

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Roger E. Henderson, Circuit Court Judge

BOBBY A. GILBERT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001981

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

ALAN WILSON
Attorney General

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

JOHNNY ELLIS JAMES, JR.
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR PETITIONER

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1 remember rather, is the fact that Tyrone is entitled to
2 justice too. Tyrone is not here; he can't say what
3 happened. But we know what happened because of Jamie,
4 because of the other evidence we presented and because of
5 the defendant's lies, blatant lies. But I'd ask that you
6 remember Tyrone because no one, none of us in society
7 deserved what to go through what we went -- what he went
8 through. And quite frankly, to think that through all of
9 this, especially the beginning, he's begging for his life
10 saying that he'd do anything to get them to stop, it just
11 got worse. He tried to get away. He literally fought for
12 his life, but ladies and gentlemen, three on one, those
13 aren't good odds when you're out in the middle of no where
14 somewhere you don't know getting beat and ultimately
15 killed and run over.

16 I thank you for your attention. I thank you for your
17 time. And I thank you in advance for your verdict because
18 as I indicated, I submit to you the State has met its
19 burden of proof and, ladies and gentlemen, you as a jury,
20 as His Honor told you, short of military service jury
21 service as Winston Churchill said is the highest duty a
22 citizen can perform. You are also the last, what I call,
23 the last passion for justice. You speak for society
24 through your verdict. And we ask that you send this
25 defendant, send society a message today, that these

1 actions will not be tolerated in civilized society as the
2 last bastion of justice law enforcement has been — well,
3 I will say Norris, he started it. Law enforcement came
4 in, did their job, we presented the case. Now it falls on
5 you, ladies and gentlemen, to complete that track to
6 justice. And on behalf of Tyrone Brown, on behalf of
7 Tyrone Brown that is exactly what I'm asking you for
8 today. Justice.

9 And ladies and gentlemen, justice in this case is a
10 guilty verdict on grand larceny and robbery and murder
11 against this defendant Bobby Gilbert. I thank you again
12 and God speed to all of you during your deliberations.

13 THE COURT: All right. Ladies and gentlemen, if
14 you'll stand by for just a minute. Let me see counsel at
15 side bar just a moment please.

16 (WHEREUPON, counsel approached the Bench for an
17 off-the-record discussion.)

18 THE COURT: All right. Madam Forelady and ladies and
19 gentlemen of the jury, if you would give me your
20 attention. You have followed very patiently and listened
21 very attentively to the presentation of the evidence in
22 this case and to the able arguments made by the Solicitor
23 Mr. Redmond on behalf of the State and to Mr. Watts on
24 behalf of Defendant and I thank you for that. It now
25 becomes the duty of the trial judge under the constitution

1 of this state to charge and instruct you on the law
2 applicable to this case. And it is your duty as jurors to
3 accept and apply the law as the Court will now state it to
4 you. And as jurors it is your exclusive duty to decide
5 all of the issues of fact in this case, and for that
6 purpose, to determine the effect the value, the weight,
7 and the truth of the evidence presented. Both the State
8 and the Defendant have the right to expect that you will
9 conscientiously consider and evaluate the evidence and
10 apply the law of the case thereto to the end that both the
11 State of South Carolina and the Defendant will receive a
12 fair and impartial trial.

13 Now when I use the word defendant in these instructions
14 I refer of course to Mr. Bobby Gilbert. The State of
15 South Carolina by the three bills of indictment in this
16 case charge the defendant with three separate offenses.
17 The first is known in the law as murder. The second is
18 armed robbery and the third is larceny. And all of these
19 offenses are alleged to have occurred on January 17th of
20 2007 and alleged that Mr. Bobby Gilbert either by himself
21 or with Jamie Gilbert and Christopher Samuel, or a
22 combination of them, did in Darlington County violate
23 South Carolina law first in the indictment number 1031
24 that he did with them feloniously, willfully, and with
25 malice aforethought kill one Tyrone Cornelius Brown with

1 blunt force trauma to the head and by running over the
2 victim with the automobile. The second charge is one of
3 armed robbery and alleges that on the date that I just
4 spoke of that Mr. Gilbert did with the other two
5 individuals while armed with a deadly weapon feloniously
6 take from the person and the presence of Tyrone Cornelius
7 Brown by means of force or intimidation certain property
8 described as a Honda Accord and a bank card, a bank card.
9 And the third indictment is that, again, Mr. Gilbert did
10 along with the other two feloniously take and carry away
11 the personal goods of Tyrone Cornelius Brown of a certain
12 value, a value that's alleged to be over five thousand
13 dollars with intent to deprive the owner of the property.
14 And again, the property is alleged to be a 2002 Honda
15 Accord.

16 Now I will tell you that each indictment alleges a
17 separate crime. You must consider each indictment
18 separately; that is, you must decide separately what the
19 evidence shows about each indictment. Your decision on
20 one indictment should not affect your decision on another
21 indictment. To these charges the defendant has entered a
22 plea of not guilty. This plea of not guilty by the
23 defendant places the burden of proof on the State to prove
24 the guilt of the defendant beyond a reasonable doubt
25 before you can convict the defendant and find him guilty.

1 The defendant, Mr. Gilbert, is presumed in the law
2 innocent of the charges contained in the indictments. It
3 is a cardinal and fundamental rule of the law of evidence
4 that a defendant irrespective of the enormity of the
5 offenses against him will always be presumed charged --
6 will always be presumed innocent of the crime for which he
7 is charged unless and until the guilt of the defendant has
8 been proven by evidence which satisfies you, the jury, of
9 the guilt of the defendant beyond a reasonable doubt.

10 The presumption of innocence is not a mere legal
11 theory; it is not just a legal phrase. The presumption of
12 innocence is a substantial right to which every accused is
13 entitled. Our Supreme Court has declared that the
14 presumption is like a robe of righteousness placed about
15 the shoulders of this defendant, and it remains with him
16 and assigns to him that class, the innocent, until that
17 presumptive robe of righteousness has been stretched from
18 his person by evidence satisfying you, the jury, of his
19 guilt beyond a reasonable doubt. The presumption of
20 innocence accompanies the defendant from the time of his
21 arraignment and appearance in this court and continues
22 with the defendant after you retire to the jury room to
23 deliberate your verdict. The presumption of innocence
24 remains and continues with in existence to the benefit of
25 the defendant until you, the jury, reach the conclusion

1 that the State has proved the guilt of the defendant
2 beyond a reasonable doubt.

3 Now the State is not required to prove the guilt of a
4 defendant beyond all doubt or beyond every doubt but
5 beyond a reasonable doubt. What is a reasonable doubt?
6 It is not a imaginary or fanciful doubt or a weak doubt.
7 It is a substantial doubt. It is a doubt which the words
8 imply, a doubt for which you can give or assign a reason
9 based on the testimony and the evidence in this case. A
10 reasonable doubt is not any sort of a doubt. You and I
11 know from every day life experiences that you may have a
12 sort of a doubt about any matter that arises, no matter
13 how trivial it may be or how serious it may be. A
14 reasonable doubt is the doubt which makes an honest,
15 sincere, conscientious juror in search of the truth
16 hesitate to act.

17 Proof beyond a reasonable doubt is proof which leaves
18 you firmly convinced of the defendant's guilt. If you
19 have a doubt for which you can give or assign a reason as
20 to the guilt of the defendant then he is entitled to a
21 verdict of not guilty. Reasonable doubt may arise from
22 the evidence which is in the case or from the lack of
23 evidence in the case. You, the jury, must make the
24 determination of whether or not reasonable doubt exists as
25 to the guilt of the defendant. The very fact, however,

1 that the jury engages in a full and free discussion on the
2 issue of guilt or nonguilt in the case with a normal
3 conversational ebb and flow on these issues does not
4 automatically mean that reasonable doubt exists in this
5 case or in any other case. I charge you that the
6 defendant is entitled to every reasonable doubt arising in
7 the whole case or arising in any defenses. If upon any
8 issue of fact essential to conviction and a verdict of
9 guilty you have a reasonable doubt as to how that doubt
10 should be resolved, it would be your duty to resolve that
11 doubt in favor of the defendant.

12 A defendant, ladies and gentlemen, is not required to
13 prove his innocence but the State is required by law to
14 prove every essential element of the offense charged
15 against the defendant by evidence which satisfies you, the
16 jury, of the guilt of the defendant beyond a reasonable
17 doubt before you can convict the defendant and find him
18 guilty. If then upon the whole case you have a reasonable
19 doubt as to guilt or innocence of the defendant he is
20 entitled to that reasonable doubt and would be entitled to
21 an acquittal and a verdict of not guilty. But on the
22 other hand, if upon the whole case you find that the State
23 has proven by evidence which satisfies you the jury of the
24 guilt of the defendant beyond a reasonable doubt, then in
25 such circumstances it would equally be your duty to

1 convict the defendant and find him guilty.

2 Now I instruct you that the indictments in this case
3 which I have in my hand are not evidence of anything and
4 they cannot be considered by you as evidence in this case.
5 The indictments are simply the formal written instruments
6 which contain the charges against the defendant and they
7 serve as the formal documents by which this case is
8 brought to trial. Now during this case each of us, you
9 and I, have certain duties to perform. As the trial judge
10 it is my responsibility to preside over the trial of this
11 case and I also have the duty to rule upon or pass upon
12 the admissibility of evidence offered during the progress
13 of the trial. The Court only considers the admissibility
14 of the evidence, not the weight to be given to the
15 evidence. That is a matter for you to determine. You are
16 to consider only the competent evidence before you, and
17 you are to disregard and disabuse from your mind any
18 testimony ordered stricken from the record of this case
19 during the progress of the trial, if there be any. And
20 you are to consider only the testimony which has been
21 presented from the witness stand together with any
22 exhibits admitted into the record and any stipulations
23 made into the record by counsel. I have the additional
24 duty to charge you the applicable law in this case. As
25 the presiding judge I am the sole judge of the law, and it

1 is your duty to accept and apply the law as I now state it
2 to you. If you have a preconceived idea as to what the
3 law is or what the law ought to be and it does not agree
4 with what I tell you the law is, you are obligated under
5 your oath to abandon this preconception on your part
6 because you are sworn to accept the law precisely as I
7 state it to you. In every case tried in this court before
8 a jury the jury becomes the sole and exclusive judge of
9 the facts. You, the jury, are the judge of the facts in
10 this case. The Court is the judge of the law. The
11 constitution has declared that the trial judge shall not
12 intimate, state, comment upon, or make any statement to a
13 trial jury about the facts in a case. Since you are the
14 sole judge of the facts you are not to infer from anything
15 that I have said during the progress of this trial in
16 ruling upon the admissibility of evidence or otherwise or
17 anything that I say to you now during the course of this
18 charge to you that I have any opinion about the facts of
19 this case; I do not. The law does not permit me to have
20 an opinion about the facts. This is a matter solely for
21 you, the jury, to determine. As jurors then it is your
22 duty to determine, as I have stated to you, the effect,
23 the value, the weight, and the truth of the evidence
24 presented during the course of this trial.

25 Necessarily then you must assess the credibility of the

1 witnesses who have testified in this case. Credibility is
2 simply a legalistic term which means believability. It
3 becomes your duty then to analyze and evaluate the
4 evidence and to determine that evidence which convinces
5 you of its truth. I charge you that in determining the
6 question of credibility or believability of the witnesses
7 you may believe one witness as against several witnesses
8 or several witnesses as against one witness. You may
9 believe a part of the testimony of a witness and reject
10 the remaining part of the testimony of that same witness.
11 You may believe the testimony of a witness in its entirety
12 or reject the testimony of a witness in its entirety. You
13 may consider whether any witness has exhibited any
14 interest, any bias, or any prejudice in the case. You may
15 consider the demeanor of a witness; that is, the
16 appearance of a witness from the witness stand. And you
17 may consider the opportunity for knowledge concerning
18 those things about which a witness testified. These
19 considerations you do not exercise arbitrarily but if in
20 your good judgment there is sound reason in the record for
21 so doing. Because your objective, ladies and gentlemen,
22 is to determine the truth and to find the truth whether it
23 comes from a witness or witnesses for the State of South
24 Carolina or a witness or witnesses for the defendant. And
25 in doing so, in exercising your mental processes and in

1 determining what you consider to be true, the law simply
2 requires that you exercise your good judgment, your common
3 sense, your sense of logic and reason, and your
4 experiences in life. You then take and apply these
5 attributes of ability to the evidence and determine what
6 you consider to be the truthful evidence and to these true
7 state of facts as determined by you, the jury, you take
8 and apply the law as the Court will now give it to you and
9 thus arrive at a true verdict in this case.

10 Now as I have said, the defendant in this case is
11 charged with three offenses and I'm going to define those
12 offenses for you. The first offense and first indictment
13 is the offense of murder. What is murder? Murder is
14 defined as the willful, felonious killing of a human being
15 by a human being with malice aforethought, that malice
16 being either expressed or implied. Section 16-3-10 of the
17 Code of Laws of South Carolina provides: Murder is,
18 quote, the killing of any person with malice aforethought
19 either expressed or implied, end quote. The State must
20 prove beyond a reasonable doubt that the defendant killed
21 another person with malice aforethought. The present of
22 malice is a required element of murder. Malice is defined
23 as being hatred or ill will. Malice in its legal sense
24 does not necessarily import ill will toward the individual
25 injured but signifies rather a general malignant reckless,

1 reckless of the lives and safety of others, or a
2 condition of the mind which shows a heart regardless of
3 society and fatally bent on mischief. Malice is the
4 intent on doing wrong. Malice is a legal term implying
5 wickedness and excluding just cause or excuse. It is the
6 doing of a wrongful act intentionally without just cause
7 or excuse. The term malice indicates a formed purpose and
8 design to do a wrongful act under the circumstances that
9 exclude any legal right to do so. Malice may be either
10 expressed or implied. The word expressed -- the words
11 expressed or implied malice add nothing to the meaning of
12 the word malice. They do not imply different kinds of
13 malice but merely the manner in which the only kind of
14 malice known in the law may be shown. That is either by
15 positive evidence or by inference.

16 Expressed malice is when there is a deliberate
17 intention to unlawfully take the life of another such as
18 lying in wait. Implied malice is when circumstances
19 demonstrate a wanton or reckless disregard for human life
20 or a reasonably prudent man would have known that
21 according to common experiences there was a plain and
22 strong likelihood that death would follow the contemplated
23 act. The law says if one intentionally kills another with
24 a deadly weapon the implication of malice may arise. If
25 facts are proved beyond a reasonable doubt sufficient to

1 raise an inference of malice to your satisfaction, this
2 inference would be simply an evidentiary fact to be taken
3 into consideration by you, the jury, along with other
4 evidence in this case and you may give it such weight as
5 you determine it should receive. A deadly weapon is any
6 article instrument or substance which is likely to cause
7 death or great bodily harm. Whether an instrument or
8 object has been used as a deadly weapon depends on the
9 facts and circumstances of each case. Now although malice
10 must be aforethought there is no requirement that it must
11 exit for any appreciable length of time before the
12 commission of the act. It may be conceived at the very
13 moment the act occurs. There must be a combination of
14 evil intent and the act producing the result.

15 Now the second charge against the defendant is armed
16 robbery, and as a part of that there's also a charge of
17 larceny and I'm going to talk to you about those two
18 offenses at the same time. Section 16-11-330 of the South
19 Carolina Code Laws provides that armed robbery is defined
20 as a robbery committed while armed with a pistol, dirk,
21 slingshot, metal knuckles, razor or other deadly weapon or
22 while alleging either by actions or words that he was
23 armed while using a representation of a deadly weapon or
24 any object which is — which a person present during the
25 commission of the robbery reasonably believed to be a

1 deadly weapon. To convict the defendant of armed robbery
2 the State must prove that the defendant, first of all,
3 element number one, committed robbery. Second, while
4 armed with a pistol, dirk, slingshot, metal knuckles,
5 razor, or other deadly weapon or while representing to be
6 armed with a pistol, dirk, slingshot, metal knuckles,
7 razor, or other deadly weapon. Robbery is larceny from
8 the person or immediate presence of another by violence,
9 intimidation, or by putting such person in fear. A thing
10 is in the presence of a person in respect to robbery which
11 is so within his reach, inspection, observation or
12 control, that he could if not overcome by violence of the
13 other retain his possession of it. Robbery is basically
14 larceny compounded or aggravated by intimidation or force
15 used in the taking of property from the person of another
16 or the presence of another.

17 Larceny is the felonious taking and carrying away of
18 goods of another against the owner's will or without his
19 consent with the intent to appropriate them to one's own
20 use and to permanently deprive the owner of the possession
21 of the property. There are five elements the State must
22 establish beyond a reasonable doubt to prove larceny.
23 Each of these elements must be present to make out the
24 crime of armed robbery. The elements of larceny are: A
25 taking, the act of carrying the property away. This is

1 called asportation in the law. Asportation is the act of
2 carrying away. Of the personal property of another
3 without the consent of another or against the will of the
4 owner. And fifth, with the intention to steal. The
5 asportation of stolen property is an indispensable element
6 of larceny and can be established by the slightest removal
7 of the property with felonious intent. The defendant must
8 intend to permanently deprive the owner of possession by
9 converting the property to his own use.

10 Now in decision to the elements of larceny the crime of
11 armed robbery requires two additional elements. These
12 are: first, the property must be taken from the person or
13 immediate presence of another. And second, the taking
14 must be accomplished by force, intimidation, or putting
15 the person in fear. This violence must be actual personal
16 violence or the threat of it. The degree of force used is
17 immaterial as long as such force or threat or force is
18 actually sufficient to overcome the victim's resistance.
19 This violence or intimidation must either precede or be
20 contemporaneous with the taking.

21 Finally, to constitute armed robbery the State must
22 show that an additional element, that the robbery was
23 committed while armed with a pistol, dirk, slingshot,
24 metal knuckles, razor or other deadly weapon or while
25 alleging either by actions or words to be armed with one

1 of these objects. What is a deadly weapon? This is a
2 factual matter that the jury must decide or determine.
3 You must answer the question factually based on the
4 evidentiary record before you. A deadly weapon is any
5 article, instrument, or substance which is likely to cause
6 death or great bodily harm. Whether an instrument or
7 object has been used as a deadly weapon depends on the
8 facts and circumstances of each case. An instrument or
9 object that is normally — is not normally considered a
10 deadly weapon may under circumstances and conditions be a
11 deadly weapon because the instrument or object is used in
12 such a fashion or in such a matter as to constitute a
13 deadly weapon. A deadly weapon may include an ordinary
14 object that is used to inflict serious injury or death.

15 Now ladies and gentlemen, some general principles that
16 you need to know about, one is that there are generally
17 two types of evidence which are generally presented during
18 a trial, direct evidence and circumstantial evidence.

19 Direct evidence is testimony of a person who asserts or
20 claims to have actual knowledge of a fact, such as an
21 eyewitness. Circumstantial evidence is proof of a chain
22 of facts and circumstances indicating the existence of a
23 fact. The law makes absolutely no distinction between the
24 weight or value to be given to either direct or
25 circumstantial evidence. Nor is a greater degree of

1 certainty required of circumstantial evidence than of
2 direct evidence. You should consider all of the evidence
3 in this case. And after weighing all of the evidence, if
4 you're not convinced of the guilt of the defendant beyond
5 a reasonable doubt you should find the defendant not
6 guilty. Also there has been presented in this case
7 testimony from certain witnesses who have been classified
8 as experts. Although lay witnesses are limited to
9 testifying about facts within their knowledge and are not
10 allowed to give opinion, certain witnesses who by their
11 training, educational -- education or experience are
12 considered experts in a particular field may give their
13 opinions in that field based upon the facts of the matter
14 and their conclusion. These opinions constitute evidence
15 to be considered by you in connection with all of the
16 other evidence in this case. You may consider an expert's
17 opinion just as you do all of the evidence, and it is for
18 you, the jury, to decide what weight that it should have.
19 The testimony of experts is to aid and assist you as
20 jurors, not to dominate or control you in the decision on
21 questions of fact. Their opinion and deductions from the
22 evidence before you and their judgments and opinions do
23 not preclude yours. You're required to decide disputed
24 questions after comparison and consideration of all the
25 evidence in this case. So you should consider expert

1 opinions received in evidence in this case and give it
2 such weight as you feel it deserves.

3 I have one other thing I wanted to tell you about
4 evidence, and I got to see where I put it. Well, I'll
5 come back to it in just a moment. Here it is. Now I've
6 already talked a little bit about credibility and I will
7 tell you that the testimony of a witness may be
8 discredited or impeached by showing that the witness has
9 been convicted of a crime. Prior convictions does not
10 render a witness incompetent to testify or necessarily
11 indicate the witness is not reliable. Such conviction is
12 merely a circumstance which you may consider in
13 determining the credibility of the witness. It is for you
14 to determine the weight, if any, to be given to any prior
15 convictions as impeachment in determining credibility.

16 Now ladies and gentlemen, to be guilty as an aider or
17 abettor the participant must have knowledge of the
18 principal's criminal conduct. Mere presence at the scene
19 is not sufficient to establish the guilt of an aider or
20 abettor. The defendant's presence where a crime is being
21 committed or mere association with a person who committed
22 a crime does not make a defendant a coconspirator who has
23 agreed to joined the commission of the crime. As I said,
24 the mere presence of a defendant where a crime has
25 occurred or the mere association by the defendant of

1 people who have committed a crime is insufficient proof
2 that the defendant has committed the crime. Evidence that
3 an individual is present at the time a crime had committed
4 is not in and of itself sufficient proof that the
5 individual committed the crime. The mere knowledge that a
6 person is going to commit a crime even if the defendant is
7 present when the crime is committed is not sufficient to
8 convict a defendant as a principal. The State must prove
9 beyond a reasonable doubt by competent evidence the theory
10 of hand of one is the hand of all. To be guilty of a
11 crime a person must personally commit the crime or be
12 present at the scene of the crime and intentionally or
13 through a common design aid, abet, or assist in the
14 commission of that crime through some overt act. A
15 principal in a crime is one who either actually commits
16 the crime or who is present aiding, abetting, or assisting
17 in the commission of the crime. Presence at the scene of
18 the crime by prearrangement to aid, encourage, or abet in
19 the preparation or the perpetration of the crime,
20 constitutes guilt as principal. So when a person does an
21 act in the presence of and with the assistance of another
22 the act is done by both. When two or more persons acting
23 with a common plan or intent are present at the commission
24 of a crime it does not matter who actually commits the
25 crime; all are guilty. The hand of one is the hand of

1 all. Present means to be sufficiently near to aid and
2 abet and assist in the commission of the crime. Intent is
3 also a necessary element for there must have been a common
4 design or intent to commit the crime and the crime must
5 have been committed pursuant to that plan with the person
6 aiding and abetting by some overt act.

7 Defendant's conduct is not a proximate cause of a
8 person's death if death results if it is the independent
9 act of another person and -- of another person who is not
10 his accomplice. The burden of the State is to prove every
11 element of the crime charged. If you find after reviewing
12 all of the evidence that the State has proven the guilt of
13 the defendant then it would be your duty to find the
14 defendant guilty. If you find by all the evidence that
15 the State has failed to prove that the defendant
16 participated in the commission of the crime then it would
17 be your duty to find the defendant not guilty.

18 Now ladies and gentlemen, I have about finished all of
19 my instructions to you but I do have one last instruction,
20 not one last but one important instruction that I do want
21 to give to you at this time. Well, there are two other
22 things I need to do. I said one; there are two. First of
23 all, you will recall that I admitted into the evidence of
24 this case a alleged statement to have been made by the
25 defendant. While the Court determines the admissibility

1 of the evidence you, the jury, must determine the
2 existence, voluntariness, and weight of the alleged
3 statement made by the defendant. You must make the
4 ultimate — you must make the ultimate determination of
5 whether or not the defendant in fact made the alleged
6 statement. If you determine that the defendant made the
7 statement you must then determine whether the statement
8 was made voluntarily. Finally, you will decide what
9 weight, if any, should be given to the statement. You
10 must determine whether the alleged statement was a product
11 of an essentially free and unconstrained choice by its
12 maker. The State must prove the voluntariness of the
13 statement beyond a reasonable doubt. If you determine
14 beyond a reasonable doubt that a statement was given
15 freely and voluntarily then you may give the statement
16 such further consideration as you deem proper. If you
17 determine the alleged statement was not the free and
18 voluntarily -- voluntary willed expression of the
19 defendant, then you should not consider the statement as
20 evidence. In determining whether the defendant's will was
21 overcome in obtaining the statement the law requires you
22 to consider what is known as the totality of the
23 circumstances. You should consider both the
24 characteristics of the defendant and the circumstances
25 surrounding any questioning or interrogation. In

1 determining the voluntariness of the alleged statement you
2 should consider whether the Defendant was advised of and
3 understood his constitutional rights. The law requires
4 that before any interrogation or questioning of a person
5 in custody may begin law enforcement must advised the
6 accused of his Miranda rights. This means that the
7 authorities must advise the accused that the accused has
8 the right to remain silent, that any statement could be
9 used against the accused in a court of law, that the
10 accused has the right to have a lawyer present, that if
11 the accused cannot afford a lawyer then a lawyer will be
12 appointed to represent him without cost, and that the
13 accused can stop making a statement at any time. You must
14 carefully scrutinize all of the surrounding circumstances
15 before you give any weight to an alleged statement. You
16 must be satisfied beyond a reasonable doubt that the
17 statement was made by the defendant uninfluenced by
18 promise of reward or threat of harm. If you find beyond a
19 reasonable doubt that any alleged statement was given
20 voluntarily then you may decide what weight, if any,
21 should be given to that statement. If you find the
22 statement was not voluntary, then in that event you must
23 not consider the statement as evidence for any purpose.

24 Now ladies and gentlemen, I will tell you that the
25 defendant in this case has not testified. This is his

1 constitutional right. It is not a circumstances -- it's
2 not a circumstance which you can take into consideration
3 or even allow to enter your discussions in the jury room.
4 Under the constitution of South Carolina and the United
5 States Constitution it is a defendant's constitutional
6 right not to testify. The burden of proof is upon the
7 State of South Carolina to establish the guilt of a
8 defendant by competent evidence beyond a reasonable doubt.
9 The fact that the defendant did not take the witness stand
10 and testify in his own behalf does not create any
11 inference against him. The jury must not permit this fact
12 to weigh in the slightest degree against the defendant,
13 and this fact should not even enter into the discussions
14 in the jury room in any manner whatsoever.

15 Now ladies and gentlemen, I have about finished my
16 instructions to you, but I want to tell you that you are
17 not partisans or advocates for the State of State of South
18 Carolina or for this defendant. It has been said in the
19 past that you do not serve on the jury to reward your
20 friends or punish your enemies. Obviously such a
21 perverted system of justice would be intolerable. You
22 have been selected by both the State and the Defendant as
23 fair and impartial jurors. It is your duty then by your
24 joint deliberations to determine the truth in this case
25 giving to the defendant the benefit of each and every

1 reasonable doubt on each and every issue and then to the
2 facts which you determine to be true. You then take and
3 apply the law which has been given to you by this Court
4 and arrive at a verdicts which does speak the truth.
5 Because the word verdict, ladies and gentlemen, has Latin
6 derivative. It comes from the Latin verb veredicto
7 meaning to speak the truth. And when you have done that
8 you will have satisfied your oath as jurors and you will
9 have discharged your duty to this Court.

10 Now I want to instruct you on the forms of verdict in
11 this case, and I'm going to go through them in just a
12 minute. But if the State has failed to prove the guilt of
13 the defendant beyond a reasonable doubt your verdict would
14 be two words, not guilty. If the State has proven the
15 guilt of the defendant beyond a reasonable doubt your
16 verdict would be one word, not guilty -- I mean, excuse
17 me, guilty. Let me read that again. If the State has
18 failed to prove the guilt of the Defendant beyond a
19 reasonable doubt your verdict would be two words, not
20 guilty. If the State has proven the guilt of the
21 defendant beyond a reasonable doubt your verdict would be
22 one word, guilty. Now the verdict that you render in this
23 case, Madam Forelady, must be your unanimous verdict. All
24 12 jurors must agree on any verdicts which you authorize
25 your forelady to write. Now I have prepared a form of

1 verdict and I will tell you that on this verdict form that
2 I have prepared here the order in which I have put your
3 possible verdicts has absolutely no significance
4 whatsoever. You should not infer from the order in which
5 I have put the possible verdicts on here that I have any
6 opinion as to what your verdict should be; I do not. The
7 law does not allow me to have an opinion. That is a
8 matter that is solely up to you, but obviously putting
9 something down on paper I had to put something first and
10 something second. But across the top here we simply have
11 the formalities: The State of South Carolina, County of
12 the Fourth Circuit, State of South Carolina versus Bobby
13 Gilbert, defendant, the case number and verdict. And
14 there are three separate verdicts, one for each of three
15 indictments which you will consider separately and arrive
16 at a verdict on each indictment. The first is: We, the
17 jury, by unanimous agreement find the defendant Bobby
18 Gilbert on the charge of murder, guilty or not guilty.
19 And you would either put an X or check mark, whichever is
20 the unanimous verdict of the jury. Number two: We, the
21 jury, by unanimous agreement find the defendant Bobby
22 Gilbert on the charge of armed robbery, guilty or not
23 guilty. And again, indicate your verdict, your unanimous
24 verdict by an X or check mark.

25 A little bit different on the larceny. There are four

1 possible verdicts on the larceny because one of the
2 findings that you have got to make is the value of the
3 property because it makes a difference as far as the
4 offense that is actually committed. Number three is: We,
5 the jury by unanimous agreement find the defendant Bobby
6 Gilbert on the charge of larceny guilty of larceny less
7 than one thousand dollars and this means the value of the
8 stolen property, guilty of larceny between one thousand
9 and five thousand dollars, guilty of larceny more than
10 five thousand dollars, or not guilty. And you would
11 select one of those. And then Madam Forelady, when you
12 have reached a verdict if you will sign it here, date it,
13 and notify the bailiff we will return you to the courtroom
14 as soon as possible.

15 Now I'm going to ask that you go to your jury room.
16 I'm gonna ask that you not begin your deliberations just
17 yet. The law does require that I take up certain matters
18 of law with the attorneys that are involved in this case.
19 If it is not necessary for me to bring you back for
20 additional instructions, the bailiffs will bring you the
21 verdict form, also the evidence in this case which I told
22 you you would have in the jury room with you. And the
23 only thing that I would say that if during your course of
24 your deliberations in the jury room some of the evidence
25 that was presented to you in the form of video evidence

1 and video tapes, and if you should want to see any of
2 those video tapes we can arrange for those to be played.
3 And if you have any questions just have the forelady give
4 a note to the bailiff, he will give it to me, and then we
5 will address that. But otherwise you will have the right
6 to have all of the evidence in the jury room with you
7 during the course of your deliberations. With the
8 exception of the two alternates I'm gonna ask that the 12
9 jurors go to your jury room. But before I do that let me
10 ask you just one thing just to make sure before -- I've
11 obviously got to address the alternates. Does everybody
12 feel okay? Anybody feel like they're sick, not going to
13 be able to participate in the deliberations? If so, I
14 need to know about it now.

15 (There was no response.)

16 THE COURT: Okay, fine. Thank you. If the 12 of you
17 then will go with the bailiffs and the two alternates will
18 stay with me. Thank you very much.

19 (WHEREUPON, the jury was removed from the
20 courtroom at 3:48 p.m., and the following proceedings
21 commenced in open court.)

22 THE COURT: Any additions or exceptions on behalf of
23 the State, Mr. Redmond?

24 MR. REDMOND: None from the State. Your Honor.

25 THE COURT: On behalf of the Defense?

1 MR. WATTS: None. No, Your Honor, nothing from Defense
2 but may I approach one second with Mr. Redmond.

3 (WHEREUPON, counsel approached the Bench for an
4 off-the-record discussion.)

5 THE COURT: No additions or exceptions on behalf of the
6 defendant, Mr. Watts?

7 MR. WATTS: No, Your Honor.

8 THE COURT: All right. Then if y'all would gather up
9 the exhibits and take those to the jury room along with
10 this verdict form.

11 MR. WATTS: Your Honor, we had discussed earlier...
12 (WHEREUPON, counsel approached the Bench for an
13 off-the-record discussion.)

14 THE COURT: While they're looking at the exhibits,
15 Mr. Gilbert, as part of the determination of what issues
16 we're going to go to the jury, the question came up in
17 discussions with counsel as to whether or not your lawyer
18 was going to request a instruction to the jury possible
19 verdict of voluntary manslaughter on the murder charge and
20 on the armed robbery charge, whether he was going to
21 request on your behalf a finding by the jury of common law
22 or strong armed robbery as both of those are lesser
23 include offenses of the principal offenses. He advised me
24 that it was -- he had discussed that with you and that it
25 was your desire that the lesser included offenses not be

1 made questions for the jury to determine; is that correct?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Okay. And you freely and voluntarily made
4 that decision; is that right?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. Okay, thank you. Anything
7 else, Mr. Watts?

8 MR. WATTS: Nothing else, Your Honor, thank you.

9 THE COURT: All right. Let me address the alternates
10 for just a minute. The two of you have heard all the
11 testimony in this case but you're not going to participate
12 in the decision. The law does not allow me to have but 12
13 jurors and the purpose of drawing alternates is in the
14 event that one or more of the jurors becomes ill and is
15 unable to complete the trial of the case so that we would
16 not have a mistrial. But at this point I will -- I'm not
17 going to be able to you and you're not going to
18 participate in the discussions so I'm going to excuse you
19 from any further responsibility on this case. I will
20 tell you that once you've been excused by me there is
21 nothing illegal about your talking with anyone about your
22 service on this case. There's nothing illegal about
23 anybody talking to you about your service on this case.
24 It's a practice of which I strongly disapprove and I
25 strongly discourage but it's not illegal. You have the

1 right to talk with anyone but you also have the right not
2 to talk with anyone. It's your call. And if anybody
3 wants to talk with you about your service on this case and
4 you don't want to talk with them and they continue to
5 irritate or harass you about it, you let the Court
6 personnel know and we will deal with them.

7 I would ask that you not talk with anybody about this
8 case until after the jury has reached a verdict and you
9 won't know when that is so I would say if you will wait
10 till sometime into the evening tonight and not talk with
11 anybody about it before then I will appreciate it.

12 (Alternates excused.)

13 THE COURT: Tell the jury to begin their deliberations.

14 (Court's Exhibit Number 4 was marked
15 and made a part of the record.)

16 THE COURT: Okay. Madam Reporter, here's the charge,
17 the Defendant's charges, to be made a court exhibit and
18 part of the record. All right, counsel, we will be at
19 ease until we hear from the jury.

20 (Court's Exhibit Number 5 was marked
21 and made a part of the record.)

22 (Jury began its deliberations at 3:57 p.m. and court was
23 in recess.)

24 THE COURT: Back on the record please. This is the
25 matter of the State versus Gilbert. The Court has

1 received a note from the jury which I have shared with the
2 attorneys. It's been marked as a court exhibit, made a
3 part of the record. That note indicated that the jury
4 would like to review the video footage of Bobby's
5 statement from 2007 and it is signed by the forelady of
6 the jury. In chambers I discussed it with counsel and
7 talked about the possibility of doing it in the jury room
8 and not having to bring the jury back for purposes of
9 doing that. And I learned that from a practical
10 standpoint that's not really practical. There's really no
11 place to show it in the jury room so I guess the proper
12 way, the only way to do it is to bring the jury back and
13 let's play it in here. Any objection to that procedure,
14 Mr. Redmond?

15 MR. REDMOND: No objection, Your Honor.

16 THE COURT: Mr. Watts?

17 MR. WATTS: No objection, Your Honor.

18 THE COURT: All right, let's get it in gear and get it
19 set up.

20 (Pause.)

21 THE COURT: We just received another note from the jury
22 we'll have marked as the next court exhibit. And they
23 want to reread the definition of armed robbery which I can
24 do that for them as well. All right, bring the jury back
25 in please.

1 (WHEREUPON, the jury was returned to the courtroom at
2 approximately 4:45 p.m., and the following proceedings
3 commenced in open court.).

4 (Court's Exhibit Number 6 was marked
5 and made a part of the record.)

6 THE COURT: All right, thank you very much, ladies and
7 gentlemen. And I have both of your notes and we will take
8 care of both of those requests. We have the equipment set
9 up to re-play the video statement of Mr. Bobby Gilbert and
10 we will play that for you. If you want to hear all of it
11 you're welcome to hear all of it. If there's a certain
12 part and you at some point you feel like you've heard
13 everything you need to hear, if you'll let me know we can
14 stop it. There will be no testimony. No questions will
15 be allowed by the lawyers. We'll just play the video
16 statement of Mr. Gilbert and play all of it if that's what
17 you want or any part of it. And after you -- we have
18 concluded that, then I will also give you instructions on
19 the armed robbery definition that you requested. All
20 right.

21 (State's Exhibit Number 1, video statement of Bobby
22 Gilbert, was played for the jury.)

23 THE COURT: All right. Thank you. And ladies and
24 gentlemen, I believe that's the thing that you had
25 requested in the note that you gave me and now I would

1 like to address the second note and that is the definition
2 of armed robbery. Section 16-11-330 Code of Laws of South
3 Carolina provides that armed robbery is defined as a
4 robbery committed while armed with a pistol, dirk,
5 slingshot, metal knuckles, razor, or other deadly weapon
6 or while alleging either by action or words he was armed
7 while using a representation of a deadly weapon or any
8 object which a person present during the commission of the
9 robbery reasonably believed to be a deadly weapon. To
10 convict the defendant of armed robbery the State must
11 prove the defendant, first, committed a robbery, second
12 while armed with a pistol, dirk, slingshot, metal
13 knuckles, razor, or other deadly weapon or while alleging
14 either by action or words that he was armed while using a
15 representation of a deadly weapon or any object which a
16 person present during the commission of the robbery
17 reasonably believed to be a deadly weapon.

18 Robbery is larceny from the person or immediate
19 presence of another by violence, intimidation, or by
20 putting such person in fear. A thing is in the presence
21 of a person in respect to robbery which is so within his
22 reach inspection, observation, or control that he could if
23 not overcome by violence or prevented by fear retain his
24 possession of it. Robbery is basically larceny compounded
25 by aggravated circumstances or by intimidation or force

1 used in the taking of property from the person or the
2 presence of another. Larceny is the felonious taking and
3 carrying away of the goods of another against the owner's
4 will with or without his consent -- I'm sorry, let me read
5 that again. Larceny is the felonious taking and carrying
6 away of the goods of another against the owner's will or
7 without his consent with the intent to appropriate them to
8 one's own use and to permanently deprive the owner of the
9 possession of the property. There are five elements which
10 the State must establish in order to to prove larceny, and
11 these elements must be proved beyond a reasonable doubt.
12 They are: A taking, the act of carrying it away, of the
13 personal property of another without consent or against
14 the will of the owner and with the intent to steal. The
15 asportation or taking away of the stolen property is an
16 indispensable element of larceny and can be established by
17 the slightest removal of the property with felonious
18 intent. The defendant must intend to permanently deprive
19 the owner of possession by converting the property to his
20 own use.

21 In addition to the elements of larceny, the crime of
22 robbery requires two additional elements. These are:
23 First, the property must be taken from the person or
24 immediate presence of another; and second, the taking must
25 be accomplished by violence, intimidation, or by putting a

1 person in fear. The violence must be actual personal
2 violence or the threat of it. The degree of force used is
3 immaterial as long as such force or threat of force is
4 actually sufficient to overcome the victim's resistance.
5 This violence or intimidation must either precede or be
6 contemporaneous with the taking. Finally, to constitute
7 armed robbery the State must show the additional element
8 that the robbery was committed while armed with a pistol,
9 dirk, slingshot, metal knuckles, razor, or other deadly
10 weapon, or while alleging either by action or words that
11 he was armed with one of these items.

12 What is a deadly weapon? This is a factual matter that
13 the jury must decide or determine. You must answer that
14 question factually based on the evidentiary record before
15 you. A deadly weapon is any article, instrument, or
16 substance which is likely to cause death or great bodily
17 harm. Whether an instrument or object has been used as a
18 deadly weapon depends on the facts and circumstances of
19 each case. An instrument or object that is not normally
20 considered a deadly weapon may under some circumstances
21 and conditions be a deadly weapon because the instrument
22 or object is used in such a fashion or is in such a manner
23 to constitute a deadly weapon. A deadly weapon may
24 include an ordinary object that is used to inflict serious
25 bodily injury or death.

1 All right, I believe that would complete the definition
2 of armed robbery as I have given it you to before and I'm
3 gonna ask if you'll return to your jury room and resume
4 your deliberations.

5 (WHEREUPON, the jury was removed from the
6 courtroom at 5:10 p.m., and the following proceedings
7 commenced in open court.)

8 THE COURT: Any exception from the State with regard to
9 the way the Court handled matters in response to the two
10 jury questions, Mr. Redmond?

11 MR. REDMOND: None from the State, Your Honor.

12 THE COURT: All right.

13 MR. WATTS: None, Your Honor.

14 THE COURT: All right. We'll be in recess till we hear
15 from the jury.

16 (WHEREUPON, a recess was taken from the proceedings.)

17 THE CLERK OF COURT: All right. Mr. Clerk, I
18 understand the jury has reached a verdict; is that
19 correct?

20 THE CLERK OF COURT: Yes, sir.

21 THE COURT: All right. Let me -- before I bring the
22 jury back in and verdict is published, let me address this
23 here in the courtroom for just a moment. I know that this
24 is a very important matter for everybody that is involved.
25 The defendant and his family and the victim's family and

1 it's a highly emotional and important case for everybody
2 including the attorneys and witnesses and everyone else.
3 However, this is a court of law and I am going to have to
4 require that when the verdict is published that everyone
5 accept the verdict quietly without shows of emotion,
6 without any clapping, or anything of that nature. And if
7 there's anyone in the courtroom who thinks they cannot sit
8 quietly when the verdict is published I would ask that you
9 leave now. All right, thank you. Bring the jury please.
10 (WHEREUPON, the jury was returned to the courtroom at
11 approximately 5:24 p.m., and the following proceedings
12 commenced in open court.)

13 THE COURT: Madam Forelady, I've been advised you've
14 reached a verdict; is that ---

15 THE FORELADY: Yes, sir.

16 THE COURT: Would you hand it up to the bailiff, I
17 mean, the Clerk please.

18 (Verdict form tendered to the Court.)

19 THE COURT: All right. From the standpoint of form the
20 verdict appears to be correct.

21 Mr. Watts, would you and your client stand please when
22 the verdict is published and Mr. Clerk you may publish the
23 verdict.

24 THE CLERK OF COURT: Yes, sir. Verdicts are
25 indictments 2008-CS-16-1031, 1032, and 1039. State of

1 South Carolina versus Bobby Gilbert, defendant. Question
2 one: We, the jury, by unanimous agreement find the
3 defendant Bobby Gilbert on the charge of murder, guilty.
4 If this is your verdict would you so signify by raising
5 your right hand.

6 (All jurors complied by raising their hand.)

7 THE CLERK OF COURT: Okay, thank you. Question two:
8 We, the jury, by unanimous agreement find the defendant on
9 the charge of armed robbery, guilty. If this is your
10 verdict would you so signify by raising your right hand.

11 (All jurors complied by raising their hand.)

12 THE CLERK OF COURT: Okay, thank you. Question three:
13 We, the jury, by unanimous agreement find the defendant
14 Bobby Gilbert on the charge of larceny, guilty of larceny
15 of more than five thousand dollars. Signed foreperson,
16 Kaitlyn Luther, April 29th, 2009, Darlington, South
17 Carolina. If that was your verdict would you please raise
18 your hand.

19 (All jurors complied by raising their hand.)

20 THE COURT: Thank you, you may be seated.

21 Mr. Watts, anything before the jury is excused?

22 MR. WATTS: Your Honor, no, sir. I believe the polling
23 has already been taken place, Your Honor.

24 THE COURT: All right, sir. Ladies and gentlemen of
25 the jury, this will conclude your services in connection

1 with this matter. Before I discharge you I have just a
2 couple of things that I want to tell you. First of all,
3 in my view the jury's role in the fact finding process is
4 so important that the trial judge should not comment on
5 the verdict of a jury even after a jury has reached a
6 verdict and I make it a practice and a policy never to
7 comment on the verdict of a jury. And I will tell you
8 that there was evidence in the record by which you could
9 have reached the decision that you did. I am in just a
10 few minutes going to excuse you from any further service
11 in this case and I will tell you that once you have been
12 discharged as a juror there is nothing illegal about your
13 talking with anyone about your service on this case.
14 There is nothing illegal about anyone talking to you about
15 your service. It is a practice of which I strongly
16 disapprove and strongly discourage but it's not illegal.
17 Anyone can talk with you about your verdict or you can
18 talk with anyone about it or about your service on the
19 case. As I say, I don't approve of contacts to jurors
20 after a case is over, but it's not illegal. But it's up
21 to you. You can either talk with anyone or not talk with
22 anyone; and if you tell anybody that wants to talk to you
23 about it that you don't wish to discuss with it them and
24 they continue to harass you or bother you you let the
25 Court personnel know and we will deal with them. But it

1 is your call.

2 Now I am going to excuse you from any further service
3 again on this case. Again, I do appreciate your being
4 here and your service this week. I know that it is never
5 convenient to serve on the jury, but it is an important
6 citizenship responsibility and it does make our judicial
7 system the best in the world. It is -- the American
8 judicial system is not without its flaws but it is still
9 the best that has ever been developed by the mind of man.

10 Now there's only one other thing remaining to be done
11 in this case and that is for the Court, me, to impose
12 sentence. And I'm going to do that in just a few minutes
13 and I'm going to do it after you're excused. However, I
14 know that sometimes jurors like to know the final outcome
15 of a case, and so I'm going to excuse you in a few minutes
16 and if you would like to stay for the sentencing phase
17 which will take, oh, 15, 20 minutes or so, then I'm going
18 to ask that you come back in the back of the courtroom and
19 just have a seat back in the back of the courtroom. Go
20 out this way, get your checks, and come back in in the
21 back of courtroom, or you may leave. It will be up to
22 you. You can go ahead take the elevator and leave. If
23 you do come into the courtroom and want to watch the
24 sentencing phase I will assure you that I will excuse you
25 first, allow you to get out of the building before anyone

1 else in the courtroom is excused. So that will be up to
2 you. If you would like to stay you're welcome to do so
3 but you will also be free to go home and go to your
4 family. Again, thank you for your service this week. I
5 hope you have a better appreciation of the American
6 judicial system as a result of having served on the jury
7 this week and you are free to go. Thank you very much.

8 (WHEREUPON, the jury was removed from the
9 courtroom at 5:31 p.m., and the following proceedings
10 commenced in open court.)

11 THE COURT: All right, Mr. Watts, motions on behalf of
12 the defendant?

13 MR. WATTS: Yes, Your Honor. At this time we would
14 move that the sentencing phase in this matter be continued
15 to have the ability for the defendant to submit any
16 affidavits in mitigation regarding this matter for
17 sentencing. I don't believe this would be prejudicial to
18 anyone else due to the fact that the other defendants in
19 this matter have been previously pled guilty but their
20 sentencing has not been completed as of yet. We would ask
21 the Court to continue sentencing phase till we may be able
22 to obtain affidavits in mitigation in regard to this
23 matter.

24 THE COURT: Mr. Redmond.

25 MR. REDMOND: Your Honor, I talked with the members of

1 Tyrone Brown's family and they have, in fairness to Mr.
2 Watts, he did advise me of this possibility and my brief
3 discussion with him but understandably they wish to go
4 forward with the sentencing at this time. And Your Honor,
5 if I may, as an administrative note while we're addressing
6 that if I can have the indictments. We're trying to
7 finish filling out these sentencing sheets so we'll be
8 able to go ahead and proceed if the Court decides to
9 proceed with sentencing.

10 THE COURT: All right. Mr. Watts, I'm going to
11 respectfully deny the motion. I'll certainly allow the
12 defendant to present anything that he wishes to submit in
13 mitigation; and if he has got individuals who would be
14 submitting affidavits in mitigation, I would think that
15 those people that were going to be submitting affidavits
16 would be supporters of his who would be here and I would
17 certainly be glad to hear from them under oath which would
18 serve the purpose of affidavits. But I don't think that
19 this is a matter that needs to be delayed, especially in
20 view of the fact that I am, under our rotating system of
21 judges, I am not scheduled to be back Darlington County
22 any time soon. I would respectfully deny the motion. I
23 want to go forward with the sentencing phase today. All
24 right, any other motions?

25 MR. REDMOND: None from the State, Your Honor.

1 THE COURT: From the Defense?

2 MR. WATTS: Your Honor, at this time I would ask that
3 you allow the ten days to submit any other post-trials
4 motions.

5 THE COURT: All right, sir, you're entitled to that
6 under Rule 29. Ten days from the imposition of sentence
7 and we would be imposing -- and we're going forward with
8 the sentencing phase today. So under Rule 29 the Rules of
9 Criminal Procedural you are entitled to have ten days to
10 the filing of any posttrial motions.

11 MR. WATTS: Thank you, Your Honor.

12 THE COURT: All right, sir. You have sentencing sheets
13 Mr.?

14 MR. REDMOND: Yes, Your Honor.

15 THE COURT: I don't think there's a requirement of
16 signing by the defendant or attorney for the defendant
17 when it's a jury verdict. If you'll hand them up please,
18 Mr...

19 MR. REDMOND: Certainly.

20 THE COURT: Come around please.

21 MR. REDMOND: And Your Honor, with the Court's
22 permission the family of the victim I believe --

23 THE COURT: I'm going to call on you and the victim's
24 family in just a moment.

25 MR. REDMOND: Yes, sir.

1 THE COURT: Come around please, Mr. Gilbert, and Mr.
2 Watts.

3 MR. WATTS: Your Honor, you're requesting Mr. Gilbert
4 to come to the bar as well, correct?

5 THE COURT: Yes.

6 All right, Mr. Redmond, let me hear from the State with
7 regard to any matters that you wish to present. First
8 from the State and then we'll be glad -- I'll be glad to
9 hear from representatives of the victim's family, several
10 of them, not everybody.

11 MR. REDMOND: Certainly, Your Honor. Would you like to
12 hear from some of those first, a few brief remarks.

13 THE COURT: Well, I'll hear from your remarks in the
14 end. Well, go ahead, I'd like to hear from you. Two
15 things I want to know. Of course I know the criminal
16 record. I'd like for you elaborate on that and anything
17 else you want to say and then I'll speak with the victims
18 in a just moment.

19 MR. REDMOND: Thank you, Your Honor, if it please the
20 Court. As Your Honor recalls, we did have prior
21 convictions for this defendant that we mentioned that we
22 would have used should he have chosen to testify. But
23 just to recap that, Your Honor, we've got in 19 -- well,
24 first to recap what we had discussed earlier, 1997 there
25 was a conviction for common law robbery, possession of a

1 weapon, and possession of a stolen vehicle. Then in 2006
2 the defendant got a probationary sentence on the burglary
3 second degree nonviolent. Now there were other earlier
4 convictions that we did not get into because they were
5 well outside the ten year range. 1994 he was convicted of
6 use of car without owner's consent, was originally a grand
7 larceny charge. He received actually a Youthful Offender
8 Act on that conviction, Your Honor. 1994, and actually I
9 think these were concurrent. The reason he got YOA he
10 actually had an earlier burglary conviction back in
11 February of 1995, that being for burglary second degree
12 nonviolent. He got a Youthful Offender Act which I
13 assume corresponds with the earlier -- with the YOA I
14 mentioned earlier. Had a shoplifting conviction. Then in
15 1997 -- actually in 1997 he also had an unlawful carrying
16 of a pistol that I didn't catch. That wasn't circled.
17 But it actually ran concurrent with everything else so
18 there were two pistol, two weapons charges back in 1997.

19 THE COURT: No serious or most serious offenses in the
20 background; is that correct?

21 MR. REDMOND: No, sir.

22 THE COURT: Okay. And both of these offenses -- let me
23 ask you, Mr. Watts, just to see if you concur in this and
24 I'll go back to Mr. Redmond in just minute. That under
25 our law under the murder conviction under the

1 interpretation of the law as I understand it that's day
2 for day. Is that the way you understand?

3 MR. REDMOND: That is the way I understand it, Your
4 Honor.

5 THE COURT: You agree?

6 MR. WATTS: Yes, Your Honor.

7 THE COURT: Under the armed robbery it would be minimum
8 of ten, maximum of 30 at 85 percent.

9 MR. WATTS: Yes, Your Honor.

10 THE COURT: And the grand larceny of over five thousand
11 dollars would be up to 10 but without the 85 percent
12 requirement.

13 MR. WATTS: Yes, Your Honor.

14 THE COURT: Okay. All right, Mr. Redmond, let me hear
15 from you and then I'll speak with the victim, members of
16 the victim's family.

17 MR. REDMOND: And Your Honor, may it please the Court,
18 and let me first thank the Court for his patience with us
19 as we presented this case and kept us efficient and timely
20 and we do appreciate. On behalf of the family we
21 appreciate you being patient with us during this very
22 difficult case. Judge, briefly I'd just like to say
23 that -- and you can correct me if I'm wrong -- sometimes
24 people get up here when there's a murder conviction and
25 want life. Well, as I read the statute I would ask the

1 Court to consider a very significant numerical sentence.
2 And when I say significant, in excess of 50, 70, 80,
3 however many years because my understanding is that if the
4 Court does that it is day for day. If the Court gives
5 life in a noncapital or non-life case he's actually
6 eligible for parole after 30 days. And again, the Court
7 can correct me if I'm wrong, but that is my reading of the
8 statute so that is why I'm not actually asking for a life
9 sentence because as I read that, if we do that and since
10 this is not an elwatt case nor is it a capital case he
11 could be eligible for parole in 30 years and I'll be quite
12 frank in telling the Court that based on the heinous
13 nature of this incident this defendant does not deserve to
14 roam free in Darlington County or anywhere in society
15 again. And if I am -- if my understanding of the statute
16 is erroneous I would apologize to the Court in advance but
17 ---

18 THE COURT: I long ago tried to -- long ago ceased
19 trying to figure out how the Department of Corrections
20 interpreted the sentencing statutes but go ahead.

21 MR. REDMOND: I am aware that if that numerical
22 sentence given that he -- that is day for day under murder
23 statute. We would ask the Court to consider that. I
24 think Your Honor has heard the case. And the only thing I
25 can really add, Judge, is that this is a case unlike

1 anything I've ever seen. To strip the victim and to bash
2 him over the head, to beat him up first, then bash him
3 over the head, then run over him, Judge, is just a sign of
4 just sheer -- I can't put it into words the heinous nature
5 of this incident. And I think that since this is the
6 older defendant. He was the ring leader. The jury
7 obviously through their verdict agree he was a very, a
8 principal in this particular matter I think he should be
9 sentenced accordingly. The State has full confidence in
10 the Court as it relates to that so at this point I will
11 yield back to the Court and at the appropriate time Teresa
12 Henneghan actually will speak on behalf of the victim's
13 family. That is the sister.

14 THE COURT: Ms. Henneghan, come up please.
15 Ms. Henneghan, I of course heard your testimony during the
16 trial of this matter. And I will tell you that under our
17 law and the victim rights amendment that was passed a
18 number of years ago and the implemented legislation even,
19 had you not testified in this case as a member of the
20 victim's family you have the right to address the Court
21 and I'll be glad to hear from you now.

22 SISTER OF THE VICTIM: Yes, sir. I just want to say
23 that I'm glad this day has finally come. Our lives were
24 shattered on January 17th when we could not locate my
25 brother. Since then a lot of my family members are

1 definitely not outgoing as they have been before. I work
2 in law enforcement myself for about 16 years and every
3 time now that I see something on TV about a missing person
4 it changes, you know, how I feel. This has been the most
5 traumatic event we've ever experienced in our lives. We
6 have come closer together to be with one and try to be
7 supportive, but this is something that, you know, is going
8 to be with us the rest of our lives. We will no longer
9 see Tyrone. He can -- he can't be a part of our lives
10 anymore. We can only remember him for how he was. Tyrone
11 was a helping person. He was always trying to be friends,
12 and he had many friends, lots of people that I never met
13 before. He was taken advantage of on this night. He was
14 called out by his friend -- who were supposed to be his
15 friends. And his life was taken. We don't understand
16 why. I have come to the conclusion that I can never
17 understand why because I would never think the way the
18 defendant thought on that night or any other night. But
19 it's just been a very traumatic event. I try to keep
20 peace with my family and stay over them and guide them
21 best I can with the experience I've had and in law
22 enforcement as far as all these the court proceedings.
23 It's just been very tough on all of us including kids who,
24 you know, now know a lot about death when they haven't
25 been exposed to this and bad guys actually taken

1 somebody's life. We've never had anything like this to
2 happen in our family before. Being in law enforcement
3 never prepared me for something like this happening in my
4 family. No matter how many warrants I've seen and
5 different situations that I've been involved in it was
6 definitely life shattering for us. I never could have
7 imagined this would happen in my family. But I would just
8 like to please try and keep this guy off the streets. He
9 does not need to be with anybody else to cause this type
10 of horror to another family and I think he's shown that.

11 THE COURT: All right. Thank you, ma'am. And I can
12 certainly tell you I empathize with your situation.
13 There's nothing I can do today that will ease your pain.
14 All I can do of course is enter a sentence or sentence the
15 defendant according to the law, but I hope that this
16 proceeding here and the conclusion of this proceeding will
17 bring some closure to you and your family on this very
18 traumatic and unfortunate incidence in your life and I
19 hope you will be able to go forward feeling like at least
20 a measure of justice has been done.

21 SISTER OF THE VICTIM: Yes, sir, thank you.

22 THE COURT: Anything else, Mr. Redmond?

23 MR. REDMOND: One thing real quick, and I'd be remiss
24 if I didn't say it, concerning the victim. I did not know
25 him, as I said, in my opening. I knew him indirectly.

1 One of the things I can tell you on a personal note is I
2 was -- and I don't say this lightly -- under a tremendous
3 amount of pressure because as being in the city and had a
4 lot of friends and my fiance is one of his friends. The
5 victim actually did her hair. She used to go to that
6 salon, and so I personally felt the need and the hope and
7 desire for justice and I'd just like -- I just wanted to
8 express that to the family that hopefully we did have some
9 small role in bringing some closure. Thank you, Your
10 Honor.

11 THE COURT: Thank you. All right, Mr. Watts, be glad
12 to hear from you.

13 MR. WATTS: Your Honor, the verdict's come back. It's
14 your prerogative to establish any sentence that you see
15 fit in this matter. I would ask the court to take into
16 consideration that Mr. Gilbert has exercised his right and
17 the fact that he did choose to go to trial and have the
18 State prove this case not be a factor so much in
19 sentencing him. We would of course ask for the judge to
20 express leniency or consider leniency in this matter. We
21 know this is a terrible situation, but Mr. Gilbert right
22 now is 30, 33 years old. An imposition of the minimum
23 sentence in this matter would leave him to be 63 time when
24 he might even be eligible or day for day service he would
25 be out there. Mr. Gilbert does have two small children.

1 One of his small children is in the care of his parents.

2 And his father, mother, family relatives have been here
3 through the trial to be supportive of him.

4 Your Honor, we would ask for any sentencing regarding
5 the armed robbery of course, and the grand larceny in
6 excess of five thousand dollars to be running concurrent
7 with the sentencing in regards to the murder. We would
8 also ask that he be given credit for time he serve since
9 his arrest.

10 THE COURT: All right, sir.

11 MR. WATTS: Thank you, Your Honor.

12 THE COURT: All right, Mr. Watts, I'll be glad to hear
13 from Mr. Gilbert. You may want to tell him, of course,
14 anything he says in connection with this would be on the
15 record and could effect later appeals. And if he does not
16 wish to say anything then as far as to me is concerned,
17 that's fine; I will not hold that against him. But he
18 also will have -- I want to give him the opportunity if
19 he's got anything he'd like to say.

20 MR. WATTS: Can I have one second to confer with my
21 client?

22 THE COURT: All right.

23 (Mr. Watts confers with the defendant.)

24 MR. WATTS: If it please the Court, Your Honor.

25 THE COURT: Yes, sir.

1 MR. WATTS: Mr. Gilbert doesn't wish to give a
2 statement.

3 THE COURT: Okay. Anything, Mr. Watts?

4 MR. WATTS: Nothing else, Your Honor, except for asking
5 for you to consider the minimum sentence in this matter.

6 THE COURT: All right.

7 MR. REDMOND: And Your Honor, I'm going to be brief.
8 But I think I'd be remiss, also Ms. Patty McKenzie who
9 assisted me in this trial, I was trying a case last week
10 and would not have been anywhere near ready to prepare
11 this case or go forward with this had she not assisted
12 both during the trial and in the preparation. I just
13 wanted the record to reflect that.

14 THE COURT: All right. All right, those who know me
15 have heard me say this many times. Before, or rather,
16 about the time I got this job over 13 years ago I was told
17 by my colleagues that the most difficult thing that we
18 would have to do is criminal sentencing. Nothing has
19 changed in the last 13 plus years that changes my mind or
20 about that, and I do think that it is the most difficult
21 thing that we have to do. We judges have no crystal ball.
22 We can only apply the facts of the case that we heard in
23 the courtroom to what we consider the defendant's
24 situation, the victim's situation, the needs of society,
25 and weigh all of those competing interests and come up

1 with a sentence that we think is appropriate. Very often
2 sentences that we pronounce don't satisfy both sides.
3 Sometimes they don't satisfy anybody in connection with
4 the matter, but we do try to conscientiously impose a
5 sentence that is appropriate to the facts and
6 circumstances and the defendant as well. But it is the
7 most difficult thing that we have to do.

8 But I have heard the facts in this case, and I find the
9 facts to be very troubling and very heinous. Any time
10 that you've got an individual that is killed or murdered
11 as a result of the actions of three individuals,
12 especially in the manner that this young man was -- met
13 his death apparently without any, not being any trouble
14 maker or anything, asking for it, bring it about in any
15 way, is really disturbing to the Court. I'm also
16 disturbed by the fact that the defendant in this case has
17 apparently not learned anything from his previous brushes
18 with the law, having been in trouble at least since he was
19 a young man and having received youthful offender offenses
20 as well as straight sentences and his time in prison has
21 not changed his conduct. I really do think that he is a
22 danger to society, and I'm going have to impose a sentence
23 that reflects that danger as I see it.

24 The sentence of the Court with regard to the murder is
25 defendant is sentenced to the South Carolina Department of

1 Corrections for a term of life imprisonment. On the armed
2 robbery, the sentence of the Court defendant is committed
3 to State Department of Corrections for a term of 30 years
4 to run consecutive to the life sentence. And on the
5 larceny, the sentence of the Court is the defendant is
6 sentenced to the Department of Corrections for a term of
7 ten years to run concurrent with the other two sentences.
8 All right. You may be seated.

9 MR. REDMOND: Thank you, Your Honor.

10 THE COURT: All right. We have concluded this hearing
11 and what I'd like to do at this time before I adjourn is,
12 Mr. Redmond, I'm going to allow the victim's family to
13 leave. I would ask everyone else to stay. If the
14 victim's family would like to go ahead and leave they may
15 do so. Mr. Gilbert can be returned to the holding cell.

16
17 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER

2
3
4 STATE OF SOUTH CAROLINA)
5 COUNTY OF FLORENCE)

6
7 I, FRANCES BAKIS-RAY, Registered Professional
8 Reporter (RPR), court reporter for the State of South
9 Carolina, Twelfth Judicial Circuit, do hereby certify that
10 the foregoing proceeding is a stenographic report and was
11 transcribed through computer-aided transcription; that the
12 foregoing transcript contains a true record of the
13 proceedings.

14 I further certify that I am neither counsel for,
15 nor related to nor employed by any of the parties
16 connected to the action, nor am I financially interested
17 in the action.

18 Witness my hand at Florence, South Carolina,
19 this 1st day of October, 2009.

20
21 
22 _____
23 FRANCES BAKIS-RAY, RPR
24 My Commission Expires: 9-13-2014
25

WITNESSES

Locklair
DCSD

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

Defendant

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

Defendant

WITNESS:

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

ARREST WARRANT #:
DAR0768

Arrested on

ACTION OF GRAND JURY

JUL 17 2008

Foreman:

Grand Jury

VERDICT
TRUE BILL

Foreman:

Petit Jury

Date:

DOCKET #: 08GS16-1031

THE STATE OF SOUTH CAROLINA
County of Darlington

COURT OF GENERAL SESSIONS

Term: July, 2008

THE STATE

vs.

Bobby Gilbert

I N D I C T M E N T F O R

0116

MURDER

16-3-10

STATE OF SOUTH CAROLINA)
)
County of Darlington)

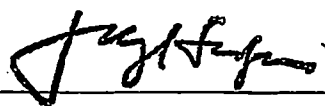
INDICTMENT #08GS16-1031

At a Court of General Sessions, convened on July 21, 2008
the Grand Jurors of Darlington County present upon their oath:

COUNT: MURDER
16-3-10

That Bobby Gilbert either did by himself or with Jamie Gilbert and Christopher Samuel or any combination thereof, in the County of Darlington on or about January 17, 2007, feloniously, wilfully and with malice and aforethought, kill one Tyrone Cornelius Brown with blunt force trauma to the head and by running over the victim with an Automobile, and that the said Tyrone Cornelius Brown did die in Darlington County as a proximate result thereof.

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

SOLICITOR: 

WITNESSES

Locklair
DCSD

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

Defendant

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

Defendant

WITNESS:

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

ARREST WARRANT #:
DAR0769

Arrested on

ACTION OF GRAND JURY

JUL 17 2008

Foreman:

Grand Jury

TRUE BILL

Foreman:

Petit Jury

Date:

DOCKET #: 08GS16-1032

THE STATE OF SOUTH CAROLINA
County of Darlington

COURT OF GENERAL SESSIONS

Term: July, 2008

THE STATE

vs.

Bobby Gilbert

I N D I C T M E N T F O R

0479

LARCENY IN EXCESS OF \$5,000

16-13-30 (B) (2)

STATE OF SOUTH CAROLINA)
County of Darlington)

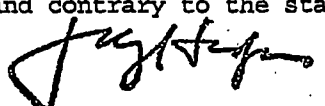
INDICTMENT #08GS16-1032

At a Court of General Sessions, convened on July 21, 2008
the Grand Jurors of Darlington County present upon their oath:

COUNT: LARCENY IN EXCESS OF \$5,000
16-13-30 (B) (2)

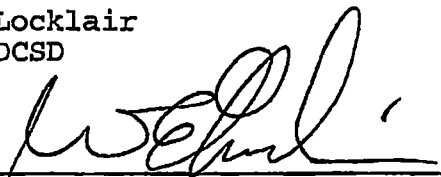
That Bobby Gilbert either by himself or with Jamie Gilbert and Christopher Samuel or any combination thereof, in the County of Darlington on or about January 17, 2007, feloniously take and carry away the personal goods of Tyrone Cornelius Brown, of the value of \$5,000 or more described as follows: a 2002 Honda Accord, with intent to deprive the owner permanently of such property.

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

SOLICITOR: 

WITNESSES

Locklair
DCSD



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

Defendant

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

Defendant

WITNESS:

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

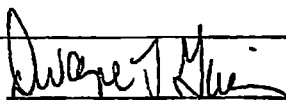
ARREST WARRANT #:
DAR0776

Arrested on

ACTION OF GRAND JURY

AUG 7 2008

Foreman:


Grand Jury

TRUE BILL

Foreman:

Petit Jury

Date:

DOCKET #: 08GS16-1039

THE STATE OF SOUTH CAROLINA

County of Darlington

COURT OF GENERAL SESSIONS

Term: July, 2008

THE STATE

vs.

Bobby Gilbert

INDICTMENT FOR

0139

ARMED ROBBERY

16-11-330 (A)

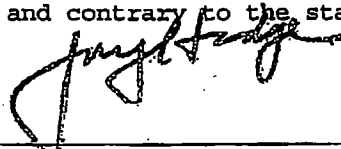
STATE OF SOUTH CAROLINA)
) INDICTMENT #08GS16-1039
County of Darlington)

At a Court of General Sessions, convened on July 21, 2008
the Grand Jurors of Darlington County present upon their oath:

COUNT: ARMED ROBBERY
16-11-330 (A)

That Bobby Gilbert either by himself or with Jamie Gilbert and Christopher Samuel or any combination thereof, in the County of Darlington on or about January 17, 2007, violate Section 16-11-330 of the Code of Laws of South Carolina (1976), as amended, while armed with a deadly weapon, did feloniously take from the person in the presence of Tyrone Cornelius Brown, by means of force or intimidation goods or monies of the said Tyrone Cornelius Brown, such goods or monies being describes: a 2002 Honda Accord and a Bank Card.

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

SOLICITOR: 

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF DARLINGTON

STATE VS.

INDICTMENT/CASE#: 08-GS-16-1031

Bobby Gilbert

AW#: ~~XXXXXXXXXX~~ DAR0768

AKA:

Date of Offense: 11/7/07

Race: B Sex: M Age: 32

S.C. Code §: 16-3-10

DOB: 76 SS#: [REDACTED]

CDR Code#: 0116

Address:

City, State, Zip: Lamar SC

DL#

SID#

SENTENCE SHEET

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

TO: murder In violation of § 16-3-10 of

the S.C. Code of Laws, bearing CDR Code # 0116

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

ATTEST:

Solicitor SC Bar # 066593

Defendant

Attorney for Defendant

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

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

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms:

☐ set by SCDPPPS

Recipient: _____

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____

Beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

*Fine:

§14-1-206 (Assessments 107.5%) \$ _____

§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____

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

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

§35.13 (Public Def/Prob) \$500 \$ _____

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

§33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

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

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

3% to County (if paid in installments) SCCS \$5-

Jonna Coulter \$ _____

Clerk of Court/Deputy Clerk

Court Reporter Francis Ray

PRESIDING JUDGE Howard P. King

Judge Code: 2107

Sentence Date: 4/29/09

White--Clerk

Green--Jail

Canary--SCDPPPS

Pink--Solicitor

Gold--Defendant

SCCA/217 (9/2006)

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF **DARLINGTON**
STATE VS.INDICTMENT/CASE#: **08-GS-16-1032****Bobby Gilbert**AW#: **DAR 0769**

AKA:

Date of Offense: **11/7/09**Race: **B** Sex: **M** Age: **32**S.C. Code §: **16-13-30(B)(2)**DOB: **11/76** SS#: **[REDACTED]**CDR Code# **0479**

Address:

City, State, Zip:

DL# **[REDACTED]** SID# **[REDACTED]**

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: **larceny over \$5,000** in violation of § **16-13-30(B)(2)** ofthe S.C. Code of Laws, bearing CDR Code # **0479**☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor **SC Bar #066583** Defendant Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of **10** days/months/years or ☐ under the Youthful Offender Act not to exceed **10** years and/or to pay a fine of \$ **[REDACTED]**; provided that upon the service of **[REDACTED]** days/months/years and/or payment of \$ **[REDACTED]**; plus costs and assessments as applicable, the balance is suspended with probation for **[REDACTED]** 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: **08-GS-16-1031 & 08-GS-16-1039.**☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ **[REDACTED]** plus 20% fee: \$ **[REDACTED]**

Payment Terms:

☐ set by SCDPPPS **[REDACTED]**Recipient: **[REDACTED]**

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ **[REDACTED]** Beginning\$ **[REDACTED]** paid to Public Defender FundOther: **[REDACTED]**

*Fine:

§14-1-206 (Assessments 107.5%) \$ **[REDACTED]**§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ **[REDACTED]**§14-1-211(A)(2) (DUI Surcharge) \$100 \$ **[REDACTED]**§56-5-2995 (DUI Assessment) \$12 \$ **[REDACTED]**§35.13 (Public Def/Prob) \$500 \$ **[REDACTED]**§73.3, 1B TP (Law Enforce. Funding) \$25 \$ **[REDACTED]**§33.7, 1B TP (Drug Court Surcharge) \$100 \$ **[REDACTED]**§50-21-114(BUI Breath Test Fee) \$50 \$ **[REDACTED]**§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ **[REDACTED]**3% to County (if paid in installments) SCCJ \$ **5-**Clerk of Court/Deputy Clerk **[REDACTED]**Court Reporter **Francis Ray**

White--Clerk Green--Jail Canary--SCDPPPS Pink--Solicitor Gold--Defendant

PRESIDING JUDGE **[REDACTED]**Judge Code: **2107**Sentence Date: **4/29/09**

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF DARLINGTON

STATE VS.

INDICTMENT/CASE#: 08-GS-16-1079Bobby GilbertA/W#: ~~08-GS-16-1079~~ DAR0776

AKA:

Date of Offense: 1/17/08Race: B Sex: M Age: 32S.C. Code §: 16-11-330(A)DOB: 76 SS#: [REDACTED]CDR Code# 0139Address: [REDACTED]City, State, Zip: Lamar SCDL# [REDACTED] SID# [REDACTED]

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Armed Robbery in violation of § 16-11-330(A) ofthe S.C. Code of Laws, bearing CDR Code # 0139
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor Bar # 066583 Defendant Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 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: 08-GS-16-1031☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms:

☐ set by SCDPPPS _____

Recipient: _____

*Fine:

\$14-1-206 (Assessments 107.5%)	\$	
\$14-1-211(A)(1) (Conv. Surcharge)	\$100	✓
\$14-1-211(A)(2) (DUI Surcharge)	\$100	
\$56-5-2995 (DUI Assessment)	\$12	
\$35.13 (Public Def/Prob)	\$500	
\$73.3, 1B TP (Law Enforce. Funding)	\$25	✓
\$33.7, 1B TP (Drug Court Surcharge)	\$100	
\$50-21-114(BUI Breath Test Fee)	\$50	
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	
3% to County (if paid in installments)	3005	5

Donna Carlier \$ _____

Clerk of Court/Deputy Clerk

Court Reporter Francis Ray

White--Clerk

Green--Jail

Canary--SCDPPPS

Pink--Solicitor

Gold--Defendant

SCCA/217 (9/2006)

PTUP

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ Beginning

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE [Signature]Judge Code: 2107Sentence Date: 4/29/09

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)
BOBBY ALEXANDER GILBERT, #219284)
 Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

15 CP 160694

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 Darlington County, Darlington S.C.
3. Name(s) of co-defendant(s) (if any) Jamie Gilbert, and Christopher Samuel
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-16-1013, for murder
 - (b) 2008-GS-16-1032, for larceny
 - (c) 2008-GS-16-1039, for armed robbery
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 22nd 2009, Life
 - (b) April 22nd 2009, 30 years concurrent

2015 SEP -3 PM 4:40
 SCOTT B. SUGGS
 CLERK OF COURT
 DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY
 CLERK OF COURT
 DARLINGTON COUNTY, SC

- (c) April 29th 2009. 30 years consecutive
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed the convictions
- ii. Denied the petition for writ of certiorari
- iii. _____
- (c) the date of each such result:
- ~~XXXXXXXXXXXX~~ June 26, 2013
- ii. July 23, 2015
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. I/A
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of Counsel
- (b) Ineffective assistance of Counsel
- (c) Trial Court error

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

- (a) Failure to investigate; failure to request certain jury instructions
- (b) Failure to object to Judges error of law/abuse of discretion
- (c) Error in granting States Batson motion/failing to instruct the jury

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

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

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

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- _____ No _____
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) First post-conviction relief petition _____
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- W.S. "Tray" Watts, III; 508 South Fourth Street Hartsville, S.C.
 - Joseph L. Savitz, III; 1330 Lady Street, Suite 401 Columbia, S.C.
 - Susan B. Hackett, 1330 Lady Street, Suite 401 Columbia, S.C.
- (b) the proceedings at which each such attorney represented you:
- Trial
 - Appeal from conviction
 - Appeal from conviction and petition to review the Court of Appeal decision
19. State clearly the relief you seek in filing this application:
the reversal of the conviction & sentence
20. Are you now under sentence from any other court that you have not challenged?
No

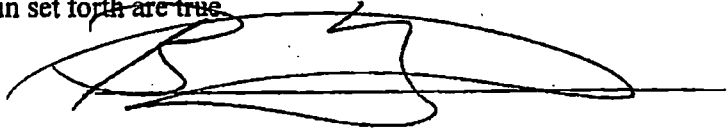
STATE OF SOUTH CAROLINA

County of Darlington

VERIFICATION

Bobby Gilbert

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



SWORN to and subscribed before me this 24th
day of August, 2015

Ludrean Bryant (L.S.)
Notary Public

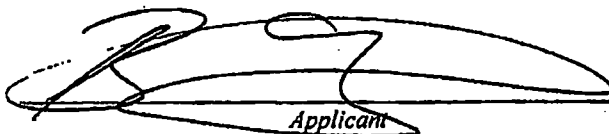
My Commission Expires: May 26, 2020

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

Bobby Gilbert

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

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


Applicant

SWORN or affirmed to and subscribed before me this
24th day of August, 2015


Notary Public

My Commission Expires: May 26, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
OF THE FOURTH JUDICIAL CIRCUIT

Bobby A. Gilbert,
S.C.D.C. No. 219284,

Case No.: 2015-CP-16-0694

Applicant,

RETURN

v.

State of South Carolina,

Respondent.

In response to the Applicant's post-conviction relief application filed August 24, 2015, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Darlington County Clerk of Court's orders of commitment. The Darlington County Grand Jury indicted the Applicant at the July 2008 term for Murder (08-GS-16-1031), Larceny in Excess of \$5,000 (08-GS-16-1032), and Armed Robbery (08-GS-16-1039). W.S. Trey Watts, Esquire, represented the Applicant.

After entering a plea of not guilty, the case proceeded to trial whereby the jury found the Applicant guilty of all three charges. On April 29, 2009, the Honorable Howard P. King sentenced the Applicant to life imprisonment for the murder charge; ten (10) years imprisonment for the Larceny charge, which is to be served concurrently with the Murder and Armed Robbery sentence; and thirty (30) years for the Armed Robbery charge, to be served consecutively to the Murder sentence. The Applicant was given credit for time served for the Murder and Armed

Applicant timely appealed his conviction and was represented by Joseph L. Savitz, Esquire. On June 26, 2013, the South Carolina Court of Appeals affirmed the trial court's verdict and sentencing. State v. Gilbert, Op. No. 2013-UP-283 (S.C. Ct. App. filed June 26, 2013). A petition for rehearing was denied on August 22, 2013.

Applicant then filed a petition for a writ of certiorari in the Supreme Court of South Carolina to review the Court of Appeal's decision. The Supreme Court of South Carolina denied the writ of certiorari on July 23, 2015, and the remittitur was issued on August 31, 2015.

II.

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

1. Ineffective Assistance of Counsel
 - a. Failure to investigate
 - b. Failure to request particular jury instructions
 - c. Failure to object to the trial judge's error of law/abuse of discretion
2. Trial Court Error
 - a. Error in granting the State's Batson motion
 - b. Failing to instruct the jury

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this return and incorporated herein are the records of the Darlington County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the trial transcript, and the records of

this action. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

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

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that

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

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

IV.

Respondent interprets Applicant’s allegation of trial court error as one of ineffective assistance of counsel and failure of trial counsel to object to the trial court’s decision. Applicant’s conviction was affirmed, and the South Carolina Court of Appeals found no errors of law in Applicant’s direct appeal. As such, Respondent incorporates section III, supra, in response to Applicant’s perceived additional ineffective assistance of counsel allegation. Respondent submits that this claim is without merit as stated in section III, supra.

[Remainder of page left intentionally blank]

V.

Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, Respondent requests that an evidentiary hearing be held on Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

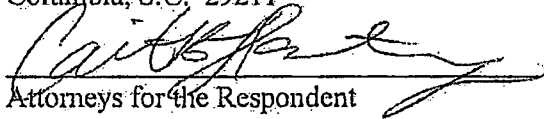
J. ROBERT BOLCHOZ, JR.
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

CAITLIN BAZAN HASTINGS
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondent

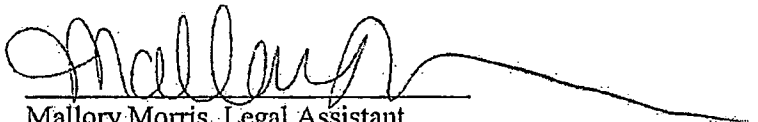
Columbia, South Carolina
December 5th, 2016

STATE OF SOUTH CAROLINA,	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	
	)	
	)	2015-CP-16-0694
BOBBY A. GILBERT, 219284,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

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

Mr. Lance S. Boozer Esquire
Boozer Law Firm, LLC
807 Gervais Street, Suite 203
Columbia, SC 29201

DATED this 5th day of December, 2016.



 Mallory Morris, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON	)	C/A NO: 2015-CP-16-694
	)	
Bobby Gilbert, #219284,	)	
	)	
Applicant,	)	
	)	FIRST AMENDMENT TO PRIOR
v.	)	APPLICATION FOR PCR
	)	
State of South Carolina,	)	
	)	
<u>Respondent.</u>	)	

The Applicant, through appointed counsel below, makes the following additional claim and amendment to his prior application for post-conviction relief:

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

- (i) Counsel was ineffective for introducing Jamie Gilbert's video statement. See trial transcript pg. 309.
- (ii) Counsel was ineffective for failing to object to implied malice jury instruction.
- (iii) Counsel failed to explain the legal concept of "hand of one, hand of all" to Applicant prior to trial.

THE BOOZER LAW FIRM, LLC



Lance S. Boozer
Attorney for Applicant
1400 Laurel Street, Suite 4A
Columbia, SC 29201
Phone: (803) 608-5543
Fax: (803) 926-3463

Columbia, South Carolina
June 7, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON	)	C/A NO: 2015-CP-16-694
	)	
Bobby Gilbert, #219284,	)	
	)	
Applicant,	)	
	)	PROOF OF SERVICE
v.	)	
	)	
State of South Carolina,	)	
	)	
<u>Respondent.</u>	)	

I, the undersigned of the Boozer Law Firm, LLC, Attorney for Applicant, do hereby certify that I served the foregoing First Amendment to Prior Application for PCR upon the persons below-listed by placing a copy, postage prepaid, in the United States Mail, this 7th day of June, 2017, addressed as follows:

Johnny E. James, Jr.
 Assistant Attorney General
 P.O. Box 11549
 Columbia, SC 29211


 Lance S. Boozer

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON	)	
Bobby A. Gilbert,	)	Case No.: 2015-CP-16-00694
S.C.D.C. No. 219284,	)	
	)	
Applicant,	)	
	)	AMENDED RETURN AND
v.	)	PARTIAL MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

In response to the Applicant's post-conviction relief application filed by Bobby A. Gilbert (Applicant) on September 3, 2015, the Respondent would respectfully amend its return to show this Court:

I.

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Applicant was indicted at the July 2008 term of the Darlington County Grand Jury for murder (2008-GS-16-1031), larceny in excess of \$5,000 (2008-GS-16-1032) and armed robbery (2008-GS-16-1039). W. S. Watts, III, Esquire represented Applicant.

After entering a plea of not guilty, the case proceeded to trial whereby the jury found Applicant guilty of all three charges. On April 29, 2009, the Honorable Howard P. King sentenced Applicant to life imprisonment (LWOP) for murder; 10 years imprisonment for larceny in excess of \$5,000, and 30 years imprisonment for Armed Robbery. The sentences for murder and armed robbery were to run consecutively. The sentence for larceny in excess of \$5,000 was to run concurrently with the other two sentences.

Applicant timely appealed his conviction and was represented by Joseph L. Savitz, Esquire. On June 26, 2013, the South Carolina Court of Appeals affirmed the trial court's verdict and sentencing. State v. Gilbert, Op. No. 2013-UP-283 (S.C. Ct. App. filed June 26, 2013). A petition for rehearing was denied on August 22, 2013. Applicant then filed a petition for a writ of certiorari in the Supreme Court of South Carolina to review the Court of Appeal's decision. The Supreme Court of South Carolina denied the petition on July 23, 2015, and the remittitur was issued on August 31, 2015.

II.

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

1. Ineffective Assistance of Counsel
 - a. Failure to investigate
 - b. Failure to request particular jury instructions
 - c. Failure to object to the trial judge's error of law/abuse of discretion
2. Trial Court Error
 - a. Error in granting the State's Batson motion
 - b. Failing to instruct the jury

Applicant, by amendment dated June 7, 2017, also alleges the following additional grounds:

3. Ineffective Assistance of Counsel, in that;
 - a. "Counsel was ineffective for introducing Jamie Gilbert's video statement. See trial transcript pg. 309."
 - b. "Counsel was ineffective for failing to object to implied malice jury instruction."
 - c. "Counsel failed to explain the legal concept of 'hand of one, hand of all' to Applicant prior to trial."

Incorporated herein by reference¹ are the records of the Darlington County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of

¹ These materials were attached to and incorporated in the original Return and are not again reproduced as attachments here. The records can be again provided upon request by the Court or opposing counsel.

Corrections, Applicant's appellate records, the trial transcript, and the records of this action. Respondent reserves the right to amend this return upon receipt of any relevant information.

III.

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant alleges that the trial court erred in its grant of the State's Batson motion and in its instructions to the jury. To whatever extent these allegations may be considered independently from Applicant's allegations of ineffective assistance of counsel, they should be summarily dismissed. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant's allegations regarding the Batson grant and jury instructions could have been raised at trial and thereafter on appeal. Therefore, Applicant's allegations of trial court error should be dismissed as not cognizable under the Uniform Post-Conviction Procedure Act.

V.

Applicant, in his amendment to the application, alleges that Counsel was ineffective for failing to object to the Court's instruction on implied malice. The jury was instructed:

Implied malice is when circumstances demonstrate a wanton or reckless disregard for human life or a reasonably prudent man would have known that according to common experiences there was a plain and strong likelihood that death would follow the contemplated act. *The law says if one intentionally kills another with a deadly weapon the implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in this case and you may give it such weight as you determine it should receive.*

TR. p. 513, l. 18 – p.514, l. 9 (emphasis added). The italicized language in the quote above is in comport with the implied malice charge proscribed by State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983).

On October 12, 2009, *after Applicant was convicted*, the Supreme Court of South Carolina overruled two hundred years of well-reasoned and constitutional precedent and held that a jury instruction on the inference of malice from use of a deadly weapon was confusing and requires reversal of the defendant's conviction where evidence is presented that would reduce, mitigate, excuse or justify the homicide. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Court limited its holding, however, to cases pending on direct appeal, and specifically refused to apply it to PCR cases such as Applicant's. Id. at 613, 685 S.E.2d at 810 (citing Teague v. Lane, 489 U.S. 388 (1989)); see also Strickland v. Washington, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made . . . to evaluate the conduct from counsel's perspective at the time.").

Applicant is attempting to apply the ruling made in Belcher to challenge his conviction in this post-conviction relief action. This is precisely the situation that the Court expressly barred in its opinion. For that reason, Applicant's allegation with respect to the implied malice charge is without merit and should be dismissed.

VI.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VII.

Respondent denies each allegation not expressly admitted, qualified or explained.

VIII.

WHEREFORE, Respondent respectfully requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to Applicant's allegations of trial court error and failure to object to the implied malice charge, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

Respectfully submitted,

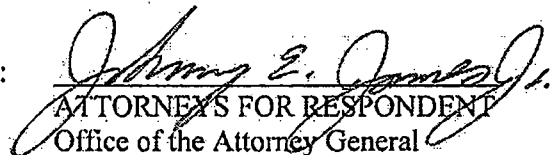
ALAN WILSON
Attorney General

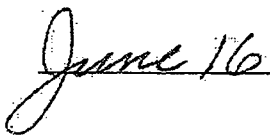
ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY E. JAMES JR.
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

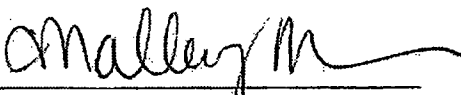
 June 16, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	
	)	
	)	2015-CP-16-0694
BOBBY A. GILBERT, #219284	)	
	)	
	)	
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 **Amended Return and Partial Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Lance S. Boozer, Esquire
Boozer Law Firm, LLC
1400 Laurel Street, Suite 4A
Columbia, SC 29201

DATED this 16th day of June, 2017.



 Mallory Morris, Legal Assistant
 For Respondent

State of South Carolina))
County of Darlington)

In the Circuit Court
Fourth Judicial Circuit
2015-CP-16-0694

BOBBY A. GILBERT,
Plaintiff,

VS.

THE STATE,
Defendant.

Transcript of Record

Darlington, South Carolina
July 18, 2017

B E F O R E:

The Honorable Roger E. Henderson

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

Mr. Lance S. Boozer, Esquire
Attorney for Plaintiff

Mr. Johnny E. James, Esquire
Attorney for Defendant

LISA CARTER
CIRCUIT COURT REPORTER

I N D E X

WITNESSESPAGE

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Cross Examination by Mr. James 45

EXHIBITSNO.DESCRIPTIONEV.

(NO EXHIBITS WERE INTRODUCED DURING THIS HEARING)

1 THE COURT: Okay.

2 MR. JAMES: Your Honor, this is the matter of Bobby
3 Gilbert versus the State of South Carolina. That is docket
4 number 2015-CP-16-00694. Mr. Gilbert is present here today
5 and he is represented by Lance boozar. At his original
6 trial he was represented by Trey Watts and that case was
7 prosecuted by Kinard E. Redmond and Pattie McKenzie.

8 Your Honor, Mr. Gilbert was indicted at the July of
9 2008 term of the Darlington County Grand Jury for murder,
10 larceny in excess of \$5,000 and armed robbery. He
11 proceeded to trial and he was convicted. On April 29, 2009
12 he was sentenced to life without prison for murder, ten
13 (10) years for larceny in excess of \$5,000, and thirty (30)
14 years for armed robbery and, Your Honor, that armed robbery
15 sentence was set to run consecutive to the life without
16 parole for the murder.

17 He did appeal and on appeal the issue as the State
18 understands it was whether or not the trial court error in
19 granting the State's Batson motion. Your Honor, the Court
20 of Appeals affirmed the ruling of the trial court.

21 This application for post-conviction relief was filed
22 September 3, 2015. The State made its original return on
23 December 5, 2016. My understanding is that applicant
24 amended it once on or about June 7, 2017 and the State made
25 an amendment to it's return as well as a partial motion to

1 dismiss on June 16, 2017. Your Honor, this matter has been
2 continued once from the January of 2017 term.

3 Your Honor, the State's understanding of the
4 allegations is that counsel was ineffective for failure to
5 investigate, failure to request a particular jury
6 instructions, failure to object to the trial judges error
7 of law/abuse of discretion. And as to the amended claims
8 that counsel was ineffective for introducing Jamie
9 Gilbert's video statements which is in the transcript up
10 and around page 309, as well as counsel was ineffective for
11 failing to object to the implied malice jury instruction,
12 counselor fails to explain the legal concept, 'hand of one,
13 hand of all' to applicant prior to trial, and additionally,
14 Your Honor, Mr. Gilbert takes issue with the trial court's
15 rulings with respect to his Batson motion and with respect
16 to the jury instructions.

17 Your honor, our pending partial motion to dismiss is
18 with respect to those complaints as to trial court error.
19 As the court is almost, certainly, aware trial court error
20 is not an issue that is not cognizable in a post conviction
21 relief action and so the State would respectfully request
22 for the reasons set forth in our partial motion to dismiss
23 that those allegations of trial court error be dismissed.

24 Additionally, Your Honor, the State is seeking a
25 partial motion to dismiss as to the allegation about the

1 implied malice instruction. There is substantial argument
2 set forth in that motion but it boils down to the fact that
3 State versus Belcher did not come down to the South
4 Carolina Supreme Court until after this trial had come to
5 pass and it's for that reason the State respectfully
6 submits that it is inapplicable and that there was, under
7 the law at the time, no problem with the implied malice
8 jury instruction. Therefore, even taking all of the facts
9 as offered by applicant, the State respectfully submits
10 that it is entitled to relief as to that allegation and
11 with that said I will seek the floor over to Mr. Boozer.

12 THE COURT: Mr. Boozer?

13 MR. BOOZER: Thank you, Your Honor. If it pleases,
14 the Court? Judge, I'm not sure if you want me to address
15 the jury instruction issue first. Is that what the court's
16 ---

17 THE COURT: That would good ---

18 MR. BOOZER: --- pleasure is?

19 THE COURT: Go ahead and do that.

20 MR. BOOZER: Okay. And then we will call Mr.
21 Gilbert to the stand. Judge, with respect to the trial
22 court errors, I do certainly understand that this court can
23 act as an appellate court and review errors that were
24 preserved by rulings or objections that were made during
25 the trial. I think my client understand that as well.

1 That's when he first filled out this application he was
2 complaining the trial court errors. Certainly we do want
3 to explore issues that we believe his lawyer failed to
4 undertake at trial and we will certainly get into those in
5 a moment. With respect to the implied malice instruction -
6 --

7 THE COURT: So you're consenting to the trial court
8 error?

9 MR. BOOZER: Sure, I mean, if there are certain
10 things that this court can't do, sure.

11 THE COURT: Right. Okay.

12 MR. BOOZER: But as far as the implied malice,
13 judge, it was very close in time to when the opinion was
14 issued in State versus Belcher, he was convicted in October
15 of 2009, very shortly, excuse me, he was convicted in April
16 of 2009, very shortly before Belcher was decided and
17 Belcher presumably had been up on appeal at that point, it
18 was being brief and taken all of his actions. I do think
19 that we should be allowed to just question his attorney
20 about his understanding at that time of the jury
21 instructions. I think it was probably somewhat of a high
22 hot issue at that time. But I would like to get into what
23 his lawyer thought about the instructions, so we would ask
24 that the court not grant the State's motion with regard to
25 that, allow us to do the testimony and certainly, Your

1 Honor, can deny that as you see fit if you believe so at
2 the end of the hearing or can certainly grant the
3 application based on that. We would certainly ask for that
4 lead way.

5 THE COURT: Any response to that Mr. James?

6 MR. JAMES: Your Honor, however, counsel may have
7 felt about the implied malice instruction at the time, he
8 has no obligation to foresee the rulings of the Supreme
9 Court especially one that's incredible as Belcher was in
10 overturning such considerable amount of precedent and so,
11 Your Honor, it doesn't really matter how he felt about the
12 implied malice jury instructions.

13 THE COURT: What about the court's holding that it
14 could refuse to apply that rulings to the PCR cases, Mr.
15 Boozer?

16 MR. BOOZER: Sure, judge. I think that, that
17 language is intended to mean in my interpretation of it and
18 what I've argue is that in cases that, where let's say that
19 we've got the ruling and then someone files a PCR case
20 later on, I don't think that the court can on its own just
21 to find that the language is impermissible. I think you've
22 got to find that counsel was ineffective for failing to
23 object to it when they know about it. So I think it still
24 will apply to PCR cases. I don't think it's kind of one of
25 those automatic things where in a PCR that the court can

1 just overrule it. You've got to find that the lawyer
2 failed to object to it just by being there. So if the
3 lawyer didn't feel like he had a problem with it, then I
4 guess you can make the finding that he was not ineffective.

5 MR. JAMES: Your Honor, I take that language to
6 mean that it is affirmatively not retroactive that you
7 can't go back and PCR people for not having seen Belcher
8 coming. I think the court was very understanding ---

9 THE COURT: I mean that's the way I interpreted it,
10 the same as Mr. James.

11 MR. BOOZER: well, judge, in looking at ---

12 THE COURT: This would be retroactive in this case.

13 MR. BOOZER: Well, looking at a little more closely
14 just to address the statement, the court limited holding
15 however, two cases pending on direct appeal in specifically
16 refused to apply it to PCR cases. I think at the time that
17 that opinion came out that if your case was pending on
18 direct appeal that it could be remedy by the appellate
19 court. If your case, at that time, was pending PCR court,
20 then it could not be addressed at that time. I don't think
21 that, that this holding limits it to being in a PCR court
22 now.

23 THE COURT: All right, sir.

24 MR. JAMES: Your Honor, if I May? My understanding
25 of that, is that it was available to cases that were still

1 pending on appeal where the issue was preserved. Where the
2 issue is not preserved for appeal, you can't go back and
3 ding the attorney for not preserving something that he
4 would've had no idea that he should've preserved because he
5 doesn't see Belcher coming so he still wasn't, there was
6 still no requirement on him to be clairvoyant.

7 THE COURT: All right. Okay. All right. Just to
8 make sure I'm fair I'll give you a little bit of lead way
9 Mr. Boozer that you requested. You've got a lot to prove
10 to me, though, I'll put it that way.

11 MR. BOOZER: Sure. Thank you.

12 THE COURT: Okay. All right. You may proceed.

13 MR. BOOZER: Thank you, Your Honor. At this time we
14 would call Mr. Gilbert to the stand.

15 THE CLERK: Yes, sir, if you can place your left
16 hand on the Bible and raise right hand. Do you solemnly
17 swear or affirm the testimony you're about to give this
18 court is the truth, the whole truth, and nothing but the
19 truth so help you God?

20 MR. GILBERT: Yes, ma'am.

21 THE COURT: Have a seat in the witness box and
22 state your full name for the court please, sir.

23 MR. GILBERT: My name is Bobby Gilbert.

24 THE COURT: Mr. Gilbert you're going to need to
25 speak really loud and clear because the microphone don't

Bobby Gilbert- Direct Examination by Mr. Boozer

11

1 work.

2 MR. GILBERT: Microphones don't work?

3 THE COURT: They don't work so speak loudly and
4 clearly. All right, sir.

5 Bobby Gilbert, first being
6 duly sworn, testified as follows:

7 **Direct Examination by Mr. Boozer:**

8 Q. Mr. Gilbert, how are you doing?

9 A. I'm all right, sir.

10 Q. All right. Good. If you can keep your voice like
11 that that would be perfect, okay. Mr. Gilbert, do you know
12 why you're here today?

13 A. Yes, sir.

14 Q. And what is it that you filed to get in to this court
15 today?

16 A. I filed a PCR hearing upon a PCR application upon the
17 errors of the lawyer.

18 Q. Okay. And what is it that you currently incarcerated
19 for?

20 A. Murder, grand larceny, and armed robbery.

21 Q. And did you have a trial on those charges?

22 A. Yes, sir.

23 Q. What type of sentence did you receive?

24 A. Life for murder and thirty (30) years for armed
25 robbery, and ten (10) years for grand larceny.

1 Q. All right. Who was your trial attorney?

2 A. Trey Watts.

3 Q. Okay. How did Mr. Watts come about representing you?

4 A. He was a court appointed attorney.

5 Q. When were you arrested for those charges?

6 A. January of 2007.

7 Q. January of 2007?

8 A. Yes, sir.

9 Q. And then your trial was April of '09?

10 A. April of '09.

11 Q. So that's a little over two years?

12 A. Yes, sir.

13 Q. When did Mr. Watts first come on your case?

14 A. I think either April or May of '09.

15 Q. April or May of 2009?

16 A. No. My fault. February of 2009.

17 Q. February of 2009?

18 A. Right.

19 Q. So just a couple months before your trial?

20 A. No. -- My fault, '07.

21 Q. That's okay. Okay. We'll get it there. So after
22 your arrest, Mr. Watts was appointed to represent you and
23 that may have been about two years of time before your
24 trial?

25 A. Yes, sir.

Bobby Gilbert- Direct Examination by Mr. Boozer

13

1 Q. Okay. How many times do you think you met with Mr.
2 Watts prior to your trial?

3 A. Prior to trial I met Mr. Watts about three times.

4 Q. Okay. And did you ever make any sort of bond?

5 A. No, sir.

6 Q. All right. So those meetings I'm presuming would have
7 occurred at the county jail?

8 A. The first meeting was in the county jail and the
9 reason why it was that is because the probation violation
10 that they had been me on, he represented me on that.

11 Q. Okay. What would y'all discuss during your meetings?

12 A. The probation hearing.

13 Q. That's what y'all were discussing?

14 A. The first hearing, I mean, the first meeting that I
15 met with Trey Watts was discussed the probation hearing.

16 Q. All right. How about the other two meetings?

17 A. The other two meetings the first, um, the second one
18 was he talked to me about the mental evaluation.

19 Q. Did you undergo any sort of mental evaluation?

20 A. Yes, sir.

21 Q. Other than the items that you've just talked about
22 what else would y'all discuss?

23 A. We talked a little bit about what we were going to go
24 through as far as the mental evaluation and reason why the
25 mental evaluation and he asked me a few questions about the

1 case but that was just about it.

2 Q. Okay. Did he discuss with you any defenses to the
3 charges?

4 A. No, sir.

5 Q. All right. Did he review with you any evidence in the
6 case?

7 A. No, sir.

8 Q. Did he discuss with you any sort of trial strategy
9 that y'all might have at trial?

10 A. No, sir.

11 Q. I'm sorry?

12 A. No, sir.

13 Q. Okay. Was there a plea offer that had been made?

14 A. It was a thirty (30) year plea offer that was made one
15 time.

16 Q. Okay. What did he tell you about the plea offer?

17 A. Well, he said the State wanted to offer me thirty (30)
18 years for, I think, it was manslaughter.

19 Q. Okay. Let's continue on. What, if anything or tell
20 us what y'all did to prepare for trial?

21 A. Mr. Watts came to me when I went back to the county
22 jail after I finish my probation violation which was in '09
23 and he discuss with me that Jamie had did a video
24 statement. He made a video statement and then that there
25 wasn't going to use Chris -- they wasn't going to use Chris

1 as a witness to testify against me ---

2 Q. Were these co-defendants?

3 A. Yes.

4 Q. Okay. Two co-defendants. And that was, basically,
5 about it and what we was going to go through as far as when
6 the trial date was set.

7 Q. To your knowledge, what did your lawyer do to
8 investigate the case?

9 A. Nothing that I know of.

10 Q. All right. One of your -- one of your allegations is,
11 of course, that your lawyer failed to investigate it.
12 Another is that your lawyer failed to request a particular
13 jury instructions.

14 A. Right.

15 Q. What exactly do you mean by that?

16 A. He failed to investigate because Mr. Samuels had did
17 two, two video statement. One of them he did -- one of
18 them he did -- the very first one that he did it was him
19 calling out another person name as far as being, being the
20 actual person that committed the crime. He was calling
21 this other dude name. He didn't do no research on that.
22 They didn't use that. And the second statement that he
23 made, he was calling my name so he didn't go to find out
24 why this guy even changed his mind or changed the names
25 that he was using as far as the person who actually

1 committed the crime. The females that Jamie said that we
2 was at their house, they made another statement themselves
3 -- well, they just made a differ statement from his and he
4 didn't even go question those girls about what they seen.
5 The father, Jamie father or stepfather, whoever he was, he
6 made a written statement as well and he said that it was
7 another guy and he said that Jamie told him that it was his
8 girlfriend car that he was driving. So he didn't
9 investigate on neither one of those, on none of those
10 people.

11 Q. Okay. Is there -- under the investigation side, is
12 there anything else that he didn't do that you wanted him
13 to do?

14 A. Yeah, I really wanted him to go talk to my mom's, my
15 mom's told the police that day that I was there at the
16 house that night that they said that this crime had
17 actually happened.

18 Q. You've also got a claim that your lawyer failed to
19 request for a particular jury instruction and my
20 understanding is that there was a point where there was a
21 discussion about lesser included offenses and instructions,
22 do you recall that?

23 A. Right.

24 Q. Okay. Is that what you're talking about?

25 A. Yes, sir.

Bobby Gilbert- Direct Examination by Mr. Boozer

17

1 MR. BOOZER: And, Your Honor, for the court's
2 information I'll be referring to page 529 of the
3 transcript.

4 Q. Mr. Gilbert, are you verily familiar with the trial
5 transcript and what happened at trial?

6 A. Yes, sir.

7 Q. And I'm looking at page 529 of the transcript and it
8 says, the court is making the statement, "while looking at
9 exhibits Mr. Gilbert as part of the determination of what
10 issues were going to the jury the questions came up in
11 discussions with counsel as to whether or not your lawyer
12 was going to request instructions to the jury a possible
13 verdict of voluntary manslaughter on the murder charge and
14 on the arm robbery charge whether he was going to request
15 on your behalf the finding by the jury of a common-law on
16 strong armed robbery as both of these are lesser included
17 offenses. He advised me that it was -- that he discuss
18 that with you and it was your desire that the lesser
19 included offenses not to be a question for the jury to
20 determine, is that correct", and you indicated, "yes sir".
21 Do you recall that going on?

22 A. Yes, sir.

23 Q. Okay. What, at the time, was your understanding and
24 what were your discussions like with your lawyer? What
25 were y'all talking about?

1 A. Well, the judge gave us time to actually sit down and
2 talk about the lesser included offense. He came to me and
3 he really -- he really didn't explain too much about
4 anything lesser when he said, when he told me lesser
5 included he was talking about manslaughter which was
6 actually thirty (30) years but that was, basically, about
7 it as far as him telling me what was less included offense.

8 Q. Okay. So based on what you're saying right now to me
9 is that you just knew that voluntary manslaughter was
10 thirty (30) years?

11 A. Yes, sir.

12 Q. Okay. Did you understand at the time that voluntary
13 manslaughter carries between two (2) and thirty (30) years?

14 A. No, sir.

15 Q. Okay. And have you and I have had discussions about
16 what voluntary manslaughter is and what strong armed
17 robbery is and sentences that potentially carry?

18 A. Yes, sir.

19 Q. Okay. And is that different from your understanding
20 of when you were in a trial back in 2009?

21 A. Yes, sir.

22 Q. So today you understand that by requesting a lesser
23 included offense if the jury doesn't think you're guilty of
24 the original charge the best they could find you either (a)
25 not guilty of anything, or; (b) guilty of lesser the

Bobby Gilbert- Direct Examination by Mr. Boozer

19

1 included if there given that instruction, you understand
2 that now?

3 A. I understand now, sir.

4 Q. Now you understand that?

5 A. Yes, sir.

6 Q. You didn't understand that then?

7 A. No, sir.

8 Q. An you understand that would've -- if you would've
9 been found guilty of voluntary manslaughter that
10 potentially the sentencing range would have been, the judge
11 would've been restricted between the two (2) and thirty (30
12 years?

13 A. I understand that now.

14 Q. Okay. An understanding the way that you do it now,
15 would you have requested that the court instruct the jury
16 on those lesser included offenses?

17 A. Yes, sir.

18 Q. I've got an allegation about your lawyer not, was
19 ineffective for actually introducing a video statement of
20 your co-defendant, Mr. Jamie Gilbert, we're going to get
21 into that with your lawyer so that's something -- that's
22 one of your allegations, right?

23 A. Yes, sir.

24 Q. Okay. You've also got an allegation that your lawyer
25 failed to explain the legal concept of 'hand of one, the

1 hand of all' prior to trial, is that an allegation?

2 A. Yes, sir.

3 Q. All right. Earlier you had indicated that there was a
4 plea offer of voluntary manslaughter of thirty (30) years,
5 do you remember testifying to that?

6 A. Yes, sir.

7 Q. What discussion did you have with your attorney about
8 the legal concept of, 'hand of one, hand of all, if any?

9 A. It really was no discussion about the 'hand of one of
10 the, hand of all'. He mentioned it but he didn't go into
11 full detail about what the 'hand of one, the hand of all'
12 was.

13 Q. Okay. When you say he mentioned it, do you recall
14 what he may have mentioned?

15 A. Not exactly. I can't recall exactly how he mentioned
16 it but he brought it up one time.

17 Q. Okay. Have you and I had a discussion about the 'hand
18 of one, hand of all'?

19 A. Yes, sir.

20 Q. Okay. You have a different understanding of 'hand of
21 one, hand of all' now?

22 A. Yes, sir.

23 Q. What is your understanding of it now?

24 A. My understanding of it now is that I could be found
25 guilty of the actual murder just by being there or

1 assistance of that, of the crime that actually been
2 committed.

3 Q. So you understand that if the State were to able to
4 prove that you had been in a armed robbery, if they were
5 ever to prove that and as a result of that robbery a death
6 occurred and there was a murder charge, that you can be
7 found guilty even if you did not participate really in the
8 murder, you were not the person who actually killed the
9 person, do you understand that?

10 A. I understand now.

11 Q. You understand now?

12 A. Yes, sir.

13 Q. If you would've understood that then, do you think
14 that you would've accepted the voluntary manslaughter offer
15 of thirty (30) years?

16 A. Yes, sir.

17 Q. Have you ever had any contact with your lawyer after
18 your trial?

19 A. No, sir.

20 Q. All right. Now ---

21 A. Excuse me.

22 Q. Go ahead.

23 A. Excuse me.

24 Q. Yes, sir.

25 A. I have. I filed a lawsuit against, a civil lawsuits

1 against Mr. Watts in 2000, I think it was 2011 and it was
2 held down in Charleston County.

3 Q. Is that still pending?

4 A. No, sir.

5 Q. Okay. Other than that, you have not had any contact
6 with Mr. Watts?

7 A. No, sir.

8 Q. Now, as I've indicated to you before a lot of your
9 case is based on some legal issues that your lawyer did or
10 didn't during your trial so I don't have anything else I
11 want to question you about. However, this is your day in
12 court and I want to make sure we covered everything that's
13 in your application that we need to cover and knowing that
14 we're going to get into things with your lawyer. Is there
15 anything related to your application of, Mr. Watts, his
16 representation to bring to this court's attention?

17 A. No, sir.

18 Q. Okay. Thank you, Mr. Gilbert.

19 MR. BOOZER: That's all the questions I have. If
20 you would please answer any of the State may have?

21 A. Yes, sir.

22 Cross Examination by Mr. James:

23 Q. Good afternoon Mr. Gilbert?

24 A. Good afternoon.

25 Q. I'm sorry I made you wait all day for your day in

Bobby Gilbert- Cross Examination by Mr. James

23

1 court. You indicated a moment ago that your mother
2 would've testify that you were with her on the day in
3 question, is that correct?

4 A. Yes, sir.

5 Q. Did you inform your attorney about this alleged alibi
6 defense?

7 A. Yes, sir. I have told him.

8 Q. Did you tell him about the various other leads and
9 witnesses that you wished for him to investigate?

10 A. Yes, sir, I have.

11 Q. What is your desire of the outcome of this proceeding?
12 Do you desire a new trial or do you desire to go back and
13 plea?

14 A. A new trial.

15 Q. A new trial. This, despite today, understanding 'hand
16 of one, hand of all'?

17 A. Sir?

18 Q. Even though -- you now understand the concept, 'hand
19 of one, hand of all', correct?

20 A. Yes, sir.

21 Q. And you still wish to go back and have a new trial?

22 A. Yes, sir.

23 MR. JAMES: No further questions, Your Honor.

24 THE COURT: Okay. Mr. Boozer?

25 MR. BOOZER: No redirect, Your Honor,

1 THE COURT: All right. You can step down. Thank
2 you, sir.

3 MR. BOOZER: We'd go ahead and call Mr. Watts to the
4 stand.

5 THE COURT: Mr. Watts?

6 THE CLERK: Do you solemnly swear the testimony
7 you're about to give the court on this case is the truth,
8 the whole truth, and nothing but the truth so help you God?

9 MR. WATTS: I do.

10 THE COURT: Have a seat in the witness box. Give
11 us your full name please.

12 MR. WATTS: My full name is Walter Stephenson
13 Watts, III. I also go by Trey.

14 W.S. Trey Watts, first being
15 duly sworn, testified as follows:

16 Direct Examination by Mr. Boozer:

17 Q. Mr. Watts, how are you doing?

18 A. Doing well. How are you?

19 Q. I'm doing fine. Mr. Watts, did you represent Mr.
20 Gilbert previously?

21 A. I did.

22 Q. Do you recall when you may have been appointed to
23 represent him?

24 A. I think it was somewhere in the earlier months of
25 2007. I was appointed by the court. It is my

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1 understanding that he had been arrested already but I think
2 our initial meeting was at the detention center that he
3 mentioned earlier. There was some probation revocation
4 issues going along too and since I was already appointed
5 for that I think I dealt with some of those issues as well.

6 Q. Okay. And at the time -- are you in private practice?

7 A. I was in private practice but I was appointed under
8 the system where if the public defender has a conflict then
9 someone else at that time it was another attorney inside
10 the county rather than inside the district.

11 Q. In 2007, how long had you been practicing?

12 A. I was sworn in November of 2003.

13 Q. Okay. And what sort of practice did you maintain in
14 2007 and through 2009?

15 A. I was doing a combination of things. I was doing
16 domestic work. I was doing civil litigation primarily
17 personal injury issues. I did Worker's Compensation and
18 also did criminal defense.

19 Q. Okay. Is criminal defense a majority of your practice
20 or was it on the lower end of your practice?

21 A. I mean, it's about third. It has tailed off some
22 since the appointments has changed within the circuit, but
23 I still, at that time had handled criminal work and still
24 do handle criminal work.

25 Q. Okay. Prior to this case had you handle one that sort

1 of had this level of seriousness attached to it?

2 A. No. No.

3 Q. Okay. Had you handled a murder case prior to this
4 case?

5 A. No.

6 Q. Okay. Did you feel comfortable handling this case?

7 A. I did.

8 Q. Tell us a little bit about, obviously, Mr. Gilbert's
9 has alleged you failed to investigate into the case, what
10 type of investigation did you do?

11 A. Well, I investigated anybody that we, when we got the
12 information from the solicitor's office, anybody who had
13 statements that I was able to talk to. I did try to get up
14 with them find out what was going on and compare their
15 statements what went on. One of the attorneys for a co-
16 defendant at the time it was Mr. Jamie Gilbert I believe,
17 Terry Quinn, was his attorney. One day we actually got
18 into my vehicle and drove out to the crime scenes, looked
19 around, tried to see the description of the areas that were
20 indicated in the reports. As far as going through and
21 finding out, I think they were cell phone records and other
22 issues that we tried to backtrack and deal with as far as
23 what was submitted to us from the Rule 5. But to say that
24 I just took the file and didn't do anything with it other
25 than, you know, glanced at it and said that's fine, I

1 wouldn't characterize it as that. Did I hire a private
2 investigator or anyone to assist me with that? No. Did
3 not hire anyone else to assist in the investigation.

4 Q. Okay. Did you make any investigation into Mr.
5 Gilbert's mother as an potential alibi witness?

6 A. I don't recall. Every time I've talked with her I
7 think I did talk with her. I know Mr. Gilbert had talked
8 about other people to speak with. I, off the top of my
9 head from 2007, can I remember exactly when I talked to her
10 or, you know, how many times I did, I can't. When we were
11 going through and looking into this and representing Mr.
12 Gilbert anybody, any avenue that I thought was going to be
13 viable, I attempted to go down it and get information about
14 it.

15 Q. Do you have any specific recollection of specific
16 individuals he ask you to look at or investigate?

17 A. Well, I think when the statements that came from, not
18 the co-defendant Samuels, but there were some young ladies
19 and where the house was the night before, so I tried to get
20 in touch with some individuals who had given statements
21 before. Now, how many times we attempted and what else
22 came from it I don't know if I've got anything useful from
23 them are not. Obviously, if it was something that, if it
24 was something useful and I got with them and was able to
25 get that then it would've been presented. So I cannot tell

1 you for sure how many times I tried to contact or talk with
2 any of the other individuals that were listed in
3 statements.

4 Q. Do you know about how many times you ever met with
5 him?

6 A. With Mr. Gilbert?

7 Q. Correct.

8 A. At the detention center, not exact number but I know
9 we dealt with him while he was in Darlington prior to him
10 being sent to Richland while he was down there serving his
11 probation term. Then we didn't have contact where I went
12 to visit him or went through. I think we had some mail
13 communication and then when he was returned to the county,
14 we went back and we reviewed the discovery that I got from
15 the solicitor's office. I think we even commandeered the
16 computer that the use the jail teleconferencing through the
17 city and looked at some video evidence, the statements that
18 were given on video. I know I went through and discussed
19 the autopsy report and the pictures of that and the other
20 crime scene photos. So we discussed a good bit about the
21 evidence that was provided from the solicitor's office.

22 Q. And were you in the courtroom for Mr. Gilbert's
23 testimony?

24 A. Just now?

25 Q. Yes, sir.

1 A. Yes.

2 Q. Okay. And you heard he mentioned that y'all may have
3 met three times, do you think that that would be an
4 accurate description?

5 A. I think it was more than three times but without
6 having, you know, documentation either from the jail, me
7 signing in and out or, you know, the sheets that were sent
8 for indigent defense, I couldn't tell you absolutely for
9 sure.

10 Q. Okay. What was your trial strategy in this case?

11 A. Trial strategy was that when Mr. Gilbert was talking
12 with me that he was someone that was essentially used to
13 get a ride from the victim in this, but he was there but
14 had no part of any kind of attempted robbery or conspiracy
15 to do so. So when we went through and asked these
16 questions and presented the case, of course, you see Mr.
17 Gilbert didn't testify so we had to rely on what was
18 presented by the State and then what was presented by the
19 co-defendant who turned State's evidence and a lot of that
20 was trying to show that inconsistencies in that testimony
21 were not to lead to do the credibility of their later
22 testimony that Mr. Gilbert was the ringleader of this
23 scenario, that he was the one that put it together. I
24 think we had a mere presence charge that's what we were
25 trying to go through and say while he was present at the

1 scene prior differing statements had been provided from the
2 co-defendants and also that just his presence there do not
3 mean that he was an active participant in any kind of
4 attempted robbery, that we believe that Mr. Samuels and
5 Mr., um, the other Mr. Gilbert I think it's Isaac, I'm
6 sorry, Jamie, excuse me, Jamie Gilbert participated in.

7 Q. You named Jamie Gilbert, you mentioned him, was he
8 basically the State's kind of star witness for this case
9 you think?

10 A. I mean, he's the one who came. So he was the one who
11 showed up and testified. So, yeah, that's who they
12 brought.

13 Q. And was that Mr. Gilbert's co-defendant?

14 A. That was Mr. Gilbert's co-defendant that was
15 represented by Mr. Quinn.

16 Q. All right. Now, I'm going to skip around a little
17 bit, but let's stay on Mr. Gilbert for the moment. Would
18 you say, kind of, part of your strategy, trial strategy
19 would have been to show that Jamie Gilbert is just not
20 credible?

21 A. Yes.

22 Q. And is that really what the case trial hinged on was
23 his believability?

24 A. Because that's who they were bringing to the
25 courtroom, that's who we were going through and trying to

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1 deal with as far as his credibility and his different
2 statements. I think he gave multiple statements that gave
3 conflicting information. I think I even, during trial,
4 questioned him about his own drug use and whether or not
5 his recollection. I think we went and tried to do what we
6 could to show that he was not someone who was able to give
7 credible information regarding Mr. Gilbert's, Bobby
8 Gilbert's, participation.

9 MR. BOOZER: And, Your Honor, just for the court's
10 reference his cross examination is on page 298, Mr.
11 Gilbert.

12 Q. Mr. Watts, during your cross examination of Mr.
13 Gilbert, you would agree with me that he admitted to giving
14 a number of statements to law enforcement?

15 A. Yes.

16 Q. And in those statements, sort of, in -- do you
17 remember how many it was he gave?

18 A. I think it's four.

19 Q. Okay. And I think you're right. Would you agree with
20 me that in the beginning there is no mention of Bobby, and
21 I'll call him Bobby so we can separate Jamie and Bobby, but
22 there's no mention of Bobby being the person who actually
23 committed the murder?

24 A. Mmm, hmm.

25 Q. Is that correct?

1 A. Yes, that's correct. Yes.

2 Q. Okay. Starting on page 308, you start hammering him
3 about this, you're getting him to, you know, admit that
4 those statements contain some falsehoods the ones that he
5 had given?

6 A. Yes.

7 Q. Okay. And then the final statement that Jamie makes
8 is actually a video recording, is that right?

9 A. I believe it was.

10 Q. Okay. And have you reviewed the transcript prior to
11 today?

12 A. I have some. I left it behind. If I need to actually
13 go back and get it and pull it back out.

14 Q. And if you need me to point out anything I'll be glad
15 to bring up there and give it. Do you have some
16 recollection of the trial as well?

17 A. Yeah, I mean, from my review of the transcript but
18 being how, do I remember exactly, of course, not, but....

19 Q. Okay. But, in any event on page 309, do you recall
20 bringing up the video statement that Jamie made?

21 A. Yeah, it was in the transcript. So, yes, I brought it
22 up.

23 Q. Okay. And at that point, to your knowledge and I'm
24 going to show you the transcript represent it ---

25 A. Okay.

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1 Q. --- it had not, but had the transcript or had the
2 video statement of Jamie was it introduced at that point as
3 evidence?

4 A. I don't think it had been.

5 Q. Okay.

6 A. I think that to get to your question, I think it was
7 me that was going through and introducing that into
8 evidence of the case.

9 Q. That's right. And on page 309 you ask Jamie, "who did
10 you say you shot in the victim's statement? And he says,
11 "Bobby Gilbert". Do you recall that?

12 A. Yes.

13 Q. And then on line 11 you asked, you admit defendant's
14 one through four into evidence which were all those
15 statements, I guess, is that right?

16 A. I believe that's correct.

17 Q. And that would be -- would that include the video?

18 A. I think that included every statement that he gave.
19 Everything that I had.

20 Q. And then on page 310, excuse me, the solicitor says,
21 whether if he's got an objection to this, absolutely, no
22 objection, do you recall that?

23 A. I do.

24 Q. What was the purpose in introducing the video
25 statement of Jamie Gilbert?

1 A. The purpose of introducing the video along with all
2 the others was to try to bolster the fact that he was not
3 credible and now with seeing his story, the latest
4 statement that explicitly implicated Mr. Gilbert, Bobby
5 Gilbert, was done in his own self-interest. So eventually
6 we have beginning statements where nobody's mentioned or
7 nothing is explicit, nobody's pointing it out and then as
8 time goes on his statements change. Going through in
9 conjunction with, you know, his prior changes, going
10 through and showing how he's changed his statements and now
11 at the very end when he's agreed to testify for the State,
12 he's putting it on and going through and putting on Bobby
13 Gilbert. He was there live, I mean, he's testifying that
14 what Bobby did. So trying to go through and show the prior
15 inconsistent statements about how he was changing his story
16 for his own self interest was part of the strategy of the
17 case.

18 Q. Okay. But would you agree with me that, I guess, from
19 the State's perspective, I guess, that the way that they
20 would spin it is although he gives inconsistent statements
21 each time a little bit more of what actually happened comes
22 out, is that the State's side of it?

23 A. Well, I think they can, without knowing exactly what
24 the State was thinking, I would think that they were going
25 through and having a video that may bolster what he said on

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1 the stand but they would've been much happier if I had gone
2 through and introduced just the video at the end without
3 introducing the other prior inconsistent statements. So it
4 was not a, whoops I really wish I hadn't introduce that,
5 type of moment. It was a calculated situation where we
6 wanted to go through and show his inconsistencies over time
7 and how that he was trying to, basically, put himself in
8 the best position possible.

9 Q. Now, flipping forward in the transcript to page 491
10 and this is during the State's closing. I'll take a moment
11 so everyone can get there. On page 491 in the State's
12 closing, beginning on line 6, the solicitor indicates,
13 "Jamie comes in and tells you what everyone else did but
14 more importantly he told you what he did. He took that
15 statement nine months before he pled as has been put in the
16 record. So it's not like he just said this last week that
17 he gave that statement in July. You saw the statement
18 because the defense thankfully played it. I couldn't play
19 it based on the rules of evidence but I'm very appreciative
20 of the fact that they did play that statement because it
21 gives you the opportunity to see that one, Jamie statement,
22 Jamie's facts are consistent from the time he gave that
23 statement until the time he testified here in court and he
24 volunteer and this is another thing you can tell you
25 whether somebody is being upfront and honest." So the

1 solicitor is telling the jury, gosh, we sure are thankful
2 that, that statement was introduced, that video was
3 introduced because we could've gotten it in any other way,
4 do you agree that's what they're saying?

5 A. I think that's the way they're spinning it. I mean,
6 now, I don't expect the solicitor to turn around and say,
7 gee whiz, I'm really sorry he ended up showing how he's
8 changed his story every time so that characterization is
9 not surprising. But when you go through and when we
10 entered that could a jury go through and look at it and say
11 hey, we're going to disregard the other stuff and focus on
12 the last one, of course, they could but that was something
13 that was part of the strategy not a sure thing.

14 Q. But there was no video prior ---

15 A. Those were all written.

16 Q. --- just statements ---

17 A. As far as I can recall I don't think there were any
18 other video. If I had other videos that showed two
19 inconsistent statement versus I think it was three written
20 submissions or it might've been four written statements
21 plus a video that went along with the fourth, if I had, had
22 that I would've looked at that too and also looked at that
23 as far as showing the inconsistency and the, basically, we
24 were trying to get across the dishonesty of Jamie Gilbert.

25 Q. And that was a big -- that was really the big piece of

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1 this case is making Jamie appear to be not credible?

2 A. Correct.

3 Q. Okay. Skipping forward and I won't spend a whole lot
4 of time on this but, at 513 during the jury instructions
5 the judge gives instructions that says, at line 23, "the
6 law says if one intentionally kills another with a deadly
7 weapon the implication of malice may arise", are you aware
8 that there's been some law that's been made in Belcher
9 versus State, is the case, where certain court judges have
10 been instructed to remove that from their jury
11 instructions?

12 A. Now.

13 Q. Okay. At the time the did you see any reason to make
14 an objection to that?

15 A. At the time when that was coming out, that was good
16 law, I mean, that was nothing for me to go through and
17 object to because with the way it stood right there, I did
18 not know of any kind of lower court appeals that had gone
19 through, excuse me, Court of Appeals or any motion what was
20 going on with that and I think, as previously been stated
21 in court, I think our trial was in April of 2009 and then
22 that ruling came down later that year.

23 Q. Okay. Moving on to the rest of the jury instructions
24 on page 529, it comes up where the court says, the question
25 came up in discussions with counsel and this right now is

1 being directed at Bobby, "whether or not your lawyer was
2 going to request an instruction to the jury for possible
3 verdict of voluntary and then strong armed robbery." And
4 then he goes on to say, he advised me that y'all had
5 discussed it, I'm paraphrasing it, "and it was your desire
6 that the lesser included offense not be any questions for
7 the jury to determine", and Mr. Gilbert says, yes sir. Do
8 you recall that conversation?

9 A. Well, yeah, we discussed it, obviously, to put on the
10 record and we had a discussion prior to putting it on the
11 record about whether or not we were going to ask for lesser
12 included offense charges. So we did that specifically I
13 think we even took time again to talk about it in the
14 courtroom before we put that on the record. So we had some
15 time to discuss that in the courtroom as well.

16 Q. Are you talking about, you're talking about with Bobby
17 or talking about it with the court?

18 A. I'm talking about with Mr. Gilbert.

19 Q. Okay. And what were you telling him about what was
20 going on with the lesser included offense?

21 A. We discussed the fact that if, as it stood right then,
22 that if he did not request the lesser included it was
23 either not guilty or finding of the indictments. I also
24 discussed that if we go through and we request it because I
25 believe there was some evidence that would've gone through

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1 and warranted a voluntary manslaughter charge or a strong
2 armed robbery, that if we requested it we could ask the
3 court to go through and put that charge out there and that
4 a jury could come back and say, no, we don't find him
5 guilty of murder but we think he's guilty of voluntary
6 manslaughter or they could come back and say, not guilty.
7 So, essentially, the course of the discussion was, do you
8 want to go through and have two absolutes or do you want to
9 have the middleground and there's always a risk in that
10 because if they feel like they have, we're not comfortable
11 with murder but we might be more comfortable with
12 voluntary, when it's not on the table you may have them go
13 to a not guilty, I mean, how can you quantify that, but
14 that was part of the discussion. So we did discuss those
15 options.

16 Q. And sort of the rendition that you just gave today, is
17 that similar to what you would've told Bobby then?

18 A. It's similar to what I've told Bobby and it's similar
19 to what I've told the other people when we're going through
20 and talking about what a lesser included offense and the
21 options for that so...,

22 Q. Would you have gotten into the specifics of what then
23 that would mean for penalty if he were convicted of
24 voluntary manslaughter?

25 A. Oh, if we talked about sentencing ranges, yes, because

1 we've talked about, you know, other options and what it
2 would mean. I can't go through and say, hey, would you
3 like to take voluntary manslaughter and put that out there
4 without telling them what they could get from that so....

5 Q. I'm sorry. Go ahead.

6 A. No. We discussed that it was an option that he could
7 either choose to or choose to have those options provided
8 to the jury and then what those ranges of sentencing would
9 be if the jury chose to do that.

10 Q. Do you have specific recollection of having the
11 conversation with Bobby that for voluntary that sentencing
12 range would be between two (2) and thirty (30) years?

13 A. If that's the range that it has then that's what we
14 would've discussed at the time in the courtroom. So, I
15 mean, when I'm -- before we put that on the record about we
16 were not requesting lesser included, we had talked about
17 the choice, the ramifications of either decision and then
18 what the possible penalties were for those lesser included
19 charges.

20 Q. Did you make any recommendation to Mr. Gilbert about
21 what you thought should be done as far as requesting the
22 lesser included?

23 A. In the courtroom at that time we were asked or are you
24 talking about during the trial?

25 Q. Yes, sir.

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1 A. Yes. My opinion was to request the lesser included.

2 Q. Okay. You had, had I guess Mr. Gilbert had indicated,
3 a mental evaluation to be conducted?

4 A. I did.

5 Q. Did you have any difficulties communicating with Mr.
6 Gilbert?

7 A. No. I requested that just to be absolutely sure as we
8 were going through the process of trial so that if we would
9 have that information to know whether or not he was
10 competent to stand and what his status was. So, it
11 actually took a lot of running around to, I think we may
12 have had to come to Dillon for a hearing on whether or not
13 we were going to be able to get that evaluation done. It
14 was difficult to go through the process to have it obtain
15 but, eventually, it was done.

16 Q. Did you ever have any conversation with Bobby about
17 the legal concept of 'hand of one, hand of all'?

18 A. I did. I mean, it's something that is a concept
19 because there were multiple co-defendants and because of
20 the charges we would've discussed, you know, when you have
21 a group what it takes as far as being part of the group.
22 So, yes, that's something we would've discussed.

23 Q. Do you know when you would've discussed it with him?

24 A. I'm sure that conversation most likely would've been
25 coming around when we started getting statements that were

1 putting Bobby as the person who was directing other people
2 or setting this up as far as being the contact point to the
3 victim and also when statements started coming out where he
4 was directing other people of what to do. Part of what the
5 strategy had been about his mere presence and just being
6 there versus being the ringleader was that with, 'hand of
7 one, hand of all' if you're part of the activity, at any
8 part, if you're setting up something or not then you can be
9 charged and convicted of whatever occurs as far as crimes.
10 His mere presence there while maybe he was going through
11 and asked to get a ride, I think there was some testimony
12 where he had been contacted by one of the co-defendants
13 just to set up getting them a ride and it escalates without
14 his knowledge of what they had been planning, that
15 supported the mere presence that we had got a charge for
16 and what we were trying to position the case as that this
17 was not Mr. Gilbert, Bobby Gilbert, setting up anything, it
18 was just he was being used to get in contact with the
19 victim in this case.

20 Q. Did you explain to him that if the State were able to
21 prove that either if he were involved in the armed robbery
22 or the conspiracy or whatever and a murder occurs as part
23 of that, that he could also be found -- even if he were not
24 the person who committed the actual murder, did you explain
25 to him that he could still be found guilty of that murder

1 charge?

2 A. Yes. We explain -- I talked about that as well
3 because when we had the testimony, I think with the autopsy
4 and also it was difficult to determine what the cause of
5 death was as far as blunt force trauma and there had been
6 testimony about Jamie Gilbert actually running over the
7 victim. So what we had also tried to indicate was that,
8 essentially, Bobby was being used to get in contact and
9 then they were the ones who took the actions but he had no
10 active participation in any attempt to not do murder, not
11 do any armed robbery, not in any way trying to cause the
12 situation what it had involved to.

13 Q. Prior to the trial, were there any plea offers?

14 A. Yes.

15 Q. What was that?

16 A. It was voluntary manslaughter, I believe.

17 Q. Was there recommendation as to sentencing or was there
18 a number that was attached to it?

19 A. They wanted thirty (30) years.

20 Q. Okay. Did you convey that, obviously, to Bobby?

21 A. I did.

22 Q. What was that discussion?

23 A. I indicated to him that he was being offered a plea, a
24 plea offer to plea to voluntary manslaughter and that
25 they're going to ask for thirty (30) years and they're

1 going to be pretty hard on thirty (30) years. When I
2 discussed that with him I also said, well if you rejected
3 it, you can, but you've got to remember that being
4 convicted of murder is thirty (30) to life. So he wasn't
5 happy about having an offer of voluntary manslaughter
6 presented to him. He, you know, decided that he wanted to
7 take the risk at trial. But this was not a situation where
8 there was a, we'll offer him voluntary and we'll see what
9 the judge say where we can go through and ask. They pretty
10 much said that this is a voluntary plea for thirty (30) and
11 that was the offer they were making to him.

12 Q. Was it that he agreed and, basically, negotiated
13 sentence of thirty (30) or that they were going to
14 recommend thirty (30) and you can come in argue whatever
15 you wanted to?

16 A. I don't remember if it was negotiated or whether or
17 not, I think it was, I think it was a situation where they
18 were going to walk in and if they accepted the plea, they
19 were going to argue very strongly in front of the court to
20 get the maximum, what I said in, you know, reply or
21 rebuttal mitigation, they didn't really care what I had to
22 say about that, but they were not going to make a
23 recommendation of anything less other than thirty (30).

24 Q. Did you explain to him that, although, the State may
25 do that it still certainly up to the judge whether to

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1 sentence you to thirty (30) or go lower or whatever?

2 A. I did. I mean, anytime someone goes through and says
3 they're putting it up to the judge, you know, the judge
4 always has the ultimate, you know, decision-making capacity
5 unless it's negotiated.

6 MR. BOOZER: I beg the court's indulgence, Your
7 Honor.

8 THE COURT: Yes, sir.

9 MR. BOOZER: Thank you, Mr. Watts. That's all I
10 have.

11 MR. WATTS: Thank you.

12 THE COURT: Mr. James?

13 **Cross Examination by Mr. James:**

14 Q. You indicated earlier that you didn't hire a private
15 investigator, is there a particular reason why you didn't
16 hire one?

17 A. No. In going through and looking at the statements
18 what we had I think it was most of the people I could
19 either talk to or I knew their defense attorneys at the
20 time, everyone was presenting a defense and it was much
21 later that it turned out that the co-defendants were going
22 to be trying to work out deals so the flow of communication
23 between the defense attorneys at the time in the beginning
24 was good. Like I said, I went out and personally looked
25 out at the scenes, but the crime scenes were well

1 documented. There wasn't much else that I thought I could
2 learn by sending an investigator out to look at a scene
3 that had already been documented at the time of their
4 discovery of the scene and also I had gone out and taken a
5 look at it. I did find interesting, one time, we found a
6 stack of bricks that were alleged to be the same type that
7 was what was used in the incident and we kind and located
8 them that we had asked before, where you think this came
9 from and nobody seemed to know where it came from, but it
10 was relatively close to the first location of the scene.
11 So, I mean, we looked around, we did investigate. I think
12 we had been provided copies when they talked about cell
13 phone records, who was making calls and we had gotten
14 copies of what was subpoenaed there. So at the time I did
15 not think a private investigator was going to be able to
16 produce anything else that we were not already having
17 access to.

18 MR. JAMES: I have no further questions, Your
19 Honor.

20 THE COURT: Mr. Boozer?

21 MR. BOOZER: Nothing further, Your Honor.

22 THE COURT: All right. You can step down, Mr.
23 Watts. Thank you, sir.

24 MR. WATTS: Thank you, sir.

25 MR. JAMES: May this witness be excused?

1 THE COURT: Any objection.

2 MR. BOOZER: No objection.

3 THE COURT: You may be excused, Mr. Watts. Thank
4 you, sir. Any other witnesses, Mr. James? This was your
5 witness, I'm sorry, Mr. Boozer?

6 MR. BOOZER: Nothing further, Your Honor.

7 THE COURT: Mr. James?

8 MR. JAMES: No witnesses from the State, Your
9 Honor.

10 THE COURT: Okay. All right. As I've done the
11 other cases, I'm going to take this under advisement. I'll
12 let you gentlemen hear from me in a couple of days or so.

13 MR. JAMES: Thank you, Your Honor.

14 (CONCLUSION OF THE HEARING ON JULY 18, 2017)

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CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Circuit Court of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence relative to appeal, in the Fourth Circuit Court for Darlington County, South Carolina, on the 18th day of July, 2017.

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

s/ Lisa S. Carter

Lisa S. Carter

Circuit Court Reporter

December 30, 2017

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON) FOR THE FOURTH JUDICIAL CIRCUIT

Bobby A. Gilbert,) Case No.: 2015-CP-16-00694
S.C.D.C. No. 219284,)

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

FILED
2017 SEP 18 PM 12:44
SCOTT B. SUGGS
CLERK OF COURT/R.M.C.
DARLINGTON COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief filed by Bobby A. Gilbert ("Applicant") on September 3, 2015. Respondent made its return on or about December 5, 2016, and amended on June 16, 2017. The Court convened an evidentiary hearing into the matter on Tuesday, July 18 2017, at the Dillon County Judicial Center in Dillon, South Carolina. Applicant was present at the hearing and represented by Lance S. Boozer, Esquire. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, W.S. "Trey" Watts, III, Esquire ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Darlington County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of confinement of the Darlington County Clerk of Court. Applicant was indicted at the July

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Answered _____

Page 1 of 12

TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

2008 term of the Darlington County Grand Jury for murder (2008-GS-16-01031), larceny in excess of \$5,000 (2008-GS-16-01032), and armed robbery (2008-GS-16-01039). W.S. "Trey" Watts, III, Esq. represented Applicant. Kernard E. Redmond, Esq., and Patti McKenzie, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Howard P. King and a jury. The jury found Applicant guilty as indicted on April 29, 2009. Judge King sentenced Applicant to imprisonment for consecutive terms of life without parole for murder, and 30 years for armed robbery. Judge King additionally sentenced Applicant to a concurrent term of 10 years for the larceny.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Joseph L. Savitz, Esq. By unpublished opinion decided June 26, 2013, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Gilbert, Op. No. 2013-UP-283 (S.C. Ct. App. 2013). Applicant's petition for rehearing was denied on August 22, 2013. Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated July 23, 2015. The Remittitur was issued on August 31, 2015.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "Failure to investigate"
 - b. "Failure to request certain jury instructions"
 - c. "Failure to object to the trial judge's error of law/abuse of discretion"
2. Trial Court Error
 - a. Error in granting the State's Batson motion
 - b. Failing to instruct the jury

Applicant, by amendment dated June 7, 2017, also alleges the following additional grounds:

3. Ineffective Assistance of Counsel, in that:

- a. "Counsel was ineffective for introducing Jamie Gilbert's video statement. See trial transcript pg. 309."
- b. "Counsel was ineffective for failing to object to implied malice jury instruction."
- c. "Counsel failed to explain the legal concept of 'hand of one, hand of all' to Applicant prior to trial."

By filing dated June 16, 2017, Respondent amended its return to address the additional allegations and include a partial motion to dismiss the allegations of trial court error and that Counsel was ineffective for failing to object to the implied malice jury instruction.

II. 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 records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334

S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use 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, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). 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 at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

IAC Allegation #1 – Failure to Investigate

Applicant alleges that Counsel was ineffective by failing to investigate his case. The scope of a reasonable investigation depends upon a number of issues, but “at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Ard v. Catoe, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quotation omitted). “Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.” Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

At the evidentiary hearing, Applicant testified he did not believe Counsel investigated the case at all. Applicant testified he believed Counsel should have interviewed his co-defendants, investigated their video statements, and talked to Applicant’s mother in order to prepare an alibi defense. Applicant asserted that he specifically instructed Counsel to interview Applicant’s mother. Applicant testified Counsel met with him on only three occasions prior to trial, despite the severity of the crimes alleged.

Counsel testified that he investigated the statements provided by Applicant’s co-defendants, drove to the crime scene alongside an attorney for a co-defendant, and reviewed cell phone records. Counsel spoke with Applicant’s mother on multiple occasions, but could not recall any discussion of her value as a potential alibi witness. Counsel attempted to speak with any witnesses he believed were potentially viable, but could not recall getting much useful material from the effort. Counsel testified he met with Applicant on more than three occasions, but lacked documentation to corroborate his assertion. Counsel asserted that he both met with Applicant in person and communicated by mail, and that he reviewed all evidence and strategy



with his client. Counsel explained his strategy of discrediting the State's key witness, co-defendant Jamie Gilbert, through his four conflicting statements. Counsel did not hire a private investigator because he was able to personally conduct the investigation, including contacting the witnesses or their attorneys and reviewing the crime scene. Counsel generally demonstrated a strong command of the facts of Applicant's case throughout his testimony.

The Court finds that Applicant has failed to demonstrate any deficiency in Counsel's investigation of his case. Applicant's complaint that Counsel did not speak with Applicant's mother is rebutted by Counsel's testimony that he did so speak with the mother on multiple occasions, and that no alibi defense was discovered or developed as a result of those meetings. As to Applicant's general allegation that Counsel failed to adequately investigate his case, he offers nothing specific as to the nature of what should have been investigated and what the result of it might be. Applicant's testimony that Counsel did nothing is not credible, given Counsel's credible testimony regarding the facts and investigation of the case. Accordingly, Applicant has failed to meet his burden by proving either deficiency on the part of Counsel or prejudice therefrom, and his claim for relief based upon this ground is **DENIED**.

LAC Allegation #2 – Failure to Request Certain Jury Instructions, Lesser-Included Offenses

Applicant alleges that Counsel was ineffective by failing to request jury instructions. Applicant did not identify with any specificity the jury instructions he desired, but testified as to his desire expressed to the trial court that lesser-included offenses not be made questions for the jury to consider. See Tr. 529-30. Applicant testified that Counsel did not explain the concept of a lesser-included offense to him and that he was not actually aware of what it meant at the time of trial. Counsel testified that he did explain lesser-included offenses to Applicant, counseled

Applicant to have them presented to the jury, and that Applicant refused. Counsel testified to the risk that a lesser-included offense offers the jury the opportunity to convict by compromise.

The Court finds that Applicant has failed to demonstrate any deficiency on the part of Counsel in determining whether to seek particular jury instructions. In light of Applicant's previously discussed, baseless allegations that Counsel failed to investigate or explain anything, when it is apparent from the trial transcript and testimony that Counsel substantially investigated the matter, the Court finds Counsel's testimony credible and Applicant's testimony not credible. The Court gives no weight to Applicant's claim that he did not understand lesser-included offenses at the time of trial, but accepts Counsel's testimony that he explained and advocated for inclusion of lesser-included offenses. Applicant clearly and unequivocally informed the trial court that he freely and voluntarily made the decision to not seek instruction on lesser-included offenses. Aside from lesser-included offenses, Applicant offers no specific jury instructions that Counsel should have sought. For all of these reasons, Applicant has failed to meet his burden of demonstrating deficiency on the part of counsel or prejudice therefrom, and his claim for relief based upon this ground is **DENIED**.

LAC Allegation #3 – Failure to Object to Trial Court Error, Implied Malice Jury Instruction

Applicant alleges that Counsel failed to object to error by the trial court. By amendment, Applicant specifies that Counsel should have objected to the trial court's instruction on implied malice from the use of a deadly weapon. "[W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide [or attempted homicide] caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." State v. Belcher, 385 S.C. 597, 613, 685 S.E.2d 802, 810 (2009). However, "[t]he permissive inference charge concerning the use of a deadly weapon remains a correct statement

of the law where the only issue presented to the jury is whether the defendant has committed murder [or attempted murder].” *Id.* Furthermore, because the Court’s October 12, 2009, decision in Belcher represented a clear break from precedent, its limited prohibition against the implied malice instruction does not apply to then-existing convictions challenged on post-conviction relief. *Id.*

The trial court instructed the jury on express and implied malice as follows:

Expressed malice is when there is a deliberate intention to unlawfully take the life of another such as lying in wait. Implied malice is when circumstances demonstrate a wanton or reckless disregard for human life or a reasonably prudent man would have known that according to common experiences there was a plain and strong likelihood that death would follow the contemplated act. *The law says if one intentionally kills another with a deadly weapon the implication of malice may arise.* If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in this case and you may give it such weight as you determine it should receive.

Tr. 513-14 (emphasis added).

Respondent, in its amended return, moved to dismiss this allegation on the grounds that Belcher was inapplicable to Applicant’s April 29, 2009, conviction and sentence because it occurred before Belcher was decided. Counsel argued that though the trial and conviction occurred before Belcher was decided, that Counsel should have known to make the same argument since Belcher was pending on appeal. This Court expressed its inclination that the language of Belcher explicitly foreclosed its applicability to the present matter, but nonetheless permitted Applicant leeway to proceed upon the allegation.

Counsel testified that, at the time of trial, the Court’s implied malice instruction was good law, that no appeals offered him a basis to claim it was not good law, and that he therefore had no basis for an objection.



The Court finds that Applicant has failed to show any deficiency on the part of counsel by his failure to object to the implied malice jury instruction. The Court agrees with Counsel and Respondent that Belcher is inapplicable to the present matter—the Court very clearly and explicitly established its ruling would not be applicable in a post-conviction relief action against a then-existing conviction. But even if Belcher did apply, it would be of no consequence to Applicant's case because there was no evidence to reduce, mitigate, excuse, or justify the homicide. The victim was directed to a remote location, beaten, shot, forced into the trunk of a vehicle, pulled out, brutalized with a cinder block, run over twice, and had his head wrapped in a grocery bag. There is no justification for the barbarism the victim suffered; the only question before the jury was whether Applicant committed the murder. Accordingly, Applicant has failed to meet his burden of demonstrating deficiency on the part of counsel or prejudice therefrom, and his claim for relief based upon this ground is **DENIED**.

LAC Allegation #4 – Introduction of Co-Defendant's Video Statement

Applicant alleges that Counsel was ineffective by introducing the video statement of co-defendant and key witness for the State, Jamie Gilbert. Specifically, during cross-examination, Counsel pressed Jamie on whether his testimony on direct examination was consistent with numerous prior statements given to law enforcement. After Jamie stated that his testimony at trial was "exactly the same as what [he] said in July," Counsel introduced the video recording of Applicant's July statement to law enforcement as Defendant's Number 5. Tr. 310.

Counsel offered a defense theory that Applicant was used by his co-defendants to get in contact with the victim, and that Applicant did not do anything to set up any part of the brutal murder. As previously noted, Counsel testified that his trial strategy was to destroy Jamie's credibility. Counsel testified that the purpose of introducing the video statement, along with the

written statements, was part of his impeachment strategy and calculated to show that Jamie was dishonest and that all of his statements and testimony were self-serving.

The Court finds that Counsel articulated a valid impeachment strategy for introducing Jamie's statements and, as such, this Court cannot deem his conduct ineffective assistance of counsel. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Accordingly, Applicant's claim for relief based upon this ground is **DENIED**.

IAC Allegation #5 – Failure to Explain “Hand of One, Hand of All”

Applicant alleges that Counsel was ineffective by failing to adequately explain the concept of “hand of one, hand of all.” Applicant testified that Counsel failed to explain or review the evidence against him, defense available, the planned trial strategy, or the concept of “hand of one, hand of all.” Applicant conceded that Counsel mentioned or discussed “hand of one, hand of all” on one occasion, but did not explain it in full detail. Applicant claimed that if Counsel had properly explained to him the concept in full detail, Applicant would have accepted the plea offer of 30 years for voluntary manslaughter.

Counsel testified that he reviewed all of the evidence with Applicant, explained the strategy, and specifically discussed the subject of “hand of one, hand of all.” Counsel recalled that he discussed the subject with Applicant after receiving the statements of the co-defendants, which prompted him to do so. Counsel testified that he additionally discussed “mere presence” and its relation to “hand of one, hand of all.”

For reasons previously set forth, the Court finds Counsel's testimony credible and Applicant's testimony for the most part not credible. The Court notes that Applicant conceded that Counsel discussed “hand of one, hand of all” on at least one occasion. The Court finds that Counsel adequately discussed the concept and its relationship to the defenses available to

Applicant. Applicant has failed to meet his burden of demonstrating deficiency on the part of counsel or prejudice therefrom, and his claim for relief based upon this ground is **DENIED**.

B. Trial Court Error

In his original application, Applicant alleged two instances of error on the part of the trial court. Respondent, in its amended return, argued that the allegations of trial court error were not cognizable under the Uniform Post-Conviction Procedure Act and should be dismissed. At the hearing, Applicant's PCR counsel conceded that PCR is not a venue to review trial court error. Accordingly, the Court finds that Applicant's allegations of trial court error were appropriately abandoned, and any claims for relief based upon those grounds are **DENIED**.

III. CONCLUSION

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

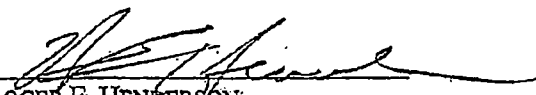
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.



IT IS THEREFORE ORDERED:

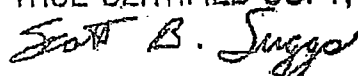
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 8th day of September, 2017.


ROGER E. HENDERSON
Presiding Judge
Fourth Judicial Circuit

Cherterfield, South Carolina

FILED
2017 SEP 18 PM 12:45
SCOTT B. SUGGS
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