

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Benjamin H. Culbertson, Circuit Court Judge

RECEIVED

JUN 01 2017

S.C. SUPREME COURT

RANDAL WILLIAM BENTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002021

APPENDIX

SUSAN B. HACKETT
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General
Rembert Dennis Building
P.O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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**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.

Randal William Benton, Appellant.

Appellate Case No. 2012-208508

Appeal From Dorchester County
Stephanie P. McDonald, Circuit Court Judge

Unpublished Opinion No. 2013-UP-400
Submitted September 1, 2013 – Filed October 30, 2013

APPEAL DISMISSED

Appellate Defenders Breen Richard Stevens and
Benjamin John Tripp, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Donald J. Zelenka,
both of Columbia, for Respondent.

PER CURIAM: Dismissed after review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.¹

APPEAL DISMISSED.

FEW, C.J., and PIEPER and KONDUROS, 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

November 18, 2013

The Honorable Cheryl L. Graham
5200 E Jim Bilton Blvd
St George SC 29477-8020

REMITTITUR

Re: The State v. Randal W. Benton
Lower Court Case No. 2010GS1801675
Appellate Case No. 2012-208508

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: Donald J. Zelenka, Esquire
Benjamin John Tripp, Esquire

FORM 5

STATE OF SOUTH CAROLINA

CERTIFIED COPY

COUNTY OF Dorchester

2014 MAY 23 PM 2:09 IN THE COURT OF COMMON PLEAS

Randal William Benton (349652)Cheryl Benham2014-CP-18- 100

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

CLERK OF COURT
DORCHESTER COUNTY

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence General Sessions/Dorchester County
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-18-01675
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) February 9, 2012 / Life with out Parole
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. October 30, 2013
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistant of Counsel
- (b) Inadequate Defense
- (c) Deficiency

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

- (a) Eliciting Damaging Evidence and Making Damaging Arguments
- (b) Impeaching Witnesses
- (c) Failure to call or Cross-Exam Witnesses

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Direct Appeal

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. Courts of Appeal / Dorchester County

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Dismissed

ii. _____

iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____

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

Yes

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

- (a) which grounds have been presented:

i. Rule 803 (1) and 803(3) S.C.R.E.

- ii. _____
- iii. _____

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

i. Hearsay Statement

- ii. _____
- iii. _____

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

- (a) N/A
- (b) N/A
- (c) N/A

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

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

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

- (a) the name and address of each attorney who represented you:
 - i. John Loy + Michelle Suggs / St. George, S.C.
 - ii. Breen R. Stevens + Benjamin J. Tripp / Columbia, S.C. Appellate Defense
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Criminal Trial
 - ii. Appeals Court
 - iii. _____

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

A New Trial

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

NO

STATE OF SOUTH CAROLINA

VERIFICATION

County of

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Randal W. Benton

SWORN to and subscribed before me this 19th
day of May, 2014.

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2026

CERTIFIED COPY
2014 MAY 23 PM 2:09
Cheryl E. Bryant
CLERK OF COURT
DORCHESTER COUNTY

FILED - RECORDS
2014 MAY 23 PM 1:28
CHERYL E. BRYANT
CLERK OF COURT
DORCHESTER COUNTY

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

CERTIFIED COPY

2014 MAY 23 PM 2:09

I, [Signature], hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

CLERK OF COURT
DORCHESTER COUNTY

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

Randal W. Benton
Applicant

SWORN or affirmed to and subscribed before me this
19th day of May, 2014.

Ludreon Bryant
Notary Public

My Commission Expires: May 26, 2020

FILED - RECORDED
2014 MAY 23 PM 1:28
CHERYL BOWMAN
CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Randal William Benton, #349652,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

2014-CP-18-1001

RETURN

Respondent, making its Return to the Application for post-conviction relief filed May 23, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. Applicant was indicted during the January 2011 term of the Dorchester County Grand Jury for Murder (2010-GS-18-1675). Applicant was represented by John Loy, Esquire and Michelle Suggs, Esquire. Applicant proceeded to trial where he was convicted as indicted on February 9, 2012. The Honorable Stephanie P. McDonald sentenced Applicant to a term of life imprisonment.

A notice of appeal was filed and an appeal perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Benton, Op. No. 2013-UP-400 (filed October 30, 2013). The Remittitur was issued on November 18, 2013.

Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. "Ineffective Assistance of Counsel"
 - a. "Prosecution evidence and arguments"
 - b. "Eliciting damaging evidence and making damaging arguments"
 - c. "Impeaching witnesses"
 - d. "Failure to call or cross-exam witnesses"
2. "Inadequate Defense"
3. "Deficiency"

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

III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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

IV.

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

V.

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

(signatures on following page)

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

Sept. 24th, 2014.

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS

2014-CP-18-1001

RANDAL WILLIAM BENTON, #349652

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,

Respondent.

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

Rodney D. Davis, Esquire
 Lowcountry Law Office
 4000 Faber Place Drive, Suite 300
 Charleston, South Carolina 29405

DATED this 24th day of September, 2014.



Sara Moore, Legal Assistant
 For Respondent

State of South Carolina)
)
County of Dorchester)

In the Court of Common Pleas
First Judicial Circuit
2014-CP-18-1001

Randal William Benton,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

Transcript of Record

May 18, 2016
St. George, South Carolina

B E F O R E:

The Honorable Benjamin H. Culbertson, Judge

A P P E A R A N C E S:

Rodney D. Davis, Esquire
Attorney for the Applicant

J. Clayton Mitchell, III, Esquire
Assistant Attorney General
Attorney for the Respondent

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
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John M. Loy	
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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page No.</u>
------------	--------------------	-----------------

No Exhibits Introduced.

1 THE COURT: All right, this is 2014-CP-18-1001, *Randal*
2 *William Benton vs. State of South Carolina*. Matter is
3 before the court on an application for post-conviction
4 relief.

5 Please give the court reporter your name and who you
6 represent.

7 MR. MITCHELL: Clay Mitchell for the state.

8 MR. DAVIS: Randy Davis for Mr. Benton.

9 THE COURT: All right. Now, I understand, Mr. Davis,
10 your client was convicted by a jury trial and sentenced to
11 life in prison for murder. Is that correct?

12 MR. DAVIS: That's correct, Your Honor.

13 THE COURT: All right. Were there any other charges
14 that were dismissed, *nolle prossed*, or reduced as a result
15 that would still be -- this was a trial, so there wouldn't
16 be anything else still out there, would there?

17 MR. DAVIS: That's correct, Your Honor.

18 THE COURT: All right, Mr. Benton, if I could get you
19 to stand and raise your hand, please.

20 APPLICANT: Yes, sir.

21 CLERK OF COURT: Please state your full name for the
22 record.

23 APPLICANT: Randal William Benton.

24 RANDAL WILLIAM BENTON, BEING DULY
25 SWORN, TESTIFIES AS FOLLOWS:

1 THE COURT: All right, Mr. Benton, your name is Randal
2 William Benton?

3 APPLICANT: Yes, Your Honor.

4 THE COURT: All right, Mr. Benton, you have filed this
5 application for post-conviction relief, and I need to go
6 over some matters with you to make sure you understand the
7 procedure we're following here and the consequences of
8 filing an action for post-conviction relief.

9 Now first of all, during the past seventy-two hours
10 have you taken any medication, consumed any alcohol or
11 drugs, or been under any influence that would affect your
12 ability to know why you're here?

13 APPLICANT: No, Your Honor.

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

15 APPLICANT: Yes, Your Honor.

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

18 APPLICANT: No, Your Honor.

19 THE COURT: All right. Now in post-conviction relief
20 cases, there are two things that can happen. Number one, if
21 I deny your request for post-conviction relief, you'll
22 simply be returned to the Department of Corrections to
23 complete whatever sentence you are now serving. Do you
24 understand that?

25 APPLICANT: Yes, Your Honor.

1 THE COURT: All right. If I grant your application for
2 post-conviction relief, then I will set aside the conviction
3 and the sentence, and your case will be set for further
4 proceedings. The case will start all over; it will begin
5 from the very beginning of the proceedings against you. If
6 any charges against you were reduced, dropped, dismissed, or
7 *nolle prossed*, they could be brought back against you, and
8 you could be facing the original charges. Do you understand
9 that?

10 APPLICANT: Yes, Your Honor.

11 THE COURT: All right. Knowing that, do you want to
12 proceed with your application for post-conviction relief?

13 APPLICANT: Yes, Your Honor.

14 THE COURT: All right, Mr. Davis, anything further you
15 want placed on the record in that regard?

16 MR. DAVIS: No, sir. Thank you.

17 THE COURT: Anything the state wants to place on the
18 record in that regard?

19 MR. MITCHELL: No, Your Honor.

20 THE COURT: All right, Mr. Davis, you can call your
21 first witness.

22 MR. DAVIS: Your Honor, could I have one split second
23 with my client?

24 THE COURT: Okay.

25 (A PAUSE.)

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

6

1 MR. DAVIS: Thank you very much, Your Honor. We would
2 call Randal Benton to the stand.

3 THE COURT: All right. Come around, please.

4 (A PAUSE.)

5 THE COURT: Mr. Davis.

6 MR. DAVIS: Thank you very much, Your Honor.

7 DIRECT EXAMINATION BY MR. DAVIS:

8 Q. Mr. Benton, this was a trial for murder, a single
9 charge of murder that you went forward on. Is that correct?

10 A. Yes.

11 Q. And were convicted of by a jury?

12 A. Yes.

13 Q. Okay, and today we're here on your PCR. Is it fair to
14 explain to the judge that the strategy at trial dealt with
15 whether it was murder or manslaughter?

16 A. Please repeat the question.

17 Q. Was the strategy at trial the difference between
18 murder, malice, and manslaughter, heat of passion without
19 malice?

20 A. Oh. Yes, sir.

21 Q. Okay. Just briefly, before your trial, do you recall
22 that there was an attempt at a guilty plea on this case?

23 A. Yes, sir.

24 Q. Okay, and do you remember what judge that was in front
25 of?

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

7

1 A. Judge Goodstein, I believe.

2 Q. And at that proceeding, were you attempting to enter a
3 plea to murder?

4 A. Yes.

5 Q. And what was the negotiated sentence, if there was one,
6 for that proceeding?

7 A. Forty years.

8 Q. Okay. Was that -- why was that plea not completed?

9 A. Because of the questions that were asked for me by the,
10 by the judge.

11 Q. Dealing with what issues specifically? Do you recall?

12 A. Yes. Concerning the matter of what -- it pertained
13 [sic] to the plea, what, what -- the terms I agreed to, to
14 the plea.

15 Q. Okay. Do you remember the judge asking you if you had
16 reviewed the evidence or discovery with your attorney?

17 A. Yes.

18 Q. Okay, and just for the record, the lead attorney on
19 your case was Mr. Loy, John Loy. Is that right?

20 A. Yes, sir.

21 Q. And so do you recall your explanation to the judge
22 about the discovery that you had reviewed or not reviewed
23 with Mr. Loy?

24 A. Yes, sir.

25 Q. Had you seen everything by the time of that plea

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

8

1 proceeding?

2 A. No, sir.

3 Q. And is that what caused the stop in the guilty plea
4 process?

5 A. That's the understanding I had, yes, sir.

6 MR. DAVIS: And, Judge, just for housekeeping matters,
7 this was the transcript we obtained from the state at a
8 later date. Do you have a copy of the guilty plea
9 proceeding from January the 6th of 2012? Is that part of
10 your packet?

11 THE COURT: No. I've just got the trial in front of
12 Judge McDonald.

13 MR. DAVIS: Okay. I intend to move on from this issue
14 pretty quickly because we are, we are going to be asking the
15 court to grant PCR on the trial conviction, but I, I do want
16 to reference it. So, if Your Honor needs it, I'm sure we
17 can provide a -- I've got one copy. We can provide that to
18 you.

19 THE COURT: All right.

20 BY MR. DAVIS:

21 Q. Do you recall that attempted plea proceeding occurring
22 on January the 6th of 2012?

23 A. Yes, sir.

24 Q. Okay. Once it was stopped by the court, was there any
25 attempt by your attorney to resurrect or get you back in

1 court to finish that guilty plea on that day?

2 A. No, sir.

3 Q. Okay. Was there any attempt to do that on January the
4 7th of 2012?

5 A. I don't recall.

6 Q. Okay. Do you remember going back to court to try to do
7 a plea the next day?

8 A. No, sir.

9 Q. Okay. What about two days after this attempt to plead?
10 Do you recall going back, try to -- to court to try to do
11 the plea?

12 A. No, sir.

13 Q. How about three days later? Did you go back to court
14 three days later?

15 A. No, sir.

16 Q. Was there an issue about not wanting Mr. Loy as your
17 attorney?

18 A. Could you...

19 Q. Remember asking the judge to have Mr. Loy relieved?

20 A. Oh, yea. Excuse me. Yes, sir.

21 Q. That's all right. Now, do you recall that that was
22 three days after the ---

23 A. Yes, sir.

24 Q. --- attempted plea? Okay. So, you were back in court
25 in front of Judge Goodstein three days later?

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

10

1 A. Yes, sir.

2 Q. But that had to do with whether Mr. Loy was going to
3 continue as your attorney or not, correct?

4 A. Correct.

5 Q. There -- was there any attempt to resurrect or, or to
6 finish up the guilty plea at that point?

7 A. No, sir.

8 Q. How many times would you say that you met with Mr. Loy
9 prior to the January 6th date where the plea was attempted?

10 A. Could you please ask the question again?

11 Q. Sure.

12 A. Be sure I understand.

13 Q. After you were arrested and prior to the attempted
14 guilty plea on January 6, 2012, how many times would you say
15 you met with Mr. Loy?

16 A. I would say approximately two to three times.

17 Q. During these discussions, did he discuss with you a
18 plan or strategy in dealing with the state's evidence
19 against you if this went to trial?

20 A. Strategy, I don't recall, no, sir.

21 Q. Did he ever discuss with you at these meetings the plan
22 to deal with the state's witnesses that we -- would call
23 against you if this went to trial?

24 A. Could you rephrase the question?

25 Q. Individual witnesses that were referenced in the, the

1 discovery, did you have any conversation with Mr. Loy about
2 how -- what the strategy was to deal with any of those
3 individual people?

4 A. No, sir.

5 Q. The general strategy, again, was to show that this was
6 not a killing with malice. Is that correct?

7 A. Correct.

8 Q. Can you indicate to the court where it was that you
9 were actually taken into custody because of this incident?

10 A. Alaba -- I believe it was Auburn, Alabama.

11 Q. Okay, and so it was some law enforcement involved at
12 that location? There were some law enforcement officers
13 involved at that location?

14 A. Oh. Yes, sir.

15 Q. There was some evidence collected at that location?

16 A. Yes, sir.

17 Q. Okay. At trial, do you recall your attorneys having
18 several pretrial motions at the start of the trial?

19 A. Yes, sir.

20 Q. Okay. How were they -- they did not argue against the
21 introduction of the evidence collected by the Alabama law
22 enforcement, did they?

23 A. No, sir.

24 Q. Now, Judge Culbertson has a copy of the trial
25 transcript. Can you briefly summarize the evidence that was

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

12

1 of concern to you that Alabama collected?

2 A. Yes, sir. Pertaining to the knife or machete that was
3 collected and introduced into evidence.

4 Q. Okay. So, so, a large knife?

5 A. Yes, sir.

6 Q. Any other evidence that would have been helpful if your
7 attorneys could have attempted to block the evidence?

8 A. Yes, sir. I would say the 9 mm.

9 Q. Okay. So, a firearm?

10 A. Yes, sir.

11 Q. Okay. In addition to the actual weapons, were there --
12 did Alabama law enforcement catalog or, or identify these
13 weapons in any way?

14 A. Yes, sir, as far as I, I recall, yes, sir.

15 Q. Were there photographs of them?

16 A. Yes, sir.

17 Q. Okay. Was there an issue you had with the seizing of
18 the evidence or the taking of the photos?

19 A. Yes, sir, there was. As I recall, the statements were
20 made during the course of the trial that the photos were
21 taken of the automobile after the, the -- my truck was towed
22 to the compound as to where the, the gun was positioned
23 inside the truck.

24 Q. Okay, help the court out a little bit. You -- where --
25 what, at what type of location were you arrested?

1 A. Okay, it was, I believe, a BP gas station.

2 Q. Okay, and you were not in your vehicle at the time?

3 A. No, sir.

4 Q. Were the doors of your vehicle open or closed?

5 A. Closed.

6 Q. Okay. Is your understanding that law enforcement in
7 Alabama seized your vehicle?

8 A. Yes, sir.

9 Q. Did they take it to another location?

10 A. Yes, sir. They loaded it on a flatbed and towed.

11 Q. Okay, and there were some photos of your vehicle. Is
12 that right?

13 A. Yes, sir.

14 Q. And at least one of those photos showed the, the
15 firearm?

16 A. Yes, sir.

17 Q. And where did law enforcement indicate they saw that
18 firearm?

19 A. At the compound where they towed the vehicle was -- and
20 the gun was located under the seat of the truck.

21 Q. When's the first time you saw photos of where Alabama
22 police found the firearm?

23 A. During the course of trial.

24 Q. And did the photographs look like they were at a police
25 compound or at the gas station?

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

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1 A. It appeared to me it was at the gas station.

2 Q. Do you recall there being any allegations of any
3 witness that a knife was used in the crime that you were
4 charged with?

5 A. No, sir.

6 Q. But a knife was admitted, a machete-type knife was
7 admitted at trial. Is that correct?

8 A. Correct. Yes, sir.

9 Q. Jump ahead just briefly, Mr. Benton. You testified at
10 your trial, correct?

11 A. Yes, sir.

12 Q. Okay. There were other witnesses on the scene of the
13 incident when it happened, correct?

14 A. Yes, sir.

15 Q. Okay. Do you remember the names -- male or female
16 witnesses?

17 A. Female.

18 Q. Okay. Do you remember how many there were?

19 A. Yes, sir. There were four.

20 Q. Okay. Do you recall the names?

21 A. Yes, sir. Erica Hill, Jessica Russell, Jessica
22 McClain, and Veronica Calunder [phonetic], I think, I
23 believe.

24 Q. Did each of these ladies give identical testimony or
25 somewhat conflicting testimony?

1 A. Conflicting, different testimony.

2 Q. Okay. Were there a couple crucial, crucial issues in
3 which they were conflicting?

4 A. Yes, sir.

5 Q. Can you tell the court about those issues?

6 A. Yes, sir. The conflicting issues concerning the
7 witnesses were pertaining to how many times my wife was shot
8 and the separation of the times that they were shot.

9 Q. There was some testimony that there were -- there was a
10 break in the shots.

11 A. Yes, sir.

12 Q. Is that correct?

13 A. Yes, sir.

14 Q. But that was not consistent among these witnesses?

15 A. Correct.

16 Q. Okay. What about the testimony about who was actually
17 there observing this? Was their -- did their testimony
18 corroborate each other, or was there conflicting testimony
19 about who actually observed you and your wife?

20 A. There was conflicting on that as well.

21 Q. Can you tell the court briefly about that conflict?

22 A. Yes, sir. Erica Hill testified that she had gone
23 outside to ask us to leave if we were going to continue the
24 argument, and she stated that once she attempted to do so,
25 that there was gunfire. She overheard a conversation of

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1 arguing and there was gunfire. When she turned around to
2 leave, one of the other employees working for her, Jessica
3 McClain, was there. They turned around to go inside. I, I
4 supposedly threatened them, told them to go inside. They
5 went inside the restaurant and stated that, that I had fled
6 [sic] the scene, but I had actually during that time that
7 they heard the gunshots, that I shot anywhere from eight to
8 nine times, and then I fled the scene.

9 Jessica McClain basically stated the same fact. The
10 difference in her story was that she had observed me. She
11 was able to pick me out of a lineup, and stated that the gun
12 appeared to be in a locked back position as if it fired its
13 last round. And she stated as well that her and the
14 manager, Erica Hill, entered the restaurant and that I had
15 fled the scene.

16 Q. Ms. Russell gave conflicting testimony about who was
17 actually outside, conflicting with Ms. Collins. Is that
18 right?

19 A. Correct.

20 Q. Of those four women, the state did not call Ms.
21 McClain, did they?

22 A. No, sir.

23 Q. Neither did your attorney?

24 A. No, sir.

25 Q. She identified you, correct?

1 A. Correct.

2 Q. But her, her -- the information she provided was there
3 was not a gap in the weapon being fired?

4 A. Correct.

5 Q. Do you recall the state calling a witness, Herbert
6 Calder?

7 A. Yes, sir.

8 Q. And can you briefly tell the court what information he
9 provided?

10 A. Yes, sir. Briefly, he stated that I had arrived at my
11 wife's residence earlier that day, and when I got to the
12 residence, I walked up supposedly, as his testimony, that I
13 knocked on the door to see if my wife was home. As I was
14 leaving, he said that I had a discussion with him about --
15 or he made a statement to me that she had just left and I
16 had just missed her. And I said, supposedly I stated, yeah,
17 she is probably with her boyfriend, and that I had gotten in
18 my vehicle and I sped off.

19 Q. Did you provide your attorney any background as to Mr.
20 Calder and his relationship with your wife?

21 A. No, sir.

22 Q. Did you indicate that they were close friends or had
23 any type of relationship?

24 A. No, sir.

25 Q. Let me go back a second. Forgive me. Let me finish

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

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1 up. On the, the women that were at the restaurant, what is
2 your complaint about how Mr. Loy handled the witnesses that
3 were called? The three that were called, what's your
4 complaint with how Mr. Loy either questioned them or did not
5 question them?

6 A. My issue concerning those was that basically that he
7 did not cross-examine them in a way to, to determine what
8 the conflict in interest was between the three of them that
9 had stated, you know, basically two different stories.

10 Q. About the shots fired?

11 A. Correct.

12 Q. And about who actually observed it?

13 A. Correct.

14 Q. The witnesses that were there?

15 A. Right.

16 Q. Prior to you testifying, did you and Mr. Loy discuss --
17 did he advise you on how to prepare for testimony?

18 A. Somewhat, yes, sir.

19 Q. Okay. Can you tell the court about that?

20 A. Yes, sir. Concerning the matter about when -- the
21 conversation I was having with my wife concerning Mike, Mike
22 Fikes, I think his name, or Mark Fikes, I think a guy she
23 supposedly had a relationship, supposed to be -- been her
24 boyfriend, and my argument or discussion with her concerning
25 their relationship. He encouraged me to use the word,

1 profanity word to illustrate what I, I was accusing her of
2 doing with Mark Fikes.

3 Q. During your testimony in front of the jury, did you
4 follow that advice?

5 A. Yes, sir, I did.

6 Q. What did your attorney do when you followed his advice?

7 A. He corrected me or chastised me for using profanity.

8 MR. DAVIS: And, Judge, just, just as a housekeeping
9 matter again, this is -- we're dealing with some profanity
10 issues. It's, it's on page 331 of, of, of the transcript
11 beginning line 14 and then rolling over to line 7 of 332.
12 So, just a short period, short portion there I'll have the
13 court take note of.

14 (A PAUSE.)

15 BY MR. DAVIS:

16 Q. Did you discuss with your attorney any limits on your
17 testimony?

18 A. Limits?

19 Q. Anything that he advised you not to get into? We
20 talked about things he told you, suggested how to answer
21 certain questions. Did he suggest to you about what not to
22 get into?

23 A. Yes. He brought up the issue about me not mentioning
24 anything concerning my criminal past.

25 Q. And why did he advise you of that?

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1 A. That he had made a, somewhat of a agreement with the
2 solicitor to prevent any calling of other further witnesses
3 to basically to discredit my credibility.

4 Q. I want to take you on -- to focus on one small but
5 important area of your testimony. Do you recall the
6 solicitor questioning you about a, a framed photograph, a
7 broken framed photograph?

8 A. Yes, sir.

9 Q. And again the judge has got the transcript. Can you
10 just summarize what the state was getting at when they asked
11 you about that?

12 A. Best that I can gather, Mr. Davis, is that they were
13 trying to establish that I had destroyed a picture of my
14 wife earlier that evening, that I had damaged a picture
15 frame or somewhat which was located on my bed supposedly
16 given, you know, by -- I was questioned about my niece
17 giving testimony -- I mean, or a statement of this
18 concerning the matter.

19 Q. And the state's position was that that was done the
20 same -- that was broken the same day of this incident?

21 A. Correct. Yes.

22 Q. And they -- the state's attorney, the solicitor's
23 office asked you questions about that?

24 A. Yes, sir.

25 Q. They called a witness to testify about the broken photo

1 frame?

2 A. No, sir.

3 Q. Your niece had provided them information about the
4 broken frame. Is that correct?

5 A. Correct.

6 Q. Did your attorney ever revisit that issue to allow you
7 to explain?

8 A. No, sir.

9 Q. During your testimony, were you allowed or prohibited
10 by your attorney's preparation and questioning in front of
11 the jury to present everything you want to? Were you
12 allowed to, or were you prohibited from doing that?

13 A. From the actions taken, I would believe that I, I was
14 prohibited.

15 Q. Can you say that again? I'm sorry.

16 A. By the actions that were, that were done or committed,
17 that occurred, I would say I was prohibited.

18 Q. What, if anything, specifically pre-testimony,
19 conversations or lack of conversations, can you tell the
20 judge? Was there anything pre-testimony that prohibited
21 you?

22 A. Trying to recall.

23 Q. Mr. Benton, I will suggest -- I want you to answer
24 fully, but -- or was it more the questions and lack of
25 questions actually in front of the jury?

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

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1 A. Correct. I would say it was that.

2 Q. Okay. So, again I don't want to suggest an answer to
3 you, but are the complaint about the discussions leading up
4 to your testimony that limited you, or was it more the way
5 the direct examination by your attorney was handled in the
6 courtroom in front of the jury?

7 A. I'd say the questions during the questioning, the
8 examining during the trial.

9 Q. You testified that this shooting was not done with
10 malice.

11 A. Yes, sir.

12 Q. Your credibility, your believability was crucial to
13 this trial?

14 A. Yes, sir.

15 Q. What is it that you were prohibited from testifying to
16 that jury that you would've said? Can you tell the judge
17 now what other testimony you wish had been provided?

18 A. Other than, I mean, you know, I, I didn't have a
19 criminal past. I wasn't this type of person that actually,
20 you know, lived a life to harm others or do things wrong.
21 I've always tried, just tried to do the right thing in life.

22 Q. Your attorney didn't ask you questions to allow you to
23 talk about that, correct?

24 A. No, sir.

25 Q. Let me connect this back to -- you testified earlier

1 that there were discussions prior to you testifying to not
2 get into that stuff?

3 A. Correct.

4 Q. From Mr. Loy, correct?

5 A. Correct.

6 Q. Did he, did he specifically tell you what the
7 consequences of getting into that stuff would have brought?

8 A. Just that -- I mean, the understanding I had was that
9 it would cause the solicitor to call witnesses to the stand
10 to try to discredit me. Basically to say, you know, or
11 testify that I'm not this kind of person that, that, you
12 know, I claim to be, so.

13 Q. Did Mr. Loy to give you names of those witnesses?

14 A. No, sir.

15 Q. Did Mr. Loy give you the substance of what those
16 witnesses would testify about?

17 A. No, sir.

18 Q. Any particular instances prior to this trial that they
19 were going to talk about?

20 A. No, sir.

21 Q. Did you have any convictions that they could have
22 brought up?

23 A. No, sir.

24 Q. In the state's closing, is it fair that they focused
25 heavily on the number of shots fired?

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

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1 A. That and the separate times that they were shot.

2 Q. Is it fair that they painted a picture of a preplanning
3 of this event?

4 A. Yes, sir.

5 Q. In your, in your attorney's closing, was there an issue
6 about how you left the scene and what you left the scene
7 with that you wished he had discussed?

8 A. Yes, sir.

9 Q. Can you tell the court about that?

10 A. Yes, sir. The matter that they, they tied to me, to
11 establish that I planned this. That I had made, you know,
12 an all out assault to, to achieve this task by arming myself
13 with a machete and a knife and planning to do this deed.
14 And then my issue concerning the matter was that, that if a
15 man would make such an attempt to make a plan like this and
16 travel so far, you know, to a point where he would leave the
17 gun in the vehicle, how was that a plan? Why would a man
18 that would plan such a task leave the murder weapon in his
19 vehicle?

20 Q. Mr. Loy never pointed that out or enforced that fact?

21 A. No, sir.

22 Q. Did Mr. Loy ever question you to allow you to testify
23 like you just did in front of the jury?

24 A. No, sir.

25 Q. Mr. Benton, prior to -- let me start that again. Once,

1 once the jury was given your case but prior to their
2 verdict, was there a concern you had with some information
3 that was provided from one of the jurors?

4 A. Yes, sir. It was they had look -- went to -- on first
5 deliberation and they came back, required a description of
6 the definition between the two charges again, and one of the
7 jurors requested to be -- leave at a certain time.

8 Q. Do you recall approximately what time of the day those
9 notes came back in? Was it the morning time? Early
10 afternoon? Do you recall?

11 A. Earlier afternoon, I would say.

12 Q. In dealing with the second part with the juror
13 indicating they had to leave at a particular time, do you
14 recall when that was? I mean, what time they had to leave?

15 A. I believe it was around, somewhere around 5:00.

16 Q. Did your attorney object to that at all?

17 A. No, sir.

18 Q. Did you have concerns about that?

19 A. Yes, sir.

20 Q. What were your concerns?

21 A. That the, the, that during the, the -- excuse me,
22 deliberation, that the witness was more concerned about
23 getting home or leaving or -- other than making the, the,
24 the difficult task of making a decision pertaining to my
25 life.

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

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1 Q. Was a verdict rendered that same day?

2 A. Yes, sir.

3 Q. That afternoon?

4 A. Yes, sir.

5 Q. Before 5:00?

6 A. Yes, sir.

7 MR. DAVIS: Your Honor, if I could have just a moment?

8 THE COURT: All right.

9 (A PAUSE.)

10 BY MR. DAVIS:

11 Q. Mr. Benton, being that this is your shot at a
12 post-conviction relief action, I believe I've covered
13 everything, but is there any other complaints that you have
14 about your attorney's performance either leading up to or
15 during your trial?

16 A. Just that, you know, it concerned me that the matter he
17 brought up, the issue that it was an election year and that
18 the outcome was not going to be good if I went to trial.

19 Q. Anything else you need to tell the court about? Any
20 complaints that you have?

21 A. If I may, may I ask?

22 Q. No.

23 A. Okay.

24 Q. I'm asking you.

25 A. Okay.

R. BENTON - DIRECT EXAMINATION BY MR. DAVIS

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1 Q. Is there anything that we -- any other complaints you
2 have about your attorney's performance leading up to or
3 during the trial?

4 A. Yes, concerning the matter of one of the officers in
5 Alabama that had gave us testimony that, that I wasn't
6 under the influence, but in his police report he stated
7 that, that him and other, other officers observe -- observed
8 me to being under the influence, and Mr. Loy didn't
9 cross-examine.

10 Q. And again, the sole, the sole issue you were fighting
11 at trial was intent, was your mental state. Is that right?

12 A. Correct.

13 Q. Can you think of any other complaints about your
14 attorney, either pretrial, leading up to the trial, or
15 during trial?

16 A. I want to make sure I understand the question again.
17 Could you please put it again?

18 Q. Are there any other complaints you want the court to
19 know about?

20 A. Oh. No, sir. No, sir.

21 Q. Okay. Mr. Benton, the attorney general may have some
22 questions for you.

23 A. Okay.

24 MR. DAVIS: Thank you, Your Honor.

25 THE COURT: Cross-examination?

R. BENTON - CROSS-EXAMINATION BY MR. MITCHELL

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1 CROSS-EXAMINATION BY MR. MITCHELL:

2 Q. Good afternoon, Mr. Benton.

3 A. Good afternoon, sir.

4 Q. So, the victim in this case was your wife at the time,
5 correct?

6 A. Yes, sir.

7 Q. Okay. Now, y'all were separated at the time. Still
8 married, though, right?

9 A. Yes, sir.

10 Q. Okay. So, the defense at trial was that this was a
11 voluntary manslaughter case and not a murder, right?

12 A. Could you repeat?

13 Q. So the defense at trial, kind of what you talked about
14 a second ago, is that you didn't have the requisite intent
15 to be convicted of murder, right?

16 A. Oh. Correct. Yes, sir.

17 Q. You were kind of shooting for a voluntary manslaughter
18 conviction instead of the murder, right?

19 A. Correct. Yes, sir.

20 Q. So, you didn't deny shooting the gun ---

21 A. No, sir.

22 Q. --- and killing your wife, right?

23 A. No, sir.

24 Q. Okay. You testified at trial, right?

25 A. Yes, sir.

1 Q. And you were able to get out your side of the story,
2 right?

3 A. Somewhat, yes, sir.

4 Q. Okay. You testified that you had been drinking
5 beforehand at a bar, right?

6 A. Correct.

7 Q. Okay, and then you were driving to a different bar --
8 or, no. Excuse me. Yes, at the first bar, you got into an
9 altercation with someone and then was hit in the head with
10 -- you thought it was a beer bottle?

11 A. Correct.

12 Q. Okay. So, you were a little bit disoriented from that,
13 right?

14 A. Correct.

15 Q. Okay, and then you went to your wife's place trying to
16 get her to give you a ride from there, right?

17 A. Correct.

18 Q. Okay. Now, you kind of made up a story that your car
19 was broken down so your wife would have to drive, right?

20 A. No, sir.

21 Q. You didn't make up the story or ---

22 A. No, sir.

23 Q. --- you didn't ask her to give you a ride?

24 A. My intent was to ask, but I didn't make up a story, no,
25 sir.

R. BENTON - CROSS-EXAMINATION BY MR. MITCHELL

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1 Q. Okay. So, your car was broken down?

2 A. No, sir.

3 Q. Okay, but you, you don't agree that you told her your
4 car was broken down?

5 A. Correct. There was testimony from my stepson that had
6 the allegations that I had said that my truck was broke, but
7 it wasn't. I, I didn't make that, I didn't make that, that
8 statement.

9 Q. Okay, and your nephew testified that that's what you
10 came over and said to him, though, right?

11 A. My stepson, yes, sir.

12 Q. Right. Yeah, nephew, excuse me. Your stepson.

13 A. That's all right.

14 Q. And at that point, your wife said to the -- to your
15 nephew that if I'm not back in twenty minutes, call the
16 police, right? That came out in the trial.

17 A. Correct.

18 Q. I'm asking you if you agree with it.

19 A. Correct.

20 Q. I understand you probably don't. So, that, that did
21 come out in the trial, right?

22 A. Correct.

23 Q. Okay, and Mr. Loy objected to that coming in. Do you
24 recall that?

25 A. I don't recall that.

1 Q. Okay. So, you also kind of testified that you met a
2 woman from Missouri and that she offered you a drink, and
3 you kind of alluded to that you may have been drugged. Is
4 that right?

5 A. Correct.

6 Q. Okay. So, you took a drink from someone, and then
7 after that you started feeling pretty disoriented, pretty
8 hazy, right?

9 A. Yes, sir.

10 Q. I think you testified that you were feeling a bit
11 paranoid at the time, feeling strange. Is that accurate?

12 A. Yes, sir.

13 Q. Okay. So, your wife had a boyfriend at the time. Is
14 that correct?

15 A. I didn't know that, but from the course of the trial,
16 that's what came out, yes, sir.

17 Q. Okay. So, it was that a guy named Michael that she was
18 possibly seeing or had some kind of relationship with?

19 A. Correct.

20 Q. Okay, and that's part of, that was part of your
21 defense, that you found out she had been with this other
22 man, and that that is what set you off, right?

23 A. Correct.

24 Q. Okay, and you were able to testify to all of that,
25 right?

R. BENTON - CROSS-EXAMINATION BY MR. MITCHELL

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1 A. Yes, sir.

2 Q. So, you testified that Mr. Loy encouraged you to use
3 the F word when testifying about that?

4 A. Yes, sir.

5 Q. Okay. You talked a little bit about the agreement with
6 the solicitor to keep certain things from coming before the
7 jury, and that was kind of putting your character at issue,
8 right? You wanted to testify that I'm a good person, I
9 wouldn't do this, right?

10 A. Right.

11 Q. Okay, and did he advise you that if you were able to
12 say that, that the state would then be able to bring in
13 certain things to show that that wasn't true?

14 A. Correct.

15 Q. Okay. So, that's -- they talk about it in terms of
16 Lyle. You ever heard that term? Probably not, and that may
17 be something Mr. Loy advised you on, but -- so, you
18 understood that that was to benefit you, though, right, so
19 that the state would not be able to bring in prior
20 altercations or prior incidents with your wife?

21 A. I understand I had -- it was to prevent a lengthy
22 trial.

23 Q. Okay. So, Mr. Loy advised you that he wanted to keep
24 out your prior altercations with your wife to avoid a
25 lengthy trial?

1 A. From the calling of, of more witnesses.

2 Q. Okay. Now, the three ladies that testified, they
3 worked at -- it's was Perkins restaurant. Is that correct?

4 A. Yes, sir.

5 Q. Okay, and they were employees at the restaurant who saw
6 you and your wife pull up in the Trailblazer and that were
7 kind of watching you as they were about to close up, right?

8 A. Correct.

9 Q. Okay, and their testimony was that they saw kind of an
10 argument going on, and that then your wife got out of the
11 car. You also got out, right?

12 A. Yes, sir.

13 Q. Okay, and then questioning, there was a lot of focus on
14 demeanors and who was more upset than who, and Mr. Loy was
15 able to get some testimony that you were very upset at the
16 time, right?

17 A. Yes, sir.

18 Q. Okay. So, he was able to get before the jury that you
19 were very upset with everything; you weren't just calm,
20 cool, and collected. Not a stone-cold murder, right?

21 A. Correct.

22 Q. And that went, that went to the strategy that you
23 didn't have the intent to be convicted of murder?

24 A. Yes, sir.

25 Q. As to the broken photograph frame, you were able to

R. BENTON - CROSS-EXAMINATION BY MR. MITCHELL

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1 explain that a bit, weren't you?

2 A. Somewhat.

3 Q. I think your testimony was that the picture had been
4 broken for four days and that it wasn't just something that
5 was broken, you know, that day or throwing down a picture,
6 then going to get your wife, right?

7 A. Right.

8 Q. So, that was able to be presented. I mean, you didn't
9 maybe get to say everything you wanted, but you got to
10 explain it a bit, right?

11 A. Somewhat, yes, sir.

12 Q. I mean, your testimony was also that, excuse me, that
13 once the, once the -- after you shot your wife, you then
14 kind of -- or you kind of blacked out a bit, right?

15 A. Correct.

16 Q. And that you kind of -- your memory kind of came back
17 after you were arrested in Alabama?

18 A. Yes, sir.

19 Q. How long was it after the incident where you get
20 arrested in Alabama?

21 A. I'm sorry. You're...

22 Q. I'm sorry. How, how long was it? Two days or about a
23 day and a half?

24 A. Approximately the next day.

25 Q. So, the next day?

1 A. Yes, sir.

2 Q. So, you would have driven through the night pretty much
3 and gone straight to Alabama?

4 A. Yes, sir.

5 Q. Okay, and that's where they found the gun that was used
6 in the crime that was in your truck, right?

7 A. Correct.

8 Q. Okay, and you had a machete in there as well?

9 A. Correct.

10 Q. And you take issue with the photographs of the vehicle
11 that show the machete in them, right?

12 A. No, sir, not the machete.

13 Q. Oh. Just the gun?

14 A. Yes, sir.

15 Q. Okay, just the gun. Gotcha. So in your attempted
16 guilty plea before Judge Goodstein, that was -- she did not
17 agree to accept the guilty plea, right?

18 A. Correct.

19 Q. And that was because you were not -- you had not
20 reviewed all of the state's evidence in the case?

21 A. Correct.

22 Q. Which portion of the state's evidence had you not
23 reviewed at that point?

24 A. I can't, I can't really give you a definite amount or
25 answer to how much I did or did not study.

R. BENTON - CROSS-EXAMINATION BY MR. MITCHELL

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1 Q. Okay. Now, I mean, you, you understood the general
2 evidence against you did. You understand at that point the
3 employees at Perkins would testify against you?

4 A. Right.

5 Q. Okay, and did you understand, then, the gun was found
6 that matched the bullets that were fired? You understood
7 that at the time?

8 A. Correct.

9 Q. Okay. So, you had a general understanding, maybe just
10 not every little detail. Is that fair?

11 A. Correct.

12 Q. Okay.

13 MR. MITCHELL: All right, no further questions. Thank
14 you.

15 THE COURT: All right, redirect?

16 MR. DAVIS: No, Your Honor, I have no questions. Thank
17 you.

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

19 WITNESS: Thank you, Your Honor.

20 (THE WITNESS EXITS THE STAND.)

21 THE COURT: Applicant can call your next witness.

22 MR. DAVIS: We would call Mr. Loy and, Your Honor, if I
23 could have a moment with my client before we begin direct?

24 THE COURT: Do what?

25 MR. DAVIS: Just a moment? We're calling Mr. Loy, but

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1 if I can have just a moment with my client before direct?

2 THE COURT: All right.

3 (A PAUSE.)

4 CLERK OF COURT: Please state your full name for the
5 record.

6 WITNESS: John Matthew Loy.

7 JOHN M. LOY, BEING DULY SWORN,

8 TESTIFIES AS FOLLOWS:

9 MR. DAVIS: May it please the court?

10 THE COURT: Yes, sir.

11 DIRECT EXAMINATION BY MR. DAVIS:

12 Q. Mr. Loy.

13 A. Yes, sir.

14 Q. The sole issue of this trial was mental state, correct?

15 A. Yes.

16 Q. And, therefore, Mr. Benton's credibility when he
17 testified was crucial?

18 A. Mr. Benton, yes, his testimony was definitely crucial.

19 Q. If the jury believed his argument about being suddenly
20 provoked and not having malice, then that led towards the
21 goal of a lesser included or a not guilty, correct?

22 A. I don't think it would have led us toward a not guilty,
23 but I think that was -- those were certainly goals on the
24 road to a voluntary manslaughter. I think they still would
25 have had to find the provocation adequate, et cetera. I

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1 don't think that that actually would have gotten us over the
2 hoop even if they had believed everything. Even if they had
3 believed everything that Mr. Benton testified to, I think
4 the jury could have listened to it and said no, I don't
5 think slapping him and knocking his hat off his head was
6 adequate provocation.

7 Q. Fair enough, but for them to believe it was, the best
8 evidence was Mr. Benton?

9 A. The only evidence. Mr. Benton had to testify for us to
10 get the charge.

11 Q. Just briefly about the attempted plea. His -- you, you
12 recall being with him before Judge Goodstein to attempt the
13 plea for the negotiated forty years?

14 A. After having been reminded and reviewing the
15 transcript, I do at this point, yes.

16 Q. We looked at that earlier today?

17 A. Yes.

18 Q. For that to have been arranged, you would have agreed
19 with his decision at that point to not to go to trial and to
20 accept that plea?

21 A. I would have encouraged him to take the forty-year
22 plea.

23 Q. However, when it failed to, to be completed, there was
24 no attempt on your part to resurrect it that day?

25 A. There is no attempt reflected in the transcript itself.

1 I suspect and my best recollection of what happened is that
2 at the outset, I don't believe Judge Goodstein wanted to
3 take this plea. It was an *Alford* plea; it was to the forty
4 years. I don't think she was pleased about it being put
5 forward at all, and we certainly didn't surprise her in
6 court. We would have discussed it in chambers, and I
7 probably pushed pretty hard with both her and the state to
8 get it through.

9 At the point that it fell apart, I suspect that I, I
10 tried to rehabilitate it in chambers. The sticking point of
11 the plea actually going forward was we got to the part in
12 this exchange between the judge and the defendant, and the
13 judge asked Mr. Benton had you reviewed all of the evidence
14 and he said, well, something to the effect of, well, not all
15 of it, and there was no further exchange. She essentially
16 banged the gavel and said I'm not taking this plea. We're
17 done.

18 I suspect that what Mr. Benton was referring to at that
19 point, and this is my belief, is that prior to sending him
20 the package of discovery, we pulled the pictures of his wife
21 both from the autopsy pictures as well as her wounds, et
22 cetera. I would have told him at that point in time it's
23 probably not something that you want to see. He agreed. He
24 did -- he may have killed her, but I certainly believe he
25 loved his wife at that point, and those were things he

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1 didn't want to see. I don't feel like the fact that he
2 hadn't seen those photographs was necessarily reason enough
3 to pull the plea, but it was enough for the judge to say I'm
4 not taking this.

5 Q. Given that as fact, that issue is easily remedied.
6 Show him the pictures.

7 A. Yes. If, in fact, I'm correct and that was the issue,
8 then the judge could have asked what is it you haven't seen.
9 Show him the pictures, Mr. Loy.

10 Q. Was it your opinion that this should have been a jury
11 trial or a guilty plea, given the state's offer of the
12 negotiated forty years?

13 A. I think he would have been better with the forty years.

14 Q. At any point after that attempted plea and the trial,
15 was there ever an attempt at resurrecting that plea again?

16 A. I, I don't recall. I don't think it was -- I had a
17 hard time, as I recall, getting it in place, and I think
18 when it fell through, the solicitors essentially wanted to
19 try the case. The judge didn't want to take it, and when
20 Judge McDonald came to the town, it was first up for trial.

21 Q. And you heard -- or do you recall the attempted plea
22 being January 6, 2012?

23 A. No.

24 Q. Would a copy of the transcript refresh your memory?

25 A. No, but I'm sure the date on it is correct if that's it

1 -- I won't recall the date that it took place.

2 Q. Fair enough. Do you recall the beginning of the trial
3 being February the 9th, 2012?

4 A. I, I don't recall that day the trial started, no.

5 Q. So, again when the trial began, the goal, unless there
6 was, unless there was some major success in blocking
7 evidence, the goal would have been for a verdict of guilt on
8 a lesser-included manslaughter?

9 A. Or the goal would have been a hung jury between murder
10 and manslaughter and renewed negotiations at that point.

11 Q. Fair enough. In your opening, you never mentioned the
12 offense of manslaughter.

13 A. I haven't reviewed my opening since that day.

14 Am I not, am I not speaking loudly enough? I haven't
15 renewed my opening since that day.

16 Q. You recall with the assistance of -- and forgive me.
17 I've known her forever. She's remarried. It was Michelle
18 Suggs. It's now Michelle Williams?

19 A. Williams, yes, sir.

20 Q. She, she was a -- she -- attorney assisted you on this
21 trial, correct?

22 A. Yes.

23 Q. The two of you filed several pretrial motions, correct?

24 A. Yes.

25 Q. Included in those was a motion to suppress the evidence

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1 that was obtained in Alabama by law enforcement there,
2 correct?

3 A. I recall, looking at the transcript briefly, that we
4 made the judge aware that we intended to object to that
5 evidence, to the seizure of Mr. Benton, the seizure of the
6 property in Alabama. Whether there was a written motion to
7 that effect or a memorandum filed with the court -- Ms., Ms.
8 Williams was handling those. Typically she does that. I
9 don't know that there was or was not, but we made the judge
10 aware on the record of our intention to, to move to suppress
11 those at the time the state attempted to introduce them.

12 Q. You resolved the issue of sequestering witnesses,
13 correct?

14 A. I'm sure we did.

15 Q. *Lyle* evidence, correct?

16 A. Yes.

17 Q. The *Biggers* issues?

18 A. I, I don't recall the hearing, but if we did, we did.

19 Q. An issue about potential phone records being used, you
20 resolved that issue?

21 A. I...

22 Q. In the sense that the state indicated they would not
23 present evidence of that?

24 A. I, I don't think that that was evidence that was
25 produced or an issue in the case.

1 Q. There was a hearing about DNA evidence which Judge
2 McDonald overruled y'all's objection to that. Do you recall
3 that?

4 A. I know that there was an argument that the hat found at
5 the scene of the shooting which we alleged was not from Mr.
6 Benton's head when his wife struck him had his DNA within
7 it. If there was an argument to suppress that, I don't
8 recall, but I think that evidence came in at trial.

9 Q. And as you've said you made the court aware, whether it
10 was by filing a written motion or not, you made the court
11 aware of the intention to suppress not only evidence seized
12 in Alabama but Mr. Benton's arrest?

13 A. Yes, and partly that's the same argument: to object to
14 the -- to his arrest, is his initial arrest as having been
15 illegal, and then the subsequent seizure of property is a
16 product of that illegal also.

17 Q. While that was mentioned pretrial, there was no
18 objection during the attempted admission of that evidence
19 during testimony, was there?

20 A. You, you've told me there was not. I have not reviewed
21 the transcript in its entirety. If there -- if it was -- if
22 it's not in the transcript, then we didn't do it.

23 Q. You're aware that there was a ballistic match between
24 shell casings and the weapon found in Alabama, correct?

25 A. Yes.

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1 Q. So, that's crucial evidence as well?

2 A. Yes.

3 Q. Another weapon was also admitted at trial, and that
4 being this knife or machete. You recall that?

5 A. Yes.

6 Q. There was no objection to the admission of that item,
7 was there?

8 A. I'm sure the transcript is an accurate reflection. My
9 recollection is that we objected to the introduction of that
10 as not having been relevant, but if that's not reflected in
11 the transcript, I would rely on the transcript.

12 Q. You recall conducting a cross-examination of Ms. Erica
13 Hill, one of the witness employees?

14 A. I recall the -- I don't recall the names. I know that
15 there were witnesses who were at Perkins who described what
16 they saw; I don't recall anyone's name in particular.

17 Q. I'm going to ask complex -- if the state wants to
18 object, they can, but I'll try to simplify it. Ms. Hill,
19 Ms. Russell, Ms. Collins all testified. You cross-examined
20 the first two but not the last. Do you recall that?

21 A. No.

22 Q. You, you have no objection to the, the accuracy of the
23 record, however?

24 A. No. I am positive the record is an accurate reflection
25 of the proceedings in the courtroom.

1 Q. You did not independently call Ms. Jessica McClain, who
2 was also an employee and witness at Perkins?

3 A. No. I, I did not call a witness from Perkins, no.

4 Q. Do you recall advising Mr. Benton to use graphic
5 language in describing the interrelationship between his
6 wife and a new man prior to his testimony?

7 A. I, I don't specifically recall the conversation, but I
8 don't doubt that. I think that that's probably correct, and
9 if I can explain that if you -- the entire action,
10 interaction between Mr. Benton and his wife as they
11 approached Perkins was what our case was focused on, and it
12 was slowly building to a crescendo between the two as he
13 described it to me. I would have wanted him to explain to
14 the jury as clearly as possible so they could have a clear
15 mental image of what was taking place between the two of
16 them, and if the exchange was such that it was heated -- it
17 was a husband and wife. They were addressing infidelities
18 on one's part because they were still husband and wife. If
19 profanity was used, I may well have told him you're allowed
20 to do that, particularly if you're quoting someone else,
21 that this is what they said or this is what you said, to
22 give an accurate picture.

23 I wanted a visceral feeling with the jury to understand
24 what was, what was taking place and what the nature of the
25 conversation had been that led up to Ms. Benton striking Mr.

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1 Benton. That is, hitting him. Knocking his hat from his
2 head and getting us over what I think the hurdle -- that is
3 mere words -- for, for the charge on voluntary manslaughter.
4 So, rather than have him pull his punches or mamby pamby it
5 and just say why aren't you being a good wife to me, if that
6 wasn't an accurate reflection of the conversation, I felt
7 like the shooting itself, the evidence itself, everything
8 else that was going to come out was ugly enough, the mere
9 profanity I didn't think was going to put it over the top
10 and might well have been beneficial to us.

11 Q. You also advised him prior to his testimony to refrain
12 from -- and I'll use generic examples; we've both practiced
13 for a while -- I would never have done this. I'm a good
14 person. It's not the type of thing -- you would have
15 advised him to avoid those type of generalities as to his
16 character?

17 A. I probably did.

18 Q. However, you did not discuss with him the specific
19 consequences in the sense of the evidence the state, if he
20 opened the door, would have attempted to bring in, did you?

21 A. I don't recall doing that; I don't know that I did not,
22 but I don't recall doing that. I know that we were
23 concerned enough at the outset that we filed the *Lyle* motion
24 that the state conceded unless things go differently than we
25 anticipate, we do not intend to introduce evidence of prior

1 bad acts, et cetera. I did not take that as a concession on
2 their part that there were none, at least within the
3 confines of the record, but merely that they weren't
4 intending to go down that road.

5 Q. What evidence, what Lyle evidence were you worried
6 about?

7 A. I, I, I -- nothing in particular at this point that
8 stands out in my mind. I don't think Mr. Benton had a
9 record that would have come in behind it. There may have
10 been, and I don't doubt there were things within the file
11 that described conflicts between her -- she and he in the
12 past or various acts of misbehavior that might or might not
13 have qualified as some sort of character evidence.

14 Q. But you don't recall specifics rising to the level as
15 to -- specific events rising to the level as to explain to
16 Mr. Benton what those were? You don't recall?

17 A. I don't recall saying I'm afraid they'll talk about you
18 fighting your boss, or I'm afraid they'll talk about this.
19 I would -- I probably spoke in generalities.

20 Q. Is it a fair representation that the state in their
21 theory in the case and in their closing painted this as a
22 preplanned event?

23 A. Yes.

24 Q. Is it fair to say that they focused in their closing on
25 the quantity of shots fired in an attempt to prove malice?

J. LOY - DIRECT EXAMINATION / CROSS-EXAMINATION

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1 A. I haven't read the -- reread the state's closing in its
2 entirety. I looked at the one part that you and I
3 discussed, but that sounds correct. I do seem to recall Mr.
4 Giese as far as timing, then shooting the shots, banging
5 them one by one, something like that. So, I think that is
6 correct, yes.

7 Q. As to the issue of the jurors submitting a note that
8 they only had limited time to deliberate that day, do you
9 recall acquiescing to the court's discretion on that issue
10 and not objecting?

11 A. I recall you telling me, well, I think that's your
12 call, Your Honor, or something to that effect, and that
13 sounds as though that would have been my response. I
14 believe you are probably representing that correctly to me.

15 MR. DAVIS: Your Honor, if I could have just one moment
16 with my client?

17 THE COURT: All right.

18 (A PAUSE.)

19 MR. DAVIS: Thank you, Your Honor.

20 Thank you, Mr. Loy. No other questions.

21 THE COURT: Cross-examination?

22 CROSS-EXAMINATION BY MR. MITCHELL:

23 Q. Good afternoon, Mr. Loy.

24 A. Good afternoon.

25 Q. Thanks for being here with us today. So, where are you

1 currently employed?

2 A. I'm employed with the Dorchester County Public
3 Defender's Office.

4 Q. How long have you been there?

5 A. I was originally hired in the Dorchester County Public
6 Defender's Office in 1990. At that point in time I was the
7 -- I had a secretary and I was both adult and public
8 defender, adult public defender from '90 to '93. Sometime
9 probably around '96 or so I was hired as a juvenile -- the
10 juvenile public defender for Dorchester County as a contract
11 part-time, as a contract part-time position. I held that
12 position up until, I guess, about eight years ago when the
13 current circuit-wide public defender system was put into
14 place, and I was hired by Mr. Mark Leiendecker on a
15 full-time basis as deputy public defender. So,
16 intermittently and pretty consistently since 1990.

17 Q. So, you've handled a number of murder cases. Is that
18 right?

19 A. I have.

20 Q. Okay. Ms. Suggs was second -- well, Ms. Williams now,
21 formerly Ms. Suggs, she was second chair on this case. Is
22 that right?

23 A. That's correct.

24 Q. What was her role in this trial?

25 A. She argued some motions or prepared some motions for

J. LOY - CROSS-EXAMINATION MR. MITCHELL

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1 us. I have been -- unlike some attorneys in my office, the
2 bulk of my trials that I have done have been either as a
3 private practitioner without backup at the table. If I have
4 a second chair, usually it's more or less a babysitter at
5 the table. I tend to do the trials myself. Most of the
6 time I don't have a second chair; I just do them on my own.

7 Q. She didn't handle any witnesses or the opening or the
8 closing?

9 A. She didn't do open or close, and I don't believe she
10 handled any witnesses. And I don't mean as a babysitter
11 flippantly or glibly, but my client, I'm listening to
12 testimony. Client has issues or questions, concerns often
13 relatively irrelevant and somewhat distracting. It can be
14 useful to have another attorney at the table to handle those
15 while I listen to the testimony or think about cross.

16 Q. After the plea was not accepted by Judge Goodstein, did
17 the solicitor hold that offer open?

18 A. I, I, I doubt it, but I do not specifically recall.
19 They kind of wanted to try the case.

20 Q. Barney Giese and Russell Hilton tried the case?

21 A. They did.

22 Q. Okay. All right, so the general strategy was that Mr.
23 Benton did not have the requisite intent and were kind of
24 shooting for voluntary. Is that right?

25 A. That's correct.

1 Q. All right, and then going off on that is that she was
2 aggressive towards him, and then he then reacted in a
3 reasonable manner?

4 A. Yes. Not, not -- certainly not self-defense or, or
5 anything along those lines, but that the, the culmination,
6 the entirety of what he was confronted with, along with the
7 physical assault which was somewhat corroborated by one of
8 the ladies at Perkins, was to provoke him into acting as he
9 did and that that enough to reduce the charge or the correct
10 charge to a voluntary manslaughter.

11 Q. So, what, what was your strategy on handling those
12 employees from Perkins?

13 A. They -- my intention was to elicit from them, to the
14 extent I could, that as the vehicle pulled in, the parties
15 appeared to be excited or disturbed, that there was a
16 conflict or confrontation going between them. If I could,
17 that Ms. Benton was perhaps more so than the other. That
18 Mr. Benton was somewhat plaintive, asking questions along
19 the lines of why, or why are you doing this to me, or why
20 would you or something like that, and that as they got out
21 of the vehicle and basically disappeared from sight, as I
22 recall, to one side of the vehicle, one of the witnesses who
23 was called testified that Mr. Benton's hat came flying from
24 the side of the vehicle like or maybe like he had been
25 struck.

J. LOY - CROSS-EXAMINATION MR. MITCHELL

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1 Q. So after the incident, he was then picked up in
2 Alabama, right?

3 A. Yes.

4 Q. And in Alabama, investigators arrested him and he was
5 transported back to Dorchester. Is that right?

6 A. Yes.

7 Q. Okay, and he was in his car which contained the murder
8 weapon, right?

9 A. At the time of his apprehension, I believe he was in
10 the gas station. He had stopped at a convenience store and
11 asked to use the telephone of the clerk. Can I use your,
12 your cell phone, and offered I'll leave my wallet on the
13 counter so you know I won't leave, but I want to step
14 outside. He then stepped outside, made a phone call to his
15 mother back here in South Carolina, had a discourse with her
16 briefly, went back in, gave the lady back her phone, and I
17 believe was shopping in the back of the store for snacks or
18 soda or something like that, at which point his mother, Mr.
19 Benton's mother hit the redial button. When the clerk
20 picked up, she said I don't know who you are or where you
21 are, but that was my son I was just talking to. He's wanted
22 for murder in South Carolina. The clerk hit the panic
23 button, and law enforcement arrived very shortly.

24 I don't, I don't believe he was in his car. I think he
25 was in the store at the time. I may be incorrect, but I

1 think he was in the store.

2 Q. I think that is accurate. So, he has an issue with the
3 seizure of the vehicle and gun. Did you see any grounds to
4 challenge that then?

5 A. At the time that they seized -- initially I thought
6 that I did. The time they seized Mr. Benton, they didn't
7 have a warrant. They didn't have a warrant that had been
8 faxed to them, presented to them. Apparently just had some
9 telephone information, as it developed at trial, and I
10 hadn't spoken with the officers from Alabama prior to trial,
11 I don't believe. One of them en route has apparently -- in
12 contact with Summerville Police Department who indicated, in
13 fact, there was a warrant or they had a warrant in place
14 charging Mr. Benton with murder and that they were in the
15 process of faxing that to the Phenix County sheriff's
16 department, police department. There was some overlapping
17 jurisdictions. Two different law enforcement officers got
18 involved or two different law enforcement agencies got
19 involved in Alabama.

20 Q. And two of them testified at trial. Is that right?

21 A. I believe that's correct.

22 Q. Okay.

23 A. I did -- as far as the seizure goes, at trial when the
24 officers en route had been in touch with the Summerville
25 Police Department, when they're told that Mr. Benton -- and

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1 gave the vehicle -- that's correct. They said we don't have
2 a warrant, but the vehicle was in NCIC as a homicide suspect
3 fleeing the state or words to that effect. They matched up
4 the tag. They detained Mr. Benton at that point, and one of
5 them walked over, looked through the glass into the truck
6 which was locked, and says I saw the pistol laying in the
7 floorboard. I, I didn't really feel like we had a terribly
8 meritorious suppression motion at that point.

9 Q. Okay.

10 A. I think meritorious is correct.

11 Q. Yeah. Did you prepare him to testify? Did you go over
12 how he'd be cross-examined and...

13 A. Yes. I, I actually practiced it with him both ways. I
14 played myself, and I played the solicitor, and we tried
15 working with his testimony. I knew his testimony would be
16 absolutely crucial in any sort of a positive result.

17 Q. And he discussed earlier in his testimony that he hoped
18 to have been able to testify as to his good character. Can
19 you explain why you came to an agreement with the
20 solicitor's office on the *Lyle* material or *Lyle* matters?

21 A. Well, I don't know that it's fair to say we came to an
22 agreement. I mean, they said we don't have anything we're
23 introducing in our case in chief, but we're not going to
24 promise we won't if the doors just get kicked open or, or
25 something to that effect. Coupled with the fact that the

1 absence of any bad character, I'm certainly allowed to argue
2 in close demonstrates good character: you didn't hear any of
3 this, you didn't hear any of that.

4 As well as if you read the transcript itself, my, my
5 direct examination of Mr. Benton, without specifically
6 touching on those things, gives his history. Here's where
7 I'm from; here's what I've done in the past. I've been
8 married. Yes, I'm in contact with my children. I'm married
9 again; I have a good relationship with my wife's children
10 now. I work. I pay my bills. This is -- it just seems a
11 little dangerous to me. I've had it kick me in the teeth,
12 the old I would never do anything like this, or I'm not that
13 type of person. So, absent it being an actual element of
14 our defense or being our defense itself, which in this case
15 it was not, I don't like to put that out there.

16 Q. Kind of like you talked about earlier, the state could
17 have presented something, some kind of prior altercation
18 with his wife, right?

19 A. There was also some -- I believe, now that you talk
20 about it, talk about a physical confrontation between he and
21 his stepson. That is the victim in this case, fourteen or
22 fifteen-year-old child who, I believe, was somewhere on the
23 autistic spectrum, whether autistic, Asperger's, something
24 along those lines. And I'm a little foggy on this, but it
25 seems as though there were some issues there about some

J. LOY - REDIRECT EXAMINATION BY MR. DAVIS

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1 improper discipline or something along those lines, and I
2 was afraid. I, I didn't want to touch on it.

3 MR. MITCHELL: All right, no further questions. Thank
4 you, Mr. Loy.

5 THE COURT: Redirect?

6 MR. DAVIS: Yes. Just a moment, Your Honor.

7 (A PAUSE.)

8 MR. DAVIS: Your Honor, just one issue, if I may?

9 REDIRECT EXAMINATION BY MR. DAVIS:

10 Q. Mr. Loy, actually testifying now in direct and cross,
11 do you recall specifically or not whether a, a written
12 motion to suppress the Alabama evidence was filed?

13 A. I don't recall.

14 Q. Would seeing a copy refresh your memory?

15 A. If, if you've got a copy of the clocked in, stamped in
16 in this case -- I, I don't recall it, but I don't deny it.
17 Ms. Suggs, like I say, or Williams would've been handling
18 those, and I think I indicated typically she would have done
19 a written motion.

20 MR. DAVIS: Your Honor, may I approach the witness?

21 THE COURT: Yes. That's fine.

22 MR. DAVIS: And, Your Honor, again housekeeping, this
23 is not a paper copy. I've got this on a CD that I received
24 from the public defender's office under a request for their
25 file. I'm not seeking to introduce this. I would just like

J. LOY - REDIRECT EXAMINATION BY MR. DAVIS

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1 to show it's on my laptop to see if it refreshes his memory.

2 THE COURT: All right.

3 (COUNSELOR AND WITNESS CONFER.)

4 BY MR. DAVIS:

5 A. I see what you're showing me, yes. This is my
6 signature on the document marked Memo in Support of Motion
7 to Suppress.

8 Q. Okay, and does that deal with the evidence obtained in
9 Alabama?

10 A. Yes. It's pretty skeletal in nature, but it does say
11 we'd like to have that, that we would like to have that
12 evidence suppressed.

13 Q. And that goes directly into what you answered on
14 cross-examination, that the basis for his arrest was
15 information provided from a clerk to law enforcement based
16 on what Mr. Benton's mother had told her?

17 A. Yes, at least that is part of it. I think I also
18 testified, and I think it's reflected in the transcript,
19 that sometime prior to one of the two agencies arriving,
20 there was contact with the Summerville Police Department.
21 They confirmed the vehicle itself was suspected of having
22 been involved in a homicide. That it was in NCIC as far as
23 a BOLO for fleeing the, the scene, and that they were in the
24 process of faxing warrants for Mr. Benton's arrest to the
25 police department, and I believe that officer had that

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1 conversation prior to arriving on the scene.

2 Q. And you knew that prior to completing this motion,
3 however?

4 A. I don't know if I knew about the phone call or not. I,
5 I did not talk with the officer in, in Alabama prior to the
6 trial, I don't believe. It may be that I relied on his
7 report, looked at it and thought this stuff might be
8 suppressible. That he arrived and when I spoke with him in
9 the hallway and he told me this is what happened, I, I said
10 I don't have grounds to suppress it. If you're on the line
11 with them when they say this is the guy, I think you can
12 detain him and look through the glass. I, I, I can't say
13 that's what happened, but that's a, a very reasonable
14 suspicion as far as how it may have gone in real time in the
15 course of the trial itself.

16 MR. DAVIS: Thank you, Mr. Loy.

17 Thank you, Your Honor. No other questions.

18 EXAMINATION BY THE COURT:

19 Q. Let me ask you. This pretrial motion to suppress the
20 Alabama evidence, to your knowledge was it ever heard or
21 ruled upon by the court, whether it be pretrial or during
22 trial?

23 A. No, to my knowledge it was not. I don't recall it. I
24 don't recall it being argued. I looked at the transcript on
25 that note, and again I see there's an exchange between our

1 table and the judge. And we said we planned to move to
2 suppress these things. We can't have the hearing today.
3 This is on the first day of trial. We can't have the
4 hearing today because the Alabama officers are not present.
5 We'll deal with that when they arrive. When they arrived,
6 we did not actually have the hearing, or at least it doesn't
7 appear to be reflected in the transcript.

8 Q. All right. Was there ever a trial strategy that the
9 applicant did not commit this, or was the whole trial
10 strategy it was voluntary manslaughter and not murder?

11 A. I, I think any credibility we had whatsoever would have
12 been out the window with he didn't do it. The whole
13 strategy was a voluntary.

14 Q. So, what would have been the objective in suppressing
15 that evidence if, if it had been ruled inadmissible, if it
16 was fruits of the poisonous tree and could not have been
17 admitted into evidence?

18 A. Well, it might have created a least a new argument or a
19 hole in the state's case, something else to touch on in
20 close, but it wouldn't have -- it, it would have been
21 something done on the fly. It certainly wouldn't have been
22 part of our strategy or our plan walking into the trial, and
23 I don't think -- the, the, the evidence -- may I?

24 Q. Yes.

25 A. The evidence essentially was that Mr. Benton and his

J. LOY - EXAMINATION BY THE COURT

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1 wife were splitting up, that he had been with her earlier in
2 the day helping her move her belongings to another home,
3 that he had gone by the house at some point. She wasn't
4 there, and he appeared angry and said she must be with her
5 boyfriend. That he had gone to a bowling alley that night
6 by his testimony. Had five or six drinks. Left there en
7 route to another bar, ironically Shooters, where he was
8 going to look for friends, et cetera. That at that point he
9 got out of his truck with a -- armed himself with a pistol,
10 put a pistol in the back of his pants, walked to his wife's
11 apartment, indicated that the truck had been broken down,
12 and would she give him a ride home. That she appeared
13 trepidatious to her family, said okay, and on the way out
14 spoke to one of them and said if I'm not back in twenty
15 minutes, call the police.

16 That subsequent, her car pulled into the Perkins
17 Pancake House. Two people got out. The -- interacted as,
18 as described. That the shots were fired into her back as
19 she crawled away. That when one of the people in the
20 Perkins came out, he brandished the pistol at her and
21 basically made threatening words or gestures about shooting.
22 That a hat was knocked off of his head at the time. That
23 the hat was tied to Mr. Benton through the DNA evidence, and
24 that he was arrested the next day fleeing in, in Alabama.

25 The shooting itself, I think, was really within minutes

1 of them leaving the home. There wasn't going to be any
2 intervening problem: he got dropped off, someone else picked
3 him up. I mean, they were going to prove he shot her.

4 Q. All right.

5 THE COURT: Any questions in response the court's
6 questions?

7 MR. DAVIS: Yes, Your Honor? Thank you.

8 FURTHER DIRECT EXAMINATION BY MR. DAVIS:

9 Q. That summary is a summary of the best evidence against
10 Mr. Benton?

11 A. It incorporates Mr. Benton's testimony itself. I mean,
12 I think that's pretty much a summary of what, what was
13 presented at trial.

14 Q. To follow up on what the court asked, the seizure of
15 the weapon in Mr. Benton's vehicle allowed the state to
16 match it ballistically to shell casings, correct?

17 A. If they hadn't seized it, I don't think they could have
18 done forensic testing.

19 Q. Right. So, the fact they did seize it allowed them to
20 do the testing. If that had been suppressed, then those
21 ballistic matches can have been suppressed through the ---

22 A. Well, there wouldn't have been any. I mean ---

23 Q. There wouldn't, correct.

24 A. Right. If they didn't get the gun, they couldn't have
25 tested it.

J. LOY - FURTHER REDIRECT EXAMINATION BY MR. DAVIS

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1 Q. Do you recall the state in response to your *Biggers*
2 motion indicating that the best the testimony was going to
3 be is describing someone who looked like Mr. Benton, but
4 none of the employees could identify that it was Mr. Benton?
5 Do you recall that?

6 A. I don't recall any employees at Perkins pointing Mr.
7 Benton out, or picking him out of a lineup, or saying that's
8 the man I saw that night.

9 Q. So, if the weapon seized out of state had been
10 suppressed, his identity does become an issue?

11 A. I don't think so. He left his wife's home in the
12 company of his wife in her vehicle. Five or ten minutes
13 later, they pull up in a Perkins parking lot, which is
14 essentially adjacent a half a mile or so, I believe, from
15 her apartment. His wife and someone else who appears to
16 look like him get out of the vehicle. There's an exchange
17 between the two of them. She's shot as she crawls away.
18 The gentleman's hat is knocked off of his head, who is
19 described as having looked like Mr. Benton. DNA testing is
20 done upon the hat, and it's his DNA. Subsequently, he flees
21 and is arrested in Alabama. Whether they had the, the
22 actual gun or not itself, that's a, that's a homicide case
23 I'd probably lose.

24 Q. You not only attempted -- you -- initially you intended
25 not only to suppress the evidence seized but his seizure,

1 his arrest based on the motion, correct?

2 A. Yes.

3 Q. Okay. Could a successful motion to suppress the
4 evidence seized have, have affected whether he testified or
5 not?

6 A. No. It would not have affect ---

7 Q. Well ---

8 A. --- off the cuff, it would not have affected my advice
9 to him that if you want the charge on voluntary, you have to
10 testify.

11 Q. We both agree, obviously, it's his decision ultimately,
12 but your advice would not have changed?

13 A. If I understand the question correctly, my advice --
14 unless I had a really good defense to murder other than this
15 is voluntary, I, I want the voluntary charge, and without
16 his testimony, I would not have gotten it, I'm confident.

17 Q. Not malice but heat of passion based on legal
18 provocation, that's a tough fight. Fair enough?

19 A. It's a -- it, it's fact driven.

20 Q. And...

21 A. I mean, sometimes it's not.

22 Q. In, in this case?

23 A. In the context of, of everything else that's involved,
24 it was tough, but the jury did deliberate for a while. I
25 felt like we honestly -- and I don't like the result either,

J. LOY - FURTHER REDIRECT EXAMINATION BY MR. DAVIS

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1 but I don't think we did a bad job.

2 MR. DAVIS: Your Honor, if I may have just a moment?

3 (A PAUSE.)

4 BY MR. DAVIS:

5 Q. Mr. Loy, as to that last issue, do you recall that the
6 jury was out approximately fifteen minutes, had the
7 question, had one question about -- kind of an elementary
8 question, one issue about the juror's length of
9 availability. That was about fifteen minutes into
10 deliberations, and then once those were answered, it was
11 about fifteen minutes more before a verdict. Do you not
12 recall it being pretty -- a pretty quick verdict?

13 A. I, I don't recall the time, no.

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

15 THE COURT: All right, Mr. Mitchell, any questions in
16 response to the court's questions?

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

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

19 WITNESS: Thank you, Your Honor.

20 (THE WITNESS EXITS THE STAND.)

21 THE COURT: Call your next witness.

22 MR. DAVIS: Thank you, Your Honor. That's our
23 presentation.

24 THE COURT: All right.

25 MR. DAVIS: The applicant rests.

1 THE COURT: Thank you.

2 State have any witnesses?

3 MR. MITCHELL: No, Your Honor, we do not.

4 MR. DAVIS: Would you allow brief summary, Your Honor?

5 THE COURT: All right.

6 MR. DAVIS: Judge, generally we, we would argue that
7 with this being, we would argue and I think the evidence
8 supports, a one-issue trial, that it really deals with
9 intent. The gist of our presentation is that the focus on
10 that one issue was insufficient, was inadequate, and that
11 Mr. Loy was ineffective.

12 To be successful, we have to show that he was
13 ineffective. We have to show the outcome would have been
14 different. Obviously on that issue I would argue that there
15 are three potential verdicts: guilty, not guilty, or a hung
16 jury. So, if there's sufficient evidence presented to you
17 today that Mr. Loy was ineffective, and if this additional
18 testimony, additional preparation, and subterfuge of Mr.
19 Benton's credibility had not occurred, that the jury either
20 would have believed the presentation of Mr. Benton that this
21 was not a malicious act and found him not guilty, or in the
22 alternative simply if the court finds that a jury would have
23 been deadlocked on that issue -- and certainly Mr. Loy even
24 testified that that was one potential goal. Under either
25 scenario, then Mr. Benton would have met his burden and

1 would be entitled to relief on his post-conviction relief
2 matter.

3 Just briefly, Judge, we would argue that, that Mr. Loy
4 did not adequately represent him at trial. In fact, it was
5 his advice that this attempted plea occur. It did not go to
6 fruition, but Mr. Loy would -- testified he would have
7 preferred that the plea had gone through on the negotiated
8 forty years. Arguably it was an easy remedy. I believe the
9 testimony from Mr. Loy is he just needed to show some more
10 pictures to the client, to Mr. Benton. That's easily
11 remedied the day of the attempted plea. Go back in front of
12 the judge. He's now seen what he needs to see. Let's get
13 this done. He failed on that. We think that's
14 foreshadowing as to his inadequacy at trial.

15 He does not mention the goal of the case, manslaughter,
16 in the opening whatsoever. Certainly that's the first
17 opportunity to persuade the court -- the jury and indicate
18 your focus to them.

19 We had significant testimony as to one of the major
20 issues, that being the one motion to suppress dealing with
21 evidence found in Alabama. There was a written motion
22 prepared. It's unclear whether it was filed with the clerk
23 of court or not, but it was clearly brought to the attention
24 of Judge McDonald at the beginning, at pretrial. As Mr.
25 Loy's testified and the transcript bears out, witnesses for

1 that motion were not available on the first day of the
2 trial. Subsequent to that, it was never readdressed. They
3 never attempted to deal with a potential unlawful arrest or
4 unlawful seizure of the weapon that caused, that caused Mr.
5 Benton's wife's death.

6 The state primarily focused on the series of shots to
7 show malice. I will not -- there's testimony by three
8 different witnesses, Your Honor. I'll let the court and the
9 transcript speak for itself, but Mr. Loy's handling of the
10 employees from the Perkins restaurant and their testimony
11 about numbers of shots and the sequence of shots was glossed
12 over. That becomes critical because it is repeated again
13 and again in the state's closing as one of the main pillars
14 they have upon which to rest their argument that was done
15 with malice.

16 There was no counterbalance throughout the trial or at
17 closing dealing with the testimony of the witnesses at
18 Perkins, the conflicting testimony of the witnesses at
19 Perkins. That needed to be highlighted. That becomes
20 crucial not only to counteract the state's argument of
21 malice, but then to support Mr. Benton's testimony and
22 support his credibility.

23 There was no argument made by Mr. Loy, as Mr. Benton
24 clearly points out, that while the state had this
25 overarching argument, that this was a preplanned event. Mr.

1 Loy concedes that; the transcript speaks for itself to that.
2 It is clear that evidence was not suppressed seized out of
3 state. As Mr. Benton argued, his complaint is let the jury
4 know about that. If I have preplanned this murder, I didn't
5 have a plan to dispose of the murder weapon. I didn't have
6 a plan to do -- throw the murder weapon out across the
7 country. I hold the murder weapon on me the entire time,
8 and yet it was preplanned, malicious.

9 That, again, was not how -- while these are specific,
10 arguably minuscule instances in his trial, they all focus on
11 the same issue and that was the issue of intent. They were
12 not highlighted sufficiently because that is the issue that
13 must be decided by this jury, who we would argue had they
14 been focused more specifically, the jury could have found
15 not guilty verdict or -- I'm sorry. Jury could have found
16 him guilty of manslaughter or a hung jury, a deadlocked
17 jury.

18 Credibility is the key, and I'll end with this, Your
19 Honor. Credibility of Mr. Benton and his explanation of
20 that night is key, and while again actual substance may --
21 might be minor, the use of profanity, and I referenced you
22 in the transcript to that. For Mr. Benton's attorney in the
23 courtroom during his testimony, which is the crux of the
24 case, to reprimand him in front of the jury for using that
25 language when he had suggested in the first place -- the

1 jury certainly didn't know that, but when he suggested in
2 the first place, to have the attorney standing up for your
3 rights, defending you, to reprimand you in front of the jury
4 as to that issue, that is, that is synonymous for the, the,
5 the conduct throughout this trial and pretrial showing that
6 Mr. Loy undercut Mr. Benton's credibility. That was the
7 issue at trial. We would argue that is ineffective on that
8 and several other accounts.

9 We would argue that ineffectiveness led to the outcome,
10 which was a guilty verdict. That he -- had he been
11 effective, the jury would have and could have found him
12 guilty of the lesser included or been deadlocked as to the
13 issue of intent. So for those reasons, Your Honor, we ask
14 that you grant Mr. Benton's post-conviction relief motion,
15 rescind his convictions, and let him begin anew. Thank you,
16 Your Honor.

17 THE COURT: Mr. Mitchell, you wish to make a statement?

18 MR. MITCHELL: Yes. Briefly, Your Honor. Talk about
19 how it's just a one-issue case where it was straight to
20 malice, straight to intent, I think that's all Mr. Loy
21 focused on on these witnesses that he cross-examined from
22 the restaurant, the witnesses who saw it.

23 You know, his, his cross-examination, all he tried to
24 do, what he tried to do was to show that there was some kind
25 of disagreement, some kind of altercation to show that the

1 intent was not there to commit murder, that it was a lesser
2 as to the voluntary. There was legal provocation to it. He
3 kept trying to highlight who was more upset, how upset were
4 they. They were fighting. Oh, there was a hat knocked off.
5 How did that happen? That's what he was going after. I
6 think that's very reasonable strategy on that.

7 A lot of the things that were pointed out just now I
8 think are very minor inconsistencies that don't go to the
9 actual intent itself, just minor inconsistencies in their
10 statements. Talk about the number of shots. Each witness
11 stated that I think there were at least six shots. So, I
12 think it ranged from six to eight. I don't think there was
13 a ton of inconsistencies there. Just, just a couple on the
14 shots. I don't think that's something you want to make a
15 huge deal about. Whether it's six, whether it's eight,
16 that's a lot.

17 As far as the attempted plea, I think the solicitor and
18 the judge were not going to do it. The solicitor was not
19 going to re-offer, re-offer that offer after the failed
20 attempt before Judge Goodstein. Judge Goodstein, she may
21 not have accepted that plea from the beginning. It was an
22 *Alford* plea to a murder case of his wife. You know, kind of
23 a -- very unusual offer in that.

24 As far as the Alabama suppression motion, I don't think
25 there's any merit to that. I think there's definitely,

1 definitely probable cause to support the arrest, and then
2 the seizure of the gun would have been, you know, search
3 incident to arrest. I think supporting the probable cause
4 we've got the testimony -- well, what the officer learned
5 from the clerk in the call, NCIC on the vehicle. As Mr. Loy
6 testified, the officer en route talking to the Summerville
7 Police Department saying this is a fugitive warrant for a
8 homicide. I think there's clearly probable cause for that
9 arrest there.

10 And I think, you know, we're kind of overplaying this
11 profanity part. I think Mr. Loy, you know, he wanted to get
12 out kind of the quotes of what was going to show how upset
13 he was over his wife's infidelity, and it was only when Mr.
14 Benton repeated the F word over and over is when Mr. Loy --
15 you can, you can spare us that. We get that part. You can
16 spare us the profanity; we get that part.

17 So, it wasn't, you know, the first time he said it he
18 was immediately chastised. Just that he kept repeating it
19 over and over. I think Mr. Loy probably did the right
20 thing. Show, okay, that's -- we got -- we understand what
21 you're saying. Let's move along. So, what's next? It
22 wasn't, you know, a big, blown up thing. It was very quick,
23 and I definitely don't think the result of the trial would
24 have been different under any of these.

25 And as far as the prejudice analysis goes, it's not

1 whether one juror would have been persuaded to maybe vote
2 not guilty to hang the jury. It's whether the result would
3 have been different, whether he would have been found not
4 guilty. So, it's a higher burden than kind of what we were
5 just talking about, and I don't think any of these
6 allegations rise to that level. I think it's pretty clear
7 that the murder conviction is supported by the evidence, and
8 I think the evidence is quite overwhelming in what was
9 presented. And on that, we ask you to deny the application.
10 Thank you.

11 RULING OF THE COURT:

12 THE COURT: All right. All right, Mr. Mitchell, if I
13 could get you to prepare an order that denies the
14 applicant's request for post-conviction relief. I don't
15 know that there's -- or I don't find there's any deficient
16 or ineffective assistance of counsel.

17 The critical question I had was the suppression of the
18 Alabama evidence. Even if that was ineffective in not
19 pursuing that more diligently, given the amount of evidence
20 that existed even without the murder weapon, so to speak,
21 there is -- there was not -- the deficiency did not so
22 prejudice the applicant that a reasonable probability exists
23 that the results would have been different.

24 As I said, I mean, as it came out in the testimony,
25 they had evidence of him going to his wife. Someone

1 testified I saw them leave together. Testified to the fact
2 that she said if you don't hear from me in twenty minutes,
3 what to do. The fact that they pulled up in the parking
4 lot, witnesses from the restaurant see the argument, hear
5 the shots, and so the critical question was not whether or
6 not he committed it but whether it was voluntary
7 manslaughter versus murder. So, I don't see that there is a
8 reasonable probability that but for the deficiency, the
9 results would have been different. So, so, I'm going to
10 deny the post-conviction relief application. All right.

11 MR. MITCHELL: Thank you, Your Honor.

12 MR. DAVIS: Thank you, Your Honor.

13 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR DORCHESTER COUNTY, SOUTH CAROLINA, ON THE 18TH DAY OF MAY, 2016.

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

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JANUARY 1ST, 2018

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Randal William Benton, #349652,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

2014-CP-18-1001

ORDER OF DISMISSAL

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This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 23, 2014. Respondent filed a Return on September 26, 2014, requesting an evidentiary hearing be convened. Rodney D. Davis was appointed by the Dorchester Clerk of Court. An evidentiary hearing was held on May 18, 2016, at the Dorchester County Courthouse. Applicant was represented by Counsel Davis. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

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

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dorchester County Clerk of Court. Applicant was indicted during the January 2011 term of the Dorchester County Grand Jury for Murder (2010-GS-18-1675). Applicant was represented by John Loy, Esquire and Michelle Suggs, Esquire. Applicant

proceeded to trial where he was convicted as indicted on February 9, 2012. The Honorable Stephanie P. McDonald sentenced Applicant to a term of life imprisonment.

A notice of appeal was filed and an appeal perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Benton, Op. No. 2013-UP-400 (filed October 30, 2013). The Remittitur was issued on November 18, 2013.

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

- I. Ineffective assistance of trial counsel in:
 - a. Failing to effectively counsel Applicant with regards to pleading guilty;
 - b. Failing to suppress evidence seized in Alabama;
 - c. Failing to highlight inconsistencies in witness testimony; and
 - d. Failing to effectively argue for the lesser offense of manslaughter

II. APPLICABLE LAW

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

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

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

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Plea Offer and Negotiations

Applicant first argues that Counsel was ineffective for failing to properly advise him regarding the State's plea offer. He argues that if he was properly advised, then the court would have accepted his guilty plea. Applicant attempted to enter a negotiated Alford plea of forty (40)

years before the Honorable Diane S. Goodstein on January 6, 2012. Judge Goodstein went through the routine questioning of Counsel. Then Judge Goodstein thoroughly went through the rights Applicant was waiving by pleading guilty. The issue arose just after the solicitor gave the factual recitation of the incident. When asked if he believed the State could produce sufficient evidence for the jury to convict him, Applicant responded, "I don't know, Your Honor." (Plea Tr. p. 26). Judge Goodstein inquired into that response and questioned if Applicant had reviewed every bit of evidence the State hoped to admit at a trial. Applicant responded, "No, ma'am, I wouldn't say every bit of it." (Plea Tr. p. 27). At that point, Judge Goodstein stated that she was not going to accept the plea because Applicant seemed unsure of the evidence and whether he would be convicted at trial.

Counsel testified that he agreed with Applicant that he should accept the plea because the State had a strong case. Counsel explained that Judge Goodstein was not happy with the plea and noted that it was an Alford plea to a murder charge. Counsel believed that Applicant likely did not agree with the State's reference to a broken photo frame of his wife. In the State's factual recitation, they alleged that Applicant "smashed" a picture of the victim, his wife, in a buildup of anger and violence over the victim's new relationship.

Counsel was not deficient because Applicant was unable to successfully enter a plea of guilty. This Court finds Counsel's testimony credible and persuasive on the issue. Applicant was unable to admit that certain facts set forth by the solicitor were accurate. This compounded with the fact that it seems Judge Goodstein was not in favor of an Alford plea where the facts set forth clearly show there was sufficient evidence for the jury to convict Applicant.

This Court further finds Applicant has failed to present any evidence to support a finding that he was prejudiced by the alleged deficiency. The plea judge will accept a plea if it is

intelligently and voluntarily made. In the plea attempt, Applicant did not agree with certain facts laid out by the State and that those facts would be sufficient for a jury to find him guilty. The court was correct in not accepting Applicant's plea. This allegation is denied and dismissed with prejudice.

Failing to Suppress Evidence

Next, Applicant argues that Counsel was ineffective for failing to suppress evidence seized in Alabama where Applicant was apprehended. At the pre-trial hearing, Counsel made a motion to suppress the results of the DNA swab taken in Alabama pursuant to a search warrant issued by an Alabama judge. Also during pre-trial, Counsel filed a written motion challenging the Applicant's arrest, the seizure of his truck and the gun inside the truck, but then withdrew those motions "unless something comes up in the testimony they may be renewed." (Trial Tr. p. 43). When the evidence collected in Alabama was offered, Counsel made no objection. (Trial Tr. p. 215; 218-23).

Counsel gave some factual background to the Court. Applicant was apprehended in Alabama after allegedly murdering his wife and fleeing the scene. Applicant stopped at a gas station in Alabama and used the telephone to call his mother while he stopped to purchase snacks. It was there that he was apprehended after a panic alarm was set off. Counsel explained that it was not likely that these motions would have been successful if made. He also testified that the strategy was not that he did not commit the murder but that he was intoxicated and lacked the *mens rea* to be convicted of murder.

This Court finds Counsel was not deficient in his handling of the evidence collected in Alabama. Counsel made the strategic decision not to challenge that evidence because any objection and challenge was without merit. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d

62, 67 (1999) (attorney not deficient for failing to make futile arguments). Applicant was unable to show any of Applicant's rights were violated in the search and seizures.

Counsel also credibly testified that the defense strategy was to argue that Applicant did not have the required mental state to be convicted of murder. He noted that he thought the best case scenario was to hope for a hung jury or to get a voluntary manslaughter conviction. A challenge to this evidence would not be consistent with that strategy because they were not challenging the fact that Applicant actually killed his wife and that identification was not an issue in this case. Further, as the trial judge noted, it is very likely that the good faith exception to the warrant requirement would apply and the results of the DNA test would be admitted. Finally, Applicant has not presented this Court with an objection that would have likely been successful. This allegation is denied and dismissed.

Failing to Highlight Inconsistencies in Testimony

Applicant next argues that Counsel was ineffective for failing to highlight inconsistent testimony given by witnesses. Specifically, Applicant argues Counsel should have highlighted various witnesses' testimony regarding how many shots Applicant fired. Applicant noted that it was the State's position that eight (8) shots were fired. Counsel testified that his overall defense strategy was not consistent with whether Applicant actually killed his wife. This Court finds Counsel proceeded with a reasonable strategy under the prevailing professional norms. While Counsel could have pointed out that different witnesses testified to a varying number of shots being fired, that does not go to the heart of the State's case. Therefore, Applicant was not prejudiced in any way by Counsel's failure to raise these minor points. This allegations is denied and dismissed.

Failing to Argue for the Lesser Offense of Voluntary Manslaughter

Finally, Applicant alleges Counsel was ineffective in failing to argue for the lesser offense of voluntary manslaughter. Specifically that Counsel should have argued for voluntary manslaughter during opening statements. During closing arguments, the State and Counsel both discussed voluntary manslaughter extensively. Counsel was sure to argue for voluntary manslaughter during closing as that was the broader defense strategy. Counsel's testimony that the identification of the shooter was not an issue and that the State was certainly going to be able to prove that Applicant killed the victim is credible and persuasive. Counsel was not deficient in any regard with his representing, especially in crafting the overall strategy. Furthermore, Applicant has not proven he was prejudiced by Counsel's failure to discuss voluntary manslaughter in opening statements. This allegation is denied and dismissed.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

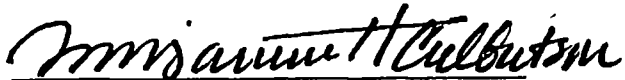
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 5th day of September, 2017.


 BENJAMIN H. CULBERTSON
 Presiding Judge

Georgetown, South Carolina

WITNESSES

Shannon Sharp

CERTIFIED COPY
2014 MAY 23 PM 2:11

Cheryl Graham
CLERK OF COURT
DORCHESTER COUNTY

Summerville Police Department

ARREST WARRANT NUMBER
K203908

Arrested: November 4, 2010

ACTION OF GRAND JURY

DATE 1-27-11

Brian C. [Signature]

Foreperson of Grand Jury

Date: January 27, 2011

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2010GS18-1675

The State of South Carolina

County of DORCHESTER

COURT OF GENERAL SESSIONS

January 31, 2011 TERM

THE STATE
vs.

Randal William Benton

Indictment for

MURDER

SC Code: 16-3-10

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

Defendant

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

Defendant

Witness:

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

FILED-RECORDED
2011 JAN 27 AM 11:47
CLERK OF COURT
DORCHESTER COUNTY

508

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

INDICTMENT
2010GS18-1675

At a Court of General Sessions, convened on January 31, 2011 the Grand Jurors of
Dorchester County present upon their oath:

MURDER

That in Dorchester County on or about October 30, 2010, with malice
aforethought, the defendant, Randal William Benton did kill one Treva Dawn
Benton by means of shooting the victim with a pistol. The victim did die as a
proximate result thereof. This offense being in violation of the Common Law and
Section 16-3-10, of the South Carolina Code of Laws, as amended.

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2014 MAY 23 PM 2:12
Cheryl M. Hester
CLERK OF COURT
DORCHESTER COUNTY

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

Russell D. Hilton

Russell D. Hilton, Solicitor

600
STATE OF SOUTH CAROLINA
COUNTY OF Dorchester
STATE VS.
Randal William Benton
AKA:
Race: W Sex: M Age: 48
DOB: [REDACTED] SS#: [REDACTED]
Address: Kimeran Larie Apt L
Summerville, SC 29485
DL#: [REDACTED] SID#: [REDACTED]
CDL: Yes ☐ No ☐ CMV: Yes ☐ No ☐ Hazmat: Yes ☐ No ☐
In disposition of the said indictment comes now the Defendant who was:
TO: Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS18-1675
A/W#: K203908
Date of Offense: 10/30/2010
S.C. Code § 16-3-10
CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC § 17-25-45 w/minor 1st or Lewd Act)
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Hilton, Russell D. 73945 Randal William Benton
SC Bar# SC Bar# Attorney for Defendant SC Bar#

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 Dept. 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

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

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 56-1-286 (DUI Breath Test) \$25 \$ _____

Proviso 47.9 (Public Def/Prob) \$500 \$ _____

§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25

§ 33.7, 1B TP (Drug Court Surcharge) \$150 \$ _____

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

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5

§ 44-53-450(C) (Conditional Discharge) \$350 \$ _____

3% to County (if paid in installments) \$ 3.90

TOTAL \$ 133.90

Cheryl Graham
Clerk of Court/ Deputy Clerk

Court Reporter: Anne Meyer

2014 MAY 23 PM 2:11
CERTIFIED COPY
CLERK OF COURT
DORCHESTER COUNTY
_____ 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: _____

☐ Conditional Discharge § 44-53-450(C) requires \$350 be
paid to the Clerk prior to disposition.

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

PRESIDING JUDGE [Signature]

Judge Code: 2162

Sentence Date: February 9, 2012

SCCA/217 (06/2010)