

ORIGINAL

VOLUME II OF II

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM DARLINGTON COUNTY
The Honorable Roger E. Henderson, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No: 2018-000184

BREYON TONEY,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPENDIX

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STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

The State of South Carolina

v.

Breyon Toney,

Defendant.IN THE COURT OF GENERAL SESSIONS
FOURTH JUDICIAL CIRCUIT

10-GS-16-077; 078

VERDICT FORM

VERDICT

1. As to the charge of Murder, we the jury unanimously and beyond a reasonable doubt find the Defendant, Breyon Toney:

 Not Guilty [If chosen, please answer question 1a.] X Guilty [If chosen, please skip question 1a and go to question 2.]

- 1a. As to the lesser included charge of Voluntary Manslaughter, we the jury unanimously and beyond a reasonable doubt find the Defendant, Breyon Toney:

 Not Guilty [If chosen, please skip question 2 and sign verdict form] Guilty [If chosen, please answer question 2]

2. As to the charge of Possession of a Weapon During the Commission of a Violent Crime, we the jury unanimously and beyond a reasonable doubt find the Defendant, Breyon Toney:

 Not Guilty X Guilty

Please sign the verdict form and return to the courtroom.

I certify this is the unanimous decision of the jury.

Darius R. SimsDarius R. Sims, Foreperson
May 18, 2011TRUE CERTIFIED COPY,
Est B. Sugar
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Darlington County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BREYON TONEY,

APPELLANT

APPELLATE CASE NO. 2011-193669

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to suppress evidence of an altercation between appellant and a witness when, during the pre-trial suppression hearing, the State failed to prove that the altercation constituted evidence of witness intimidation, the evidence constitutes an inadmissible bad act and the prejudicial effect outweighs any possible probative value?

STATEMENT OF THE CASE

In January of 2010, the Darlington County Grand Jury indicted Toney for murder and possession of a weapon during a crime of violence, indictments #2010-GS-16-77, 78. On May 18, 2011, Toney proceeded to jury trial before the Honorable J. Michael Baxley. Attorneys Matthew Swilley, Richard Jones and Tiffany Gibson represented Toney at trial. The jury found Toney guilty as charged and Judge Baxley sentenced Toney to 30 years for murder and 5 years concurrent for the weapon charge. Appellant's post trial motion was denied on June 3, 2011. A timely notice of intent to appeal was served on June 3, 2011. This appeal follows.

ARGUMENT

The trial judge erred in refusing to suppress evidence of an altercation between appellant and a witness when, during the pre-trial suppression hearing, the State failed to prove that the altercation constitutes evidence of witness intimidation, the evidence is irrelevant, constitutes an inadmissible bad act and the prejudicial effect outweighs any possible probative value.

Prior to trial appellant moved to suppress evidence of an incident that occurred two weeks prior to trial involving appellant and LaVincent Hankins, a State's witness. (R. p. 9, lines 12-18). Appellant requested a hearing and argued that evidence of the incident was not relevant and the prejudicial effect of the evidence outweighed any possible probative value. (R. p. 16, lines 21- p. 17, lines 1-12; p. 21, lines 8 – p. 63, line 1). The State argued that the incident was relevant as evidence of witness intimidation. (R. p. 17, lines 17 – p. 18, p. 60 lines 1-11). The State advised that the incident could result in law enforcement charging appellant with intimidation of a witness. (R. p. 19, lines 12 – p. 20, line 1). Appellant additionally argued that evidence of the incident constituted improper character evidence pursuant to Rule 404(b), SCRE. (R. p. 23, lines 12-16). The judge held a hearing to determine the admissibility of the incident. (R. pp. 46-57).

During the hearing Hankins testified, "When I was just sitting in the park in the car, and that's when the fight started. I was in the car and he [appellant] came into the car and he hit me, and then he just fought me and then my girl got in the car and she drove off and went straight to the Police Department." (R. p. 47, lines 2-7). Hankins testified that appellant's watch fell off during the scuffle. (R. p. 47, lines 16-17). When asked if appellant said anything Hankins testified, "I wrote in the statement, I'm gonna kill you bitch." (R. p. 47, lines 18-23). When asked if that was all appellant said, Hankins replied, "Yes." (R. p. 47, lines 24-25). Hankins' testimony at trial was different. At trial Hankins testified that

appellant said “. . . I read your statement and I’m gonna kill you bitch.” (R. p. 198, lines 24 – p. 199, lines 1-8). This testimony, however, was not before the judge when he made his ruling in regard to the admissibility of the incident.

At the conclusion of the hearing appellant again argued that the incident was irrelevant, the prejudicial effect of the evidence outweighed any possible probative value and the evidence constituted improper character evidence pursuant to Rule 404(b), SCRE.. (R. p. 52, lines 23 – p. 53, lines 1-11). The judge found evidence of the incident admissible as witness intimidation evidence pursuant to State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009). (R. p. 53, lines 15 – p. 54, lines 1-11). Additionally the judge found that evidence of the incident was more probative than prejudicial in light of the fact that appellant argued self defense in opening arguments.¹ (R. p. 54, lines 12 – p. 55, lines 1-7). The judge then stated:

And finally, I want to make the point that the Court believes that evidence should come in because, it is a factual issue for the jury, and the jury is the finder of fact.

And that allegation of witness intimidation, particularly when it comes right after the disclosure of the individual as a witness who has given the statement, it goes to the heart of our justice system. And to permit that type of activity, without the court allowing it into evidence for whatever purpose the jury may use it I think would be a failure on the part of this court to see that an appropriate response was made by the system; that is the justice system. And for that reason, the Court believes it is imperative to this case.

(R. p. 56, lines 21- p. 98, lines 1-9). The judge failed to address the 404(b) objection. Appellant renewed his objection when Hankins testified at trial. (R. p. 196, lines 14 – p. 241, lines 1-5). The objection was again overruled. (R. p. 197, line 6). The judge erred in

¹ The pre-trial hearing was held after opening statements.

finding the evidence of the incident between Hankins, a State's witness, and the appellant admissible in the murder trial.

First, the State failed to prove that the evidence of the incident constitutes witness intimidation. At the time of the ruling, there was no evidence that the altercation was in any way linked to Hankins' role as a State's witness against appellant. During the pre-trial hearing Hankins testified that there was a fight and appellant threatened to kill him. Based on the testimony at the hearing, the fight could have been in regard to something completely unrelated to the murder trial. The evidence is irrelevant because it is not linked to the trial. The evidence is inadmissible as irrelevant pursuant to Rule 402, SCRE.

In State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009), the South Carolina Supreme Court found that witness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt. In Edwards the mother of the victim testified that the defendant threatened the victim with death if she testified against him. There was no question that, if true, the statements constituted witness intimidation. In contrast, in the present case the State failed to prove that the fight and threat constituted witness intimidation.

In Edwards the Court wrote:

Our approach follows the majority of jurisdictions that have addressed the issue. For example, in United States v. Hayden, 85 F.3d 153, 159 (4th Cir.1996), the court noted that "[e]vidence of witness intimidation is admissible to prove consciousness of guilt and criminal intent under Rule 404(b), if the evidence (1) is related to the offense charged and (2) is reliable."

383 S.C. at 72, 678 S.E.2d at 408. In the present case the evidence was inadmissible under Rule 404(b) because the State failed to relate the evidence to the offense charged.

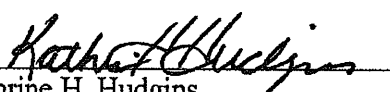
Given Hankins' inconsistent testimony between the pre-trial hearing and the trial, reliability is certainly a question. The evidence was inadmissible as more prejudicial than probative pursuant to Rule 403, SCRE. The incident between appellant and Hankins was not probative of any issue in regard to the murder charge because the State failed to link the incident to the murder charge.

The error in admitting evidence of the fight and threat was not harmless. In closing argument the State argued the altercation between Hankins and the appellant was evidence of consciousness of guilt. (R. p. 388, lines 18 – p. 389, 390 lines 1-12). Appellant testified that the decedent came at him with a broken bottle in his hand and appellant used the knife in self defense. Appellant was prejudiced by the admission of the improper evidence.

CONCLUSION

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

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of March, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 26, 2013



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Darlington County
J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

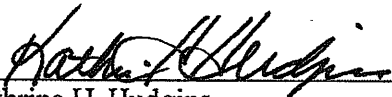
BREYON TONEY,

APPELLANT

APPELLATE CASE NO. 2011-193669

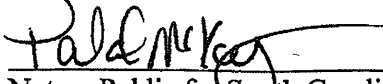
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and also served upon Mr. Breyon Toney, # 346126 Lee Correctional Institution 990 Wisacky Hwy. Bishopville, SC 29010 this 26th day of March, 2013.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of March, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2011-193669

THE STATE,

RESPONDENT,

V.

BREYON TONEY,

APPELLANT

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QUESTION PRESENTED

Whether the trial court erred when, in conducting a Rule 403, SCRE balancing test, it determined the probative value of evidence showing appellant Breyon Toney attempted to intimidate a witness shortly before he was tried on charges of murder and possession of a weapon during the commission of a violent crime, was substantially outweighed by the risk of unfair prejudice from the admission of such evidence.

STATEMENT OF THE CASE

The State agrees with Appellant's statement of the case.

STATEMENT OF THE FACTS

A. The Death of James Tucker

During the early morning hours of March 24, 2009, Hartsville authorities were dispatched to Darlington County's Carolina Pines Medical Center ("CPMC") after hospital personnel reported treating a patient who had been stabbed. (R. 65-66, 224-25, 240-41, 243-44). The victim, later identified as James Tucker ("Victim"), was pronounced dead at 3:40 AM. (R. 224-25). According to forensic pathologist Dr. Janice Ross, who would later testify at Appellant's trial, the knife used to stab Victim likely penetrated at least four inches into Victim's chest. (R. 191-92).

B. The Investigation

Upon hearing Victim had died, Officer Cheryl McCall, who along with Officer LaVern Davis had been dispatched to CPMC when staff initially advised authorities about the situation, called her supervisor Tracey Meyers to report Victim's death. (R. 224-25, 227). After speaking with Meyers, McCall contacted detectives Mike Anderson and John Specht, who made their way to CPMC. (R. 227). McCall and Davis then obtained written statements from two witnesses, Crystal Robinson and Marcus Brunson, who, in separate statements, explained Victim and Appellant were squaring up to fight one another when Appellant pulled a knife on Victim, refused to put the knife down and stabbed Victim as he was attempting to flee. (R. 229, 103-05, 133-35). After giving statements, both Robinson and Brunson were interviewed later that morning by Anderson at the Hartsville Police Department. (R. 68-69). Once there, Specht prepared a photographic lineup for each witness, who in turn, separately identified Appellant as

the person who stabbed Victim.¹ (R. 73, 76). Additionally, Anderson and Specht accompanied Robinson and Brunson to the corner of Marion Avenue and Chaplin Circle, where the incident occurred.² (R. 83-84). Subsequently, Anderson also spoke with Phillip Franklin and LaVincent Hankins, both eyewitnesses to the incident. (R. 87, 171, 200, 205). According to Anderson, Franklin and Hankins' statements corroborated Robinson and Brunson's version of events. (R. 87).

C. Opposing Theories at Trial

At trial, the State theorized Appellant and Victim had a disagreement on the afternoon of March 23rd; decided to meet sometime after midnight on the 24th; the meeting turned into a fight; and Appellant pulled a knife on Victim stabbing him as he was attempting to retreat. (R. 37-38). Meanwhile, the defense theorized Appellant stabbed Victim in self-defense claiming Victim wanted to fight Appellant because he was jealous about a girl they were both dating. (R. 41-42).

In support of its murder theory, the State offered eyewitness testimony from Robinson, Brunson, Franklin and Hankins. (R. 96, 131, 159, 192). Each eyewitness corroborated that Victim was stabbed following an altercation with Appellant occurring near the corner of Marion Avenue and Chaplin Circle. (R. 103-04, 133-35, 162-66, 194-96). Additionally, the State presented testimony from Hankins demonstrating that in the weeks leading up to trial, Appellant, who was out on bond, confronted Hankins about the statement he had given to authorities in the aftermath of the incident, hit him six times and threatened Hankins saying, "I read your statement and I'm going to kill you bitch." (R. 198-99).

¹ While both Robinson and Brunson identified Appellant as the perpetrator, identification does not appear to be at issue. Indeed, Appellant admitted to being involved in the incident, and at trial argued he was acting in self-defense. (R. 301, 41).

² The transcript reveals that Marion Avenue is also referred to as Marion Street throughout the record. There is no dispute that these names refer to the same street.

Meanwhile, defense counsel, in support of its self-defense theory, called Tiffany Huggins, who was not at the scene that night, but testified Victim was angry with Appellant over the fact Appellant had sex with Victim's girlfriend and wanted to fight Appellant. (R. 280-81, 286, 294-95). Appellant further testified he stabbed Victim, but said he was acting in self-defense when he did so contending Victim was attempting to stab him with a broken bottle in the moments leading up to the incident. (R. 301). Addressing Hankins testimony regarding the confrontation following the murder, Appellant denied he was attempting to intimidate Hankins explaining the confrontation actually occurred between Hankins' girlfriend and himself at which point Hankins got angry and approached him, which prompted him to punch Hankins in self-defense. (R. 302-04). Thus, the main question at trial was one of criminal intent.

D. Testimony from the State's Eyewitnesses

Crystal Robinson was the first of the State's eyewitnesses to testify about the incident. (R. 96-130). Specifically, Robinson explained she was at the intersection of Marion Avenue and Chaplin Circle in her car talking to Brunson, when Victim approached them and began talking to Brunson. (R. 98-99). During the course of Victim and Brunson's conversation, Robinson learned Appellant wanted to fight Victim because he had purchased diapers for the mother of Appellant's child. (R. 102). Recounting the events of the evening, Robinson said she observed Appellant walk up Marion Avenue towards Victim at which point the two squared up to fight. (R. 103). According to Robinson, Appellant and Victim were circling and had taken a swing at one another when Victim yelled, "he got a knife." (R. 103). Continuing, Robinson said Victim asked Appellant to drop the knife, but he refused, prompting her to ask Brunson and Franklin, who were also watching the altercation, to get the knife from Appellant. (R. 104). When Brunson and Franklin did not attempt to retrieve the knife, Robinson said she told Victim to run.

(R. 104). Thereafter, Robinson testified that Victim ran down the street before stopping and picking up two large beer bottles in an effort to defend himself. (R. 104-05). Robinson stated she watched Victim throw the bottles at Appellant after which she explained Appellant swung at Victim, who fell to the ground before getting back up and running away from Appellant in her direction. (R. 105). As Victim approached Robinson, he told her, "oh shit he cut me. Breyon cut me." (R. 105). Robinson then attempted to help Victim and upon seeing the wound, put him in her car and drove him to the hospital. (R. 105). On cross-examination, Robinson admitted a person she knew by the nickname "Mouk" was also at the scene of the crime along with Appellant, Victim, Franklin, herself and Brunson.³ (R. 124).

Marcus Brunson was the second of the State's eyewitnesses to testify. (R. 131-156). Brunson, who was talking with Robinson when the incident occurred, testified to essentially the same version of events. (R. 133-35). Like Robinson, Brunson said Appellant wanted to fight Victim because Victim had purchased diapers for the mother of Appellant's child. (R. 133). Brunson also explained that Appellant pulled a knife on Victim as they were squaring up to fight which prompted Victim to retreat from Appellant. (R. 134-35). Further corroborating Robinson's description of the incident, Brunson testified that Victim, despite being told to run, stopped as he was retreating from Appellant, threw a bottle at Appellant in self-defense and then fell to the ground before jumping back up and running towards Robinson. (R. 135). Brunson explained that as Victim approached him (Brunson was next to Robinson), Victim said Appellant stabbed him. (R. 135). On cross-examination, Brunson confirmed "Mouk," Franklin and Robinson also witnessed the incident. (R. 147).

Phillip Franklin also testified about what he observed on the night in question. (R. 159-182). Like Robinson and Brunson, Franklin believed Appellant was angry with Victim because

³ In his testimony on direct examination, Hankins testified his nickname was "Mouk." (R. 193).

Victim bought diapers for the mother of Appellant's child. (R. 169). Franklin further added that Appellant had text messaged Victim telling him to "meet [him] on Marion Street." (R. 173). According to Franklin, who spoke with Victim prior to the incident, Victim said he was going to meet with Appellant and "they were just . . . going to . . . talk it out[.]" (R. 161). Continuing, Franklin testified he observed Appellant walk up the street "talking loud" when the two met and began talking, which Franklin said, escalated into a fight. (R. 162-63). As Appellant and Victim were preparing to fight, Franklin testified Victim saw Appellant had a knife stating, "he got a knife" which in turn caused Victim to retreat from Appellant. (R. 163). Franklin then admitted Victim and Appellant backed into the shadows where he could not see what transpired next. (R. 164). Nevertheless, Franklin confirmed Victim was not bleeding when he walked into the shadows, but was bleeding when he left them. (R. 164-65). Franklin further noted that in the time the two were in the shadows he heard bottles breaking, after which he heard Victim say that Appellant cut him. (R. 165). In the aftermath of the event, Franklin later called Appellant to tell him that Victim was in the hospital in critical condition. (R. 166). According to Franklin, Appellant said "he didn't give a fuck." (R. 167).

As its final eyewitness, the State called LaVincent Hankins.⁴ (R. 193). In his testimony, Hankins, like Robinson, Bruson and Franklin, confirmed he was near the intersection of Marion Avenue and Chaplin Circle when Appellant stabbed Victim. (R. 194-96). Specifically, Hankins recalled that just before the stabbing occurred, Victim was explaining he had received text messages from Appellant telling him to come to "Marion Street" and fight. (R. 195). Hankins further recounted that Appellant was walking down Marion Avenue approaching Victim saying "let's get it mother fucker" and "you are going to die[.]" (R. 195). Continuing, Hankins explained Appellant and Victim were preparing to fight when Victim indicated Appellant had a

⁴ Hankins is also referenced in the record as Quintell, which he confirmed, is his middle name. (R. 193).

knife. (R. 195). Hankins then said that he and the others who were present at the scene told Victim to run, at which point Victim began backing up and threw a beer bottle at Appellant. (R. 196). Next, Hankins testified that Appellant dodged the beer bottle at which point he “came over with the knife” stabbing Victim. (R. 196). Hankins said Victim then approached Robinson telling her, “I can’t breathe” prompting Robinson to take him to the hospital. (R. 196).

Elaborating about his confrontation with Appellant, Hankins first explained he encountered Appellant twice after the incident; once about a month before trial where Appellant asked him what he “was going to do about that court shit” (R. 196); and a second time, occurring approximately two weeks before trial. (R. 197). Explaining his initial interaction with Appellant, Hankins admitted he simply told Appellant he would not be attending Appellant’s trial. (R. 196). Describing his second interaction with Appellant, Hankins said he was at a local Hartsville park when he saw Appellant approaching him. (R. 197-98). Upon seeing Appellant, Hankins and his girlfriend began walking to his car in order to avoid Appellant. (R. 197-98). Hankins testified that as he was getting into his car, he glanced back at the park when Appellant said “let’s get it mother fucker” after which he pulled Hankins out of the car and hit him in the face six times. (R. 198). After Appellant had been pulled off of Hankins he then said, “I read your statement and I’m going to kill you bitch.” (R. 198-99).

E. Testimony from Appellant

As noted above, Appellant testified in his own defense. (R. 293-336). According to Appellant, in the afternoon before Victim was killed, he overheard Victim talking to a third party, Demetrious Sowell, telling Sowell he had discovered that Appellant had sex with his girlfriend and he was going to do something about it. (R. 294). Following the confrontation, Appellant said he received a three-way phone call from Victim and his girlfriend. (R. 295).

During the conversation, Victim's girlfriend asked Appellant why he was telling people he had sex with her, to which Appellant responded he did not. (R. 295). Appellant stated that when he said this, Victim called him a liar. (R. 295).

Continuing, Appellant testified that after the three-way conversation, he received a text message from Huggins which implied Victim was talking about Appellant. (R. 295). After reading the text message, Appellant called Huggins, who, according to Appellant, gave the phone to Victim. (R. 296). Appellant admitted he and Victim had words during the conversation. (R. 296). Appellant further said that following this telephone call, he received a text message saying "meet me on Marion Street." (R. 296). According to Appellant, he and Victim then began arguing via text message until later that night when Appellant claimed he received a telephone call from Franklin, who called from Victim's phone and allegedly tried to persuade Appellant to meet Victim on a different street. (R. 296-97). Appellant claimed Brunson was also involved in this discussion. (R. 297). According to Appellant, it was after this discussion that Victim sent him a text message indicating he better meet Appellant on Marion Avenue. (R. 298). Appellant agreed. (R. 298).

Next, Appellant recounted the incident, testifying that as he approached Victim he observed Victim giving his coat and CD player to Brunson. (R. 298). Shortly thereafter, Appellant admitted the two squared up to fight, but when they did, he observed Victim go "for his jacket" prompting him to draw "a key ring knife." (R. 299). Appellant said Victim then called out telling the others that Appellant had a knife at which point Victim began to back up. (R. 299). Appellant claimed Victim then grabbed two bottles and after throwing the first bottle, kept the broken end of the second bottle. (R. 300). Appellant stated Victim then attempted to stab him with the broken end of the bottle and when he dodged Appellant's attempt, he "moved

the knife towards [Victim]." (R. 301). Appellant explained Victim then fell to the ground, got up, walked away and said he had been cut. (R. 301).

Addressing Hankins testimony regarding the confrontation in the park, Appellant denied he was attempting to intimidate Hankins explaining the confrontation actually occurred between Hankins' girlfriend and himself at which point Hankins got angry and approached him, which prompted him to punch Hankins in self-defense. (R. 302-04).

F. The Conclusion of Trial

Following Appellant's testimony the defense rested and directed verdict motions were renewed. (R. 335, 337). Thereafter, each party presented closing arguments, after which, the jury was charged and sent out for deliberations. (R. 337, 345-370, 370-95, 395-419, 421). An hour and twenty minutes later, the jury returned with a verdict finding Appellant guilty as charged. (R. 423).

PRESENTATION OF ISSUE AT TRIAL

Prior to trial, defense counsel moved to suppress the pre-trial altercation between Appellant and Hankins arguing the evidence was essentially more prejudicial than probative. (R. 9, 17, 18). Continuing, defense counsel noted he was unaware of exactly what Hankins testimony would be, prompting the trial court to ask the State to explain the substance of Hankins' potential testimony. (R. 17). In response, the State explained:

The witness is one of the witnesses in the murder, Your Honor. He was there that night. I started getting this trial ready with Mr. Swilley, to let him know we were getting ready to call this, at which time shortly thereafter Mr. Toney bonded out of jail. When he first gets out he makes contact with this witness on the Street. Wants to know what is up with this court shit, is what I think is going to be the testimony. What's up with this court shit? I don't know what my—I think my witness kind of plays off like he is not coming. Several weeks later I give Mr. Swilley—he is missing a few things as part of the Rule 5. He comes over to my office to look through my file just to make sure he's got everything. I made it available to him. He takes the statement from this witness at 4:00. At 6:00 in

Hartsville on the day Mr. Toney comes up to my witness, who is in a car, he beats him about the face area. Saw my witness the next day. He had a fat lip and a swollen eye. And the watch that Mr. Toney was wearing actually came off in his lap. The intimidation of a witness charge is something to be handled later with law enforcement. They've got the watch. I think they have sent it off for some analysis. Be that as it may, I think what he is going to testify to is that Mr. Toney said something to the effect of, if you come, I'm gonna kill you. I'm gonna run out of state. I think that is the effect, it is clearly intimidation. I think we are only talking about two hours in between me giving that statement to Mr. Swilley and Investigator actually coming to my office with the young man whose face was beaten up. He is going to testify to that.

(R. 18-19). Continuing, the State opined the evidence was clearly relevant, adding that the real question was "more of a 403 issue[.]" (R. 19). Weighing in on the "403 issue[.]" the State explained the evidence was probative because the conduct could show intimidation when viewed in conjunction with Appellant's statement and the timeframe in which the incident occurred. (R. 19).

The court then asked defense counsel to reply to the State's argument. (R. 21). In so doing, defense counsel stated he had "serious questions as to the veracity of the State's witness" adding he wanted the Court to determine whether Hankins testimony was relevant under Rule 402, SCRE, and if so, whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice as required by Rule 403, SCRE. (R. 21). Responding to defense counsel's argument, the State correctly noted the issue of veracity was a jury question to be remedied by cross-examination. (R. 22).

Following additional discussion, defense counsel added, "I think what this is going to turn into is a 404(b) problem, prior bad acts." (R. 23) (emphasis added). Continuing, defense counsel noted that a prior bad act must be proven by clear and convincing evidence. (R. 24). The trial court then agreed with defense counsel's assertion, but took this issue under

advisement, instructing both parties to refrain from referencing the incident in their opening statements. (R. 25).

After the conclusion of opening statements, the trial court dismissed the jury and Hankins was called to the stand to testify regarding the confrontation. (R. 46). Describing the incident, Hankins testified he was sitting in the passenger seat of his car when he was approached by Appellant, who came into the car and hit him in the face. (R. 47). According to Hankins, Appellant, while hitting him, said "I'm gonna kill you bitch." (R. 47).

Upon the conclusion of Hankins' *in camera* testimony, the trial court asked both parties to argue, pursuant to Rule 403, SCRE, whether the probative value of the evidence was substantially outweighed by the risk of unfair prejudice. (R. 52). In response to the trial court's request, the State reiterated its position that the evidence, while prejudicial, was "extremely probative." (R. 52). Meanwhile, defense counsel disagreed arguing the evidence was "extremely prejudicial" adding the issue of whether the confrontation amounted to witness intimidation was collateral and an attack on Appellant's character. (R. 52-53). Continuing, defense counsel argued the physical confrontation was a prior bad act and was not proven by clear and convincing evidence. (R. 53).

With that, the trial court ruled the evidence of witness intimidation was admissible pursuant to State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009). In so finding, the trial court explained the eyewitness testimony alone served as clear and convincing evidence that the incident occurred. (R. 54) ("Here I find that the proof is clear and convincing with eyewitness testimony."). Moving to the Rule 403 question—whether the probative value of the evidence was substantially outweighed by the risk of unfair prejudice—the trial court found the evidence was probative as evidence of intent and consciousness of guilt since Appellant raised a claim of

self-defense in opening arguments. (R. 54). Continuing, the trial court noted that the evidence, while prejudicial, “is much more probative than it is prejudicial.” (R. 55). Accordingly, the trial court concluded the evidence of witness intimidation was admissible adding that the defense could choose to offer testimony as to Appellant’s intent, but that the question of witness intimidation was a factual question for the jury. (R. 55). Appellant renewed his objection to the introduction of physical confrontation at trial. (R. 196).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). “An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law.” State v. Anderson, 386 S.C. 120, --, 687 S.E.2d 35, 38 (2009). Moreover, the trial court is afforded considerable latitude in ruling on the admissibility of evidence and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

ARGUMENT

- I. The trial court correctly determined the probative value of evidence showing Appellant physically confronted a State’s witness prior to trial was not substantially outweighed by the risk of unfair prejudice since the evidence was probative of Appellant’s intent as well as his consciousness of guilt and, when viewed against the entirety of the record, was not unfairly prejudicial

Appellant maintains the trial court committed reversible error in admitting, pursuant to Rule 403, SCRE, evidence of the physical confrontation between himself and Hankins. Br. of

App. at 5. In support of this proposition, Appellant contends the physical confrontation does not amount to witness intimidation and is therefore irrelevant as to either intent or consciousness of guilt meaning it lacks any probative value. Br. of App. at 7. Using this logic, Appellant reasons the prejudicial effect of the admission of the evidence must outweigh its' probative value. Br. of App. at 7. The State disagrees as the physical confrontation and threats could clearly be interpreted as evidence of witness intimidation making it probative of both intent and consciousness of guilt. Moreover, because defense counsel was allowed to cross-examine Hankins as to the incident and since Appellant testified to his own version of events, the prejudicial effect of the admission of the physical confrontation and threats does not substantially outweigh its' probative value.

A. The Physical Confrontation was Evidence of Witness Intimidation

Appellant correctly notes State v. Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009) requires witness intimidation be linked to the defendant if it is to be introduced as evidence demonstrating consciousness of guilt. Br. of App. at 7. In particular, the Edwards Court said, "the proponent of the evidence of intimidation must connect the defendant with the threat." 383 S.C. at 70, 378 S.E.2d at 407. Here, the State undoubtedly demonstrated Appellant was the source of the physical confrontation since both parties admitted it occurred. Thus, the only question would be whether the trial court's factual ruling, that the jury could find Appellant's actions and threats were evidence of witness intimidation, is supported by the record. See State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("The appellate court is bound by the trial court's factual findings made in response to preliminary motions when there is conflicting testimony, or when the findings are supported by any evidence and not clearly erroneous[.]"). In response to this

inquiry, the State submits the record clearly supports the trial court's ruling meaning the question of witness intimidation was properly submitted as a factual issue to be resolved by the jury.

Specifically, the information before the trial court at the time it issued its' ruling is obviously capable of showing witness intimidation. Indeed, the record plainly reflects Appellant, within two hours of speaking with defense counsel about Hankins's statement, located him, confronted him, hit him and threatened to kill him. (R. 18-19, 47). In particular, the background information, which was before the trial court and was never disputed in argument, established Appellant learned from his attorney that Hankins gave a statement sometime after 4:00 PM and, within in two hours, had found Hankins, hit him in the face six times and threatened his life, saying "I'm going to kill you bitch." (R. 18-19, 46-47).

Furthermore, the evidence which came in after the trial court's ruling provided additional support for its finding that the jury could infer Appellant was attempting to intimidate Hankins. Specifically, Appellant admitted he spoke with his attorney about Hankins on the day the physical confrontation occurred. (R. 326-27). Additionally, he admitted he spoke with his attorney about Hankins a few hours *before* the physical confrontation took place. (R. 327). Finally, Hankins testimony at trial linked Appellant's action and death threats to Hankins' statement since Appellant reportedly said, "I read your statement and I'm going to kill you bitch[.]" (R. 198-99). Accordingly, the State submits the trial court's factual ruling, that the physical confrontation and the evidence surrounding the physical confrontation could be viewed as evidence of witness intimidation, was clearly supported by the record. (R. 198-99).

B. The Evidence of Witness Intimidation is Probative and is not Substantially Outweighed by the Risk of Unfair Prejudice

As detailed above, Appellant further argues that because the physical confrontation and threats do not amount to witness intimidation against Hankins, the physical confrontation was

irrelevant and therefore, inadmissible meaning its' prejudicial effect would necessarily outweigh any probative value under Rule 403. Br. of App. at 7. Again, the State disagrees, because as demonstrated in section (A), the physical confrontation was evidence of witness intimidation meaning it was probative of intent and consciousness of guilt thus making it relevant and admissible evidence. (R. 54). Moreover, because defense counsel cross-examined Hankins on the incident and Appellant elected to testify as to his version of the encounter, the State submits the risk of unfair prejudice did not substantially outweigh its' prejudicial effect.

In ruling on the issue, the trial court found the evidence of witness intimidation was probative as to intent since defense counsel, in its' opening, maintained Appellant was acting in self-defense when he stabbed Victim. (R. 54). Additionally, the trial court, citing to Edwards, found the evidence of witness intimidation was probative because it could show consciousness of guilt. (R. 55). Addressing concerns of unfair prejudice the trial court noted defense counsel could cross-examine Hankins on the incident and, if he wished, could call Appellant to testify to his version of events. (R. 55).

Under Rule 403, otherwise admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Rule 403, SCRE. However, appellate courts must give "great deference to the trial court's judgment under Rule 403 and . . . should be reversed only in exceptional circumstances." State v. Smith, 391 S.C. 353, 364, 705 S.E.2d 491, 497 (Ct. App. 2011) (citing State v. Holland, 385 S.C. 159, 171-72, 682 S.E.2d 898, 904 (Ct. App. 2009)).

Pursuant to Rule 403, SCRE, "the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity,

or . . . some other form of unfair prejudice.” Smith, 391 S.C. at 361, 705 S.E.2d at 496. Unfair prejudice may also mean “an undue tendency to suggest decision on an improper basis.” State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). Similarly, “[t]he determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case.” State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009).

Here, the State submits the trial court did not abuse its’ considerable discretion in admitting the evidence of witness intimidation because it was clearly probative of intent and consciousness of guilt. Indeed, as has been explained above, defense counsel, by claiming Appellant was acting in self-defense, clearly created an issue as to Appellant’s criminal intent at the time he stabbed Victim. Taking this in conjunction with the fact the State is required to prove, beyond a reasonable doubt, that Appellant killed Victim with malice aforethought, any actions by the Appellant which may prove or disprove allegations regarding his intent would clearly be relevant evidence for the jury to consider. See Rule 401, SCRE (“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”) (internal quotations omitted). Understanding this, the State submits evidence of intent and consciousness of guilt, would be clearly probative as both go to one of the main issues at trial—whether Appellant was acting with malice aforethought when he stabbed Victim. See Wiles, 383 S.C. at 158, 679 S.E.2d at 176 (internal quotations omitted) (holding evidence which is “logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.”).

Moreover, a review of the entire record reflects that the risk of unfair prejudice stemming from the admission of the evidence is *de minimis*. See Holder, 382 S.C. at 293, 676 S.E.2d at 698 (“The determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case.”). First, since defense counsel cross-examined Hankins as to whether Appellant was attempting to intimidate him and Appellant testified as to his own version of events, the jury had the opportunity to evaluate the credibility of both witnesses and determine whether it believed Hankins’ or Appellant’s version of events. Additionally, because the evidence of witness intimidation was never offered as a propensity argument in support of Appellant’s guilt, but was instead strictly tied to the facts of the case and related directly to Appellant’s conduct in intimidating Hankins, the State submits Appellant was not unfairly prejudiced by the admission of the witness intimidation evidence. Accordingly, the trial court did not abuse its discretion.

CONCLUSION

In light of the aforementioned arguments, the State respectfully requests this Court to affirm Appellant’s conviction and sentence.

Respectfully Submitted,

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March 21, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Darlington County

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2011-193669

THE STATE,

RESPONDENT,

V.

BREYON TONEY,

APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled “ Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”

Respectfully Submitted,

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STATE OF SOUTH CAROLINA
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THE STATE,

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V.

BREYON TONEY,

APPELLANT.

PROOF OF SERVICE

I, Brendan J. McDonald, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Katherine H. Hudgins, SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201-3332.

I further certify that all parties required by Rule to be served have been served.

This 21st day of March, 2013.



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

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

The State, Respondent,

v.

Breyon Toney, Appellant.

Appellate Case No. 2011-193669

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Unpublished Opinion No. 2014-UP-005
Submitted November 1, 2013 – Filed January 8, 2014

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Brendan Jackson McDonald, both of
Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following
authorities: *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) ("In
criminal cases, the appellate court sits to review errors of law only."); *State v.*

Holder, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009) ("The admission or exclusion of testimonial evidence falls within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent abuse resulting in prejudice."); *State v. Edwards*, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009) ("[W]itness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt."); *id.* ("Establishing the defendant as the source of the intimidation provides the necessary reliability for admissibility.").

AFFIRMED.¹

SHORT, WILLIAMS, and THOMAS, JJ., concur.

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

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM DARLINGTON COUNTY
Court of General Sessions**

J. Michael Baxley, Circuit Court Judge

**Appellate Case No. 2011-193669
Lower Court Case Nos. 2010-GS-16-00077; 78**

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

BREYON TONEY,

APPELLANT.

PETITION FOR REHEARING

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ATTORNEY FOR APPELLANT.

NOW COMES the Appellant in the above-captioned action, acting by and through undersigned counsel, respectfully petitioning this Court to rehear his appeal and reconsider its decision in State v. Toney, Op. No. 2014-UP-005 (S.C. Ct. App. filed January 8, 2014). The Appellant would assert that the following critical matters of fact and law were overlooked or misapprehended by the Court in its decision:

The Appellant raised one ground on appeal: whether or not the trial court erred in refusing to suppress evidence of alleged witness intimidation. This ground for appeal contained three arguments in favor of exclusion of the evidence: (1) the State did not adequately prove that the altercation was evidence of witness intimidation; (2) the evidence should have been excluded pursuant to Rule 404(b), SCRE; and (3) the evidence should have been excluded pursuant to Rule 403, SCRE. In its opinion, this Court affirmed the Appellant's convictions and sentences, finding in full:

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) ("In criminal cases, the appellate court sits to review errors of law only."); *State v. Holder*, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009) ("The admission or exclusion of testimonial evidence falls within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent abuse resulting in prejudice."); *State v. Edwards*, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009) ("[W]itness intimidation evidence, if linked to the defendant, may be admitted to show a consciousness of guilt."); *id.* ("Establishing the defendant as the source of the intimidation provides the necessary reliability for admissibility.").

State v. Toney, *supra*. The Appellant respectfully contends that this Court overlooked the clear merit of the Appellant's allegations and that this Court should rehear this matter.

A. There Was no Evidence of Witness Intimidation

The Appellant respectfully asserts that this Court erred in finding that the testimony at trial constituted witness intimidation testimony such that it would be admissible under State v.

Edwards, 383 S.C. 66, 678 S.E.2d 405 (2009). Here, the “intimidated” witness—LaVincent Hankins—testified *in camera* that the following altercation occurred:

Q. Mr. Hankins, I am specifically referring to an altercation that took place in March, about two months ago. Can you tell us how that altercation happened, what your role in the altercation was, as well as what Mr. Toney’s role in the altercation was?

A. When I was just sitting in the park in the car, and that’s when the fight started. I was in the car and he came into the car and he hit me, and then he just fought me and then my girl got in the car and she drove off and went straight to the Police Department.

Q. Now, were you in the passenger’s side or the driver’s side?

A. Passenger.

Q. Passenger. Did the defendant strike you in the face?

A. Yes.

Q. How many times?

A. Say about six.

Q. Did anything off of his person fall into your car?

A. A watch.

Q. And what, if anything, did the defendant tell or say to you that you could hear?

A. Can you cuss in the courtroom?

Q. Yes, sir. Just be completely honest with what happened?

A. I wrote in the statement, I’m gonna kill you bitch.

Q. And, is that all he said?

A. Yes.

ROA p. 46, line 21-p. 47, line 25. That testimony was the entirety of the State’s presentation of witness intimidation evidence prior to the trial court’s ruling that the testimony was admissible.

In Edwards, the Supreme Court did not define what kinds of threats and actions would constitute witness intimidation. See 383 S.C. at 69, 678 S.E.2d at 407 (footnote 2) (“We can envision a litany of ... forms of witness intimidation, but for purposes of uniformity, we believe the term witness intimidation captures the nature of the evidence in most situations”). Furthermore, the statute criminalizing witness intimidation does not define “intimidation.” See S.C. Code Ann. § 16-9-340(A). The Appellant contends, however, that it is axiomatic that the perpetrator’s actions be in some way linked to the court process with the intent to alter a witness’ testimony or to prevent a witness from testifying altogether in order to be admissible as witness “intimidation.” See, e.g., Edwards, 383 S.C. at 68, 678 S.E.2d at 406 (finding witness intimidation where the defendant threatened the victim by stating that he had a “hit out on her, [and] that she wouldn’t make it through the courtroom doors”); State v. Center, 205 S.C. 42, 30 S.E.2d 760 (1944) (finding witness intimidation where the defendant’s son assaulted a witness and told the witness “that if I got on the stand ... that [what he had just done] was not half what he was going to do for me if I swore against his mother”); Commonwealth v. Rivera, 76 Mass.App.Ct. 530, 535, 923 N.E.2d 1086, 1090 (Mass. App. Ct. 2010) (holding, in interpreting a witness intimidation statute, that “the Commonwealth was required to prove that the defendant wilfully engaged in intimidating conduct, that is, acts or words that would instill fear in a reasonable person, and did so with the intent to impede or influence a potential witness’s testimony”). After all, the term “witness” indicates that the perpetrator has knowledge that the individual being intimidated will be a witness in an upcoming court proceeding. Without the necessary link, irrelevant bad acts are inadmissible. See Rule 404(b), SCRE. The doctrine of witness intimidation should not be used as a gateway through Rule 404(b)’s restrictions.

In the present case, even if Hankins is believed, the encounter between the Appellant and Hankins does not rise to the level of witness intimidation. There is no indication from Hankins that the altercation was in any way related to the Appellant's upcoming trial. There were no statements made by the Appellant that demonstrated that he wanted to prevent Hankins from testifying or that his purpose for assaulting Hankins was to shape Hankins' testimony in any way. Shortly put, there is evidence of an assault on an individual who happened to be a witness. While it may have been illegal for the Appellant to assault Hankins, there must be something more to transform the assault into witness intimidation. That required link is missing in this case. Accordingly, the Appellant respectfully asserts that this Court overlooked the lack of evidence tying the assault to an attempt to intimidate a witness, and that this Court erred in finding the evidence properly admitted pursuant to Edwards.

B. The Witness Intimidation Evidence Violated Rule 403, SCRE

In Edwards, the Supreme Court instructed that evidence that a defendant attempted to intimidate a witness, even if relevant, "may be excluded for a host of reasons, including a finding under Rule 403, SCRE, that the probative value of the evidence is substantially outweighed by its prejudicial effect." 383 S.C. at 72, 678 S.E.2d at 408 (footnote 3). The Appellant respectfully asserts that this Court overlooked the clear prejudicial nature of the evidence and its inadmissibility under Rule 403, SCRE.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. Here, the witness intimidation evidence should have been excluded pursuant to Rule 403. According to the State's version of the facts, the Appellant

murdered the victim during a fight that began as a dispute arising from the victim's purchase of diapers for the mother of the Appellant's child. The Appellant admitted to his participation in the fight—though he testified that the victim was angry with him for having a sexual relationship with the victim's girlfriend—and claimed he acted in self-defense. Furthermore, the trial court charged the jury on the lesser-included offense of voluntary manslaughter. See ROA pp. 405-408. The central issue at trial, then was the motivation for the death of the victim and whether or not the Appellant acted with malice or in self-defense.

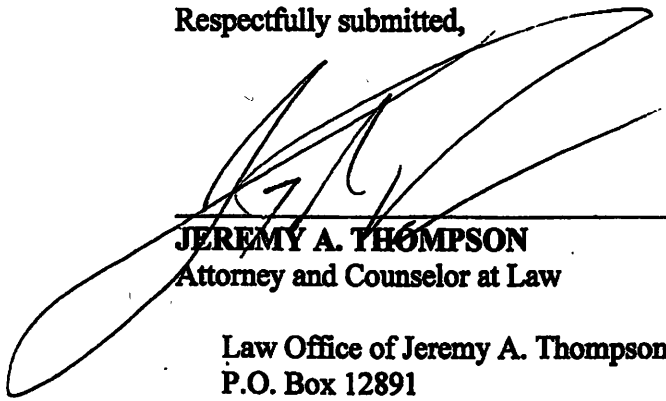
Here, the State introduced the evidence of witness intimidation to show that the Appellant acted with malice the night of the victim's death. The fact that the Appellant would engage Hankins in a fight and threaten to kill him could have easily been unfairly used by the jury to conclude that the Appellant wanted to intentionally kill the victim. While it may be implausible to believe that an individual would want to kill someone over the purchase of diapers, it would be far easier to believe that individual capable of killing for that reason if they are making threats against another person's life. Again, there was virtually no reason presented for the death threat levied against Hankins, so the jury could have easily come to conclude that the Appellant acted with malice in killing the victim based solely on his threats to Hankins. Accordingly, the Appellant respectfully contends that the evidence was unduly prejudicial—as it caused the jury to form its verdict on facts not drawn from the victim's death—and that this Court overlooked its overly prejudicial nature in finding Hankins' testimony admissible. This Court should rehear this appeal and find that the trial court abused its discretion in admitting the evidence.¹

¹ Though the Appellant believes the above discussion has sufficiently discussed the matter of prejudice, for the purpose of preserving the record, the Appellant would also argue that the admission of the witness intimidation evidence prejudiced him. The pivotal issue at trial was the presence of malice and the believability of the Appellant's claim of self-defense. It is very likely that accusations that the Appellant intentionally attacked Hankins and threatened to kill him overrode the jury's belief in the Appellant or his claim that he acted without malice in killing the victim. The Appellant asserts that the prejudicial admission of this erroneous testimony requires a new trial.

CONCLUSION

WHEREFORE, having set forth his grounds, the Appellant respectfully petitions this Court to rehear its opinion issued in this matter: See State v. Toney, Op. No. 2014-UP-005 (S.C. Ct. App. filed January 8, 2014).

Respectfully submitted,



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This 23rd day of January, 2014.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
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J. Michael Baxley, Circuit Court Judge

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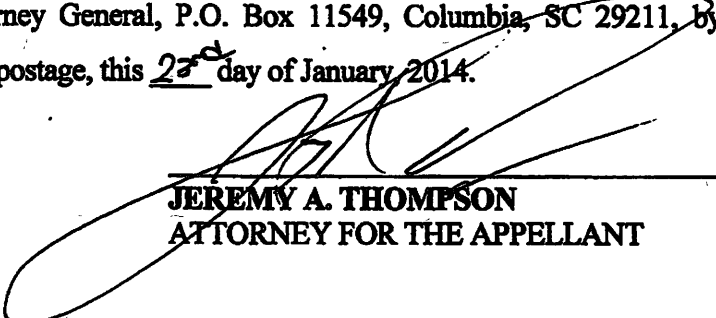
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BREYON TONEY,

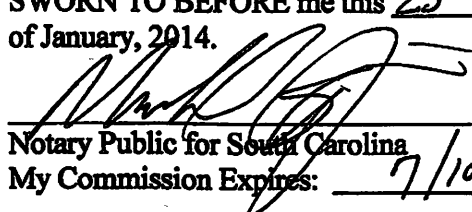
APPELLANT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Petition for Rehearing in the above-entitled case has been served upon opposing counsel, Brendan J. McDonald, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 23rd day of January, 2014.


JEREMY A. THOMPSON
ATTORNEY FOR THE APPELLANT

SWORN TO BEFORE me this 23rd day
of January, 2014.


(L.S.)
Notary Public for South Carolina

My Commission Expires: 7/10/2022

The South Carolina Court of Appeals

The State, Respondent,

v.

Breyon Toney, Appellant.

Appellate Case No. 2011-193669

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul C. Story, Jr. J.

H. B. Wa J.

Paul C. Thomas J.

Columbia, South Carolina

cc: Kathrine Haggard Hudgins, Esquire
Brendan Jackson McDonald, Esquire
Donald J. Zelenka, Esquire
Jeremy Adam Thompson, Esquire

FILED

February 20, 2014



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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

April 11, 2014

The Honorable Scott B. Suggs
1 Public Sq Rm B4
Darlington SC 29532-3213

REMITTITUR

Re: The State v. Breyon Toney
Lower Court Case No. 2010GS1600077, 2010GS1600078
Appellate Case No. 2011-193669

Dear Clerk of Court:

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

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jenny A. Kitchings".
CLERK

cc: Kathrine Haggard Hudgins, Esquire
Brendan Jackson McDonald, Esquire
Donald J. Zelenka, Esquire
Jeremy Adam Thompson, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

BREYON TONEY, #346126

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

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

14CP160875

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lee Correctional Institution
2. Name and location of Court which imposed sentence Darlington County Court of General Sessions; 1 Public Square, Darlington, SC 29532
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-16-00077: Murder
 - (b) 2010-GS-16-00078: Possession of a Weapon During a Crime of Violence
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 5/18/11: Thirty years' imprisonment
 - (b) 5/18/11: Five years' imprisonment (concurrent)
 - (c) _____

TRUE CERTIFIED COPY,

Scott B. Figg
CLERK OF COURT/BMO
DARLINGTON COUNTY, SC

2014 OCT 23 AM 9:42
SCOTT B. FIGG
CLERK OF COURT/BMO
DARLINGTON COUNTY, SC

FILED

6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty X
 - (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Affirmed
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. 1/8/14
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. 2014-UP-005
 - ii. _____
 - iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
 - (b) _____
 - (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Trial Counsel
 - (b) Ineffective Assistance of Appellate Counsel

(c) _____

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

(a) Defense counsel failed to conduct an adequate investigation into the Applicant's

case.

(b) Defense counsel failed to adequately prepare for trial and failed to make appropriate objections and motions at trial.

(c) Appellate counsel failed to raise all meritorious claims on appeal.

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

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

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

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) This Application for Post-Conviction Relief provides the first opportunity to present these issues.

(b) _____

(c) _____

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

(a) your arraignment and plea? _____

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

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

- (a) the name and address of each attorney who represented you:

- i. Matthew Swilley, Esquire; Fourth Circuit Public Defender's Office; 418 West Boulevard, Chesterfield, SC 29709

- ii. Richard Jones, Esquire; Jones, Seth, Shuler & Jones, LLP; P.O. Box 1268, Sumter, SC 29151

- iii. Tiffany Gibson, Esquire; South Carolina Department of Consumer Affairs; 1727 Highway 9 West, Dillon, SC 29536

- iv. Katharine Hudgins, Esquire; South Carolina Commission on Indigent Defense, Division of Appellate Defense; 1330 Lady Street, Suite 401, Columbia, SC 29201

- v. Jeremy A. Thompson, Esquire; Law Office of Jeremy A. Thompson, LLC; P.O. Box 12891, Columbia, SC 29211

- (b) the proceedings at which each such attorney represented you:

- i-iii. Trial and sentencing

- iv. Appeal

- v. Petition for rehearing

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

To vacate the Applicant's convictions and sentences and to remand for a new trial.

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

No

555

STATE OF SOUTH CAROLINA

County of Darlington

)
)
)

VERIFICATION

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

SWORN to and subscribed before me this 22nd
day of October, 2014.

[Signature] (L.S.)
Notary Public

My Commission Expires: 7/10/2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	FOR THE FOURTH JUDICIAL CIRCUIT
Breyon Toney, #346126,	)	Case No. 2014-CP-16-0875
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief filed October 23, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. In January 2010, the Darlington County Grand Jury indicted Applicant for murder (2010-GS-16-00077) and possession of a weapon during the commission of a violent crime (2010-GS-16-00078). Matthew Swilley, Esquire; Richard Jones, Esquire; and Tiffany Gibson, Esquire, represented Applicant. On May 18, 2011, Applicant proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury found Applicant guilty as indicted. Judge Baxley sentenced Applicant to thirty (30) years imprisonment for murder and five (5) years imprisonment for possession of a weapon during the commission of a violent crime.

Applicant filed a timely notice of appeal. Katharine Hudgins, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, perfected the appeal on behalf of Applicant. The South Carolina Court of Appeals affirmed Applicant's conviction on January 8, 2014. State v. Toney, Op. No. 2014-UP-005 (S.C. Ct. App. filed January 8, 2014). On January 23, 2014, Jeremy Thompson, Esquire, filed a Petition for Rehearing on behalf of

Applicant. By Order filed February 20, 2014, the South Carolina Court of Appeals denied the Petition. The remittitur was returned to the circuit court on April 11, 2014.

II.

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

1. "Ineffective assistance of trial counsel"
 - a. "Defense counsel failed to conduct an adequate investigation into the Applicant's case"
 - b. "Defense Counsel failed to adequately prepare for trial and failed to make appropriate objections and motions at trial"
2. "Ineffective Assistance of Appellate Counsel"
 - a. "Appellate Counsel failed to raise all meritorious claims on appeal"

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

Attached to this Return and incorporated herein are the records of the Darlington County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, the trial transcript, and Applicant's appellate records. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. In a post-conviction relief action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 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, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney 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 that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial 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.

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

IV.

Applicant's second claim is an allegation of ineffective appellate counsel. Respondent contends that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. *Id.* Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. *Id.* Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that

cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

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

VI.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

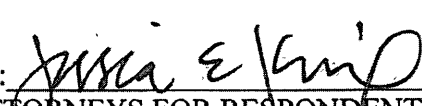
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

JESSICA E. KINARD
Assistant Attorney General
S.C. Bar No. 77889

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

March 28, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON)
))
))
BREYON TONEY, 346126)
))
Applicant,)
))
vs)
))
STATE OF SOUTH CAROLINA,)
))
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

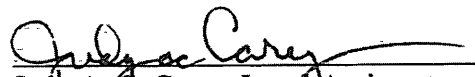
2014-CP-16-0875

AFFIDAVIT OF SERVICE BY MAIL

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

Jeremy A. Thompson, Esquire
Post Office Box 12891
Columbia SC 29211

DATED this 28th day of March, 2016.


Judy A. Carey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF DARLINGTON	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
BREYON TONEY, #346126,	)	
	)	CASE NO.: 2014-CP-16-875
Applicant,	)	
	)	
v.	)	AMENDED APPLICATION FOR
	)	POST-CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

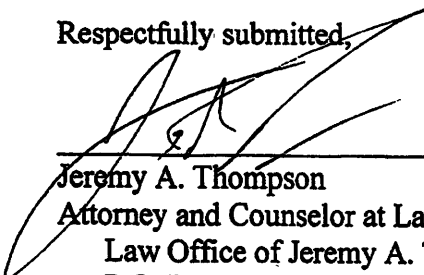
NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving to amend his Application for Post-Conviction Relief. In general, the Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. The Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of counsel:

1. Trial counsel was ineffective for failing to object to the trial court's failure to charge the jury on the general permissive malice inference instruction.
2. Trial counsel was ineffective for failing to require the State to deliver a closing argument on the law prior to his closing argument. See Tr. p. 393, lines 6-17.
3. Trial counsel was ineffective for failing to adequately research and prepare a request to charge on the lesser-included offense of involuntary manslaughter. See Tr. p. 386, line 19-p. 389, line 14.
4. Trial counsel was ineffective for failing to request that the jury be charged on the defense of accident.
5. Trial counsel was ineffective for failing to request that the jury be recharged on the law of murder and voluntary manslaughter in response to two notes from the jury requesting the definition of murder and the definition of manslaughter. See Courts Exhibits #4 and 5.

6. Trial counsel was ineffective for failing to object to the trial court's instructions on self-defense which repeatedly placed the burden of proof on establishing the defense on the Applicant. See Tr. p. 457, line 17-p. 461, line 18.
7. Trial counsel was ineffective for failing to prepare the Applicant to testify and to meet on a sufficient number of occasions prior to trial with the Applicant to prepare the Applicant for trial generally.
8. Trial counsel was ineffective during his closing argument in:
 - a. Stating that he did poorly in philosophy and then comparing Proverbs to Friedrich Nietzsche at the outset of his argument, see Tr. p. 395, line 15-p. 396, line 15;
 - b. Arguing that the Applicant should not have gone to the park where he encountered LaVincent Hankins, see Tr. pp. 404-406;
 - c. Failing to discuss the elements of self-defense and how they were met by the Applicant's testimony, see Tr. pp. 410-412;
 - d. Arguing that a friend who died as a result of a fall was comparable to the victim, see Tr. pp. 414-415.
9. Trial counsel was ineffective for failing to adequately cross-examine the witnesses who were at the scene regarding their discussions with each other about the case.
10. Trial counsel was ineffective for failing to present readily available witnesses who could have testified in support of the Applicant regarding his altercation with LaVincent Hankins.
11. Trial counsel was ineffective in failing to object to improper hearsay, vouching, and opinion testimony given by Investigator Mike Anderson in the following respects:
 - a. Testimony walking through the incident with the jury based entirely on accounts given to him by witnesses at the scene; see Tr. pp. 126-129;
 - b. Testimony that other witnesses that he interviewed substantially matched the accounts given by Marcus Brunson and Crystal Robinson, see Tr. p. 131, lines 10-24;
 - c. Testimony that the victim's fingerprints were on the bottle matched the version of events that he got from four witnesses at the scene, see Tr. p. 132, line 12-p. 133, line 5.
12. After-discovered evidence exists to show that the primary witnesses against the Applicant collaborated to falsify their statements against the Applicant in order to make the case against the Applicant stronger.

The Applicant asks that the above-referenced allegations be considered in addition to those allegations previously raised in his original Application for Post-Conviction Relief.

Respectfully submitted,



Jeremy A. Thompson

Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC

P.O. Box 12891

Columbia, SC 29211

803-779-2555

803-779-2556 FAX

jeremyatlaw@yahoo.com

Attorney for the Applicant

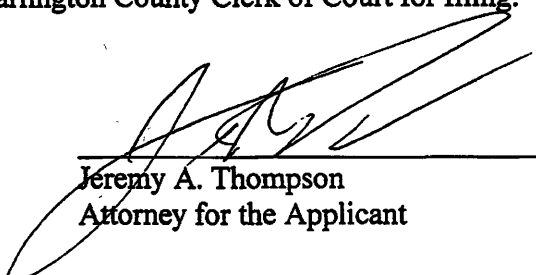
This 5th day of July, 2017

STATE OF SOUTH CAROLINA	)	
COUNTY OF DARLINGTON	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
BREYON TONEY, #346126,	)	CASE NO.: 2014-CP-16-875
Applicant,	)	
v.	)	CERTIFICATE OF SERVICE
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

The undersigned hereby certifies that a true copy of the Amended Application for Post-Conviction Relief in the above matter has been served on opposing counsel this 5th day of July, 2017, by mailing in an envelope properly addressed with postage prepaid to:

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

The original having been sent to the Darlington County Clerk of Court for filing.



Jeremy A. Thompson
Attorney for the Applicant

SWORN TO BEFORE ME this 5th day of
July, 2017.



Notary Public for South Carolina (L.S.)

My Commission Expires: 2 22/18

In Circuit Court of the
Fourth Judicial Circuit
2014-CP-16-0875

BREYON TONEY,

Plaintiff,

VS.

THE STATE,

Defendant.

)
)
)
)
)
)
)
)
)
)

Transcript of Record

Dillon, South Carolina
July 18, 2017

B E F O R E:

The Honorable Roger E. Henderson

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

Mr. Jeremy A. Thompson, Esquire
Ms. Tricia Blanchette, Esquire
Attorneys for Plaintiff

Mr. Johnny E. James, Jr., Esquire
Ms. Megan Jameson, Esquire
Attorneys for Defendant

Lisa Carter
Circuit Court Reporter

I N D E X

WITNESSESPAGE

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EXHIBITSNO.DESCRIPTIONEV.

(NO EXHIBITS INTRODUCED DURING HEARING)

1 THE COURT: Yes, sir?

2 MR. JAMES: All right. Your Honor, we're going to
3 go a little bit out of order at this moment, The State
4 calls the matter of Breyon Toney versus State of South
5 Carolina. That is docket number 2014-CP-16-00875. Your
6 Honor, since we're taking a witness out of order I
7 respectfully request to forgo the usual full procedural
8 hilt and permit the applicant to go ahead and call their
9 witness.

10 THE COURT: All right, sir. I agree. Yes, sir?

11 MR. THOMPSON: May it please, the Court, Your Honor?
12 For the record my name is Jeremy Thompson. I along with
13 Tricia Blanchette, we're representing the applicant in this
14 matter. Again, I have a bit of lengthier presentation that
15 I would like to do but I will just wait to do it afterwards
16 just, I think, suffice it to say that this is a case that's
17 a PCR that rises out of a murder trial and the facts are
18 somewhat simple. It's basically a fight late at night
19 between my client and the victim and they were a few
20 witnesses to it and some of them, they testified at the
21 trial and we're going to call one of them now to testify
22 again before this court. So with that background in mind,
23 Your Honor, we would call Phillip Franklin as the
24 applicant's first witness.

25 THE COURT: Come forward please. Come around here.

1 THE CLERK: Place your left hand on the Bible and
2 raise your right hand. Do you solemnly swear or affirm the
3 testimony you're about to give the Court is the truth, the
4 whole truth, and nothing but the truth so help you God?

5 MR. FRANKLIN: Yes, ma'am.

6 THE CLERK: All right. Be seated in the witness
7 box. State your full name for the court and you're going
8 to have to speak up.

9 THE COURT: Yeah, these microphones do not work so
10 speak loudly and clearly and answer questions with yes or
11 no response and not a uh, uh or a huh, huh, do you
12 understand?

13 MR. FRANKLIN: Yes, sir.

14 THE COURT: All right, sir.

15 PHILLIP FRANKLIN, first being
16 duly sworn, testified as follows:

17 **Direct Examination by Ms. Blanchette:**

18 Q. Can you please state your name for the record?

19 A. Philip Anton Franklin.

20 Q. Okay. And Mr. Franklin where do you currently reside
21 and what city and state?

22 A. The city of Hartsville, South Carolina.

23 Q. Okay.

24 A. The State of -- yeah.

25 Q. Now, Breyon Toney, who is there seated next to me, do

1 you recall testifying for the State back in his trial in
2 May of 2011?

3 A. Yes, ma'am.

4 Q. Okay. And do you recall being present at the incident
5 that we here about, the stabbing incident on Marion Avenue
6 on March 24, 2009?

7 A. Yes, ma'am.

8 Q. Okay. And at trial you testified about that, is that
9 correct?

10 A. True.

11 Q. Okay. Now, did you have any firsthand knowledge of
12 the victim in Mr. Toney's relationship prior to that night
13 of March 24th?

14 A. Yes, ma'am.

15 Q. Okay. What did you know about them, where they
16 friends?

17 A. Of course.

18 Q. Okay.

19 A. Great friends.

20 Q. Oh, go ahead, sorry.

21 A. Great friends.

22 Q. And do you know if they ever resided together or lived
23 together at any time?

24 A. Yes, ma'am. Plenty of times.

25 Q. Okay. Now, you said you were there on the night in

1 question, is that correct?

2 A. Yes, ma'am.

3 Q. Now, based upon what you saw and had firsthand
4 knowledge of, did it appear to you that the victim was the
5 aggressor or wanted to fight Mr. Toney that night?

6 A. Honestly, he was.

7 Q. Okay. Do you want to explain that?

8 A. I mean, like, okay, they met up, like, basically to
9 squash it, to clear out what was going on. But my deceased
10 friend, he wasn't really feeling it like he wanted revenge,
11 like, he didn't want to settle. He, like, instead of
12 talking, he wanted to fight, you know, get aggressive. I
13 already talked to him before. Before Breyon showed up I
14 was already with Junie, the deceased, and I already -- I
15 know he ask what he had but I ain't never said nothin'
16 like, I know he had a gun the whole time but I'm pretty
17 sure it wasn't loaded or nothin' and he probably didn't
18 have no intentions of using it but I know he had it.

19 Q. And when you were talking to him were you trying to
20 talk him out of being aggressive and fighting that night --

21 -

22 A. Yes, ma'am. I was like ---

23 Q. --- or what were you talking about?

24 A. I was just telling him, like, bruh, that your home
25 boy, like, they just -- they just -- he say, she say what

1 got into his head so I told him just meet up with them and
2 have a good conversation, you know, end it off, but it
3 didn't go nowhere's.

4 Q. And just to be clear and make a good record here, you
5 said there was a he said, she said, there was an argument
6 going on?

7 A. No, like, people that's not even know where -- they's
8 somebody's people that ain't got nothing to do with this
9 telling him stuff that ain't true.

10 Q. Okay. So they were meeting up was your understanding
11 to quash, is what you said, to put some rumors, some talk
12 to rest?

13 A. Yeah.

14 Q. Okay.

15 A. Yes, ma'am.

16 Q. Okay. Now, when you testified, you testified that the
17 victim and an individual y'all called "Cruddy" saw Mr.
18 Toney with a knife, but you never testified about the
19 victim having a weapon that night but you did, in fact, see
20 him with a weapon?

21 A. Yes, ma'am.

22 Q. Okay. Now, based upon what you saw and heard that
23 night as you were watching this all take place, did it
24 appear to you that Mr. Toney intentionally stabbed the
25 victim in this case?

1 A. No, ma'am.

2 Q. Can you explain that?

3 A. Okay, like, I tell you before, he was not aggressive.
4 My deceased friend, he, was aggressive but, like, it
5 basically, from what I seen he was defending his self,
6 like, from how our distance is, I already know there was a
7 coat on the ground that my deceased friend that he was
8 wearing and I already know there was something in it. So
9 as they are backing toward the shadows they get'in closer
10 to where the coat at. I did see Junie go, like, reach down
11 for his coat but that was all, like, they got further in
12 the shadows.

13 Q. Okay. So you saw him reaching for his coat, what
14 would that mean to you?

15 A. Probably he going to get that gun.

16 Q. Okay. Now, you testified for the State, correct?

17 A. Yes, ma'am.

18 Q. Did anybody from the defense attorney or defense team,
19 attorney Swilley, a private investigator, anybody ever
20 reach out to you to ask you about what you saw and heard
21 about that night?

22 A. Like, when I was in there they did, by my statement,
23 they asked me did, um, did I see anything, they, like, well
24 what about Junie does he have anything. I told them he had
25 a weapon. They just said that ain't the case, we ain't

1 worried about what he had. It was too much focus on what
2 Breyon had.

3 Q. And when you say you told them, who did you tell that
4 to, was that the person from the State that talked to you?

5 A. Yes, ma'am.

6 Q. Okay. But did the defense attorney or a private
7 investigator for Mr. Toney, anybody that said, hey, we're
8 working on behalf of Mr. Toney, did they ever reach out to
9 you before trial?

10 A. No, ma'am.

11 Q. Okay. If they would've reached out to you and said,
12 hey, we want to interview you, we want to hear everything
13 you remember from that night and what you know about the
14 relationship, what you knew about your friend Junie that
15 was the victim, would you have talked to them?

16 A. Of course.

17 Q. Okay. And you were willing to talk to myself and Mr.
18 Thompson leading up to this PCR case, is that correct?

19 A. Yes, ma'am.

20 Q. Okay. And you were willing to come to court today, is
21 that correct?

22 A. Yes, ma'am.

23 Q. And you accidentally or mistakenly subpoenaed for
24 Darlington so you came here to Dillon of your own free
25 will, is that correct?

1 A. Yes, ma'am.

2 Q. Okay. Now, do you -- if the defense attorney would
3 have further questioned you, he got to cross-examine you
4 when you were on the stand, would you had admitted the
5 information or given the information that you've given
6 today?

7 A. Yes, ma'am. I wanted to that day but they never asked
8 me no other type of question like that. They didn't really
9 -- obviously, to me they didn't care.

10 Q. Okay.

11 THE COURT: I'm sorry I didn't understand what you
12 said. Repeat that answer.

13 A. I said they didn't ask me any questions towards it so
14 to me it felt like they really didn't care.

15 Q. And who is the, they, that you're referring to, just
16 so we're really clear?

17 A. The people, the solicitor and them, like the defense.

18 Q. So attorneys for both sides?

19 A. Yes, ma'am.

20 Q. Okay.

21 MS. BLANCHETTE: Your Honor, if I can beg the
22 Court's indulgence just one moment.

23 THE COURT: Yes, ma'am.

24 Q. Like I said, we appreciate you coming here today by
25 your own free will, is there anything else that you'd think

1 is pertinent to this situation that you would've testify to
2 if asked that day in court?

3 A. Yes, ma'am. I would like to tell the court that how
4 the whole situation had went down, that was two friends who
5 they got into an argument that escalated to something that
6 it really didn't need to. I know how the family feel.
7 They understand it was an accident. If I could say
8 anything to make it better I wish it would've never
9 happened. I wish he would be doing the time that he's
10 doing. The amount of time he doing is definitely wrong,
11 that's his friend. He's got to suffer enough to know that
12 an accident killed his friend.

13 MS. BLANCHETTE: Your Honor, I have no further
14 questions. Thank you, Mr. Franklin.

15 THE COURT: Ms. Jameson?

16 **Cross-Examination by Ms. Jameson:**

17 Q. Good morning Mr. Franklin, you testified you saw a
18 weapon on the victim that day?

19 A. Yes, ma'am.

20 Q. When did you see that weapon?

21 A. This was before -- I was with him the whole time so
22 that was when I saw it.

23 Q. Before the defendant arrived at the Marion Circle
24 gathering?

25 A. Yes, ma'am.

1 Q. How long before he got there, before the defendant got
2 there?

3 A. Probably like twenty to thirty minutes.

4 Q. How many times did you see the weapon that night?

5 A. Twice.

6 Q. Can you describe when you saw the weapon?

7 A. Okay. When he first showed up, I seen it in his coat.
8 And the second time is when he took his coat off and I, it
9 was down on the ground.

10 Q. You said you saw it in his coat, did he take it out of
11 his coat and brandish it?

12 A. No, like, just, you could see it, like, when he opened
13 his jacket.

14 Q. You saw the actual gun inside his coat ---

15 A. No, like ---

16 Q. --- or just the ---

17 A. No, just like the print.

18 Q. You saw the print of the gun?

19 A. Yes.

20 Q. You never actually saw a weapon?

21 A. It was shiny. I saw -- I know it was a weapon, but I
22 couldn't see, but I could see a print.

23 Q. How did you know it was a weapon?

24 A. I got common sense to be honest.

25 Q. So you saw the outline of what you thought was a gun?

1 A. Yes, ma'am.

2 Q. Did the victim brandish the weapon during his fight
3 with Mr. Toney?

4 A. Did he brandish it?

5 Q. Did he pull it out of his jacket?

6 A. The jacket was on the ground.

7 Q. So he never took the weapon out during their physical
8 altercation?

9 A. When they got towards the shadows I'm pretty sure that
10 was what he was going for.

11 Q. Going to the shadow, I'm glad you brought that up, you
12 recall testifying at trial, correct?

13 A. Yes, ma'am.

14 Q. And your testimony at trial was, you couldn't see much
15 of the fight because it was in the shadows, correct?

16 A. True.

17 Q. And you were cross-examined about that by Mr. Swilley
18 at trial, correct?

19 A. Yes, ma'am.

20 Q. And you testified you didn't see the actual stabbing
21 or what happened, correct?

22 A. Yes.

23 MS. JAMESON: No further questions, Your Honor.

24 MS. BLANCHETTE: Very briefly, Your Honor.

25 THE COURT: Yes, ma'am.

Redirect Examination by Ms. Blanchette:

Q. How was it that you knew the victim in this case, were you all friends?

A. Yes.

Q. How long had you known him?

A. Since we were kids.

Q. Okay.

A. Do you want an exact number?

Q. If you have one that would be great.

A. Well, I'm 27 now, I give it 17 years.

Q. Okay. Did you know the victim to carry a weapon in his coat?

A. Yes.

Q. Okay. And was that common knowledge that he would carry a weapon in his coat?

A. Yes, around that time all of us was, you know, we was in the streets, we was protecting ourselves from each other.

MS. BLANCHETTE: Your Honor, I have nothing further. Thank you, Mr. Franklin.

MS. JAMESON: No other showing from the State.

THE COURT: All right. You can step down.

MR. JAMES: My understanding, Your Honor, is that opposing counsel is confirming if another witness needs, I believe to go now or if she can be delayed until this

1 afternoon with the rest of the case.

2 THE COURT: I'm sorry, is there another witness
3 that we need to call now, is that what you're saying?

4 MR. JAMES: That is what Ms. Blanchette is looking
5 into at this moment.

6 THE COURT: Oh, okay.

7 MS. BLANCHETTE: Your Honor, can we beg the Court's
8 indulgence just two minutes. I misdirected her to the old
9 courthouse downtown so she just walked in. If I could just
10 have two minutes.

11 THE COURT: Nobody has talked to her before now?

12 MS. BLANCHETTE: No, I just didn't want to keep the
13 court waiting I was trying to figure out her schedule since
14 we thought we were the first ones this morning.

15 THE COURT: Is this a lengthy witness or another
16 short one?

17 MS. BLANCHETTE: No, she'll be just as quick as Mr.
18 Franklin.

19 THE COURT: Why don't we knock it out and move on.

20 MS. BLANCHETTE: Oh, okay.

21 MR. THOMPSON: We'd call Johnetta Evans, Your Honor.

22 THE COURT: Who?

23 MR. THOMPSON: Johnetta Evans.

24 THE COURT: Come on up here, Ms. Evans.

25 THE CLERK: Place your left hand on the Bible and

J. Evans- Direct Examination by Ms. Blanchette

17

1 raise right hand. Do you solemnly swear or affirm the
2 testimony you're about to give the court is the truth, the
3 whole truth, and nothing but the truth so help you God?

4 MS. EVANS: Yes, ma'am.

5 THE CLERK: Be seated in the witness box and state
6 your full name for the court please, ma'am.

7 MS. EVANS: Hey, I'm Johnetta Bernice Evans.

8 MS. BLANCHETTE: And does anybody -- could you
9 spell your first name so we get it right.

10 MS. EVANS: J-o-h-n-e-t-t-a.

11 JOHNETTA EVANS, first being
12 duly sworn, testified as follows:

13 **Direct Examination by Ms. Blanchette:**

14 Q. And, Ms. Evans, what city and state do you currently
15 reside in?

16 A. Hartsville, South Carolina.

17 Q. Okay. And we are here today about an incident that
18 occurred back on March 24, 2009 and one of the State's
19 witnesses was Lavincent Quitell Hankins, do you know Mr.
20 Hankins?

21 A. Yes, ma'am, I do.

22 Q. How do you know him?

23 A. Well, I used to date him.

24 Q. Okay. And back in March of 2009, were you all dating
25 at that time?

1 A. Wasn't dating, but, you know, I was seeing him.

2 Q. Okay.

3 A. It wasn't -- I was in a relationship.

4 Q. I'm sorry.

5 A. I was in a relationship but it wasn't, you know

6 Q. Okay. You were in a relationship with him at that
7 time?

8 A. Yes.

9 Q. Okay. Now, we talked a little bit with the last
10 witness about incident that took place on Marion Street
11 where the victim was stabbed and, unfortunately, lost his
12 life on March 24, 2009, were you present that night when
13 that happened?

14 A. No, ma'am.

15 Q. Okay. What was your understanding as to whether or
16 not Mr. Hankins was present that night on March 24th?

17 A. Well, you know, that was the confused thing, but how I
18 found out about it was Mr. Hankins. He gave me a call and
19 he said, "Guess what?" I'm, like, "huh?" And he said, "my
20 cousin ---

21 MS. JAMESON: Your Honor, I'd object to hearsay.

22 THE COURT: I'll sustain the objection.

23 Q. Ms. Evans, you can't tell us what somebody else said.

24 A. Okay.

25 Q. What was your understanding as to whether or not he

1 was present that night?

2 A. Well, he told me he wasn't ---

3 THE COURT: Ma'am, don't tell us what he told you.

4 A. Oh, okay, I'm sorry, judge.

5 MS. JAMESON: Hearsay, Your Honor.

6 THE COURT: I agree. Sustain the objection.

7 Q. Let me ask the question just one more time and I will
8 try to ask you ---

9 THE COURT: Tell us what you know of your own
10 knowledge ---

11 A.

12 THE COURT: --- or your own observation, not what
13 somebody told you.

14 A. Okay.

15 Q. Of your own knowledge, was it your understanding he
16 was present that night?

17 A. No, ma'am.

18 MS. JAMESON: Your Honor, I would object. This
19 witness said she wasn't present at the scene, anything she
20 knows is hearsay.

21 THE COURT: I agree. That's still a hearsay
22 response.

23 MS. BLANCHETTE: I'll move on, Your Honor.

24 Q. Now, did you encounter Mr. Toney later at a park?

25 A. Yes, ma'am.

1 Q. When he was out on bond?

2 A. Yes, ma'am.

3 Q. Okay. At the trial, Mr. Hankins testified about that
4 incident, can you tell us about what you know about that
5 incident, what you saw, heard, and were aware of with your
6 first-hand knowledge from that day?

7 A. Okay. Well, we took the kids to the park. We got out
8 at the park. Not long after we were at the park, the kids
9 were playing or whatever, that's when we saw Mr. Toney. I
10 spoke with him. And we were just conversating. Hankins
11 was in the car. Hankins got out of the car and came over,
12 I don't know if he thought I was talking to him about
13 something else, but he intervened and he kind of like
14 pushed Breyon and they started fightin'.

15 Q. Okay. So from what you saw with your very own eyes,
16 who was the aggressor in the fight that day at the park?

17 A. Mr. Hankins.

18 Q. And did Mr. Toney ever approach your vehicle before
19 Mr. Hankins came out?

20 A. No, ma'am. He was -- he approached the park as
21 altogether, him and his, whoever he was with.

22 Q. Okay. And were you have any type of negative
23 conversation or fighting with Mr. Toney or was it a nice
24 conversation?

25 A. It was a nice conversation. I think it was too nice,

1 probably. I don't know.

2 Q. How did you all end up then, at a Police Department
3 that day, you and Mr. Hankins?

4 A. Actually, I had to leave my kids that day because Mr.
5 Hankins, you know, he was abusive. He told me to get in
6 the car and drive, go to the police department, this dude
7 killed my cousin. Let's go. So I, drove to the police
8 department and that's what happened.

9 Q. Okay. Why did you tell the police that day that you
10 had a different account of events that happened?

11 A. No, I wasn't going to get beat no more by Hankins so
12 what I -- how I got away from him, my husband came back.

13 Q. Okay.

14 A. Yeah.

15 Q. So you were in an abusive relationship ---

16 A. Yes, ma'am.

17 Q. --- with Mr. Hankins?

18 A. Yeah, it's on record.

19 Q. Did Mr. Swilley, who represented Mr. Toney, or anybody
20 from the defense contact you and ask you about what you had
21 saw and witnessed in the park that day before Mr. Toney's
22 trial?

23 A. No, ma'am.

24 Q. Okay. If they had, would you have been willing to
25 talk with them about it?

1 A. I don't think so at that time.

2 Q. Okay. Please explain that?

3 A. I was -- I was, you know, because of my relationship I
4 wouldn't have said anything.

5 Q. Okay.

6 A. I would have did what Hankins told me to do.

7 Q. Okay. And if you would have been subpoenaed to court
8 and put on the stand, would you have told the truth about
9 that day?

10 A. I would've told them -- if I could I wouldn't. I
11 wouldn't want to say anything because in fear of my life or
12 my kids.

13 Q. Okay. But if you were under oath like you were today,
14 would you have told the truth?

15 A. With protection, yes.

16 MS. BLANCHETTE: Your Honor, if I can beg the
17 Court's indulgence just one moment.

18 Q. Just to clarify since you were speaking to Mr. Toney
19 in the park that day, how did you know him?

20 A. Oh, I know him from when he was a child. I knew about
21 everybody in Hartsville you know them, I mean, I'm older.
22 I know him real good.

23 Q. So it would've been -- oh, go ahead.

24 A. And I knew all of them. Everybody in Hartsville, I
25 know.

1 Q. So it wouldn't have been odd for him to have approach
2 you and talk to you ---

3 A. No.

4 Q. --- that day?

5 A. No. No. And -- no.

6 Q. Did you ever hear him make any threats or anything
7 towards Mr. Hankins that day?

8 A. No. No.

9 Q. Did you ever hear any discussions about a statement
10 that Mr. Hankins had given in the case that day?

11 A. No. But Hankins told me some of that.

12 Q. Okay. But you didn't hear anything or witness
13 anything ---

14 A. No, ma'am.

15 Q. --- discussed about that?

16 A. Uh, uh.

17 MS. BLANCHETTE: Beg the Court's indulgence. Your
18 Honor, I have no further questions of this witness.

19 THE COURT: Okay.

20 **Cross-Examination by Ms. Jameson:**

21 Q. Good morning, Ms. Evans.

22 A. Good morning.

23 Q. You testified that you would not have spoken with Mr.
24 Swilley at the time of trial?

25 A. I would've been scared.

1 MS. JAMESON: No, further questions, Your Honor.

2 THE COURT: Anything else, Ms. Blanchette?

3 MS. BLANCHETTE: No, Your Honor. Thank you.

4 THE COURT: You can step down, Ms. Evans.

5 MS. EVANS: Thank you, sir.

6 MR. JAMES: Your Honor, I respectfully request that
7 the record in this matter be left open until later this
8 afternoon when we can resume the case in full?

9 THE COURT: Yes, sir.

10 MR. JAMES: Thank you, Your Honor.

11 MS. BLANCHETTE: Thank you, Your Honor.

12 MR. THOMPSON: Thank you, judge.

13 THE COURT: I assume this witness wishes to be
14 excused as the other one?

15 MR. THOMPSON: Yes, Your Honor.

16 THE COURT: Any objection, Mr. James?

17 MR. JAMES: No objection.

18 THE COURT: Thank you.

19 (Whereupon, other cases were held until this matter could
20 be heard later in the afternoon)

21 THE COURT: All right. Mr. James.

22 MR. JAMES: Thank you, Your Honor. This is a
23 matter of Breyon Toney versus the State of South Carolina,
24 docket number 2014-CP-16-00875. We took a little bit of
25 testimony this morning but we are now proceeding on this

1 case in full. Mr. Toney is present here today and he is
2 represented by Jeremy Thompson and Tricia Blanchette. Your
3 Honor, Mr. Toney was indicted in January of 2010 by the
4 Darlington County Grand Jury for murder and possession of a
5 weapon during the commission of a valid crime. Mr. Matthew
6 Swilley, J. Richard Jones and Tiffany Gibson all
7 represented Mr. Toney on those charges. The case was
8 prosecuted by Mr. John Holt, Patty McKenzie Parker and
9 Kendall Burch. Mr. Toney proceeded to trial and he was
10 convicted on May 18, 2011. He was sentenced to thirty (30)
11 years for the murder and five (5) years for possession of a
12 weapon during the commission of a violent crime. He
13 promptly appealed that conviction. And on appeal, Your
14 Honor, the issue before the Court of Appeals was whether
15 or not the trial judge erred in refusing to suppress
16 evidence of an altercation between applicant and a witness.
17 When during the pre-trial suppression hearing the State
18 failed to prove that the altercation constituted evidence
19 of witness intimidation. The evidence constituted
20 inadmissible bad act of the prejudicial effect outweighs
21 any possible probative value, the Court of Appeals,
22 thereafter, confirm the conviction. Your Honor, this
23 application for post-conviction relief was filed on October
24 23, 2014 and the State made its return on or about March
25 28, 2016. Your Honor, there has been one amendment to the

1 application since it's original filing on or about July 7,
2 2017 and this matter has been continued once from the
3 previous term PCR here in the Fourth Circuit back in
4 January. Your Honor, I will forgo reading out all the
5 allegations the applicant has raised simply because there
6 are numerous and for that reason I will seek the floor to
7 opposing counsel.

8 THE COURT: Okay. All right. Mr. Thompson? Ms.
9 Blanchette?

10 MR. THOMPSON: May it please the Court, Your Honor?
11 Ms. Blanchette handled the witnesses this morning, I'll be
12 taking it from here. As I mentioned this morning I did
13 want to kinda do a brief, just a little opening. We do
14 allege that Mr. Toney received ineffective assistance of
15 counsel in of the violation of the Sixth and Fourteenth
16 Amendment Rights of the United States Constitution as well
17 as corresponding provisions of the South Carolina
18 Constitution. Your Honor, this case as I alluded to this
19 morning is pretty kind of simple. Factually, it's
20 basically a scuffle late at night between Mr. Toney and the
21 victim, Junie, as he was known, Tucker and during which Mr.
22 Tucker received one stab wound from the knife that Mr.
23 Toney was holding that ultimately resulted in his untimely
24 death. We -- those are, you know, kind of the basic facts.
25 I think that everybody agrees on. I think the main issue

B. Toney- Direct Examination by Mr. Thompson

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1 at trial was, you know, kinda of how it happened and what
2 the intent of the individuals involved was. We did file an
3 amended application, Your Honor, and there are twelve
4 different allegations that are alleged in the application.
5 Again, I think a lot of them deal with, you know, jury
6 instructions and things of that nature that we we'll kind
7 of cover as we go through but, you know, again our basic,
8 our basic contention here is that there were a number of
9 ways this case could have been successfully tried in trying
10 to a not guilty verdict had the, in our opinion, the
11 correct approach had been taken so that's kind of what, you
12 know, kind of what our intent is here to show that. So with
13 that background in mind, Your Honor, I would call Breyon
14 Toney as our own witness.

15 THE COURT: Okay. Mr. Toney, if you would come
16 forward please.

17 MS. BLANCHETTE: Do you mind if I approach the
18 witness stand?

19 MS. BLANCHETTE: Certainly.

20 THE CLERK: Place your left on the Bible and raise
21 right hand. Do you solemnly swear the testimony you're
22 about to give the court is the truth, the whole truth, and
23 nothing but the truth so help you God?

24 MR. TONEY: Yes, ma'am.

25 THE CLERK: Be seated in the witness box and state

1 your full name for the court.

2 MR. TONEY: Breyon Toney.

3 BREYON TONEY, first being
4 duly sworn, testified as follows:

5 **Direct Examination by Mr. Thompson:**

6 Q. All right. Breyon, it's my understanding that the
7 microphones in this courtroom do not work so you're going
8 to need to speak up nice and clearly, okay, so the judge
9 can hear you and so the court reporter can take down
10 everything that you're saying, all right?

11 A. Yes, sir.

12 Q. And remember as we've talked about before you have to
13 answer yes or no, no uh, uh or huh, huh or just nodding or
14 shaking your head, do you understand?

15 A. Yes, sir.

16 Q. All right. Great.

17 MR. THOMPSON: Judge, I did want to add one minor
18 little thing to the procedural background. I represented
19 Mr. Toney not on the direct appeal proper. I was retained
20 to represent him on his petition for a rehearing that was
21 filed in the Court of Appeals after the Court of Appeals
22 had issued the opinion affirming the lower courts. So I
23 did just want to make sure that, that was my initial
24 involvement in this case and I came on to do the PCR.

25 THE COURT: Okay. Thank you.

B. Toney- Direct Examination by Mr. Thompson

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1 Q. All right. Breyon, I'm gonna start with talking about
2 your relationship with Mr. Swilley. First of all, was Mr.
3 Swilley appointed or retained to represent you?

4 A. He was court-appointed.

5 Q. He was court-appointed. To the best of your
6 knowledge, where did he work when he represented you?

7 A. At the public defender's office.

8 Q. And this is in Darlington County?

9 A. Yes, sir.

10 Q. Now, this incident occurred on March 24, 2009, right?

11 A. Yes, sir.

12 Q. When did you get arrested?

13 A. I didn't actually get arrested.

14 Q. When did you turn yourself in?

15 A. The same day.

16 Q. The same day so March 24, 2009?

17 A. Yes, sir.

18 Q. And were you represented by the public defender's
19 office throughout the course of your time, that your case
20 was pending?

21 A. Yes, sir.

22 Q. And so your case went to trial in May, starting on May
23 18, 2011, so that's about two years and two months if my
24 math is correct, does that sound about right?

25 A. Yes, sir.

1 Q. And you didn't have any other attorneys it was just
2 the public defender's office representing you?

3 A. Yes, sir.

4 Q. To the best of your recollection, did you have any
5 other attorneys other than Mr. Swilley prior to your trial?
6 Did any other attorneys come to visit with you at the jail?

7 A. No, sir.

8 Q. Did you ever get any letters from any other attorneys
9 saying for example, I'm representing you, here's my name?

10 A. No, sir.

11 Q. Did you get a letter from Mr. Swilley stating that he
12 was your attorney?

13 A. Yes, sir.

14 Q. Okay. So do you remember how soon after, how soon
15 after you turn yourself in that you got that letter?

16 A. It was about a year after actually got Mr. Swilley's
17 letter.

18 Q. About a year after you had been, you turn yourself in?

19 A. Yes.

20 Q. That's when you got a letter?

21 A. Yes, sir.

22 Q. Now, how long were you in jail?

23 A. Two years.

24 Q. And did you make bond, eventually?

25 A. Yes, sir.

B. Toney- Direct Examination by Mr. Thompson

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1 Q. And so you were in the jail for about, you said, for
2 about two years, you would've been on bond for about two
3 months, is that about right?

4 A. Yes, sir.

5 Q. Now, while you were in jail how many meetings would
6 you say you had with Mr. Swilley at the jail?

7 A. Only one.

8 Q. Only one. Could there have been more than one or do
9 you just remember one?

10 A. I only remember one, sir.

11 Q. And how long did that meeting last?

12 A. I was say around thirty minutes.

13 Q. And this is two years have gone by that he's
14 representing you and you say you only met with him once for
15 about thirty minutes at the jail, right?

16 A. Yes, sir.

17 Q. Now, once you got out on bond, did you meet with him
18 prior to the day of your trial, did you go to the public
19 defender's office to meet with him?

20 A. No, sir.

21 Q. So other than at trial you had met with Mr. Swilley
22 once for about thirty minutes for, you know, for your
23 entire case?

24 A. Yes, sir.

25 Q. Now, did you have your discovery materials?

1 A. Yes, sir.

2 Q. Did you have them at the jail?

3 A. Yes, sir.

4 Q. How did you get that?

5 A. They were sent to me by Mr. Scott B. Suggs, the clerk
6 of court.

7 Q. So the clerk of court sent you your discovery
8 materials, directly?

9 A. Yes, sir, from my ---

10 Q. You did not get them from your public defender's
11 office?

12 A. No, sir.

13 Q. Did you sit down and review those discovery materials
14 with Mr. Swilley?

15 A. No, sir.

16 Q. During that thirty minute meeting, what did y'all talk
17 about?

18 A. He was telling me that he was appointed to my case and
19 had me, basically, run down what happened.

20 Q. So you kinda just gave a brief overview of your side
21 of the story and that's about it?

22 A. Yes, sir.

23 Q. You didn't -- did you go over and say for example this
24 is what, you know, what Marcus Brunson saying about me, did
25 you have that discussion with him?

1 A. I don't understand your question, sir.

2 Q. Did you discuss with him what the witnesses that the
3 State had were going to say against you?

4 A. No, sir.

5 Q. Did you discuss any forensic evidence or anything
6 along those lines with him?

7 A. No, sir.

8 Q. When it came, you know, kind of close to trial, kind
9 of throughout the course of his representation, did you
10 trust Mr. Swilley?

11 A. No, sir.

12 Q. Why not?

13 A. Because I didn't know Mr. Swilley.

14 Q. Because he never came to meet with you?

15 A. Yes, sir.

16 Q. Because he never developed a rapport with you?

17 A. No, sir.

18 Q. Now, were you -- your case, obviously, went to trial
19 the week of May 18th, right, 2011?

20 A. Yes, sir.

21 Q. Did you receive notice of that trial from Mr. Swilley?

22 A. I didn't understand your question, sir.

23 Q. Did you receive a notification from Mr. Swilley that
24 your case would be going to trial in May?

25 A. While I was in the county jail?

1 Q. Just in general, either while, before you got out on
2 bond or after you got out on bond?

3 A. After I got out on bond I talked to Mr. Swilley once.

4 Q. You talked to Mr. Swilley once?

5 A. Yes, sir.

6 Q. And did he tell you, you were going to trial?

7 A. Yes, sir.

8 Q. Did you schedule a meeting with Mr. Swilley at that
9 point?

10 A. No, sir, I didn't.

11 Q. Did you eventually have a meeting scheduled with Mr.
12 Swilley?

13 A. Yes, sir.

14 Q. And in the interim, did something significant happened
15 before that meeting?

16 A. Actually, I was, I was reported by a guy, Quitell
17 Hankins, and that caused me to be wanted for intimidation
18 of the witness. So when Mr. Swilley contacted me a week
19 prior to trial, I didn't meet with him because I thought he
20 was trying to get me to meet with him so I could be
21 arrested.

22 Q. So you thought that by meeting with Mr. Swilley you
23 would end up going back to the county jail?

24 A. Yes, sir.

25 Q. Is that why you did not make that meeting with him?

1 A. Yes, sir.

2 Q. This is the -- this would basically only be the second
3 meeting that you had with him throughout the entire course
4 of his representation of you?

5 A. Yes, sir.

6 Q. Is that accurate to say? Did he correspond with you?
7 Did you get, like, letters from him all the time or
8 anything like that?

9 A. No, sir.

10 Q. Did you talk on the phone with him from the jail? Did
11 you try and call him from the jail?

12 A. No, sir.

13 Q. Did you try and have, you know, trying to pass notes
14 to him or anything like that when someone else came in
15 from, you know, from the public defender's office to send
16 to him?

17 A. No, sir.

18 Q. Did you ever have anybody else from the public
19 defender's office meet with you to say this is what he
20 wanted me to tell you?

21 A. No, sir.

22 Q. Now, I want to kinda go into the trial strategy of
23 your case, prior to showing up to court and going to trial,
24 did you know what Mr. Swilley's plan defense for you was?

25 A. No, sir.

1 Q. Did you know what his trial strategy was going to be?

2 A. No, sir.

3 Q. Did you discuss that he was going to argue, for
4 example, self-defense, did that conversation come up?

5 A. No, sir.

6 Q. Did the word self-defense ever come up in your
7 conversations with him?

8 A. Yes, sir.

9 Q. Prior to trial, did the words self-defense come up?

10 A. Prior to trial it didn't come up, prior to trial, at
11 trial.

12 Q. This came up at the trial. So when was the first time
13 you found out what his trial strategy was going to be?

14 A. When I was in the courtroom and we asked for couple of
15 minutes so we can discuss a couple of things around the
16 case and that's when he informed me.

17 Q. Now, ultimately, you did testify at the trial, right?

18 A. Yes, sir.

19 Q. When was -- let me rephrase that. Did you have any
20 discussions with Mr. Swilley prior to the trial about your
21 potential testimony at trial?

22 A. No, sir.

23 Q. Did you discuss your right to testify?

24 A. No, sir.

25 Q. Did you discuss your right not to testify?

1 A. No, sir.

2 Q. Did you discuss what, I know you said at the meeting
3 at the jail, you did discuss your version of events, but
4 did he sit down with you and go, kind of, question by
5 question, these are the kind of things I'm going to ask
6 you?

7 A. No, sir.

8 Q. When did -- when was the decision made to testify?

9 A. At the end of my trial around the time it was ready
10 for me to make the decision that I want to testify or not.

11 Q. And you were the last witness, ultimately, in the
12 case, right?

13 A. Yes, sir.

14 Q. Was that when you had your first subject to discussion
15 with Mr. Swilley about testifying?

16 A. Yes, sir.

17 Q. And how did that conversation go, what did y'all, you
18 know, what did y'all talk about?

19 A. He told me it was my time to make a decision whether
20 or not I wanted to testify.

21 Q. And now, you, ultimately, made the decision to
22 testify, obviously, because you did?

23 A. Yes, sir.

24 Q. Did Mr. Swilley advise you to testify?

25 A. Not really, sir.

1 Q. Did he just say it was up to you?

2 A. It was my decision whether I wanted to or not.

3 Q. Now, one of the allegations we've raised here today is
4 that Mr. Swilley was ineffective for failing to prepare you
5 to testify, did you, obviously, you did testify so do you
6 remember that experience?

7 A. Yes, sir.

8 Q. Do you, do you feel or did you feel prepared to
9 testify when you testified?

10 A. No, sir.

11 Q. Did you feel comfortable testifying?

12 A. No, sir.

13 Q. Had Mr. Swilley gone over with you what it was going
14 to be like to be cross-examined by the prosecutor?

15 A. Not at all, sir.

16 Q. Did he discuss with you, you know, kind of how to act
17 in terms of responses to questions?

18 A. Not that I can remember, sir.

19 Q. Did you talk to you, for example, about not get angry
20 at the solicitor?

21 A. No, sir.

22 Q. And, again, talking about his preparation for you
23 testifying, did y'all talk about the elements of self-
24 defense prior to your testimony?

25 A. Yes, sir.

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1 Q. Did you -- so you knew what the four elements of self-
2 defense were going to be?

3 A. No, sir, I didn't know what the four elements was.

4 Q. But you just talk about self-defense kind of in
5 general?

6 A. Yes, sir.

7 Q. That's what it was going to be but you didn't know
8 what the four elements were?

9 A. No, sir.

10 Q. And had you gone over potential other defenses, had
11 you talked about accident?

12 A. No, sir.

13 Q. Had you talked about involuntary manslaughter?

14 A. No, sir.

15 Q. So, you know, since we've alleged that Mr. Swilley was
16 ineffective to prepare you to testify, the argument is that
17 your testimony would've been better had you been better
18 prepared so I want to go through your testimony with you,
19 all right, in your testimony starts at page 342 of the
20 transcript. Let me know when you are there.

21 A. Yes, sir.

22 Q. Are you there?

23 A. Yes, sir.

24 Q. All right. And have you reviewed this both with me
25 and you, obviously, have a copy of your transcript, don't

1 you?

2 A. Yes, sir.

3 Q. So you're familiar with, you know, with your testimony
4 and, obviously, you've lived it. So I'm going to start,
5 I'm on page 343, and this is going through pages 344 and
6 345, and you say, you know, on page 343, this is, you know,
7 you're talking about, "can you elaborate on the facts
8 regarding the dispute between you and Mr. Tucker" and this
9 is, that's starting on line 2 and, you talk about India
10 Grimes, who is India Grimes?

11 A. It was a female that I was conversating with and the
12 deceased was conversating with her also.

13 Q. And when I say, and when you say conversating with,
14 you mean that you, did you have a relationship with her?

15 A. No, I had no relationship with her, sir.

16 Q. Did you, did Mr. Tucker have a relationship with her?

17 A. Not from my understanding but I know they conversated
18 too.

19 Q. Okay. What happens when you converseate, you just
20 hanging out with each other?

21 A. Yes, sir.

22 Q. Okay. Had you had a sexual relationship with Ms.
23 Grimes?

24 A. Yes, sir.

25 Q. And to the best of your understanding, was that the

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1 same situation with Mr. Tucker, was he having a sexual
2 relationship with Ms. Grimes?

3 A. Yes, sir.

4 Q. And had your relationship been recent?

5 A. I don't understand your question, sir..

6 Q. Had -- prior to this conversation, had your sexual
7 relationship with her, had that been recent, had that been
8 with ---

9 A. Oh, yes, sir.

10 Q. Okay. And on page -- so you start talking, you start
11 testifying about what was going on with Ms. Grimes, was
12 that -- did Mr. Tucker get mad at you about that?

13 A. Yes, sir.

14 MR. JAMES: Objection, Your Honor, at this point
15 we're just retrying the case.

16 THE COURT: How far we gonna go with this, Mr.
17 Thompson?

18 MR. THOMPSON: Judge, our allegation is that he had,
19 there are details that are missing from the testimony and
20 that I had he been prepared to testify and that had he had
21 been gone through the testimony and prepare him for trial,
22 the testimony would've been better.

23 THE COURT: Let's address what he didn't get
24 prepared for, what he didn't testify to. I mean, we know
25 what he testify to, we got the transcript.

1 MR. THOMPSON: Right. But there are details with
2 regard to each of these things that are in the transcript
3 that provide a clearer picture as to this incident and what
4 occurred than what was brought forward in the transcript,
5 that's what I'm trying to get to.

6 THE COURT: So how much do you plan to go back
7 through, I mean, how much is involved?

8 MR. THOMPSON: Well, Your Honor, I'm planning to go
9 back through the incident. I mean, his testimony takes up
10 about ten pages of the record on direct. That's kind of
11 what I'm looking at.

12 THE COURT: All right. I'll let you continue it
13 but if he gets what I decide is improper, I'll let you
14 know, but go ahead ---

15 MR. THOMPSON: Thank you, Your Honor.

16 MR. JAMES: Thank you, Your Honor.

17 Q. To the best of your knowledge -- but did Mr. Tucker
18 get angry with you?

19 A. Yes, sir.

20 Q. Did Ms. Grimes get angry with you?

21 A. Yes, sir.

22 Q. Why were angry?

23 A. I don't understand your question, sir.

24 Q. Why do you think they got angry with you?

25 A. Because I had sex with India Grimes.

1 Q. Did you try to fix it? Did you try to make Mr. Tucker
2 not mad at you anymore?

3 A. Yes, sir.

4 Q. What did you try to do?

5 A. I tried to talk to him. I was trying to get some
6 understanding and, like, basically apologize about it, you
7 know, and find some type of peace within the situation.

8 Q. Now, Mr. Tucker -- did you know Mr. Tucker before this
9 incident?

10 A. Yes, sir.

11 Q. What would you describe your relationship as at the
12 time, were you friends?

13 A. Yes, sir.

14 Q. Were you close friends?

15 A. Yes, sir.

16 Q. Did he live with you at any point?

17 A. Yes, sir.

18 Q. Did you live with him at any point?

19 A. No, sir.

20 Q. Okay. Did he stay at your house sometimes?

21 A. Yes, sir.

22 Q. Was this somebody that you've known, how long would
23 you say you have known him for?

24 A. I was say about fifteen, sixteen years.

25 Q. And you were, and you were about seventeen at the time

1 of this, so you've known him almost your entire life?

2 A. Yes, sir.

3 Q. Is that accurate to say?

4 A. Yes, sir.

5 Q. Was this somebody that you were generally, that you
6 generally had a bad relationship with?

7 A. No, sir.

8 Q. Now, what time of day was, did this conversation with
9 Mr. Tucker and Ms. Grimes occur?

10 A. It was probably like 3 PM?

11 Q. So about 3 o'clock in the afternoon?

12 A. Yes, sir.

13 Q. And you said you tried to apologize to Mr. Tucker, did
14 you get through to Mr. Tucker?

15 A. No, sir.

16 Q. So how were you trying to reach out to him? Did you
17 try to call him or what were you trying to do?

18 A. No, actually, when everything occurred I saw him the
19 same day and when I saw him I was trying to talk but he was
20 aggressive so I walked off.

21 Q. We're going to get -- so that -- this was during the
22 afternoon?

23 A. Yes, sir.

24 Q. Now, did you hear back from him again later on that
25 day?

1 A. Yes, sir.

2 Q. And on page 345 you said, "later on that night I got a
3 text message saying meet me on Marion Street", you got that
4 message for Mr. Tucker, correct?

5 A. Yes, sir.

6 Q. What did you think -- what was going through your mind
7 when you got that message?

8 A. It's just that like he was trying to confront me
9 about....

10 Q. And what time of day was this when you got that
11 message?

12 A. This was, this was later. This was later that night.

13 Q. This was late at night?

14 A. Yes, sir.

15 Q. So this was nine, ten, twelve hours after the
16 conversation with Ms. Grimes?

17 A. Yes, sir.

18 Q. Now, what did Mr. Tucker want you to do?

19 A. I don't understand your question, sir.

20 Q. He said meet me on, meet me on Marion Street, what did
21 that mean to you?

22 A. That mean -- that meant come to where he was.

23 Q. And kind of outline the area for me, where did you
24 live?

25 A. I live probably two or three blocks away.

1 Q. From Marion Street?

2 A. Yes, sir.

3 Q. Where did he live? Where did Mr. Tucker live?

4 A. Probably the same distance.

5 Q. So Marion Street is kind of in between your two
6 houses?

7 A. Yes, sir.

8 Q. And did he know, since he lived with you, did he know
9 where you lived?

10 A. Yes, sir.

11 Q. Who were you with that night?

12 A. The night that ---

13 Q. At your house, who were you with?

14 A. I was with my daughter and my mom.

15 Q. You thought Mr. Tucker was angry with you?

16 A. Yes, sir.

17 Q. Did that make you fearful?

18 A. Yes, sir.

19 Q. Did that make you fearful for the safety of your
20 child?

21 MR. JAMES: Objection. Leading.

22 THE COURT: Well, I'll give him some lead way but
23 it does seem like you're trying to retry the case.

24 MR. THOMPSON: I don't disagree but that, that's the
25 substance of the testimony. I am trying to retry the case

1 because I am ---

2 THE COURT: But I don't understand why don't you
3 just get to the point of what you say that he should've
4 prepared for, he should've presented rather than redo what
5 we already know what he said. I don't understand why we
6 have covered this ground again. I mean, I've got it.

7 MR. THOMPSON: Because some of this information, for
8 example, the information about them being friends is not
9 really in the transcript. The information about them
10 living together and how he knew where they lived. That's
11 not in the transcript. Parts of it are and parts of it
12 aren't and I can't -- it's hard to say, I can't lead him
13 through and say should you have said X and Y and Z. He's
14 got to be able to testify as to what happened.

15 THE COURT: I mean, I assume this is his testimony
16 at the time of the trial with what happened. That's what
17 he offered at the time.

18 MR. THOMPSON: And we're arguing that he was not, that
19 Mr. Swilley was not prepared and that there was ---

20 THE COURT: And that's why I am back to my point.
21 Tell me what Mr. Swilley did not do to prepare him and in
22 what areas did he not prepare him. I don't need to see or
23 hear the testimony again, or hear it again. Do you follow
24 me?

25 MR. THOMPSON: I understand, Your Honor.

1 THE COURT: Okay. I mean, I want to know what he
2 did wrong. That's what we're here for.

3 Q. To the best of ---

4 THE COURT: I don't need to re-plow all this ground
5 in order to do that if you make it specific through your
6 witness.

7 Q. To the best of your recollection, did you discuss --
8 did you testify at trial how you and Mr. Tucker knew each
9 other?

10 A. No, sir.

11 Q. Did you go into great detail about how you knew each
12 other?

13 A. No, sir.

14 Q. Did you testify as to how or why you knew Mr. Tucker
15 might be dangerous?

16 A. No, sir.

17 Q. Did you talk about why he might have been armed?

18 A. No, sir.

19 Q. Do you know, do you know from your experience with Mr.
20 Tucker that he may have been armed?

21 A. Yes, sir.

22 Q. Was he known to carry a weapon?

23 A. Yes, sir.

24 Q. Did you testify to that at trial?

25 A. No, sir.

1 Q. Where would he usually keep his weapons?

2 A. Like, in his belt.

3 Q. In his belt?

4 A. Yes, sir.

5 Q. You testified at trial that when you got to the
6 encounter, when you met him down the street, that he took
7 his jacket off, why was that important?

8 A. Because he already made threats earlier that day.

9 Q. What did you -- did you think there might be something
10 in that jacket?

11 A. I didn't -- honestly I didn't no, sir.

12 Q. Did you think he might have a gun?

13 A. How he -- when he reached for his jacket I really did
14 think that he had a gun.

15 Q. Inside the jacket?

16 A. Yes, sir.

17 Q. Did you think that -- when you first encountered Mr.
18 Tucker, did you believe that he was going to attack you?

19 A. Yes, sir.

20 Q. Was it just a question to what degree?

21 A. Yes, sir.

22 Q. Did you, did you -- you didn't know what you were
23 getting into?

24 A. Yes, sir.

25 Q. Is that correct?

1 A. Yes, sir.

2 Q. So you thought he might have been armed?

3 A. Yes, sir.

4 Q. With a gun?

5 A. Yes, sir.

6 Q. When he took his jacket off, did you think he would
7 still be armed?

8 A. Honestly, sir, I didn't know.

9 Q. Dis his move to the jacket make any sense to you?

10 A. Yes, sir, it made perfect sense.

11 Q. What did you think he was doing?

12 A. I thought he was going for something.

13 Q. Going for something, going for a gun?

14 A. Yes, sir.

15 Q. And you did not testify to that at trial, did you?

16 A. No, sir.

17 Q. Why didn't you testify about that at trial?

18 A. Because when I brought the issue up to my attorney it
19 was like I didn't actually see it so I couldn't actually
20 say anything about it.

21 Q. So Mr. Swilley advised you not to testify that you
22 thought the victim might have had a gun?

23 A. Yes, sir.

24 Q. And do you think that you, I mean, you obviously did
25 not testify at any point in time during the trial that you

1 thought he had a gun, do you think that might have been
2 relevant ---

3 A. Yes, sir.

4 Q. --- to whether or not you fear for your life? Now,
5 when Mr. Tucker attacked you, what was he using, did he
6 have a gun or not?

7 A. No, sir.

8 Q. What did he have in his hand?

9 A. He had a two beer bottles, 40 ounce beer bottles.

10 Q. And did you intentionally stabbed at him when he came
11 at you?

12 A. No, sir.

13 Q. So kinda, I'm going based a little bit here on your
14 testimony but you said, "he grabbed you" and, "you
15 testified, "when I backed up and moved the knife towards
16 him", was that just an involuntary reaction?

17 A. Yes, sir, he grabbed my shirt.

18 Q. So he almost twisted you into him?

19 A. Yes, sir.

20 Q. And he had a broken beer bottle, describe the beer
21 bottle to me?

22 A. Well, the first one, he threw it.

23 Q. And was that I whole beer bottle?

24 A. Yes, sir.

25 Q. And the second one was a broken beer bottle, right?

1 A. Yes, sir.

2 Q. Did it appear jagged?

3 A. Yes, sir.

4 Q. How was he coming at you? Where was he coming with
5 the beer bottle?

6 A. Honestly, sir, when he grabbed my shirt, I did like
7 everything was just so fast, like....

8 Q. But you fear for your life when he grabbed your shirt
9 like that?

10 A. Yes, sir.

11 Q. Did you testify to that when you testified at trial?
12 Did you testify that you were in fear for your life?

13 A. Yes, sir.

14 Q. You did? When -- so you had a knife in your hand at
15 the time, right?

16 A. Yes, sir.

17 Q. How were you holding that the knife?

18 A. Honestly, sir, I can't remember.

19 Q. I mean, I guess let me kind of, I don't know if I want
20 to say it, do it in a colorful way, have you ever seen
21 people like twirl knives around with things like that in
22 their hands?

23 A. Yes, sir.

24 Q. Were you doing that with your knife?

25 A. No, sir.

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1 Q. Were you just holding it out like I'm holding this pen
2 right here?

3 A. Yes, sir.

4 Q. Do you believe that you are exercising due care of
5 handling that knife?

6 A. I don't understand your question, sir.

7 Q. Do you believe that you were being careful with how
8 you are holding the knife?

9 A. Yes, sir.

10 MR. JAMES: Objection. Leading.

11 THE COURT: I'll overrule the question. Answer the
12 question.

13 A. Yes, sir.

14 Q. Did you testify at trial that you thought you were
15 being careful in holding the knife?

16 A. No, sir. I don't know.

17 Q. And was it an accident that he was stabbed?

18 A. Yes, sir.

19 Q. And did you testify at trial at any point in time it
20 was an accident, I didn't mean to do it?

21 A. No, sir.

22 Q. All right. Now, in terms of your preparation for
23 trial and I know we've covered it and I'm not trying to
24 beat a dead horse or anything, Your Honor, but you had a
25 chance to review your testimony, correct?

1 A. Yes, sir.

2 Q. Anticipation for the trial. Did you recall Mr.
3 Swilley asking you specific questions about what happened?
4 Is that how your testimony unfolded?

5 A. Honestly, sir ---

6 Q. I'm going to give you an option, or did he just,
7 basically, have you testify? Did you just give your own
8 side of the story?

9 A. Basically, I gave my own account of what happened.

10 Q. And during your, just from your own impression, do you
11 believe that your testimony came off well to the jury?

12 A. No, sir.

13 Q. Do you feel like they believed you after you were done
14 testifying?

15 A. No, sir.

16 MR. THOMPSON: I beg the Court's indulgence.

17 THE COURT: Yes, sir.

18 Q. Did you know Mr. Tucker to have an aggressive
19 disposition?

20 A. Yes, sir.

21 Q. Was he -- so was he an aggressive individual in
22 general?

23 A. Yes, sir.

24 Q. Was he quick to anger?

25 A. Yes, sir. He like to drink.

1 Q. And he liked to drink?

2 A. Yes, sir.

3 Q. And you knew this because you've been around him for a
4 long time?

5 A. Yes, sir.

6 Q. Did you testify about that at trial?

7 A. No, sir.

8 Q. What did you think, when you hadn't talked to him for
9 several hours, he had been doing in the time between when
10 you talked and when he told you to meet him on Marion
11 Street?

12 A. I thought he had probably been thinking about the
13 altercation, the situation at hand.

14 Q. And were you afraid he had been drinking?

15 A. Yes, sir.

16 Q. And were you afraid that because he was an angry
17 person that he would be angry with you?

18 A. Yes, sir.

19 Q. And that alcohol may also have played a factor in to
20 that?

21 A. Yes, sir.

22 Q. And again you feared that he had a gun?

23 A. Yes, sir.

24 Q. And even knowing all of that, you did not bring a gun
25 to this argument, did you?

1 A. No, sir.

2 Q. Did you have a gun?

3 A. No, sir.

4 Q. Do you own a gun?

5 A. Never.

6 Q. Did your mom, did your mom on the gun?

7 A. No, sir.

8 Q. So even knowing, even knowing that Mr. Tucker might be
9 armed, you still went and what was your purpose in going,
10 did you want to fight him?

11 A. No, sir.

12 Q. What did you want to do?

13 A. I was told that we were coming to talk, sir.

14 Q. And were you still trying to reconcile even that long
15 into it?

16 A. Yes.

17 Q. That long after the initial argument?

18 A. Yes, sir. I was still, I was still trying to reach an
19 understanding.

20 Q. You were not going there to hurt Mr. Tucker?

21 A. No, sir.

22 Q. And did you testify to that at trial?

23 A. Yes, sir.

24 Q. You testified that you did not, that you were going
25 over there to reconcile that you weren't intending to hurt

1 him?

2 A. Yes, sir.

3 Q. You did?

4 A. Yes, sir.

5 Q. You were present in the courtroom this morning for the
6 testimony of Ms. Evans and Mr. Franklin?

7 A. Yes, sir.

8 Q. If you could, would you have wanted that testimony to
9 be brought up at your trial?

10 A. Definitely, sir.

11 Q. Well, Ms. Evans testimony in particular, was that an
12 accurate description of what occurred with Mr. Hankins?

13 A. Yes, sir.

14 Q. That Mr. Hankins was the aggressor, not you?

15 A. Yes, sir.

16 Q. And do you think it would've been beneficial to have
17 somebody that was not you to be able to testify to the
18 events that occurred that day at the park?

19 A. Yes, sir.

20 Q. And Mr. Franklin, do you believe that the testimony
21 that he presented today, do you believe that was adequately
22 presented at the trial?

23 A. Yes, sir.

24 Q. Or do you think there was something different than
25 what he said today?

1 A. It seem like it was accurate, sir.

2 COURT REPORTER: I didn't hear what you said. What
3 did you say?

4 Q. Do you think his testimony today was accurate,
5 correct?

6 A. Yes, sir.

7 Q. Would you have wanted that testimony presented at your
8 trial?

9 A. Yes, sir, most definitely.

10 Q. All right. I think most of the other allegations were
11 going to handle through Mr. Swilley's testimony but this is
12 your one and only chance at a PCR hearing regarding
13 exceptionally unusual circumstances and so you've been
14 waiting a long time for this hearing. Is there anything
15 else that you think the judge needs to know in order to
16 adequately rule in your case that we haven't covered and
17 that, obviously, you're going to hear from Mr. Swilley but,
18 do you think there is anything in addition to what's been
19 presented in the amended application that he needs to know?

20 A. The only thing I can really say I wasn't ---

21 THE COURT: Speak up. Speak up.

22 A. The only thing I can really say is that I wasn't
23 properly grown to be at a murder trial. I wasn't grown. I
24 wasn't ready, like, I didn't have any knowledge of what it
25 was like.

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1 Q. And is that due to -- Mr. Swilley didn't go over that
2 with you, right?

3 A. Yes, sir.

4 Q. And one final thing, you understand you did not get
5 the maximum penalty you could have gotten for this charge,
6 you understand that murder carries life in prison?

7 A. Yes, sir. I understand, sir.

8 Q. And even though you were seventeen at the time which
9 makes it constitutionally difficult for you to get a life
10 sentence as the law as it stands now, you understand that
11 if you go back and get a new trial, you could get all the
12 way up to a life sentence, do you understand that?

13 A. Yes, sir.

14 Q. Knowing that, do you still want to go forward here
15 today to try and get the new trial?

16 A. Yes, sir.

17 Q. All right.

18 MR. THOMPSON: One more moment, Your Honor.

19 THE COURT: Yes, sir.

20 Q. One last thing, were you aware that any of the State's
21 witnesses had indicated that Mr. Tucker had a firearm that
22 night?

23 A. Could you repeat that question, sir?

24 Q. Were you aware that any of the State's witnesses
25 indicated that Mr. Tucker had a firearm that night, had a

1 gun on his person?

2 A. I'm miss ---

3 Q. Were you aware prior to trial that any of the
4 witnesses that testified for the State had indicated in
5 prior statements or statements they may have made to
6 various investigators or state officials that Mr. Tucker
7 may have been armed or was armed with a firearm that night,
8 were you aware that they made those statements?

9 A. No, sir.

10 Q. Would you have wanted that testimony brought out at
11 trial?

12 A. Yes, sir.

13 Q. Because you were afraid he had a gun?

14 A. Yes, sir.

15 MR. THOMPSON: No further questions, Your Honor.

16 THE COURT: Thank you. Mr. James?

17 **Cross-Examination by Mr. James:**

18 Q. Good afternoon, Mr. Toney.

19 A. Good afternoon, sir.

20 Q. Did you or did you not testify at trial about your
21 relationship with the victim in this case?

22 A. Yes, sir.

23 Q. Did you or did you not at the trial testify that you
24 were in fear for your life?

25 A. Yes, sir.

B. Toney- Cross Examination by Mr. James

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1 Q. And did you or did you not at trial testify that the
2 stabbing was unintentional?

3 A. Yes, sir.

4 Q. About how many times did you meet with your attorney
5 while you were out on bond?

6 A. None, sir.

7 Q. Are you sure about that?

8 A. Yes, sir.

9 Q. Did you ever speak with him at all while you are out
10 on bond?

11 A. Yes, sir, I spoke with him.

12 Q. In what manner did you speak with him?

13 A. I spoke with him through telephone.

14 Q. You never went to his office?

15 A. No, sir.

16 Q. You never met with him face-to-face?

17 A. No, sir.

18 Q. You never review the statement of Lavincent Hankins
19 with him?

20 A. No, sir.

21 Q. Did he talk to you about Lavincent Hankins statement
22 with you over the phone?

23 A. I can't remember, sir.

24 MR. JAMES: If I may approach the witness, Your
25 Honor?

1 THE COURT: Yes, sir.

2 MR. JAMES: At the convenience of everybody
3 present, I am about to refer to pages 375 and 376 of the
4 trial transcript.

5 MR. THOMPSON: I'm sorry, what page did you say?

6 MR. JAMES: Three hundred seventy-five but
7 primarily 376 starting at line 1.

8 Q. If you'll start down here, sir, and just read through
9 to the next page to refresh your memory. And I follow up
10 and asking that same question again.

11 A. Start from the highlighted?

12 Q. If you'll read from line 21 on page 375 and then on to
13 page 376, to refresh your memory.

14 A. "That he did not give me the statement" ---

15 Q. I'm sorry. Just quietly read to yourself to refresh
16 your memory. You don't need to read the transcript into
17 the record.

18 A. Yes, sir.

19 (Whereupon, he read the transcript to himself)

20 A. I can understand it.

21 Q. So, Mr. Toney, isn't it true that while you are out on
22 bond, you and your attorney had some form of discussion
23 with respect to the statement of Lavincent Hankins?

24 A. Yes, sir.

25 Q. And wasn't it the same day that you had an encounter

B. Toney- Redirect Examination by Mr. Thompson

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1 with Mr. Hankins, I suppose it was a park?

2 A. It was the same day that I saw Lavincent Hankins.

3 Q. Isn't it true that the knife that was used in this
4 confrontation, you carried that with you at all times,
5 correct?

6 A. Yes, sir.

7 Q. And why did you do so?

8 A. Because I'm from Hartsville, sir, it's a dangerous
9 place.

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

11 THE COURT: Mr. Thompson?

12 **Redirect Examination by Mr. Thompson:**

13 Q. You don't deny having some phone conversations with
14 Mr. Swilley, do you?

15 A. I don't deny, sir.

16 Q. Do what?

17 THE COURT: Speak up please.

18 A. I don't deny having having a phone conversation, no,
19 sir.

20 Q. And this question here on 375, "if I were to ask your
21 attorney if he spoke with you about that statement or gave
22 you that statement a few hours before your argument with
23 Lavincent, what would your attorney say if you told him the
24 truth?" You answered, "that he did not give me the
25 statement", so, basically, that Mr. Swilley did not give

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1 you Lavinent statement that day?

2 A. No, sir.

3 Q. Is that accurate?

4 A. Yes, sir.

5 Q. He did not give you that statement, right?

6 A. He did not, sir.

7 MR. THOMPSON: No further questions.

8 THE COURT: Anything else, Mr. James?

9 **Re-cross Examination by Mr. James:**

10 Q. But you knew about the statement, correct?

11 A. Yes, sir.

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

13 THE COURT: Okay. All right. You can step down,
14 Mr. Toney.

15 MR. TONEY: Thank you, sir.

16 THE COURT: Thank you.

17 MR. THOMPSON: The applicant would call Matthew
18 Swilley, Your Honor, if they will get him from the
19 conference room.

20 THE COURT: Okay.

21 THE CLERK: Do you solemnly swear or affirm the
22 testimony about to give the court is the truth, the whole
23 truth, and nothing but the truth so help you God?

24 MR. SWILLEY: I do.

25 THE CLERK: Have a seat in the witness box. Give

M. Swilley- Direct Examination by Mr. Thompson

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1 your full name to the court please, sir.

2 MR. SWILLEY: Matthew Sherrod Swilley.

3 MATTHEW SWILLEY, first being
4 duly sworn, testified as follows:

5 **Direct Examination by Mr. Thompson:**

6 Q. Mr. Swilley, how are you doing this afternoon?

7 A. I'm okay.

8 Q. Thank you for being so patient. I know it's been
9 quite a long day. I promise I'll try to get you outta here
10 just as quickly as I can, all right?

11 A. Thank you.

12 Q. How long have you been practicing law?

13 A. November of 2009.

14 Q. How much of that experience has been, you know,
15 dealing with criminal law?

16 A. Almost, almost all of it.

17 Q. When you first started practicing, where did you work?

18 A. Fourth Circuit Public Defender's Office.

19 Q. And how long did you work there?

20 A. I worked the Fourth Circuit Public Defender's Office
21 from November of 2009 until June of 2011 and then again
22 from January of 2014 until February of 2015.

23 Q. So you said June of 2011 so that would be almost a
24 month after this trial ended?

25 A. That's correct.

1 Q. Is that right? I know you don't, it doesn't like you
2 have a file with you, so do you have a general recollection
3 of this case?

4 A. I do.

5 Q. And how many cases would you say you have taken to
6 trial at the time of this case?

7 A. At the time of this case probably between twelve or
8 fifteen, somewhere in that round.

9 Q. And how many were, you know, kind of really serious
10 cases, murder cases and things of that nature?

11 A. This was my first murder case. Yeah, this was my
12 first murder case.

13 Q. Now, how did -- when did you come to start
14 representing Breyon?

15 A. I was assigned to Mr. Toney's case after Ms. Tonya
16 Little left the office. I believe he was assigned to her
17 proceeding to me.

18 Q. Do you have any, you have a general idea of when she
19 left the office?

20 A. I think it would've been somewhere around June of
21 2010.

22 Q. So my math is right, that's about eleven months that
23 you represented Mr. Toney? If June, the trial was in May
24 of 2011, so...

25 A. I believe so.

1 Q. And when you first got appointed to or when you first
2 got case, I guess, to take it over, where was Mr. Toney?

3 A. Darlington County Detention Center.

4 Q. And, I'm sorry, who did you say was the prior attorney
5 on the case?

6 A. Tonya Copeland-Little.

7 Q. Tonya Little?

8 A. That's right.

9 Q. And Ms. Little, do you have anything or do you
10 remember her notes from the file saying that she had gone
11 to the jail to meet with Mr. Toney?

12 A. I do believe she had been to the jail to meet with Mr.
13 Toney. I think she represented him at his bond hearing
14 when he got the initial \$125,000 bond.

15 Q. Now, did -- was there a point in time when Mr. Toney
16 got out on bond?

17 A. Yes.

18 Q. And he testified earlier that was a couple months
19 before trial, is that accurate with your recollection or
20 ...

21 A. I want to say it was about a month. About tax return
22 time, I think, is when he got out. It was April, maybe.

23 Q. How many times did you meet with Mr. Toney at the
24 jail? Just a ballpoint number.

25 A. Probably about, I believe, maybe five, five or six.

1 Q. And how long did these meetings last?

2 A. They'd last from anywhere, you know, probably up to an
3 hour to maybe sometimes fifteen to twenty minutes.

4 Q. And did you meet with him at your office prior to
5 trial?

6 A. No.

7 Q. And so your face-to-face meetings other than the trial
8 were at the jail?

9 A. Correct.

10 Q. Was this a case that you believe was headed to trial?

11 A. Yes.

12 Q. Was Mr. Toney pretty certain that he wanted to go to
13 trial?

14 A. Well, he didn't want to take -- I think the only offer
15 we got before trial was a thirty (30) year offer from Mr.
16 Holt so he didn't want to take that and I did recommend he
17 take it so, yes.

18 Q. Now, what was your defense strategy heading into
19 trial?

20 A. Self-defense.

21 Q. Had you discussed that with Breyon prior to the trial?

22 A. Yes.

23 Q. Did he know that was going to be the case? That, that
24 was going to be the defense?

25 A. Yes. I believe so.

1 Q. Did you discuss the elements of self-defense with him
2 prior to trial?

3 A. Yes.

4 Q. You talked about how he needed to, how there needed to
5 be certain elements that have to be met through his
6 testimony?

7 A. Well, I believe I explained to him that the State has
8 to disprove self-defense beyond a reasonable doubt which is
9 I believe what the law says.

10 Q. Did you discuss Breyon's testimony with him?

11 A. During the trial, I did. Yes.

12 Q. Okay. So during the trial you did -- did you ever sit
13 down and have a discussion about whether he would or would
14 not testify if the case came to trial while he was in the
15 jail?

16 A. I can't recall that.

17 Q. Did you discuss any other defenses with him? Did you
18 discuss accident with him?

19 A. I don't believe so.

20 Q. Did you discuss involuntary manslaughter with him?

21 A. We had -- during the trial we had a plea to
22 involuntary manslaughter and so I think that's when we
23 discussed it.

24 Q. A plea to voluntary?

25 A. Excuse me, yes, voluntary manslaughter. We never -- I

1 don't believe we ever discussed involuntary manslaughter,
2 no.

3 Q. Have you had a chance to look at the amended
4 application that I filed in this case?

5 A. I have.

6 Q. All right. I am going to try and, Your Honor, may I
7 approach?

8 THE COURT: Yes, sir.

9 Q. Just to be on the easy side ---

10 A. Sure.

11 Q. --- I'm going to give you the amended application
12 because I'm going to bounce around a little bit in the
13 transcript.

14 A. Okay.

15 Q. I am going to try and go sequentially as I can through
16 the transcript. And I know it's been over six years so
17 it's kind of hard to remember the specific events of
18 transcript and the trial. Do you remember Investigator
19 Anderson testifying during this trial?

20 A. No.

21 Q. The crime scene investigator?

22 A. I can remember him being a witness. I can't remember
23 his testimony, though, specifically. You're talking about
24 Terry Anderson, correct?

25 Q. Mike Anderson?

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1 A. Oh, Mike Anderson, ah, yes, I do remember Mike
2 Anderson's testimony.

3 Q. All right. So I'm going to start on page 126 and it
4 runs through page 129. And do you believe Investigator
5 Anderson was and this is just kind of previously to that,
6 but do you have any recollection of Investigator Anderson
7 being qualified as an expert witness in this case?

8 A. No.

9 Q. I'm going to read right here on page 127, lines 17
10 through 23 just generally, "Investigator Anderson, during
11 the course of your investigation, did you learn facts and
12 pertinent information about where the fight started and
13 where it stopped?" "Yes, sir, I did." And it said, "And
14 did -- how did you gather that information?" "From Ms.
15 Robinson and Mr. Brunson." And then there's a lot of
16 testimony here between where he describes his walk-through
17 of the scene based on that information. Did you consider
18 objecting to that testimony on the basis of hearsay and as
19 improper opinion testimony?

20 A. No, not at the time.

21 Q. And does the judge actually asked you on page 128, he
22 asked, "Do you have an objection?" You say, "There is
23 none." Does that look to be objectionable testimony to
24 you? I know it's hard right here to look at.

25 A. Well, I guess, I guess, it could be objectionable

1 testimony. I guess he didn't say anything specifically
2 what the other witnesses said to him but, yeah, I guess I
3 could've objected.

4 Q. And, you know, he's -- do you believe he's given an
5 opinion as to his understanding of what occurred at the
6 crime scene during his testimony?

7 A. In which lines?

8 Q. Just in general. You know, I'd say page 129 starting
9 on one, "What objection evidence did you find to prove that
10 this is where it took place right here?" Do you think
11 that's an opinion, he's basing on the information he got
12 from the witnesses?

13 A. Is that an opinion? I guess, I mean, I guess he's
14 telling his opinion. I think when Mr. Holt ask him, "What
15 objective evidence did you find to prove that this is where
16 it to place right here?" And he says, because the
17 witnesses told me, I'm paraphrasing. I don't, I mean, I
18 don't think it's really calling for an opinion.

19 Q. And we moved to page 131, lines 10 through 24.

20 A. Yes.

21 Q. And he asked, the prosecutor asked the Investigator
22 Anderson, "Did he track down other witnesses?" And he
23 asked, "what else did you do, interviewed those witnesses
24 and were you able to get statements from those witnesses as
25 well?" Answer is, "Yes, sir." Question, "And did those

1 witnesses versions of what happened substantially match
2 with what Marcus Brunson and Crystal Robinson told you at
3 the very beginning of that very first night?" "Yes." Do
4 you believe that testimony is objectionable?

5 A. Yes.

6 Q. And did you make an objection to that testimony?

7 A. No.

8 Q. And in retrospective, do you believe you should've
9 been objected to that testimony?

10 A. Yes.

11 Q. And do you have, forgive me if I just asked this
12 question, do you have a strategic reason for not making
13 such an objection?

14 A. I can't recall the reason why I may -- I can't recall
15 the reason I did make an objection there.

16 Q. And on, continuing on to page 132 and 133 and I'll
17 just, I think it's just easiest to look at the question on
18 page 133, and it says, "And did the fact that James
19 Tucker's fingerprints on that bottle, did that match-up
20 perfectly with the versions of the events that you got from
21 all four witnesses?" Answer is, "Yes, sir, it did." Do
22 you believe that, that's objectionable?

23 A. Yes, probably on the basis of hearsay.

24 Q. And just let the record show, that you did not object
25 to that testimony?

1 A. That's correct. I did not.

2 Q. And do you -- you don't have any strategic reason for
3 not objecting to that testimony, correct?

4 A. Correct. Not that I recall.

5 Q. Now, there were, obviously, and this is kind of
6 throughout you had many of the fact witnesses from the on
7 the scene, Marcus Brunson and Crystal Robinson and Philip
8 Franklin, they testifying at trial, did you, did you know
9 prior to trial from talking to Breyon, did you know that he
10 and Mr. Tucker were friends?

11 A. Yes.

12 Q. Did you consider relevant as part of your strategy to
13 show that they knew each other, that they were friendly?

14 A. Well, I believe the facts were they were friendly at
15 the time. The fact that they had been friends before, I
16 don't recall that as being, I don't recall feeling that was
17 of any serious consequence of the case.

18 Q. You don't think that if Breyon had been close friends
19 with Mr. Tucker make it less likely to want to kill him?

20 A. Well, I mean I would agree with that statement but the
21 fact that I had, I didn't really think the fact -- the fact
22 that they were friends I didn't want to, I didn't feel like
23 it would be fruitful to focus on that. Although, I guess,
24 it would've been, it wouldn't have been harmful to focus on
25 that.

1 Q. Did -- so you weren't present in court -- were you
2 present for Mr. Toney's testimony?

3 A. I was. Well, for his direct examination.

4 Q. Okay. Did -- had y'all discussed whether or not he
5 thought that Mr. Tucker had a weapon?

6 A. We, I believe, we had. I believe we did discuss that
7 and I can't recall. I can't recall anything indicative
8 that would've shown that Mr. Tucker had a weapon at the
9 time.

10 Q. Did you think to question the State's witnesses, in
11 particular Mr. Franklin, about Mr. Tucker having a gun or
12 being known to carry a gun?

13 A. I don't recall.

14 Q. Do you think that -- let me rephrase. Do you think it
15 would've been relevant to your defense of self-defense to
16 show that the victim had a gun?

17 A. If he had a gun, yes. Yes.

18 Q. Or that he was known to carry a weapon?

19 A. Yes.

20 Q. And did, you know, dealing with the incident at the
21 park, did you try and question or find any witnesses who
22 had been in that park during that altercation?

23 A. I don't believe so.

24 Q. And, specifically Ms. Evans, were you present for her
25 testimony here this morning?

1 A. Yes.

2 Q. If you had contacted her and she had given you that
3 information, would you have wanted to present that
4 testimony at trial?

5 A. Yes.

6 Q. Did you, I guess, did you, you didn't ever speak to
7 her prior to trial, did you?

8 A. That's correct. I don't think I ever spoke to Ms.
9 Evans.

10 Q. Or did you have an investigator to go speak with her
11 or anything?

12 A. No.

13 Q. I apologize, I meant, to cover this at the very
14 beginning but there are three attorneys listed as counsel
15 for the defendant that is you, Richard Jones and Tiffany
16 Gibson, kind of what was, you know, kinda of what was the
17 relationship between the defense attorneys? Were you the
18 lead counsel, how was that working?

19 A. I mean, it was my case and Rick and Tiffany were there
20 to help, you know, just to help.

21 Q. And it had been your case, basically, since you had
22 been assigned to it?

23 A. Yes.

24 Q. All right. I'm going to move to the jury instructions
25 there's a number of them, a number of issues pertaining to

1 jury instructions. I'm going to start with the issues
2 three and four, and so, if you can turn to page 386 --
3 well, 386 and 387, and at this point the judge is talking
4 about involuntary manslaughter and at the very end of his,
5 kind of, discussion on involuntary he says on lines 14
6 through 15, he says, "In other words what is the evident of
7 accident in this case?" Prior to trial, had you done any
8 research into cases of involuntary manslaughter that
9 involve a knife instead of a gun?

10 A. I can't recall any.

11 Q. And if the record shows that you, you know, handed any
12 cases up or anything like that, that's -- I mean, let me
13 rephrase that. Do, in your standard practice, do you
14 prepare proposed jury charges?

15 A. Yes.

16 Q. Do you file them with the court or do you just send
17 them to the judge's chambers?

18 A. I just hand them up to the judge.

19 Q. And do they cite cases too in those instructions or is
20 it just you should charge this?

21 A. I cite cases in the instructions?

22 Q. Do you recall requesting involuntary manslaughter?
23 It, obviously, came up but do you remember that you were
24 the one to request it?

25 A. I don't recall.

1 Q. And so you wouldn't know if you handed up a case that
2 dealt with involuntary manslaughter with a knife in your
3 request to charge?

4 A. I don't remember that.

5 Q. I know it's been six years. It's hard to remember
6 that kind of detail. Did you consider when he ask you,
7 when Judge Baxley ask you what the evidence of accident in
8 this case was, did you consider arguing a defense on
9 accident?

10 A. Well, no, I pretty much had stuck with self-defense.
11 I think those kind of, those defenses could be mutual or
12 would be mutual exclusive in reality but I don't, I can't
13 ever recall arguing anything about the accident of defense.

14 Q. All right. Let's move to the, move to page 454 and
15 this is the issue pertaining to the permissive malice
16 inference instruction. Are you familiar with, kind of,
17 the, while you're flipping there, are you familiar with the
18 just standard inferred malice instruction ---

19 A. The one that dealt ---

20 Q. --- in South Carolina?

21 A. The one that Belcher got rid of?

22 Q. That's dealing specifically with the use of a deadly
23 weapon, but you familiar with that instruction in general,
24 right?

25 A. Yes.

1 Q. And is it appropriate to charge language regarding
2 what to do with inferences that can be drawn, the
3 permissive inference charge?

4 A. I'm sorry, again?

5 Q. The charge that says, "that an inference of malice is
6 only something for you to take into consideration in
7 connection with the entire case", that charge, are you
8 aware of that charge?

9 A. Yes.

10 Q. Now, here on page 454, lines 20 through 22, says,
11 "malice also be inferred from conduct that shows a total
12 disregard for human life and, ladies and gentlemen, that is
13 the talk of the charge of murder." Is that permissive
14 inference language that permits the jury to reject that
15 inference, is that included in that charge?

16 A. No.

17 Q. Do you believe that it would've been appropriate for
18 that to be charged to the jury?

19 A. Yes.

20 Q. Do you think you should have objected to the charge to
21 ask that, that language be included?

22 A. Yes.

23 Q. Do you believe that having a knife out and making a
24 stabbing motion, is that an action that would show a total
25 disregard for human life?

1 A. In and of itself, yes.

2 Q. On page 457, I'm not going to go through it all, Your
3 Honor, but page 457 through 461 is the instruction on self-
4 defense. Now, I'll readily acknowledge that this is a
5 pretty standard self-defense charge, Your Honor. Did you
6 consider objecting to this charge as placing the burden of
7 proof on the defendant to show the elements of self-
8 defense?

9 A. No.

10 Q. In reading the charge, do you believe that it requires
11 the defense to prove the elements of self-defense?

12 A. And this is the charge from 457 to ---

13 Q. Four sixty one.

14 A. I mean, I don't believe that's what says but it's, I
15 mean, it could be clearer that, that's not the case.

16 Q. But you didn't consider objecting to this charge on
17 burden shifting grounds?

18 A. No, I didn't.

19 Q. I'm going to jump back just a little bit because I
20 want to handle all of the jury instruction issues at once.
21 On page 393 and lines 6 through 17, the court and
22 prosecutor states that he does not want to open on the law,
23 that he just wants to make a final closing argument and you
24 acquiesce in that request. Was that a strategic decision
25 that you made? Did you want the solicitor to open?

1 A. Well, you know, I figured the less time John Holt
2 spends up there talking about his side, the better off we
3 would be.

4 Q. So you didn't consider requiring him to open so that
5 you would get a chance to at least respond to some of his
6 argument?

7 A. No, I didn't. I didn't want to do that.

8 Q. And finally, do you recall there being notes being
9 sent back from the jury?

10 A. Based on my recollection I believe the jury wanted to
11 be charge again on voluntary manslaughter but just based on
12 my recollection. I don't remember any notes.

13 Q. Your Honor, there on, it's on page 7 it's Court's
14 Exhibit it says, "Four is note from the jury the definition
15 of murder, a note from the jury the definition of
16 manslaughter." Did you consider requesting that the jury
17 be recharged on the law of murder and manslaughter based on
18 those notes?

19 A. That's what it seems to -- that's what it seems to ask
20 for.

21 Q. Do you think that would've been appropriate?

22 A. Yes.

23 Q. Do you recall the jury being recharged?

24 A. No, not for my recollection. I can't remember it.

25 Q. And I don't think I've ever tried a case with Judge

1 Baxley, is he a judge who would send, you know,
2 instructions back to the jury or anything like that?

3 A. No, he wouldn't send instructions back to the jury.
4 He would bring them out and re-read them but he wouldn't
5 send them in chambers.

6 MR. THOMPSON: I beg the Court's indulgence.

7 Q. Have you had the chance to reread your closing
8 argument in this case?

9 A. Well, no, I haven't read, reread my closing argument.

10 Q. I'm going to try to be, I'm going to try and be brief
11 about this. In the opening of your closing argument it
12 starts on page 394 and goes on from there, you begin by
13 arguing that you didn't do very well in undergrad and
14 didn't do very well in philosophy and then argued Nietzsche
15 to a jury and compared Nietzsche to Proverbs, do you recall
16 making that argument?

17 A. Yeah.

18 Q. Did you -- how much time did you spend preparing your
19 closing arguments?

20 A. I think we were allotted the lunch period to prepare
21 for closing. Not as long as I would have liked in
22 retrospect. Nietzsche, that's not a good, not a good thing
23 to bring up in closing argument to a Darlington jury.

24 Q. Is Nietzsche famous for saying, "God is dead, we have
25 killed him"?

1 A. Something like that, I think. Like I said, I made a C
2 in law school, for undergrad philosophy.

3 Q. And in retrospect would you have wanted to start out
4 may be like by arguing something different?

5 A. Yes.

6 Q. All right. On page 405 and this is talking about
7 your, the incident at the park with Lavinent Hankins, it
8 says, you know, starting about line 16, "I wish he hadn't
9 gotten into this altercation with Quitell", and then you go
10 on to say, "it may have not all been Breyon's fault", it
11 may not have been all Quitell's fault but he shouldn't have
12 been there." "We all know that, all right." "We know he
13 didn't go looking for trouble at the private park." Did --
14 and then you go on to say, "he shouldn't have been there",
15 was -- did it occur to you to argue that Breyon did nothing
16 wrong by going to the park that he was just going to the
17 park?

18 A. No.

19 Q. Do you think by arguing that your own client shouldn't
20 have gone to that park that he may have been, that he may
21 have done something wrong?

22 A. Well, you know, I felt at the time what I was trying
23 to say is that he probably shouldn't have put himself in
24 that position where he would run into Quitell. But, I
25 think to answer your question, I, you know, it was probably

1 a poor choice of words.

2 Q. Now, and I know it's a closing argument and is easy to
3 kind of get lost up in the drama and moment of a closing
4 argument, but on page 410 and then through 412, you talk
5 about, you talk about self-defense and on 411, in
6 particular, you talk about, the first element that you
7 have to remember the defendant is without fault bring on
8 the danger that's lines 5 through 7. And then you don't
9 specifically address any of the other elements of self-
10 defense. In retrospect do you believe you should have
11 argued how each of the elements was met by Breyon's
12 testimony?

13 A. Yes.

14 Q. And I apologize for even bringing this back, this one
15 back up, but on page 414 on to 415, you argue about a
16 friend that you knew who had, you know, passed away, was it
17 -- was that something that was a spur of the moment or was
18 that something you had intended to bring up to the jury?

19 A. I think that was a spur of the moment.

20 Q. And do you believe that someone just falling down the
21 stairs is comparable to this situation?

22 A. Well, it's a different situation but the point I was
23 trying to make is that, you know, people die and when
24 people die it's not, sometimes is not anybody else's fault,
25 they just die and, you know, something happens to where

M. Swilley- Cross Examination by Mr. James

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1 it's just their own fault or it's by their own actions. I
2 think that was the point I was trying to get across.

3 Q. And that was an accidental, you know, situations where
4 it's not anybody's fault, right?

5 A. You're talking about falling down the stairs?

6 Q. Yeah.

7 A. Well, I mean, it was his fault, he ingested, you know,
8 too much alcohol and drugs.

9 MR. THOMPSON: I beg the Court's indulgence. No
10 further questions of this witness, Your Honor.

11 THE COURT: Mr. James?

12 **Cross-Examination by Mr. James:**

13 Q. Mrs. Swilley, you may have heard some of my
14 questioning earlier today where I jump straight to the
15 point in the interest of being exceedingly thoroughal to
16 make sure I don't miss anything, we're going to be
17 exceedingly thoroughal on your questions, all right?

18 A. Okay.

19 Q. So earlier you testified that you met with Mr. Toney
20 maybe five or six times while he was in jail, correct?

21 A. Yeah, I believe that was how many times we met.

22 Q. Okay. You didn't have any meetings in your office?

23 A. No.

24 Q. Do you know about how many times you communicated with
25 Mr. Toney outside of a face-to-face meeting?

1 A. I specifically remember one time -- are you talking
2 about after he got out of jail?

3 Q. At any time, while he was in jail or outside of the
4 jail or anytime, you called him or he called you or

5 A. I think we may have exchanged some letters and I can
6 remember he called me when he was out of jail very close to
7 the trial. I sent him a Facebook message actually because I
8 couldn't get a hold of him by phone and then he called me.

9 Q. What did you discuss in that conversation?

10 A. Just that, that the trial was coming up, that he
11 needed to be at trial and that, you know, they would
12 probably proceed in his absence.

13 Q. When did you inform him -- I'm sorry, did you inform
14 him that Lavincent Hankins had produced a statement
15 regarding the confrontation?

16 A. I do believe we discussed that.

17 Q. And did you discuss the indictments, the offenses and
18 the elements with your client?

19 A. Yes.

20 Q. And did you review the possible punishments?

21 A. Yes.

22 Q. Did you explain all of his constitutional rights such
23 as right to a jury, right to remain silent?

24 A. Yes.

25 Q. The right to confront the witnesses against him?

1 A. Yes.

2 Q. The right to call witnesses himself?

3 A. Yes.

4 Q. Right to testify?

5 A. Yes.

6 Q. Did you have a conversation about whether or not it
7 would be wise for him to testify, outside of trial?

8 A. Yes, I think, I believe we discussed that.

9 Q. Okay. You know about when you discussed that?

10 A. It would've been, you know, it would've have been in
11 2011, definitely, sometime in the spring.

12 Q. Did you explain that the State had a burden to prove
13 the fact beyond a reasonable doubt?

14 A. Yes.

15 Q. Did he appear to understand everything that you told
16 him?

17 A. Yes.

18 Q. You didn't discern any mental deficiencies or learning
19 disorders or anything of that nature?

20 A. No.

21 Q. Can you recall the conversations that you had with
22 your client with respect to each of constitutional rights
23 whether to go for a jury trial, a plea, whether to testify
24 or not?

25 A. I can remember speaking with him about it. Yeah.

1 Q. But can you remember the contents of those
2 conversations?

3 A. You know, I know I explained to him that, you know, I
4 mean, we talked about testifying at trial, we talked about
5 the right to present our own witnesses, the right we don't
6 have, you know, he presumed innocent. I mean, I can recall
7 having these conversations with him when we would meet.

8 Q. And did he ---

9 A. Specific days, I don't know.

10 Q. Understandable. Did he -- do you recall if he gave
11 specific indications as to whether or not he wanted to
12 testify?

13 A. Yes, well, I do recall explaining to Breyon if he
14 didn't testify we might not get a self-defense jury charge.
15 I do remember having that conversation with him and that if
16 he was going to have a self-defense jury charge or viable
17 self-defense, he was going to have to testify.

18 Q. And believe that as -- do you believe his testimony
19 would've been a necessity as a matter of law or a necessity
20 as a matter of the facts in the case?

21 A. At the time I believe it was a matter of both. As a
22 matter of law and as a matter of facts. In retrospect I
23 think that he probably could've gotten self-defense jury
24 charge without his testimony but at the time I didn't think
25 that?

1 Q. And why is that?

2 A. Well, he was the only -- he was the only witness we
3 had that would've attested to the facts that were
4 consistent to whether he was defending himself. But I
5 think, I feel now though looking retrospect, I think Judge
6 Baxley -- I don't know of Mr. Holt would have fought me on
7 a self-defense jury charge. Actually, come to think of it
8 now, but at the time I felt that it was a necessity that he
9 testified to get that charge.

10 Q. What if anything did Mr. Toney tell you about what
11 happened?

12 A. The night of the ---

13 Q. The night of stabbing?

14 A. That he and Mr. Tucker had, had some kind of quarrel,
15 falling out, they had been arguing over text messages back
16 and forth. That Mr. Toney went to meet him at the
17 designated spot near Marion Street. When they got there
18 that, that were several individuals there "boosting it up"
19 to try and instigate them to fight, that they did have a
20 physical altercation that took place and that Mr. Toney had
21 his, you know, pulled his knife after Mr. Tucker had armed
22 himself with these glass bottles and that they had a
23 scuffle. I think at some point it had got broken up and
24 that Mr. Toney left and Mr. Tucker was walking around, you
25 know, walking around near a car or some of the friends that

1 had accompanied him. I think that's what I remember from
2 our conversation.

3 Q. Did he give you any leads to pursuit?

4 A. Specifically, what you mean by leads?

5 Q. People to talk to, evidence to look for?

6 A. Yes. He told me that the young lady that we brought
7 down from New York, I mean, he told me about her.

8 Q. Anybody else?

9 A. One moment let me try to recall. No, I think that's
10 the only witness that we discussed that I believe would be,
11 that I felt like we wanted to use, call as a witness at
12 trial.

13 Q. I'm skipping just a little bit here, your strategy at
14 trial was self-defense, did Mr. Toney tell you that he was
15 acting in self-defense?

16 A. Yes.

17 Q. Did you conduct any additional investigation into the
18 facts either personally or through an investigator?

19 A. I knew we had -- I can't speak for Mr. Goodman, Morris
20 Goodman, our office investigator at the time. I think that
21 he may have gone out but I can't really recall. I mean, he
22 was involved in, I think he went and picked up the young
23 lady from the bus station that came down from New York but
24 I can't recall anything specific that he did.

25 Q. Let's talk a little bit about that, how did you go

1 about arranging that witness to come down from New York?

2 A. Based on my recollection either Mr. Jones, I think
3 I've got the number from Breyon. I spoke to the young
4 lady. I think I spoke to her father and he was very
5 apprehensive about her coming down and I, basically, told
6 him, you know, this is a murder trial so she doesn't come
7 down he's more likely going to be convicted and he let her
8 come down. I think she was a teenager. Either Mr. Jones
9 or Mr. Stephens paid for her bus fare down, I think, out of
10 their own pocket if I'm not mistaken. And I think she took
11 a bus that was a nonstop bus route from New York to
12 Florence if I'm not mistaken the night before.

13 Q. She testified at trial, correct?

14 A. Yes.

15 Q. Did you find her testimony helpful or

16 A. I think it was helpful. How helpful, I don't know.

17 Q. In the course of your representation, did you file a
18 request for discovery, the Rule 5, Brady?

19 A. My office did, yes.

20 Q. Okay. Before you join the case?

21 A. Yes.

22 Q. And did the State provide everything in response to
23 that request?

24 A. Yes.

25 Q. And did you review all of those materials?

1 A. Yes.

2 Q. And did you review all of those materials with your
3 client, Mr. Toney?

4 A. I can't recall. I don't have an independent
5 recollection of going over it with Breyon but I do believe
6 we did, we did go over the evidence.

7 Q. In your opinion as a professional, what would you --
8 how did you engage the strength of the State's case?

9 A. I didn't think that it was as strong as most murder
10 cases would've been. I did not feel that the testimony of
11 the eyewitnesses were very strong. In fact, I think after
12 the first day I felt very confident about our chances with
13 the jury returned a not guilty verdict.

14 Q. And again just skipping forward to trial, expand on
15 that, what was the quality of the State's witnesses
16 testimony?

17 A. For my opinion, poor.

18 Q. All right. We'll get back to that a little more in a
19 moment. You had your opinion in the strength of the
20 State's case, did you express that opinion to Mr. Toney?

21 A. Yes.

22 Q. Did he give you any reaction to your opinion?

23 A. I think he agreed with me.

24 Q. Just to be clear, you fully explain self-defense to
25 your client?

1 A. Yes.

2 Q. And did you feel adequately prepared to proceed on
3 trial on that self-defense strategy?

4 A. Yeah. Yes, I mean, as prepared as I ever was going
5 to be.

6 Q. I believe you previously indicated that there was a
7 plea offer of thirty (30) years, is that correct?

8 A. Before trial, yes.

9 Q. Were there any other plea offers that came along
10 during the trial?

11 A. Yes. After the first day of testimony Mr. Holt met
12 with me and offered me seventeen (17) years on voluntary
13 manslaughter. I took that to Breyon. We discussed it and
14 I think both of us were of the opinion that he shouldn't
15 take it.

16 Q. So Breyon rejected it?

17 A. Correct.

18 Q. And that was his decision?

19 A. Yes.

20 Q. And you agree to that decision?

21 A. Yes.

22 Q. At trial, how did you go about trying to prove --
23 scratch that. If I may rephrase the question, how did you
24 execute your self-defense strategy at trial?

25 A. You know, just trying to, you know, impeach, you know,

1 the unfavorable eyewitness, seeing witnesses and establish
2 it through Breyon's testimony. I mean, that's pretty much
3 the only way, I mean, to show a self-defense charge. I
4 can't remember if I tried to emphasize the size of the
5 wound that was on Mr. Tucker's chest. I think it was
6 fairly small as far as the length of the actual fatal ---

7 Q. You're making a number of hand motions that would be
8 captured in the transcript, can you give me like a physical
9 comparison?

10 A. From my recollection, the wound, I think the fatal
11 wound on Mr. Tucker's chest was probably half the side of
12 my thumb.

13 Q. The width?

14 A. I guess like the length of my thumb. A very, it was a
15 very small wound on Mr. -- it didn't look like, it didn't
16 look like a wound that would kill anybody but I guess it
17 had perforated his heart. I can't remember from the
18 autopsy report. But it was not looking at Mr. Tucker's
19 wounds, you know, looking at Mr. Tucker's body after the,
20 you know, postmortem it didn't look like there was anything
21 that could have killed him.

22 Q. Do you recall if you tried to get any evidence
23 suppressed?

24 A. I don't recall.

25 Q. Do you recall there being phone calls made from the

1 jail?

2 A. I was given recordings of calls between Breyon and
3 family members.

4 Q. Did you ever suppress that evidence?

5 A. That's right, yes, I did try to keep those out.

6 Q. Okay. Did they stay out or did they come in?

7 A. I think only a portion of one call came in.

8 MR. JAMES: I beg the Court's indulgence for just a
9 moment.

10 THE COURT: Okay.

11 Q. In what way did you impeach the State's witnesses at
12 trial?

13 A. I believe with prior inconsistent statements.

14 Q. Did they all have prior inconsistent statements?

15 A. Based on my recollection I believe there were prior
16 inconsistent statements with all of them, I believe.

17 Q. Did their testimony in trial match up?

18 A. All their testimony really didn't comport with each
19 other, I don't believe. I mean, I mean, their testimony
20 established, you know, the elements of murder, I believe
21 collectively but, I mean, I don't think that they each
22 comported with each other's, you know, with every specific
23 fact.

24 Q. Isn't it true that they disagreed on who all was
25 there?

1 A. I believe so.

2 Q. And isn't it true that they disagreed on how many
3 people were there?

4 A. Yes.

5 Q. Do you recall what reason they gave for the conflict?

6 A. No.

7 Q. Isn't it true that one of the reasons offered was a
8 comment with respect to buying pampers for the baby's
9 mother?

10 A. I remember there was a comment -- I remember that
11 being a comment made at some point, I believe, by Mr.
12 Tucker.

13 Q. But no one said that it was because Mr. Toney had
14 sexual relations with Ms. Grimes?

15 A. I don't believe that was any of the witnesses
16 testimony.

17 Q. That was Mr. Toney's testimony?

18 A. Yes. I believe that's who it was.

19 Q. Did you see glaring problems after the close of the
20 State's case in chief?

21 A. What you mean by glaring problems?

22 Q. Was there any testimony that you were worried was
23 particularly harmful to your client or did you broadly feel
24 very strong, strongly about your chances?

25 A. After the, after the -- when the State rested I felt

1 we had a very good chance of an acquittal.

2 Q. Earlier you said the Nietzsche was probably not the
3 best person to cite in front of a Darlington jury, do you
4 recall the exact quote that you cited?

5 A. Something about the indignant person that lies a lot.
6 I mean, like it says, it's applicable but no one is really
7 going to understand that.

8 Q. But you would agree that the quote itself is still
9 applicable, correct?

10 A. Well, yeah. Yeah.

11 Q. Earlier you testified as it is evident from the
12 record, you only emphasize one of the elements of self-
13 defense during your closing argument, is that correct?

14 A. Yes.

15 Q. Is it also true that the court thoroughly charged on
16 self-defense?

17 A. Yeah, I mean, it charged -- the court charged on all
18 four elements, I believe.

19 Q. Earlier there was testimony and it's evident from the
20 front of the transcript that the jury sent out two notes
21 requesting to be recharged on murder and involuntary
22 manslaughter, correct?

23 A. Yes.

24 Q. Do you recall the court's reaction to those notes was?

25 A. No.

1 Q. Do you think the court would have just -- do you think
2 the court would have done nothing in response to those
3 notes?

4 A. I don't think so.

5 Q. The court would've offered some kind of response?

6 A. Yeah, I believe so.

7 Q. But you don't believe it would've offered just a
8 written response?

9 A. No, I mean, no, I don't think so. I don't know. I
10 can't -- I don't know what Judge Baxley would've done.

11 Q. Was there any evidence introduced at trial that the
12 victim was armed with a gun?

13 A. Not to my recollection.

14 Q. Was there any evidence introduced at trial to indicate
15 that he carried a gun as a matter of course?

16 A. Not that I recall.

17 Q. And in the course of preparing for this case, did you
18 ever receive any information to indicate to you that he was
19 armed with a gun?

20 A. No.

21 Q. Or that he carried a gun as a matter of course?

22 A. No.

23 Q. Did Mr. Toney ever tell you that he feared that the
24 victim had a gun in his coat?

25 A. Not that I recall.

1 Q. Is there any evidence that the victim was ever armed
2 with anything other than those beer bottles?

3 A. Not that I recall.

4 Q. I hate to put you on the spot like this but earlier
5 you indicate you didn't think it was worth, you didn't
6 think that focusing on the defendant and the victim's
7 friendship would be a fruitful course of action, am I
8 remember that correctly?

9 A. Yes.

10 Q. Isn't it true, however, that among the first questions
11 you asked Mr. Toney was about his relationship with the
12 victim?

13 A. I don't remember asking him that but I don't

14 Q. May I bring your attention to page 342 of the trial
15 transcript, lines 20 through 23, do you have a copy of the
16 transcript up there?

17 A. Yeah. Yeah. Are you asking me what it says?

18 Q. Yes.

19 A. Line 20, "Breyon, how long have you known James Junie
20 Tucker?" "My whole life." "Where you friends?" "Yes,
21 sir."

22 Q. So you did at least take the time to indicate that
23 they were friends?

24 A. Yes.

25 Q. Was the location of this crime ever a fact and serious

1 dispute?

2 A. No.

3 Q. Was the location of this crime at all relevant to the
4 strategy that you employed at trial?

5 A. Not that I can really recall.

6 Q. So would it have bothered you to hear law enforcement
7 say this is where the crime took place?

8 A. No.

9 Q. Was the victim's use of beer bottles ever a serious
10 factual dispute?

11 A. Whether or not he used the beer bottles -- whether or
12 not he ever had the beer bottles I don't think it was in
13 fascist dispute. I think the manner in which they were
14 used may have been the factual dispute.

15 Q. Was the number of beer bottles used in some dispute?

16 A. I don't believe so.

17 Q. Okay. So would it have bothered you for law
18 enforcement indicate that they had found victim's
19 fingerprints on multiple beer bottles?

20 A. No.

21 Q. You would've wanted that to come in?

22 A. Yes.

23 Q. And, in fact, that would've been helpful to your
24 strategy of self-defense, correct?

25 A. Yes.

1 Q. You earlier indicated that you never discussed the
2 strategy of accident with your client, why not?

3 A. I just didn't feel like it was, I guess, feel like it
4 was something that we could prevail on.

5 Q. You also indicated that you never discussed the lesser
6 included charge of involuntary manslaughter with your
7 client, why not?

8 A. I just didn't think it was anything worth talking
9 about with him, I guess. I can't recall why I didn't talk
10 about involuntary with him.

11 MR. JAMES: If I may indulge the Court's indulgence
12 just for a moment.

13 THE COURT: Yes, sir.

14 Q. Ms. Evans testified this morning with respect to a
15 confrontation between Mr. Toney and Mr. Hankins prior to
16 trial after the events in question at trial.

17 A. Yes.

18 Q. Do you -- in deciding whether or not to go into that
19 subject, do you believe the court would have permitted you
20 to go into that ancillary issue?

21 A. I honestly don't know.

22 Q. Isn't it true that you wanted to keep all reference to
23 the park confrontation out of the record?

24 A. Yes.

25 Q. Why is that?

1 A. Well, it was harmful to our case, I felt.

2 Q. How regularly did you communicate with your client via
3 Facebook?

4 A. Just that one time.

5 Q. Was he otherwise difficult to get in touch with?

6 A. When he was out -- subsequent to the incident and
7 prior to the park, he was, I was having some difficulty
8 getting in touch with him.

9 Q. Was that because he was rejecting phone calls or

10 A. I can't -- I don't know if Breyon had a cell phone, I
11 can't recall. I just couldn't get a hold of him.

12 Q. When you did get a hold of him, was he cooperative in
13 developing his defense?

14 A. He spoke with me on the phone, I mean, I, I mean, you
15 know, he did not do anything I told him to do.

16 Q. I'm going to direct your attention to page 131, lines
17 10 through 24 of the trial transcript. You went over this
18 testimony earlier where Investigator Anderson made
19 reference to the consistency of the statements of
20 witnesses, Marcus Brunson and Crystal Robinson, correct?

21 A. This is page 131?

22 Q. One hundred, thirty-one.

23 A. Okay. Yes.

24 Q. Starting at line 10 and then we run right down to the
25 bottom of the page.

1 A. Okay.

2 Q. We discussed this earlier or we discussed this earlier
3 on direct examination.

4 A. Okay.

5 Q. Thereafter, on page 132, there's an indication of a
6 bench conference prompted by solicitor Holt, do you recall
7 what occurred during that bench conference?

8 A. No, sir.

9 Q. Anything I can do to jog your memory on that?

10 A. I don't know. I don't remember it ever happening.

11 Q. Not necessarily within the context of that specific
12 bench conference but, broadly speaking, do you ever recall
13 discussing the admissibility of Investigator Anderson's
14 testimony?

15 A. I don't, I don't remember that.

16 Q. Did you ever have any suspicion that the witnesses for
17 the State colluded together in developing their testimony?

18 A. Any suspicion, yes.

19 Q. Any proof?

20 A. No.

21 Q. Did you think of any proof to look for?

22 A. I couldn't think of any at the time. I know that, I
23 know that I questioned Marcus about, you know, him having
24 the incident report, his prior statement with him, and that
25 he was trying, that I was trying to insinuate that he was

1 trying to, you know, falsify testimony or something of that
2 nature but that's all I recall.

3 MR. JAMES: I have no further questions, Your
4 Honor.

5 THE COURT: Mr. Thompson?

6 MR. THOMPSON: Just briefly, Your Honor.

7 **Redirect Examination by Mr. Thompson:**

8 Q. You testified just a moment ago about the plea offer
9 during the trial which I believe was to seventeen (17)?

10 A. Correct.

11 Q. Is that correct?

12 A. Yes.

13 Q. I do believe that's referenced in the sentencing
14 portion of the transcript where Mr. Holt does talk about
15 that offer and you advised Breyon not to take that deal?

16 A. Correct.

17 Q. And that's because you thought your case was strong at
18 the time that offer was made?

19 A. Yeah, I thought we were -- I thought it was going to
20 be an acquittal.

21 Q. Did you think it was going to be an acquittal after
22 Breyon finished testifying?

23 A. I didn't feel as strongly as I felt after the first
24 day but I felt we had a chance but I

25 Q. Do you believe that Breyon came off well during his

1 testimony?

2 A. No.

3 Q. Why not?

4 A. I don't think he did well on cross-examination.

5 Q. And had you spent a significant amount of time
6 preparing them for that cross-examination?

7 A. Significant amount of time, no.

8 Q. Is that -- you said this was your first murder trial?

9 A. Yes.

10 Q. Have you done a murder trial, subsequently?

11 A. Yes.

12 Q. Given that subsequent experience, would you have
13 advised him differently heading into this trial?

14 A. As far as ---

15 Q. As to the cross-examination to expect from the
16 prosecutor?

17 A. To expect, I would've advised him differently on how
18 to respond to the questions and the manner in which to
19 respond to the questions.

20 Q. And what was his demeanor in responding to those
21 questions?

22 A. Breyon, didn't -- he got very I don't want to say
23 agitated, he got very anxious and it manifested.

24 Q. And that was visible to you while he was testifying?

25 A. Yes, on cross.

1 Q. Do you believe the preparation could have helped avoid
2 or mitigate that experience for him?

3 A. Yes.

4 Q. In regarding self-defense, I recognize and I'm going
5 to touch on this in a couple of different ways with regards
6 to the State's witnesses and their testimony, you testified
7 you thought they may have colluded to craft their testimony
8 and their statements, is that accurate?

9 A. Yes.

10 Q. And although you had no proof, they did seem to be
11 quite similar to one another, right?

12 A. Certain parts of it did, yes.

13 Q. Which do you believe is more likely to have caused an
14 argument of this nature, arguing over diapers or arguing a
15 woman?

16 A. Argument over a woman.

17 Q. So in that context, does Breyon's testimony make a
18 little bit more sense as to how this escalated so quickly?

19 A. Yeah. I don't think it was an argument over diapers.

20 Yeah. To answer your question, yes. The explanation is
21 from what I can tell, it seem that Mr. Tucker had been
22 taunting and belittling Breyon and I think that had a lot
23 to do with, from what I could gather, that had a lot to do
24 with something Breyon had done to him.

25 Q. Now, you testified that you had not gotten any

1 indication that Mr. Tucker like firearms or was known to
2 carry firearms, is that accurate?

3 A. I don't, I don't recall any indication that Mr. Tucker
4 carried a gun or firearm or weapon that I can recall.

5 Q. You recall cross-examining Marcus Brunson and this is
6 on pages 193 and 195, about an app lyric that Mr. Brunson
7 claim was an app lyric that had come from the victim?

8 A. What page?

9 Q. One ninety-four, 193, and 195. Specifically, on the
10 bottom of 194 over to 195, you questioned Mr. Brunson about
11 the text message from the victim and it says, you say on
12 195, line 2 through 7, "Okay. All right." "And Marcus was
13 is four, four?" He answers, "A four, four is a gun". You
14 say, "A firearm?" He says, "Huh, huh". Do you recall
15 that?

16 A. I mean, I'm reading it. I don't recall it.

17 Q. Okay. Is there some indication at least that Mr.
18 Brunson and Mr. Tucker communicated about guns?

19 A. It would appear so.

20 Q. Now, you testified that you tried to impeach witnesses
21 with prior inconsistent statements, I'm going to refer you
22 to the testimony of Crystal Robinson, and forgive me for
23 jumping around, this is page 156, line 11 through 25, she
24 said on direct this is starting on line 11, "You told Mr.
25 Holt that he never heard Breyon say anything, is that

1 correct?" She said, "Correct". And then, "Why did you say
2 in your statement you kept saying over and over that I'm
3 going to kill this person?" And it goes on from there and
4 it uses quite colorful language, is there any reason why
5 you impeached Ms. Robinson with a statement that said that
6 Breyon was threatening to kill the victim?

7 A. Just to show that she wasn't telling the truth it's a
8 prior inconsistent statement. I mean, I wasn't trying to
9 bring that statement into the truth of the matter for
10 certain that he had, the prior statement that I'm going to
11 kill this person, just to show that she was lying. Just to
12 show that there were inconsistencies in their statement and
13 that she was not telling the truth on the stand.

14 Q. There couple of other issues, Mr. James ask you, you
15 know, talking about your closing arguments. The court
16 charge on self-defense and obviously the judge did charge
17 the elements of self-defense but closing arguments, I mean,
18 this is a patrial question, but aren't closing arguments
19 important?

20 A. Are closing arguments important? I think they are. I
21 want to say no but they're not as important as people think
22 they are but, yeah, they're important.

23 Q. You wouldn't advised a defense attorney to waive their
24 closing argument and let the judge's charge handle things
25 for them, would you?

1 A. No.

2 Q. And lastly he, Mr. James was asking you about wanting
3 to keep references to the incident at the park out, which,
4 obviously, that was your intent, you did move to exclude
5 that evidence, right?

6 A. Yes.

7 Q. But once that evidence comes in, you want to make sure
8 you present the best possible case to the jury, don't you?

9 A. Yes.

10 Q. That's, I mean, Breyon testified about what happened
11 at the park, right?

12 A. Yes.

13 Q. So once the evidences is coming in you would want to
14 present the best possible evidence and the best possible
15 view of that evidence to the jury, wouldn't you?

16 A. Yes.

17 MR. THOMPSON: I beg the Court's indulgence. No
18 further questions, Your Honor.

19 THE COURT: Mr. James?

20 MR. JAMES: Briefly, Your Honor.

21 **Re-cross Examination by Mr. James:**

22 Q. Counselor, you indicated you would've advised your
23 client differently on how to respond to the questions with
24 the experience you have today versus the experience you had
25 on trial, how would you have differently advised him?

1 A. What I would do now is I would get somebody, I mean,
2 we would go through a test run of testimony at trial. I
3 would get someone as a prosecutor and I would get someone
4 to, um, and then I'll direct someone, we'll go through live
5 testimony. And I would have liked to have done that more
6 with Breyon with more time, that's what I would've liked to
7 do. That's what I would do now if I had this case again.

8 Q. Mr. Thompson just ask you about rap lyric, do you
9 believe that a rap lyric is enough to suspect that somebody
10 has a gun?

11 A. You mean texting a rap lyric to somebody over the
12 phone?

13 Q. Yes.

14 A. Just enough to suspect somebody has a gun? It's
15 enough to suspect somebody has a gun, I mean, you can have
16 the suspicion. If somebody is texting you about a gun, I
17 guess, you could have a suspicion that, that person has a
18 gun. I don't know.

19 Q. Do rap lyrics often make references to firearms?

20 A. Yes.

21 Q. You took a long time to answer the question about
22 whether or not closing arguments are important, would you
23 agree that reasonable attorneys reach different opinions
24 about the importance of closing arguments?

25 A. Well, all the best attorneys that I know, defense and

1 prosecution and probably even some civil attorneys, you
2 know, most of the time the jurors have already made their
3 minds up in closing argument. With that being said, like I
4 told Mr. Thompson, you would never want to waive it. I
5 mean, it's important, you want to hammer out some points
6 and maybe speak to some jurors that haven't quite made up
7 their mind but it's not, you know, the television, movies
8 makes closing arguments seem like it's the most important
9 thing in a trial and it's really, it's not.

10 Q. It falls somewhere in between the full spectrum of
11 importance, would you agree with that?

12 A. I guess it depends on the case, but, yes.

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

14 THE COURT: All right. You can step down, Mr.
15 Swilley.

16 MR. SWILLEY: Can I be excused?

17 THE COURT: Any objection to him being excused?

18 MR. THOMPSON: No, Your Honor.

19 MR. JAMES: No, objection.

20 THE COURT: You may be excused.

21 MR. THOMPSON: Your Honor, that would be the
22 applicant's case. I did print out some cases to hand up
23 and I know it's quite late and I know, Your Honor, is
24 pretty much taking these cases under advisement so I'm open
25 to doing whatever you want to do. We have no further

1 witnesses.

2 THE COURT: Mr. James?

3 MR. JAMES: Your Honor, the State has no witnesses
4 and the State is fine with perhaps submitting memos in lieu
5 of oral argument. I also -- I don't have any cases to hand
6 up but I do have a copy of Friedrich Nietzsche if you would
7 like the source in question.

8 MR. THOMPSON: I would.

9 MR. JAMES: Here you go.

10 MR. THOMPSON: Thank you.

11 THE COURT: If you've got it. I mean, if you want
12 to make an oral argument I certainly have no problem with
13 you making a brief argument. I certainly would entertain
14 memos to. It's whatever your preference is?

15 MR. THOMPSON: It's late. We can do memos.

16 MR. JAMES: I think we both would ---

17 MR. THOMPSON: It's pretty late. We can do that.

18 THE COURT: That's fine. Okay.

19 MR. JAMES: If I may approach?

20 THE COURT: Yes, sir.

21 MR. JAMES: Here you go, is an excerpt from beyond
22 good and evil.

23 THE COURT: Thank you.

24 MR. JAMES: The quote in question is the very last
25 sentence that I hand up, Your Honor, but the entire section

1 establishes the context for it.

2 THE COURT: Okay. As Mr. Thompson has pointed out
3 I'm certainly going to take this matter under advisement.
4 It's very involved and it has a lot of issues so it may
5 take me more than a couple of days to get back in touch
6 with you on this one, okay?

7 MR. JAMES: In terms of submitting memos, by when
8 would you like them, Your Honor?

9 THE COURT: All right. I gave you twenty days the
10 other day on one?

11 MR. JAMES: Yes, Your Honor.

12 THE COURT: I'll give you twenty on this one, okay.

13 MR. JAMES: Sounds good.

14 THE COURT: If you need more time, just contact me,
15 pretty liberal.

16 MR. JAMES: I appreciate that.

17 THE COURT: I know how busy both of you are so.

18 Thank you, gentlemen.

19 MR. JAMES: Thank you, Your Honor.

20 Ms. Jameson: Thank you, Your Honor.

21 THE COURT: And ladies.

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

23

24

25

CERTIFICATE

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

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

s/ Lisa S. Carter

Lisa S. Carter

Circuit Court Reporter

May 6, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON	)	
Breyon Toney,	)	Case No.: 2014-CP-16-00875
S.C.D.C. No. 346126,	)	
	)	
Applicant,	)	
	)	MEMORANDUM OPPOSING
v.	)	POST-CONVICTION RELIEF
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, pursuant to its granted request to submit a post-hearing memorandum in support of its position, would respectfully show this Court that Matthew Swilley's (Counsel) representation of Breyon Toney (Applicant) was effective and that Applicant is entitled to no relief.

I.

This matter comes before the Court by way of an application for post-conviction relief filed by Applicant on October 23, 2014. Respondent made its return on or about March 28, 2016. Applicant, by and through counsel, amended his application by filing on July 7, 2017. The Court convened an evidentiary hearing into the matter on July 17, 2017, at the Dillon County Judicial Center in Dillon, South Carolina. Applicant was present at the hearing and represented by Jeremy A. Thompson, Esq. and Tricia A. Blanchette, Esq. Johnny Ellis James Jr. and Megan Harrigan Jameson, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Matthew Swilley, Esquire, as well as Phillip Franklin and Janetta Evans also testified.

The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Darlington County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings.

II.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). "Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed

ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

IAC Allegation #1 – General Permissive Malice Inference Instruction

Applicant alleges Counsel was ineffective for failing to “object to the trial court’s failure to charge the jury on the general permissive malice inference instruction.” The Court charged malice as follows:

Malice is hatred, or ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act itself.

Malice aforethought may be expressed or it may be inferred. Now, these terms express and inferred do not mean different kinds of malice, but merely the manner in which it may be shown to exist. That is either by direct evidence, or by inference from the facts and circumstances which are shown to have existed and which are proved here by the state. Express malice is shown when a person speaks words which express hatred or ill will for another person, or when the person prepares beforehand to do some act which was later accomplished; for example, lying in wait for someone, or some other act of preparation going to show that the deed was within the defendant's mind. That would be expressed malice.

Malice may also be inferred from conduct that shows a total disregard for human life.

Tr. 453, l. 20 – p. 454, l. 21. At the evidentiary hearing, Counsel testified he believed stabbing somebody with a knife shows disregard for human life.

There are no faults with the malice charge by which the Court instructed the jury. Given the efforts to show self-defense, any further expansion on permissive inference could have only harmed Applicant's cause, if not run afoul of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Because the jury charge was proper, there was no reason for Counsel to object, and thus Counsel was not deficient for failing to object. Accordingly, Applicant's request for relief upon this allegation should be denied.

IAC Allegation #2 – Failure to Require the State to Close First on the Law

Applicant alleges counsel was ineffective for failing to require the State to deliver a closing argument on the law prior to his own closing argument. At trial, Counsel did not object to the State waiving the opening close. Tr. 393, ll. 8-17. At the evidentiary hearing, Counsel testified to his belief that the less time a solicitor gets to talk about his case, the better. Minimizing the State's opportunities to talk to the jury is a valid trial strategy. Because Counsel articulated a valid strategy, Counsel was not ineffective, and Applicant's request for relief based upon this allegation should be denied. See Smith, 386 S.C. at 567, 689 S.E.2d at 632.

IAC Allegation #3 – Lesser-Included Offense of Involuntary Manslaughter

Applicant alleges counsel was ineffective for failing to adequately research and prepare a request to charge on the lesser-included offense of involuntary manslaughter. “Declining to charge the lesser included offense is warranted when it very clearly appears that no evidence whatsoever exists tending to reduce the crime from murder to manslaughter.” State v. Gibson, 390 S.C. 347, 356, 701 S.E.2d 766, 770 (Ct.App. 2010) (quoting State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct.App. 2010)) (internal quotations and modifications omitted). “Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in (1) an unlawful activity not naturally tending to cause death or great bodily harm or (2) a lawful activity with reckless disregard for the safety of others.” State v. Scott, 408 S.C. 21, 24, 757 S.E.2d 533, 535 (Ct.App. 2014) (citing State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011)).

At trial, Counsel requested the Court charge the jury on involuntary manslaughter, and the Court declined that request. Tr. 386, l. 19 – p. 389, l. 7. The Court asked what evidence existed in the record to show Applicant was engaged in an unlawful activity not naturally tending to cause death or great bodily harm, to which Counsel argued that the stab was unintentional and that Applicant was merely poking out in an effort to fend off the advancing victim. Tr. 387, ll. 10-25. The Court’s reasoning in response was straightforward:

What happened here was a fight Mr. Swilley. This was not some outing or some event not likely to cause injury. A fight between two persons where the defendant was armed with a knife. That is something that would tend to cause death or great bodily harm.

And I simply do not find, there is any evidence for which the Court should under these facts and circumstances charge involuntary manslaughter. So, I respectfully decline to charge involuntary manslaughter.

Tr. 388, l. 24 – 389, l. 7. At the evidentiary hearing, Applicant testified he did not intentionally stab at the victim, but that his doing so was an involuntary reaction where the victim was armed with beer bottles. Counsel could not recall whether or not he requested a charge on involuntary manslaughter, but testified he typically prepares proposed jury instructions and provides them to the judge with case citations.

The Honorable J. Michael Baxley's reasoning is accurate. The evidence presented at trial established Applicant and Victim mutually engaged one another in a fight and that both were armed with deadly weapons—a pin knife and broken beer bottles, respectively. The armed combat in this case constituted unlawful activity that naturally tends to cause death or great bodily harm. Therefore, the facts of the case foreclosed the applicability of involuntary manslaughter. No amount of honest preparation on the part of Counsel can change the facts of the case. Accordingly, Counsel was not ineffective, and Applicant's request for relief based upon this allegation should be denied.

IAC Allegation #4 – Failure to Request Charge on Accident

Applicant alleges Counsel was ineffective for failing to request the jury be charged on the defense of accident. "For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) (citing State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994)). Additionally, as previously stated, "[w]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Caprood, 338 S.C. at 110, 525 S.E.2d at 517 (citation omitted).

At the evidentiary hearing, Counsel noted that the death was the consequence of a fight, that stabbing a knife forward tends to show a total indifference to human life, and that an accident charge was therefore inapplicable. Counsel further testified he pursued a strategy based on self-defense, and he believed the defenses of accident and of self-defense were mutually exclusive.

Applicant's testimony he unintentionally, instinctively poked in the victim's direction, but did not intentionally stab, is facially absurd. Thrusting, pushing, and/or pointing a sharp object in the direction of a person in close proximity carries with it the obvious and probable outcome that the person at whom said object is pointed is going to end up stabbed, as observed by the Supreme Court in Smith:

When Evans grabbed at Smith, Smith pulled the knife, a dangerous instrumentality, and stabbed at Evans. Just as in [State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976)], whether Smith intended to harm Evans is irrelevant. The stabbing is clearly not a lawful act, and the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence.

315 S.C. at 550, 446 S.E.2d at 413. While Counsel's belief that self-defense and accident are mutually exclusive is subject to some caveats, it holds true in the present circumstance: claiming that the knife was thrust accidentally detracts from the argument that Applicant was trying to defend himself. Counsel accurately determined that an accident charge was not applicable in Applicant's case. Accordingly, Counsel was not ineffective, and Applicant's request for relief based on this allegations should be denied.

IAC Allegation #5 – Failure to Re-Charge Murder and Voluntary Manslaughter

Applicant alleges Counsel was ineffective for failing to request the jury be recharged on the law of murder and voluntary manslaughter in response to two notes from the jury requesting the definition of murder and the definition of manslaughter. "In the absence of evidence to the

contrary, the regularity of proceedings of a court of general jurisdiction will be assumed.” Pringle v. State, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986).

Court exhibits 4 and 5 reflect two notes from the jury requesting “The Definition of murder” and “Definition of manslaughter,” respectively. There is no record of either the notes or the Court’s disposition of them in the trial transcript—nothing was recorded during the course of the jury’s deliberations from 3:39 p.m. to 5:00 p.m. Tr. 470, l. 22 – 471, l. 1. Counsel could not remember what, if any response the Court gave, but agreed that the Court would not have simply ignored the notes. No other witness testified to the jury’s notes.

There is no evidence in the record to show that the Court failed to appropriately respond to the jury’s notes. Accordingly, Applicant has failed to meet his burden, and his request for relief based upon this allegation should be denied.

IAC Allegation #6 – Failure to Object to Self-Defense Charge

Applicant alleged Counsel was ineffective for failing to object to the trial court’s instructions on self-defense. Counsel testified at the evidentiary hearing that the charge given was a standard charge, did not shift the burden, and that that it was not objectionable. Applicant conceded this point. Accordingly, Applicant’s request for relief based upon this allegation should be denied.

IAC Allegation #7 – Failure to Prepare Applicant to Testify

Applicant alleges Counsel was ineffective for failing to adequately prepare Applicant to testify and to meet on a sufficient number of occasions prior to trial to prepare Applicant for trial. Where an applicant alleges that counsel failed to adequately prepare for trial, the applicant must show what evidence could have been presented or what other defenses could have been pursued had counsel more adequately prepared. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772

(1998). A trial counsel's willingness to engage in hindsight at the PCR hearing does not amount to evidence of ineffectiveness. See Wright v. Hopper, 169 F.3d 695, 707 (11th Cir. 1999) (the issue of ineffectiveness is for the court to decide, so admissions of deficient performance by attorneys are not decisive – no error in finding trial strategy, even though counsel categorically denied making a strategic choice); Edwards v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (a trial court is not obligated to “accept a self-proclaimed assertion of trial counsel”); Gentry v. Sinclair, 576 F.Supp.2d 1130, 1154 n.38 (W.D. Wash. 2008) (finding “counsel’s current regret about their performance . . . does not support a claim that trial counsel performed deficiently at the time of trial”).

At the evidentiary hearing, Applicant testified he was not groomed properly for a murder trial. Applicant claimed he did not discuss with Counsel prior to trial the question of whether or not to testify, and he made the decision to testify on his own with no advice of counsel at the end of the State’s case-in-chief. Applicant testified he and the victim had known one another for their entire lives and were close friends.¹ Applicant testified the victim was upset because Applicant had sexual relations with the victim’s girlfriend.² Applicant testified the victim was aggressive when they encountered one another the afternoon before the fight.³ Applicant testified he received text messages from the victim late that night asking to meet on Marion Street, and Applicant decided to meet him there because the victim knew the location of his residence and was afraid for his daughter.⁴ Applicant testified when he arrived at Marion Street and engaged with the victim, the victim continuously attempted to get to his jacket, which

¹ Applicant claimed he did not testify to this at trial, but see Tr. 342, ll. 20-23.

² Applicant testified to this at trial. Tr. 343, l. 9 – p. 344, l. 22; p. 357, ll. 13-22.

³ See again, n.2, above.

⁴ Applicant testified to this at trial. Tr. 345, l. 19 – p. 347, l. 11.

Applicant feared had a gun.⁵ Applicant claimed Counsel advised him not to testify that the victim may have had a gun. Applicant testified he did not know other witnesses had claimed that the victim had a gun. Applicant could not recall how he was holding the knife. Applicant claimed to be afraid that the victim had been drinking. Applicant testified that he did not intentionally stab the victim.⁶

Counsel testified he met with Applicant six times at the detention center, in addition to communications by phone, letter, and via Facebook. Counsel testified he prepared Applicant to testify on his behalf at trial, but did not conduct a full mock trial with his client. Applicant indicated before trial that he wanted to testify. Counsel agreed Applicant's testimony was necessary for a viable self-defense strategy. Counsel stated Applicant became very anxious and that his testimony on cross-examination went poorly. Counsel stated he would have advised Applicant differently on how to respond to cross-examination and that he uses a different procedure at this point in time. Counsel stated he did not recall anything to indicate that the victim ever had a gun and that there was nothing to show the victim ever had any weapon other than the beer bottles he retrieved in the middle of the fight. Applicant never told Counsel that he feared the victim had a gun.

The Court should find that Counsel's testimony was credible and that Applicant's testimony was not credible. Applicant's assertions that he did not testify to his friendship with the victim, his fear there was a weapon in the victim's coat, and that he did not intentionally stab the victim are false upon review of the trial transcript. Applicant's testimony was his own, and additional preparation would not have changed the facts of this case, as evidenced by the

⁵ Applicant claimed he did not testify to this at trial. No evidence was introduced at trial to suggest the victim had or even owned a gun—the only reference to a gun was a purported rap lyric sent via text to Marcus Brunson. Applicant *did* testify that he feared for his life. See Tr. 348, ll. 2-22; p. 354, ll. 13-16

⁶ Applicant claimed he did not testify to this at trial, but see Tr. 368, l. 19 – p. 369, l. 6.

overwhelming similarity between his testimony at trial and his testimony at the evidentiary hearing. The only substantive difference is the allegation that the weapon Applicant feared was in the victim's coat was a gun, and there existed no evidence to show that there was any such gun.⁷ The victim's coat was delivered to law enforcement by Marcus Brunson and there is no evidence anything was removed from that coat and thereafter concealed. Tr. 281, ll. 14-24. If there had been a weapon, it would have been discovered and disclosed.

As to Counsel's testimony that he could have done more to prepare Applicant, the present matter is a textbook case of an attorney engaging in hindsight analysis with the benefit of additional years of experience. However true Counsel's testimony may be to that end, it is of no consequence to Strickland analysis.

Altogether, it is evident that Applicant has not met his burden of showing what additional evidence could have been presented at trial given additional time preparing him to testify. Accordingly, Applicant has not met his burden of proof, and his request for relief based upon this allegation should be denied.

IAC Allegation #8 – Counsel's Closing Argument was Ineffective

Applicant alleges that Counsel was ineffective at four different points during his closing arguments: (a) when Counsel referred to Friedrich Nietzsche; (b) when Counsel said Applicant should not have gone to the park where he encountered witness LaVincent Hankins; (c) when Counsel failed to discuss each of the elements of self-defense; and (d) when Counsel compared the death of a friend to that of the victim.

A. Friedrich Nietzsche

⁷ At the evidentiary hearing, Phillip Franklin (who testified at trial) testified that the victim had a gun in his possession the entire time. However, on cross-examination, he admitted he didn't see the weapon in the coat, only an outline of what he speculated was a weapon. Franklin claimed the victim was known to carry a weapon. He again admitted he couldn't see much of the fight. The coat was delivered to law enforcement and no gun recovered. This witness's testimony is very simply not credible and should be given no weight.

During his closing argument at trial, Counsel argued to the jury that “[n]o one is such a liar [as] the indignant man.” Tr. 396, ll. 7-8. Counsel introduced the quote, from Aphorism 26 of Friedrich Nietzsche’s “Beyond Good and Evil,” by comparing it to the Bible’s Proverbs and used it to preface his discussion of State witness testimony, arguing that the State’s witnesses were angry and felt wronged for losing a friend. At the evidentiary hearing, Counsel testified that he could have started the argument differently and that Nietzsche was probably not right for a Darlington jury. Applicant’s PCR counsel suggested that Nietzsche’s connections to the ideology of Nazi Germany would not have been helpful.

The prongs of Strickland cannot be satisfied by the use of a closing argument that is “too smart” or “too simple” for a particular jury or jurors hailing from a particular region.⁸ In any event, the aphorism was appropriate to case: it stands for the proposition that one should better consider the thoughts of those who speak without indignation, as the moralistic, indignant speaker is inherently dishonest in the omission of his own human imperfections. The argument suits Applicant’s defense that the State’s witnesses were angry at Applicant and spoke out against him in a way to draw attention away from their own concealed errors. Counsel sufficiently simplified it so as to be understandable to any lay jury. Accordingly, Applicant cannot meet either prong of Strickland by this allegation, and his request for relief should be denied.

B. Reference to Confrontation with LaVincent Hankins

Before trial, Counsel filed a motion to suppress any reference to a confrontation between Applicant and Hankins that occurred shortly before trial at Pride Park in Hartsville, South

⁸Applicant’s argument necessitates a presumption that the jury is of a very particular level of familiarity with European continental philosophy. A jury with no familiarity would not draw any positive or negative inference from a reference to Nietzsche. A jury with proficient familiarity would know that Nietzsche’s work predates the rise of Nazism and its relationship thereto is primarily the result of misapplication by Nietzsche’s sister.

Carolina, but the Court denied the motion on grounds that there was evidence to show that Applicant was trying to intimidate Hankins from testifying. Tr. 57-98. Both Hankins and Applicant testified at trial to the Pride Park confrontation. Tr. 241, l. 2 – p. 243, l. 8; Tr. 351, l. 10 – p. 354, l. 2; Tr. 370-384. During closing argument, Counsel told the jury that he wished Applicant had not gotten into the scuffle at Pride Park with Hankins, but emphasized to the jury its irrelevance to the charges at issue in the trial. Tr. 405, l. 3 – p. 406, l. 4. At the evidentiary hearing, Counsel reaffirmed that he was trying to say that Applicant shouldn't have gone to the park.

Counsel was not ineffective in his effort to diminish the weight imputed to the fight by the State. That Applicant went to Pride Park and got in a fight with Hankins was an uncontroverted fact, and it was incumbent upon Counsel to diminish the impact of those bad facts as best he could. His professed wish that Applicant had not gone to the park did not diminish Applicant's defense, but was obviously aimed to bolster Counsel's standing with the jury and increase the chances the jury would accept his argument. Counsel was not deficient and the statement did not prejudice Applicant. Accordingly, Applicant's request for relief as to this ground should be denied.

C. Failure to Discuss the Elements of Self-Defense

"[W]hen a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt." State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (citing State v. Wiggins, 330 S.C. 538, 544-45, 500 S.E.2d 489, 492-93 (1988)). A person is justified in using deadly force in self-defense when:

- (1) The defendant was without fault in bringing on the difficulty;
- (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;

- (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ..." and
- (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Id. (citations omitted).

After addressing the merits and weaknesses of each witness presented at trial, Counsel broadly touched on self-defense and then thoroughly discussed the first element that Applicant needed to be "without fault." Tr. 410, l. 20 – p. 412, l. 18. Counsel emphasized that Applicant did not bring about the danger, that he did not go to the victim with ill intent, and that he thought the meeting was to talk out their issues. Id. Counsel did not similarly flesh out the other three elements. Id. The trial judge thoroughly instructed the jury on each element of self-defense. Tr. 458, l. 5 – p. 461, l. 7.

Counsel's reasoning is valid, as there is no dispute that Applicant, who was engaged in mutual combat, was in imminent danger. The key element in dispute was whether or not Applicant was without fault in bringing about the danger by going to Marion Street as demanded, so Counsel was wise to focus his argument on that issue. In any event, the Court thoroughly appraised the jury of the elements of self-defense in its instructions. Accordingly, Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief as to this allegation should be denied.

D. Friend of Counsel Anecdote

In closing, Counsel offered to the jury a personal anecdote of a friend who perished by falling down stairs after a night of hard partying and heavy intoxication. Tr. 414, l. 1 – p. 415, l. 13. Counsel drew a parallel between the mourning of his friend and the witnesses of the case:

Well, what does that have to do with this situation? Well, how it reminds me of this situation is the people that testified on behalf of the state have that same mentality that everybody else that I knew had the mentality about my friend falling down the stairs is that it was such a tragedy that we can't ever put any kind of blame on somebody who has passed away, but it really is undeniable.

Tr. 414, ll. 17-24. Counsel then listed the victim's numerous faults and errors that brought about the fight before connecting again to the point that Counsel's deceased friend willingly intoxicated himself, such that he was responsible for his own demise. At the evidentiary hearing, Counsel admitted that his decision to argue the anecdote was spur-of-the-moment, but maintained his goal was to emphasize to the jury that people who die are not blameless.

Based on the facts presented and theory of defense, Counsel made a valid strategic decision to include this personal anecdote in his closing argument. The point of the story is valid. Counsel articulated a valid strategic reason for telling the anecdote. See Smith, 386 S.C. at 567, 689 S.E.2d at 632. Accordingly, Applicant's request for relief as to this allegation should be denied.

IAC Allegation #9 – Failure to Adequately Cross-Examine Regarding Collusion

Applicant alleges Counsel was ineffective for failing to adequately cross-examine the witnesses who were at the scene regarding their discussions with each other about the case. Four key fact witnesses who were present at the fight testified at trial: Crystal M. Robinson, Marcus Branson, Phillip A. Franklin, and LaVincent Quintell Hankins.⁹

At the evidentiary hearing, Counsel testified that he thoroughly impeached the State's witnesses with their prior inconsistent statements. In particular, Counsel recalled cross examining Marcus Brunson on his prior statement, which he had in his possession on the stand at trial. See Tr. 183. Counsel affirmed his belief that their testimony was very poor, suffered

⁹ The index to the trial transcript refers to a "Lavincent T. Hankins." Testimony at trial repeatedly refers to him as "Quintell" and he affirmed upon inquiry that his middle name is "Quintell."

discrepancies, and that he felt very good about Applicant's chances of acquittal at the end of the State's case-in-chief. Counsel testified that he suspected the State's witnesses colluded to straighten out their testimony, but lacked any proof.

There is no evidence of any effort by the State's witnesses to collude and coordinate their testimony against Applicant. There was not any evidence at the time of trial to prompt questioning on that point, and there is no evidence of such now. The allegations of collusion and that Counsel failed to ferret it out on cross-examination amount to baseless speculation. Accordingly, Applicant has failed to show either prong of Strickland, and his claim for relief based upon this allegation should be denied.

IAC Allegation #10 – Failure to Present Witnesses to Altercation with LaVincent Hankins

Applicant alleges Counsel was ineffective for failing to present readily available witnesses to testify in support of Applicant regarding his post-murder, pre-trial altercation with Hankins. At the evidentiary hearing, Applicant presented the Janetta Evans, who testified to her memory of Applicant's Pride Park encounter with Hankins. According to Evans' testimony, Hankins arrived at the park, saw Applicant speaking with Evans, got out of his car, walked over, pushed Applicant, and the two started fighting. After the fight was resolved, Hankins demanded Evans take him to the police department, which she did. Evans alleged Hankins was abusive in his relationship with her. Evans never spoke with Counsel. On cross-examination, Evans testified that at and around the time of trial, she was so afraid of Hankins that she never would have spoken to Counsel.

Evans' admission that she would never have spoken to Counsel at and around the time of trial is dispositive. Counsel cannot be ineffective for failing to call a witness who would not have spoken to him. To the contrary, had Counsel blindly subpoenaed Evans to testify, it would

have potentially amounted to ineffective assistance of counsel. Furthermore, as Respondent noted in its objection at the evidentiary hearing, Evans was not a witness to any part of the murder at issue, but only to the collateral occurrence at Pride Park shortly before trial. To the extent that her testimony may be construed as evidence that could not have been discovered before trial, Evans' testimony would not have changed the result at trial, is immaterial to the issue of Applicant's guilt, and merely impeaches another witness. Accordingly, Applicant has failed to meet his burden and his request for relief as to this allegation should be denied.

IAC Allegation #11 – Failure to Object to Testimony of Inv. Mike Anderson

Applicant alleges counsel was ineffective for failing to object to three instances of testimony by Investigator Mike Anderson: (a) Inv. Anderson's geographic walkthrough of the scene of the fight; (b) Inv. Anderson's testimony that the statements he received from witnesses matched those provided by Marcus Brunson and Crystal Robinson; and (c) Inv. Anderson's testimony that the discovery of the victim's fingerprints matched the version of events he got from the four witnesses at the scene.

Hearsay is an out of court statement offered to prove the truth of the matter asserted therein. Rule 801(c), SCRE; State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006); State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). “[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.” Brown at 63, 451 S.E.2d at 894 (citing U.S. v. Love, 767 F.2d 1052 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986)). Where hearsay evidence is improperly admitted, its admission may be harmless where the hearsay evidence was impeached by the jury's exposure to the fact the evidence was not based on any first-hand knowledge. Price at 499, 629 S.E.2d 366.

“The assessment of witness credibility is within the exclusive province of the jury.” State v. Barrett, 416 S.C. 124, 131, 785 S.E.2d 387, 390 (Ct.App. 2016) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). “Therefore, witnesses are generally not allowed to testify whether another witness is telling the truth.” Id. (citing Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998)).

A lay witness may testify to opinions or inferences which “(a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.” Rule 701, SCRE.

A. Geographic Walkthrough

At trial, Inv. Anderson testified to where the fight between Applicant and the victim took place based upon information provided to him by Brunson and Robinson. Tr. 126-129. At the evidentiary hearing, Counsel agreed that he could have objected on grounds of hearsay, but rejected Applicant’s assertion that Inv. Anderson was offering an expert opinion. On cross-examination, Counsel testified that the location of the fight between Applicant and the victim was not in dispute and not relevant to his trial strategy.

Inv. Anderson’s testimony was not hearsay, but rather was provided in the course of broader testimony explaining the progression of the investigation and the reasoning to justify its course. The testimony did not constitute improper bolstering as it did not remark on the truthfulness of the statements of Brunson and Robinson, but merely observed their consistency. The testimony was based upon Inv. Anderson’s findings in the course of his investigation, was helpful to the determination of the case, and did not require special knowledge, skill, experience or training. Robinson, Brunson, Franklin, and Hankins all testified at trial and were thoroughly

cross-examined on their recollection of events. Written statements were utilized by Counsel for impeachment purposes. Finally, Counsel articulated a valid reason why he did not object to Inv. Anderson's presentation regarding where the fight took place—it would have been a pointless objection given the location of the fight was not in dispute. Accordingly, Applicant's request for relief as to this ground should be denied.

B. Matching Statements

Inv. Anderson testified at trial that the statements he took from witness interviews the night of the murder substantially matched one another. Tr. 131, ll. 10-24. The parties thereafter entered a conference at the bench. Tr. 132, ll. 2-10. The substance of that discussion was not disclosed. At the evidentiary hearing, Counsel agreed the statement was objectionable and could not recall the substance of the bench conference.

The reasoning set forth in Section 11.A., above, applies here. Inv. Anderson's testimony was not hearsay, but rather was provided in the course of broader testimony explaining the progression of the investigation and the reasoning to justify its course. The testimony did not constitute improper bolstering as it did not remark on the truthfulness of the statements of Brunson and Robinson, but merely observed their consistency. The testimony was based upon Inv. Anderson's findings in the course of his investigation, was helpful to the determination of the case, and did not require special knowledge, skill, experience or training. Robinson, Brunson, Franklin, and Hankins all testified at trial and were thoroughly cross-examined on their recollection of events. Written statements were utilized by Counsel for impeachment purposes. Accordingly, Applicant's request for relief as to this ground should be denied.

C. Fingerprints on the Bottle

At trial, Inv. Anderson also testified that in the course of his investigation, he found the victim's fingerprints on a broken bottle and an intact bottle consistent with the version of events he got from the four witnesses. Tr. 132, l. 12 – p. 133, l. 5. Counsel did not object. At the evidentiary hearing, Counsel agreed that Inv. Anderson made objectionable statements. On cross-examination, Counsel agreed that the victim's use of beer bottles as weapons was never in factual dispute, nor was their number.

Again, the reasoning set forth in Section 11.A., above, applies here. Inv. Anderson's testimony was not hearsay, but rather was provided in the course of broader testimony explaining the progression of the investigation and the reasoning to justify its course. The testimony did not constitute improper bolstering as it did not remark on the truthfulness of the statements of Brunson and Robinson, but merely observed their consistency. The testimony was based upon Inv. Anderson's findings in the course of his investigation, was helpful to the determination of the case, and did not require special knowledge, skill, experience or training. Counsel articulated a valid reason to not object to Inv. Anderson's testimony that the victim's fingerprints were found on the broken bottles. Robinson, Brunson, Franklin, and Hankins all testified at trial and were thoroughly cross-examined on their recollection of events. Written statements were utilized by Counsel for impeachment purposes. If anything, the testimony to cement the fact that the victim was armed with the bottles during the fight inured to Applicant's benefit, given his trial strategy of self-defense. Accordingly, Applicant's request for relief as to this allegation should be denied.

Allegation #12 – After-discovered Evidence to Show Collusion of Witnesses

Finally, Applicant alleges after-discovered evidence exists to show that the primary witnesses against the Applicant collaborated to falsify their statements against the Applicant in order to make the case against the Applicant stronger. An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Applicant did not introduce *any* evidence of collusion at the evidentiary hearing to support his claim of newly discovered evidence. Applicant didn't even make a *prima facie* showing that he is entitled to relief to justify having a hearing on the question in the first place. See Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Accordingly, Applicant has failed to meet any of the factors set forth in Hayden, and his request for relief based upon this allegation should be denied.

III.

Applicant raises 17 grounds for relief—12 allegations, with two containing multiple sub-allegations. A plethora of post-conviction relief and appellate allegations do not accumulate to Applicant's benefit; to the contrary, the multiplicity betrays the inadequacy of any single allegation. See Fifth Third Mortgage Co. v. Chicago Title Ins. Co., 692 F.3d 507, 509 (6th Cir. 2012) ("When a party comes to us with nine grounds for reversing the district court, that usually means there are none."); Pierce v. Visteon Corp., 791 F.3d 782, 788 (7th Cir. 2015) (raising 13

issues on appeal violates principle that counsel must concentrate attention on the best issues). Taken together, it is apparent that the application may be effectively summarized as provided by opposing counsel's opening statement: Applicant feels Counsel could have done better. However, Monday-morning quarterbacking and hindsight analysis do not provide for post-conviction relief. The relevant question is only whether or not Counsel's performance was so deficient as to deprive Applicant of a fair trial, and deprive the judiciary of confidence in the outcome. For all the reasons set forth above, Applicant has failed to meet his burden under Strickland as to any of the allegations, and the application for post-conviction relief should be denied.

Respectfully submitted,

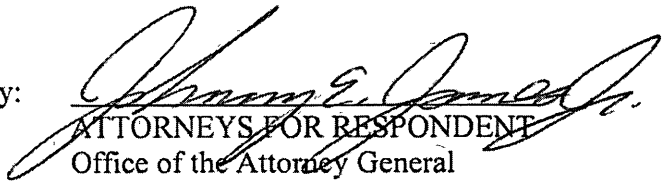
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By:


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E. Aug., 2017

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS

2014-CP-16-0875

BREYON TONEY, #346126,)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,)

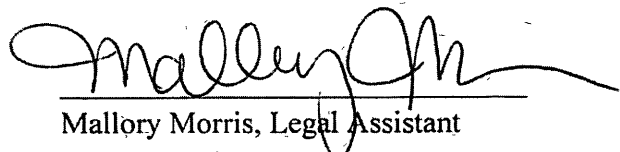
Respondent.)

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

Mr. Jeremy Adam Thompson
 Law Ofc. of Jeremy A. Thompson, LLC
 PO Box 12891
 Columbia, SC 29211

Tricia A. Blanchette, Esquire
 Law Office of Tricia A. Blanchette, LLC
 PO Box 2147
 Leesville, SC 29070

DATED this 8th day of August, 2017.


 Mallory Morris, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF DARLINGTON	)	IN THE COURT OF COMMON PLEAS FOURTH JUDICIAL CIRCUIT
BREYON TONEY, #346126,	)	CASE NO.: 2014-CP-16-875
	)	
Applicant,	)	
v.	)	MEMORANDUM OF LAW IN
	)	SUPPORT OF APPLICATION FOR
STATE OF SOUTH CAROLINA,	)	POST-CONVICTION RELIEF
	)	
Respondent.	)	
	)	

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully filing this Memorandum of Law in support of his Application for Post-Conviction Relief. The Applicant asserts that his Application should be granted for the reasons stated herein.

I. FACTUAL BACKGROUND

The Applicant was charged with murder and possession of a weapon during the commission of a violent crime after he fatally stabbed his friend James Tucker during a fight in the early morning hours on March 24, 2009. The central issues at trial centered on the circumstances leading up to the fight and the participants' actions during the fight.

According to the State's witnesses, the Applicant sent Tucker a text message stating that he wanted to fight Tucker over Tucker purchasing diapers for the Applicant's child's mother. When the Applicant arrived at the scene, the Applicant approached Tucker and began to fight. During the altercation, the Applicant took out a knife. Tucker tried to run away and threw bottles at the Applicant to ward him off; however, Tucker was ultimately stabbed once. See Tr. pp. 146-149 (Crystal Robinson); 177-179 (Marcus Brunson); 205-210 (Phillip Franklin); 239-240 (LaVincent Hankins).

In contrast to the State's witnesses, the Applicant testified that the argument arose over the Applicant's sexual encounter with Tucker's girlfriend India Grimes. Tucker became angry and sent threatening text messages to the Applicant. The Applicant agreed to meet Tucker because Tucker told him he would come to the Applicant's home if the Applicant did not appear. During the altercation, the Applicant took his knife out for self-defense and only struck at Tucker when Tucker rushed him with a broken bottle. He testified that he had never meant to hurt Tucker. See Tr. pp. 343-350.

At trial, the jury was charged on murder, the lesser-included offense of voluntary manslaughter, and self-defense. During deliberations, they requested to be reinstructed on the definitions of murder and manslaughter, though there is no evidence from the record that the trial court gave the instructions again. Ultimately, the jury returned a verdict of guilty of murder.

II. STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the Applicant must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standard for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State,

325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

III. DISCUSSION

Although the Applicant has raised numerous allegations for relief, this Memorandum will focus on two specific allegations: (1) ineffective assistance of counsel for failing to object to the trial court's failure to charge the jury on the general permissive malice inference instruction; and (2) ineffective assistance of counsel for committing numerous errors during his closing argument. Each allegation will be addressed in turn.

A. Permissive Malice Inference Instruction

The trial judge's instruction on murder reads in full:

All right. Let's talk about the charge of murder. The defendant is charged with murder, as you are aware. In order to prove this charge, the state must prove that the defendant killed another person with malice aforethought.

Malice is hatred, or ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act itself.

Malice aforethought may be expressed or it may be inferred. Now, these terms express and inferred do not mean different kinds of malice, but merely the manner in which it may be shown to exist. That is either by direct evidence, or by inference from the facts and circumstances which are shown to have existed and which are proved here by the state. Express malice is shown when a person speaks words which express hatred or ill will for another person, or

when the person prepares beforehand to do some act which was later accomplished; for example, lying in wait for someone, or some other act of preparation going to show that the deed was within the defendant's mind. That would be expressed malice.

Malice may also be inferred from conduct that shows a total disregard for human life. And ladies and gentlemen, that is the charge of murder.

Tr. p. 453, line 15-p. 454, line 22. Defense counsel did not object to this portion of the charge at the conclusion of the trial court's charge to the jury, nor did defense counsel make any additional requests to charge on the law of malice prior to the instruction.

The trial court's charge lacks the general permissive inference instruction that is required when a judge charges the jury on inferred malice: "If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (footnote 9). While Belcher deals specifically with a charge that permits the inference of malice from the use of a deadly weapon, the Supreme Court has stated that all inferences should be accompanied by the general permissive inference instruction. See State v. Mattison, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it"), overruled on other grounds by Belcher.

A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). Here, it is clear that the general permissive inference instruction should have been given because the trial judge instructed the jury that "[m]alice may also be inferred from conduct that

shows a total disregard for human life.” Tr. p. 454, lines 20-21. Defense counsel’s failure to object to the lack of the charge is, therefore, deficient conduct. To his credit, defense counsel testified before this Court that the charge was warranted and that it was a mistake not to object.

Turning to the question of prejudice, this Court “must decide whether the erroneous malice instruction contributed to the jury’s verdict based on all the evidence presented to the jury.” Id. at 265, 786 S.E.2d at 265. “The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge.” Id.

Here, the Applicant was prejudiced by the trial court’s failure to include the general permissive inference charge. As noted by the Supreme Court in Belcher, additional context for an inference charge is required because an inferred malice instruction can lead a jury to disregard defenses raised by a criminal defendant:

Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because if one intentionally kills another with a deadly weapon, the implication of malice may arise. ... That highlights the “half-truth” of the charge.

386 S.C. at 610, 685 S.E.2d at 809 (internal quotation marks omitted). Similarly, the jury was instructed in this case that they could infer malice from conduct showing a total disregard for human life. That charge is just as much as a “half-truth” as the deadly weapon charge because killing another in self-defense is unmistakably an activity that shows total disregard for human life. The jury needs context in which to evaluate an inferred charge and the general permissive inference instruction provides that context. Since the jury did not receive that context due to defense counsel’s deficient performance, it is highly likely that the jury followed the trial judge’s

instructions and found malice simply due to the Applicant's admitted actions, defensible as they might have been.

Moreover, the jury made it known that they had difficulty processing the trial court's instructions as evidenced by their request to be recharged on the law of murder and voluntary manslaughter. If the jury was absolutely convinced that the Applicant had acted with malice, then there would have been no reason for the jury to request to be recharged on the law again. Had they been provided the proper context for the murder charge in the first instance, then there is a reasonable probability that the jury would have found the Applicant either guilty of voluntary manslaughter or not guilty by reason of self-defense. In either circumstance, the result of the trial would have been different.

Finally, there is a significant lack of evidence tending to prove malice in this case. The fight occurred in the dark and there was very little testimony from the State's witnesses as to how the fatal blow was struck. Furthermore, the Applicant testified in his own defense that he only struck at Tucker when Tucker rushed at him with a broken bottle. This case came down to whether or not these actions constituted malice, and the Applicant's testimony provided a complete defense to the charge. Under these circumstances, there is a reasonable probability that the result of the trial would have been different. This Court should grant the Applicant a new trial.

B. Closing Argument

A defense attorney's deficient performance during closing argument can serve as a basis for ineffective assistance of counsel. See Lounds v. State, 380 S.C. 454, 465, 670 S.E.2d 646, 652 (2008) (granting relief because "petitioner's own counsel damaged the defense case because the closing argument did not support petitioner's account of what had happened.")

In this case, defense counsel committed three major errors during his closing argument. First, he tried to argue to the jury that a quotation by Friedrich Nietzsche—“[n]o one is such a liar a[s] the indignant man”—was comparable to the Book of Proverbs and that Nietzsche’s quotation explained the State’s witnesses’ testimony. See Tr. p. 395, line 15-p. 396, line 15. Nietzsche is also famous for his quotation “God is dead ... [a]nd we have killed him,” making a comparison to the Book of Proverbs less than apt. Additionally, defense counsel prefaced his remarks by stating that he had not done much “by way of my career” and had not learned anything in philosophy other than to remember some of Nietzsche’s quotations. Defense counsel testified before this Court that he felt it was a mistake to argue Nietzsche as a persuasive authority to a Darlington County jury.

Second, defense counsel argued that the Applicant was wrong to go to a park while out on bond where he encountered LaVincent Hankins, and that the Applicant bore a portion of the blame for the subsequent fight:

And yeah, you know, he probably shouldn’t have gotten into that petty little scuffle at a park where kids play. It shouldn’t have happened. But it has nothing to do with what happened on Marion Avenue and Chaplin Circle as far as whether or not he is guilty of these crimes or not. It doesn’t have anything to do with that. It makes him look bad. All right. And it does. I wish you didn’t hear about it, and I wish he hadn’t gotten in this altercation with Quintell. And it may not have been all Breyon’s fault, and it may not have been all of Quintell’s fault, but he shouldn’t have been there. We all know that. All right?

Tr. p. 405, lines 9-20. Contrary to his attorney’s argument, the Applicant testified that he was talking with Hankins’ girlfriend at the park when Hankins approached him in a threatening manner and they got into a fight. Tr. pp. 352-353. He did not go to the park looking for trouble as there was no indication that Hankins would be at the park before he arrived, nor was there any reason for his attorney to be arguing that “he shouldn’t have been there.” Defense counsel testified before this Court that it was a “poor choice of words” to make this argument.

Third, defense counsel failed to argue all of the elements of self-defense and how the Applicant's testimony met those elements to the jury. Instead of reviewing the elements, defense counsel focused on only one: whether or not the Applicant was without fault in bringing on the difficulty. See Tr. pp. 410-412. There were three other elements, therefore, that went completely unexamined by defense counsel during his closing argument. Given that self-defense was the only realistic path to a not guilty verdict for the Applicant, it was imperative for defense counsel to focus on the elements and how the Applicant's testimony satisfied those elements. As with the prior errors, defense counsel testified before this Court that it was a mistake to focus on only one of the elements of self-defense.

Taken together, defense counsel began his argument with a tone-deaf quotation from Friedrich Nietzsche, proceeded to place blame on his client for being in a location he had every right to be, and failed to argue how the Applicant's primary defense was shown through his testimony. In each instance, defense counsel admitted his error to this Court. This closing argument was clearly deficient, especially given that the argument contravened the Applicant's own account of his encounter with Hankins.

Turning to the question of prejudice, the Applicant asserts that there is a reasonable probability that the result of his trial would have been different had defense counsel made a stronger closing argument. The evidence of guilt was not overwhelming and the Applicant's testimony provided a complete defense to the crimes charged. Furthermore, the jury evidently had doubts about the Applicant's guilt since they requested to be reinstructed on the definitions of murder and voluntary manslaughter. Consequently, there is a reasonable likelihood that the jury would have carried that doubt to a verdict of either voluntary manslaughter or not guilty had defense counsel not admitted fault on the part of the Applicant and actually argued that self-defense

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was met by the Applicant's testimony. The Applicant respectfully asserts that he has met his burden of proof with regard to this issue and that this Court should grant him a new trial.

**IV.
CONCLUSION**

For the reasons outlined above, the Applicant respectfully requests that this Court grant his Application for Post-Conviction Relief. The Applicant contends that the appropriate remedy for these claims of ineffective assistance of counsel is a new trial.

Respectfully submitted,

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This ____ day of August, 2017.

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF DARLINGTON	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
BREYON TONEY, #346126,	)	
	)	CASE NO.: 2014-CP-16-875
Applicant,	)	
v.	)	ORDER GRANTING APPLICATION
	)	FOR POST-CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed October 23, 2014. An evidentiary hearing into this matter was convened on July 18, 2017. The Applicant was present and was represented by Jeremy A. Thompson, Esquire, and by Tricia A. Blanchette, Esquire. The Respondent was represented by Johnny E. James, Jr., Assistant Attorney General.

I. PROCEDURAL HISTORY

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Darlington County Clerk of Court's orders of commitment. At the January 2010 term of General Sessions, the Darlington County Grand Jury indicted the Applicant for murder (2010-GS-16-00077) and possession of a weapon during the commission of a violent crime (2016-GS-16-00078). On May 16-18, 2011, the Applicant proceeded to trial by jury. Matthews Swilley, Richard Jones, and Tiffany Gibson, all then with the Darlington County Public Defender's Office, represented the Applicant at trial. At the conclusion of the trial, the jury convicted the Applicant as charged. The Honorable J. Michael Baxley, presiding circuit judge, sentenced the Applicant to thirty years' imprisonment for murder and five years' imprisonment for the firearms offense, with the sentences to run concurrently.

TRUE CERTIFIED COPY

Scott B. Suggs

CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

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The Applicant pursued a direct appeal to the South Carolina Court of Appeals, and was represented in this proceeding by Katharine H. Hudgins, Appellate Defender. On January 8, 2014, the South Carolina Court of Appeals affirmed the Applicant's conviction and sentence in an unpublished opinion. State v. Toney, Op. No. 2014-UP-005 (S.C. Ct. App. filed January 8, 2014). The Applicant did not pursue an appeal to the Supreme Court.

II. ALLEGATIONS RAISED

In his Application for Post-Conviction Relief, the Applicant alleged that he is being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; and
2. Ineffective assistance of appellate counsel.

He alleged generally that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated prior to, during, and after his trial, as well as during his direct appeal.

In an Amended Application for Post-Conviction Relief filed July 7, 2017, the Applicant submitted the following specific allegations of trial counsel:

1. Trial counsel was ineffective for failing to object to the trial court's failure to charge the jury on the general permissive malice inference instruction.
2. Trial counsel was ineffective for failing to require the State to deliver a closing argument on the law prior to his closing argument. See Tr. p. 393, lines 6-17.
3. Trial counsel was ineffective for failing to adequately research and prepare a request to charge on the lesser-included offense of involuntary manslaughter. See Tr. p. 386, line 19-p. 389, line 14.

4. Trial counsel was ineffective for failing to request that the jury be charged on the defense of accident.
5. Trial counsel was ineffective for failing to request that the jury be recharged on the law of murder and voluntary manslaughter in response to two notes from the jury requesting the definition of murder and the definition of manslaughter. See Courts Exhibits #4 and 5.
6. Trial counsel was ineffective for failing to object to the trial court's instructions on self-defense which repeatedly placed the burden of proof on establishing the defense on the Applicant. See Tr. p. 457, line 17-p. 461, line 18.
7. Trial counsel was ineffective for failing to prepare the Applicant to testify and to meet on a sufficient number of occasions prior to trial with the Applicant to prepare the Applicant for trial generally.
8. Trial counsel was ineffective during his closing argument in:
 - a. Stating that he did poorly in philosophy and then comparing Proverbs to Friedrich Nietzsche at the outset of his argument, see Tr. p. 395, line 15-p. 396, line 15;
 - b. Arguing that the Applicant should not have gone to the park where he encountered LaVincent Hankins, see Tr. pp. 404-406;
 - c. Failing to discuss the elements of self-defense and how they were met by the Applicant's testimony, see Tr. pp. 410-412;
 - d. Arguing that a friend who died as a result of a fall was comparable to the victim, see Tr. pp. 414-415.
9. Trial counsel was ineffective for failing to adequately cross-examine the witnesses who were at the scene regarding their discussions with each other about the case.

10. Trial counsel was ineffective for failing to present readily available witnesses who could have testified in support of the Applicant regarding his altercation with LaVincent Hankins.
11. Trial counsel was ineffective in failing to object to improper hearsay, vouching, and opinion testimony given by Investigator Mike Anderson in the following respects:
 - a. Testimony walking through the incident with the jury based entirely on accounts given to him by witnesses at the scene; see Tr. pp. 126-129;
 - b. Testimony that other witnesses that he interviewed substantially matched the accounts given by Marcus Brunson and Crystal Robinson, see Tr. p. 131, lines 10-24;
 - c. Testimony that the victim's fingerprints were on the bottle matched the version of events that he got from four witnesses at the scene, see Tr. p. 132, line 12-p. 133, line 5.
12. After-discovered evidence exists to show that the primary witnesses against the Applicant collaborated to falsify their statements against the Applicant in order to make the case against the Applicant stronger.

At the evidentiary hearing in this matter, the Applicant proceeded on these allegations, and waived any claims of ineffective assistance of appellate counsel. Accordingly, this Court has only considered the allegations raised in the Amended Application.

III. EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearing held in this case on July 18, 2017, the Applicant presented testimony from defense counsel Matthew Swilley, Esquire, Johnetta Wheeler Evans, Phillip Franklin, and his own testimony. In addition to this testimony, this Court has before it a transcript of the trial, a copy of the briefs filed on the direct appeal, a copy of the Court of Appeals'

opinion affirming the Applicant's convictions and sentences on the direct appeal, a copy of the records of the Darlington County Clerk of Court regarding the subject conviction, a copy of the Applicant's records with the South Carolina Department of Corrections, and the exhibits introduced by the parties during the evidentiary hearing. What follows below are findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.*

IV. RELEVANT FACTS

The Applicant was charged with murder following the death of James Tucker during the early morning hours of March 24, 2009. According to the State's witnesses, the Applicant wanted to fight Tucker because Tucker purchased diapers for the Applicant's child's mother. See Tr. p. 146, lines 7-24 (Crystal Robinson); p. 177, line 22-p. 178, line 1 (Marcus Brunson). The Applicant and the victim met near the corner of Marion Avenue and Chaplin Circle. They then began to fight, and the victim audibly stated that the Applicant had a knife. See Tr. p. 147, lines 14-21 (Robinson); p. 178, lines 2-7 (Brunson); p. 207, lines 2-12 (Phillip Franklin); p. 239, lines 11-18 (LaVincent Hankins). The victim ran away from the Applicant, who gave chase despite the victim throwing bottles at the Applicant. During the subsequent encounter, the victim was apparently stabbed. See Tr. p. 148, line 17-p. 149, line 25 (Robinson); p. 179, lines 4-20 (Brunson); p. 207, line 13-p. 209, line 25 (Franklin); p. 240, lines 1-10 (Hankins).

The Applicant testified in his own defense and gave a significantly different version of the facts. According to the Applicant, the victim was angry and threatened the Applicant throughout the day because he had learned that the Applicant had a sexual encounter with the victim's girlfriend. Tr. pp. 343-347. The Applicant agreed to meet the victim and the victim wanted to fight the Applicant. During the altercation, the victim picked up a broken bottle and came after the

Applicant. When the victim grabbed his shirt while holding the broken bottle, the Applicant stabbed the victim once. Tr. pp. 347-350.

At trial, the jury was charged on murder, voluntary manslaughter, and self-defense. The jury returned a guilty verdict for murder. Additional facts that were presented both at trial and at the evidentiary hearing held in the case before this Court are discussed in more detail below when pertinent.

V. STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the Applicant must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standard for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

**VI.
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A. Allegations Which Are Meritorious

Although the Applicant has raised numerous allegations for relief, this Court concludes that two specific allegations are meritorious: (1) ineffective assistance of counsel for failing to object to the trial court's failure to charge the jury on the general permissive malice inference instruction; and (2) ineffective assistance of counsel for committing numerous errors during his closing argument. This Court also finds that relief should be denied as to the remaining claims presented by the Applicant. This Court will begin with an analysis of the claims warranting relief before turning to the remaining claims which this Court has concluded should be denied.

1. Permissive Malice Inference Instruction (Allegation #1)

The trial judge's instruction on murder reads in full:

All right. Let's talk about the charge of murder. The defendant is charged with murder, as you are aware. In order to prove this charge, the state must prove that the defendant killed another person with malice aforethought.

Malice is hatred, or ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act itself.

Malice aforethought may be expressed or it may be inferred. Now, these terms express and inferred do not mean different kinds of malice, but merely the manner in which it may be shown to exist. That is either by direct evidence, or by inference from the facts and circumstances which are shown to have existed and which are proved here by the state. Express malice is shown when a person speaks words which express hatred or ill will for another person, or

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when the person prepares beforehand to do some act which was later accomplished; for example, lying in wait for someone, or some other act of preparation going to show that the deed was within the defendant's mind. That would be expressed malice.

Malice may also be inferred from conduct that shows a total disregard for human life. And ladies and gentlemen, that is the charge of murder.

Tr. p. 453, line 15-p. 454, line 22. Defense counsel did not object to this portion of the charge at the conclusion of the trial court's charge to the jury, nor did defense counsel make any additional requests to charge on the law of malice prior to the instruction.

The trial court's charge lacks the general permissive inference instruction that is required when a judge charges the jury on inferred malice: "If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (footnote 9). While Belcher deals specifically with a charge that permits the inference of malice from the use of a deadly weapon, the Supreme Court has stated that all inferences should be accompanied by the general permissive inference instruction. See State v. Mattison, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it"), overruled on other grounds by Belcher.

A trial attorney's failure to object to the lack of a general permissive inference instruction when it is warranted constitutes deficient conduct. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). This Court concludes that it is clear that the general permissive inference instruction should have been given because the trial judge instructed the jury that "[m]alice may also be inferred from

conduct that shows a total disregard for human life." Tr. p. 454, lines 20-21. Defense counsel's failure to object to the lack of the charge is, therefore, deficient conduct. To his credit, defense counsel testified before this Court that the charge was warranted and that it was a mistake not to object.

Turning to the question of prejudice, this Court "must decide whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury." Id. at 265, 786 S.E.2d at 265. "The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge." Id.

This Court finds that the Applicant was prejudiced by the trial court's failure to include the general permissive inference charge. As noted by the Supreme Court in Belcher, additional context for an inference charge is required because an inferred malice instruction can lead a jury to disregard defenses raised by a criminal defendant:

Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because if one intentionally kills another with a deadly weapon, the implication of malice may arise. ... That highlights the "half-truth" of the charge.

386 S.C. at 610, 685 S.E.2d at 809 (internal quotation marks omitted). Similarly, the jury was instructed in this case that they could infer malice from conduct showing a total disregard for human life. That charge is just as much as a "half-truth" as the deadly weapon charge because killing another in self-defense is unmistakably an activity that shows total disregard for human life. The jury needs context in which to evaluate an inferred charge and the general permissive inference instruction provides that context. Since the jury did not receive that context due to

defense counsel's deficient performance, it is highly likely that the jury followed the trial judge's instructions and found malice simply due to the Applicant's admitted actions, defensible as they might have been.

Moreover, the jury made it known that they had difficulty processing the trial court's instructions as evidenced by their request to be recharged on the law of murder and voluntary manslaughter. If the jury was absolutely convinced that the Applicant had acted with malice, then there would have been no reason for the jury to request to be recharged on the law again. Had they been provided the proper context for the murder charge in the first instance, then there is a reasonable probability that the jury would have found the Applicant either guilty of voluntary manslaughter or not guilty by reason of self-defense. In either circumstance, the result of the trial would have been different.

Finally, there is a significant lack of evidence tending to prove malice in this case. The fight occurred in the dark and there was very little testimony from the State's witnesses as to how the fatal blow was struck. Furthermore, the Applicant testified in his own defense that he only struck at Tucker when Tucker rushed at him with a broken bottle. This case came down to whether or not these actions constituted malice, and the Applicant's testimony provided a complete defense to the charge. Under these circumstances, there is a reasonable probability that the result of the trial would have been different. Accordingly, this Court concludes that the Applicant has proven both prongs of Strickland with regard to this claim. Therefore, a new trial is warranted.

2. Closing Argument (Allegation #8)

A defense attorney's deficient performance during closing argument can serve as a basis for ineffective assistance of counsel. See Lounds v. State, 380 S.C. 454, 465, 670 S.E.2d 646, 652

(2008) (granting relief because “petitioner’s own counsel damaged the defense case because the closing argument did not support petitioner’s account of what had happened.”)

In this case, defense counsel committed three major errors during his closing argument. First, he tried to argue to the jury that a quotation by Friedrich Nietzsche—“[n]o one is such a liar a[s] the indignant man”—was comparable to the Book of Proverbs and that Nietzsche’s quotation explained the State’s witnesses’ testimony. See Tr. p. 395, line 15-p. 396, line 15. Nietzsche is also famous for his quotation “God is dead ... [a]nd we have killed him,” making a comparison to the Book of Proverbs less than apt. Additionally, defense counsel prefaced his remarks by stating that he had not done much “by way of my career” and had not learned anything in philosophy other than to remember some of Nietzsche’s quotations. Defense counsel testified before this Court that he felt it was a mistake to argue Nietzsche as a persuasive authority to a Darlington County jury.

Second, defense counsel argued that the Applicant was wrong to go to a park while out on bond where he encountered LaVincent Hankins, and that the Applicant bore a portion of the blame for the subsequent fight:

And yeah, you know, he probably shouldn’t have gotten into that petty little scuffle at a park where kids play. It shouldn’t have happened. But it has nothing to do with what happened on Marion Avenue and Chaplin Circle as far as whether or not he is guilty of these crimes or not. It doesn’t have anything to do with that. It makes him look bad. All right. And it does. I wish you didn’t hear about it, and I wish he hadn’t gotten in this altercation with Quintell. And it may not have been all Breyon’s fault, and it may not have been all of Quintell’s fault, but he shouldn’t have been there. We all know that. All right?

Tr. p. 405, lines 9-20. Contrary to his attorney’s argument, the Applicant testified that he was talking with Hankins’ girlfriend at the park when Hankins approached him in a threatening manner and they got into a fight. Tr. pp. 352-353. He did not go to the park looking for trouble as there was no indication that Hankins would be at the park before he arrived, nor was there any reason

for his attorney to be arguing that "he shouldn't have been there." Defense counsel testified before this Court that it was a "poor choice of words" to make this argument.

Third, defense counsel failed to argue all of the elements of self-defense and how the Applicant's testimony met those elements to the jury. Instead of reviewing the elements, defense counsel focused on only one: whether or not the Applicant was without fault in bringing on the difficulty. See Tr. pp. 410-412. There were three other elements, therefore, that went completely unexamined by defense counsel during his closing argument. Given that self-defense was the only realistic path to a not guilty verdict for the Applicant, it was imperative for defense counsel to focus on the elements and how the Applicant's testimony satisfied those elements. As with the prior errors, defense counsel testified before this Court that it was a mistake to focus on only one of the elements of self-defense.

Taken together, defense counsel began his argument with a tone-deaf quotation from Friedrich Nietzsche, proceeded to place blame on his client for being in a location he had every right to be, and failed to argue how the Applicant's primary defense was shown through his testimony. In each instance, defense counsel admitted his error to this Court. This closing argument was clearly deficient, especially given that the argument contravened the Applicant's own account of his encounter with Hankins.

Turning to the question of prejudice, this Court concludes that there is a reasonable probability that the result of his trial would have been different had defense counsel made a stronger closing argument. The evidence of guilt was not overwhelming and the Applicant's testimony provided a complete defense to the crimes charged. Furthermore, the jury evidently had doubts about the Applicant's guilt since they requested to be reinstructed on the definitions of murder and voluntary manslaughter. Consequently, there is a reasonable likelihood that the jury

would have carried that doubt to a verdict of either voluntary manslaughter or not guilty had defense counsel not admitted fault on the part of the Applicant and actually argued that self-defense was met by the Applicant's testimony. As with the prior claim, this Court finds that the Applicant has proven both prongs of Strickland with regard to this claim. A new trial, therefore, is warranted on this claim as well.

B. Claims Which Are Not Meritorious

Although this Court's disposition of the previous issue is dispositive of the Applicant's PCR application, this Court "must make specific findings of fact and state expressly the conclusions of law relating to each issue presented" pursuant to S.C. Code Ann. § 17-27-80. Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266 (2007). Consequently, this Court will address the Applicant's remaining contentions in turn.

1. Defense Counsel's Failure to Require the State to Deliver a Closing Argument on the Law (Allegation #2)

At trial, the prosecutor stated that he did not intend to deliver a closing argument on the law prior to defense counsel's closing argument. Tr. p. 393, lines 8-11. In response, defense counsel stated that he had no objection to the prosecution waiving its opening argument. Tr. p. 393, lines 15-17.

The Applicant alleges that defense counsel was ineffective for failing to require the State to open fully on the law prior to beginning his closing argument. This Court disagrees. Defense counsel testified before this Court that he made a strategic decision not to require the opening argument by the prosecution, particularly since he did not want the State to be able to argue his client's guilt twice. This Court finds this explanation reasonable and finds that defense counsel's performance was not deficient with regard to this claim. Accordingly, this allegation is denied and dismissed.

2. Defense Counsel's Failure to Sufficiently Request a Charge on Involuntary Manslaughter or Accident (Allegations #3 & 4)

During the colloquy on the jury charge at trial, the trial judge requested an explanation from defense counsel as to how involuntary manslaughter was applicable in this case. Tr. p. 386, line 19-p. 387, line 15. Defense counsel argued that the lesser-included charge should be given because the Applicant's stabbing motion towards the victim may not be "an unlawful activity ... depending on the facts." Tr. p. 387, lines 22-23. The trial judge then denied the request. See Tr. p. 388, line 22-p. 389, line 7. Defense counsel did not request that the jury be charged on the defense of accident.

The Applicant argues that defense counsel was ineffective for failing to present a more prepared and researched argument in support of his request to charge involuntary manslaughter. This Court disagrees. This Court does not find, under the facts of this case, that involuntary manslaughter was applicable. "[I]nvoluntary manslaughter is the unintentional killing of another without malice and while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others." State v. Light, 378 S.C. 641, 647, 664 S.E.2d 465, 468 (2008). Here, the killing was not unintentional because the Applicant intentionally struck at the victim. See Tr. p. 350, lines 1-3("And when he grabbed on my shirt that is when I backed up and moved the knife towards him.") Consequently, the Applicant cannot demonstrate that a stronger argument would have resulted in the trial court charging the jury on the lesser-included offense of involuntary manslaughter. This allegation is denied and dismissed.

Similarly, the Applicant argues that defense counsel was ineffective for failing to request a charge on the defense of accident. "For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was

exercised in the handling of the weapon.” State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999). This Court finds that this defense was inapplicable because the Applicant intentionally struck at the victim. Accordingly, this allegation is denied and dismissed.

3. Defense Counsel Was Ineffective for Failing to Request that the Jury Be Recharged on the Law of Murder and Voluntary Manslaughter (Allegation #5)

During deliberations, the jury sent two notes, which were recounted verbatim in the list of court exhibits. Court Exhibit #4 stated simply: “The definition of murder.” Tr. p. 7. Court Exhibit #5 stated: “Definition of Manslaughter.” Tr. p. 7. There is no indication from the record that the jury was recharged on either principle of law after they began deliberations.

The Applicant alleges that defense counsel was ineffective for failing to require that the jury be recharged on the law of murder and voluntary manslaughter once the jury sent these notes back during deliberations. This Court disagrees. Specifically, this Court finds that the Applicant cannot prove that there is a reasonable probability that he would have either been acquitted or convicted of voluntary manslaughter had the jury been recharged on the law. Notably, had the trial court recharged the jury on murder and voluntary manslaughter, the same errors present in the trial court’s charge on murder would have been given again, which would have made it only more likely that the jury would have convicted the Applicant of murder. Accordingly, this Court concludes that the Applicant has failed to meet Strickland’s second prong with regard to this claim. This allegation is denied and dismissed.

4. Defense Counsel Was Ineffective for Failing to Object to Burden-Shifting Self-Defense Instructions (Allegation #6)

The trial court charged the jury on self-defense at trial. See Tr. p. 457, line 17-p. 461, line 18. Specifically, the trial court charged the jury that “[t]he state has the burden of disproving self-defense beyond a reasonable doubt.” Tr. p. 457, lines 21-22.

The Applicant alleges that the charges were burden-shifting as they shifted the burden of proof from the State to disprove self-defense beyond a reasonable doubt to the defense to prove the existence of self-defense. This Court disagrees. This Court does not find the charge to be burden-shifting and notes that the trial court specifically reminded the jury that the burden remained on the State to disprove self-defense beyond a reasonable doubt. Accordingly, this allegation is denied and dismissed.

5. Defense Counsel Was Ineffective for Failing to Prepare the Applicant to Testify (Allegation #7)

At trial, Applicant took the stand and testified regarding details of the night in question. Trial Transcript pp. 342-384. During the evidentiary hearing, Applicant also took the stand in support of his allegation that counsel failed to sufficiently meet with him and prepare with him for trial.

While on the stand at the evidentiary hearing, the Applicant recalled meeting with counsel one time at the jail and only speaking over the phone while out on bond. He stated that he did not trust counsel because he did not meet with him or put effort into building an attorney client relationship with him. He further stated that he did not know the "plan" for the defense or the trial strategy. He did not recall counsel engaging in any trial testimony preparations with him prior to or during trial. He concluded that he did not feel prepared or read to testify.

He also testified regarding facts that he felt counsel failed to elicit from him at trial that would have supported his defense. Specifically, he addressed his long-standing friendship with the victim, the underlying dispute with victim over a female, his interaction with the victim and female over the phone, his knowledge that the victim carried a gun, his belief that victim carried a gun in his jacket and was reaching for it during their altercation, that he did not intentionally stab the

victim, that the victim was being aggressive, that he was in fear of his life and that the stabbing was accidental.

Defense counsel also testified before this Court. He testified that he had been practicing law since 2009, with two stints at the Fourth Circuit Public Defender's Office. He explained that he was appointed to represent the Applicant following representation by another public defender. He did not have his file, but he thought he represented the Applicant for about ten months prior to trial. He recalled meeting with the Applicant five to six times at the jail, and not times while he was out on bond. He stated that the Applicant's case was his first murder trial.

He made it clear that self-defense was the primary defense. He recalled discussing self-defense with the Applicant and informing the Applicant that he would need to testify to establish self-defense. He explained that now he prepares defendants to take the stand with a mock trial, and he would prepare the Applicant in that way if he had the case again.

With regard to this allegation, the Applicant must show what evidence could have been presented or what other defenses could have been pursued had counsel more adequately prepared. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998). This Court has carefully reviewed the Applicant's trial testimony and considered the testimony offered at the evidentiary hearing. This Court is not convinced that counsel was deficient in his preparation with the Applicant prior to trial. This Court is also not convinced that the Applicant has shown that prejudice resulting from counsel's alleged deficient performance. Therefore, this claim must fail on both prongs of the Strickland analysis. This allegation is denied and dismissed.

6. Defense Counsel Was Ineffective for Failing to Adequately Cross-Examine the State's Witnesses (Allegation #9)

At trial, one of defense counsel's principal strategies was to show that the State's witnesses coordinated with one another to synchronize their version of events. The Applicant alleges that defense counsel's performance with regard to this strategy was ineffective. This Court disagrees.

At the evidentiary hearing before this Court, defense counsel testified that he discussed with the Applicant the "poor" quality of the State's witnesses. He further recalled that his trial strategy was to highlight their poor quality by impeaching them with their original statements and by emphasizing their inconsistencies. Defense counsel indicated that he was as prepared as he could be to execute that strategy.

This Court finds that the Applicant has failed to carry his burden and establish that defense counsel was deficient in his preparation and cross-examination of the State's witnesses at trial. As the transcript and counsel's testimony establish, defense counsel thoroughly cross-examined the witnesses in execution of his valid trial strategy. Consequently, this claim must fail on the first prong of the Strickland analysis. This allegation is denied and dismissed.

7. Defense Counsel Was Ineffective for Failing to Present Witnesses to Testify in Support of the Applicant's Testimony Regarding His Altercation with LaVincent Hankins (Allegation #10)

At trial, LaVincent Hankins testified about being present during the incident between the Applicant and the victim. Tr. pp. 238-9. He also testified, over counsel's motion to suppress and contemporaneous objection, to a subsequent encounter with the Applicant while with Hankins' girlfriend in a local park. Hankins detailed how the Applicant physically attacked and verbally threatened him. Tr. pp. 240-43.

During the evidentiary hearing before this Court, Johnetta Wheeler Evans testified that she was dating LaVincent Hankins in March 2009, but she was not present on Marion Avenue on

March 24, 2009, for the incident between the Applicant and the victim. She testified that she questioned whether Hankins was present on Marion Avenue as he testified to at trial.

She further testified she was present for the incident in the park that Hankins testified about at trial. She recalled that she was speaking with the Applicant in the park while her children were playing, and Hankins was in the car. She testified that Hankins, not the Applicant, initiated the contact and Hankins was upset because they were speaking. She made it clear that Hankins was the aggressor and initiated the fight with Applicant. She remembered Hankins making her leave her kids behind at the park to take him to the police station to report the incident.

She did not recall being contacted by anyone prior to trial regarding the incident in the park or Hankins. She explained that she was in an abusive relationship with Hankins, so she would not have been willing to testify against him at Applicant's trial. When asked, defense counsel stated that he did not look into finding any witnesses from the park incident, and he would have "wanted" Evans' testimony at trial.

After reviewing the trial transcript and considering the evidentiary hearing testimony this Court is concerned that counsel may have been deficient for failing to investigate possible witnesses from the park incident and utilize Evans as a witness. Yet, this Court is troubled with finding any resulting prejudice when Evans testified that she would not have cooperated or testified at trial. Therefore, this claim must fail under the second prong of the Strickland analysis. This allegation is denied and dismissed.

8. Defense Counsel Was Ineffective for Failing to Object to Improper Testimony Given by Investigator Mike Anderson (Allegation #11)

At trial, Investigator Mike Anderson testified that he walked through the incident scene with Marcus Brunson and Crystal Robinson. Tr. p. 127, line 17-p. 128, line 6. He then testified about the details of the altercation based on the information he received from Brunson and

Robinson. Tr. pp. 128-129. He further testified that information he received from other witnesses matched the accounts given by Brunson and Robinson. Tr. p. 131, lines 10-24. Finally, he testified that the fact that the victim's fingerprints were found on the bottle matched the accounts he was given by the witnesses at the scene. Tr. p. 132, line 12-p. 133, line 5. Defense counsel testified before this Court that he found portions of Investigator Anderson's testimony.

The Applicant alleges that defense counsel should have objected to this line of testimony on the grounds of hearsay, vouching, and improper testimony in the form of an expert opinion as an unqualified crime scene analyst. While this Court concludes that the testimony was objectionable, this Court finds that the Applicant was not prejudiced by defense counsel's failure to object to the testimony. Investigator Anderson's walkthrough testimony was largely cumulative to Brunson and Robinson's testimony. Furthermore, Investigator Anderson's testimony that the accounts given by Brunson and Robinson matched other accounts given to him by unidentified witnesses is vague and not unduly prejudicial to the Applicant. Finally, Investigator Anderson's testimony that the victim's fingerprints were found on the bottle was cumulative to both the State's witnesses' and the Applicant's testimony at trial. Accordingly, this Court finds that the Applicant has failed to meet his burden of proof with regard to Strickland's second prong as to this claim. This allegation is denied and dismissed.

9. After-Discovered Evidence Exists to Show that the Primary Witnesses Against the Applicant Collaborated to Falsify Their Statements (Allegation #12)

This Court denies relief with regard to this claim as this Court does not find that any evidence was presented to support it. No witness provided after-discovered evidence about collaboration between the State's witnesses, particularly given the nature of the questioning of the State's witnesses at trial on the matter. Accordingly, this allegation is denied and dismissed.

**VII.
CONCLUSION**

This Application for Post-Conviction Relief is hereby **GRANTED**. This Court finds that the appropriate remedy is a new trial. The Applicant's convictions and sentences are hereby vacated and this matter is remanded to the Darlington County Court of General Sessions for a new trial.

IT IS SO ORDERED.



Roger E. Henderson
Presiding Circuit Court Judge
Fourth Judicial Circuit

This 19 day of October, 2017
Chesterfield, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

BREYON TONEY, #346126,
☒ Applicant,

v.

THE STATE OF SOUTH CAROLINA
☐ Respondent.

734
IN THE COURT OF COMMON PLEAS

CASE NO. 2014-CP-16-875

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

COPY

Applicant's Attorney:

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phone: 803-734-3737 fax: 734-4113

e-mail: other:

☐ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☒ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Applicant / ☐ Respondent

October 31, 2017

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

TRUE CERTIFIED COPY

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

CLERK OF COURT/RMC

DARLINGTON COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON	)	
 Breyon Toney,	)	Case No.: 2014-CP-16-00875
S.C.D.C. No. 346126,	)	
	)	
Applicant,	)	
	)	MOTION TO RECONSIDER
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

In response to the Order Granting Application for Post-Conviction Relief dated October 19, 2017, and filed November 3, 2017, Respondent would respectfully motion this court reconsider its ruling pursuant to Rule 59(e), SCRPC.

I.

In the above described Order, the Court granted Applicant post-conviction relief on two general grounds: “(1) ineffective assistance of counsel for failing to object to the trial court’s failure to charge the jury on the general permissive malice inference instruction; and (2) ineffective assistance of counsel for committing numerous errors during his closing argument.” The Court should reconsider its ruling because Counsel’s failure object to the trial court’s exclusion of an Elmore¹ permissive inference charge could not have prejudiced Applicant because there was evidence at trial of *expressed* malice, and because Counsel’s closing argument was not constitutionally deficient.

¹ State v. Elmore, 379 S.C. 417, 308 S.E.2d 781 (1983).

II.

This Court's order grants relief upon a finding that Counsel was deficient for failing to object to the trial court's failure to charge the jury with a general permissive malice inference instruction. In State v. Elmore, the Supreme Court of South Carolina, upon review of a trial judge's instruction on the presumption of malice from the use of a deadly weapon, suggested the following charge:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts[] are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Elmore, 379 S.C. at 421, 308 S.E.2d at 784. The Court then cautioned "that hereafter only slight deviations from this charge will be tolerated." Id.

The Supreme Court reviewed the Elmore charge again a quarter-century later in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). There the Court functionally divided the charge into two parts: (1) the inference of malice from the use of a deadly weapon (the first sentence), and (2) the general permissive inference instruction (the second, longer sentence). Id., 385 S.C. at 612 n. 9, 685 S.E.2d at 810 n. 9. That division made, the Court circumscribed the applicability of the first sentence "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon[.]" but emphasized that the second sentence remained generally applicable. Id.

The Court again returned to Elmore in Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), which provides the clearest guidance to the present matter. In Gibson, the Supreme Court reversed a denial of relief where trial counsel failed to object to the trial court's total omission of the second sentence of Elmore. Gibson, 416 S.C. at 264-65, 786 S.E.2d at 123-24.

In weighing the prejudice prong, the Supreme Court explained that “this Court must decide whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury. The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge.” Id. 416 S.C. at 265, 786 S.E.2d at 124 (citations omitted). The Court thereafter overturned the PCR judge’s finding that there was evidence of malice other than the use of a deadly weapon because “there was little evidence of malice aside from the use of a gun[.]” Id. The implicit inversion of the Court’s logic is that where there is evidence of malice aside from that which was subject to deficient treatment by counsel, there is no prejudice to a PCR applicant, and relief should be denied.

Here, unlike in Gibson, the record reflects numerous witness reports of express malice and, as such, the Court should properly find that there is no prejudice from Counsel’s deficiency because there was no need for the jury to infer malice at all. Crystal Robinson, in a written statement to law enforcement made a few hours after the murder, stated that Applicant “kept repeating over and over that he gonna kill this nigger” as he approached. Tr. 112-13, 156-57. Robinson additionally testified that the victim, James Tucker, reported to her that he received a text message from Applicant indicating that Applicant wished to fight him. Tr. 144-46. LaVincent Q. Hankins also testified Applicant, as he approached the victim, declared “let’s get it on mother fucker” and that the victim was going to die. Tr. 247-48. Though he could not remember the precise statements Applicant made, Phillip Anton Franklin corroborated Robinson’s written statement by testifying that Applicant “was talking loud, and probably out of anger” as he approached the scene. Tr. 205-06. Franklin additionally testified that Applicant, upon being told that Tucker was in critical condition, responded “I don’t give a ‘F’”. Tr. 222-23.

There can be no more explicit a statement of malice than the permutations of "I am going to kill you" above described and attributed to Applicant as he approached the victim. Though there are numerous valid bases from which a jury could have inferred malice, there was no need for them to do so as multiple witnesses testified to express malice and, therefore, Applicant could not have been prejudiced by the absence of the general permissive inference language. That the jury requested to be charged again on murder and voluntary manslaughter does not invariably support the inference drawn by the Court that the jurors were struggling with whether malice existed—the reason or reasons why the jury sought additional instruction is left entirely to speculation with the record before the Court. There could have been a dispute among the jurors as to the precise definition of the terms, or perhaps there could have been sympathy for the Applicant such that there was a desire to further inspect the possibility of the lesser-included charge. To the contrary of the language of the order, the fact that the jury convicted Applicant of murder despite extra consideration of the lesser-included charge *and* self-defense arguably suggests they could find no way around Applicant's express declarations of malice. Accordingly, the Court should reconsider and vacate its order granting relief with respect to the failure to object to the lack of a general permissive inference charge.

III.

The Court additionally granted relief due to three alleged deficiencies in Counsel's closing argument: (1) his reference to Friedrich Nietzsche; (2) his partial concession of Applicant's confrontation with a witness in a public park shortly before trial; and (3) his failure to present an argument as to each and every element of self-defense.

A.

As to the first alleged deficiency regarding Nietzsche, the sum of the Court's ruling is premised on an assumption that the jury vehemently disliked the German philosopher by way of only knowing and misinterpreting his declaration that "God is dead." No evidence exists in the record to support any assertion that the jury, or that the broader jury pool, knows of Nietzsche, disfavors him, and would turn against Applicant because Counsel used him as an example. The total of Applicant's argument as to this point, and thereafter reflected in the Court's order, is simultaneously unrealistic and condescending to the jurors Darlington County.

Furthermore, the finding of constitutional deficiency based upon Counsel's failure to pander to the perceived ideological tilt of a rural South Carolina jury does not render any justice onto Applicant, but only serves to establish through the judiciary a policy that, in order to avoid a finding of deficient performance, attorneys in this state must recognize and structure their arguments to reflect and respect certain prejudices. This Court can no sooner find Counsel deficient for referencing Nietzsche than it could for referencing locally unpopular politicians (e.g. former President Barack Obama or Senator Lindsey Graham), locally unpopular religious figures (e.g. the Muslim prophet Muhammed), or other notable persons of a potentially divisive character (e.g. former South Carolina football coach Steve Spurrier or current Clemson football coach Dabo Sweeney). The alternative amounts to a state-sponsored endorsement of an ill-defined set of majority beliefs, which is not appropriate and would be highly restrictive of the nature of arguments available to attorneys throughout this state. The wisdom of cultural sensitivity in closing argument cannot be permitted to transform into cultural mandate by way of post-conviction grants based upon mere disagreement as to what constitutes the most effective rhetorical technique in a given community.

As for Counsel's humbling preface, a finding of any deficiency as to Counsel's remark runs contrary to best practices as to attorney conduct in a closing argument: "Let the jury know that you are human." The Honorable Joseph F. Anderson, Jr., *The Lost Art: An Advocate's Guide to Effective Closing Argument* 28 (3d ed. 2008); see also *Id.* at 20 ("It is generally safe to poke fun at yourself."). That Counsel took a complex idea, humanized its challenging character, and then correctly applied it to the facts of the case is not deficiency, but the mark of skilled and ambitious advocacy.

Finally, that Counsel now, after a conviction, believes he could have crafted a better closing argument is of little to no probative value. See Strickland v. Washington, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Counsel testified at the evidentiary hearing that, at the time, he was permitted only the lunch break to modify and craft his closing argument to reflect the evidence as it was introduced at trial. Given the time constraints that Counsel faced, and which all attorneys face in the heat of trial, that a more perfect closing argument could have been crafted is inevitable, but that universal character of trial advocacy does not give rise to a finding of deficient representation. Accordingly, the Court should reconsider and vacate its order granting relief.

B.

As to the second alleged deficiency, Counsel intelligently and candidly addressed damning testimony of witness intimidation by focusing the attention of the jury away from Applicant's fight in a public park and back towards the confrontation between Applicant and the victim. Applicant argues, and the Court's order reflects, that Counsel should not have conceded

any part of responsibility for the confrontation at Pride Park, but rather should have firmly stood by Applicant's testimony as to what occurred. That argument and conclusion runs contrary to the totality of the circumstances that existed at the time of closing argument: Counsel testified at the evidentiary hearing that Applicant's testimony went very poorly, as Applicant appeared very anxious under the pressure of cross-examination by the State. In light of Applicant's poor testimony on the stand, for Counsel to concede nothing and proceed undaunted in his closing argument with Applicant's recollection of events at Pride Park would have been a weak, tone-deaf approach and would have only undercut Applicant.² See The Lost Art at 22 ("It is also very important that you not overstate the strength of your case."); Thomas A. Mauet, Trial Techniques 397-98 (8th ed 2010) ("Closing argument is the time to solve problems, not ignore them. This is time to deal openly with the jury's concerns about the case, and discuss them candidly."). Accordingly, the Court should reconsider and vacate its order granting relief.

C.

As to the third alleged deficiency, Counsel's failure to specifically argue each and every element of self-defense did not prejudice Applicant where (1) the Court properly charged the jury on each of the elements, and (2) no evidence exists in the record to show a meaningful argument as to each of the elements. The Court clearly and completely advised the jury as to each and every element of self-defense in its instructions, thereby curing any error. Furthermore, Applicant has failed to show what it was that Counsel was supposed to argue as to each of the elements, but only vaguely indicates that some argument should have been made. Given the ample evidence to show that Applicant willingly went to the confrontation, willingly persisted

² Counsel could have conceivably taken a stronger position with respect to the Pride Park fight had there been additional testimony to corroborate Applicant's story, but the only other witness who could have done so, Johnetta Wheeler Evans, testified at the evidentiary hearing that she would not have cooperated with the defense or testified at trial.

and chased the victim throughout the confrontation, and ignored all opportunity to retreat from the fight, despite the victim's own attempts to retreat, the record shows that no reasonable argument as to the other elements of self-defense existed. Therefore, Applicant has not and cannot meet his burden of proof to support a grant of relief, and the Court should reconsider and vacate its order granting relief.

IV.

To the extent the Court's Order denies relief, Respondent takes no exception.

V.

WHEREFORE, Respondent respectfully requests that this Court vacate its order granting Applicant relief and deny relief for the reasons herein stated, in addition to those arguments already advanced in Respondent's Memo in Opposition.

Respectfully submitted,

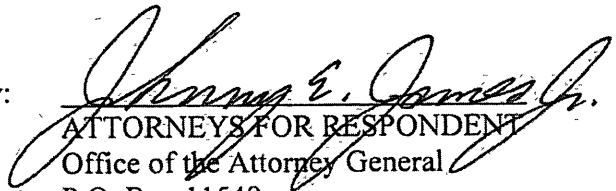
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
Assistant Attorney General

By:


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

8 Nov., 2017

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS

2014-CP-16-0875

BREYON TONEY, #346126,)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,)

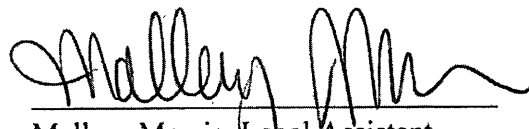
Respondent.)

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

Jeremy A. Thompson, Esquire
PO Box 1834
Irmo, SC 29063

Tricia A. Blanchette, Esquire
PO Box 2147
Leesville, SC 29070

DATED this 8th day of November, 2017.


Mallory Morris, Legal Assistant
For Respondent.

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

BREYON TONEY, #346126,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

CASE NO.: 2014-CP-16-875

ORDER

THIS MATTER comes before the Court by way of a Motion to Reconsider filed pursuant to Rule 59(e), SCRCF, by the Respondent. This motion is in response to this Court's Order Granting Application for Post-Conviction Relief, which was filed on November 3, 2017.

After careful consideration of the matters addressed in the Respondent's Rule 59(e), SCRCF, motion, this Court finds that the allegations are adequately responded to in this Court's Order filed November 3, 2017, and that the allegations are without merit. Specifically, this Court would note that the arguments presented in the Respondent's Rule 59(e) motion were largely presented in its Memorandum Opposing Post-Conviction Relief filed following the evidentiary hearing in this case. This Court already rejected those arguments by granting the Applicant's Post-Conviction Relief Application in its Order. Consequently, this Court is unpersuaded by the Respondent's motion to alter or amend the Order Granting Application for Post-Conviction Relief. Accordingly, the Respondent's Motion to Reconsider is hereby **DENIED** and **DISMISSED**.

IT IS SO ORDERED.

 Roger E. Henderson
 Presiding Circuit Judge
 Fourth Judicial Circuit

This 10 day of January, 2018.
Chesterfield, South Carolina.

FILED
 2018 JAN 29 AM 11:25
 SCOTT B. SUGGS
 CLERK OF COURT/R.O.D.
 DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA

745
COUNTY OF DARLINGTON

BREYON TONEY, #346126,

☒ Applicant,

v.

THE STATE OF SOUTH CAROLINA

☐ Respondent.

IN THE COURT OF COMMON PLEAS ✓

CASE NO. 2014-CP-16-875

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Applicant's Attorney:

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e-mail: jeremyatlaw@yahoo.com other:

Respondent's Attorney:

Johnny E. James, Jr., Asst. Attorney General Bar No.

Address: Office of the Attorney General

P.O. Box 11549 Columbia, South Carolina

phone: 803-734-3737 fax: 734-4113

e-mail: other:

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Applicant / ☐ Respondent

January 29, 2016
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____