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JUL 16 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Diane Schafer Goodstein, Circuit Court Judge

DESHAWN LEE POWELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002099

APPENDIX

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M. HINDS ON DIRECT

1 Q. Okay, and did you meet with him again after you got dis-
2 covery?

3 A. Yes.

4 Q. Okay.

5 A. I have that I met with him fourteen times.

6 Q. Okay. What was your understanding of -- it was a serious
7 case?

8 A. Say that again.

9 Q. From the evidence you had gotten, what was your view of
10 the case?

11 A. Well, I knew it was a serious charge. They believed that
12 -- well, there were two theories actually. One was that he
13 was angry because he wasn't being let in the house or someone
14 else was in the house or they had let someone else in. Se-
15 condary to that was . . .

16 Q. Let me stop you there. Was there any -- to the best of
17 your recollection was there anything presented at trial about
18 potential drugs?

19 A. There were no drugs found in the house but there were
20 several witnesses who said that the house was a drug house.

21 Q. I apologize for the form of that question. In dealing
22 with Mr. Powell . . .

23 A. There was no evidence of that.

24 Q. Okay.

25 A. Of drug use by Mr. Powell.

M. HINDS ON DIRECT

1 Q. Okay. I want to talk a little bit about the DNA results.
2 There was -- was there any DNA found that was connected to
3 Mr. Powell?

4 A. There was not, and I was the one that made them look at
5 that or go through that. There were several things that had
6 been taken during the arrest that had not been tested, and I
7 didn't understand that.

8 Q. Okay. Was there any item that came back with DNA of
9 someone other than Mr. Wiley, the victim, or anything of Mr.
10 Powell?

11 A. I don't believe there was anything linking Mr. Powell
12 through DNA, but there may have been a link to someone else.

13 Q. Okay. Did you do any follow-up investigation as to the
14 person?

15 A. I would have no way of knowing who that was.

16 Q. When Mr. Powell proceeded to trial it was only on the
17 murder charge, is that right?

18 A. Yes.

19 Q. What happened with the weapons charge?

20 A. Actually, as I told Mr. Powell, it was dismissed. Mr.
21 Powell was actually aware of it before I was, I think. Ap-
22 parently he had been told before I got the stuff in or
23 anything, and I wanted to double check to make sure it was
24 gone.

25 Then about that time I was told the State had dismissed

M. HINDS ON DIRECT

1 it. I think he thought at that time that I was withholding
2 things from him but the charge was dismissed I believe in
3 January, or maybe there was not a true bill, for that matter.

4 So I had no way of knowing at that point in time there
5 was a dismissal, but when I became aware of it I went to the
6 Solicitor and his explanation was that they didn't really care
7 about that charge and it was all a matter of the murder charge
8 they were looking at.

9 Q. Okay. And that was sometime prior to the trial?

10 A. Yes.

11 Q. Do you recall speaking to witnesses?

12 A. I spoke to numerous witnesses.

13 Q. Okay. Do you recall who you spoke with?

14 A. I probably can -- yeah, I spoke with his mom and I spoke
15 with his brother. I spoke with Mr. Frazier. I spoke with
16 Daryl Jones several times. I spoke to -- I tried to find Todd
17 but was not able to locate him.

18 Again Maurice Tucker, his brother, his cousin. We talked
19 to someone named Doris Dash. I didn't go back to my file but
20 I believe those are the ones I talked to off the top of my
21 head right now.

22 Q. Okay. Touching on his brother briefly, why -- what was
23 your trial strategy behind not calling his brother to testify?

24 A. Well, first off, I thought we had difficult with Mr.
25 Tucker because my investigator went to talk with him and he

M. HINDS ON DIRECT

1 basically said he wasn't coming to the trial and there was no
2 need to come asking him questions.

3 I believe he had a change of heart later. I think as it
4 got closer to trial -- I met with him on January 26 of 2012.
5 Basically in terms of trial strategy what it ended up coming
6 down to was that there were a lot of potentially good things
7 on our side.

8 There was no DNA, no fingerprints. There was absolutely
9 nothing linking Mr. Powell to that murder other than a fight
10 they had prior to that.

11 Mr. Tucker could not tell me anything other than when he
12 got there he didn't see him. I felt that our strongest posi-
13 tion was to move forward without him and for that reason I did
14 not call him as I didn't think Mr. Tucker sounded strong enough
15 as a witness to help his brother.

16 Then I tried to find the person that was with him in the
17 yard that day but that person was in New York and I was not
18 able to get in contact with him. Perhaps if another relative
19 had been able to verify that I may have done otherwise but I
20 felt it was more important to have the closing argument last.

21 Q. Did you and Mr. Powell discuss the statement that he gave
22 to law enforcement?

23 A. We did.

24 Q. Okay. Did you all talk about the circumstances when he
25 was actually giving the statement, where he was and those

M. HINDS ON DIRECT

1 things?

2 A. Yes, I knew exactly where he was. I had been in that
3 room before.

4 Q. Okay. Do those rooms have cameras in them?

5 A. That room does, yes.

6 Q. Did you get any indication that the camera was on?

7 A. No.

8 Q. All right. Were those cameras ever on?

9 A. They are not useful unless they ^{specifically} ~~are/wanting~~ to show the
10 circumstances of someone giving a statement or whatever, but
11 if they are just talking to someone they don't always turn
12 it on.

13 Q. Okay. Did you have any indication that they were on from
14 talking to anyone?

15 A. No.

16 Q. No indication it may have been on at that time?

17 A. No.

18 Q. Do you have a copy of the transcript?

19 A. Yes.

20 Q. Would you turn to page 356?

21 MR. WALLER: Your Honor, do you have a copy?

22 THE COURT: I do.

23 BY MR. WALLER:

24 Q. Beginning about halfway down page 356 and continuing to
25 page 357, the Solicitor discusses -- what's the idea, that

M. HINDS ON DIRECT

1 someone else had come in after the fact and ransacked the
2 house and stole clothing off the victim?

3 Was there any evidence presented during the trial that
4 would give rise to that, as he went through that statement?

5 A. Not that I'm aware of. The house obviously was ransacked
6 but nobody knows what was done.

7 Q. Okay. No indication that someone had come in that tested
8 positive or someone had come in after the fact and taken his
9 shorts or something else?

10 A. Correct.

11 Q. Okay. What was the trial strategy behind not reacting to
12 those comments?

13 A. I wanted the jury to think somebody could have come in
14 after the fact.

15 Q. Okay.

16 A. Not after the fact of his death but after the point in
17 which Mr. Powell was no longer there.

18 Q. Okay. If you would turn to page 366? Two thirds of the
19 way down, Your Honor.

20 Mr. Powell and Dshop had been at a club earlier that
21 night?

22 A. Yes.

23 Q. Dshop testified that Mr. Powell did not have a weapon on
24 him because they had gone through metal detectors and security
25 at the club?

M. HINDS ON DIRECT

1 A. Yes.

2 Q. The Solicitor about two thirds of the way down on page
3 376 and continuing on to 377 starts discussing violence in
4 Orangeburg clubs, and it is not likely that people wouldn't
5 have weapons because of all the violence that occurred in the
6 clubs.

7 What was the strategy behind not objecting to that tes-
8 timony or that argument?

9 A. According to the club Mr. Powell was in, I wanted the
10 jury to listen to the part where he could not have had weapons
11 because he would not have gotten into the club.

12 Q. Okay. That was the only evidence regarding -- the only
13 testimony regarding the club and that he couldn't have had a
14 weapon because he went in the club and was frisked or in a
15 metal detector or however it was at the time?

16 A. Correct.

17 Q. Had they both gotten rides there?

18 A. I know they went together. I do not -- it seems to me
19 that they had gotten a ride there with somebody else. I
20 cannot tell you a name, and that person had dropped them off
21 after they left the club.

22 Q. The jury had several questions. Is that your understand-
23 ing or your recollection?

24 A. Honestly I don't remember. I'm sure they did. I know
25 they had at least one.

M. HINDS ON DIRECT

1 Q. Okay.

2 MR. WALLER: Beg the Court's indulgence.

3 THE COURT: All right.

4 (Brief pause)

5 BY MR. WALLER:

6 Q. Did you make any pretrial motions?

7 A. I honestly don't remember. I'm not sure at this time
8 but I must have. I'm not going to elaborate on it because I
9 don't remember off the top of my head.

10 Q. Do you think you made a motion to sequester witnesses?

11 A. Oh, yes. That's done in every case.

12 Q. Okay. Do you have a specific recollection of whether
13 you did in this case?

14 A. You are asking me if I can sit here remembering -- no. I
15 tell you it is a motion I usually do make.

16 Q. Okay. No further questions. Please answer any questions
17 Mr. Neely has.

18 THE COURT: All right, Cross Examination.

19 MR. NEELY: Thank you, Your Honor.

20 CROSS EXAMINATION

21 BY MR. NEELY:

22 Q. Just kind of going over some background information, Ms.
23 Hinds.

24 When were you admitted to the Bar in South Carolina?

25 A. In 1996.

MS. HINDS ON CROSS

1 Q. In 1996, and since then how much of your practice has
2 been criminal?

3 A. One hundred percent.

4 Q. Since 1996?

5 A. Uh hm. Since my first job.

6 Q. Okay, and did you ever tell Mr. Powell that the weapon
7 wouldn't come in in his murder case because possession of a
8 a weapon in the commission of a violent crime was dismissed?
9 That charge was dismissed?

10 A. To the contrary. He assumed from that fact that the se-
11 condary charge was dismissed that the case would go away. We
12 had several, probably five or six, conversations where I ex-
13 plained to him that was not the case and that they were going
14 forward.

15 Q. And did you have any bond hearings for Mr. Powell?

16 A. No. I can tell you why.

17 Q. Because he was on trial on a murder charge at the time?

18 A. Correct.

19 Q. And is that why you didn't move for a bond hearing?

20 A. I was one hundred percent confident that he would not
21 get bond.

22 Q. Did you ever discuss the potential of a plea deal with
23 Mr. Powell?

24 A. Yes.

25 Q. What was that discussion?

MS. HINDS ON CROSS

1 A. The offer was to plead guilty to -- excuse me. He had
2 two counts of murder that would be reduced to voluntary man-
3 slaughter, and the offer was to plead guilty to both of them
4 and it would be thirty years concurrent.

5 Q. So it was a package deal?

6 A. Yes.

7 Q. Did you represent on the other charge as well?

8 A. Yes.

9 Q. What's the status of the other murder charge?

10 A. The status of the other murder charge is that I believe
11 they have lost contact with their main witness. Unfortunately,
12 right before Mr. Powell picked up this charge they renewed
13 their efforts so that actually they've found their witness
14 again and actually had date for it to go forward, but Mr.
15 Sorenson actually decided that he had a stronger case with
16 this one and went forward with this.

17 Q. What's the status of that case now?

18 A. . .

19 MR. WALLER: Your Honor, I'm going to object. I'm not
20 sure where he's going with this.

21 MR. NEELY: I'll withdraw it, Your Honor.

22 THE COURT: Okay.

23 BY MR. NEELY: 2

24 Q. Did you discuss with Mr. Powell what his version of what
25 happened was?

MS. HINDS ON CROSS

1 A. Yes, sir.

2 Q. And what was his version of what happened?

3 A. Basically that he was not there, he wasn't there at all.

4 But ultimately his version of it was pretty much -- it was
5 that he had had a disagreement, a physical fist fight, and
6 he left after that.

7 That he left and whatever happened was after he left
8 or once he left.

9 Q. And at trial, the evidence came in that reflected the
10 scene consistent with what he had told you?

11 A. Correct.

12 Q. Did you want to call him as a witness?

13 A. First off, he had contended to me that he did not wish
14 to testify, and that was a choice that remains with him and
15 him only.

16 But I did feel that it was probably the best way for him
17 not to because he had nothing to add other than saying that I
18 didn't do it, and it occurred to me after that that he would
19 be taking a chance.

20 Q. Mr. Powell testified that you didn't interview Daryl Jones
21 and that Daryl Jones had indicated somebody had robbed him
22 prior to then that same night.

23 Do you recall that interview?

24 A. I talked to Daryl Jones several times but I did not have
25 that conversaton with him.

MS. HINDS ON CROSS

1 Q. You never indicated that conversatoin took place?

2 A. No.

3 Q. When you spoke of the DNA being somebody else, that DNA
4 didn't come back to somebody that was identified?

5 A. Correct.

6 Q. Did your -- there is testimony you hired an investigator
7 in the case. Is that accurate?

8 A. Yes.

9 Q. And did your investigator try to find witnesses that you
10 were not given names for?

11 A. Yes.

12 Q. Was there any other witnesses that could have come to
13 testify against the Defense?

14 A. The problem was that the murder took place after that
15 time frame so anybody that was at the club and would have seen
16 him at the club -- Daryl put him at the club. He was at the
17 club, and that was not an issue.

18 Q. The fact that he was at the club wouldn't have assisted
19 his case?

20 A. No. The fact that after he left the club was the time
21 that was important. After he had left the club.

22 Q. And you felt that having the last argument was more im-
23 portant than establishing the time he was at the club?

24 A. Absolutely.

25 Q. How much time would you say you spent preparing for his

MS. HINDS ON CROSS

1 case?

2 A. A lot of time is all I can tell you. I can't give you a
3 total of hours or whatever. A lot of time was put into this
4 case.

5 Q. And there was a question about pretrial motions. Was
6 there a Jackson v Deno motion?

7 A. I'm sure there was.

8 Q. And the only statement given to law enforcement by Mr.
9 Powell was that he wasn't there and didn't know anything
10 about it.

11 A. That's pretty much it, yes, as I understand it.

12 THE COURT: What was the last part of your question? He
13 wasn't there and . . .

14 BY MR. NEELY:

15 Q. Isn't it true Mr. Powell gave a statement saying he wasn't
16 there and didn't know anything about the incident?

17 A. Yes.

18 Q. And you already testified that the statements made by the
19 Solicitor in his closing argument you thought helped your case?

20 A. Yes.

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

22 THE COURT: Redirect?

23 MR. WALLER: I don't believe I have any further questions.

24 THE COURT: Just to be sure that I'm clear, I've got just
25 a couple of questions.

MS. HINDS, Q.: by the Court

1 And after that I will allow questions from anybody else they
2 may have.

3 THE COURT: As I understand it, Mr. Powell's position orig-
4 ionally was that he was not at the location where the victim
5 was murdered?

6 A. Correct.

7 THE COURT: And he was at the club all night, or was at
8 the club at the time of the event but he was at the location
9 initially?

10 A. Yes.

11 THE COURT: And in your interview did that change?

12 A. No.

13 THE COURT: And the person named Daryl . . .

14 A. Jones.

15 THE COURT: Daryl Jones -- he was with him at the club?

16 A. Yes, maam.

17 THE COURT: And did he leave with him?

18 A. Yes, they both went to the club together and left to-
19 gether and were dropped off together.

20 THE COURT: And where were they dropped off?

21 A. At Mr. Powell's house or where he was staying at the time.

22 THE COURT: All right, and did your client confirm to you
23 that that had happened?

24 A. Yes.

25 50

MS. HINDS, Q.: by the Court

1 Q. And did he confirm he went to Mr. Wiley's house?

2 A. Yes.

3 Q. He told you that?

4 A. Yes.

5 Q. Okay, and there was one statement given to law enforce-
6 ment? Was one oral statement to law enforcement?

7 A. Correct.

8 Q. That he did not murder Mr. Wiley?

9 A. Something to that effect.

10 Q. Something to that effect.

11 (Brief pause)

12 THE COURT: I just wanted to clear that up. I thought that
13 is what I heard him say.

14 If that prompts some questions or if either of you have
15 any more questions that's perfectly fine.

16 MR. WALLER: Your Honor, I don't have any further ques-
17 tions.

18 THE COURT: Okay.

19 DEFENDANT: I may have some questions.

20 THE COURT: Why don't you speak to Mr. Waller about that?

21 DEFENDANT: I want to ask her . . .

22 THE COURT: Do you want him to ask a question?

23 DEFENDANT: Right.

24 (Brief pause)

25 REDIRECT EXAMINATION

MS. HINDS ON REDIRECT

1 BY MR. WALLER:

2 Q. You testified that the person who left the DNA, that
3 person never got named?

4 A. That's correct. In other words it was not a match to
5 Mr. Powell but there was some DNA there.

6 Q. Okay.

7 A. It wasn't Mr. Powell's and it wasn't Mr. Wiley's.

8 Q. Ms. Hinds, let me show you what seems to be marked as Ap-
9 plicant's Exhibit 2, and I would ask if you've ever seen that
10 before?

11 A. Okay, I guess that I have because I did know about that,
12 yes.

13 Q. Okay.

14 A. I was forgetting but that is on the DNA.

15 MR. WALLER: Beg the Court's indulgence.

16 THE COURT: Sure.

17 (Brief pause)

18 Q. So there was some evidence that the DNA was not a match
19 to your client and you spoke with Doris Dash, is that correct?

20 A. Yes.

21 Q. Do you have any notes regarding your investigator's talk-
22 ing to Doris Dash?

23 A. I don't know if I do or not.

24 THE COURT: Do you want to admit that?

25 MR. WALLER: I would, Your Honor.

MS. HINDS ON REDIRECT

1 THE COURT: Okay, sure.

2 (SLED letter admitted as Applicant's Exhibit 2)

3 THE COURT: Let's take a short break at this time.

4 (Whereupon, the Court took a brief recess, after which
5 the matter continued)

6 (Ms. Hinds resumed the witness stand)

7 THE COURT: You may continue.

8 BY MR. WALLER:

9 MR. WALLER: Thank you, Your Honor.

10 Q. Ms. Hinds, I'm going to hand you a document. Does that
11 refresh your memory as far as your investigation or your inves-
12 tigator's investigation regarding the DNA results?

13 A. Yes.

14 Q. I believe you'd handed it to me first. What is your re-
15 collection to her role in this case, if you have any recol-
16 lection at all in the Dash-DNA results?

17 A. It doesn't change anything I was arguing which was basic-
18 ally that there was nothing there to support a conviction of
19 Mr. Powell.

20 It did not affect our position that although Mr. Powell
21 allegedly was the last one to see him, that after that there
22 is nothing to show who else came there or what people came to
23 the house after he left.

24 It had nothing to do with what the State was trying to
25 show against Mr. Powell or the murder.

MS. HINDS ON DIRECT

1 People could have come in the house after he left to harm
2 the man or to steal drugs or whatever was there. That has no-
3 thing to do with Mr. Powell, nothing to link Mr. Powell to the
4 murder.

5 Q. Okay, did you have any indication that law enforcement
6 had followed up with Ms. Dash?

7 A. No.

8 Q. Did you ever contemplate calling Danny McDaniel to testify
9 who interviewed Ms. Dash?

10 A. No.

11 Q. No further questions.

12 THE COURT: All right. Yes, sir.

13 MR. NEELY: Just briefly, Your Honor.

14 THE COURT: All right.

15 RE-CROSS EXAMINATION

16 BY MR. NEELY:

17 Q. Was there any testimony elicited from Ms. Dash or the
18 investigator about Ms. Dash that would have helped your case?

19 A. Correct.

20 Q. And was that a part of your strategy?

21 A. Very much so.

22 Q. That's all I have.

23 THE COURT: All right, thank you.

24 Now, is the document -- is it in evidence or was it marked
25 for identification?

1 MR. WALLER: I'm not sure.

2 THE COURT: Is there any objection?

3 MR. WALLER: It was shown to Ms. Hinds to refresh her re-
4 collection.

5 MR. NEELY: No objection.

6 THE COURT: It is admitted.

7 (Applicant's Exhibit 2 previously introduced)

8 MR. WALLER: So Applicant's Exhibit 2 is in. Thank you.

9 THE COURT: All right. Anything further for Ms. Hinds?

10 MR. NEELY: No, Your Honor.

11 MR. WALLER: Nothing further.

12 THE COURT: All right. Thank you.

13 (Witness excused from the stand)

14 THE COURT: Anything further in this matter?

15 MR. WALLER: No, Your Honor.

16 MR. NEELY: Nothing further. No further witnesses.

17 THE COURT: Thank you.

18 All right, I will take the matter under advisement.

19 MR. WALLER: Your Honor, I've got a couple of things I
20 would like to just point out.

21 THE COURT: Sure, Mr. Waller.

22 MR. WALLER: On the allegation of ineffective assistance
23 of appellate counsel, I would just point out to Your Honor
24 that on pages 14 and 15 of the trial transcript there was no
25 jury selection or pre-trial motions which are usual for that

1 time and also . . .

2 THE COURT: You asked about Jackson/Deno and sequestration
3 of witnesses.

4 MR. WALLER: And also the Jackson v Deno was actually taken
5 mid-trial but a great portion of that was also missing. In the
6 transcript there was some audio. It was Ms. Harrydot Walker who
7 is now retired, and I apologize for that.

8 But the Appellate Defender would have had thirty days from
9 when the transcript was produced before those tapes could be
10 destroyed but nothing was done as to that.

11 Your Honor, I would also -- just to point out, I asked
12 Mr. Powell about some of the jury questions. The jury asked
13 some questions during deliberations, and I point out that on
14 page 416 . . .

15 THE COURT: Okay.

16 MR. WALLER: . . . and it goes on for a couple of pages
17 there. I would ask the Court to review those.

18 THE COURT: Let me tell you that I would like to do that
19 now.

20 MR. WALLER: Yes, maam.

21 (Brief pause)

22 THE COURT: Okay.

23 MR. WALLER: Your Honor, I just wanted to point that out,
24 and finally there were two cites that I have regarding the
25 Solicitor's closing argument that I would ask the Court to

1 consider.

2 THE COURT: Let me stop you. This thing with regard to
3 Appellate Counsel and the PCR Appellate Counsel, the concern
4 is that the Motion for sequestration was not preserved and it
5 is not in the transcript.

6 MR. WALLER: Yes, maam, as well as the other pre-trial
7 motions.

8 THE COURT: All right.

9 MR. WALLER: Including jury selection.

10 THE COURT: Okay.

11 MR. WALLER: And there was a portion of the Jackson v
12 Deno, specifically Investigator Shumpert's portion of it, that
13 is not there in pages 14 and 15, so I am not sure what it con-
14 tained.

15 THE COURT: Okay. All right.

16 Tell me what is the alleged prejudice for those pages
17 and sections not being a part of the transcript?

18 MR. WALLER: Your Honor, we don't know what steps or what
19 efforts that Appellate Counsel made to obtain them. There
20 is obviously a time limit on that and the transcript was pro-
21 duced without certain portions.

22 Appellate Counsel should have reviewed the transcript and
23 requested those pages during that time period before the tapes
24 could be destroyed.

25 THE COURT: Okay.

1 MR. WALLER: That's it, Your Honor, and we just wanted to
2 make sure we pointed that out for review. That's the allega-
3 tion.

4 THE COURT: Got it.

5 MR. WALLER: With respect to the Solicitor's closing argu-
6 ments, Ms. Hinds testified as to her strategies, and we would
7 ask that you make a factual ruling as to whether that was a
8 valid trial strategy or not in a PCR setting.

9 THE COURT: All right.

10 MR. WALLER: We would also ask you to consider State ver-
11 sus New, 526 Southeastern Second 237. That's a case from 1999
12 and that case cites State versus Durgan, 212 Southeastern Second
13 587, a 1975 Supreme Court case, and it outlines what a Soli-
14 citor is allowed to go into in their closing arguments.

15 They have to limit their arguments to facts in evidence
16 and reasonable inferences drawn or that can be drawn from those
17 facts.

18 THE COURT: Got it. Yes.

19 MR. NEELY: I just want to point out in State v New and
20 State v Durgan they were both confirmed and the Court held there
21 was not prejudice to overcome such comments in closing argu-
22 ments.

23 MR. WALLER: Not prejudice over comments but just com-
24 ments in closing arguments such as to find prejudice in com-
25 ments in trial court situations.

1 THE COURT: Got it. Okay.

2 All right. I'm going to ask you for proposed Orders, please,
3 and I will ask for them in thirty days. I know you are busy and
4 I will ask you to please consult with each other.

5 If you all require an extension all I need you to do is
6 to contact my Law Clerk. Email and let him know so we can keep
7 up with what you anticipate.

8 -----END OF REQUESTED TRANSCRIPT OF RECORD-----

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CERTIFICATE

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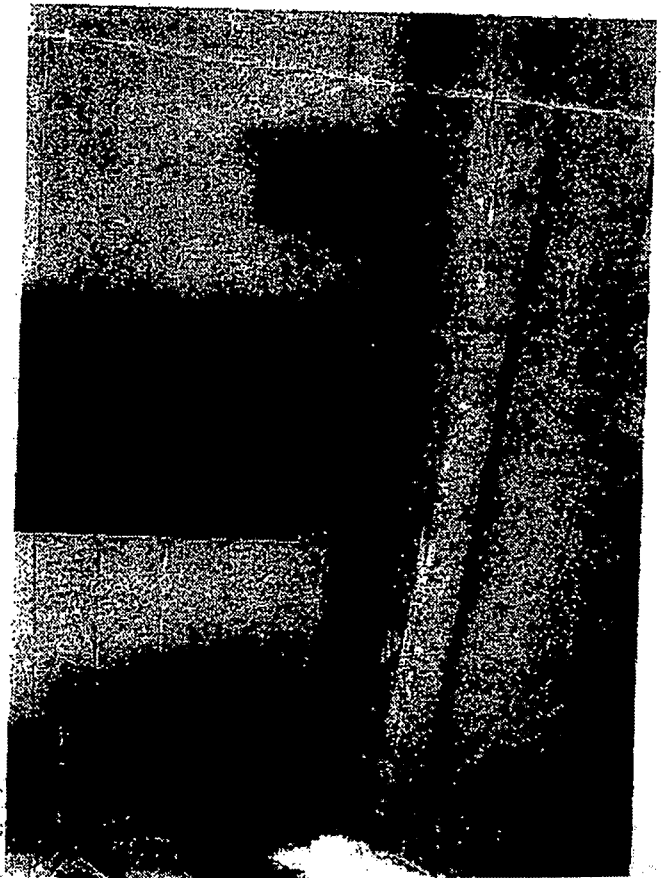
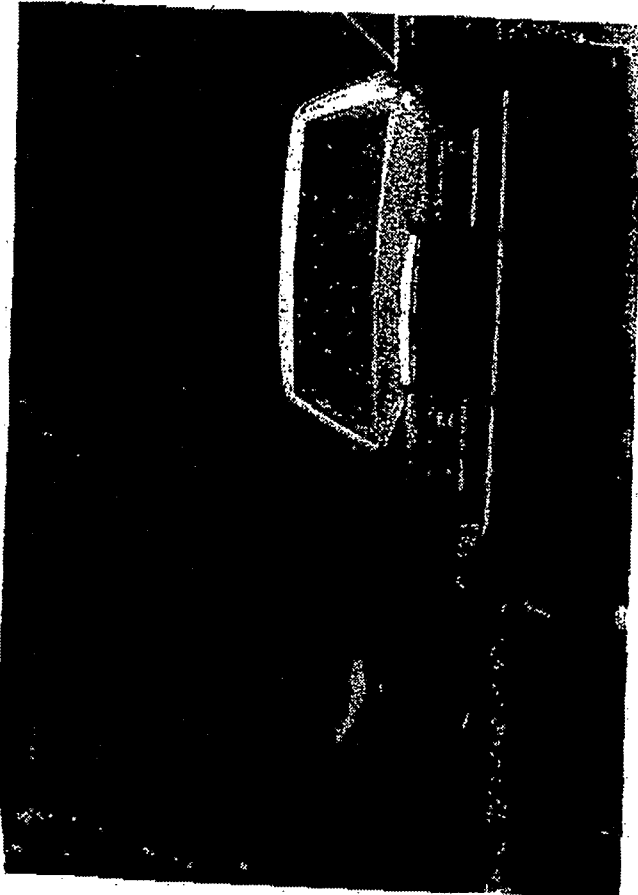
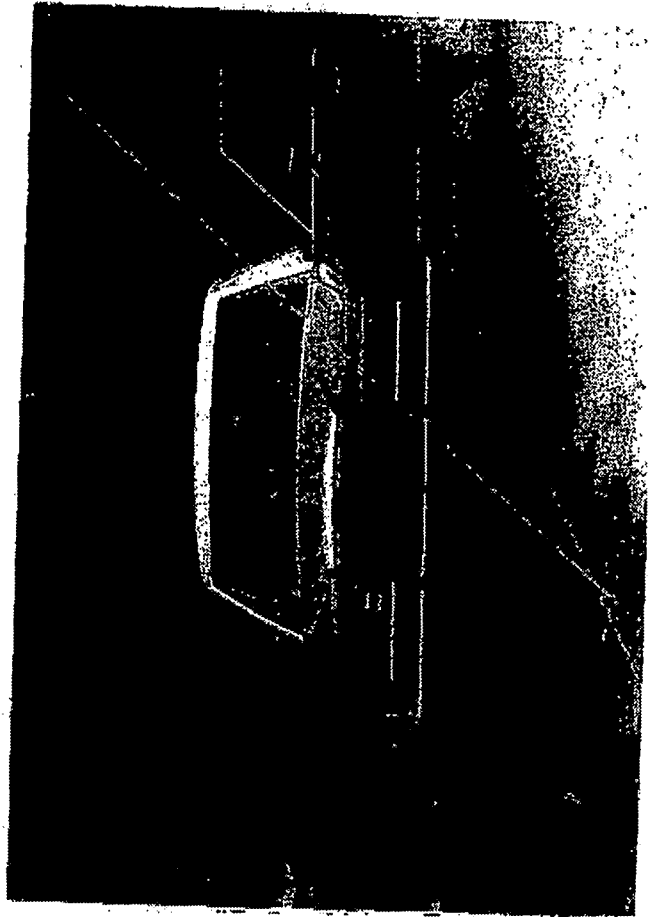
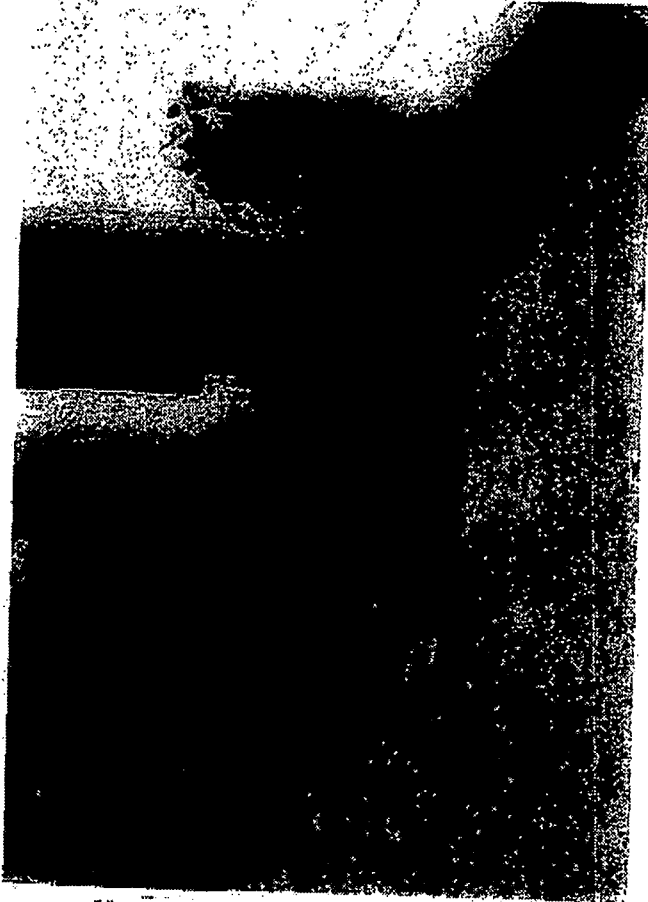
I, HARRIET P. BENNETT, Court Reporter for South Carolina Court Administration, hereby certify that the foregoing Transcript was prepared from the records of Heather Landry, to the best of my ability, having been heard in the Court of Common Pleas for Orangeburg County on October 27, 2016.

FURTHER, I certify that I am neither of kin nor counsel to any party to this matter, nor do I have any interest in the same.



February 10, 2018

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SOUTH CAROLINA LAW ENFORCEMENT DIVISION FORENSIC SERVICES LABORATORY REPORT

NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

March 30, 2012

Jared Kittrell
Orangeburg County Sheriff's Office
P.O. Box 9000
Orangeburg, SC 29116

Agency Case Number: 2010013616
SLED Case Number: L10-12427

Dear Jared Kittrell,

The Short Tandem Repeat (STR) PCR DNA profile developed from item 20 was compared to the Combined DNA Index System (CODIS). This profile matches the STR PCR DNA profile developed from DNA Database Offender Doris Dash, South Carolina SID# SC00340862.

This information is provided for investigative purposes only. If the suspect is charged, an additional biological specimen must be submitted for court purposes.

This search was conducted by Rhonda R. Fields, South Carolina Law Enforcement Division.

Sincerely,

Rhonda R. Fields
DNA Database Unit



Honorable Edgar W. Dickson. The jury found Applicant guilty of the lesser included offense of voluntary manslaughter. Judge Dickson sentenced Applicant to thirty years' imprisonment.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders¹ brief. Applicant also filed a *pro se* brief. The South Carolina Court of Appeals dismissed Applicant's appeal after review on July 01, 2015. State v. Powell, Op. No. 2015-UP-379 (S.C. Ct. App. filed July 01, 2015). Remittitur was issued to the lower court on August 18, 2015.

II. ALLEGATIONS

Applicant did not allege any grounds against Douglas Mellard. Against trial counsel, Applicant alleged the following grounds in his application:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to properly cross-examine witnesses
 - b. Counsel failed to investigate circumstances surrounding death of victim
 - c. Counsel failed to develop a defense regarding weapon
 - d. Counsel failed to investigate or develop all mitigating evidence
 - e. Counsel failed to object to irrelevant evidence
2. Ineffective Assistance of Appellate Counsel
 - a. Appellate counsel failed to obtain a complete transcript to review

III. SUMMARY OF FACTS

Applicant was convicted of murder for stabbing a sixty-nine year old man, Arthur Riley, to death. A witness testified he saw the Applicant beating the victim 'to deaf' at the victim's home. App. p. 81-82. Witnesses testified they saw Applicant at a club before seeing Applicant again at the victim's residence later that evening. App. p. 67. Witnesses testified to leaving the scene of the murder when the fight started. App. p. 221. Law enforcement found a bloody knife, the DNA of which was a match for the victim, on Applicant's porch. App. p.196.

¹ Anders v. California, 386 U.S. 738 (1967).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process" that the proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this first prong, the proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel 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 in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 688.

This Court finds trial counsel properly prepared for Applicant's trial. She interviewed multiple witnesses. Trial counsel elucidated valid trial strategies and the reasoning behind her decisions. "A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record." Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Strickland itself recites that there are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. 466 U.S. at 689. When counsel focuses on some issues to the exclusion of others, there is a strong presumption of doing so for tactical reasons rather than sheer neglect, Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1,5, 157 L.Ed.2d 1 (2003). This Court finds trial counsel rendered adequate assistance and exercised professional judgment in all her decisions at trial. This Court dismisses Applicant's application for the reasons set out below:

A. Ineffective Assistance of Counsel

At the evidentiary hearing, Applicant claims he did not remember whether trial counsel discussed the State's evidence against him. Applicant testified he met with trial counsel's investigator and discussed potential witnesses and alibis. Trial counsel testified Applicant was only able to give the investigator witness names and an alibi from a party that occurred prior to the murder. At trial, it was uncontroverted that Applicant was at a party prior to the murder. Applicant's half-brother, Maurice Tucker, testified at the evidentiary that he did not see the murder weapon, which was found at Applicant's home on the porch, when he entered the home

that morning. Law enforcement found the knife later that day on Applicant's front porch. Trial counsel testified she chose not to introduce the testimony because she didn't believe it added enough weight to the argument to trump having the final closing argument. This Court finds plea counsel's testimony credible in this regard.

Based on the trial transcript, as well as the testimony presented, this Court finds trial counsel appropriately investigated, cross-examined, and objected during the trial. In this regard, this Court finds Applicant's allegations meritless.

After a thorough review of the record, this Court finds Applicant was adequately and professionally represented by trial counsel. This Court finds trial counsel appropriately based their investigation, questioning, and arguments around a valid trial strategy. This Court finds Applicant has failed to satisfy his burden of proving the alleged deficiency. This Court also finds that Applicant has failed to prove how he was prejudiced by any of trial counsel's actions. Accordingly, Applicant has failed to satisfy his burden of proving ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

B. Ineffective Assistance of Appellate Counsel

This ground was not fully argued at the evidentiary hearing. There were a few pages missing from the transcript obtained by appellate counsel, Kathrine H. Hudgins, Esquire. Ms. Hudgins presented an Anders brief to the Court of Appeals. Applicant also filed a *pro se* brief. The Court must fully review the record, separate from appellate counsel and Applicant's briefs. This review defeats any potential prejudice Applicant might have faced from an inadequate review of his case by appellate counsel. "The court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Anders v. State of Cal., 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493 (1967). This Court finds

Applicant has failed to satisfy his burden of proving the alleged deficiency. This Court also finds that Applicant has failed to prove how he could have been prejudiced by any of the missing pages in the trial transcript. Accordingly, Applicant has failed to satisfy his burden of proving ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

C. 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, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

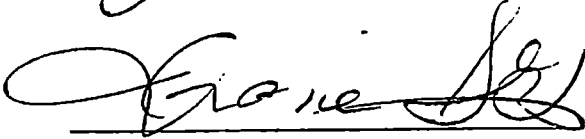
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this 9 day of January, ~~2016.~~ ²⁰¹⁷ *DS*



DIANE GOODSTEIN
 Presiding Judge
 1st Judicial Circuit

St George, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)
)
 Deshawn L. Powell, #350880,)
)
 Applicant,)
 vs.)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 1ST JUDICIAL CIRCUIT

MOTION PURSUANT TO RULE 59(e)
 SCRPC, TO AMEND

Case No. 2015-CP-38-1052

FILED FOR RECORD
 WINIFRED CLARK
 CLERK OF COURT
 ORANGEBURG, SC
 MAY 16 2018
 P 3 19

YOU WILL PLEASE TAKE NOTICE that the Applicant, Deshawn L. Powell, by and through his undersigned counsel, hereby gives notice of his intent to move and does so move the Court pursuant to Rule 59(e), SCRPC, for an Order of the Court to alter or amend its prior Order signed January 9, 2017 and served on counsel by US mail, on January 24, 2017.

The Applicant filed a timely application for post-conviction relief (PCR) on August 24, 2015. In his application, and subsequent amendments, Applicant indicated various claims of ineffective assistance of counsel. Specifically, Applicant raised six (6) issues that he intended to present to the court during the evidentiary hearing.


The Applicant contends that despite the issuance of the Order of Dismissal, said Order of Dismissal does not contain specific findings of fact and conclusions of law regarding each of the claims presented at the evidentiary hearing, as required by S.C. Code Ann. §17-27-80.

Applicant respectfully requests this Court to amend its prior Order pursuant to Rule 59(e), SCRPC to include findings of fact and conclusions of law for each of the claims ineffective assistance of counsel as required by S.C. Code Ann. §17-27-80.

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For the foregoing reasons, Applicant requests that the Court withdraw or amend its previous Order and issue a new Order the above requested findings and rulings.

Respectfully submitted,

By:  _____

Jonathan D. Waller
Giese Law Firm, LLC
1315 Blanding Street
Columbia, South Carolina 29201
Telephone: 803-708-6767
Facsimile: 803-708-6769
E-mail: jwaller@thegieselawfirm.com

ATTORNEY FOR THE APPLICANT

February 1, 2017

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

Deshawn L. Powell, #350880,)

2015-CP-38-1052

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

FILED FOR RECORD
WINNIE B. CLARK
2017 SEP - 8 A 11: 49
CLERK OF COURT
ORANGEBURG, SC.

This Court convened an evidentiary hearing into the matter on October 27, 2016, at the Dorchester County Courthouse. Applicant was present at the hearing and represented by Jonathan D. Waller, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Margaret Hinds, Esquire (hereinafter "trial counsel") was present and testified. This Court had the opportunity to listen to the testimony of Applicant and trial counsel. This Court had before it a copy of the trial transcript, the records of the Orangeburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter. This Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was indicted at the February 2011 term of the Court of General Sessions for Orangeburg County for murder (2011-GS-38-0015). Applicant was represented by Margaret Hinds, Esquire and Douglass Mellard, Esquire, sat with trial counsel as second chair. Applicant proceeded to trial before the

ATTEST, TRUE COPY
Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

Honorable Edgar W. Dickson. The jury found Applicant guilty of the lesser included offense of voluntary manslaughter. Judge Dickson sentenced Applicant to thirty years' imprisonment.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders¹ brief. Applicant also filed a *pro se* brief. The South Carolina Court of Appeals dismissed Applicant's appeal after review on July 01, 2015. State v. Powell, Op. No. 2015-UP-379 (S.C. Ct. App. filed July 01, 2015). Remittitur was issued to the lower court on August 18, 2015.

II. ALLEGATIONS

Applicant did not allege any grounds against Douglas Mellard. Against trial counsel, Applicant alleged the following grounds in his application:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to properly cross-examine witnesses
 - b. Counsel failed to investigate circumstances surrounding death of victim
 - c. Counsel failed to develop a defense regarding weapon
 - d. Counsel failed to investigate or develop all mitigating evidence
 - e. Counsel failed to object to irrelevant evidence
2. Ineffective Assistance of Appellate Counsel
 - a. Appellate counsel failed to obtain a complete transcript to review

III. SUMMARY OF FACTS

Applicant was convicted of murder for stabbing a sixty-nine year old man, Arthur Riley, to death. A witness testified he saw the Applicant beating the victim 'to death' at the victim's home. App. p. 81-82. Witnesses testified they saw Applicant at a club before seeing Applicant again at the victim's residence later that evening. App. p. 67. Witnesses testified to leaving the scene of the murder when the fight started. App. p. 221. Law enforcement found a bloody knife, the DNA of which was a match for the victim, on Applicant's porch. App. p.196.

¹ Anders v. California, 386 U.S. 738 (1967).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety, listened to the testimony given, and heard the arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process" that the proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this first prong, the proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel 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 in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 688.

This Court finds trial counsel properly prepared for Applicant's trial. She interviewed multiple witnesses. Trial counsel elucidated valid trial strategies and the reasoning behind her decisions. A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Strickland itself recites that there are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. 466 U.S. at 689. This Court finds trial counsel rendered adequate assistance and exercised professional judgment in all her decisions at trial. This Court dismisses Applicant's application for the reasons set out below:

A. Ineffective Assistance of Counsel

1. Counsel failed to properly cross-examine witnesses.

The trial transcript reflects the only witness trial counsel failed to cross-examine was Phillip Furtick. Furtick's testimony was duplicative to the testimony already taken from other officers and he was not a substantive witness for the State. The record reflects Counsel adequately cross-examined each witness in defense of Applicant.

Therefore, this Court finds Applicant failed to show how trial counsel's cross-examination was deficient or how he was prejudiced by a lack of further cross-examination. Accordingly, this Court denies and dismisses this allegation.

2. Counsel failed to investigate circumstances surrounding victim's death.

At the evidentiary hearing, Applicant claims he did not remember whether trial counsel discussed the State's evidence against him. Applicant testified he met with trial counsel's investigator and discussed potential witnesses and alibis. Trial counsel testified Applicant was only able to give her investigator witness names and an alibi from the party that occurred prior to the murder. It was uncontroverted that Applicant was at the party prior to the murder. Trial counsel testified she spoke to numerous witnesses in preparation for Applicant's trial.

Applicant also failed to show how he was prejudiced by trial counsel's alleged failure to further investigate. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006).

This Court finds trial counsel made reasonable efforts to investigate the circumstances of the murder with the assistance of Applicant. Therefore, this Court finds Applicant failed to show how trial counsel's investigation was deficient or how he was prejudiced by a lack of further investigation. Accordingly this Court denies and dismisses this allegation.

3. Counsel failed to develop a defense regarding the weapon.

Applicant's half-brother, Maurice Tucker, testified at the evidentiary that he did not see the murder weapon, which was found at Applicant's home on the porch, when he entered the home that morning. The substance of this testimony was already in evidence from law enforcement. Law enforcement entered the home and also did not see the knife until they were exiting the home. Tucker testifying he did not see the knife when he went into the home adds no new evidence for the jury to consider. Law enforcement found the knife later that day on Applicant's front porch. Trial counsel testified she chose not to introduce Tucker's testimony

because she did not believe the testimony was stronger than having the final closing argument. During closing argument, trial counsel's strategy was to argue law enforcement did not have enough evidence to convict Applicant beyond a reasonable doubt. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court finds trial counsel made reasonable efforts to investigate the circumstances of the murder with the assistance of Applicant. Therefore, this Court finds Applicant failed to show how trial counsel's defense of the knife was deficient or how he was prejudiced by trial counsel's choice of argument. Accordingly, this Court denies and dismisses this allegation.

4. Counsel failed to investigate or develop mitigating evidence

As delineated above, trial counsel had her office's investigator investigate each of Applicant's potential alibis and witnesses. Further, trial counsel herself interviewed a number of witnesses in preparation for the trial. Trial counsel also presented mitigating evidence on Applicant's behalf after he was found guilty. Applicant failed to show how he was prejudiced by trial counsel's failure to further investigate mitigating evidence. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Porter, 368 S.C. at 385-86, 629 S.E.2d at 357.

This Court finds trial counsel made reasonable efforts to investigate the circumstances of the murder with the assistance of Applicant. Therefore, this Court finds Applicant failed to show how trial counsel's investigation was deficient or how he was prejudiced by a lack of further investigation into mitigation. Accordingly, this Court denies and dismisses this allegation.

5. Counsel failed to object to irrelevant evidence

Applicant failed to prove that trial counsel should have objected. Applicant further failed to prove that an objection to irrelevant evidence would have resulted in the result of the proceeding being different.

This Court finds trial counsel's objections were appropriate. Therefore, this Court finds Applicant failed to show how trial counsel's failure to object was deficient or how he was prejudiced by a lack of objection. Accordingly, this Court denies and dismisses this allegation.

After a thorough review of the record, this Court finds Applicant was adequately and professionally represented by trial counsel. This Court finds trial counsel appropriately based their investigation, questioning, and arguments around a valid trial strategy. This Court finds Applicant has failed to satisfy his burden of proving the alleged deficiency. This Court also finds that Applicant has failed to prove how he was prejudiced by any of trial counsel's actions. Accordingly, Applicant has failed to satisfy his burden of proving ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

B. Ineffective Assistance of Appellate Counsel

This ground was not fully argued at the evidentiary hearing. There were a few pages missing from the transcript obtained by appellate counsel, Kathrine H. Hudgins, Esquire. Ms. Hudgins presented an Anders brief to the Court of Appeals. Applicant also filed a *pro se* brief. The Court must fully review the record, separate from appellate counsel and Applicant's briefs. The law is clear that even in Anders briefing situations, the normal Strickland analysis applies. "With a claim that counsel erroneously failed to file a merits brief, it will be easier for a defendant-appellant to satisfy the first part of the Strickland test, for it is only necessary for him to show that a reasonably competent attorney would have found one nonfrivolous issue

warranting a merits brief." Smith v. Robbins, 528 U.S. 259, 288 (2000). Here, Applicant has failed to show that a reasonably competent attorney would have found one nonfrivolous issue. Therefore, this Court finds Applicant has failed to satisfy his burden of proving the alleged deficiency. This Court also finds that Applicant has failed to prove how he was prejudiced by any of the missing pages in the trial transcript.

Accordingly, Applicant has failed to satisfy his burden of proving ineffective assistance of counsel with regard to this allegation and it is therefore denied and dismissed.

IV. CONCLUSION

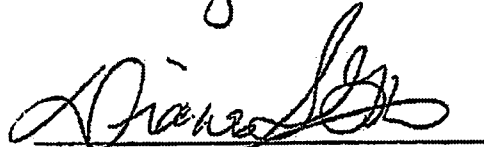
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this 29 day of August, 2017.



DIANE GOODSTEIN
Presiding Judge
1st Judicial Circuit

Orangeburg, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DESHAWN LEE POWELL,

APPELLANT

APPELLATE CASE NO. 2012-212140

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in overruling the hearsay objections made to the testimony of two witnesses about what a third witness said, finding the testimony met the present sense impression exception to the rule against hearsay?

STATEMENT OF THE CASE

In February of 2011, the Orangeburg County Grand Jury indicted Powell for murder, indictment #2011-GS-38-0015. On May 15, 2012, Powell proceeded to jury trial before the Honorable Edgar W. Dickson. Peggy Hinds and Douglas Mellard represented Powell at trial. Donald Sorenson and Harrison Bell prosecuted the case. The jury found Powell guilty of the lesser included offense of voluntary manslaughter. Judge Dickson sentenced Powell the thirty (30) years in prison. A timely notice of intent to appeal was served and filed. This appeal follows.

ARGUMENT

The trial judge erred in overruling the hearsay objections made to the testimony of two witnesses about what a third witness said, finding the testimony met the present sense impression exception to the rule against hearsay.

The jury found Powell guilty of voluntary manslaughter. Niki Bryant, aka Wendy Noel, testified that on November 3, 2010, at approximately 5:00 AM she returned to Arthur Riley's house on Jameson Street. When she knocked on the door, the door partially opened and she saw Riley on the floor and the house in disarray. (Tr. p. 50, line 1 – p. 51, lines 1-12). According to Bryant, she got scared and ran to find someone to call the police. (Tr. p. 51, lines 14-21). Officers with the Orangeburg County Sheriff's Department responded to Jameson Street and met with Bryant who directed them to Riley's home. (Tr. p. 26, line 1- p. 27, lines 1-12). The officers found Riley lying in the doorway in a pool of blood. (Tr. p. 27, lines 15-20). Crime scene investigator Lieutenant Gerald Carter testified that Riley was found face up, unclothed in his living room. (Tr. p. 137, lines 2-8). Upon examining Riley at autopsy, the forensic pathologist, Dr. Janice Ross, testified that she observed both sharp force injuries and blunt force injuries. (Tr. p. 251, lines 20-25). Dr. Ross testified that the cause of death was exsanguination due to stab wounds. (Tr. p. 260, lines 9-16).

Bryant testified that Riley's house was a crack house where people smoked crack, sold crack, drank and tricked. (Tr. p. 41, lines 18-25). Between midnight and 2:00 AM on November 3, 2010, Bryant went to Riley's house to get crack. (Tr. p. 44, line 2 – p. 45, lines 1-18). According to Bryant, when she arrived at Riley's house he asked her to stay but she left with Slick and Ebony to turn a trick. (Tr. p. 45, line 19 – p. 46, 47, lines 1-18). Bryant testified that Red and Todd were at Riley's house when she left. (Tr. p. 44, lines 12-22).

Ronnette “Red” Stevenson testified that on the evening of November 2, 2010, and early morning of November 3, 2010, she was at Art Riley’s house “drinking, getting high, playing cards” and chatting with Todd and Monkey Doo. (Tr. p. 93, lines 11-25). Riley later asked them to leave his house because he was expecting company. (Tr. p. 94, lines 3-19). According to Red, she and Todd left Riley’s house and saw Darrell Jones, “D-Shop” and Appellant, “New York” walking toward Riley’s house. (Tr. p. 95, lines 3 - 24). Red testified that Appellant asked her who was at Art Riley’s house and she told him the house was closed down because Riley was expecting company. (Tr. p. 95, line 23 – p. 96, line 1). According to Red, Appellant and D-Shop kept walking toward Riley’s house.

Red testified, “As we was walking, I, I turned around and I seen D-Shop and I said D-Shop what’s going on, and he was like man, he in there beating, beating Mr.--” (Tr. p. 96, lines 23-25). Appellant objected on hearsay grounds. (Tr. p. 97, lines 3-4). The State argued the testimony met the present sense impression exception to the rule against hearsay. (Tr. p. 97, lines 6-14). The trial judge agreed, stating, “All right. Okay. I’m gonna overrule the objection. I’m gonna let it go in, okay, as present sense impression. I’ll note your objection” (Tr. p. 97, lines 17-20).

Red then testified that when asked about what was going on, D-Shop said, “Man, he in there beating, beating that man, ...” (Tr. p. 98, lines 1-3). Red testified, “... and I was like that’s F’ed up, go stop him, and he say he did try, but they kicked him out.” (Tr. p. 98, lines 3-5). The judge erred in allowing the hearsay testimony.

Todd Wise testified that he was at Art Riley’s house with Red on the evening of November 2, 2010, and early morning of November 3, 2010. (Tr. p. 111, line 21 – p. 112, lines 1-21). Wise testified that they were asked to leave Riley’s house shortly after Niki

arrived because Niki and Riley had a date. (Tr. p. 113, lines 2-14). Wise testified that after he and Red left Riley's house they saw Appellant and D-Shop coming up the sidewalk toward Riley's house. (Tr. p. 113, line 15 – p. 114, 115, lines 1-3). According to Wise, as he and Red were headed down the dirt road an argument ensued between Appellant, D-Shop and Riley. (Tr. p. 115, lines 6-24). Wise and Red continued down the dirt road hoping to buy alcohol but when nobody answered the door at the presumed liquor house, they walked back up the dirt road and saw D-Shop. (Tr. p. 116, line 2 – p. 117, lines 1-2). Wise testified that D-Shop said, "New York is beating Art or trying to kill him at some point." (Tr. p. 117, lines 2-3). The trial judge stated, "I'm noting your objection for the record again --" (Tr. p. 117, lines 4-5).

D-Shop testified that earlier in the evening of November 2, 2010, he and Appellant were at Shorty's Club. (Tr. p. 66, line 9 – p. 67, lines 1-14). The two left the Club between 2:00 and 2:30 AM and got a ride from somebody who dropped them off near Riley's house. (Tr. p. 67, lines 4-25). D-Shop testified that he went to Riley's house to see if "he had any girls or something there." (Tr. p. 68, lines 19-23). According to D-Shop, Riley allowed him in the house but not Appellant. (Tr. p. 69, lines 7-11). D-Shop testified that after he determined there were no girls at Riley's house, he was on his way out but Riley and Appellant were arguing about why Appellant could not come inside. (Tr. p. 69, lines 12-23). The argument escalated into a shoving match and D-shop testified that he was unsuccessful in breaking up the argument so he left. (Tr. p. 69, line 24 – p. 70, lines 1-25).

D-Shop testified that after he left Riley's he saw Red about 30-40 yards away and then later saw Todd. (Tr. p. 70, line 22 – p. 71, 72, lines 1-7). Appellant and Riley were still arguing on the porch. (Tr. p. 72, lines 8-15). Todd told D-Shop to go and get

Appellant. (Tr. p. 72, lines 19-20). According to D-Shop he once again tried to break up the fight but was again unsuccessful. (Tr. p. 72, line 20 – p. 73, 74, lines 1-6). D-Shop then walked off and went home, according to his testimony. (Tr. p. 74, lines 11-14). D-Shop testified that he never saw a knife or any weapon. (Tr. p. 74, line 7). D-Shop later gave a statement to police indicating that Appellant was beating Riley to “deaf” meaning that he was beating the hell out of him. (Tr. p. 82, lines 1-14).

The trial judge erred in overruling the hearsay objections made to the testimony of Red and Todd Wise about what a D-Shop said, when the testimony fails to meet the present sense impression exception to the rule against hearsay. In State v. Parvin, 2012-205888, 2014 WL 3734369 (S.C. Ct. App. July 30, 2014), the South Carolina Court of

Appeals wrote:

“Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted.” State v. Townsend, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct.App.1996). “Hearsay is inadmissible as evidence unless an exception applies.” Id. Rule 803(1), SCRE, provides for the “present sense impression” exception, which allows for the admission of “a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” Our courts have not delineated a time frame that would constitute “immediately thereafter”; however, this court has held that a statement given nearly ten hours after the perceived incident cannot be admitted under Rule 803(1), SCRE. State v. Burroughs, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct.App.1997).

The State, as the proponent of the testimony, failed to establish that the time frame constituted “immediately thereafter” for purposes of meeting the present sense impression to the rule against hearsay. “The burden of establishing the facts which qualify a statement as an excited utterance [or present sense impression] rests with the proponent of the evidence.” 31A C.J.S.*Evidence* § 359 (1996); accord Mariano v. State, 933 So.2d 111,

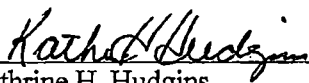
118 (Fla. Dist. Ct. App. 2006); Jarvis v. Commonwealth, 960 S.W.2d 466 (Ky. 1998); State v. Kemp, 919 S.W.2d 278, 280 (Mo. Ct. App. 1996) (“The party offering the statement as an exception to the rule against hearsay has the burden of making a sufficient showing of spontaneity to render the statement admissible.”), State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006).

In regard to Wise’s testimony that D-Shop stated Appellant was trying to kill Riley, the State failed to establish that the time frame constituted “immediately thereafter” as well as failed to establish that D-Shop witnessed any actions that would have constituted voluntary manslaughter. Riley died from stab wounds and D-Shop only testified to witnessing a fist fight, with no weapons, between Appellant and Riley. Statements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance [or present sense impression] exception to the hearsay rule. State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998); State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006). Based on the totality of the circumstances and the record in the present case, D-Shop could not have witnessed the manslaughter of Riley when he all he saw was a fist fight and Riley died of stab wounds. The erroneous admission of the hearsay testimony was not harmless.

CONCLUSION

Based on the above argument, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DESHAWN LEE POWELL,

APPELLANT

APPELLATE CASE NO. 2012-212140

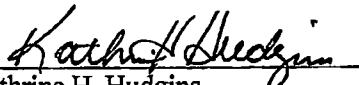
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Deshawn Lee Powell states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Edgar W. Dickson, which was held on May 17, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Deshawn Lee Powell.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DESHAWN LEE POWELL,

APPELLANT

APPELLATE CASE NO. 2012-212140


**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment and sentencing sheet;
- (2) Trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 14th, 2014



Kathrine H. Hudgins
Appellate Defender

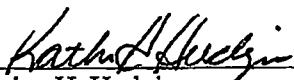
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 14, 2014



Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-158

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

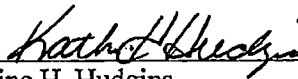
DESHAWN LEE POWELL,

APPELLANT

APPELLATE CASE NO. 2012-212140

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Deshawn Lee Powell, #350880 at Lieber Correctional Institution, this 14th day of August, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of August, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 24, 2021

WITNESSES

Jarred Kittrell

Orangeburg County Sheriff

ARREST WARRANT NUMBER
M214446

Arrested: November 4, 2010

TRUE GRAND JURY

~~FEB 09 2011~~

Deane Bloome
Date

Coreperson of Grand Jury
Date: February 9, 2011

VERDICT

Coreperson of Petit Jury
ate:

DOCKET NO. 2011GS38-0015

The State of South Carolina
County of ORANGEBURG

COURT OF GENERAL SESSIONS
February 7, 2011 TERM

THE STATE
vs.

Deshawn Powell

Indictment for
MURDER

SC Code: 16-3-10

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

Defendant

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

Defendant

Witness:

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

RECORDED
INDEXED
FEB 9 2011
CLERK OF COURT
ORANGEBURG COUNTY
SC
WJ

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

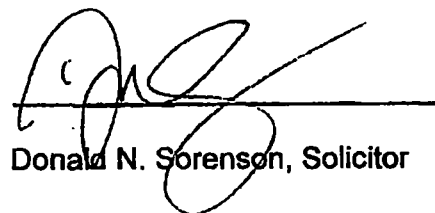
INDICTMENT
2011GS38-0015

At a Court of General Sessions, convened on February 7, 2011 the Grand Jurors of Orangeburg County present upon their oath:

MURDER

That in Orangeburg County on or about November 3, 2010, with malice aforethought, the defendant, Deshawn Powell did kill one Arthur Riley by means of stabbing victim. The victim did die as a proximate result thereof. This offense being in violation of the Common Law and Section 16-3-10, of the South Carolina Code of Laws, as amended.

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


Donald N. Sorenson, Solicitor

STATE OF SOUTH CAROLINA

COUNTY OF Orangeburg
STATE VS Deshawn Powell
AKA:
Race: B Sex: M Age: 26
DOB:
Address:
DL#: SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS38-0015
A/W#: M214446
Date of Offense: 11/3/2010
S.C. Code § 16-3-10
CDR Code #: 0116

SENTENCE SHEET

CDL: Yes No CMV: Yes No Hazmat: Yes No

CONVICTED OF or PLEADS

In disposition of the said indictment comes now the Defendant who was:

TO: Voluntary Manslaughter

In violation of § 16-3-50 of the S.C. Code of Laws, bearing CDR Code #: 0217

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC) §17-25-45 w/minor 1st or Lawd Act

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST

Solanson, Donald N.

9512 SC Bar#

Deshawn Powell

Attorney for Defendant

SC Bar#

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

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

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP

Total: \$ plus 20% fee: \$

Payment Terms:

set by SCDPPPS

Recipient:

Table with 2 columns: Description and Amount. Includes items like 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, 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, 73.3, 1B TP (Law Enforce. Funding) \$25, 33.7, 1B TP (Drug Court Surcharge) \$150, 50-21-114 (BUI Breath Test Fee) \$50, 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCJA Surcharge) \$5, 44-53-450(C), (Conditional Discharge) \$350, 3% to County (if paid in installments) \$3.90, TOTAL \$133.90

V. Glenn

Clerk of Court/ Deputy Clerk

Harry Dot Walker

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp

May serve WE beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

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

\$ paid to Public Defender Fund

Other:

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

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

PRESIDING JUDGE

Judge Code: 2153

Sentence Date: May 17, 2012

ATTEST: TRUE COPY
M. J. PLEK
CLERK OF COURT
ORANGEBURG COUNTY