

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable R. Knox McMahon, Circuit Court Judge

WILLIAM ANTHONY BUTTS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001851

APPENDIX

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1 minute to read it.

2 A Okay. Go ahead.

3 Q Do you recall asking the court at the point during
4 the trial for permission to recall some of the State's
5 witnesses as defense witnesses?

6 A Are you getting that from this page, from page
7 140?

8 Q Well, I'll --

9 A I think that I said it, if you look at --

10 Q If you look at 13 through 17?

11 A Yeah, I did. I think I mentioned it in here as
12 far as the height part of it goes. I did. I asked the
13 court for that, yes.

14 Q Would you, with my indulgence and with the court's
15 indulgence, would you read 13 to 17?

16 A Measurement is six feet, something like that, and
17 my client's very a lot larger than that. And I wanted
18 to recall them at a certain point to basically have my
19 client stand up and say this is -- this is the height
20 of the -- it was just a totally different height.

21 Q And then to go on, if you would read lines 19 and
22 20.

23 A And that's what I wanted to do, but I've excused
24 them. When I asked Mr. -- actually, Mr. Wilkins asked.

25 Q Okay. And also lines 23 to 24?

1 A 23 to 24?

2 Q Yes.

3 A And I did that and kind of out of -- it's
4 something my investigators just mentioned.

5 Q Which investigators were present with you during
6 the trial?

7 A I just had one -- it wasn't an investigator. I
8 misspoke. It was actually Lisa Nieto. That's my
9 assistant.

10 Q So the reference before in the court to Lisa being
11 an investigator, that could have been where it came
12 from?

13 A I believe so. When Lisa Nieto used to work for
14 me, she was my assistant, paralegal, and she would go
15 talk to people and things like that, so.

16 Q She was a multifunction person?

17 A Yeah. Like anyone in a small office would be a
18 lot of times, yeah.

19 Q I just wanted to clear up the prior testimony
20 where you said she wasn't an investigator, but I think
21 you've done that now. Thank you.

22 A Okay.

23 Q And did the court give you leave to recall these
24 witnesses in your case-in-chief? If you look at page
25 141. This is not meant to be a test, so take your time

1 and read the transcript.

2 A I think I did. I think Judge Stillwell is great.
3 I'm sure he did. Looks like he did. If I'm looking at
4 141, looks like he did.

5 Q And would it be clear to say that you did not call
6 either of the two clerks back as witnesses for the
7 defendant on that issue of the height difference in
8 their testimony?

9 A I did not. And the reason I did not is because,
10 as a trial strategy, if I put them up in this case, if
11 I put them up again in this case, I would have lost the
12 last argument, and I don't know the effect that they
13 would have had. I don't know if -- it was not, as far
14 as this height differentiation you're talking about,
15 there are a lot of other points I was trying to bring
16 out in terms of the pictures, the testimony of
17 Mr. Flynn, things like that. Other testimony that I
18 had. I did not want to lose the last argument in this
19 case because I did not believe that the State had
20 established a case as far as evidence, as far as
21 physical evidence. The testimony was kind of all over
22 the place, and I believe that the -- this is my
23 thoughts in my mind, what I was thinking about the fact
24 that they had these witnesses, that they, the mother
25 and the girlfriend that were -- I was going to argue

1 about the fact that they were State witnesses that had
2 been proffered sweetheart deals to get them to testify.

3 Q Well, isn't it true, and it's in the transcript if
4 you want to look, but isn't it true that you elicited
5 from the girlfriend on the stand on cross-examination
6 that she was, in fact, coerced by the investigators?

7 A Oh, yeah. I firmly believe that, and I think we
8 made pretrial motions to the effect we were -- it was a
9 very contested kind of thing in the beginning because,
10 you know, they kind of kept -- they put these two
11 witnesses that I was going to use potentially in this
12 case, they basically took them and put them into hiding
13 so I could not have contact with them, couldn't get
14 ahold of them. But I thought they were coerced, and I
15 think I went through with the mother, Mary Spaulding,
16 and the witness about potential coercion because they
17 sat there and were saying they were telling the truth
18 and all this stuff. But on cross-examination, I think
19 what was elicited was the fact that -- this is the
20 girlfriend -- she didn't testify the way they wanted
21 to, that they were either going to take her kid and put
22 the kid in protective custody or charge her as an
23 accessory.

24 Q Okay.

25 A That's what I thought the coercion was as well

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1 with the mother in this case who had given a prior
2 statement on the record. I elicited from her that she
3 had given a prior statement that she had been coerced,
4 I believe, from one of the officers.

5 Q Okay. So you thought enough of the discrepancies
6 in the eyewitnesses' testimony as far as the height. I
7 think you mentioned that they testified in a range
8 between five foot eight and six foot, I believe that
9 that's what their testimony was.

10 A Whatever the transcript is.

11 Q Again, if I refer you to page 140, it's that same
12 page.

13 A Okay.

14 Q You know, if you look at line -- when you're
15 ready, look at line ten to 11.

16 A It described this individual between five eight
17 and five -- then Mr. Wilkins says six feet.

18 Q And you said six feet, something like that?

19 A Right.

20 Q Did you have an opportunity to cross -- I
21 understand that you didn't recall them --

22 A I didn't.

23 Q -- as the applicant's witnesses on your direct,
24 but did you have the opportunity to cross-examine them
25 about the difference in the height as they described?

1 A You know, I don't know if I went in that direction
2 on this one. I was looking back through the
3 transcript. I think I paid the most attention in this
4 matter to the coercion and that prior statement and
5 things like that. I looked at Ms. McCroskey, the
6 daughter, and Ms. Spaulding. I don't know if I went
7 into that with them. I don't know if I -- I'm looking
8 at the transcript and I don't think I did.

9 Q And you didn't go into it on cross with the
10 eyewitnesses, the two clerks, Flynn and Campbell?

11 A I think -- let's see. I have to -- I'd go by the
12 transcript. If I didn't do it, I didn't do it, but --

13 Q I don't want to speak for you --

14 A Yeah.

15 Q -- but I did review it again last night.

16 A Right.

17 Q And I made a note that you brought up shoe size
18 and the imprint with Mr. Flynn.

19 A Right.

20 Q And that's on page 129 where he said that they
21 took an imprint and did testing on it. You asked him,
22 "The police took that imprint, did testing on it. It
23 would most likely belong to the person that robbed you
24 that day, correct?" And he answered, "Yes." But yet
25 did you consider offering any expert testimony as far

1 as the comparison between the imprint and, say, the
2 boots that the defendant was wearing the day he was
3 arrested?

4 A I didn't consider that. I may have thought about
5 that in terms of overall thinking about the case and
6 things like that, but the issue comes in. There's two
7 parts to that, and I think that the attorney general
8 brought this out on cross-examination of your expert
9 witness.

10 First, you lose the last argument in a case like
11 this. In this kind of case, it's extremely important.
12 But, second, as far as that particular expert witness
13 who is a paid witness in this matter who's going to
14 testify according to what you're basically telling him
15 to testify to, I think, in the jury's mind, they look
16 at that person as either, one, being a paid vessel of
17 the person, and, two, I think that on cross-examination
18 all these sciences we're talking about are not perfect.

19 And on cross-examination, the questions that a
20 solicitor can ask or anyone can ask either are going to
21 make the expert's testimony not stand up very well or,
22 two, make the expert not basically give a different
23 opinion so you really don't know. You don't know what
24 that expert is going to say exactly. Because I was
25 listening to the cross-examination and so forth. The

1 science is one that some jurors come into these things.
2 You know, you just don't know how they're going to do.
3 And to take the risk in that matter is a big risk on
4 the client's behalf.

5 Q Well, the risk -- and I understand that. Was
6 there a financial aspect, a lack of money or funds, as
7 far as in the decision to not hire an expert?

8 A Not on my part.

9 Q Or to consult with an expert?

10 A Do what?

11 Q Or to -- withdrawn.

12 You just testified that, in your opinion, that an
13 expert would basically testify as something that you,
14 as a defense attorney, or defense attorneys in general
15 want them to say?

16 A Right.

17 Q Well, isn't it true that you can hire an expert as
18 a consultant because you don't know the answer?

19 A You can.

20 Q And have somebody evaluate it independently?

21 A You can do that. But the only issue with the
22 problem that I have with that, there's two things. You
23 don't -- if that expert comes back and says you're
24 screwed. Basically, your guy is this, blah, blah,
25 blah, and so forth, that could potentially be a

1 problem. Because you've got to divulge this stuff to
2 the State.

3 Q I understand that. Let me ask you this. You
4 testified, and it's in the transcript, that you
5 mentioned the height differences in the testimony --

6 A Right.

7 Q -- to the jury in your summation?

8 A Okay.

9 Q But as an attorney, as an experienced trial
10 attorney, you understand the jury is directed and
11 charged that your testimony during summations, just
12 like the solicitor's, is not admissible as evidence?

13 A Of course.

14 Q You understand that, right?

15 A I do.

16 Q So how could you expect a jury to take what you
17 were saying in summation, when you never crossed
18 anybody on that topic, you never elicited any
19 information from those witnesses as far as the
20 discrepancy, you never -- withdrawn.

21 Did you ever ask the defendant to stand up in
22 front of the jury and point out his apparent height?

23 A If I go from the transcript, no, I don't think I
24 did.

25 Q And, again, I'm not testing you, and I'm not going

1 to cause you to make any kind of misrepresentation.

2 A Sure.

3 Q I respect what you do.

4 A Uh-huh.

5 Q But I'm just troubled by the fact that you were
6 saving your best argument for summation, knowing that
7 your words were not admissible and when they went back
8 to the jury room after being charged --

9 MR. SCHMECKPEPER: Your Honor, I object. I don't
10 think he's asking a question so much.

11 THE COURT: I will sustain that objection. I
12 think it's argumentative.

13 You may rephrase or ask your next question. And I
14 don't mean that you're argumentative. I didn't mean it
15 like that at all.

16 MR. SMITH: Judge, I learn more every day. Thank
17 you.

18 THE COURT: All right. You may continue.

19 BY MR. SMITH:

20 Q Mr. Robinson, I believe you testified that you
21 wanted to save the best -- you wanted -- you felt you
22 had one shot at convincing the jury. Is that a proper
23 representation of what you said as far as the height
24 difference?

25 A I don't think I said I had just one shot. I don't

1 think I put it in those words. I think that the case
2 itself -- I was looking back through my closing
3 statement in this matter. And, you know, one of the
4 pictures, I was looking at the pictures, looking at the
5 alleged robber and looking at Mr. Butts' height by
6 looking at the pictures. They look different to me,
7 and I thought a jury could see that.

8 Q But did --

9 A Yes. I'm sorry.

10 Q Did you elicit that from any of the witnesses? In
11 cross-examination of actual witnesses, did you show
12 them the pictures and ask them about that?

13 A I don't think I did. I don't think I did. I
14 was --

15 Q Was there a reason?

16 A You know, as you know, sir, you know a jury trial,
17 a contested jury trial event, you're not going to be a
18 hundred percent perfect in this matter. I make
19 mistakes like anybody else does. I don't think I made
20 any mistakes in this case, but I don't think that I
21 didn't go into that. And I can't tell you a reason for
22 it other than just a trial itself. But I was really
23 keying on the footprint, the pictures, the lack of
24 physical evidence in this case, and the credibility of
25 the two main witnesses that they had, the girlfriend

1 and the mother.

2 Q Okay. How about the credibility of the testifying
3 officers, did you have any feelings about that during
4 the trial?

5 A Well, they're going to testify for the State,
6 obviously, but they didn't. The issue with, as far as
7 their credibility, I don't have access to their history
8 of complaints or disciplinary things, stuff like that,
9 but I think that I elicited from Officer Weiner that
10 the imprint was not the same.

11 Q Well, let me refer you now to -- and I'm getting
12 finished. There is an end.

13 A No, not at all. Please.

14 Q Page 298, sir. That's the cross-examination of
15 Investigator Weiner. Specifically, when you find the
16 page, pages nine through and including 14.

17 A Okay. I have it. Do you want me to read it?

18 THE COURT: What lines was that again, Mr. Smith?

19 MR. SMITH: Nine through 14.

20 THE COURT: All right. Thank you.

21 THE WITNESS: Would you like me to read it,
22 Mr. Smith? Do you want me to read it?

23 BY MR. SMITH:

24 Q No. I'm going to ask you a question on it.

25 A Go ahead.

1 Q You heard Sergeant Weiner's testimony earlier
2 today; is that correct?

3 A I was in the courtroom.

4 Q But did you hear his testimony?

5 A Yeah, I heard it.

6 Q I don't mean to be smart.

7 A No. It's okay.

8 Q I'm just laying a foundation.

9 A I was sitting right there. I heard it, yeah.

10 Q Did you hear when I asked Sergeant Weiner if he
11 was able to compare the shoeprint impression on the
12 counter with the boots that Mr. Butts was arrested in?

13 A I think -- I -- refresh my memory a little bit.
14 What did he say?

15 Q Well, it's my recollection that he said he was not
16 able to.

17 A Yeah. And I think he also said in here as far as
18 when I asked him about the question.

19 Q Can you tell us what he said?

20 A He said, "I don't know whether it matched him or
21 not. All I can tell you is it did not match the shoe
22 he was wearing when he was arrested."

23 Q Referencing the boots?

24 A Right.

25 Q I have three or four brief questions.

1 A Sure.

2 Q When you talked about the visits, did you maintain
3 any kind of time sheets or billing records for those
4 visits?

5 A I would have. I don't have them here.

6 Q Okay. Was there any -- besides mentioning it in
7 closing arguments, was there any -- do you have any
8 recollection as you sit here today testifying of
9 something that I may have missed, either crossing the
10 two eyewitnesses with the disparities, or crossing the
11 detectives or the investigators that testified
12 specifically as to the height disparities that you just
13 maybe testified to?

14 A I'm not sure -- I'm sorry, Mr. Smith. I'm not
15 sure exactly what your question is. What is your
16 question?

17 Q Well, did you elicit -- during the trial, did you
18 elicit any evidence through testimony of either the two
19 eyewitnesses, the two clerks, or the numerous
20 investigating police as to the discrepancies between
21 the height of the robbers in the three robberies and
22 your client, Mr. Butts?

23 A I don't think I did. I have to -- I have to go by
24 the transcript. This transcript is it. If I didn't do
25 it, then I didn't do it.

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1 Q Again, this is not a trick to test you, like I've
2 already done that, and I thank you.

3 A Sure.

4 Q Thank you very much.

5 A Sure.

6 THE COURT: Thank you, Mr. Smith.

7 Redirect, Mr. Attorney General?

8 MR. SCHMECKPEPER: Briefly, Your Honor.

9 THE COURT: All right. Of course.

10 REDIRECT EXAMINATION

11 BY MR. SCHMECKPEPER:

12 Q Mr. Robinson, you consult with an expert in every
13 case on every issue?

14 A Are you asking me do I? No, not every issue, not
15 every case.

16 Q And was the height of the defendant in the videos
17 the focus of your case or focus of your defense?

18 A It really wasn't because the big focusing that I
19 had in this case was the two -- what broke this case
20 had nothing to do -- I don't think it had anything to
21 do with the height and that stuff that they're talking
22 about. I think it had to do with the girlfriend and
23 the mother. That was -- those were the most important
24 witnesses in this case. And when they turned on him,
25 they basically just tied every single little thing that

1 the State put out there. We had a big problem.

2 Q Do you recall at any point the applicant was
3 actually standing in the presence of the jury
4 throughout the course of the trial?

5 A I think when he -- I think -- this is just based
6 on memory of five years ago, but the court would
7 normally have the defendant stand up to -- I think the
8 court would ask the attorneys to introduce themselves,
9 then ask the client to stand up so he can -- so they
10 can determine whether or not he has a relationship or
11 knows any of the people in the jury panel.

12 MR. SCHMECKPEPER: I have no further questions,
13 Your Honor.

14 THE COURT: Recross, Mr. Smith?

15 MR. EPPEES: Your Honor, can I inject myself into
16 this cross?

17 THE COURT: No. And I wouldn't typically mind,
18 but the Honorable Ralph King Anderson taught me a very
19 valuable lesson one time, and I never forgot it. And I
20 would never want him to think that I violated that
21 order. Although it's been --

22 MR. EPPEES: Your Honor, Judge Anderson has
23 corrected me before. I understand very well what
24 you're talking about.

25 RECROSS-EXAMINATION

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1 BY MR. SMITH:

2 Q Mr. Robinson, is it correct that in the procedure
3 here in the local courts, that they have multiple
4 attorneys introduce themselves and as far as the
5 defendant to stand, that's during voir dire of the jury
6 panel to find out if anybody knows --

7 A That's what the court usually does. I'm not
8 sure -- you want me to go back and look at the
9 transcript and see if the court does that?

10 Q I wanted to ask you -- I wanted to reask you the
11 question. I was specific as far as during the trial
12 itself in front of the panel, the jury that reached the
13 verdict. The question was: Did you ever ask Mr. Butts
14 to stand up demonstratively?

15 A I think I answered no.

16 Q Okay.

17 A I answered no to that, but you asked me whether or
18 not he stood up, or I think you may have asked as far
19 as standing up when he was introduced to the jury.

20 Q Well, again, that was to the general pool?

21 A That was the voir dire, correct.

22 Q And you're not -- I don't think you're saying -- I
23 think you're answering the question, but I don't think
24 you're saying that you would expect any potential
25 jurors in the pool to remember during the trial the

1 height of the individual that stood up; is that what
2 you're implying?

3 A No, I'm not implying anything. I have no idea. I
4 just know the judge asked him to stand to introduce
5 himself to the jury to see if the jury knew him or not.
6 I have no --

7 Q But it was before the jury was sworn and before
8 that actual panel was seated; is that correct?

9 A Yes.

10 Q Okay.

11 MR. SMITH: Thank you, Judge. I have no further
12 questions.

13 THE COURT: Thank you, Mr. Smith.

14 Thank you, Mr. Robinson. Thank you for being with
15 us today. You may step down. You may be excused.

16 MR. SCHMECKPEPER: Your Honor, the State rests at
17 this point.

18 THE COURT: I'm trying to track something.

19 MR. SCHMECKPEPER: Your Honor, can I ask
20 Mr. Robinson be excused?

21 MR. SMITH: No objection.

22 THE COURT: Yes, sir. You may be excused.

23 Mr. Robinson, again, thank you for being with us
24 today.

25 Mr. Schmeckpeper and Mr. Eppes, were the

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1 motions -- I don't see it as part of the transcript. I
2 have not read the entire transcript. There was a
3 motion to sever in the *Neil vs. Biggers* motion. Are
4 they part of the record?

5 MR. EPPEES: I believe so, Your Honor.

6 THE COURT: Are they in the transcript?

7 MR. SCHMECKPEPER: They should be, Your Honor,
8 because I know that the motion to sever --

9 THE COURT: As I say, I haven't read it all.

10 MR. SMITH: The motion to sever, Your Honor, was
11 done very early in the trial, and it was cursory at
12 best.

13 THE COURT: Okay. I just was curious if it's in
14 there at all.

15 MR. SMITH: Your Honor, it is in there.

16 THE COURT: It is what it is. I mean, that's
17 fine. I just wanted to make sure I had it in the
18 record because I haven't read the read entirely.

19 MR. SCHMECKPEPER: I believe the *Neil v. Biggers*,
20 looks like around 156 of the transcript.

21 THE COURT: Thank you. I was just checking that.
22 All right.

23 Y'all want to make a brief closing?

24 MR. EPPEES: Your Honor, I've done a bunch of
25 these, sadly, with Mr. Robinson. And what happened

1 here is he believed that two witnesses, the mother and
2 girlfriend -- the girlfriend and her mother were going
3 to be in his corner and they turned out not to be. And
4 what happened is he had put so much stock in them that
5 he had not prepared the rest of the case.

6 Quite frankly, Judge, he never looked at the shoe
7 sizes yet he argued -- he argued at the close that the
8 imprint was a smaller shoe than the shoe they took off
9 my client. More important, his verbalization of these
10 photographs today and this chart over here on the side
11 of the door, which I can only see because, frankly, I'm
12 always taller than the tallest place on it, what he
13 said on the stand today, and you can look at the
14 transcript, it was better than anything that was
15 brought out in the trial. It was better than his
16 closing argument. It was better than anything at all.

17 And, frankly, Mr. Smith got this case -- have we
18 been doing this for five years now?

19 MR. SMITH: It was before your son was born.

20 MR. EPPES: Mr. Smith had this case for about an
21 hour and a half and he called me and retained me and
22 found Mr. Spivack, and we were able to show these
23 photographs which clearly show what to me looks like
24 different people.

25 Now, that made the severance issue kind of

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1 critical, and I briefed that with the court of appeals
2 and they didn't think much of my brief. I think I
3 might have taken it to the supreme court, but I don't
4 remember right now.

5 But, Judge, the height issue was the critical
6 issue. It was the one way to show that this was not
7 the same person in all three cases. If you look at the
8 severance issue, you'll see that it was done, like so
9 many issues in a trial, very quickly, very haphazardly.

10 And the evidence in the three individual incidents
11 was just enough to link them together. There was a
12 common gun that was used in at least two of them.
13 There was two different stocking caps that were used in
14 two different cases. And the height issue was really
15 the issue that would have made a material difference in
16 the case. It is the issue, if it had been focused on,
17 I believe it would have gotten the jury over the hump
18 from guilt to not guilty on one or more of these cases.

19 Now, we're not saying -- we're not saying that for
20 Mr. Butts' appeal -- Mr. Butts' petition to be
21 successful that we have to show that he would -- he
22 would have been found not guilty in all three cases.
23 All we're saying is because of the way this went,
24 because of his 20-year sentence, if the jury had heard
25 that information, it would have materially affected the

1 outcome because he may have been found not guilty on
2 one or two or all three of them thereby leading to a
3 material difference in his ultimate verdict and a
4 material difference in his sentence.

5 And, Judge, I'll just speak personally because I
6 don't know any other way to speak to judges. But I get
7 on the stand, and I've done a bunch of these, and I
8 generally say I did what I did, and if I made a
9 mistake, God bless my client because I don't really
10 give a dad-gum about whether somebody thinks I made a
11 mistake or not.

12 The height issue was not a strategy issue. The
13 height issue was an issue that was so critical to this
14 case, it was so obvious, it was the best evidence. My
15 client had never gone over that evidence before the
16 date of his trial. He had never even seen it to think
17 about it. Now five years later, Mr. Robinson
18 verbalizes it in a way that, frankly, makes a pretty
19 good sounding jury argument. He never verbalized that
20 with a single witness, didn't point it out to a single
21 witness. He argued it in closing without pointing it
22 out very well to a jury. I believe it rises to the
23 level of mistake. How he got there? Because witnesses
24 changed their mind. How he got to a point where he's
25 trying a case where he hadn't talked to a client about

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1 whether to testify or not, don't know. Doesn't matter.
2 I believe this PCR should be granted.

3 THE COURT: Thank you, Mr. Eppes.

4 MR. EPPES: Oh, Your Honor. We have a brief that
5 we'd like to submit.

6 THE COURT: Of course.

7 MR. EPPES: Mr. Smith, frankly, finished it last
8 night.

9 MR. SMITH: I had provided a copy last night and
10 today, and I'd like to hand up a copy to the court.
11 And I would like to point out that I have stricken
12 paragraph six which was an attempt to make a Brady
13 argument. Today, after hearing the testimony, I have
14 stricken that and I have initialed it and we're not
15 making that an issue.

16 MR. EPPES: Your Honor, obviously, if
17 Mr. Schmeckpeper wants time to respond in writing to
18 this written brief, we have no objection to it.

19 THE COURT: All right. Thank you, Mr. Eppes,
20 Mr. Smith.

21 Mr. Schmeckpeper.

22 MR. SCHMECKPEPER: Thank you, Your Honor. May it
23 please the court. Trying to take these allegations one
24 at a time. I think the first thing that was talked
25 about was witness coercion. I think the record

1 reflects that Mr. Robinson adequately cross-examined
2 the witnesses, and he objected to their introduction of
3 their statements, observations that they were coerced,
4 and he made a *Biggers* violation, requested a *Biggers*
5 hearing.

6 In terms of preparation, looking at the testimony
7 presented here today, I don't think there's really any
8 grounds to grant PCR on the claim of failure to
9 investigate or failure to prepare. Counsel testified
10 that there were multiple investigators working on this
11 case, that he got investigation from all of them. He
12 testified that he reviewed discovery. He reviewed
13 discovery with the applicant. He testified that he
14 discussed the case with the applicant, and he never
15 told the applicant that he could guarantee a win. Your
16 Honor, I think that specifically goes towards the
17 applicant's credibility.

18 Next issue, as far as severance, I don't know what
19 the answer to the severance question is, but I can tell
20 you the court of appeals decided it. I think
21 Mr. Robinson made the objection to severance. I think
22 it was preserved for review. It was denied preserved
23 for review, briefed to the court of appeals and then
24 they came out with a decision affirming the trial
25 court. For that reason I don't think that's an

William Anthony Butts vs. The State of South Carolina 2015-CP-23-01027

1 appropriate claim for ineffective assistance of
2 counsel.

3 Clearly the applicant's height, this expert report
4 wasn't presented at the trial. I don't think the
5 applicant's met his burden to show, one, that counsel
6 was deficient specifically in light of counsel's
7 testimony concerning strategy he was focusing on the
8 lack of evidence in the State's case, lack of forensic
9 evidence in the State's case, and the fact that the
10 only people putting the applicant in these stores
11 robbing it were two witnesses who had terrible
12 credibility problems. And he brought -- as I discussed
13 earlier, he brought those credibility problems to the
14 jury's attention during cross-examination.

15 In terms of prejudice, I don't think, even
16 assuming counsel's strategy in not focusing on height
17 is reasonable. I don't think the expert's testimony
18 today here helps the applicant meet his burden on
19 prejudice. I think in terms of apparent height, you
20 can be looking at the apparent height. I think there
21 is a pretty good argument that just looking at the
22 pictures, he's slouching. He's got his head bent.
23 Whether or not it's an actual -- whether or not the
24 apparent height of the person is different, I'd submit
25 that applicant hasn't met the burden of proof to prove

1 that this person is not the applicant and doesn't have
2 the same actual height. And the expert wasn't an
3 expert in posture, wasn't an expert in anatomy, and I
4 don't think his testimony is sufficient to get them
5 over that burden there.

6 You know, just to close, I know opposing counsel
7 has talked about counsel's reasoning, and the point I'd
8 like to emphasize today is *Strickland vs. Washington* is
9 a very, very tough, harsh standard. It requires a
10 great deference to counsel's strategic reasoning,
11 prohibits a trial court or PCR court from looking in
12 hindsight about what counsel should have done. Maybe
13 it might have helped for counsel to introduce this
14 expert and these photographs at the trial. In
15 hindsight, it's pretty easy to say that it might, but
16 the standard prohibits us from doing that. You have to
17 look at it at the time counsel was trying the case, and
18 trying the case, I think he had a pretty good argument
19 that the State had very little evidence and the
20 witnesses were not present. There is a presumption of
21 ineffective assistance, so we'd rest on the
22 presumption, Your Honor.

23 THE COURT: Thank you.

24 How much time, Mr. Schmeckpeper, do you need to
25 respond to applicant's brief? And I'm going to have

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1 both of you, both parties, prepare a proposed order.

2 How much time do you need? How much time do you
3 need, Mr. Eppes, Mr. Smith?

4 MR. SCHMECKPEPER: Your Honor, if I could look
5 over this today and let you know tomorrow, I very well
6 might just rest on argument and submit a proposed
7 order, but I'd like to look at it first.

8 THE COURT: Of course. We'll be -- that would be
9 fine.

10 Mr. Eppes, how much time y'all need? Y'all know
11 how busy you are.

12 MR. EPPES: Your Honor, I was going to say two
13 weeks, but today is a Tuesday. How about if we did
14 Friday?

15 THE COURT: How about 30 days?

16 MR. EPPES: 30 days would be great.

17 THE COURT: That fine with you, Mr. Schmeckpeper?

18 MR. SCHMECKPEPER: That works, Your Honor.

19 THE COURT: All right. 30 days would be fine.

20 Thank you very much, Mr. Smith, Mr. Eppes,
21 Mr. Schmeckpeper.

22 And good luck to you, Mr. Butts.

23 THE DEFENDANT: Thank you.

24 MR. SMITH: Pleasure meeting everybody, sir.
25 Thank you.

William Anthony Butts vs. The State of South Carolina 2015-CP-23-01027

1 THE COURT: Yes, sir. My pleasure.

2 (WHEREUPON, the hearing ended at 12:20 p.m.)

3 ***END OF REQUESTED TRANSCRIPT OF RECORD***

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1 Certificate of Reporter
2

3 I, Diane L. Marcengill, Official Court Reporter
4 for the Tenth Judicial Circuit of the State of South
5 Carolina, do hereby certify that the foregoing is a
6 true, accurate, and complete transcript of record of a
7 portion of the proceedings had and evidence introduced
8 in the trial of the captioned case, relative to appeal,
9 in the Circuit Court for Greenville County, South
10 Carolina, on the 19th day of April 2016.

11 This transcript may contain quoted material. Such
12 material is reproduced as read by the speaker.

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

15 December 19, 2016
16

17 
18 Diane L. Marcengill, RPR, CRR
Circuit Court Reporter
19
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5102

RBA

PARTIAL GEL-LIFT FOOTWEAR
IMPRESSION

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PARTIAL GEL-LIFT FOOTWEAR
IMPRESSION

DURT

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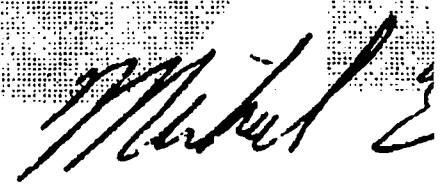
The accused
to be

(L.S.)

I further state that there is probable cause to believe that the defendant
the crime set forth and that probable cause is based on the following facts:

Affiant, an investigator with the Greenville County Sheriff's Office, has video surveillance
defendant has been identified as the person who shot the victim, Kenneth Daniel
occurred in Greenville County.

Signature of Affiant



STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

) Affiant's Address 4 Mcgee St
) Greenville, S

) Affiant's Telephone (864)467-5

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY

It appearing from the above affidavit that the

on or about 11/3/2009 defendant William Anthony

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of

3/4/2010

1
DASH. * 11/14/10

ate v. William Anthony Butts

ie following proposal to your above-referenced client in order to di

and guilty to the following:

Charge:

Threatening life of a teacher

~~Assault / Simple Assault And Battery~~ dismiss best

Robbery / Armed Robbery, robbery while armed or allegedly armed
weapon

Assault / Assault and battery with Intent to Kill (ABWIK)

Robbery / Armed Robbery, robbery while armed or allegedly armed

- 38 Weapons / Poss. weapon during violent crime, if not also sentenced to life without
parole or death
- 41 Conspiracy / Criminal Conspiracy, Common Law conspiracy defined
- 42 Conspiracy / Criminal Conspiracy, Common Law conspiracy defined

te will make the following sentence recommendations/negotiation:

s, concurrent on all charges

ontact me as soon as possible with your client's response as plea negotiations must be concluded
ilty plea entered before ~~10/7/2010~~ or this and any other offers are automatically withdrawn. If your
not plead guilty by this date, the case(s) will be placed on the trial calendar for disposition without
negotiation.

Dec. 9, 2010

Yours very truly,



Kris Hodge
Assistant Solicitor

H: 6' 3.221"

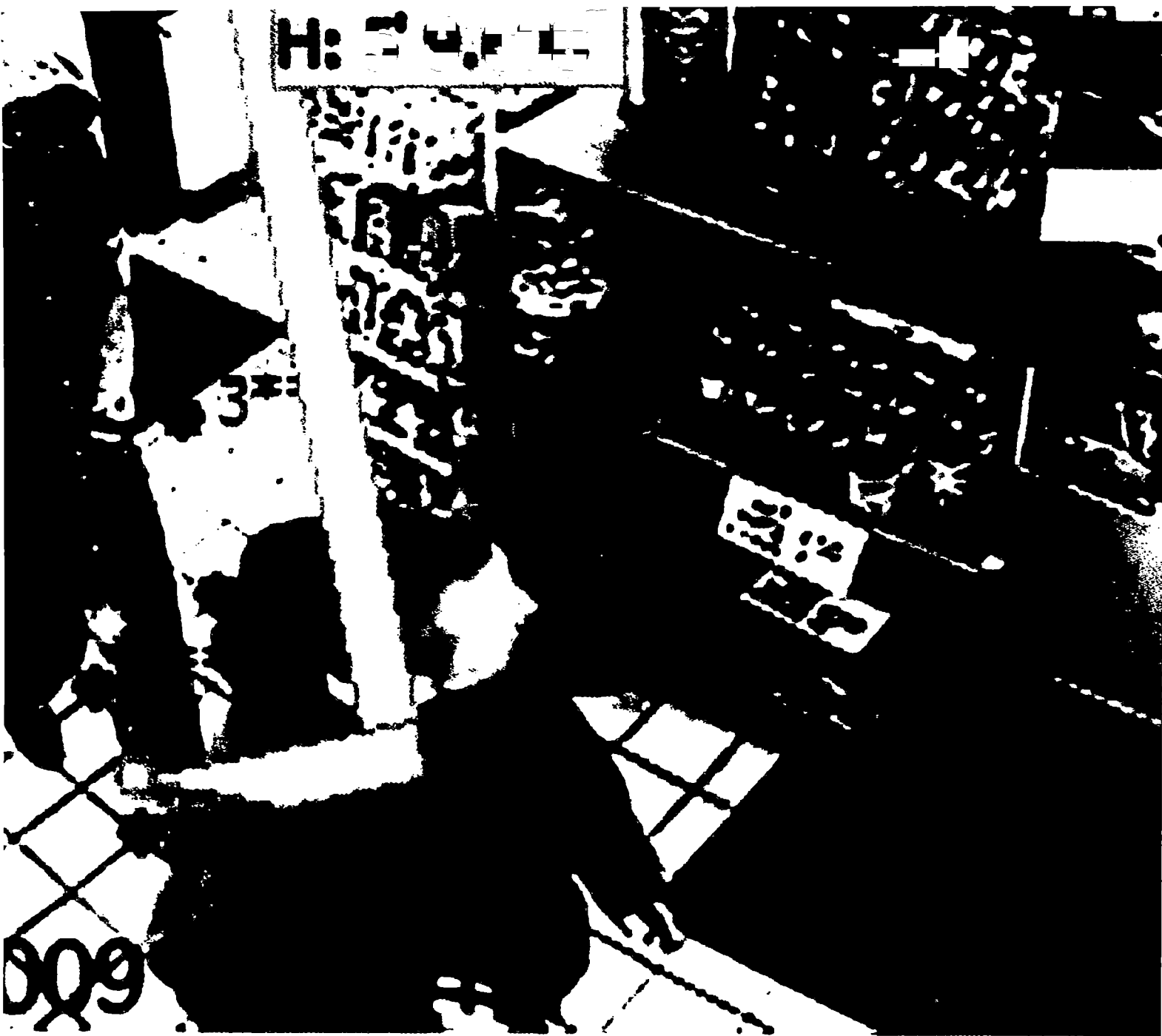
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regard to Spivack's measurements, he determined that Mr. Butts is 6' 1.25" tall without shoes, and 6' 2.75" with shoes that have a difference from the height calculated using the stereophotogrammetry.

According to the expert, the height of the suspects recorded on 10/18/80 would likely eliminate Mr. Butts as a potential suspect due to the fact that

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

William Anthony Butts,
S.C.D.C. No. 348307)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-23-1027

ORDER OF DISMISSAL
(with prejudice)**ENTERED COMPUTER**FILED-CLERK OF COURT
GREENVILLE, S.C.
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This matter comes before the Court by way of a post-conviction relief (PCR) application filed on February 10, 2015. Respondent filed its Return on July 21, 2015. An evidentiary hearing into the matter was convened on April 19, 2016, at the Greenville County Courthouse. Applicant was present at the hearing and was represented by Peter S. Smith, Esquire, appearing *pro hac vice*, and Frank L. Eppes, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the July 2011 term of General Sessions for 3 counts of armed robbery (2011-GS-23-5149, count 1; -5150, count 1; -5151, count 1) and 3 counts of possession of a weapon during commission of a violent crime (2011-GS-23-5149, count 2; -5150, count 2; -5151, count 2). Scott D. Robinson, Esquire represented the Applicant.

After the State brought the case to trial, the Applicant was found guilty. On October 19, 2011, the Honorable Robin B. Stilwell sentenced the Applicant to concurrent terms of 20 years

on each count of armed robbery and 5 years on each count of possession of a weapon during commission of a violent crime.

A notice of appeal was filed at the South Carolina Court of Appeals. Frank L. Eppes, Esquire perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Butts, Op. No. 2014-UP-141 (S.C. Ct. App. filed April 2, 2014). The remittitur was sent on April 18, 2014.

Allegations

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

1. "Claim of actual innocence."
2. "Misidentification."

In his "Amendment to Petition for Post Conviction Relief" filed by counsel on August 12, 2015, the Applicant makes the following allegations:

1. Ineffective assistance of trial counsel:
 - a. Counsel was not adequately prepared for a motion to sever the three incidents into separate trials.
 - b. Counsel was not prepared, nor did he properly address issues of misidentification.
 - c. Counsel was not prepared and did not properly address issues of the Applicant's actual innocence.
 - d. Counsel's cross-examination of the officer concerning the gun found in the Applicant's possession was inappropriate and inexcusable and was wrongly allowed to contribute to the Applicant's conviction.
2. Material facts, not previously presented and heard, as to both [the Applicant]'s innocence and a misidentification by witnesses as well as other matters, were not previously presented and heard, and require vacation of the conviction and sentence in the interest of justice."
3. "Certain investigators for the Solicitor's Office unreasonably harassed and threatened key witnesses in an inappropriate manner."

At the evidentiary hearing, Applicant stated, through counsel, that he was proceeding on the allegations that counsel was not prepared to argue severance; that counsel did not properly

address identification; that counsel did not properly cross-examine witnesses; and that Applicant was not prepared to go to trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses present at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, Applicant's pretrial memorandum, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must

overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Applicant's Height

Applicant has made a number of allegations focusing on counsel's failure to introduce evidence and call witnesses to prove his height was not the same as that of the assailant in the three armed robberies. Specifically, he alleges counsel was ineffective for failing to call an expert witness, and failing to request that Applicant stand up before the jury. This Court finds Applicant has failed to meet his burden.

Applicant's general allegation that counsel was ineffective for failing to present evidence with respect to height is without merit. Based on counsel's credible testimony and the record, this Court finds counsel focused on what he believed to be more fruitful issues pursuant to a valid trial strategy. See Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel). There are countless ways to provide effective assistance in any given case. Strickland at 689, 104 S.Ct. at 2065. Even the best criminal defense attorneys would not defend a particular client in the same way. Id.

Counsel testified that his theory of the case was that there was no physical evidence of Applicant's involvement in the robberies, and that the clerks did not identify him as the assailant. At trial, counsel argued that none of the State's physical evidence was unique to Applicant. He pointed out that no witnesses had been able to identify the gun as being the actual gun used to rob the stores. Tr. p. 335, l. 14-15. Counsel argued that the gun and clothes entered into evidence were not unique to Applicant. Tr. p. 335, l. 12 - p. 336, l. 11. One victim, who testified that he was not sure if the gun used in the robberies was the same as the gun presented at trial, acknowledged that he did not know very much about pistols, and that there were a lot of black and silver guns in circulation. Tr. p. 126, l. 4-19.

The record also corroborates counsel's testimony that he focused on the victims' inability to identify Applicant. He was able to elicit testimony from one of the victims, on cross-examination, that the assailant could have been a former employee of the gas station based on his knowledge of the "drop" system, in which clerks deposit excess money from the cash registers into the safe at various intervals. Tr. p. 125, l. 20 - p. 126, l. 3.

Counsel said that rather than focus on height in cross-examining several of the State's witnesses, he wanted to highlight coercion. He vigorously attacked the credibility of the only witnesses who were able to identify Applicant. Counsel testified at the evidentiary hearing that he had to discredit Applicant's ex-girlfriend and her mother – Ms. McCroskey and Ms. Spaulding, respectively – because their trial testimony was different than their pretrial statements. During closing statements, counsel argued that Ms. McCroskey and Ms. Spaulding were coerced by law enforcement into identifying Applicant, and were therefore not credible. Tr. p. 344, l. 6-10. Ms. McCroskey admitted on cross-examination that her story had changed over the course of the investigation. Tr. p. 209, l. 2 - p. 210, l. 5. She also testified that she felt

threatened by law enforcement, and feared losing custody of her child if she did not cooperate. Tr. p. 212, l. 12-18. In addition, Counsel was able to get Ms. Spaulding to testify that at one point before trial she recanted her identification of Applicant in the videos of the armed robberies. Tr. p. 255, l. 1-8. He also reemphasized to the jury that Ms. Spaulding had been convicted of writing fraudulent checks. Tr. p. 249, l. 20-22.

This Court finds counsel's focus was objectively reasonable given the circumstances of the case. Further, his testimony and the record reflect that counsel also explored the issue of identity as a general matter, including height.¹ Counsel elicited testimony and argued that the descriptions given by the victims and as seen on the videos were inconsistent with Applicant's physical characteristics. The jury heard testimony that the assailant was "between five eight and six foot," Tr. p. 132, l. 13-15, and that Applicant was "six-one." Tr. p. 206, l. 17-19. Counsel further instructed the jury to "go back and look at it and see how tall this guy is" during their deliberations. Tr. p. 340, l. 22-23. He asked that the jurors "[l]ook at the difference in height between [Applicant] and the six-one that they talked about and this alleged robber." Tr. p. 341, l. 3-4.

With this in mind, this Court finds counsel was not deficient in choosing to focus his theory on one issue over another – particularly when he actually addressed height and misidentification. Moreover, because these issues were before the jury and they still found Applicant guilty, this Court finds he has failed to show prejudice.

Failure to Call Expert Witness

This Court further finds counsel was not deficient in failing to call an expert witness. Counsel gave a number of objectively reasonable justifications for deciding not to use an expert.

¹ With respect to identity, counsel also argued that Applicant's voice differed from those recorded in the armed robberies; that the assailant – unlike Applicant – appeared to have a tattoo on his left arm; and that the footprint taken from the scene was never matched to Applicant's shoes. Tr. p. 341, l. 12 - p. 342, l. 3.

First, he said that he did not know how a jury would interpret an expert's findings on the issue. Counsel explained that expert testimony sometimes does not stand up well on cross-examination, and that an expert could have ultimately ended up giving a different opinion on the witness stand. He said he did not think the science behind photogrammetry was perfect, and that he did not believe the jury would have been convinced. In light of counsel's theory and strategy, this Court finds Applicant has failed to meet his burden to show deficient performance.

Applicant has also failed to show prejudice. As an initial matter, this Court finds that the report and opinion rendered by Jeff Spivack, Applicant's retained expert in the field of photogrammetry, do not rule out the Applicant as the assailant in each of the videos. Mr. Spivack testified that he was able to determine an object's real world "apparent height" – the straight line distance between its highest and lowest points – from a photograph or video still to a reasonable degree of certainty.² He found Applicant's apparent height in the control video to be approximately six feet, three inches tall. He determined the assailant's apparent height in the armed robbery stills to be between five feet, eight inches, and five feet, nine inches. As a result, Mr. Spivack testified that did not believe Applicant was the assailant in the armed robberies.

This Court finds Mr. Spivack's findings are not sufficiently clear or concrete to support his conclusion for the purposes of this hearing. He was unable to adequately explain how a subject's apparent height relates to its actual height. According to Mr. Spivack's testimony, photogrammetry appears to be severely limited in that it is unable to take into account curves, or anything other than straight lines, in the human body beyond adjusting for them with a generalized margin of error. Mr. Spivack conceded, for example, that his analysis could not

² The actual analysis apparently involves "flattening out" three dimensional objects in a photo or video still frame, and thereby determining their actual size by referencing other "known" objects within that same photo or still frame. Mr. Spivack testified that he went to the scene of the robberies to take measurements of several "control" items from the video, and by comparison determined the height of the person in each of the video stills presented at the evidentiary hearing.

determine whether a person was “slouching” more than usual at any given time. Moreover, as an expert in photogrammetry rather than posture or anatomy, this Court finds Mr. Spivack’s is not qualified to opine as to the average “slouch” for purposes of conducting his analysis; much less his opinion concerning the impact of Applicant’s posture on his results. Having had the opportunity to view the video stills, the expert’s report and materials, and the record, this Court is not persuaded that Applicant can be definitively excluded as the assailant in any of the armed robberies. A fact finder could fairly and easily look at each of the video stills and conclude that Applicant is standing up, straight and tall, in the control still, and hunched over in those depicting the robberies.³ In addition to being unable to rule out such a possibility, Mr. Spivack’s analysis fails to convincingly address it.

Further, to the limited extent that Mr. Spivack’s analysis actually touches on the issue of height, it does not meaningfully change the overall equation that was before the jury during their deliberations. As described above in more detail, counsel raised the issues of misidentification and height at trial. The jury heard testimony that the assailant was “between five eight and six foot,” Tr. p. 132, l. 13-15, and that Applicant was “six-one.” Tr. p. 206, l. 17-19. Clearly it dispensed with the height issue in a way that was not favorable to Applicant. This Court finds Mr. Spivack’s analysis fails to clarify the issue beyond what was already presented at trial, and is too tenuous to throw the outcome of the proceeding into question. The jury clearly believed the identifications made by Ms. McCrosky and her mother despite the credibility issues counsel raised. Applicant is not entitled to a new trial for the sole purpose of presenting a “fancier” case. Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998).

³ This conclusion would be entirely logical, as the natural assumption would be that one who is attempting to hide their identity would be hunched over. In fact, the video stills of the robberies appear to depict as much.

Failure to request that Applicant stand up

Applicant has also failed to show prejudice with respect to the allegation that counsel was ineffective in failing to have him “stand up” in front of the jury. As stated above, this Court finds counsel’s focus and trial strategy was objectively reasonable. Counsel also credibly testified that he did not recall the victims for the purpose of asking Applicant to stand in front of them because he did not know what their response would be, and because he did not want to lose last argument.

This Court further finds that Applicant has failed to show prejudice. It appears that the jury saw Applicant standing at least twice. At the evidentiary hearing, Counsel testified that he thought he remembered Applicant standing up at some point before the jury was sworn. The record also reflects counsel asked Applicant to stand during closing argument. Tr. p. 338, l. 13-16. Regardless, as discussed previously, the jury heard testimony as to the issue of height and still found Applicant guilty.

Failure to Cross Examine

Applicant has also alleged counsel was ineffective for failing to cross-examine several witnesses regarding various parts of their testimony. This allegation is entirely without merit. As outlined in the previous sections, counsel credibly testified as to his focus and theory in the case. Judicial scrutiny of counsel’s performance must be highly deferential. Strickland at 689, 104 S.Ct. at 2065. This is also true of counsel’s performance with respect to cross-examination. See Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (the manner and extent of cross-examination should not be second-guessed). Applicant has not met his burden and overcome this burden.

Additionally, Applicant has failed to show any prejudice. Instead, Applicant has merely pointed to witnesses and testimony, and argued counsel should have done more. In order to show prejudice, Applicant must present testimony or evidence to show that but for counsel's purportedly deficient performance, the outcome of the proceeding would have been different. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence). Applicant has not presented any evidence that additional cross-examination would have been fruitful. In keeping with the presumption that counsel rendered reasonably effective performance, this Court will not fill in the gaps of Applicant's burden with speculation.

Applicant's Shoe Size

Applicant argues counsel was ineffective in failing to present any evidence to the jury, including expert testimony, of the fact that the physical description of the perpetrator did not match the description of Applicant as to the comparison of the size of the sneaker imprint of the perpetrator with Applicant's foot and shoe size.

Applicant did not present any evidence at the evidentiary hearing that the shoe imprint did not match his own foot or shoe size. The testimony at the evidentiary hearing was that the State did not conduct any such comparison with respect to size. Accordingly, even assuming counsel was deficient in failing to contest this point,⁴ Applicant has failed to show prejudice. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (failure to investigate

⁴ Such an assumption is not supported by the record, where counsel argued to the jury that they should infer the State's failure to test the footprint against Applicant's shoes and foot size meant that they did not match. Tr. p. 341, l. 22 - p. 342, l. 3.

does not constitute ineffective assistance of counsel when the allegation is supported by mere speculation as to the result). This allegation is therefore denied and dismissed.

Brady Violation

Applicant further alleges the State failed to disclose “the obvious differences in the shoe size of the perpetrator’s shoe print impression taken from the scene in comparison with [Applicant’s] foot/shoe size,” violating Brady v. Maryland, 373 U.S. 83 (1963). This Court finds Applicant has failed to meet his burden.

An individual asserting a Brady violation must demonstrate that evidence is: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused’s guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). Evidence is material if there is a “reasonable probability” that the result of the proceeding would have been different had the information been disclosed. Id. at 44-45, 631 S.E.2d at 73.

Applicant has not presented any evidence that the State failed to make any required disclosure. Further, there is no evidence in the record to support Applicant’s allegation that these purported nondisclosures were material. Applicant has not presented any evidence that the shoe seized by law enforcement was a different size than the print taken at the scene of the robbery. Sergeant Weiner testified at the evidentiary hearing that he did not know the size of the shoe seized from Applicant, and that to his knowledge the footprints collected from the scene of the robbery were never tested against anything by the State.

Motion to Sever

Applicant further alleges counsel was “not adequately prepared for a motion to sever the three incidents into separate trials.”

This Court finds this allegation is entirely without merit. Counsel made a motion to sever the incidents into separate trials. Tr. p. 41, l. 3-17. The Court ruled against counsel's motion. Tr. p. 44, l. 1-15.

The record reflects that Applicant ultimately appealed that issue, and that the South Carolina Court of Appeals issued an opinion affirming the trial court's ruling on the merits. State v. William Anthony Butts, 2014-UP-141 (Ct. App. filed April 2, 2014). Accordingly, this Court finds neither deficiency nor prejudice.

Failure to Prepare

This Court further finds Applicant has failed to meet his burden to prove counsel did not adequately prepare for trial. Counsel said he had two private investigators working on this case at different times, and also reviewed the material provided by Applicant's privately retained investigator. Counsel testified that he went over the discovery with Applicant from Applicant's first attorney. The record reflects that counsel was prepared with seven pretrial motions, ranging from motions to limit introduction of evidence by the State to a motion to sever the charges into separate trials. This Court finds Applicant has failed to present sufficient evidence to overcome the "strong presumption" of effective assistance. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

In any event, Applicant did not offer any evidence or argument as to how counsel's alleged lack of preparation prejudiced him. Therefore, it is merely speculative that counsel's alleged deficient performance was prejudicial to him. See Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). Applicant has not presented any evidence with respect to how additional preparation would have changed the outcome of the proceeding. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (finding PCR judge erred in finding counsel

ineffective in preparing respondent's case where respondent failed to show how his counsel's lack of preparation prejudiced him given respondent did not 'present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for trial."). This allegation is therefore denied and dismissed.

ALL OTHER ALLEGATIONS

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

[Signature follows]

CONCLUSION

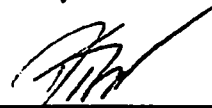
Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCF; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

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

AND IT IS SO ORDERED this 29 day of July, 2016.



R. KNOX MCMAHON
Presiding Judge
Thirteenth Judicial Circuit

 _____, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2301027

FILED-CLERK OF COURT
GREENVILLE
PAUL B. WICKENSIMER
2016 AUG 9 PM 2:54

William A Butts vs. South Carolina State Of

CHECK ONE:

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

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter: _____

PRESIDING JUDGE - R Knox McMahon

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

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29603
Peter S Smith ,

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Patrick Lowell Schmeckpeper PO Box 11549
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ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court