

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Honorable Frank R. Addy, Circuit Court Judge

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S.C. SUPREME COURT

J'COREY SUAVE HULL-KILGORE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001682

APPENDIX

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

J'COREY SUAVE HULL-KILGORE,

APPELLANT

FINAL BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

- I. Whether the trial court erred in refusing to instruct the jury on voluntary manslaughter.
- II. Whether the trial court erred in allowing the State to impeach Appellant with the fact he "had been convicted of two crimes in December 2007" so long as the State did not disclose the nature of these offenses.

INTRODUCTION

On May 24, 2008, Courtney Rogers ("Victim") was shot in the base of neck at close range while on a neighbor's front porch in Spartanburg. (R. 18, 4, 5-6, 121-22). Victim later died from the injury. (R. 3). The ensuing investigation culminated in the trial and conviction of J'Corey Hull-Kilgore ("Appellant"). (R. 433).

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg Grand Jury for murder (#2009-GS-42-4486) and was tried before the Honorable J. Derham Cole and a jury on May 18-20, 2010 in Spartanburg. (R. 1). At trial, Appellant was represented by Clay Allen while the State was represented by Derrick Balsa. (R. 1). At the conclusion of trial, Appellant was found guilty of murder and received a sentence of life imprisonment. (R. 438-39).

STATEMENT OF THE FACTS

On May 24, 2008, at 8:24 PM, authorities were dispatched to the intersection of South Liberty and Amos Street in Spartanburg following reports of a shooting. (R. 18, 21). Upon arriving at the scene, first responder Deputy Bradford James explained he observed a black male, later identified as Victim, with several individuals around him attempting to render aid. (R. 21, 3). Approaching Victim, James noticed a gunshot wound to the base of his neck near the collarbone. (R. 22). As James was attempting to apply pressure to the wound in an effort to stop the bleeding, Victim grabbed James and stated "I'm going to die." (R. 22). Victim's statement proved to be prophetic as the wounds were indeed fatal. (R. 3, 13).

While James and others were attempting to aid Victim, officer Derrick Canada, understanding the shooting had happened nearby, responded to a residence located on East Columbia Avenue. (R. 36). Arriving at the residence, Canada encountered its occupant, Sandra Dandy and her then-boyfriend, Dwight Mills. (R. 37). After observing what appeared to be

blood on the front porch, Canada turned the scene over to investigators who in turn sought a search warrant in order to process the scene. (R. 38-39, 63).

Processing the scene, authorities swabbed the blood-like substance in order to conduct a DNA analysis. (R. 64, 74). SLED Analyst Lindsay Thompson would later confirm the swabs taken from the blood-like substance on the front porch matched Victim's blood. (R. 213). Additionally, authorities observed what appeared to be a bullet hole in the wall nearest the front porch and recovered a shell casing from a .380 handgun, with the head stamp, "RP." (R. 66, 75, 81). Six days later, acting on a tip from Appellant's brother James and James' friend, Demetrius Reid, authorities also recovered a loaded handgun containing five .380 rounds at the intersection of Williams Street and Harmony Drive in Spartanburg near Appellant's grandmother's house. (R. 78-80, 81, 332-33). Of the five rounds which were found in the handgun, two rounds carried an "RC" head stamp, while the remaining rounds revealed an "FC" head stamp. (R. 214). SLED analyst Frank Dan Defreese later determined the shell casing found at the scene was fired by the .380 handgun recovered near Appellant's grandmother's house. (R. 219).

At trial, the State called a variety of witnesses who were in and around Dandy's residence at the time Victim was shot. First, the State called Dandy who testified she observed Appellant and Victim briefly talking to one another near the doorway to the front porch of her residence when she heard a "loud sound." (R. 121-22). This testimony was essentially echoed by witness Keevin Anderson who added that in addition to hearing the shot, he witnessed Appellant shoot Victim and take his money. (R. 277).

The State also called Taquil "Penny Red" Nabors, who was an eyewitness to the shooting. (R. 165, 168-69). Specifically, Nabors, who was friends with both Appellant and Victim, explained he was on the front porch playing cards when Victim pulled up in front of

Dandy's residence prompting him to approach Victim. (R. 167, 168-69). Continuing, Nabors testified he spoke with Victim briefly before Victim walked up the porch and entered the residence. (R. 168-69). Nabors explained he did not see Victim again until he heard a "gun cock back" causing him to look into the residence. (R. 169-70). Upon doing so, Nabors witnessed Appellant shoot Victim in the neck while Victim was walking out of the front door. (R. 169-70). Nabors added Victim was digging in his pocket when Appellant shot him. (R. 169-70).

D'Angelo Miller also testified. In his testimony, Miller, who was dating Dandy's daughter and was friends with both Appellant and Victim, explained that when Victim pulled into the driveway, Appellant went around the side of the house with his brother James and asked James for his gun so he could rob Victim. (R. 235, 239-240). Miller then observed Victim walk into the house. (R. 236). Understanding Appellant was armed and intended to rob Victim, Miller walked into Dandy's house in order to get Dandy's young son and his girlfriend's young daughter out of harm's way. (R. 236-37, 238-39). After getting the children, Miller locked himself and the children in a nearby bedroom when he heard a gunshot. (R. 238).

Appellant's brother, James Kilgore, like Dandy, Anderson, Nabors and Miller, testified against Appellant. In particular, Kilgore repeated Miller's testimony, that Appellant approached him and asked for his handgun, adding that the handgun he gave Appellant was the handgun recovered near Appellant's grandmother's house. (R. 297).

After the close of the State's case, Appellant elected to present a defense. Specifically, Appellant's younger brother, Javaris Hull-Smith told the jury he was playing video games with Appellant until sometime after dark when the two began talking to some girls. (R. 361-62). Continuing, Hull-Smith explained Appellant only briefly left the house after hearing sirens in the neighborhood. (R. 361-62). Consistent with his younger brother's testimony, Appellant testified

that he was playing video games, then talked to some girls who happened to be in the neighborhood before leaving the house around 9:00 PM or 10:00 PM. (R. 376). Appellant noted he left the house to check on his older brother James because he knew James was at Dandy's house and believed the sirens were coming from that direction. (R. 377). Finally, Appellant denied ever seeing Victim that day and stated he never asked his brother for a gun and never shot Victim. (R. 380).

Following the conclusion of his defense, closing arguments were held and the jury was charged. Thereafter, the jury convicted Appellant of murder and the trial court sentenced Appellant to life imprisonment. (R. 433, 438-39).

PRESENTATION OF ISSUES AT TRIAL

A. Voluntary Manslaughter Issue

After the defense rested, defense counsel requested the trial court charge the jury on voluntary manslaughter arguing that since Victim was armed and Nabors observed Victim reaching for his pocket, there was evidence to support the charge. (R. 390-91). Ruling on the issue, the trial court stated, "I don't think there's any evidence that the defendant operated in sudden heat of passion, nor is there any evidence that it was based upon any sufficient legal provocation even if he did." (R. 392). Continuing, the trial court noted that while there was testimony from Nabors that indicated Victim was bent over, there was no evidence from which one could reasonably infer Appellant was aware Victim had a weapon. (R. 392). Additionally, the trial court found there was no indication from anybody that Appellant and Victim were in an argument when Appellant shot Victim. (R. 392). Accordingly, the trial court declined to charge the jury on voluntary manslaughter.

B. Rule 609(a)(1), SCRE Issue

At the conclusion of the State's case, defense counsel asked the trial court to determine the convictions with which the State could impeach Appellant. (R. 342). In response, the State highlighted Appellant had previous convictions from December of 2007 for assault and battery of a high and aggravated nature ("ABHAN") as well as a pointing and presenting a firearm for which Appellant received probation. (R. 342). In response, defense counsel argued that under Rule 609(a)(1), SCRE, Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000) and State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) the convictions were more prejudicial than probative explaining the similarities between the prior convictions would likely lead the jury to determine guilt as opposed to credibility.¹ (R. 343). After hearing defense counsel's argument, the trial court asked defense counsel whether his objection was based upon the type of offense or the potential sentence. (R. 344-45). Clarifying his objection, defense counsel stated it was both the type of offense as well as his concern that if the offense was not disclosed to the jury, the jury would be left to speculate on the nature of the offense which defense counsel believed would lead the jury to assume the offense was in fact a similar offense. (R. 345-46). Continuing, defense counsel argued that since the convictions did not involve deceit, dishonesty or fraud, they were not

¹ Rule 609(a), of the South Carolina Rules of Evidence provides for the impeachment of a witness by evidence of conviction of a crime under the following conditions:

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970).

probative of Appellant's credibility thereby rendering the prior convictions inadmissible for purposes of impeachment. (R. 345).

Thereafter, the trial court ruled that because the nature of the offense was more prejudicial than probative under the second part of Rule 609(a)(1), SCRE and the underlying crimes are not crimes of dishonesty, fraud or deceit, the nature of the offenses would not be admitted for purposes of impeachment. (R. 346). Next, the trial court, reviewing the "punishment by death or imprisonment in excess of one year" aspect of Rule 609(a)(1), SCRE, determined the convictions themselves were also excluded for purposes of impeachment noting that Petitioner was a juvenile and received probation on the December 2007 charges. (R. 347).

However, following the conclusion of the State's case and after reviewing Rule 609, SCRE in chambers, the trial court reversed itself explaining that pursuant to Rule 609(d), SCRE "evidence of a juvenile adjudication is admissible . . . if the conviction would be admissible to attack the credibility of an adult." (R. 366). Continuing, the trial court noted the conviction would be admissible to attack the credibility of an adult. (R. 366). Nevertheless, the trial court informed the parties that while the State could impeach Appellant with the convictions themselves, the State would still be unable to impeach Appellant with the nature of the offense as the nature of the offense was still more prejudicial than probative. (R. 366).

Responding to the trial court's ruling, defense counsel argued, "my position is—and I realize that there are South Carolina Supreme Court decisions contrary to this—but the, the practice of just allowing the State to ask the defendant if he'd been convicted of . . . an offense . . . still leaves it open to the jury to speculate what [the offense] is." (R. 367). Overruling defense counsel's objection, the trial court noted the prejudicial effect of learning Appellant had previous

convictions did not outweigh the probative value of the conviction "because its going to be limited for one thing, to the fact that he has a conviction but not to the nature of it." (R. 368).

ARGUMENTS

- I. The trial court correctly found Appellant was not entitled to an instruction on voluntary manslaughter as there was no evidence Appellant was acting in the sudden heat of passion upon sufficient legal provocation

Appellant argues he was entitled to an instruction on voluntary manslaughter in light of Nabors' testimony indicating Victim was reaching into his pocket which Nabors knew, contained a firearm. In support of this proposition, Appellant explains that since Nabors' testimony established Victim was armed and may have been reaching for the gun, there was evidence of voluntary manslaughter. The State disagrees as Nabors' testimony fails to establish Appellant was acting in the sudden heat of passion upon sufficient legal provocation as required under South Carolina law, and therefore, Appellant was not entitled to an instruction of voluntary manslaughter. See State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) (finding heat of passion and sufficient legal provocation must both be present at the time of killing to reduce murder to voluntary manslaughter); State v. Hernandez, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010) (holding a jury instruction should not be given unless justified by the evidence).

It is the evidence presented at trial that determines the law with which the jury will be charged. State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). However, a trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993).

As to lesser-included offenses, the law requires that a jury must be charged on a lesser-included offense if, "there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). Conversely, a trial court may eliminate instructing the jury on a lesser-included offense where there is no evidence tending to reduce the crime from the greater offense to the lesser. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "In determining whether the evidence requires a charge of voluntary manslaughter, the Court views the facts in a light most favorable to the defendant." Pittman, 373 S.C. at 572-73, 647 S.E.2d at 168.

In South Carolina, "[v]oluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." Cole, 338 S.C. at 101, 525 S.E.2d at 513. To mitigate murder to manslaughter, the sudden heat of passion upon sufficient legal provocation "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Locklair, 341 S.C. 352, 359, 535 S.E.2d 420, 424 (2000) (quoting State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996)). With this in mind, "[b]oth heat of passion and sufficient legal provocation must be present at the time of the killing" and there must be evidence that the sudden heat of passion was caused by the sufficient legal provocation. State v. Starnes, 388 S.C. 590, 599-97, 698 S.E.2d 604, 608 (2010).

Here, as noted above, Nabors' testimony does not amount to evidence supporting a charge of voluntary manslaughter. Indeed, Nabors' testimony fails to show Appellant was acting in the sudden heat of passion upon sufficient legal provocation.

With regard to sufficient legal provocation, Nabors' testimony, as noted by the trial court, only establishes *Nabors* knew Victim was armed, not that *Appellant* knew Victim was armed. Specifically, Nabors explained he had only learned Victim was armed when Victim privately revealed he was carrying a small .380 in his pocket. (R. 181). As Appellant was not a party to this conversation, there was no testimony establishing Appellant was ever aware Victim was armed on the day in question and thus there is no evidence of sufficient legal provocation. Furthermore, even assuming one could reasonably infer Appellant was somehow aware Victim was armed, D'Angelo Miller, Keevin Anderson and James Kilgore's testimony reflected Appellant was attempting to rob Victim (R. 239-240, 277, 296-97) and according to Nabors, had already pulled and cocked the gun (R. 169-170, 174-75) when Victim reached for his pocket. Therefore, as Appellant was in the process of committing an armed robbery when Victim reached for his pocket, there is no evidence of sufficient legal provocation. See State v. Holland, 385 S.C. 159, 167, 682 S.E.2d 898, 902 (Ct. App. 2009) (quoting State v. Ivey, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997)) ("The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence."); State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001) (holding a victim's attempts to resist or defend himself from crime do not constitute sufficient legal provocation); State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984) (holding there was no evidence of sufficient legal provocation where the victim was defending himself against an armed robber and was killed in the attempt).

Additionally, even assuming the Victim's act of reaching for his pocket in some way constituted sufficient legal provocation, there is no evidence suggesting Appellant acted in the sudden heat of passion. As explained in Pittman, the Supreme Court of South Carolina describes

a sudden heat of passion as emotion which, "while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." 373 S.C. at 574, 647 S.E.2d at 169. In other words, in order to establish that Appellant was acting in the sudden heat of passion, the Victim's act of reaching into his pocket must create "an uncontrollable impulse to do violence." Starnes, 388 S.C. at 599, 698 S.E.2d at 609.

In the present case, the record and the reasonable inferences from the record fail to demonstrate Victim's act of reaching for his pocket created "an uncontrollable impulse to do violence" in Appellant. Rather, the surrounding circumstances, as detailed above, indicate Appellant shot Victim during the course of a robbery. Furthermore, since Appellant, who was the best person to explain his mental state at the time of the shooting, testified he was at home at the time of the shooting, the trial court correctly declined to charge the jury on voluntary manslaughter.

II. The trial court correctly determined Appellant could be impeached with the fact he "had been convicted of two crimes in December of 2007" so long as the State did not disclose the nature of these offenses

Initially, the State notes Appellant is not arguing the December 2007 convictions were unimpeachable under the "punishable by death or imprisonment in excess of one year" portion of Rule 609(a)(1), SCRE, but is instead arguing the trial court erred in concluding Rule 609(a)(1), SCRE's balancing test allowed Appellant to be impeached with the fact he had been convicted of two offenses in December of 2007 without specifying their nature. Specifically, Appellant postulates that because the jury was left to speculate as to the nature of these convictions, the jury likely viewed the prior convictions as evidence Appellant was a bad person who needed to

be off the streets. Quite simply, the State disagrees and notes South Carolina appellate courts have expressly approved of this tactic, especially where the admission of the nature of the prior conviction or convictions could result in unfair prejudice to the defendant as the trial court determined here. See State v. Young, 378 S.C. 101, 106, 691 S.E.2d 387, 389-90 (2008) (holding the trial court properly allowed the defendant to be impeached generally on "another felony for which he ha[d] been convicted" pursuant to Rule 609, SCRE); State v. Rollins, 348 S.C. 649, 653, 560 S.E.2d 450, 452 (Ct. App. 2002) (concluding the trial court did not abuse its discretion in allowing the defendant to be impeached with the existence of his prior convictions without mentioning the nature of the offenses).

The admission or exclusion of evidence falls within the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of that discretion. State v. Huggins, 325 S.C. 103, 110, 481 S.E.2d 114, 118 (1997). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, ---, 687 S.E.2d 35, 38 (2009).

Rule 609(a)(1), of the South Carolina Rules of Evidence provides for the impeachment of a witness by evidence of conviction of a crime under the following conditions:

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused;

Rule 609(a)(1), SCRE. Additionally, where the trial court determines the probative value of the nature of the offense is outweighed by its prejudicial effect, the trial court may seek to lessen the

prejudicial effect by allowing the State to inquire "about the existence of the prior convictions, but not their nature." Rollins, 348 at 653, 560 S.E.2d at 452 (citing Green v. State, 338 S.C. 428, 433 n.5, 527 S.E.2d 98, 101 n.5 (2000)).

In Rollins, the trial court, after determining the defendant's prior convictions were impeachable offenses under Rule 609(a)(1), SCRE, concluded the prejudicial effect of the nature of the prior convictions, outweighed their probative value and therefore limited the State's inquiry to the existence of the prior convictions. 348 S.C. at 653, 560 S.E.2d at 452. On appeal, Rollins argued the trial court erred in doing so, explaining the procedure adopted by the trial court allowed the jury to speculate freely as to the nature of those prior convictions adding the trial court's vague reference resulted in prejudice outweighing any probative value. 348 S.C. at 651, 560 S.E.2d at 451. Affirming Rollins' conviction, the Court of Appeals found the trial court, in employing such a tactic and coupling it with a limiting instruction to the jury, did not amount to an abuse of discretion stating "[t]his procedure minimized the prejudice to Rollins." 348 S.C. at 652, 560 S.E.2d at 452.

Here, the State submits the trial court, much like the trial court in Rollins, did not abuse its discretion in allowing Appellant to be generally impeached with his previous criminal record. Specifically, the trial court, after finding Appellant's December 2007 convictions were impeachable offenses under Rule 609(a)(1), SCRE, determined the probative value of the nature of the convictions was outweighed by their prejudicial effect and thus utilized the same tactic employed in Rollins. In particular, the trial court limited the State's inquiry to whether Appellant was convicted of two crimes in December of 2007 without allowing the State to ask specifics. (R. 366). Moreover, the trial court here, like the trial court in Rollins, instructed the jury that Appellant's prior convictions could only be used in evaluating Appellant's credibility

and could not be used as evidence of Appellant's guilt. (R. 420-21). Accordingly, as the trial court in Rollins did not abuse its discretion in utilizing the same tactic to minimize the prejudicial effect of an otherwise impeachable offense under Rule 609(a)(1), SCRE, and as jurors are presumed to follow the law as it is given to them, the State submits the trial court correctly determined Appellant could be impeached with his December 2007 convictions. See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions.")).

CONCLUSION

For the aforementioned reasons, the State respectfully asks this court to affirm the ruling of the trial court as well as Appellant's underlying convictions.

Respectfully Submitted,

ALAN WILSON
Attorney General

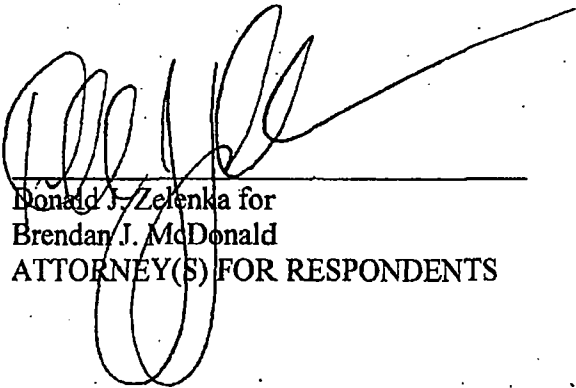
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March 27, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

J'COREY SUAVE HULL-KILGORE,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

Respectfully Submitted,

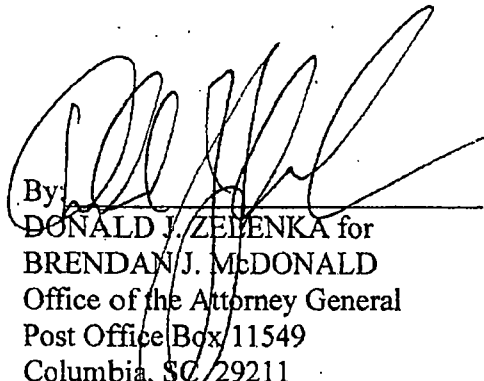
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General

BARRY J. BARNETTE
Solicitor, Judicial Circuit



By: _____
DONALD J. ZEENKA for
BRENDAN J. McDONALD
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305
ATTORNEYS FOR RESPONDENT

March 27, 2012.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

J'COREY SUAVE HULL-KILGORE,

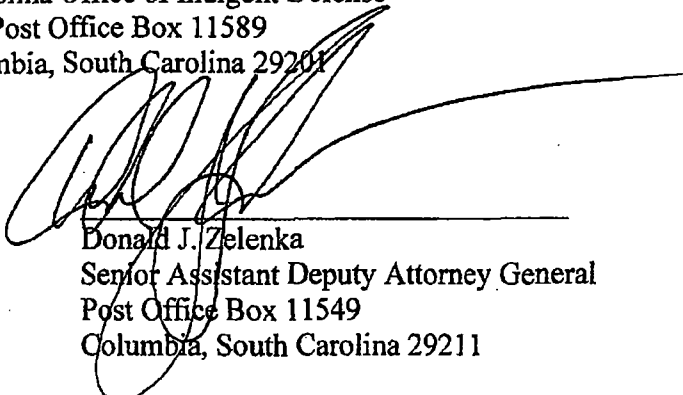
APPELLANT

PROOF OF SERVICE

I, Donald J. Zelenka, Counsel for Respondent, certify that I have served the Final Brief of Respondent, dated March 27, 2012, on Appellant by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Chief Appellate Defender
South Carolina Office of Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29201

This 27th day of March, 2012.



Donald J. Zelenka
Senior Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

J'Corey Hull-Kilgore, Appellant.

Appellate Case No. 2010-162289

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Unpublished Opinion No. 2012-UP-531
Submitted August 1, 2012 – Filed September 19, 2012

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Donald J. Zelenka, and Assistant
Attorney General Brendan J. McDonald, all of Columbia;
and Solicitor Barry J. Barnette, of Spartanburg, for
Respondent.

PER CURIAM: Affirmed¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in declining to instruct the jury on the lesser included offense of voluntary manslaughter: *State v. Norris*, 253 S.C. 31, 35, 168 S.E.2d 564, 565 (1969) ("[O]n a trial for murder growing out of the use of a deadly weapon, it is unnecessary to charge the law relating to manslaughter where the testimony fails to suggest any theory upon which a verdict of manslaughter could rest.").
2. As to whether the trial court erred in allowing the solicitor to impeach Hull-Kilgore with prior convictions: *Green v. State*, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000) ("We decline to hold similar prior convictions inadmissible in all cases. Trial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence."); *State v. Rollins*, 348 S.C. 649, 651-53, 560 S.E.2d 450, 451-52 (Ct. App. 2002) (allowing introduction of prior convictions for impeachment purposes on nearly identical grounds).

AFFIRMED.

HUFF, THOMAS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 05, 2012

The Honorable M. Hope Blackley
P.O. Box 3483
Spartanburg, SC 29304-3483

REMITTITUR

Re: The State v. Hull-Kilgore, J'Corey
Lower Court Case No. 2009GS4204486
Appellate Case No. 2010-162289

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Brendan Jackson McDonald
Robert Michael Dudek

2013-CP-42-2062

STATE OF SOUTH CAROLINA)

County of Spartanburg)

J'Corey Suave Hull-Kilgore, 340853)
Applicant,)

vs.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

Case No.:

**APPLICATION FOR
POST-CONVICTION RELIEF**

1. Place of detention: Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010.
2. Name and location of Court that imposed sentence: Spartanburg County Court of General Sessions
3. Name(s) of co-defendant(s) (if any):
 - (a) James Hull-Kilgore
 - (b) Dimitris Reid
4. The indictment number or numbers upon which and the offenses for which sentence was imposed:
 - (a) Murder: 2009GS4204486
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) May 21, 2010: life imprisonment for murder.
6. A finding of guilty was made after a jury trial.
7. The applicant appealed from judgment of conviction and the imposition of sentence.
8. (a) The name of the Court to which applicant appealed:
 - i. South Carolina Court of Appeals
- (b) The result in the Court to which applicant appealed:
 - i. Appeal dismissed.

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 SPARTANBURG COUNTY
 J. L. BLAUGLEY

(c) The date of such result:

i.

(d) Citation of any written opinions or orders entered pursuant to such disposition:

i.

9. Not applicable.

10. & 11. GROUND FOR RELIEF WITH SUPPORTING FACTS

10(a):: **Applicant's sentence of life without parole, imposed for a crime he committed when he was a juvenile, violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution.**

11(a): **Supporting facts:** In *Miller v. Alabama*, the United States Supreme Court held that mandatory sentences of life without parole for juvenile offenders violate the Eighth Amendment to the United States Constitution. *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012). While the Court in *Miller* was not required to explicitly address whether a life without parole sentence is under all circumstances constitutionally excessive when imposed upon a juvenile offender, there can be no real doubt that the Court will outlaw such sentences when that question is squarely presented to it. Such a rule follows inexorably from the combination of the steady evolution in standards of decency rejecting life without parole for juveniles for non-homicides and mandatory life without parole sentences in homicide cases, and the principles already established by the Supreme Court *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. ___, 130 S.Ct. 2011 (2009), and *Miller* itself.

To be valid under the 8th Amendment, a punishment must comport with the "evolving standards of decency that mark the progress of a maturing society." *Miller*, 132 S. Ct. at 2478 (internal quotations omitted). Mercy towards the guilty is one form of decency, and a maturing society can abandon harsh punishments views as "unnecessary or unjust." *Id.* The inquiry into the validity of punishment relies heavily upon legislative enactments already expressed by the states, and the trajectory of such judgments at the time the reviewing court conducts the Eighth Amendment analysis. *Id.* at 2459.

In *Graham*, the Supreme Court spoke of national consensus¹ and noted that six jurisdictions² did not allow life without parole sentences for any juvenile

¹ The Court has repeatedly stated that, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham*, 130 S.Ct. at 2023; *Atkins*, 536 U.S. at 312.

² The Court referred to Alaska, Colorado, Montana, Kansas, Kentucky, and Texas. *Graham*, 130 S.Ct. at Appendix III.

limited control over their own environment," lack maturity and responsibility, and are thus inclined toward "recklessness, impulsivity and needless risk-taking." *Id.* Elaborating on the cruelty of imposing a life without parole sentence on a juvenile, the Court noted "the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. . . . We believe that incorrigibility is inconsistent with youth.'" *Miller*, 132 S.Ct. at 2469 (quoting *Roper*, 543 U.S. at 573); see also *Graham*, 130 S.Ct. at 2026-27; *Workman v. Commonwealth*, 429 S.W.2d at 378.

Significantly, "[n]othing the Court said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." *Miller*, 132 S.Ct. at 2465. Those characteristics are "evident in the same way, and to the same degree" in juveniles who commit homicide as they are in those who commit armed robbery, kidnapping or any other offense. *Id.* at 2465. In short, the constitutional difference between juvenile and adult offenders does not turn in any respect on the nature of the crime, and any purported distinction on that basis finds no support in the Court's recent decisions.

Finally, the Court also relied upon the difficulty of distinguishing between the "unfortunate" and the truly culpable offender: "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Graham*, 130 S.Ct. at 2030. Indeed, it is difficult, if not impossible, for even highly trained child psychologists and psychiatrists to differentiate juvenile offenders whose crimes are the product of permanent fixed character traits from those whose crimes are the result of circumstances and the transient qualities of youth.⁹ *Miller*, 132 S.Ct. at 2469 (citing *Roper*, 543 U.S. at 573, and *Graham*, 130 S.Ct. at 2026-27).

It is equally impossible for a judge or a jury to make such a determination. The potential for reform that is present in all juvenile offenders thus requires States to maintain the possibility of eventual release as a sentencing option. It would be constitutionally excessive to render a final, permanent judgment that a juvenile offender should never be released; a mechanism for future review must be available, because States cannot ignore the juvenile's "potential to attain a mature understanding of his own humanity." *Roper*, 543 U.S. at 573.

Applicant was 17 years old at the time of the offense and was sentenced to life imprisonment without the possibility of parole. Given the direction of the Supreme Court's juvenile sentencing decisions, the legal principles governing the sentencing of juvenile offenders, and the heightened capacity for change in all juvenile offenders, this Court should hold that Applicant's sentence violates both

⁹ See *Miller*, 132 S.Ct. at 2464 (referencing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. text rev. 2000); Steinberg & Scott 1015).

Supplement To 2013 CP 42 2002

10(B1) INEFFECTIVE ASSISTANCE OF TRAIL COUNSEL.

11(B2) FAILURE TO OBJECT/FAILURE TO MAKE THE RECORD SUFFICIENT FOR REVIEW.

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SPARTANBURG COUNTY

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PI. ROY E BLACKLEY

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the 8th Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution.

10(b): Applicant's sentence of life without parole violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution, because the proceedings which led to its imposition were both procedurally and substantively inadequate.

11(b): **Supporting Facts:** The proceedings which led to the imposition of Applicant's sentence of life without parole failed to comply with fundamental Eighth Amendment mandates:

Miller established a presumption against imposing a sentence of life without parole for juveniles. 132 S.Ct. at 2469 ("we require [a sentencer] to take into account how children are different . . ."). Applicant's sentencing procedure included no such presumption.

The Eighth Amendment requires particularized consideration of a juvenile defendant's character and background, and the circumstances of the offense. *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976) (plurality opinion). Applicant's sentencing procedure included neither the presentation nor the consideration of any mitigating evidence, and thus failed to satisfy the constitutional requirements of "individualized sentencing" and the "distinct set of legal rules" now applicable in juvenile homicide cases. *Miller*, 132 S.Ct. at 2466, 2468.

My Father got killed at my one year old Birthday party, at least that's what I was told. I never got to spend any time with him, so that left my mother on her own with three kids to take care of. My mother worked hard everyday but sometimes it still wasn't enough. I use to play on the basketball team at school and I did good in school. I only been locked-up one time when I was a juvenile, so I don't have an adult criminal record.

FACTS OF MY TRIAL: My first trial started Dec. 2, 2009 & ended Dec. 3, 2009. I went before The Honorable C. Burnett, III. I had a mistrial on the murder charge & I got found not guilty of Armed Robbery. At both trials I feel that no witnesses were credible witnesses because investigator Russell Porter admitted that he threatened every one before they wrote statements. Then on top of that, no evidence was leaked to me.

Since I came to SCDC, I have gotten my GED & two trades (Carpentry & Welding). I have been working in the kitchen for a good minute. Also I got my work keys too.

Also, I have never received my full motion of discovery. I found out there was a gun in my case, two months before I went to my first trial. Plus I don't know how the gun ever got put into evidence. I feel that my second trial was set up because they never had any evidence on me. I had an alibi.

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SPARTANBURG COUNTY
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12. Applicant has not previously filed any other petition in Federal or State Courts, nor has applicant filed any petition for certiorari in the United States Supreme Court.
13. Not applicable.
14. The grounds set forth in (10) have not been previously presented to this or any other court, state or federal, in any petition, motion or application which Applicant has filed.
15. Not applicable.
16. The grounds set forth in (10) have not been previously presented because they were not appropriate issues for direct appeal or for a petition for a writ of certiorari to the United States Supreme Court. Furthermore, these grounds rely on newly established Supreme Court precedent in *Miller v. Alabama*, 567 U.S. ____ (2012).
17. Applicant was represented by counsel during his trial, sentencing, and his appeal from judgment of conviction or the imposition of sentence.
18. (a) Name and address of each attorney who represented Applicant:
- i. Clay Allen, 366 North Church Street, Spartanburg, SC 29303.
 - ii. Robert M. Dudek, 1330 Lady Street, Suite 401, Columbia, SC 29201.
- (b) Proceedings at which each such attorney represented Applicant:
- i. Allen represented Applicant during his ^{trial} and at sentencing.
 - ii. Dudek represented Applicant during his 2010 appeal from sentence.
19. Applicant seeks relief from his convictions and sentence.
20. Applicant is not under sentence from any other court.

Respectfully submitted,

April 30, 2013

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 MAY -6 AM 10:40
M. HOFF BLANCHLEY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

VERIFICATION

I, J'COREY SUAVE HULL-KILGORE, 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 challenged in this application; and that the matters and allegations therein set forth are true.

J'Corey Hull-Kilgore
 J'Corey Suave Hull-Kilgore, Applicant

Sworn to and subscribed before me this
 30 day of April, 2013.

Debra Sura
 Notary Public.

My Commission Expires: 11-4-2015

FILED
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 SPARTANBURG COUNTY
 2013 MAY -6 AM 10:40
 H. MERE BLAUMLEY

2013-CP-42-2002

STATE OF SOUTH CAROLINA
 COUNTY OF Spartanburg
 J'Corey Suave Hull-Kilgore, 340853

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

Case No. _____

**MOTION AND AFFIDAVIT TO
 PROCEED IN FORMA PAUPERIS**

I, J'Corey Suave Hull-Kilgore, being duly sworn, state that I am the Applicant in this action, and that I do not have the funds to pay the costs of filing and service. I hereby apply for leave to proceed in this action without prepayment of fees or costs.

J'Corey Hull-Kilgore
 Applicant

SWORN to and subscribed before me this

30 day of April, 2013.

Debra Sine
 Notary Public

My Commission Expires: 11-4-2015

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2013 MAY -6 AM 10:40
 H. MORT O'CONNLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
J'Corey Hull-Kilgore, #340853,	)	2013-CP-42-2062
	)	
Applicant,	)	
	)	MOTION TO HOLD IN ABEYANCE
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, by and through undersigned counsel, making a Motion to Hold in Abeyance, would respectfully show unto this Court:

1. The matter is before the Court by way of post-conviction relief (PCR) action filed May 6, 2013;

2. One of the allegations set forth in the PCR application is that the United States Supreme Court opinion in Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455 (2012) requires the grant of post-conviction relief because Applicant was a juvenile when he committed the underlying crime for which he was sentenced to life imprisonment without parole;

3. Respondent submits this matter should be held in abeyance until the South Carolina Supreme Court has decided the case of Aiken v. Byars, Appellate Case No. 2012-213286, which is pending in the South Carolina Supreme Court's original jurisdiction. See S.C. Const. Art. V, § 5; Rule 245, SCACR. In Aiken, the issues being raised in the Petition for a Writ of Certiorari concern whether Miller should extend to all sentences of life imprisonment without parole for juvenile defendants or alternatively whether such defendants are entitled to a new sentencing hearing. As the Court's decision in Aiken will likely be dispositive of the Miller issue raised in the instant case, the instant case should be held in abeyance pending a final

decision in Aiken;

4. Respondent submits all motions for either discovery or funding for investigation should also be held in abeyance until the Aiken decision is rendered;
5. Respondent reserves all defenses and the right to file a full Return as necessary;
7. Respondent respectfully requests the Motion to Hold in Abeyance be granted.

Respectfully submitted,

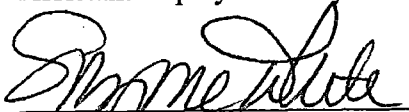
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

By:



Attorneys for Respondent

P.O. Box 11549

Columbia, S.C. 29211

Sept. 26, 2013

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS
) SEVENTH JUDICIAL CIRCUIT

J'Corey Suave Hull-Kilgore,

2013-CP-42-2062

)
)
) Applicant,

)
)
) v.

) CERTIFICATE OF SERVICE BY MAIL
)
)

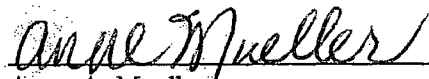
)
) State of South Carolina,

)
)
) 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 Respondent's Motion to Hold in Abeyance in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

J'Corey Suave Hull-Kilgore, SCDC No. 340853

Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina 29010



Anne A. Mueller
Legal Assistant for the Respondent

DATED this 20th day of September, 2013.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

J'Corey Suave Hull-Kilgore, #340853,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
IN THE SEVENTH JUDICIAL CIRCUIT

C/A No.: 2013-CP-42-2062

**RETURN AND PARTIAL
MOTION TO DISMISS**

This matter comes before this Court by way of an Application for Post-Conviction Relief (PCR) filed November May 6, 2013. Respondent filed a Motion to Stay the Proceedings of the Application for Post-Conviction Relief on or about September 20, 2013, pending the outcome of Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). Respondent, now making its Return and Partial Motion to Dismiss, would respectfully show unto this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the August 2009 term of the Spartanburg County Grand Jury for murder (09-GS-42-4486). Applicant was represented by Clay T. Allen, Esquire. Applicant proceeded to trial before the Honorable J. Derham Cole and a jury May 18-20, 2010. The jury convicted Applicant as indicted and Judge Cole sentenced him to confinement for life.

A timely notice of appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. J'Corey Hull-Kilgore,

Op. No. 2012-UP-531 (S.C. Ct. App. filed September 19, 2012). The court of appeals returned the remittitur to circuit court on October 5, 2012.

Respondent attaches and incorporates with its Return the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript and appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Applicant's sentence of life without parole, imposed for a crime he committed when he was a juvenile, violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution.
2. Applicant's sentence of life without parole violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution because the proceedings which led to its imposition were both procedurally and substantively inadequate, in that:
 - a. The proceedings which led to the imposition of Applicant's sentence of life without parole failed to comply with fundamental Eighth Amendment mandates pursuant to Miller v. Alabama.
3. Ineffective Assistance of Counsel, in that:
 - a. Counsel failed to object and failed to make the record sufficient for review.

III.

Respondent submits the allegations (numbers 1 & 2) related to Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455 (2012) must be dismissed. On November 12, 2014, the South Carolina Supreme Court held sentences of life without the possibility of parole that were imposed on juveniles violated the Eighth Amendment under Miller and that those individuals are entitled to

resentencing pursuant to the United States Constitution. Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). The South Carolina Supreme Court specifically ordered “any individual affected by our holding may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced.” Id. at 545, 765 S.E.2d at 578 (emphasis added). As such, any challenges under Miller are not properly heard in a PCR action and this allegation must be summarily dismissed.¹

IV.

Respondent asserts that Applicant’s allegation of ineffective assistance is without merit. The Respondent asserts the Applicant’s attorney rendered effective assistance well within the standard of “reasonableness within professional norms” for a defense attorney.

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel

¹ Respondent notes this case has been held in abeyance pending the resolution of Aiken v. Byars. As the United States Supreme Court denied the petition for writ of certiorari on June 1, 2015, this matter is no longer stayed.

"rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

V.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by Respondent at an evidentiary hearing. S.C. Code Ann. § 17-27-10 *et seq*; Rule 71.1, SCRCP. Additionally, Respondent will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code Ann. §17-27-50. All claims should be made well in advance of the PCR hearing by counsel of record. If Applicant has an attorney appointed, the attorney, and not the inmate, is the

only individual authorized to file amendments. Rule 11, SCRCP. Filings by inmates will not be considered at the PCR hearing.

VI.

Each and every allegation contained within the Application that is not expressly admitted, qualified, or explained in this Return is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the allegation of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ALICIA A. OLIVE
Assistant Attorney General

By 
ATTORNEYS FOR RESPONDENT

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

February 11, 2016.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
J'Corey Suave Hull-Kilgore, #340853,	)	C/A No.: 2013-CP-42-2062
	)	
Applicant,	)	AMENDED RETURN AND MOTION
	)	FOR MORE DEFINITE STATEMENT
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before this Court by way of an Application for Post-Conviction Relief (PCR) filed November May 6, 2013. Respondent filed a Motion to Stay the Proceedings of the Application for Post-Conviction Relief on or about September 20, 2013, pending the outcome of Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). Respondent made a Return and Partial Motion to Dismiss on February 11, 2016. Respondent, now making its Amended Return and Motion for More Definite Statement, would respectfully show unto this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the August 2009 term of the Spartanburg County Grand Jury for murder (09-GS-42-4486). Applicant was represented by Clay T. Allen, Esquire. Applicant proceeded to trial before the Honorable J. Derham Cole and a jury May 18-20, 2010. The jury convicted Applicant as indicted and Judge Cole sentenced him to confinement for life.

A timely notice of appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. J'Corey Hull-Kilgore, Op. No. 2012-UP-531 (S.C. Ct. App. filed September 19, 2012). The court of appeals returned the remittitur to circuit court on October 5, 2012.

Respondent attaches and incorporates with its Return the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript and appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Applicant's sentence of life without parole, imposed for a crime he committed when he was a juvenile, violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution.
2. Applicant's sentence of life without parole violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution because the proceedings which led to its imposition were both procedurally and substantively inadequate, in that:
 - a. The proceedings which led to the imposition of Applicant's sentence of life without parole failed to comply with fundamental Eighth Amendment mandates pursuant to Miller v. Alabama.
3. Ineffective Assistance of Counsel, in that:
 - a. Counsel failed to object and failed to make the record sufficient for review.

III.

Respondent submits the allegations (numbers 1 & 2) related to Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455 (2012) must be dismissed. On November 12, 2014, the South Carolina

Supreme Court held sentences of life without the possibility of parole that were imposed on juveniles violated the Eighth Amendment under Miller and that those individuals are entitled to resentencing pursuant to the United States Constitution. Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). The South Carolina Supreme Court specifically ordered “any individual affected by our holding may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced.” Id. at 545, 765 S.E.2d at 578 (emphasis added). As such, any challenges under Miller are not properly heard in a PCR action and this allegation must be summarily dismissed.¹

IV.

Respondent asserts that Applicant’s allegation of ineffective assistance is without merit. The Respondent asserts the Applicant’s attorney rendered effective assistance well within the standard of “reasonableness within professional norms” for a defense attorney.

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at

¹ Respondent notes this case has been held in abeyance pending the resolution of Aiken v. Byars. As the United States Supreme Court denied the petition for writ of certiorari on June 1, 2015, this matter is no longer stayed.

2065). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

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 624. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

V.

Respondent also moves for a more definite statement. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Applicant alleges that Counsel was ineffective for failing to object and preserve the record for review. Applicant

has wholly failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his claims are based. Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application well in advance and set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing.² Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

VI.

Applicant must specify any claims she intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be considered 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, SCRCF. 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), SCRCF.

VII.

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

² Respondent requests Applicant provide Respondent with an amendment specifically setting forth the factual grounds for his allegations no later than two weeks prior to the scheduled hearing.

VIII.

WHEREFORE, having made its Return and Motion for a More Definite Statement, Respondent requests that Applicant amend his application to set forth the factual grounds supporting his allegation of ineffective assistance of counsel. Respondent further requests an evidentiary hearing be held solely on the claims of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

ALICIA A. OLIVE
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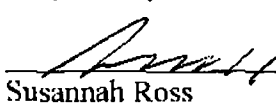
August 30th, 2016.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2016 SEP -2 PM 9:53
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
J'COREY HULL-KILGORE	)	
APPLICANT,	)	
	)	APPLICATION ADDENDUM
VS.	)	
	)	
THE STATE OF SOUTH CAROLINA	)	
	)	CASE NO: 2013-CP-42-2062
RESPONDENT.	)	
	)	

This matter comes before the Court by way of application of post conviction relief filed May 6, 2013, alleging ineffective assistance of trial counsel. A Return was made on August 30, 2016, requesting a more definite statement of the allegations and a hearing on the allegation of ineffective assistance of counsel. This application is intended to incorporate Mr. Hull-Kilgore's application and add the allegations of ineffective assistance of counsel in the failure to adequately advise, investigate, preserve the record, request charges for self-defense or accident, and object to the assistant solicitor's comment in closing that his job is to find the truth and seek justice.

Respectfully submitted,


 Susannah Ross
 Attorney for the Applicant
 330 E. Coffee St.
 Greenville, SC 29601
 (864) 242-0029

Greenville, South Carolina
 This 26 day of October 2016

2016 NOV -1 AM 9:30
 M. HOPE BLAUGLE

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1 J'COREY HULL-KILGORE VS. THE STATE OF SOUTH CAROLINA

2 THE COURT: All right. Attorney General.

3 MS. OLIVE: May it please the Court, Your Honor?

4 THE COURT: Yes, ma'am.

5 MS. OLIVE: This is the case of J'Corey
6 Hull-Kilgore versus State. This is Case Number
7 2013-CP-42-2062. Your Honor, Mr. Hull-Kilgore was
8 indicted in 2009 for murder. He was represented by Clay
9 Allen on those charges. He proceeded to trial May 18th
10 through 20th, 2010. The jury convicted him as indicted
11 and Judge Cole sentenced him to confinement for life.

12 He did appeal his conviction and an appeal was
13 perfected. The South Carolina Court of Appeals affirmed
14 his conviction and sentence in an order, an unpublished
15 opinion filed September 19th of 2012. Your Honor, he
16 filed this application for postconviction relief on
17 May 6th, 2013, alleging ineffective assistance of
18 counsel, in addition to claims under Miller versus
19 Alabama.

20 Your Honor, just for the Court's knowledge, the
21 State did file a return -- well, initially that
22 matter -- excuse me. The State filed a return and
23 motion for more definite statement. The State moved to
24 dismiss the Miller versus Alabama claim on the basis
25 that the Aiken v. Byar's decision which was 410 SC 534

1 issued in 2014, provided relief in the form of
2 resentencing for those sentenced to a life sentence as a
3 juvenile.

4 Your Honor, that is currently pending in General
5 Sessions court. Mr. Hull-Kilgore has been appointed an
6 attorney on that, on the resentencing. As far as I
7 know, the actual resentencing has not been scheduled
8 yet. So in this postconviction relief action he is, to
9 my understanding, is going forward on ineffective
10 assistance of counsel allegations.

11 Ms. Susannah Ross, who represents Mr.
12 Hull-Kilgore, did file two application amendments which
13 should be in your judge's packet, Your Honor, specifying
14 those allegations of ineffective assistance. Your
15 Honor, one of those addendum does allege due process
16 violations; however, there is no specificity with regard
17 to that claim. Therefore, the State would move to
18 dismiss that allegation for failure to state a prima
19 facie claim.

20 And, Your Honor, at this time I would turn it
21 over to Ms. Ross. Mr. Hull-Kilgore is present in the
22 courtroom today.

23 THE COURT: All right. Ms. Ross, happy to hear
24 from you. This is the case that we exchanged some
25 e-mails on last week, correct, or is that a different

1 case?

2 MS. OLIVE: In regards to the ---

3 THE COURT: I think you had -- did you initially
4 seek a continuance on this matter so that -- or am I
5 thinking of a different -- that's the one for tomorrow?

6 MS. ROSS: That's a different one.

7 THE COURT: Okay. All right, I'm sorry. I'm
8 sorry.

9 MS. OLIVE: That's okay.

10 MS. ROSS: But that is an interesting issue
11 whether should we have a stay until the resentencing. I
12 guess that would go to possibly his decision to go
13 forward whether he gets life again or not.

14 THE COURT: But do you know if -- do you know if
15 that has been set?

16 MS. ROSS: I do not. I know counsel was just
17 appointed despite that. I think Clay Allen might be
18 able to address that.

19 THE COURT: Do you have any word on that
20 Mr. Allen?

21 MR. ALLEN: Your Honor, I just have been
22 appointed. Mr. Morin, Michael Morin, has agreed to
23 represent him. I saw Mr. Morin yesterday, who tells me
24 he just got the official order appointing him.

25 THE COURT: So it's going to be a year or so from

1 now probably.

2 MR. ALLEN: I don't know what their timetable is,
3 but that's my -- but, yeah, it's -- yes, sir, it's gonna
4 be a while.

5 THE COURT: All right.

6 MR. ALLEN: I don't think a scheduling order has
7 been done in that case yet since it's just appointed an
8 attorney.

9 MS. OLIVE: And, Your Honor, if I may speak just
10 in regards to any motion to stay. And in candor with
11 the Court I have had this discussion with people in my
12 office as well to determine, because certainly Mr.
13 Hull-Kilgore is not the only applicant we have in this
14 situation.

15 THE COURT: Right.

16 MS. OLIVE: But in regards to his specific case,
17 he has not yet had a resentencing. He's challenging the
18 underlying conviction.

19 THE COURT: I would be inclined to really kind of
20 go ahead and move forward. And, I mean, one of two
21 things will either happen. If the Court grants his
22 application for postconviction relief, then he's kind of
23 back to square one anyway. It was a trial, so he could
24 either try and negotiate a plea or he can proceed to
25 trial and he's in no worse situation than he was when he

1 initially had his case tried six years ago plus. I
2 think it was six years ago, whatever the case may be.

3 MS. OLIVE: That's, that's correct, Your Honor.

4 THE COURT: In the alternative, if the Court
5 denies his application for postconviction relief and he
6 is resentenced in a manner that he thinks is more just
7 or equitable, he could always abandon his appeal of the
8 PCR at a later point in time. So, I mean, the Court's,
9 I've got an either or -- I've got an either or option on
10 this case and either way Mr. Kilgore, and perhaps even
11 the State to a certain extent, have options regardless
12 of what the Court elects to do. So why don't we move
13 forward.

14 MS. ROSS: Yes. And we're prepared to go forward
15 at this time. I just want to add into the procedural
16 history of this. There was also a prior trial in front
17 of a different judge prior to the May, 2010, trial.
18 Mr. Hull-Kilgore was tried for murder and armed robbery.
19 He was -- the jury was hung on the murder and he was
20 acquitted on that armed robbery. And that was prior to
21 this trial.

22 And that would go to one of our issues today,
23 which is issue preclusion which was argued to some
24 degree. Mr. Allen did mention Ashe v. Swenson and
25 talked about collateral estoppel in that the State's

1 witnesses were referencing the armed robbery during this
2 murder trial that Mr. Hull-Kilgore had been acquitted of.

3 However, Mr. Allen did not argue Yeager v. U.S.,
4 which was a recent opinion at that time, which was more
5 directly on point and did not attempt to argue issue
6 preclusion or double jeopardy to present -- prevent the
7 murder trial from going forward at all, nor did he use
8 that to argue that. Though, certainly the robbery
9 couldn't be referred to, but then the gun itself could
10 not be referred to either since that would be an element
11 of the armed robbery. I can get into the full argument
12 at the end.

13 There was also an issue about voluntary
14 manslaughter. Mr. Allen argued for that charge, but did
15 not, did not, again, argue sort of the issue preclusion.
16 And it seems like on Page 439 the judge's reasoning is
17 all based on the conflict and argument and such that he
18 sees as part of the armed robbery could not be used as
19 something that would add to a heat of passion from
20 voluntary manslaughter.

21 But within that reasoning, if Mr. Hull-Kilgore
22 had been acquitted of the armed robbery, that should not
23 be part of the judge's factual consideration in denying
24 a voluntary manslaughter charge. And I'll get into that
25 later as well.

1 There are also a number of failure to request
2 self-defense, accident or involuntary manslaughter.
3 There's no motion to reveal the deal.

4 Also, a juvenile record was used against Mr.
5 Hull-Kilgore. Now, while under the rules of evidence
6 that is allowed, we'd argue it's unconstitutional
7 because juvenile's don't enjoy the constitutional
8 protections like a trial by jury that adults enjoy, so
9 that should not have been used against this juvenile in
10 his, in his trial. And that was made worse because the
11 State referred to it in closing.

12 So that's sort of the basis of our argument.
13 While I did not initially, we just said ineffective
14 assistance of counsel. We'd also include appellate
15 counsel simply for the issue of not failing to brief the
16 issue preclusion in his brief.

17 I did talk to Bob Dudack about that last week. I
18 did not feel the need to subpoena him. I think the
19 record speaks for itself that that was not a briefed
20 issue. I've got sort of a rough draft outline of what I
21 just said if that will help.

22 THE COURT: That may be helpful, thank you.

23 MS. ROSS: I put notes on it. It was really for
24 me, so ignore my ---

25 THE COURT: That's quite all right.

1 MS. ROSS: And it has some page references that I
2 will get into as well.

3 At this time we would call Mr. -- excuse me, I
4 did also want to argue due process violations that would
5 go into, again, where Judge Cole seems to be weighing
6 the facts of an acquitted armed robbery in his
7 consideration not to give a voluntary manslaughter
8 charge. I'd argue that he's being a trier of the fact,
9 which was the jury's role and would violate separation
10 of powers. And then also we've got the double jeopardy
11 Yeager issue, again, as a due process argument.

12 So at this time I would call J'Corey
13 Hull-Kilgore.

14 THE COURT: Sir, come on up and have a seat over
15 here.

16 (Whereupon, witness comes forward.)

17 All right. If you'll just raise your right hand
18 for me, please. (Complies.)

19 Swear or affirm the testimony you're about to
20 give is the truth?

21 THE DEFENDANT: It's the truth.

22 J'COREY SUAVE HULL-KILGORE,
23 having been duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MS. ROSS:

1 Q. Okay. J'Corey, how old are you now?

2 A. Twenty-five.

3 Q. When this incident occurred how old were you?

4 A. Seventeen.

5 Q. And, and when you were tried how old were you?

6 A. Nine -- well, the first -- 19. Both times 19.

7 Q. How far did you go in school?

8 A. Tenth grade. I made it all the way through tenth
9 grade.

10 Q. Okay.

11 A. But I didn't have my GED since I've been at the
12 county when I first came down (sic).

13 Q. Okay. And -- but you didn't have a high school
14 diploma or anything back then?

15 A. No, ma'am.

16 Q. Had you graduated from high school?

17 A. No, ma'am.

18 Q. And for some reason I thought you were 16, but
19 you're saying you were 17 at the time of the incident?

20 A. Yes, ma'am.

21 Q. Okay. Now, can you just briefly explain. We've
22 gone over it a little bit. So when was your first
23 trial?

24 A. December the 2nd, 2009.

25 Q. And what happened at that trial?

1 A. I got found not guilty on armed robbery, had a
2 mistrial on the murder charge.

3 Q. Who represented you at that trial?

4 A. Clay Allen.

5 Q. And how long or how many times had you met with
6 him before? How long had he represented you at that
7 time?

8 A. One, I think one time in October.

9 Q. Okay.

10 A. No, it was two times because I went back after
11 October.

12 Q. And this trial was nearly two years after the
13 incident; is that correct?

14 A. Yes, ma'am.

15 Q. And who was representing you during the majority
16 of those two years?

17 A. They had Kathleen Hodges at first. Then they
18 switched to Clay Allen when I bonded out.

19 Q. When was that?

20 A. I bonded out August the 7th, 2009.

21 Q. Did Mr. Allen go over the evidence against you
22 with you?

23 A. He -- I found out I had a gun in my case October,
24 when I first went to go meet him.

25 Q. Okay. And that was two months before your trial?

1 A. Yes, ma'am.

2 Q. Did he attempt to investigate your case?

3 A. I tell him people to go talk to, but to me I
4 don't feel like he had attempted to investigate nothing.

5 Q. Okay. How so? What did he not do?

6 A. I was telling him about a woman whose house I had
7 went to when I left my house. He ain't never go there.
8 He ain't never do it. Like two years later I'm still
9 telling him about it and he still never went there. By
10 the time he did decide to go there, they had done moved
11 already.

12 Q. Okay. And had you told Kathleen Hodges about
13 these alibi witnesses?

14 A. I ain't, I ain't never get to talk to her. She
15 ain't never come talk to me or nothing.

16 Q. So for two years essentially no one was really
17 talking to you?

18 A. No, ma'am.

19 Q. And so you felt that there were alibi witnesses
20 out there that had disappeared --

21 A. Uh-huh.

22 Q. -- now just because they didn't investigate in a
23 timely manner?

24 A. Yes, ma'am.

25 Q. Was Kathleen Hodges with the Public Defender's

1 office at the time?

2 A. Yes, ma'am.

3 Q. Did you -- so can you say how many times you
4 think you met with Clay Allen?

5 A. I would say probably two times and then he took
6 probably a year to get the armed robbery charge. And
7 after that it was time for me to go to trial.

8 Q. Okay. What do you mean he brought you here to
9 get -- did you have a direct indictment here in the
10 courtroom or did they just hand you an indictment?

11 A. They just, they gave me the armed robbery charge.
12 I don't even know how they did it. I ain't, see I ain't
13 know too much, but... I don't know how they did it.
14 They just told me to sign a piece of paper.

15 Q. Okay. Now, did you ever get a plea offer?

16 A. That was part of the armed robbery. They told me
17 plead to murder, murder 30 years day-for-day or take an
18 armed robbery charge.

19 Q. Okay. And as far as your alibi defense, did, did
20 you ever take a lie detector test or were you ever asked
21 to?

22 A. No, ma'am.

23 Q. Did you ever ask for a new lawyer?

24 A. No, ma'am.

25 Q. And at the time -- now you know a little bit more

1 about the law, but at the time you were pretty
2 unsophisticated, right?

3 A. Yes, ma'am.

4 Q. And you were a juvenile, correct?

5 A. Yes, ma'am.

6 Q. And did your case start in juvenile court and get
7 waived up or do you even know?

8 A. No, ma'am. They just straight General Sessions.

9 Q. Okay. All right. I have no further questions.

10 THE COURT: Anything Ms. Olive?

11 MS. OLIVE: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MS. OLIVE:

14 Q. Mr. Hull-Kilgore, you stated that you were a
15 juvenile?

16 A. Yes, ma'am.

17 Q. So you were 17 years old?

18 A. Yes, ma'am.

19 Q. Okay. And you said you had alibi witnesses?

20 A. Yes, ma'am.

21 Q. Are those witnesses here today?

22 A. I don't see any.

23 Q. So you received a plea offer 30 years and you
24 declined that?

25 A. Yeah. It was 30 years or armed robbery charge.

1 Q. So the State was -- is it your testimony that the
2 State was willing to dismiss the murder charge?

3 A. No, ma'am. They ---

4 Q. Okay. So they offered you a 30 year ---

5 A. I was supposed to plead to murder 30 years --

6 Q. And they ---

7 A. -- day-for-day.

8 Q. Sorry.

9 A. I was supposed to plead to murder 30 years
10 day-for-day --

11 Q. And they wanted ---

12 A. -- or take an armed robbery charge.

13 Q. What do you mean or take an armed robbery charge?

14 A. They was gonna indict me on an armed robbery
15 charge. They was gonna put the armed robbery charge
16 with the murder charge.

17 Q. Okay. But is this before or after your first
18 trial?

19 A. This was before my first trial.

20 Q. And you were ultimately indicted and tried for
21 that armed robbery in that trial, right?

22 A. Yes, ma'am.

23 Q. So did you receive a subsequent plea offer for
24 this, for this trial?

25 A. You mean like, what do you mean by that?

1 Q. After you were -- so you were -- were there any
2 other offers on the table before -- between your first
3 trial and this trial?

4 A. I think he came with -- he asked me would I plead
5 to involuntary manslaughter, but he ain't really come
6 and say that they had it on the table. He just asked me
7 would I plead to it.

8 Q. And by he do you mean your attorney?

9 A. Mr. Clay Allen. I told him no because I didn't
10 do anything.

11 Q. Okay. So your testimony at trial was that you
12 did not do anything?

13 A. Uh-huh.

14 Q. That you did not shoot this individual?

15 A. Yes, ma'am.

16 MS. OLIVE: Okay, thank you. That's all the
17 questions I have.

18 THE COURT: All right, sir, you may -- anything
19 else?

20 MS. ROSS: I just have one.

21 THE COURT: Go ahead.

22 REDIRECT EXAMINATION

23 BY MS. ROSS:

24 Q. And we've discussed your alibi witnesses and what
25 have I told you about that?

1 A. You told me there's too many that say that I was
2 present at the time.

3 Q. Okay. What have I told you about my ability to
4 find alibi witnesses ten years later?

5 A. I mean, not just eight years too is really too
6 late.

7 Q. Okay. And -- okay. That's all I've got.

8 THE COURT: All right. Sir, thank you. You can
9 step down.

10 (Whereupon, witness leaves witness stand.)

11 Call your next witness.

12 MS. ROSS: We call Clay Allen.

13 (Whereupon, witness comes forward.)

14 THE COURT: All right. Raise your right hand.

15 (Complies.)

16 Swear or affirm the testimony you're about to
17 give is the truth?

18 THE WITNESS: Yes, Your Honor.

19 CLAY ALLEN,

20 having been duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MS. ROSS:

23 Q. I'm gonna switch back and forth a little bit.
24 You've heard the history of the case that's been put
25 forward. Is that in fact what happened, the procedural

1 history of how this case went along?

2 A. Yes. I can't ---

3 Q. Can you clarify?

4 A. I was just looking in the file about any meetings
5 between Ms. Hodges and him, his original public
6 defender. So I don't know what happened from the time
7 we got appointed to his case. We got appointed to his
8 case in July of '08. He was arrested in May of '08.
9 And I don't know why it took us -- you know, sometimes
10 people say that they want lawyers or whatnot. I don't
11 know why it took us two months to pick this case up.

12 Q. Okay.

13 A. But we picked this case up and Kathleen Hodges of
14 my office was appointed to represent him originally.

15 Q. Okay.

16 A. In October of '09, I just wanted to illucinate
17 (sic) on this, the way I got involved. Ms. Hodges was
18 out sick for about a week and they wanted to try two
19 murder cases that she had, this one and another one,
20 later that month. And while she was out sick, Derrick
21 Bulsa, Deputy Solicitor, got me to go talk to the
22 administrative judge, Judge Couch.

23 And I called Mr. Hull-Kilgore. He agreed to the
24 change of attorneys, but told him we needed more time to
25 work on this case. And I got the case continued with

1 the -- I mean, I switched lawyers with the understanding
2 that the case needed to be continued. Judge Couch
3 agreed to that and that's how I got involved with the
4 case in October of '09.

5 Q. Okay. And then it was tried. When was the first
6 trial in front of ---

7 A. December of '09.

8 Q. Okay. And just about that first trial, do you by
9 any chance have the transcript of that trial?

10 A. Yeah. Do you want me to bring my -- I'll bring
11 the -- I do have the transcript, yes, but I have to step
12 down.

13 Q. Okay.

14 THE COURT: Go ahead.

15 (Whereupon, witness briefly leaves the witness
16 stand.)

17 MS. OLIVE: Your Honor, I would just generally
18 object to relevance at this point. We do not have the
19 transcript of the first trial.

20 MS. ROSS: Well ---

21 THE COURT: I think it's probably gonna relate to
22 the issue of preclusion that you were arguing earlier
23 or...

24 MS. ROSS: Well, it relates to cross-examining a
25 witness --

1 THE COURT: Oh, I understand that.

2 MS. ROSS: -- who was in the prior trial. And
3 this is the only point I'm gonna -- I intend to use it
4 for.

5 THE COURT: All right.

6 MS. OLIVE: Your Honor, I would just object at
7 this point. Just I -- since the State did not have this
8 transcript, the State has not been able to prepare to
9 address this issue of this other testimony. I'd just
10 like to put that on the record, that object, Your Honor.

11 THE COURT: All right. It's noted. If you want
12 a moment to look at the actual trial transcript after he
13 has testified I'll afford you that opportunity.

14 THE WITNESS: May I clarify my last answer?

15 THE COURT: Go ahead.

16 THE WITNESS: I have an excerpt of the transcript
17 from the first trial. I only asked the court reporter
18 to prepare me a transcript of the testimony of the
19 witnesses so I can use that for impeachment purposes on
20 the retrial.

21 BY MS. ROSS:

22 Q. And this -- this question goes to on Page 150 of
23 that expert, I believe -- excerpt that I copied from
24 your copy, I believe, Mr. Allen.

25 A. Okay. All right, thank you.

1 Q. Just referring to Page 150, Line 4. What did
2 Taquil Nabors or Penny Red say about the shooting?

3 A. Do you know -- well, the question I asked on
4 recross-examination: (Reading.) Do you know why Corey
5 shot Courtney? (Ends reading.) Corey being Mr.
6 Hull-Kilgore. Courtney being the individual that was
7 shot and killed.

8 And he -- and Mr. Nabors answered: (Reading.) I
9 don't know. It could have been self-defense. I don't
10 know why. I don't know. (Ends reading.)

11 Q. Okay. Is this a fair and accurate Xeroxed copy
12 of that page?

13 A. With the exception of the underline, yes.

14 Q. Yes, okay. And my, my notation on there as well.

15 A. Right.

16 Q. I don't think I did the underline, but it was
17 there when I copied it.

18 A. Right.

19 Q. And then um -- and then on the next page there's
20 reference to some testimony that came in at the other
21 trial.

22 A. Yes. About where he -- which pocket Courtney
23 Rogers had a gun in.

24 Q. Okay.

25 A. Let me see if we can explain it this way.

1 Q. Okay.

2 A. Taquil Nabors said that he -- this is getting
3 into the facts of the case. Courtney Rogers arrived at
4 the location, and I forgot the address, but at Sandra
5 Dandy's house. This was basically a liquor and drug
6 house, I think. I mean, it didn't really come out that
7 way, but there was a lot of liquor there. We think
8 people went there to use, smoke drugs. She said they'd
9 play games, you know, cards and whatnot. But Courtney
10 arrived. Taquil went up to Courtney's vehicle and said
11 he saw a gun. I want to say he saw Courtney with a gun.

12 Q. Uh-huh.

13 A. And that he put in a pocket (sic). And I was
14 trying to bring out in both trials that the pocket
15 Courtney had a gun in was not a regular pocket like
16 that's in the typical front of a pair of pants, but a
17 pocket, an additional pocket that was lower in the
18 pants. To explain why other witnesses testified that
19 Courtney was bent over at the time he got shot. So I
20 was trying to demonstrate that Courtney may have been
21 reaching for a gun.

22 Q. Okay. And that you did in the first trial.

23 MS. ROSS: I would offer this as Applicant's
24 Exhibit 1 at this time.

25 THE COURT: All right. Subject to the earlier

1 objection it'll be in evidence.

2 MS. ROSS: And I'd offer it in evidence.

3 (Whereupon, Applicant's Exhibit Number 1, Excerpt
4 of Transcript, was marked for identification.)

5 (Whereupon, Applicant's Exhibit Number 1 was
6 entered into the record.)

7 BY MS. ROSS:

8 Q. Now -- now, during the -- and that's my only
9 reference to the prior trial of Burnett other than just
10 generally it was a hung jury on the murder and a not
11 guilty on the armed robbery, correct?

12 A. That's correct.

13 Q. And during the, the trial in 2010 with Judge
14 Cole, you cross-examined Taquil Nabors with, with the
15 prior trial transcript to use to impeach him
16 essentially. You, you had that.

17 A. I had that available if he said anything
18 inconsistent with it, yes.

19 Q. And he -- and in that trial Taquil Nabors does
20 refer to digging in his pocket where he knew he had a
21 gun, correct?

22 A. Right. I was reviewing that portion of the
23 transcript. I mean, he kind of fought me, if you will,
24 on the specific location of where Courtney put the gun.
25 And I kept trying to get him to say you have to reach

1 down low in order to get it. And he kept arguing with
2 me and trying to say what he was seated when he saw the
3 gun. But eventually I was able to get him later on in
4 the cross-examination to acknowledge that it was in the
5 lower pocket of his pair of pants. So that if he
6 reached for the gun while standing, he would have had to
7 bend over.

8 Q. Correct. And that came out also on direct on
9 Page 214, Line 7 and 8.

10 A. 214?

11 Q. Where he says: (Reading.) And Courtney started
12 walking out the door and he was digging in his bottom
13 pocket. (Ends reading.)

14 A. Yes. And was he sort of leaning over while he
15 was doing that, yes.

16 Q. And it came in also on Page 229, Line 3.

17 A. Right.

18 Q. And again on Page 231, Line 3.

19 A. Yes.

20 Q. But at no time did you say it could have --
21 couldn't it have been self-defense or lead Taquil Nabors
22 to say something about self-defense as he had in the
23 prior trial.

24 A. No, I didn't. Initially I asked him, you know,
25 in the first trial, do you know why Courtney was shot or

1 why Corey shot Courtney or something. And that's when
2 he sort of blurted out, you know, it could have been
3 self-defense. You know, I don't know if a witness
4 technically can testify to a legal conclusion. So, you
5 know, like to say whether it was self-defense, I mean,
6 that's not up for a witness to testify to, to some
7 degree.

8 Q. Yeah, it's not a bad thing --

9 A. That's obvious ---

10 Q. -- to have in front of the jury. Yet, it's not a
11 bad thing to have in front of the jury, is it?

12 A. Oh, no, it's not a bad thing if you can get it.

13 Q. Okay. And just moving on. On Page 218, Line 18,
14 there was something about -- there was some confusion
15 about -- in response to Mr. Bulsa's question:
16 (Reading.) And you heard a shot and it was Corey's gun
17 that shot, right?

18 And then Taquil says: I ain't know. I ain't
19 know. I ain't know which gun it was at first till I
20 seen him running. (Ends reading.)

21 And you didn't really followup with that to say,
22 okay, there was more than one gun and someone else shot
23 or Courtney shot or anything, did you?

24 A. No. I mean, I think there was some testimony, if
25 I'm not mistaken, about a gun being taken. See what

1 happened was Courtney was shot and he ran out of the
2 house. And actually he ran down the block a little bit
3 and then took a side street and over a while where he
4 eventually collapsed. And I don't know if he had died
5 by the time EMS arrived or not, but some people were
6 around him when EMS and the law -- and officers arrived.

7 Initially everybody said they didn't know
8 anything about anything. And that's where we had a lot
9 of the cross-examination for impeachment. A lot of
10 people were initially saying they knew nothing about
11 nothing. And then after the police, in my view, started
12 saying, we're gonna -- you're gonna -- we're gonna
13 charge you with false statements and accessories and
14 whatnot, then they started changing their story. And
15 then most people knew a lot about everything it seemed.

16 But anyway, there was some discussion about a
17 gun. Somebody took a gun, we think, from Courtney and
18 gave to someone else or one of the other witnesses and
19 that kind of thing. So we're pretty sure, from the
20 testimony at least, that Courtney had access to a gun,
21 had a gun that day.

22 Q. So it's quite possible given the scenario that
23 you understood of the case that Taquil Nabors was saying
24 I wasn't sure whether it was Courtney's gun that shot
25 Corey or Corey's gun that shot Corey?

1 A. Right.

2 Q. Or that Corey -- Courtney was the one whose gun
3 shot?

4 A. Right.

5 Q. Okay. But that wasn't followed up? That didn't
6 come out --

7 A. No.

8 Q. -- in the transcript?

9 A. Oh, no.

10 Q. Now, just before you Page 352, Line 7. There's
11 something about didn't mean to. James Kilgore is
12 testifying, and that's Corey's brother. And he's
13 talking about talking to Corey over the phone and
14 something coming out. He said he didn't know, he didn't
15 mean to if he did shoot. And that is 352, Line 6
16 through 8.

17 A. Right. Yes, that was -- this was in response to
18 questions --

19 Q. From Mr. Bulsa.

20 A. -- from Mr. Bulsa.

21 Q. And you never requested accident or involuntary
22 manslaughter, did you?

23 A. I did not re -- that is correct. I did not
24 request accident or involuntary. Well, yeah, I did not
25 request involuntary.

1 Q. Okay. Now, but you did, however, request a
2 charge on voluntary. There's some discussion on that.
3 And I'll refer you on the record to Page 439.

4 A. Yes.

5 Q. And at that point the judge states there's no
6 evidence in the record of legal provocation or heat of
7 passion. And I've got a number of page references on
8 there, but would you agree if I put it on the record, on
9 Page 321, Line teen -- Line 19 and 322, Line 25 and 323,
10 Line 7, Line 19 and 21, all talk about a conflict?
11 They're all talking about enduring this conflict,
12 enduring this argument. And um ---

13 A. Okay. I'll need ---

14 Q. Let me let you go back and --

15 A. I can't --

16 Q. -- catch up to me.

17 A. I can't look 'em up that fast, but I'm sure the
18 record says what the record says.

19 Q. And um, and on page, back on Page 438 when you
20 were arguing this to Judge Cole saying, well, this
21 conflict, this arguing should be allowed to be legal
22 provocation, correct?

23 A. Okay.

24 Q. That's what you're asking for?

25 A. I think that's what I was trying to do. Uh-huh.

1 Q. Okay. And I'll refer you to Page 438, Line 8.

2 A. Yes. Judge Cole had asked if there were -- Judge
3 Cole thought there was no indication that Courtney and
4 Mr. Hull-Kilgore were in an argument. And I was telling
5 him that there was testimony about loud talking. Of
6 course there was testimony from Keban (phonetic)
7 Anderson about what sounded like a robbery going down,
8 or words to that effect.

9 Q. Uh-huh.

10 A. So...

11 Q. And so would you agree that the judge seems to be
12 analyzing this in a manner where he's saying an armed
13 robbery cannot be legal provocation?

14 MS. OLIVE: I would object. It calls for
15 speculation.

16 THE COURT: Okay. Overruled to the extent he can
17 answer it. I'll let him. He was there, so he's got a
18 better feel.

19 THE WITNESS: Sure. I mean, I think that's part
20 of the analysis.

21 BY MS. ROSS:

22 Q. Yet you just had a prior trial and
23 Mr. Hull-Kilgore was acquitted on that armed robbery.

24 A. Right.

25 Q. And at that point did you argue issue preclusion

1 to say you cannot consider this is armed robbery because
2 a jury has acquitted him on that charge? This arguing
3 and this conflict has to be considered independent of an
4 armed robbery charge since due to the acquittal?

5 A. I think, and I can't find it. I think there was
6 some point during the trial or the arguments, so maybe
7 it was around the directed verdict or something, I had
8 mentioned that.

9 Q. And I will refer you to page -- just moving on
10 with that issue, to Page 373, Line 18. This is where
11 you're arguing Ashe v. Swenson and arguing collateral
12 estoppel. And it's really --

13 A. Yes. That's also ---

14 Q. -- 372, 373, 374.

15 A. Okay. Yes, that's what I was referring to.
16 Thank you.

17 Q. Okay. And, and you were preserving your
18 objections to sort of continued -- or three or four
19 references to a robbery --

20 A. Right.

21 Q. -- throughout this murder trial. And that was
22 the very robbery that Mr. Hull-Kilgore was acquitted on,
23 correct?

24 A. That's correct.

25 Q. And yet you didn't argue Yeager v. U.S., which

1 was a newer Supreme Court case than Ashe v. Swenson.

2 A. No. I've looked through my -- I had a research
3 file on that issue and I don't have that case in there,
4 so I didn't -- I was not aware of that case.

5 Q. Okay. And at no point before trial did you argue
6 double jeopardy and issue preclusion to the extent of a
7 jury has made a finding on armed robbery; therefore, you
8 cannot only not refer to the robbery in any way, but you
9 cannot refer to the gun even in any way because that
10 issue would be -- did you make that argument?

11 A. No. I mean, you know, I do -- and it's not on
12 the record, and I should have known better. But I do
13 think we had a meeting prior to selection of the jury
14 with Judge Cole, as we typically do. And I think we had
15 some discussion in chambers about that. You know, how
16 much of the armed robbery, if any, they could go into
17 and that kind of thing. And I should have put it on the
18 record. But that's where we got into some of the
19 discussions.

20 You know, part of the problem is, and as I was
21 looking over some of the cases I had, research, I mean,
22 you know, when you get a situation where they're
23 acquitted of one and they're, they're not of the other
24 or they're being tried on a separate charge, and
25 sometimes it looks like the courts are looking at well

1 what was the issue that was the deciding factor. So I
2 didn't know or didn't think that I could legitimately
3 argue, well, you can't even mention that he didn't have
4 a gun because, you know, we don't really know why a jury
5 finds someone not guilty.

6 Q. Uh-huh.

7 A. You know, like specifically what helped. And
8 then if we're gonna say, well, you can't refer to any
9 element, then you could also say, well, you can't even
10 refer to the fact that he was there because, you know,
11 that was our defense, by the way, was alibi --

12 Q. Uh-huh.

13 A. -- in both trials. So if the jury is gonna find
14 him not guilty of murder -- I mean of armed robbery but
15 not of the other, I mean can you legitimately say where
16 you can't refer to the fact that he was even there? I
17 mean --

18 Q. Well ---

19 A. -- obviously if they were gonna rule that way on
20 the armed robbery then they're gonna look at it --

21 Q. Then it would be an --

22 A. -- the same way on the murder.

23 Q. -- inconsistent verdict or what is the word? I
24 think it's inconsistent verdict or something if ---

25 A. Right.

1 Q. And ---

2 A. And I -- excuse me, but I was just gonna say
3 that, you know, looking at it, I guess, fairly there
4 really wasn't very strong evidence in my opinion of an
5 armed robbery or of any robbery that anything was taken.
6 And that could have been the deciding factor in that
7 case. Whether or not the jury was torn as to whether or
8 not Corey was there or whether or not Corey was
9 elsewhere, I don't know. I mean ---

10 Q. Right. And you didn't do any followup after the
11 fact to find out the jury's reasoning or what their
12 reasoning was --

13 A. No.

14 Q. -- as to the verdict?

15 A. No, I didn't.

16 Q. As far as going back to Yeager v. United States,
17 and it's a long case, but it sets out sort of a
18 procedure for the judge to go through to try to analyze
19 whether they're going to analyze the swaying of issue
20 preclusion or not. Did Judge Cole go through any ---

21 A. I hate to tell you this, but I haven't read
22 Yeager versus United States. I'm not familiar with this
23 case at all.

24 Q. I haven't read it closely. I've read it a little
25 bit.

1 A. So...

2 Q. But if, in fact, that Supreme Court case has sort
3 of a weighing factor that the judge is to do before
4 making a determination of the issue of preclusion, do
5 you recall anywhere in the record that Judge Cole did
6 that?

7 A. No. No.

8 Q. And just following up on, did once he determined
9 that the gun and the robbery were gonna come in and be
10 out in front of a jury, you didn't request an
11 instruction or a charge saying another jury found Mr.
12 Hull-Kilgore not guilty of the charge of armed robbery?

13 A. No, I did not request that instruction. I don't
14 know if that would have been proper, quite frankly, to
15 even suggest to a jury that a result has been reached
16 one way or the other. I think what we were trying to do
17 was, and I think it was partially agreed to in chambers,
18 was not really to talk about, you know, an acquittal of
19 one charge. I can't quite remember now if, you know,
20 how we were dealing with the armed robbery. I think we
21 were -- they were trying to downplay the armed robbery
22 aspect in the second trial. In other words, not try to
23 go into so much of what was being said or like to get it
24 up or anything to that effect, but to basically get to
25 the actual events surrounding the, the shooting, if you

1 will.

2 Q. Okay. And, um, but in fact the armed robbery
3 came out there?

4 A. Yeah. I think, yes.

5 Q. And ---

6 A. I think Mr. Anderson mentioned it.

7 Q. Yeah, Kevon Anderson mentioned it. And then I
8 don't have a page number for that. But then he
9 responded. He talked about the robbery. And then he
10 went on to say I know he shot him, though he was not
11 supposedly a witness.

12 A. Right. Right.

13 Q. So that came out with Kevon Anderson. And just
14 moving on. Did, um, did you do a motion to reveal the
15 deal with Kevon Anderson or D'Angelo Miller?

16 A. I had had some -- yes. Yes. I, um, I don't know
17 if I did a motion or if it was strictly by e-mail. I'd
18 have to look and see. But I typically asked about that.
19 I think Mr. Bulsa's response to me was that there was no
20 specific agreement with anybody, which is a typical
21 response.

22 Q. Okay. And, in fact, D'Angelo Miller did not
23 testify at the first trial, did he? He was a new
24 witness in the second trial only; is that correct? I
25 know it's one of them, either Kevon Anderson or D'Angelo

1 Miller.

2 A. I'm looking at the index right now for that --

3 Q. Okay.

4 A. -- first one that we did. You said Miller?

5 Q. Yeah.

6 A. His, his name is not listed in the index.

7 Q. Okay. And I would just refer you to page, just
8 briefly, 202, Line 21. This is where Lakeisha Brewton
9 says that Miller left with her. It's 202, Line 21.

10 A. Okay.

11 Q. Well, I'm sorry, 202, Line 18 through 21. And
12 it's to your cross-examination.

13 A. Right.

14 Q. So that she says that she and D'Angelo Miller
15 left together and as they were leaving Courtney came up.
16 So you could infer from that that she's saying that Mr.
17 Miller was not in the house at all during any of the
18 time this went down because he left before Courtney went
19 inside.

20 A. That's, that's correct.

21 Q. And yet you didn't cross-examine Mr. Miller with
22 that issue, did you?

23 A. Uh.

24 Q. Or with Lakeisha's testimony that he ---

25 A. Well, you can't pit one witness against the

1 other, but she testified before he did. I mean, several
2 witnesses before he did.

3 Q. Yeah. And it's a small point, but that wasn't
4 mentioned in your cross of Miller or your closing, was
5 it?

6 A. Did I mention it in my closing?

7 Q. (Nods head up and down.)

8 A. I don't recall. Obviously my closing would be in
9 the record.

10 Q. Okay. Now, then I'm just gonna move on. Judge
11 Cole initially determined that the jury would not hear
12 about Corey's juvenile convictions, but then he changed
13 his mind on that based on Rule 609(e) and allowed the
14 juvenile convictions to be used.

15 A. I don't recall exactly what all happened around
16 that time, but...

17 Q. Okay.

18 A. But yes.

19 Q. Would that surprise you if that was the case and
20 the transcript reflects that?

21 A. No. I mean, it's whatever the transcript says.

22 Q. Okay. And, and at that point -- and, I'm sorry,
23 I didn't get the page number for that. You never argued
24 that that would be unfair because juveniles don't share
25 the constitutional protections of a jury trial like

1 adults do and so a juvenile conviction is inherently
2 different and thus shouldn't be used to impeach?

3 A. No, I never made that argument. You, you
4 mentioned that to me this morning. I'm, I'm not aware
5 that that's the law. Davis v. Alaska indicates that
6 juvenile adjudications can be used to impeach.

7 Q. And I'm just referring you to the State's
8 closing. You did not object during the body of the
9 State's closing, did you?

10 A. Apparently. I don't think so.

11 Q. And I refer you to Page 455. Well, let me start
12 at 454, Line 25 running into 455, Line 4. At that point
13 Mr. Bulsa argues that he deliberately left out what
14 Kevon Anderson saw. (Reading.) I truly believe he saw
15 it but perhaps in a different fashion because if you
16 recall, he probably had been surprised when I did this,
17 but I do it because my job is to find the truth and seek
18 justice. (Ends reading.)

19 Did you object at all to those comments?

20 A. I did not object to those comments.

21 Q. And, and earlier when referred to Kevon Anderson
22 talking about the armed robbery and then saying, I know
23 he shot him. So clearly that was not factual either
24 because Kevon Anderson did testify at Mr. Bulsa's direct
25 to what he saw he did.

1 A. Right.

2 Q. And, again, just another small matter on Page 458
3 in the closing. Mr. Bulsa goes into comparing the
4 witness James Hull to Corey Hull-Kilgore's records. And
5 so he starts arguing essentially who are you going to
6 believe, the defendant with his record or the witness
7 without his record? And that's on Page 458.

8 A. If you're talking between Lines 6 and 11?

9 Q. Yes, exactly.

10 A. Well, he also follows up the statement of the
11 defendant has a pending charge. He's got a criminal
12 record. Use that to assess credibility. I mean, if --
13 when he, when he follows it up with a comment, you can
14 consider the defendant's record as to the credibility.
15 That was the purpose of the admissibility of the
16 defendant's record to begin with was to impeach his
17 credibility. So I just didn't see that as being outside
18 the realm --

19 Q. All right. So you didn't object --

20 A. -- of fairness.

21 Q. -- and argue that it was essentially lowering
22 their burden of proof to attempt to do that? You didn't
23 object on the record, did you? I mean, I see your
24 argument, but, again, you didn't object to that comment
25 about the record?

1 A. No, I didn't. I mean, I guess at the time -- I
2 mean, I think when he says: (Reading.) The defendant
3 has got a criminal record, use that to assess -- then
4 use that to assess his credibility. (Ends reading.) I
5 didn't see that that was an improper comment --

6 Q. Okay.

7 A. -- to raise an objection.

8 Q. All right. I believe that -- those are -- just
9 to correct, I do have a reference on Page 323 to Line 21
10 as to Kevon's testimony. And I think that came in
11 before. But it's about the robbery and what he saw.
12 And that was just going to, despite what Mr. Bulsa said
13 in closing, he did have Kevon Anderson testify to what
14 he saw and truth and justice didn't keep him from
15 bringing that before the jury.

16 A. Right.

17 Q. Okay. I believe that's all I've got. Do you
18 have any questions?

19 MR. HULL-KILGORE: No.

20 MS. ROSS: I've got no further questions.

21 THE COURT: Ms. Olive.

22 MS. OLIVE: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MS. OLIVE:

25 Q. Good afternoon Mr. Allen.

1 A. Good afternoon. Good afternoon.

2 Q. Just by way of background, Mr. Allen, I just have
3 a few questions regarding how long you've been
4 practicing law, that sort of thing. How long have you
5 been practicing law?

6 A. Thirty-seven years today.

7 Q. And how much of that practice has been criminal?

8 A. Most of it. The first four years was in the
9 Army's Judge Advocate General's Corp for four years. I
10 did one year as a prosecutor and two years as a defense
11 attorney. A little bit of criminal defense in my
12 initial private practice in Gaffney. Assistant public
13 defender in Richland County for three years after that.
14 Assistant solicitor in Greenville County for four years
15 after that. Private practice in Greenville for about
16 ten years.

17 I was on the contract to do public defender type
18 work on a part-time basis. And then since 2001 I've
19 been with the, either the Spartanburg County Public
20 Defender's office and/or, beginning in 2008, the Seventh
21 Judicial Circuit Public Defender's office.

22 Q. Thank you. And you stated you became involved in
23 this case in October of 2009?

24 A. Yes, I did.

25 Q. And this trial that we're talking about today

1 occurred in May of 2010?

2 A. Yes, it did.

3 Q. Do you recall how many times you met with
4 Mr. Hull-Kilgore in preparing this case for trial?

5 A. I've got it noted. I think I met with him three
6 times prior to the first trial in December. I spoke
7 with him by phone first and then spoke with him in
8 person a couple days later.

9 Q. And did you meet with him additional times prior
10 to?

11 A. Yes, I, I did. I was just trying to look at my
12 notes. I met with him, you know, before the first trial
13 I met with him October 16th. It looks like again on,
14 let's see here, November 13th. This is all '09. Also
15 November 20th of '09. We started the trial on December
16 2nd.

17 And then I met with him on December 4th. We
18 finished the trial on December 3rd of '09. The State
19 offered a plea to voluntary manslaughter on, on
20 December 4th. And I spoke with him about that. At this
21 time he was in the detention center.

22 Then I spoke with him again, or I had a
23 conference with him again January 27th of 2010. March
24 29th. May 4th. And then, let's see here, May 13th.
25 And again on May 18th, which was also the day we started

1 the trial. And so I met with him several times, but
2 yeah. Yes.

3 Q. Okay. That's about six times. Well, including
4 the day of trial. And you stated that you received an
5 offer for voluntary manslaughter?

6 A. After the first trial. Now Mr. Hull-Kilgore's
7 testimony was correct that prior to the first trial in
8 December the best that they -- the State was willing to
9 do was let him plead to murder for a sentence of
10 30 years. And they told me if he turned that down that
11 they would do the indictment for armed robbery at trial
12 on both. I explained that to him and he did turn down
13 that offer. And that's why we went to trial on both
14 those charges. But I think after the first trial and
15 getting the hung jury, they -- that's when they decided
16 to make the offer to voluntary manslaughter.

17 Q. And do you recall whether there was any sort
18 of -- did they offer any sort of particular sentence
19 with the voluntary manslaughter?

20 A. No. I tried to get them to do that, but they,
21 they wouldn't. They told me that I would have to do the
22 best I can with the judge.

23 Q. So that ---

24 A. They were gonna -- so it wasn't, it wasn't a deal
25 for voluntary manslaughter and burglary, but just simply

1 a plea for voluntary manslaughter and, and the
2 sentencing left up to the judge of course.

3 Q. And you rejected that offer?

4 A. He did.

5 Q. In your meetings with Mr. Hull-Kilgore, did you
6 discuss with him the elements of the offenses -- excuse
7 me, the elements of the offense and the State's burden
8 of proof at trial?

9 A. Yes. I mean, I told -- I talked to him about
10 what murder was and what the State would have to prove
11 in order to prove the charge of murder. Of course,
12 mostly those discussions were also in conjunction with
13 our discussion of armed robbery because those would have
14 been occurring early on as far as the State's burden of
15 proof and that kind of stuff. We went over the, the
16 discovery, the pros and the cons. Also his defense in
17 our ability to locate witnesses on his defense.

18 Q. Mr. Hull-Kilgore stated that he had alibi
19 defenses -- excuse me, alibi witnesses. Did he tell you
20 about these witnesses in your discussions with him?

21 A. The only witnesses for alibi that I was aware of
22 was his brother or half brother, Javaris Hull-Smith who
23 testified. He had spoken to me about a lady who lived a
24 few doors down from him who he got a soda from sometime
25 that night and her daughter. And we made attempts to

1 locate this lady. There was no one in that house. We
2 talked to some neighbors. And we never could figure out
3 who the lady was or where she was at that time, at the
4 time that we were looking for her.

5 Those were the only alibi witnesses that I was
6 aware of at the time we tried those cases. I was not
7 aware of the claim that there were some young girls and
8 -- or not young girls, but some girls in the house with
9 him and his brother until the second trial. Actually
10 with the thorough cross-examination of my alibi witness
11 during the second trial.

12 Q. So you addressed that at trial?

13 A. (Indicating.)

14 Q. You addressed that at trial?

15 A. No, no, no. The Solicitor asked who else was in
16 the house and the brother said there was some, I think
17 he called, chicks. And it would have been nice to know
18 about that prior to trial.

19 Q. But Mr. Hull-Kilgore did not provide that
20 information to you?

21 A. Neither Mr. Hull-Kilgore nor Mr. Hull-Smith
22 provided me with that information.

23 Q. Did Mr. Hull-Kilgore discuss with you his version
24 of the facts of the case?

25 A. Yes. I mean, it was always alibi, that he wasn't

1 present at the time the shooting occurred.

2 Q. Did you discuss possible defenses with him in
3 addition to the alibi? I mean, were there any other
4 available defenses?

5 A. Well, no. I mean, I don't generally just sort of
6 tick off a bunch of defenses with a client. You know,
7 like well this might be available. Depending on what
8 you say, this might be available. I sort of try to
9 figure out what they know or what they say and then I go
10 from there to discuss what could or could not be a
11 defense, but I don't try to suggest defenses to them.

12 Q. Based on your discussion -- excuse me,
13 discussions with Mr. Hull-Kilgore, what was the theory
14 that you proceeded on at trial?

15 A. My theory was that J'Corey Hull-Kilgore was not
16 present and did not commit the shooting, but his brother
17 James or his -- yeah, his brother James Hull-Kilgore
18 did. It was James who testified that he gave the gun to
19 J'Corey. It was James who testified that he got the gun
20 from Corey later. It was James who testified that he
21 hid the gun, although he claims he was with Corey when
22 he hid the gun in a separate location.

23 It was, you know, I think I even mentioned this
24 in my final argument. It was James that had basically
25 his name all over this case. And yet he blamed his

1 brother for having done it when James was identified as
2 being involved in some fashion. So -- and James was
3 actually in jail throughout the whole pendency of this
4 case. J'Corey got out on bond for a while.

5 So basically my argument was James was -- you
6 know, I think, I think at some point James was only
7 charged with accessory and he hadn't been to -- his case
8 had not been tried or pled yet by the time he testified
9 in either occasion, so he was still facing a pretty
10 severe sentence. And even though everybody said there
11 was no deal, it was pretty clear that James was hoping
12 for lenient treatment in exchange for his testimony
13 against his brother.

14 So my theory was James did it and he and all
15 these other people who initially said that they didn't
16 know anything about anything and all of sudden when
17 J'Corey's name started coming up they all joined in to
18 say, yeah, J'Corey's the one.

19 Q. Regarding, as you stated, these -- many of these
20 witnesses were charged with accessory. Did you
21 cross-examine those individuals regarding the charges
22 they were facing?

23 A. Well, I don't know if everybody was charged with
24 accessory. I think James was charged with accessory. I
25 don't recall now if anybody else was, but I would have

1 cross-examined him, I think, if they had been charged
2 and were waiting for some sort of adjudication.

3 Q. And Mr. Hull-Kilgore actually testified at this,
4 at trial, right?

5 A. Yes, he did.

6 Q. And do you recall what the nature of his
7 testimony was?

8 A. Again, the alibi that he wasn't present. He had
9 been there earlier, then he left. And then when he went
10 -- he heard the sirens, you know, later in the night.
11 And maybe he went back after everything was over. I
12 can't remember that. But basically he was not present
13 when Courtney was shot. Or for that matter, he wasn't
14 present when Courtney went out.

15 Q. Did his testimony have an impact on your request
16 for any particular jury charges?

17 A. Well, no. I mean, it's kind of hard to ask for
18 or to argue, at least in front of a jury, alibi and
19 self-defense. It sort of comes off as, well, he wasn't
20 there, but if you don't believe that then he was
21 defending himself. I mean, it just sounds kind of, kind
22 of bad. So, I mean I know I can ask for self-defense,
23 as I did for voluntary manslaughter, when the facts
24 would suggest it or when the facts are there. But --
25 and I don't have to pick defenses in order to choose a

1 particular charge. But still I wasn't going to argue
2 self-defense because I was trying to go with the alibi.
3 That's what he testified to and that's what our witness
4 testified to.

5 Q. And you did request a voluntary manslaughter
6 charge, correct?

7 A. Yes, I did.

8 Q. Did you see any reason to request a charge of
9 accident?

10 A. No. No. Part of the problem with accident is
11 that one has to be acting lawfully at all times, I
12 believe. And if J'Corey at 17 years old had a gun that
13 he was -- and didn't have a license, I think that that
14 would defeat a claim of accident.

15 Q. Did you see any reason to request an involuntary
16 manslaughter charge?

17 A. Again, no. I don't think there was any testimony
18 that would give rise to a conclusion that he was
19 criminally or that he was negligent in handling a weapon
20 or something to that effect.

21 Q. Back to Taquil Nabor's testimony. Did you
22 cross-examine him on the inconsistencies in his
23 statements?

24 A. I think I did. I'm pretty sure I did.

25 Q. Regarding -- back to the issue regarding the

1 issue of preclusion as it relates to the armed robbery,
2 that issue arose at trial when Kevon Anderson testified
3 about him taking -- going to take his money and you
4 objected at that point, correct?

5 A. I think I did, yes.

6 Q. And the judge considered your objection?

7 A. Yes.

8 Q. And he ultimately overruled it?

9 A. I think so, uh-huh.

10 Q. And, and you, again, you argued the Ashe versus
11 Swenson case?

12 A. Yes.

13 Q. Okay. And I believe you testified earlier that
14 you are not familiar with Yeager case, but do you have
15 any knowledge as to whether that case changed the ruling
16 in Swenson?

17 A. I really haven't read it other than just looking
18 at a couple of highlights just so I can get familiar
19 with it.

20 Q. The -- well, the Court has the case. Your Honor
21 has the case. One of the head notes ---

22 THE COURT: Clearly they rely on Ashe versus
23 Swenson and Yergin -- or sorry, Yeager.

24 MS. OLIVE: Yes, Your Honor.

25 THE COURT: All right.

1 BY MS. OLIVE:

2 Q. And the -- is it your understanding that the
3 ruling in Ashe versus Swenson precludes the Government
4 from relitigating an issue that was necessarily decided
5 by a jury's acquittal on a prior trial?

6 A. Right.

7 Q. Okay.

8 A. Right.

9 Q. And -- but an acquittal on an armed robbery does
10 not preclude -- is there more than one element to an
11 armed robbery charge?

12 A. Yes, there is.

13 Q. Okay. So it would not preclude the jury, the
14 fact that Mr. -- any evidence that Mr. Hull-Kilgore had
15 a gun, I mean the possession of a weapon -- is the
16 possession of a weapon the only element in an armed
17 robbery charge?

18 A. I mean a weapon -- yes, committing an armed
19 robbery while being in possession of a deadly weapon is
20 an element.

21 Q. But is that ---

22 A. Are elements of an armed robbery.

23 Q. But it's not the only element.

24 A. No.

25 Q. I mean --

1 A. A weapon, the use of a weapon is not the only --
2 or the threat of the use of a weapon is not -- are not
3 the only elements, that's correct.

4 Q. Okay. So the jury could have acquitted him on
5 the armed robbery charge simply by finding that he did
6 not take something from the person?

7 A. That's -- yes.

8 Q. Or intend to take something?

9 A. Yes.

10 Q. Okay.

11 A. Trying to rationalize the jury's decision in that
12 first case. That is to say, an acquittal of that -- of
13 the armed robbery, but not making a decision or unable
14 to make a decision on the murder, I mean I can't really
15 say.

16 MS. ROSS: And I'd object to his response on
17 that. I think that goes to what Yeager was saying is
18 that it's not up to -- once there's a jury verdict, it's
19 not up to second guessing why that was the verdict.

20 THE COURT: Right. Right. But that case does --
21 yeah, I mean it cuts both ways. It can't be used as a
22 positive, it can't be used as a negative. So in a
23 nutshell I'm taking this -- I'm taking his testimony as
24 meaning he's really not sure why the jury acquitted on
25 an armed robbery and found him guilty or, sorry, and

1 couldn't reach a verdict on the homicide. I take it,
2 though, from earlier discussions since you -- since he
3 was not initially charged with, with armed robbery at
4 the time that he was charged with a homicide, I take it
5 that your gut feeling and your experience indicated you
6 felt the armed robbery was a little weaker or it wasn't
7 as, as strong as perhaps other armed robberies that you
8 have tried. Is that accurate?

9 THE WITNESS: That's, that's correct. I don't
10 think there was ever any true evidence that anything was
11 taken from him or from Mr. Rogers. And certainly no
12 evidence that Mr. Hull-Kilgore had anything from him.

13 THE COURT: So maybe the armed robbery was simply
14 an easier question for the jury to answer along those
15 lines.

16 THE WITNESS: Right.

17 THE COURT: But, again, that's speculation. We
18 don't know.

19 THE WITNESS: No. That is correct.

20 THE COURT: All right.

21 BY MS. OLIVE:

22 Q. Regardless, the -- as you testified, you
23 objected. When that issue came up at trial you raised
24 an objection?

25 A. Right. My thinking was in the first trial they

1 were gonna try to say that the murder occurred because
2 he was trying to commit an armed robbery or that the
3 armed robbery was the, the motive behind the murder.
4 And I was trying to preclude them from talking about the
5 armed robbery as a part of the, or a motive behind the
6 murder.

7 And basically all I was trying to do was to keep
8 them from talking about any kind of motive so that the
9 next jury was just kind of well what was this all about,
10 you know, kind of thing. That was my thinking at the
11 time. They wouldn't be able to explain why somebody was
12 shot.

13 Not that they have to prove motive, but we all --
14 because that's not an element of murder, but it always
15 helps them to prove malice to prove a motive. And I
16 think once the acquittal on the armed robbery came
17 through, then that took away their ability to argue a
18 motive or malice because of the armed robbery. That was
19 my thinking at the time.

20 Q. And the -- so you made the objection and the
21 Court overruled the objection?

22 A. Yes.

23 Q. Okay.

24 MS. OLIVE: Beg the Court's indulgence, Your
25 Honor.

1 THE COURT: Yes, ma'am.

2 BY MS. OLIVE:

3 Q. Regarding Mr. Hull-Kilgore's prior convictions,
4 did you, did you seek to exclude those altogether?

5 A. Yes, I did.

6 Q. Okay. And did the Court agree with you?

7 A. I can't quite remember, but I take it from the
8 questions earlier that the Court ultimately allowed some
9 of his convictions in.

10 Q. I think that would be correct. That would, of
11 course, be reflected in the record.

12 A. I know because when I was looking at this
13 earlier, I know there was some discussion about --
14 between the Court and me. I was objecting to them
15 trying to dress it up, I call it, by having him answer
16 only a question of whether or not he'd be convicted of
17 an earlier crime because I didn't want the jury to
18 speculate as to what that other crime was and that kind
19 of stuff.

20 Q. And you raised that to the judge?

21 A. I did.

22 Q. And ultimately he ruled to allow those
23 convictions?

24 A. I think. I guess he did allow the convictions in
25 at some point, yes.

1 Q. At least the facts of the convictions.

2 A. Yes. But, again, those were admitted in
3 cross-examination to impeach his -- to impeach
4 Mr. Hull-Kilgore's credibility.

5 Q. The -- did you see any reason at the time to
6 object to the State's closing argument?

7 A. No.

8 Q. Thank you. That's all the questions I have.

9 THE COURT: Anything on -- any additional
10 questions?

11 MS. ROSS: Just briefly.

12 REDIRECT EXAMINATION

13 BY MS. ROSS:

14 Q. Referring to Page 357 and 358. Probably
15 impossible to go into that, but Page 358, Line 11,
16 you're attempting to bring out any deals that James
17 Kilgore was offered. And on 358 Mr. Bulsa objects to
18 your line of questioning. And y'all approached. What
19 was the objection or were you limited in your full and
20 fair cross of Mr. Hull -- James Kilgore by the judge?

21 A. Wait a minute. I'm trying to --

22 Q. Um...

23 A. I'm trying to understand the sense of what was
24 going on at the time. Excuse me.

25 Q. Okay. Yeah, that's fine.

1 A. I was trying to bring out the fact that he did
2 have an incentive to -- he, being James, had incentive
3 to stick by the story or tell them J'Corey Hull-Kilgore.
4 You know, that's what I was referring to in Lines 7
5 through -- or eight through ten about: (Reading.)
6 Before we tell anybody that you're a good guy and not to
7 put James in trouble -- in jail for the same amount of
8 time. (Ends reading.)

9 That's when he objected. I don't remember
10 specifically what we discussed at the bench. And I was
11 -- then went back and was trying to, you know, go back
12 around and trying to find out what they had told -- what
13 the officers had told James to try to get him to tell
14 Mr. Hull-Kilgore. I was trying to figure -- you know,
15 trying to demonstrate how J'Corey Hull-Kilgore's name
16 first came up, because we not only had James saying
17 J'Corey did it, but also several other witnesses had
18 said that. So I was trying to get out or trying to, to
19 get before the jury that the officers had suggested
20 J'Corey's name.

21 Q. Well, with that objection were you limited in
22 your ability to ask the amount of time James was facing
23 and what he was saving by testifying potentially or do
24 you recall?

25 A. I don't -- no, I don't think that was -- no, that

1 would not have -- I don't think the judge limited me to
2 that at all.

3 Q. Okay.

4 A. That was not -- no, that was not.

5 Q. All right.

6 A. Because I think, I mean, based on my past
7 experience with the judge, that he would not have ruled
8 that way.

9 Q. Okay. Well that was the only question that was
10 brought up by cross that I had.

11 A. Okay.

12 THE COURT: Anything on -- any further questions?

13 MS. OLIVE: No further questions, Your Honor.

14 EXAMINATION

15 BY THE COURT:

16 Q. One question. And I have not had a chance to
17 review the entire transcript, but from your recollection
18 was there any physical evidence tying the applicant to
19 this particular incident or was it the State's case
20 primarily testimony of witnesses, et cetera? Or do you
21 -- and if you don't recall that's fine. And I'm going
22 to read the transcript later, but I just -- I ---

23 A. No, sir. I don't think there was anything
24 specifically tying him. There was no GSR. There was no
25 -- because of the time, that went from the time that

1 they got involved to the time they arrested him or came
2 in contact with Mr. Hull-Kilgore. There might have been
3 some ballistics test. But, again, this gun was actually
4 taken, according to the testimony, by James Hull-Kilgore
5 from one location that he claimed J'Corey had stashed
6 it. And then they took it to another location actually
7 not far from this courthouse on -- you know, the
8 shooting occurred on the other side of Main Street or
9 Carter Circle which is --

10 Q. Okay.

11 A. -- on the other side of Main Street.

12 Q. Right. I know where that is.

13 A. Near the Pepsi plant.

14 Q. Right.

15 A. And the gun was recovered off of, I think it's
16 Holmes or Waddell or Homes of Wofford, which is back
17 here off of Howard Road or Howard, Howard Street.

18 Q. Okay.

19 A. Right back here. And actually it was found, I
20 thought it sound pretty clean. I mean, because it was
21 just sort of out there in the open. You know, James got
22 the word that the gun was back there and officers went
23 several days later went there and found it. And I think
24 I brought up that it wasn't rusty or anything like that.
25 I mean, it had been there allegedly several days. But

1 anyway, so there was no fingerprints or anything on the
2 gun. I don't recall anything specifically that tied
3 Corey to this thing other than the testimony of the
4 people.

5 Q. That was the impression I got. All right, thank
6 you, sir.

7 A. Okay.

8 Q. And you're free to leave or stay, whatever you
9 choose.

10 (Whereupon, witness leaves witness stand and
11 courtroom.)

12 Any additional witnesses from anyone?

13 MS. OLIVE: No, Your Honor.

14 MS. ROSS: No, Your Honor.

15 THE COURT: None?

16 MS. ROSS: No, Your Honor.

17 THE COURT: All right. I think I have a good
18 feel for the, for the issues involved in this. You've
19 given me kind of your outline. I do want to review
20 Yeager as it may relate to this case and of course
21 review the transcript. But if there's anything that you
22 want to point out to me that specifically that you think
23 I really need to hone in on or focus on, on behalf of
24 the applicant I'm all ears, but I think I've got a
25 pretty good feel.

1 MS. ROSS: No, Your Honor. I hope I preserved
2 the record as to these. I think I read through them at
3 the beginning and that's really what I found. I know
4 some of it is nit-picky going through the record, but it
5 is all taken together weighing the situation, so I've
6 got nothing more at this time.

7 THE COURT: Very good. Anything from the State?

8 MS. OLIVE: Your Honor, is it possible that we
9 could submit briefs on this?

10 THE COURT: If y'all would like to that may very
11 well helpful. I mean, that might not be a bad idea.

12 MS. OLIVE: I just, I feel that most of the
13 issues are legal. I mean, a lot of his allegations have
14 to do with legal issues. I would appreciate help.

15 THE COURT: I'll need to take this under
16 advisement until at least probably next week because I'm
17 in court in Abbeville and I may have some downtime to
18 take a look at this next week. So if we could maybe
19 just have an understanding that if y'all want to file
20 any sort of briefs on any particular issue. And they
21 don't have to be works of art. I'm not Court of
22 Appeals. I have no interest in that.

23 So if you want to just kind of summarize your
24 positions or lay it out to me in a fairly informal
25 manner, that's perfectly fine. But let's just say that

1 they're due two weeks from now if there is gonna be
2 anything.

3 MS. OLIVE: Thank you, Your Honor.

4 THE COURT: All right. Good to see y'all. Y'all
5 take care, all right?

6 MS. ROSS: All right, thank you.

7 THE COURT: I know we have two different families
8 here. I'm assuming that one's on behalf of the decedent
9 in this case and of course one's the applicant's family.
10 I don't know who wants to sort of -- it might be easier,
11 I don't know if you wanted to brief these people or if
12 you're gonna talk to them afterwards. If you guys want
13 to just hang out here in the courtroom. Y'all can
14 adjourn after, after you leave the courtroom, okay?

15 MS. OLIVE: Thank you, Your Honor. That's all
16 for today.

17 THE COURT: All right. See y'all tomorrow
18 morning around 9:30 then.

19 MS. OLIVE: Yes, sir.

20 (Whereupon, court concluded at 1:09 p.m.)

21

22 --- THIS ENDS REQUESTED TRANSCRIPT ---

23

24

25

1 COURT REPORTER CERTIFICATE

2
3 I, the undersigned Julie A. Ashbrook, Court
4 Reporter for the Seventh Judicial Circuit Court of the
5 State of South Carolina, do hereby certify that the
6 foregoing is a true, accurate, and complete transcript
7 of record of all the proceedings and evidence introduced
8 in the hearing and/or trial of the captioned case,
9 relative to appeal, in the Court of Common Pleas for
10 Spartanburg County, South Carolina, on the 8th day of
11 November, 2016.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.
14
15
16
17

18 s/Julie A. Ashbrook.
19 Julie A. Ashbrook
20 Circuit Court Reporter
21 Seventh Judicial Circuit
22
23
24
25

J. B. BERRYETT

12/2-3/2009

TAQUIL NABORS - RECROSS EXAMINATION BY MR. ALLEN

150

1 UP. DO YOU REMEMBER THAT? WHO WAS HE TALKING TO?

2 A. I GUESS COURTNEY.

3 Q. DO YOU KNOW WHY COREY SHOT COURTNEY?

4 A. I DON'T KNOW. IT COULD HAVE BEEN SELF DEFENSE. I
5 DON'T KNOW WHY. I DON'T KNOW.

6 Q. DID IT SOUND LIKE COREY WAS TAKING SOMETHING FROM
7 COURTNEY?

8 A. I DON'T KNOW. WHEN I LOOKED IN THE DOOR I JUST SEEN
9 BOTH OF THEM, THEY WERE MOVING. COURTNEY, HE WAS GOING IN
10 HIS POCKET. I DON'T KNOW IF HE WAS GIVING SOMETHING UP OR
11 NOT. AND I JUST HEARD A GUNSHOT.

12 Q. WHAT DREW YOUR ATTENTION WAS THE COCK OF THE GUN?

13 A. YES, SIR.

14 Q. DO YOU HAVE ANYTHING AGAINST J' COREY KILGORE?

15 A. NO, SIR.

16 Q. HAVE ANY REASON TO LIE AGAINST HIM?

17 A. NO, SIR.

18 Q. DID YOU HAVE ANYTHING TO DO WITH COURTNEY'S DEATH?

19 A. NO, SIR.

20 Q. IN FACT, YOU TRIED TO HELP HIM?

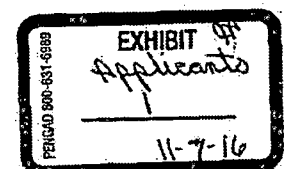
21 A. YES, SIR.

22 Q. THANK YOU. THAT'S ALL.

23 THE COURT: ANY RECROSS?

24 MR. ALLEN: BRIEFLY, YOUR HONOR, IF I MAY.

25 RECROSS EXAMINATION BY MR. ALLEN:



JAMES HULL-KILGORE - DIRECT EXAMINATION BY MR. BULSA

151

1 Q. THE POCKET THAT YOU SAW COURTNEY ROGERS GOING FOR WAS
2 THE SAME POCKET YOU SAW HIM PUT THE GUN IN, RIGHT?

3 A. YES, SIR.

4 Q. THAT WAS BEFORE THE SHOT THAT YOU SAY YOU HEARD, RIGHT?

5 A. YES, SIR.

6 MR. ALLEN: THANK YOU, YOUR HONOR.

7 THE COURT: STEP DOWN. NEXT WITNESS.

8 MR. BULSA: MY NEXT WITNESS IS IN CUSTODY.

9 JAMES HULL-KILGORE, BEING

10 DULY SWORN TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION BY MR. BULSA:

12 Q. MR. KILGORE, INTRODUCE YOURSELF TO THE JURY.

13 A. I'M JAMES HULL-KILGORE.

14 Q. ARE YOU RELATED TO J'COREY HULL-KILGORE?

15 A. YES, SIR, BROTHER.

16 Q. YOU HIS FULL BROTHER OR HALF BROTHER?

17 A. FULL BROTHER.

18 Q. SAME MOTHER AND SAME FATHER?

19 A. YES, SIR.

20 Q. HOW OLD ARE YOU?

21 A. TWENTY.

22 Q. HOW OLD IS HE?

23 A. NINETEEN.

24 Q. DID Y'ALL LIVE TOGETHER?

25 A. YES, SIR.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013-CP-42-2062

J'Corey Suave Hill-Kilgore

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: COURT

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

This matter came before the Court on November 8, 2016. Applicant was present with counsel. Having reviewed the pleadings, considered the applicable law, and reflected upon the testimony at trial, the Court denies Applicant's request for post-conviction relief.

As a preliminary matter, Applicant requested a continuance pending his resentencing pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). For the reasons stated at the hearing, the Court declined to grant a continuance, and a hearing on the merits was held. Applicant raises several grounds for relief.

First, applicant maintains that trial counsel was ineffective for failing to argue issue preclusion and double jeopardy. In his first trial, applicant was found not guilty of armed robbery, but the jury could not reach a verdict on the murder charge. When subsequently retried on the murder count, Applicant maintains that counsel was ineffective for failing to argue that the acquittal on the armed robbery charge negates the possibility of guilt on the murder charge. In essence, Applicant argues that, because the jury in his first trial found him not guilty of armed robbery, the issue of whether he was armed with a gun at the time of the murder is settled, and the State should not have been allowed to prove that he was armed at the time of the homicide. On this question, Applicant misstates the law. The jury on the first case could have concluded that no property was taken from the victim, and as trial counsel stated, the State's case for armed robbery case was not very strong. Put plainly, an acquittal on an armed robbery does not negate the possibility of retrial on the homicide charge. These offenses are separate and distinct, and therefore, YeARGIN v. US, 129 U.S. 2360 (2009) is not controlling.

Second, Applicant complains that trial counsel failed to request a self-defense instruction. Applicant is correct that one witness did allude in passing that the shooting may have been in self-defense; however, Applicant's defense was alibi. Because presenting conflicting defense theories often operates to confuse the jury or lessen the effectiveness of the primary defense, the Court finds that trial counsel articulated a valid trial strategy for not requesting a self-defense instruction. Similarly, trial counsel was not ineffective for failing to request an accident or involuntary charge in light of the brief testimony of Applicant's brother at trial (see p. 352, lines 4-9). Therefore, Applicant's requested relief on these grounds is denied.

Third, Applicant asserts that trial counsel should have requested and argued for a voluntary manslaughter charge. On pages 436-439, the transcript reflects that counsel requested a voluntary manslaughter charge; however, the trial judge declined to give that instruction. After the jury was instructed on the law, trial counsel renewed his request for a voluntary instruction (see p. 477, lines 13-16). Accordingly, relief on this ground is denied.

Fourth, Applicant argues that trial counsel was ineffective for moving to "reveal the deal" with a witness, but Applicant offered no evidence that any such deal existed. Similarly, Applicant makes a bare assertion regarding failure to adequately cross examine witnesses. The court has reviewed the transcript and finds these arguments to be without merit; counsel did effectively cross the witnesses concerning any deals or leniency they might receive in return for testifying, and counsel also effectively crossed all testifying witnesses concerning discrepancies in their statements. Relief is denied on these grounds.

Fifth, Applicant maintains that counsel was ineffective for failing to object to Applicant's impeachment based upon juvenile convictions for burglary. Because such impeachment is permitted under the rules, and because an objection was apparently made (see page 433), relief is denied on this ground.

Finally, Applicant maintains trial counsel should have objected to Solicitor Bulsa's closing argument when he apparently vouched for a witness and then stated that the Solicitor's job was to seek truth and justice. Although this argument was likely objectionable as improper vouching, the court finds that the argument was not so improper or inflammatory as to prejudice Applicant. Accordingly, relief is denied on this ground.

In conclusions, the Court finds that trial counsel's strategy was reasonable and that he provided competent, effective representation of Applicant. Therefore, the Court denies Applicant's request for relief.

Within thirty (30) days, Ms. Olive shall prepare a more formal order which memorializes the Court's ruling.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$

		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2159

Judge Code

11/23/2016

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 24 day of Nov, 20 16 and a copy mailed first class or placed in the appropriate attorney's box on this day of Nov, 20 16 to attorneys of record or to parties (when appearing pro se) as follows: 29

Susannah C. Ross, Esq.

Assistant Attorney General Alicia Olive

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

2016 NOV 29 AM 8:48
M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2391
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

November 29, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Gloria Shaw-Hill-Kelgore
Applicant # 340853

7TH JUDICIAL CIRCUIT

CASE # *2013CP42-2062*

VS

Shel

Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the

Form-4

In this action dated

11-23

2016

on

11-29-16

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

Anthony Hancock

Alisa Oliver

Suzanne Ross

11-29-16

(Date)

Paul Seay
(Signature)

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

J'Corey Suave Hull-Kilgore,
S.C.D.C. No. 340853,

Case No. 2013-CP-42-2062

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

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H. H. BLANCHET

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 6, 2013. Respondent made a Return and Motion to Stay the Proceedings on September 20, 2013, requesting that the PCR be stayed pending the outcome of Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).¹ Thereafter, Respondent made an amended Return and Partial Motion to Dismiss on February 11, 2016, requesting that the claims related to Aiken v. Byars be dismissed and an evidentiary hearing be held solely as to the allegations of ineffective assistance of counsel.² On August 29, 2016, Respondent made an Amended Return and Motion for More Definite Statement. Applicant filed an Application Addendum on November 1, 2016.

The Court convened an evidentiary hearing into the matter on November 8, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Susannah Ross, Esquire. Alicia A. Olive, Esquire of the South Carolina Attorney General's Office represented Respondent.

As a preliminary matter, Applicant requested a continuance pending his resentencing

¹ The Aiken v. Byars case concluded on June 1, 2015 when the United States Supreme Court denied the petition for writ of certiorari.

² Simultaneously, Respondent sent a letter to the Spartanburg County Clerk of Court requesting that Applicant be appointed counsel.

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pursuant to Aiken v. Byars. For the reasons stated at the hearing, the Court declined to grant a continuance, and a hearing on the merits was held.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Clay T. Allen, Esquire, ("Counsel") also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the pleadings and amendments. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In August 2009, the Spartanburg County Grand Jury indicted Applicant for murder (2009-GS-42-4486). Clay T. Allen, Esquire, represented Applicant. Applicant proceeded to trial May 18-20, 2010, before the Honorable J. Derham Cole and a jury. The jury convicted Applicant as incited, and Judge Cole sentenced him to confinement for life.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence on September 19, 2012. State v. Hull-Kilgore, O-2012-1212-UP-531 (S.C. Ct. App. filed September 19, 2012). The remittitur was returned to the circuit court on October 5, 2012.

II. ALLEGATIONS

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

1. Applicant's sentence of life without parole, imposed for a crime he committed when he was a juvenile, violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution.

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2. Applicant's sentence of life without parole violates the Eighth Amendment to the United States Constitution and Article I, § 15 of the South Carolina Constitution because the proceedings which led to its imposition were both procedurally and substantively inadequate, in that:
 - a. The proceedings which led to the imposition of Applicant's sentence of life without parole failed to comply with fundamental Eighth Amendment mandates pursuant to Miller v. Alabama.

3. Ineffective Assistance of Counsel, in that:
 - a. Counsel failed to object and failed to make the record sufficient for review.

In his amended Application filed November 1, 2016, applicant also alleged:

4. Ineffective assistance of counsel, in that:
 - a. Counsel failed to adequately advise, investigate, preserve the record, request charges for self-defense or accident, and object to the assistant solicitor's comment in closing that his job is to find the truth and seek justice.

At the evidentiary hearing, Applicant raised additional grounds for relief and proceeded on the following grounds: ineffective assistance of counsel for failing to argue issue preclusion and double jeopardy, failing to request a voluntary manslaughter instruction, failing to adequately impeach and cross-examine State's witnesses, failing to object to impeachment using juvenile convictions, failing to request self-defense instruction, and failing to object to closing argument.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

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A. Evidence Adduced at Trial

On May 24, 2008, at 8:24 PM, authorities were dispatched to the intersection of South Liberty and Amos Street in Spartanburg following reports of a shooting. (Tr. at 18, 21). Upon arriving at the scene, first responder Deputy Bradford James explained he observed a black male, later identified as Victim, with several individuals around him attempting to render aid. (Tr. at 3, 21). Upon approaching Victim, James noticed a gunshot wound to the base of Victim's neck near the collarbone. (Tr. at 22). As James applied pressure to the wound to try to stop the bleeding, Victim grabbed James and stated "I'm going to die." (Tr. at 22). Victim's statement proved to be prophetic as the wounds were indeed fatal. (Tr. at 3, 13).

While James and others were attempting to aid Victim, Officer Derrick Canada, understanding the shooting had happened nearby, responded to a residence located on East Columbia Avenue. (Tr. at 36). Upon arrival at the residence, Canada encountered its occupant, Sandra Dandy, and her then-boyfriend, Dwight Mills. (Tr. at 37). After observing what appeared to be blood on the front porch, Canada turned the scene over to investigators who sought a search warrant to process the scene. (Tr. at 38-39, 63).

Processing the scene, authorities swabbed the blood-like substance in order to conduct DNA analysis. (Tr. at 64, 74). SLED Analyst Lindsay Thompson would later confirm the swabs taken from the blood-like substance on the front porch matched Victim's blood. (Tr. at 213). Additionally, authorities observed what appeared to be a bullet hole in the wall nearest the front porch and recovered a shell casing from a .380 handgun with the head stamp "RP." (Tr. at 66, 75, 81). Six days later, Acting on a tip from Applicant's brother James and James' friend, Demetrius Reid, authorities also recovered a loaded handgun containing five .380 rounds at the intersection of Williams Street and Harmony Drive in Spartanburg near Applicant's grandmother's house. (Tr. at 78-80, 81, 332-33). Of the five rounds that were found in the

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handgun, two rounds carried an "RC" head stamp, while the remaining rounds revealed an "FC" head stamp. (Tr. 214). SLED analyst Frank Dan Defreese later determined the shell casing found at the scene was fired by the .380 handgun recovered near Applicant's grandmother's house. (Tr. at 219).

At trial, the State called a number of witnesses who were in and around Dandy's residence at the time Victim was shot. First, the State called Dandy who testified she observed Applicant and Victim briefly talking to one another near the doorway to the front porch of her residence when she heard a "loud sound." (Tr. at 121-22). This testimony was essentially echoed by witness Keevin Anderson who added that, in addition to hearing the shot, he witnessed Applicant shoot Victim and take his money. (Tr. at 277).

The State also called Taquil "Penny Red" Nabors, who was an eyewitness to the shooting. (Tr. at 165, 168-69). Nabors was friends with both Applicant and Victim, and Nabors explained he was on the front porch playing cards when Victim pulled up in front of Dandy's residence, prompting him to approach Victim. (Tr. at 167, 168-69). Nabors testified he spoke with Victim briefly before Victim walked onto the porch and entered the residence. (Tr. at 168-69). Nabors explained he did not see Victim again until he heard a "gun cock back" causing him to look into the residence. (Tr. at 169-70). Upon doing so, Nabors witnessed Applicant shoot Victim in the neck while Victim was walking out the front door. (Tr. at 169-70). Nabors added Victim was digging in his pocket when Applicant shot him. (Tr. at 169-70).

D'Angelo Miller also testified. Miller was dating Dandy's daughter and was friends with both Applicant and Victim. Miller explained that when Victim pulled into the driveway, Applicant went around the side of the house with his brother, James, and Applicant took James for his gun so he could rob Victim. (Tr. at 235, 239-240). Miller then observed Victim was inter-

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the house. (Tr. at 236). Understanding Applicant was armed and intended to rob Victim, Miller walked into Dandy's house to get Dandy's young son and his girlfriend's young daughter out of harm's way. (Tr. at 236-37, 238-39). After getting the children, Miller locked himself and the children in a nearby bedroom, and he then heard a gunshot. (Tr. at 238).

Applicant's brother, James Kilgore, like Dandy, Anderson, Nabors and Miller, testified against Applicant. In particular, Kilgore repeated Miller's testimony that Applicant approached him and asked for his handgun. Kilgore added that the handgun he gave Applicant was the handgun recovered near Applicant's grandmother's house. (Tr. at 297).

After the close of the State's case, Applicant elected to present a defense. Specifically, Applicant's younger brother, Javaris Hull-Smith, told the jury he was playing video games with Applicant until sometime after dark when the two began talking to some girls. (Tr. at 361-62). Hull-Smith explained Applicant only briefly left the house after hearing sirens in the neighborhood. (Tr. at 361-62). Consistent with his younger brother's testimony, Applicant testified he was playing video games, then talked to some girls who happened to be in the neighborhood. Applicant then maintained he left the house around 9:00 PM or 10:00 PM (Tr. at 376) to check on his older brother, James, because he knew James was at Dandy's house, and Applicant believed the sirens were coming from that direction. (Tr. at 377). Finally, Applicant denied ever seeing Victim that day, stated he never asked his brother for a gun, and maintained he never shot Victim. (Tr. at 380).

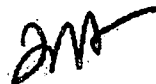
B. Summary of Testimony

Applicant testified that, in his first trial on the murder charge, he was also tried for armed robbery. He testified the jury acquitted him of the armed robbery charge, and the jury was hung on the murder charge. Applicant testified that his juvenile record was referenced in closing. He

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testified he told his previous attorney about an alibi witness. He testified the State offered to allow him to plead guilty to murder with a sentence of thirty (30) years. Applicant declined this offer prior to the first trial.

Counsel testified he has been practicing law for thirty-seven (37) years. He testified that he was appointed in October of 2009, prior to Applicant's first trial, and that he met with Applicant approximately four times prior to his first trial, and five (5) or six (6) times prior to his second trial. Counsel testified he reviewed the indictments with Applicant as well as the elements of the offense. He discussed with Applicant the State's burden of proof at trial. He filed discovery motions and reviewed discovery with Applicant. Counsel testified the defense they discussed was always alibi. He testified he was not aware of the claim regarding the girls. Counsel testified that his theory was that Applicant was not present and did not commit the crime, but that Applicant's brother, James, did. James testified he hid his brother's gun and had his name all over the case. Counsel testified James was in jail for the pendency of trial and was charged as an accessory. Counsel testified he cross-examined State's witnesses to bring out inconsistencies. Counsel testified that it is difficult to argue alibi and self-defense together. Counsel testified he never requested instructions on voluntary manslaughter or accident. He testified there was no evidence in the record of legal provocation or sudden heat of passion to support a voluntary manslaughter charge. Counsel testified the trial judge first ruled that he would not allow the juvenile convictions, but the court then ruled the convictions would be allowed for impeachment purposes. Counsel testified juvenile convictions can be used for impeachment. Counsel testified he saw no reason to object to the charge to "find truth and seek justice" and did not feel the solicitor made an improper comment in closing. Counsel testified he was trying to point out that James had an incentive to cast blame on Applicant.



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C. Ineffective Assistance of Trial Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

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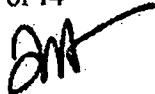
As a matter of general impression, this Court finds Counsel's strategy was reasonable and he provided competent, effective representation of Applicant. Therefore, the Court denies Applicant's request for relief for the reasons that follow:

1. Failure to argue issue preclusion and double jeopardy

Applicant maintains that trial counsel was ineffective for failing to argue issue preclusion and double jeopardy. In his first trial, applicant was found not guilty of armed robbery, but the jury could not reach a verdict on the murder charge. When subsequently retried on the murder count in the instant case, Applicant maintains that counsel was ineffective for failing to argue that the acquittal on the armed robbery charge negates the possibility of guilt on the murder charge. In essence, Applicant argues that, because the jury in his first trial found him not guilty of armed robbery, the issue of whether he was armed with a gun at the time of the murder is settled, and the State should not have been allowed to prove that he was armed at the time of the homicide. On this question, Applicant misstates the law. The jury on the first case could have concluded that no property was taken from the victim, and as Counsel stated, the State's case for armed robbery was not very strong. Put plainly, an acquittal on an armed robbery does not negate the possibility of retrial on the homicide charge. These offenses are separate and distinct, and therefore, Yeager v. United States, 557 U.S. 110 (2009) is not controlling as a matter of law. Accordingly, Applicant has failed to establish either deficiency or prejudice with respect to this allegation.

2. Failure to request self-defense instruction

Applicant next complains that trial counsel failed to request a self-defense instruction. Applicant is correct that one witness did allude in passing that the shooting may have been in self-defense; however, Applicant's defense was alibi. Counsel testified it is difficult to argue both



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alibi and self-defense. Where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance[.]" Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992)). Because, as Counsel testified, presenting conflicting defense theories often operates to confuse the jury or lessen the effectiveness of the primary defense, the Court finds that Counsel articulated a valid trial strategy for not requesting a self-defense instruction. Similarly, trial counsel was not ineffective for failing to request an accident or involuntary charge in light of the brief testimony of Applicant's brother, James Kilgore, at trial. James testified he asked Applicant over the phone if he did "it," and Applicant "said he don't know—he don't know. He didn't mean to if he did. He don't know." (Tr. at 352, lines 4-9). Again, Counsel testified regarding the difficulty of presenting the conflicting defenses alibi and self-defense. The same rationale applies to alibi and accident or involuntary manslaughter. In addition, Applicant has failed to show there is a reasonable probability that, but for the alleged deficiency, the outcome would have been different. Therefore, Applicant's requested relief on these grounds is denied.

3. Failure to request a voluntary manslaughter instruction

Applicant asserts that trial counsel should have requested and argued for a voluntary manslaughter charge. On pages 436-39, the transcript reflects that counsel requested a voluntary manslaughter charge; however, the trial judge declined to give that instruction. After the jury was instructed on the law, Counsel renewed his request for a voluntary instruction (Tr. at 477, lines 13-16). In addition, this issue was raised and decided on the merits in Applicant's direct appeal. Accordingly, relief on this ground is denied.

4. Failure to adequately impeach and cross-examine State's witnesses

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Applicant argues Counsel was ineffective for failing to move to "reveal the deal" with State's witness, Deangelo Miller, but Applicant offered no evidence that any such deal existed. Similarly, Applicant makes a bare assertion that Counsel failed to adequately cross-examine State's witnesses. Cross-examination is a matter of trial strategy and is subject to the presumption that Counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). The Court has reviewed the transcript and finds these arguments to be without merit; Counsel effectively cross-examined witnesses concerning any deals or leniency they might receive in return for testifying. Further, Counsel effectively impeached all testifying witnesses concerning discrepancies in their statements. Accordingly, Applicant has failed to satisfy his burden of proving either deficiency or prejudice, and relief is denied on these grounds.

5. Failure to object to impeachment using juvenile convictions

Applicant maintains that Counsel was ineffective for failing to object to Applicant's impeachment based upon juvenile convictions for burglary. This allegation is without merit. The Supreme Court of South Carolina "has found that there is no direct prohibition against the use of juvenile adjudications to impeach either a defendant, or a non-party witness. State v. Sparkman, 287 S.C. 489, 492, 339 S.E.2d 865, 867 (1986) (citing State v. Mallory, 270 S.C. 519, 242 S.E.2d 693 (1978); State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981)). See also Rule 609(a)(1), SCRE. This Court also notes that in his direct appeal Applicant raised the issue of whether the trial court erred in allowing the solicitor to impeach Applicant with prior convictions, and the Court of Appeals decided the issue on the merits. Therefore, because the use of juvenile adjudications for impeachment is permitted under the rules, and because

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was apparently raised and ruled on at trial (Tr. at 388-89; 412, lines 7-12; 433); this allegation is without merit and relief is denied on this ground.

6. Failure to object to closing argument

Finally, Applicant maintains trial counsel should have objected to Solicitor Bulsa's closing argument when he apparently vouched for a witness and then stated that the Solicitor's job was to seek truth and justice. (Tr. at 455, lines 3-4). "The prosecution may not comment, directly or indirectly, on the defendant's decision not to testify or present a defense; however, any improper comments do not require reversal unless they prejudice the defendant." State v. Cooper, 334 S.C. 540, 554, 514 S.E.2d 584, 591 (1999). On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (citations omitted). Appellate review "of the closing argument is based upon whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000). "The appellant has the burden of proving she did not receive a fair trial because of the alleged improper argument." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624-25 (1996) (citing State v. Dawkins, 297 S.C. 386, 388, 377 S.E.2d 298, 299 (1989)).

Although this Court finds the argument was likely objectionable improper vouching, the argument was not so improper or inflammatory as to prejudice Applicant. Therefore, Applicant has failed to satisfy his burden of proving that there is a reasonable probability the outcome of the proceeding would have been different had an objection been made. See State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted) ("the appropriateness of a solicitor's

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M. J. BULSA

closing argument is a matter left to the trial court's sound discretion [and the] appellate court will not disturb a trial court's ruling regarding closing argument unless there is an abuse of that discretion."'). Accordingly, relief is denied on this ground.

7. Miller v. Alabama

Applicant's allegation pursuant to Miller v. Alabama, 567 U.S. 460 (2012) and Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014) is hereby dismissed. In its amended return, Respondent moved to summarily dismiss this allegation as improper for consideration in PCR, noting the South Carolina Supreme Court specifically ordered "any individual affected by [the] holding may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced." Byars, 410 S.C. at 545, 765 S.E.2d at 578 (emphasis added). Applicant's PCR counsel informed the Court that Applicant currently has a motion for resentencing pursuant to Miller v. Alabama and Aiken v. Byars pending in General Sessions Court. Accordingly, this allegation is dismissed.

IV. CONCLUSION

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

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek

2nt

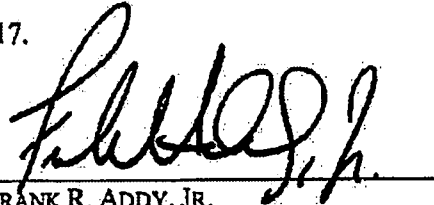
CLERK OF COURT
SPARTANBURG COUNTY
2017 JAN 15 AM 10 59
JAMES E. AUSTIN

appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

IT IS SO ORDERED this 7th day of June, 2017.



FRANK R. ADDY, JR.
Presiding Judge
Seventh Judicial Circuit

Newberry, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 15 AM 10 04
M. B. ALLEN

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	
J'COREY SUAVE HULL-KILGORE,	)	
APPLICANT.	)	
	)	MOTION TO ALTER OR AMEND
	)	THE JUDGMENT
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	CASE NO. 2013-CP-42-2062
RESPONDENT.	)	

COMES NOW the Applicant and hereby moves pursuant to Rule 59(c), SCRCP, to alter or amend the judgment of this Court filed on June 15, 2017. The Applicant takes issue with the findings of fact and conclusions of law set fourth resulting in the denial of post-conviction relief in his case. He argues each allegation set fourth amounted to undue prejudice. He further argues that if each allegation did not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989).

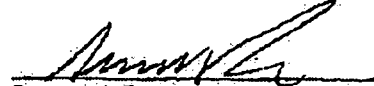
Regarding issue preclusion and double jeopardy, the Order of Dismissal rules that Yeager v. United States, 557 U.S. 110 (2009) does not prevent a retrial for homicide after prior trial resulted in an acquittal for armed robbery and hung jury on the homicide. However, the ruling does not fully address the allegation that trial counsel failed to effectively argue that the State was precluded from presenting evidence of an armed robbery though witnesses D'Angelo Miller and Keevin Anderson in the second trial as

CLERK OF COURT
SPARTANBURG COUNTY
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D. HOPE BACKLEY

they did on pages 285, 321 and 323 of the trial transcript. While trial counsel did place a full objection on the record on page 373, he did not reference Yeager v. United States, 557 U.S. 110 (2009) and failed to request an instruction that Mr. Hull-Kilgore had been acquitted of the referenced armed robbery. Alternatively, if the record reflects that trial counsel adequately argued issue preclusion and double jeopardy without referencing Yeager v. United States, 557 U.S. 110 (2009), appellate counsel failed to brief the issue and challenge the trial judge's ruling on appeal. In either case, the Applicant was denied a fair trial and is due post-conviction relief. The order fails to address these arguments.

For the foregoing reasons, the Applicant requests this Court to alter or amend its Order of Dismissal.

Respectfully submitted,



Susannah Ross
Attorney for the Applicant
333 E. Coffee Street,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 16 day of June, 2017.

CLERK OF COURT
SPRINGFIELD COUNTY
2017 JUN 20 PM 6:47
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2013-CP-42-2062
J'Corey S. Hull-Kilgore, #340853	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN TO MOTION
	)	TO ALTER OR AMEND
State of South Carolina,	)	JUDGMENT
	)	
Respondent.	)	
_____	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR). An evidentiary hearing into the matter was convened on November 8, 2016 at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Susannah Ross, Esquire. Alicia A. Olive, Esquire of the South Carolina Office of the Attorney General represented Respondent.

The Final Order denying Applicant's relief was filed on June 15, 2017. Applicant filed his motion to reconsider on June 20, 2017. This Return follows.

I. ARGUMENT

Applicant has failed to set forth any sufficient reasons to alter or amend the final order.

Cumulative Error

Applicant asks the Court to reconsider its ruling because the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989). Respondent submits the Order of Dismissal adequately addressed all issues. Further, the Court need not conduct a cumulative error analysis for the two reasons provided below.

First, South Carolina courts have consistently declined to apply a cumulative error analysis in PCR actions. See, e.g., Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002) (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (finding PCR court did not err in failing to conduct a cumulative error analysis where only one allegation had merit and the "record simply did not contain 'several errors' for the judge to cumulatively assess"). In addition, a number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

Second, because the Court found Applicant failed to satisfy his burden of proving ineffective assistance of counsel on any issue, the record contains no error for the Court to cumulatively assess. Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, error. See, e.g., Green v. State, 351 S.C. at 197, 569 S.E.2d at 325 ("While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors."). Only then can the cumulative prejudice arising from the alleged errors be considered. See id. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland. See 466 U.S. at 687 ("Unless a defendant makes both showings [i.e.,

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M. HOPE BEACHEY

deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable”).

Respondent submits that the Court adequately addressed all issues before it, and found that Applicant failed to satisfy his burden of proving ineffective assistance on any issue. Therefore, the Order of Dismissal need not address the issue of cumulative error.

Issue Preclusion and Double Jeopardy

Applicant requests this Court to reconsider its finding that trial counsel failed to effectively argue that the State was precluded from presenting evidence of an armed robbery through the state's witnesses. Respondent submits the Order of Dismissal addresses this allegation. Applicant mistakenly relies on Yeager v. United States, 557 U.S. 110 (2009), for the proposition that because Applicant had previously been acquitted of armed robbery in his first trial, the state's witnesses in his second trial for murder should not have been able to testify regarding the context in which the murder occurred. In Yeager, the court held that a jury verdict that necessarily decides a critical issue of ultimate fact in favor of a defendant protects him from prosecution for any charge for which that issue is an essential element. Id. at 122. In this case, murder shares no essential element with armed robbery that would have prevented the prosecution of the murder charge.

Applicant attempts to apply the holding in Yeager to the instant case to argue the testimony of D'Angelo Miller and Keevin Anderson was inadmissible. Miller and Anderson were both present at the time of the shooting. Miller testified that he heard Applicant say something about robbing when Applicant went to get his gun. (Tr. p. 285).¹ Anderson testified

¹ At which point counsel objected and a bench conference was held.

that he witnessed Applicant take the victim's money. (Tr. p. 321).² Outside the presence of the jury, counsel elaborated on the basis of his objections. Counsel, citing Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970), argued issue preclusion (collateral estoppel) and res judicata precluded the admission of testimony of an armed robbery. (Tr. p. 371-372). The solicitor responded that it was simply part of the res gestae of the case and the state was not attempting to exploit or prove there was an armed robbery. (Tr. p. 372). The trial court disagreed with Applicant and found the testimony related to the circumstances of the murder, that the state was not trying to prove an armed robbery was committed, and the testimony was certainly *relevant* on a number of elements and showed intent and the existence of malice. (Tr. p. 373).

Respondent submits this Court found correctly that Yeager is inapplicable and therefore Applicant failed to establish deficiency or prejudice with respect to that allegation. With regard to the argument proposed in Applicant's motion to reconsider that Counsel failed to request an instruction that Applicant had been acquitted of the armed robbery, Respondent submits this argument was not advanced at the hearing and therefore not specifically addressed in the Order of Dismissal. Nevertheless, Respondent would submit that Applicant failed to establish either deficiency or prejudice from counsel's failure to request such an instruction. Applicant also fails to establish either deficiency or prejudice from appellate counsel's failure to brief the issue on appeal. As noted above, Yeager is not applicable and does not preclude a testimony of witness's account of the circumstances surrounding the murder.

Applicant has not set forth any sufficient grounds to persuade this Court to alter or amend the judgment. Furthermore, Respondent submits oral argument would not aid in the

² At which point counsel objected again and another bench conference was held. When questioning resumed, counsel immediately objected again. The basis for these objections was later put on the record on page 371 of the trial transcript.

³ Respondent notes that counsel did cite to Ashe, the case that the United States Supreme Court found to be controlling in Yeager.

reconsideration of the original judgment as the Order of Dismissal in this case fully comports with the requirements of Rule 52(a), SCRCF.

II. CONCLUSION

WHEREFORE, having made its Return to Applicant's Rule 59(c) Motion to Reconsider, Respondent requests that the motion be denied and dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHIOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

By:


Attorneys for the Respondent
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

July 11, 2017

CLERK OF COURT
SPARTANBURG COUNTY
2017 JUL 14 AM 10:32
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
J'Corey S. Hull-Kilgore, #340853)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
OF THE SEVENTH JUDICIAL CIRCUIT

2013-CP-42-2062

ORDER DENYING
MOTION TO ALTER OR
AMEND JUDGMENT

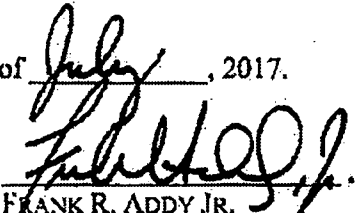
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SPARTANBURG COUNTY
2017 JUL 27 PM 1:13
M. HOPE BLACKLEY

This matter comes before the Court by way of Applicant's Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRPC, filed June 20, 2017. Respondent made its Return to the motion on or about July 11, 2017. Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend the judgment.

IT IS THEREFORE ORDERED:

1. That Applicant's motion is denied and dismissed.
2. Applicant shall remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 20th day of July, 2017.


FRANK R. ADDY JR.
Presiding Judge
Seventh Judicial Circuit

Abbeville, South Carolina

WITNESSES

1. SENTENCE MADE
2. REPORT ENDED
3. CARD PULLED
Spartanburg City Police
4. INDEXED
5. CHECKED WARRANTS
6. CHECKED SIGNATURE
7. ASSESSMENT AND
FINE CARD MADE
8. TRAFFIC VIOLATION COPY

ARREST WARRANT NUMBER

M-022193

ACTION OF GRAND JURY

Tome Bill

Shandy

Foreperson of Grand Jury

Date: 8-20-09

VERDICT

Guilty

Robert H. Remonte

Foreperson of Petit Jury

Date: 5/20/2010

DOCKET NO.

09-GS-42-4486

Computer

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

Computer

COURT OF GENERAL SESSIONS

AUG 24 2009

TERM

THE STATE

VS.

J'COREY SUAVE HULL-KILGORE

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2009 AUG 28 AM 10:57
MARC KITCHENS

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

AUG 20 2009

At a Court of General Sessions, convened on _____, the

Grand Jurors of Spartanburg County present upon their oath:

MURDER

The Defendant, J'Corey Suave Hull-Kilgore, did in Spartanburg County on or about May 24, 2008, feloniously, willfully, and with malice aforethought, kill one Courtney Ralpheal Rogers, by shooting the victim with a handgun and the victim died as a proximate result thereof, all in violation of Section 16-3-0010, 0020, Code of Laws of South Carolina, (1976, as amended).

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


Deputy Solicitor

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

645

COUNTY OF SPARTANBURG
STATE VS.

JCorey Suave Hull-Kilgore

INDICTMENT/CASE#: 2009GS4204486

A/W#: M022193

Date of Offense: 5/24/2008

S.C. Code § : 16-03-0010,

CDR Code #: 0116

AKA: _____
Race: B Sex: M Age: 19
DOB: _____ SS#: _____
Address: WILKINSON CT
SPARTANBURG, SC
DL#: _____ SID#: _____

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was
TO: Murder / Murder☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0010, of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

BULSA, DERRICK

SC Bar#

Defendant

Attorney for Defendant

SC Bar# 328

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

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

of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

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

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100 \$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100 \$
§ 56-5-2995 (DUI Assessment)	\$12 \$
§ 56-1-286 (DUI Breath Test)	\$25 \$
§ 47.12 (Public Def/Prob)	\$500 \$ 25.00
§ 14-1-212 (Law Enforce. Funding)	\$25 \$
§ 14-1-213 (Drug Court Surcharge)	\$100 \$
§ 50-21-114 (BUI Breath Test Fee)	\$50 \$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea \$
§ 90.7 (SCCJA Surcharge)	\$5 \$ 5.00
3% to County (if paid in installments)	\$ 9.90
TOTAL	\$ 139.90

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §47.12 requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 01513

Sentence Date: July 20, 2010

Clerk of Court/ Deputy Clerk R. Bennett

Court Reporter: P. Magitt

SCCA/217 (06/2009)