman Jr., who sentenced Applicant to life imprisonment on the murder charge, thirty years imprisonment for armed robbery, five years imprisonment on the weapon charge, with all charges running concurrently. Applicant appealed and his conviction and sentence were affirmed on February 29, 2012.

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

1. Ineffective assistance of counsel

[Signature]
CLERK OF COURT

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 80 L.Ed.2d 674. 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 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.E. at 117-18, 386 S.E.2d at 625.

Applicant alleges three issues in his Application for post-conviction relief and by way of his testimony has addressed an additional issue (gunshot residue).

As to issues number 2 and 3 both related to trial counsel's alleged failure in respect to interviewing and subpoenaing witnesses. There is no evidence in the record to support either of these issues. Applicant presented no testimony of any of the witnesses he proposes should have

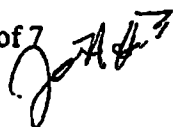


been interviewed or subpoenaed.¹ Without evidence as to what these witnesses had to offer as testimony the court cannot find trial counsel ineffective in these two issues.

Applicant's first issue is that trial counsel was ineffective for not impeaching the State testimony at trial. The undersigned has to admit being completely baffled by this issue. The "State testimony" mentioned seems to be that of Kalamison Hill. This is based on the portion of the transcript relied on by Applicant of Hill's testimony at page 191-196 of the transcript. What is baffling is that all of the effort to prove this issue seems to revolve around two letters to Applicant from a co-defendant named Chadd Wilson. Wilson is a cousin to Applicant. Neither of these letters mentions Hill. The letters contents which deal, arguably, with the offense for which Applicant was on trial are rank hearsay. This hearsay is basically in the vernacular that "word on the street is that 'C' was the trigger man in the murder" Applicant was on trial for. Neither letter exonerates applicant.

The undersigned, after several readings of the letters and Hills trial testimony, cannot relate the letters issue to Hill's testimony. Hill's testimony at issue is regarding an incident which occurred, according to him, three days before the murder. He testified that three guys pointed a gun to his head. He did not name all three but did name Applicant (by his nickname Amp) and Chadd (presumably Chadd Wilson). At this point in the trial, the transcript reads as though trial counsel was unaware Hill would testify to this threat by Applicant three days prior to the murder. The two Chadd Wilson letters are not mentioned. Trial counsel related to the court that he was unaware that Hill would testify about any threat and that trial counsel did not even have a single piece of paper suggestion such testimony from Hill.

¹ There is an issue regarding trial counsel's failure to interview Kalamison Hill. This is addressed hereinafter.



The trial judge denied trial counsel's motions (2) for mistrial. The trial judge appears to base his ruling on the availability of Hill for an interview by trial counsel prior to trial. (TR p. 194 L 14 through p. 146 L 17).

Trial counsel testified at the PCR hearing that he did not interview Hill as he had all of the State's discovery including witness statements, relied on the solicitor's memorandum as to what the State's witness would testify to and Applicant's assurance that Hill would not testify.

I find trial counsel's testimony as to being in possession and being aware of the letters to be credible. I find his failure to use the letters at trial were not ineffective using the reasonable attorney standard. The letters contents were as stated above littered with rank hearsay and did not exonerate Applicant. Interestingly, Applicant does not assert the letters had any impeachment value as to the writer, Chadd Wilson, but rather that the letter would have "contradicted" co-defendant, Coaty Deas, nicknamed "C." Coaty Deas testified for the State. The letters from Wilson based on street talk had no impeachment value to Coaty Deas and as stated elsewhere do not appear to constitute admissible evidence nor relevant evidence.

The issue regarding Hill is not the letters, but whether or not trial counsel was ineffective for not interviewing Hill, a witness he was aware of, prior to trial. This boils down to whether or not trial counsel had the right to rely on what the State provided during discover and what the State told trial counsel to expect as witnesses testimony. Reliance on Applicant's opinion as to whether or not Hill would testify does not meet the reasonable attorney standard.

In a nutshell, the question becomes, is trial counsel effective when trial counsel relies solely on information provided by the State regarding expected witness testimony?² The answer

² The subject testimony from Hill raised both a prior bad act and applicant's character.

is no. Failure to interview a witness, particularly an eye-witness does not meet the reasonable attorney test of *Strickland*.

Having found the above, the court must look to the second prong set forth in *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (Sup. Ct. 1989). The court must examine the record to determine whether or not the results of Applicant's trial would have been different but for counsel's failure to interview Hill.

Before proceeding with the prejudice prong the court should point out that when confronted with Hill's testimony regarding a prior criminal incident involving Applicant trial counsel acted reasonable and took the only course available, a motion for a mistrial.

The State offered four eye-witnesses to the shooting of the victim, Ervin Graham (who is also known as "Fido"). The witnesses were Tony Angelo Wilson (a cousin of the Applicant, TR p. 97 LL 14-15); Coaty Deas (who calls the Applicant "homeboy," TR p. 237 LL 13-18); Chadd Wilson (Applicant's cousin, TR p. 410 LL 23-25); and Kalamison Hill (a neighbor of Applicant's, TR p. 162 LL 12-14).

With limited reference to page and line, the court will go through each of the witnesses' relevant testimony.

Tony Wilson testified the victim and Applicant met for a drug deal and Applicant got into the back seat of the victim's car and "shot him," (TR p. 104 LL 2-3) and then shot the victim a second time (TR p. 105 LL 11-25).

Coaty Deas testified that Applicant and the victim were his drug suppliers and he was at the scene of the shooting to buy drugs (TR p. 238 L 20 through p. 239 L 6), and that Applicant told Deas he was going to shot the victim (TR 239 L 14 thought p. 240 L 9).

Chadd Wilson testified the victim was a drug supplier (TR p. 413 L 17 through p. 414 L 13) and that Applicant shot the victim (TR p 417 LL 3-6).

Kalamison Hill testified that Applicant shot the victim (TR p. 163 L 7 through p. 164 L 2, p. 164 L 20 through 165 L 11), and that Applicant stated prior to shooting the victim that he was going to "kill somebody" (TR p. 164 L 20 through p. 165 L 11).

Based on the overwhelming testimony regarding Applicant's murder of the victim from witnesses Tony Wilson, Coaty Deas, and Chadd Wilson the undersigned finds trial counsel's failure to interview Kalamison Hill did not in any way prejudice Applicant and such failure does not indicate to any degree that absent such failure the result of Applicant's trial would have been different.

As to the gunshot residue issues, Applicant presents no evidence on this issue other than his own testimony. Therefore, there is nothing before the court of substance on the issue. There is no evidence any gunshot residue evidence would be of value or would even exist at the time of Applicant's arrest, some eight (8) or more days after the crime.

As to the issue regarding what caliber bullet would fit what caliber handgun or pistol the court finds no issue raised by Applicant to which this issue even remotely relates.



The Court finds that motions counsel's representation of Applicant was effective. Therefore, Applicant's Application for Post-Conviction Relief is denied and dismissed with prejudice.

Applicant is hereby placed on notice that any petition for certiorari to the South Carolina Supreme Court must be filed within thirty (30) days. See Appellate Court Rules 203, 206, and 227(b).

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge

November ¹⁸~~10~~, 2014
Conway, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

MICHAEL LIVINGSTON, #330593)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2012-CP-26-4207

AFFIDAVIT OF SERVICE BY MAIL

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

Steven W. Fowler, Esquire
1019 Highway 17 South #222
North Myrtle, SC 29582

DATED this 4TH day of December, 2014.


Norma Bigbee, Legal Assistant
For Respondent

FORM 5

STATE OF SOUTH CAROLINA

County of HorryMichael Livingston #330593

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

20 16 CP26 1750Austin REVIEW

APPLICATION FOR

POST-CONVICTION RELIEF

2016 MAR 11 PM 4:01
CLERK OF COURT
HORRY COUNTY

INSTRUCTIONS B 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 Brad River Correctional
2. Name and location of Court which imposed sentence Horry County of General Sessions
3. Name(s) of co-defendant(s) (if any) Chad Wilson, Kal Hill, Tony Wilson, Carly Oates
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 (a) (2008-GS-26-219) Murder

- (b) (2008-03-26-2008) Armed Robbery
- (c) (2008-GS-26-2659) Poss. of weapon during the commission of violent crime
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 13, 2009
- (b) August 13, 2009
- (c) August 13, 2009
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 Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. Direct Appeal
- ii. P.C.R. Hearing
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied
- ii. Denied
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. Nov. 17, 2011
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
 (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 (a) Ineffective Assistance of P.C.R. Counsel
 (b) _____
 (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) Counsel failed to file Notice of Appeal (Austin Petition)
 (b) _____
 (c) _____
12. Prior to this application have you filed with respect to this conviction:
 (a) any petition in a State Court under South Carolina Law? YES
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? YES
 (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 Ayes@ to any part of (12), list with respect to each petition, motion or application:
 (a) the specific nature thereof:
 i. DIRECT APPEAL
 ii. P.C.R. Hearing
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. Direct Appeal - South Carolina Court of Appeals
 ii. P.C.R. Hearing - ~~SC~~ Horry County General Sessions
 iii. _____

- iv. _____
- (c) the disposition thereof:
- i. Dismissed
- ii. Dismissed
- iii. _____
- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. Nov. 17, 2014
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____

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

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

- (a) which grounds have been presented:

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

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

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

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

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

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

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

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

(a) the name and address of each attorney who represented you:

- i. _____
- ii. Scott J. Jye -
- iii. Steve Fowler - 1019 Hwy. 17 South, North Myrtle Beach;
SC 29582

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

- i. _____
- ii. Trial
- iii. P.C.R. Hearing

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

NEW TRIAL

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA

County of

Horry

VERIFICATION

20 16 CP26 1750

I, Michael Livingston, 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.

x Michael Livingston

SWORN to and subscribed before me this 9 day of March, 2016.

Jennifer Montemur (L.S.)
Notary Public

My Commission Expires: 6/12/2018

Horry County
2016 MAR 11 PM 4:01
CLERK OF COURT

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

20 16 CP26 1750

I, Michael Livingston, 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.

x Michael Livingston
Applicant

SWORN or affirmed to and subscribed before me this
9 day of March, 2016.

Tamara Montgomery
Notary Public

My Commission Expires: 10/10/2018

HORRY COUNTY
2016 MAR 11 PM 4:01
MELANIE H. HARRIS
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
OF THE FIFTEENTH JUDICIAL CIRCUIT

Michael A. Livingston,
S.C.D.C. No. 330593,

Case No.: 2016-CP-26-1750

Applicant,

RETURN

v.

State of South Carolina,

Respondent.

In response to Applicant's post-conviction relief application filed March 11, 2016, Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Horry County Clerk of Court's orders of commitment. The Horry County Grand Jury indicted Applicant at the August 2008 term for murder (2008-GS-26-2912). The Horry County Grand Jury indicted Applicant on additional charges at the August 2009 term for armed robbery (2009-GS-26-2658) and possession of a weapon during the commission of a violent crime (2009-GS-26-2659). Scott Joye, Esquire, represented Applicant.

On August 13, 2009, Applicant was tried and found guilty as indicted before the Honorable Larry B. Hyman, Jr., who sentenced Applicant to life imprisonment on the murder charge, thirty (30) years imprisonment for armed robbery, five (5) years imprisonment on the weapon charge, with all charges running concurrently.

Applicant appealed to the South Carolina Court of Appeals. His appeal was perfected by Robert M. Dudek, Esquire and Chief Appellate Defender for the state of South Carolina, in the

form of an Anders¹ brief. The Court of Appeals affirmed Applicant's conviction and sentence by order date February 29, 2012. The remittitur was issued March 16, 2012.

2012-CP-26-4207

Following his direct appeal, Applicant filed for post-conviction relief on May 25, 2012. The State made its return on September 24, 2012. In his first PCR application, Applicant alleged he was being held in custody unlawfully for the following reason:

1. Ineffective assistance of counsel.

A PCR hearing was held in front of the Honorable John C. Hayes, III, on October 28, 2014. Applicant was represented by Steven Willard Fowler, Esquire, and the State was represented by Josh Thomas, Esquire. The court found that Applicant's counsel was effective, and denied and dismissed his PCR application on November 10, 2014.

Applicant filed and served a notice of appeal on April 4, 2015. Upon inquiry by the Court, Applicant confirmed that he had received written notice of entry of the order on appeal on December 8, 2014. The Supreme Court of South Carolina dismissed the appeal as untimely by order dated May 8, 2015. The remittitur was issued May 27, 2015.

II.

Applicant filed the present, successive PCR application on March 11, 2016, alleging he is being held in custody unlawfully for the following reason:

1. Ineffective Assistance of PCR Counsel.

a. Counsel failed to file notice of appeal (Austin petition).

Respondent denies Applicant is entitled to relief for this claim and demands strict proof thereof. Any claims not specifically enumerated in the application or amendments thereto will

¹ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this return and incorporated herein are the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's direct appeal records, the records from Applicant's prior PCR and appeal thereof, and the records of this action. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under § 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id.* Austin "is limited to its particular factual situation..." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their

application. Based on Applicant's grounds in support of his ineffective assistance of PCR counsel claim, Respondent requests an evidentiary hearing on this ground for relief. Sharper, Id.; Austin, 305 S.C. 453, 409 S.E.2d 395.

IV.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro se filings will not be considered at the PCR hearing.

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

V.

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

[Remainder of page left blank intentionally]

VI.

WHEREFORE, having made its Return, Respondent requests that an evidentiary hearing be held to address the issue of whether counsel was ineffective in failing to appeal the order denying Applicant's initial application for post-conviction relief.

Respectfully submitted,

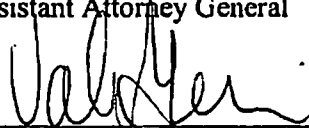
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

By:



ATTORNEYS FOR RESPONDENT
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

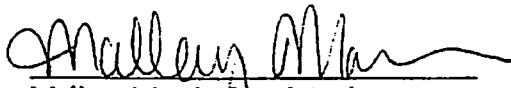
February 28, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
	)	2016-CP-26-1750
MICHAEL A. LIVINGSTON, 330593,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Mr. Daniel A. Selwa, II, Esquire
516 29th Avenue North
Myrtle Beach, SC 29577

DATED this 28th day of February, 2017.


Mallory Morris, Legal Assistant
For Respondent

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
 2 COUNTY OF HORRY) CASE NO. 2016-CP-26-01750
 3 MICHAEL A. LIVINGSTON,)
 4 Plaintiff,) Transcript of Record
 5 vs.)
 6 THE STATE OF SOUTH) Date: May 22, 2017
 7 CAROLINA,)
 Defendant.

* * * * *

B E F O R E:

The Honorable Roger E. Henderson

* * * * *

Denise J. Lauder, RPR

Ninth Judicial Circuit

1 A P P E A R A N C E S

2

3 REPRESENTING THE PLAINTIFF:

4 DANIEL A. SELWA, II, ESQUIRE

5 516 29th Avenue North

6 Myrtle Beach, SC 29577

7

8 REPRESENTING THE ATTORNEY GENERAL'S OFFICE:

9 JOHNNY E. JAMES, JR., ESQUIRE

10 OFFICE OF THE ATTORNEY GENERAL

11 P. O. Box 11549

12 Columbia, SC 29201

13

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1 INDEX

2 TESTIMONY OF [!WITNESS]

3

Direct Examination by Mr. ^

4

#

Cross-Examination by Mr.^

5

Redirect Examination by Mr. ^

6

REPORTER'S CERTIFICATE

#

ERRATA SHEET

7

8

9

INDEX OF EXHIBITS10 (No exhibits were offered or
11 marked for identification.)

12

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1 The following proceedings were held May
2 22, 2017, Horry County Courthouse, in re:
3 Livingston v The State.)

4 MR. JAMES: James Michael Livingston.

5 THE COURT: All right. Mr. James,
6 whenever you're ready, sir.

7 MR. JAMES: Thank you, Your Honor. If
8 it may please the Court.

9 This is the matter of Michael
10 Livingston v The State of South Carolina, docket
11 number 2016-CP-26-1750. The applicant is presently
12 incarcerated in the South Carolina Department of
13 Corrections pursuant to the Horry County Clerk of
14 Court's Order of Commitment.

15 The Horry County Grand Jury indicted
16 Mr. Livingston at the August 2008 term for murder.
17 The Horry County Grand Jury indicted him
18 additionally at the August 2009 term for armed
19 robbery and possession of a weapon during the
20 commission of a violent crime.

21 Attorney Scott Joey, Esquire
22 represented the applicant. Applicant was tried and
23 found guilty on August 13, 2009. The Honorable
24 Larry B. Hyman sentenced the applicant to life
25 imprisonment on murder, 30 years imprisonment for

1 armed robbery, and five years imprisonment on the
2 weapons charge. All charges running concurrently.

3 He appealed to the South Carolina Court
4 of Appeals. That appeal was perfected by OAD and
5 the Court affirmed his convictions. Applicant
6 filed his first application for post-conviction
7 relief on May 25, 2012. The Court denied that on
8 November 10, 2014.

9 Mr. Livingston filed and served a
10 notice of appeal from that order April 4, 2015.
11 Upon inquiry of the Court, applicant confirmed that
12 he received written notice of the entry of the
13 order of appeal on December 8, 2014.

14 The Supreme Court of South Carolina
15 dismissed that appeal as untimely by order dated
16 May 8, 2015. The remittitur was issued May 27,
17 2015.

18 So, ultimately, the matters that we
19 have here today is an Austin claim, Your Honor.
20 Mr. Livingston is present and represented by Daniel
21 Selwa, Esquire. Your Honor, the State is ready to
22 proceed.

23 THE COURT: Okay. Mr. Selwa, are you
24 ready to proceed?

25 MR. SELWA: Yes, Your Honor.

1 THE COURT: Okay. Anything before we
2 proceed?

3 MR. SELWA: No, sir.

4 THE COURT: Mr. James.

5 MR. JAMES: Your Honor, the State would
6 like to call Attorney Steven Fowler to the stand.

7 So as a point of confusion, Your Honor,
8 being that this is Mr. Livingston's allegation, I
9 believe he needs to make his case at this point.

10 THE COURT: Okay. Mr. Selwa.

11 MR. SELWA: Yes, Your Honor. I would
12 call Michael Livingston to the stand.

13 MICHAEL LIVINGSTON,
14 being first duly sworn, testified as follows:

15 THE CLERK: State your name for the
16 record, please.

17 THE APPLICANT: Michael Livingston.

18 MR. SELWA: Thank you, Your Honor. May
19 it please the Court?

20 THE COURT: Yes, sir.

21 DIRECT EXAMINATION

22 BY MR. SELWA:

23 Q. Mr. Livingston, you filed a PCR on
24 5/25/2012; is that correct?

25 A. Yes, sir.

1 Q. And that PCR was heard on 10/28/2014?

2 A. Yes, sir.

3 Q. That was denied by order of the Court
4 on 11/10/2014 and then filed 11/17/2014; is that
5 correct?

6 A. Yes, sir.

7 Q. Okay. Did you appeal that PCR?

8 A. Yes, sir, I had appealed it. He was
9 supposed to have appealed it, but he didn't do it.

10 Q. When you say, he, who are you referring
11 to?

12 A. Steven Fowler.

13 Q. And that was your PCR counsel; is that
14 correct?

15 A. Yes, sir.

16 Q. To your knowledge, do you remember when
17 the appeal on that was filed?

18 A. No, sir, not to my knowledge.

19 Q. Would it be correct that that was filed
20 April 10, 2015?

21 A. Around that time.

22 Q. Okay. And did the supreme court issue
23 an order stating that your counsel had received --

24 THE COURT: Just a second. Can we tell
25 those people to be quiet in there? I'm going to

1 hold somebody in content.

2 Go ahead, Mr. Selwa.

3 MR. SELWA: Thank you, Your Honor.

4 BY MR. SELWA:

5 Q. And by order of the supreme court, they
6 stated that the --

7 A. That my attorney didn't -- he didn't --

8 THE COURT: Hang on a minute. Let him
9 ask the question before you start answering.

10 BY MR. SELWA:

11 Q. Your PCR counsel received the order
12 denying your PCR on 12/8/2014; is that correct?

13 A. Yes, sir.

14 Q. And so the appeal in the matter is way
15 outside of the 30 days; is that correct?

16 A. Yes, sir.

17 Q. Do you recall asking Mr. Fowler to
18 appeal the PCR decision?

19 A. Yes, sir.

20 Q. And when do you recall asking him that?

21 A. Probably about a month and a half after
22 I got turned down.

23 Q. I'm sorry?

24 A. About a month and a half after I got
25 turned down.

1 Q. After the hearing date?

2 A. Yes, sir.

3 Q. Okay. And how did you ask him?

4 A. Letter.

5 Q. You sent him a letter?

6 A. Yes, sir.

7 Q. Okay. And did he respond to you in any
8 way?

9 A. No, sir.

10 Q. And, to your knowledge, did he file
11 that appeal?

12 A. No, sir.

13 Q. Within the 30 days?

14 A. No, sir.

15 Q. He eventually filed it; is that
16 correct?

17 A. Yes, sir.

18 Q. Did you follow up with any other
19 letters?

20 A. A lot. Even my mom called, and he
21 still didn't answer us or nothing.

22 Q. And, obviously, you didn't keep copies
23 of those letters, correct?

24 A. No, sir.

25 Q. Are you asking the Court to grant this

1 PCR so that you can file your appeal of the
2 original PCR?

3 A. Yes, sir.

4 MR. SELWA: Okay. No further
5 questions, Your Honor.

6 Please answer any that the Attorney
7 General's Office will have.

8 MR. JAMES: The State has no questions
9 for this witness.

10 THE COURT: You can step down, sir.

11 MR. SELWA: I have no further
12 witnesses, Your Honor.

13 Thank you, sir.

14 THE COURT: Mr. James.

15 MR. JAMES: Now the State would call
16 Mr. Steven Fowler to the stand.

17 THE COURT: Mr. Fowler.

18 STEVEN FOWLER,

19 being first duly sworn, testified as follows:

20 THE CLERK: Thank you. You may be
21 seated. If you will, state your full name for the
22 record please.

23 THE WITNESS: Steven Fowler,
24 F-O-W-L-E-R.

25 DIRECT EXAMINATION

1 BY MR. JAMES:

2 Q. Mr. Fowler, you previously represented
3 Mr. Livingston in the matter of 2012-CP-26-4207 in
4 the prior PCR; is that correct?

5 A. That's correct.

6 Q. And that application was denied by the
7 Court, correct?

8 A. That's correct.

9 Q. Did Mr. Livingston ever request or
10 indicate that he wished for appellate review from
11 the order in that matter?

12 A. He did not within the time allotted.
13 Our records show he contacted our office in March
14 of 2015.

15 Q. Would you have filed a notice of appeal
16 if he had requested you -- requested that you do so
17 in a timely manner?

18 A. Yes.

19 Q. Was Mr. Livingston informed of his
20 right to appellate review by either yourself or
21 the Court?

22 A. Yes. On October 24, 2014, he and I had
23 a long conversation about the PCR process, about
24 appeals, about whether he wanted to go through with
25 the PCR, things along those lines.

1 MR. JAMES: I have no further questions
2 for this witness.

3 THE COURT: Okay. Mr. Selwa.

4 MR. SELWA: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. SELWA:

7 Q. Mr. Fowler, you stated you had a
8 conversation with him on 10/24/2014?

9 A. That's correct.

10 Q. And that was approximately four days
11 before the PCR was heard; is that correct?

12 A. I don't know the calendar, but we had a
13 conversation on October 24, 2014, according to my
14 records.

15 Q. Do you recall if that was prior to the
16 PCR hearing?

17 A. I believe it was.

18 Q. Did you have any hearing -- I'm sorry,
19 did you have any conversation with him afterwards
20 regarding the appeal?

21 A. His mother -- he called starting in --
22 according to my records and on information and
23 belief, he started calling the office in March of
24 2015. He called several times and at that point we
25 started a dialogue, to the best of my recollection.

1 Q. Did you receive any documentation in
2 the form of correspondence from Mr. Livingston
3 regarding anything?

4 A. No.

5 Q. Between the time that he was denied and
6 the March filing?

7 A. According to my records, no and no.

8 Q. And your address has not changed, has
9 it?

10 A. No.

11 Q. Did you serve him a copy of the final
12 order?

13 A. I believe so.

14 Q. All right. And how did you do that?

15 A. By mail.

16 Q. Do you recall when you mailed that?

17 A. No.

18 Q. Did you bring your file with you?

19 A. No, just some basic notes.

20 Q. Okay. Do you recall when,
21 approximately, that was?

22 A. We try to keep our clients informed, to
23 the best of our knowledge, so we provided him -- I
24 don't know this for a fact, but we traditionally
25 provide the client with some kind of knowledge

1 about what went on in the hearing.

2 Q. Okay. And you did not hear anything
3 after you served him?

4 A. No.

5 Q. And you don't have any copies of any
6 documentation wherein you sent that service of that
7 order to him?

8 A. No.

9 Q. And, obviously, when you did file the
10 appeal, was that at his direction?

11 A. My understanding is he called our
12 office on March 27th at approximately 10:31 a.m.,
13 and he spoke to my paralegal, and soon afterwards
14 we filed the appeal.

15 Q. Okay. He didn't write you a letter; he
16 called you said?

17 A. Yes.

18 Q. And then, subsequently, you did file an
19 appeal?

20 A. Yes.

21 MR. SELWA: No further questions, Your
22 Honor.

23 THE COURT: Anything else, Mr. James?

24 MR. JAMES: No redirect, Your Honor.

25 THE COURT: All right. You may step

1 down, Mr. Fowler.

2 THE WITNESS: Thank you, Your Honor.

3 MR. JAMES: State has no further
4 witnesses, Your Honor.

5 THE COURT: Okay. Anything else,
6 Mr. Selwa?

7 MR. SELWA: No, sir.

8 THE COURT: Okay. Counsel, do you
9 want to make a statement?

10 MR. JAMES: Just very, very briefly,
11 Your Honor.

12 In order to receive relief pursuant to
13 Austin v State, the applicant needs to show that he
14 either asked for an appeal and his counsel failed
15 to do that on his behalf, or that he did not
16 knowing and intelligently waive his right to
17 appellate review.

18 The testimony of Mr. Fowler on the
19 stand just now shows that he was aware of his right
20 to appellate review before, during, and after the
21 PCR hearing, and that he failed to ask or otherwise
22 direct Mr. Fowler to file a notice of appeal on his
23 behalf until it was entirely too late; and,
24 therefore, the failure of his untimely notice of
25 appeal falls on Mr. Livingston and not upon

1 Mr. Fowler, and his request for relief pursuant to
2 Austin v. State should be denied.

3 THE COURT: Mr. Selwa.

4 MR. SELWA: Thank you, Your Honor.

5 Your Honor, Mr. Livingston testified
6 that he did contact his attorney, sent it by mail.
7 Obviously, the jail's resources are limited and do
8 not allow them often to make copies and keep copies
9 of what they send to counsel.

10 Counsel testified that he didn't have a
11 have a copy of that; however, my client stated that
12 did send that and requested that appeal. Your
13 Honor, we would ask that he be given that
14 opportunity to appeal the decision in a PCR
15 request.

16 THE COURT: Thank you, sir.

17 All right. I'm going to take that
18 matter under advisement. I want to review my notes
19 and I will get back to counsel within the next
20 30 days.

21 MS. SELWA: Thank you, Your Honor.

22 (These proceedings were concluded at
23 2:10 p.m.)

24

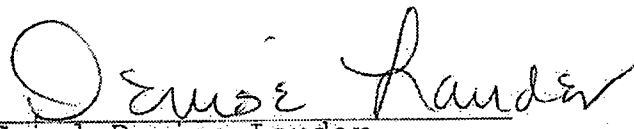
25

1 CERTIFICATE OF REPORTER
2

3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

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

11 Witness my hand, I have hereunto affixed my
12 official seal this 18th day of October, 2017 at
13 Charleston, Charleston County, South Carolina.
14

15
16 
17 Carol Denise Lauder
18 Registered Professional
19 Reporter, CP
20
21
22
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24
25

RECEIVED

OCT 27 2017

APPELLATE DEFENSE

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
)

Michael A. Livingston,
S.C.D.C. No. 330593,

) Case No.: 2016-CP-26-01750
)
)

Applicant,

) **ORDER OF DISMISSAL**
)
)

v.

State of South Carolina,

Respondent.

FILED
HORRY COUNTY
2017 JUN 10 PM 4:42
BRUCE N. ELVIS
CLERK OF COURT
HORRY COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief filed by Michael A. Livingston ("Applicant") on March 11, 2016. Respondent made its return on or about February 28, 2017. The Court convened an evidentiary hearing into the matter on May 22, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esquire. Johnny E. James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's prior PCR counsel, Steven W. Fowler, Esquire ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the records from Applicant's prior PCR and appeal therefrom, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the August 2008

term of the Horry County Grand Jury for murder (2008-GS-26-02912). Applicant was further indicted at the August 2009 term for armed robbery (2009-GS-26-02658), and possession of a weapon during the commission of a violent crime (2009-GS-26-2659). R. Scott Joye, Esquire, represented Applicant, and Jimmy A. Richardson, II, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Applicant guilty as indicted on August 13, 2009. Judge Hyman sentenced Applicant to imprisonment for concurrent terms of life for murder, 30 years for armed robbery, and 5 years for the weapons charge.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esquire, filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Livingston, Op. No. 2012-UP-137 (S.C. Ct. App. filed Feb. 29, 2012). The Remittitur was issued on March 16, 2012.

2012-CP-26-4207

Applicant filed his first application for post-conviction relief on May 25, 2012 (2012-CP-26-4207). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel

Respondent made its return on or about September 24, 2012, and an evidentiary hearing into the matter was convened on October 28, 2014, before the Honorable John C. Hayes, III. Applicant was present at the hearing and represented by Steven W. Fowler, Esquire. Joshua Thomas, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and R. Scott Joye, Esquire, also testified. By written order dated November 10, 2014, and filed November 7, 2014, Judge Hayes denied and dismissed the application.

Applicant filed a notice of appeal, which was served on Respondent on April 10, 2015. Upon inquiry by the Court, Counsel advised the Court that he received written notice of entry of the order on appeal on December 8, 2014. On May 8, 2015, the Supreme Court of South Carolina denied the petition by unpublished order. Livingston v. State, S.C. Sup. Ct. Order dated May 8, 2015. The Remittitur was issued on May 27, 2015.

II. PRESENT ALLEGATIONS

In his second and current post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of P.C.R. Counsel"
 - a. "Counsel failed to file notice of appeal (Austin petition)."

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

III. APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Ineffective assistance of post-conviction relief counsel is generally not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of his original

application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his "one full bite at the apple." Id.; Aice, 305 S.C. at 452, 409 S.E.2d at 394; see also Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999). Therefore, the question before this court is whether defendant either (1) requested and was denied an opportunity to seek appellate review, or (2) did not knowingly and intelligently waive the right to appeal. Odom at 260, 523 S.E.2d at 755.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court finds that Applicant has failed to prove he timely requested Counsel appeal the denial of his prior application for post-conviction relief. Applicant testified that he first requested an appeal by letter sent to Counsel a month and a half after the evidentiary hearing. Applicant further testified that he sent many letters and that his mother also attempted to contact Counsel on Applicant's behalf.

Counsel testified at the hearing that he met with Applicant on October 24, 2014, and explained the PCR process in detail, through and including his right to appeal from a denial of relief. As previously indicated to the Supreme Court, Counsel received notice of entry of the order on December 8, 2014. Counsel testified that he served the order of dismissal on Applicant by mail, but was unable indicate precisely when he did so. Counsel testified that he did not

Speak to, or receive any correspondence from, Applicant until March 27, 2015, when Applicant called him and requested an appeal. Counsel thereafter filed the notice of appeal, which was dismissed as untimely. Counsel made clear that his address did not change in the course of his representation of Applicant.

Neither party was able to produce any copy or record to show the existence of the letter Applicant purports to have sent 1 ½ months after the hearing—Applicant had no copy and Counsel denied ever receiving it. The Court is therefore left to weigh the credibility of the witnesses. Having closely observed each witness' testimony, the Court finds Counsel to be credible—Applicant was aware of his rights to appeal and has failed to prove he timely requested Counsel appeal the denial of post-conviction relief. Therefore, Applicant has failed to meet his burden, and this application shall be denied.

[Conclusion and signature on following page]

V. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 26th day of June, 2017.


 ROGER E. HENDERSON
 Presiding Judge
 Fifteenth Judicial Circuit

Chesapeake, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

MICHAEL LIVINGSTON, #330593,

Applicant,

v.

STATE OF SOUTH CAROLINA,

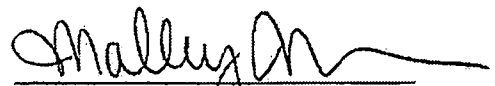
Respondent.

CERTIFICATE OF SERVICE

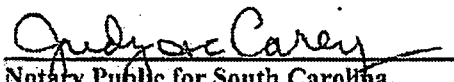
The undersigned hereby certifies that a true copy of the **Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Daniel Selwa, II, Esquire
516 29th Avenue North
Myrtle Beach, SC 29577

This 17th day of July, 2017.


MALLORY MORRIS
LEGAL ASSISTANT FOR RESPONDENT

SWORN to before me this 17th day of July, 2017.


Notary Public for South Carolina.
My Commission Expires: 5/14/2024

2016-CP-26-1750

DOCKET NO. 2008-GS-26- 02912

WITNESSES

Toby Boyd Horry County Police Department

**The State of South Carolina
County of Horry**

Jimmy Richardson, II
86710-1

COURT OF GENERAL SESSIONS

August, 2008 TERM

ARREST WARRANT NUMBER

J478732

CDR: 0116 16-03-0010, 0020

DOA: 8/10/2007

THE STATE

vs.

Michael Anthony Livingston
/ M



ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: AUG 21 2008

ATTORNEY: Mullins, Randall K.

VERDICT

Indictment for

Murder

J. Gregory Hembree, Solicitor

Foreperson of Petit Jury

Date:

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on August 21, 2008, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116 16-03-0010,0020

That Michael Anthony Livingston did in Horry County, on or about July 30, 2007, willfully, feloniously, and intentionally kill the victim, Earvin Graham, with malice aforethought, either express or implied, by means of gunshot, and the victim did die as a proximate result thereof on or about July 30, 2007 in Horry County, in violation of Section 16-03-0010, S. C. 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.


J. GREGORY PEMBREE
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Gerodie Livingston 15th Judicial Circuit Solicitor's
Office

DOCKET NO. 2009-GS-26-2658

The State of South Carolina

County of Horry

Jimmy A. Richardson, II
86710-1

COURT OF GENERAL SESSIONS

July, 2009 TERM

ARREST WARRANT NUMBER

2009GS2602658

CDR: 0139 16-11-0330(A)

DOA: 8/10/2007

THE STATE

vs.

Michael Anthony Livingston

/ M



ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

JUL 30 2009

ATTORNEY: Joye, R. Scott

VERDICT

Indictment for

Armed Robbery

J. Gregory Hembree, Solicitor

Foreperson of Petit Jury

Date:

 **ORIGINAL**

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on July 30, 2009, the Grand Jurors of Horry County present upon their oath:

ARMED ROBBERY**CDR: 0139 16-11-0330(A)**

That Michael Anthony Livingston did in Horry County on or about July 30, 2007, while armed with a deadly weapon, to wit: a gun, take and carry away personal property of Earvin Graham from or in the immediate presence of Earvin Graham with intent to deprive Earvin Graham of possession by use of force, threats or intimidation, in violation of Section 16-11-0330(A), S. C. 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.


J. GREGORY PEMBREE
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Gerodie Livingston 15th Judicial Circuit Solicitor's
Office

DOCKET NO. 2009-GS-26- 2659

The State of South Carolina

County of Horry

Jimmy A. Richardson, II
86710-1

COURT OF GENERAL SESSIONS

July, 2009 TERM

ARREST WARRANT NUMBER

2009GS2602659
CDR: 0549 16-23-0490
DOA: 8/10/2007

THE STATE

VS.

Michael Anthony Livingston
/ M

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: JUL 30 2009

ATTORNEY: Joyce, R. Scott

VERDICT

Indictment for

**Possession of a Weapon During the
Commission of a Violent Crime**

J. Gregory Hembree, Solicitor

Foreperson of Petit Jury
Date:

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

At a Court of General Sessions, convened on July 30, 2009, the Grand Jurors of Horry County present upon their oath:

**POSSESSION OF A WEAPON DURING THE COMMISSION
OF A VIOLENT CRIME**

CDR: 0549 16-23-0490

That Michael Anthony Livingston did in Horry County, on or about July 30, 2007, possess a firearm, or visibly display what appeared to be a firearm, or visibly displayed a gun, during the commission or attempted commission of a violent crime, in violation of Section 16-23-0490, S. C. 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.


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR