

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Certiorari to Marion County

' 14 2213

Michael G. Nettles, Circuit Court Judge. SUPREME COURT

SHAWN REAVES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000630

APPENDIX

SUSAN B. HACKETT
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

SAMUEL KEY
Assistant Attorney General
Rembert Dennis Bldg, Room 519
1000 Assembly Street
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED AUGUST 24, 2010 (MISTRIAL)	1
TRIAL TRANSCRIPT DATED NOVEMBER 8, 2010	494
FINAL BRIEF OF APPELLANT	1280
FINAL BRIEF OF RESPONDENT	1300
<u>STATE V. REAVES</u> , 2014-UP-057 (S.C. Ct. App. filed Feb. 12, 2014)	1338
PETITION FOR REHEARING.....	1341
RETURN TO PETITION FOR REHEARING	1356
ORDER DENYING PETITION FOR REHEARING	1367
PETITION FOR WRIT OF CERTIORARI	1368
RETURN TO PETITION FOR WRIT OF CERTIORARI	1388
ORDER GRANTING CERTIORARI	1418
BRIEF OF PETITIONER	1420
BRIEF OF RESPONDENT	1441
<u>STATE V. REAVES</u> , Op. No. 27569 (S.C. Sup. Ct. filed Sep. 2, 2015).....	1476
REMITTITUR	1489
PETITION FOR WRIT OF CERTIORARI	1490
ORDER DENYING PETITION FOR WRIT OF CERTIORARI.....	1517
APPLICATION FOR POST-CONVICTION RELIEF	1518
RETURN.....	1527
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED NOV. 15, 2017	1535
ORDER OF DISMISSAL.....	1604

INDICTMENT AND SENTENCE SHEET 1630

20. He also talked to several ladies that night as well but he did not remember their names. R. 161, ll. 23 – 25. Lt. Davis admitted that he asked McGill to write a statement, and he gave him paper to write it on. He thought McGill gave it to one of the other officers as he did not receive the statement. He did not remember if he asked Lane to write a statement. R. 167, ll. 1 – 25; R. 169, ll. 1 – 23.

Lt. Davis also testified that there was a crime scene log that everyone who entered the scene should have signed. However, that procedure was not followed. He was at the crime scene, and he did not sign his name but claimed someone signed his name. R. 169, ll. 1 – 25; R. 170, ll. 1 – 25; R. 171, ll. 1 – 25; R. 172, ll. 1 – 25.

Kenneth Kensy was employed with SLED in May 2007 as a crime scene examiner, and worked the scene in Reaves' case. R. 185, ll. 9 – 25; R. 186, ll. 1 – 25. He said it would be prudent to test the clothing of the people in close proximity to the gun shot for gun shot residue although the hands were a better indicator. R. 223, ll. 1 – 25; R. 224, ll. 1 – 25; R. 225, ll. 1 – 25.

Lieutenant Farmer Blue with the Marion Police Department testified that the clothing of the victim of a homicide could reveal valuable evidence. He knew that Officer Jackson had collected the victim's clothing from the Marion County Medical Center and turned this over to Captain Gray who was heading the investigation that night. Lt. Blue took charge the next day. R. 432, ll. 21 – 25; R. 433, ll. 1 – 21; R. 489, ll. 15 – 25. Lt. Blue said the clothes were not in the evidence box; he had never seen the clothes, and the clothes were never sent to SLED for analysis as far as he knew. R. 489, ll. 15 – 25; R. 490, ll. 1 – 25; R. 491, ll. 1 – 5.

Lt. Blue admitted that when he became the lead investigator two days after the incident, he realized he would have done some things differently. He said better evidence could have been collected, and more evidence should have been collected. R. 433, ll. 1 – 25; R. 434, ll. 1. On cross

examination, he admitted that the case was still open because they were still looking for the second shooter. R. 442, ll. 1 – 5.

Lt. Blue admitted that he did not sign the log in sheet at the crime scene. R. 448, ll. 1 – 24. This was the first murder crime scene he had ever investigated. R. 466, ll. 14 – 25; R. 467, ll. 1 – 3. There were pieces of evidence that SLED collected that the Marion Police Department requested be returned without being tested. R. 470, ll. 14 – 25; R. 471, ll. 1 – 3. This included a white hat found at the scene. R. 471, ll. 4 – 25; R. 472, ll. 1 – 25. A blue and black hat was found at the scene that was returned without being tested. R. 474, ll. 1 – 25; R. 475, ll. 1 – 25. A VISA card was taken from the scene and returned to Bellamy without being checked for prints. R. 476, ll. 1 – 25. A Motorola cell phone and a second cell phone were taken from the scene and not tested. R. 479, ll. 20 – 25; R. 482, ll. 1 – 25.

Lt. Blue admitted that three gold chains taken from the crime scene as shown in photographs were not in the evidence box, and he did not know what happened to them. R. 486, ll. 21 – 25; R. 487, ll. 1 – 25; R. 488 ll. 1 – 25. He said that, as an investigator, evidence could be helpful in identifying everyone at the crime scene because the authorities still did not know the identity of everyone there. He had not identified the second shooter. R. 489, ll. 1 – 14. Everyone at the crime scene was a potential suspect. R. 519, ll. 18 – 20.

McGill and Lane were shown photo lineups and did not select Reaves as the shooter but, in fact, selected someone else. R. 502, ll. 1 – 18; R. 508, ll. 1 – 25; R. 509, ll. 1 – 25.

Lt. Blue admitted that he heard McGill testify that he, Lane and Graves had written statements and given them to the police the night of the incident at the scene. However, he did not possess those statements; he did not know what happened to them. R. 502, ll. 19 – 25; R. 503, ll. 1 – 25; R. 504. ll. 1 – 3.

In a pretrial motion and at the close of the state's case, defense counsel moved for the indictments against Reaves to be dismissed due to a lack of due process based on the misconduct of the state in not producing evidence that was obtained during the investigation and then not provided to the defense because it was lost. Counsel argued that it was a violation of Rule 5, SCRCrimP and Brady v. Maryland, 373 U.S. 83 (1963). R. 123, ll. 2 – R. 128, ll. 25; R. 596, ll. 1 – 25; R. 597, ll. 1 – 25.

Counsel argued that because the victim's clothing was lost as well as the other evidence, he did not have the benefit of determining if that information would be helpful to his defense of the case. Counsel argued that the purpose of due process was for the defendant to be able to defend himself in the best way possible, and he had a right to weigh all of the evidence. R. 125, ll. 1 – 25; R. 126, ll. 1 – 5.

Counsel argued that he was not able to effectively cross examine the witnesses since their statements were not provided. He did not have the advantage of determining if there were contradictory testimony. Under the Sixth Amendment, Reaves had a right to cross-examine the witnesses. Due to the gross negligence of law enforcement, counsel argued Reaves' Sixth Amendment right was violated. R. 597, ll. 1 – 25; R. 598, ll. 1 – 25.

Counsel told the court that he never received the photographs taken of Joemilla Wilson on the night of the incident. R. 599, ll. 1 – 25.

Counsel argued that Reaves was prejudiced by the severe mishandling of his case. R. 600, ll. 1 – 2.

The judge commented during the trial: "But, obviously, we've got a messed up trial based on that bad investigation." R. 263, ll. 14 – 24. However, he denied defense counsel's motion to dismiss the case because he ruled that the lack of evidence went to the credibility of the state's case

but was not enough for a dismissal. He agreed with the state that Reaves was entitled to the charge of spoliation of evidence. R. 600, ll. 1 – 25; R. 601, ll. 1 – 4. The judge did charge the jury on the spoliation of evidence. R. 676, ll. 10 – 16.

This incident occurred May 13, 2007. Shawn Reaves was arrested a few days later in Philadelphia on a warrant for murder. R. 183, ll. 5 – 25. The first trial was not held until August 2010. R.1. As a pretrial motion, defense counsel moved for the indictment against Reaves to be dismissed based on a violation of Reaves' Sixth Amendment right to a speedy trial which resulted in a lack of due process in Reaves' case. Counsel said the first trial in August 2010, resulted in a mistrial. R. 107, ll. 15 – 25; R. 108, ll. 1.

Counsel argued that he understood that the length of the delay of the trial was not *per se* a violation but should be considered in conjunction with the reason for the delay. The delay of three years and six months which, he correctly argued, was a lengthy time. R. 109, ll. 1 – 25; R. 110, ll. 1 – 7.

Counsel cited the four factors to consider in determining whether a defendant's right to a speedy trial has been violated as identified by this Court in Barker v. Wingo, 407 U.S. 514, 521 (1972): (1) the length of the delay; (2) the reason for the delay, (3) the defendant's assertion of his right, (4) prejudice to the defendant. R. 108, ll. 1 – 24.

One eyewitness, Joemilla Wilson, had identified Reaves as the shooter on May 25, 2007. R. 110, ll. 8 – 25; R. 111, ll. 1 – 25. Counsel argued that this was not a complicated case, and there was no reason for the delay. Therefore, he argued, the first two factors violated due process. R. 111, ll. 117 – 25; R. 112, ll. 1 – 8.

The third factor, the defendant's assertion of the right, was made at the first trial in August 2010. Then the state went ahead with the trial at that time. R. 112, ll. 9 – 25. That trial ended in a

mistrial when new evidence was untimely produced to the defense during the trial. R. 112, ll. 23 – 25; R. 113, ll. 1 – 12.

Counsel argued regarding the fourth factor, that Reaves was prejudiced by the delay. He explained that when the new discovery was revealed during the first trial, Reaves' defense evolved and changed. However, the fact that evidence was lost which was crucial to the development of the defense occurred during this time period. He argued that the victim's clothing was critical because it may have provided evidence for a self defense theory of defense. R. 114, ll. 1 – 25; R. 115, ll. 1 – 25; R. 116, ll. 1 – 25; R. 117, ll. 1 – 25.

Counsel argued that one reason for a speedy trial was to insure that evidence was preserved to enable the accused person to be able to evaluate the evidence in order to present a defense. It was also essential to have the evidence fresh in the minds of witnesses. Counsel argued that Reaves' rights were violated as he was being forced to go forward without the advantage of having that evidence through no fault of his own. R. 118, ll. 1 – 22.

The solicitor responded that the evidence issue had nothing to do with the speedy trial motion. He argued that part of the delay was that Reaves had two lawyers during the process, and that the assertion of the speedy trial right was first made at the start of the first trial. R. 119, ll. 14 – 25; R. 120, ll. 1 – 15.

The solicitor admitted that there were "very many" problems with the evidence in this case. No one knew, including him and the Marion Police Department, where some of the evidence that existed earlier was as it could not be found. He said all they could do was to go forward with the evidence they had. R. 120, ll. 16 – 25.

The judge denied the speedy trial motion finding the delay was reasonable, and there was no prejudice to Reaves. R. 121, ll. 4 – 25; R. 122, ll. 1 – 3.

At the close of the state's case, counsel again renewed his motion for a dismissal based on the speedy trial motion. Counsel argued there was even more prejudice since he learned that eyewitness statements were lost. R. 601, ll. 5 – 25; R. 602, ll. 1 – 25; R. 603, ll. 1 – 25. The judge denied the motion. R. 604, ll. 1 – 7.

REASONS FOR GRANTING THE WRIT:

Question One: This Court is requested to grant the writ because there is conflict among the states on the application of the standard set in Arizona v. Youngblood, 488 U.S. 51 (1988), for the resolution when evidence is destroyed or lost by law enforcement. In Arizona v. Youngblood, Id., this Court held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence did not constitute a denial of due process of law. Youngblood was accused of sexually assaulting and sodomizing a ten year old boy. The police collected a rectal swab for semen, and also the child's clothing. However, the police failed to refrigerate the clothing and failed to perform tests on the semen samples. None of their information was concealed from the respondent at trial.

There was disagreement among the justices at the time the Youngblood opinion was issued. In his dissent in Arizona v. Youngblood, id., Justice Blackmun wrote that a defendant was entitled to a fair trial, and not a "good faith" try at a fair trial. Justice Stevens, who concurred in the result, still wrote that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." This is the situation of Shawn Reaves' case.

In Illinois v. Fisher, 540 U.S. 544 (2004), this Court wrote that pursuant to Brady v. Maryland, 373 U.S. 83 (1963), when the state suppresses or fails to disclose exculpatory evidence, the good or bad faith of the prosecution is irrelevant; a due process violation occurs whenever such evidence is withheld.

This Court then wrote however, in Youngblood, the Due Process Clause required a different result when the state failed to preserve evidentiary material which might have exonerated the

defendant if it could have been tested. If the missing evidence is potentially exonerating, then bad faith on the part of the police was required.

These two cases present a confusing result for attorneys, defendants, police and prosecutors. These are contradictory interpretations of the Due Process Clause. A defendant's right to a fair trial is violated if the evidence had potential exculpatory value for the defendant. The good or bad faith of the police is still irrelevant. This was indicated by the fact that Youngblood was eventually exonerated by DNA evidence. See *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 Wash. U.L. Rev 241, 276 (2008).

As the South Carolina Supreme Court noted in their opinion, in this case, and as noted by this Court in Illinois v. Fisher, *supra*, several state courts have declined to follow the bad faith standard set in Youngblood based on state law grounds. See State v. Ferguson, 2 S.W.3d 912, 917 (Tenn 1999) (Because we deem the preservation of the defendant's fundamental right to a fair trial to be a paramount consideration here, we join those jurisdictions which have rejected the Youngblood analysis in its pure form); State v. Osakalumi, 461 S.E.2d 504, 512 (W. Va. 1995) (As a matter of state constitutional law, we find that fundamental fairness requires this Court to evaluate the State's failure to preserve potentially exculpatory evidence in the context of the entire record.); Commonwealth v. Henderson, 582 N.E.2d 496, 497 (Mass. 1991) (The rule under the due process provisions of the Massachusetts Constitution is stricter than that stated in the Youngblood opinion.)

The Connecticut Supreme Court explained: "Fairness dictates that when a person's liberty is at stake, the sole fact of whether the police or another state official acted in good or bad faith in failing to preserve evidence cannot be determinative of whether the criminal defendant received due process of law." Illinois v. Fisher, *supra*, citing State v. Morales, 232 Conn.707, 723, 657 A.2d 585,

593 (1995).

One federal district court has rejected an unduly narrow reading of Youngblood. United States v. Elliott, 83 F. Supp.2d 637, 647-48 (E.D. Va. 1999), held that where the “law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the Trombetta/Youngblood test.”

The Due Process clause of the Fifth and Fourteenth Amendments mandate a defendant’s fundamental right to a fair trial.

In Brady v. Maryland, *supra*, the United States Supreme Court declared the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. It is anomalous to have a Draconian “bad faith” standard apply to destruction of evidence, but not to withholding of evidence in violation of Brady.

The Sixth Amendment provides an accused with the right to be confronted with witnesses against him. The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.

The Fourteenth Amendment secures all persons against any state action which results in either deprivation of life, liberty, or property without due process of law. U.S.Const. amend. XIV. The right to confront and cross-examine witnesses and to call witnesses in one’s own behalf are essential to due process. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

The police handling of the investigation here was so severely botched to the point of

constituting misconduct and bad faith, especially in light of the fact that the second shooter was not identified; GSR tests were not performed on everyone at the incident site; the victim's clothing was lost; DNA tests were not performed on many items of evidence. The police conduct in Reaves' case was a violation of his due process right to a fair trial. An affirmance of Reaves' conviction is only encouraging negligent and reckless investigations.

The evidence was never presented to Reaves. The clothing of the deceased was not provided; the witnesses' statements taken the night of the incident were not provided as well as other evidence. The police deliberately not allowing SLED to perform an analysis on some evidence when the police asked for it to be returned before testing was an act of bad faith.

One point that makes Reaves case so egregious and indicative of bad faith on the part of the police was that the police had a person suspected of being the second shooter, Jeremy Vereen, and never interviewed him about this case although he was incarcerated in the county detention center for a period of time. Lt Blue talked with Vereen about other cases but not this one. R.498, ll. 1-25.

Another point that raises reasonable doubt about Reaves' case is the inconsistency between expert testimony that the fatal shot was to Applewhite's upper back and witness testimony that Applewhite was in front of Reaves during the shooting. This was never explained.

In United States v. Agurs, 427 U.S. 97 (1976), this Court held that if omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. Prejudice is difficult to demonstrate when the evidence is not available.

Question Two: This Court is requested to grant this writ because it has national significance for the treatment of adolescents in the criminal justice system. Shawn Reaves was incarcerated in the local detention center in Marion County, South Carolina at the age of sixteen. He remained there for three

years before his case was called to trial.

This Court has addressed other issues related to the treatment of adolescents in the criminal justice system. In Roper v. Simmons, 543 U.S. 551 (2005), this Court held that execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments. In Graham v. Florida, 560 U.S. 48 (2010), this Court ruled that the Eighth Amendment prohibits the imposition of life without parole sentence on juvenile offender who did not commit homicide. In Miller v. Alabama, 132 S.Ct.2455 (2012), this Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments.

Therefore, Reaves is requesting this Court to address the issue of the length of pretrial detention for an adolescent under the age of 18 regardless of the crime. Although Reaves was charged as an adult, he was still a 16 year old being held without the benefit of education or family life.

"Speedy trial" is part of due process of law to which every person accused of a crime is entitled under the Federal Constitution. U.S. Const. amends. VI, XIV. Four factors to consider in determining whether a defendant's right to a speedy trial has been violated were identified by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 521 (1972); see also Doggett v. United States, 505 U.S. 647 (1992): (1) the length of the delay; (2) the reason for the delay, (3) the defendant's assertion of his right, (4) prejudice to the defendant. R. 108, ll. 1 – 24.

The length of the delay of the trial should be considered in conjunction with the reason for the delay. The incident was May 13, 2007; Reaves was arrested May 29, 2007; and the first trial was held August 24, 2010. This created a delay of three years and six months which was a lengthy time. R. 109, ll. 1 – 25; R. 110, ll. 1 – 7.

Counsel argued that this was not a complicated case, and there was no reason for the delay. Therefore, he argued, the first two factors violated due process. R. 111, ll. 117 – 25; R. 112, ll. 1 – 8.

The third factor, the defendant's assertion of the right, was made at the first trial in August 2010. Then the state went ahead with the trial at that time only after Reaves had asserted his speedy trial right. R. 112, ll. 9 – 25. That trial ended in a mistrial when new evidence was untimely produced to the defense during the trial. R. 112, ll. 23 – 117 – 25; R. 112, ll. 1 – 8.

The fourth factor was that Reaves was prejudiced by the delay. Counsel explained that when the new discovery was revealed during the first trial, Reaves' defense evolved and changed. However, the fact that evidence was lost which was crucial to the development of the defense occurred during this time period. Petitioner argued that the victim's clothing was critical because it may have provided evidence for a self defense theory of defense. R. 114, ll. 1 – 25; R. 115, ll. 1 – 25; R. 116, ll. 1 – 25; R. 117, ll. 1 – 25.

The trial judge erred by not granting Reaves' speedy trial motion to dismiss the indictment as there was a lack of due process based on evidence lost during this delay. The factors weigh in Reaves' favor as the length of delay was three and one-half years; the state did not have a good reason for the delay and tried the case the first time only after Reaves filed his motion; Reaves asserted his right to a speedy trial; and the delay was prejudicial when evidence was lost during this delay.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court grant the writ of certiorari.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lanelle Canthey Durant", is written over a horizontal line.

LANELLE CANTEY DURANT

Counsel of Record

South Carolina Commission on Indigent Defense

Division of Appellate Defense

Post Office Box 11589

Columbia, South Carolina 29211-1589

(803) 734-1330

November 18, 2015

ATTORNEY FOR PETITIONER

No. _____

In the Supreme Court of the United States

SHAWN REAVES, Petitioner,

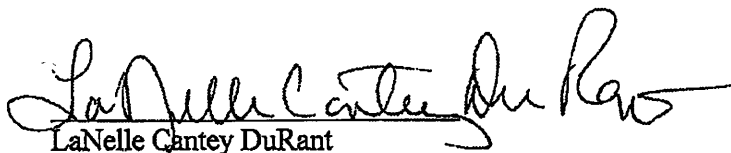
v.

STATE OF SOUTH CAROLINA, Respondent.

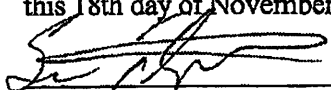
**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on November 18, 2015, I filed the petition for writ of certiorari and appendix in the above-referenced case, together with a motion for leave to proceed in forma pauperis, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.


LaNelle Cantey DuRant
Counsel of Record

SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

No. _____

In the Supreme Court of the United States

SHAWN REAVES, Petitioner,

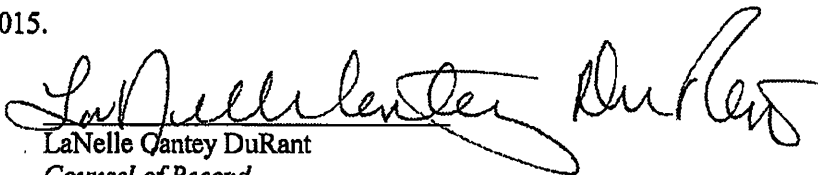
v.

STATE OF SOUTH CAROLINA, Respondent.

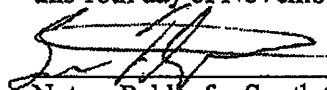
**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel, Mark R. Farthing, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 18th day of November, 2015.


LaNelle Qantey DuRant
Counsel of Record

SWORN TO BEFORE me
this 18th day of November, 2015.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

No. _____

In the Supreme Court of the United States

SHAWN REAVES, Petitioner,

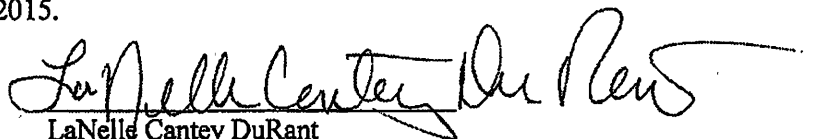
v.

STATE OF SOUTH CAROLINA, Respondent.

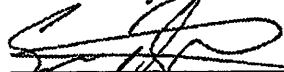
**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

CERTIFICATE OF SERVICE

I certify that copies of the motion for leave to proceed in forma pauperis have been served upon opposing counsel, Mark R. Farthing, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 18th day of November, 2015.


LaNelle Cantey DuRant
Counsel of Record

SWORN TO BEFORE me
this 18th day of November, 2015.



Notary Public for South Carolina
My Commission Expires: October 30, 2022. (L.S.)

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 11, 2016

Ms. LaNelle Cantey DuRant
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

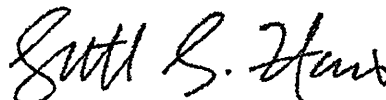
Re: Shawn Reaves
v. South Carolina
No. 15-7068

Dear Ms. DuRant:

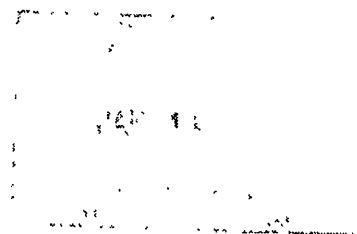
The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



Scott S. Harris, Clerk



FORM 5

FILED

2016-CP-3371

STATE OF SOUTH CAROLINA

COUNTY OF Marion

2016 FEB 18 THE COURT OF COMMON PLEAS

SHawn BEAVES # 343643
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Bishopville SC. 29010, Lee C.I.
2. Name and location of Court which imposed sentence Marion General Session Court
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-GS-33-00325
 - (b) 2010-GS-33-0375
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 24, 2010 mistrial
 - (b) November 8, 2010 sentenced to 25 yrs

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty yes
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes, to U.S. Supreme Court
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. Denial affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. January 11, 2016
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- 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: 6th amendment violation; Right to a speedy trial
14th amendment violation; Right to Due Process

#10, Explanation in Detail

a well drafted application should set forth all errors and omissions of counsel. in other words, what did trial counsel do wrong & what did he neglect to do that might have been beneficial to his client's defense or his exercise of sound judgement concerning a decision in his case? (Delaney v. State, 269 S.C. 555, 238)

The effective assistance of counsel is a necessary request of due process of law. (State v. Conwert, 251 S.C. 360, 162 S.E.2d 535 (1968))

a failure to investigate facts of the case; labored under a conflicting interests. Trial judge involvement prior to case investigation, illegal search warrant

Counsel, however can also deprive a defendant of the right to effective assistance, simply by failure to render adequate legal assistance."

Cutler v. Sullivan, 446 U.S., 344, 100 S.Ct., 1716

Criminal Law 641.13(1)

From Counsel's function as assistant to defendant derive the ~~very~~ arching duty to advocate defendant's cause & more particular duties to consult with defendant on important decisions & to

- * Keep defendant informed of important developments in course of the prosecution

Brady v. Maryland, 373 U.S. 83 (1963)

Violation of Rule 5, Scrimp. lack of due process

Based on misconduct of the state in producing evidence.

Under 6th Amendment Counsel suppose to effectively
Cross examine each and every witness, Due to statements
Not Being provided By law enforcement gross negligence.

Not Cross examining witness effectively support the
Ineffective assistance of Counseling, Counsel was deprived
of a chance to prove contradictory during testimony

- (a) Ineffective assistant Counsel trial lawyer
 (b) Ineffective assistant Counsel appellate lawyer
 (c) _____

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

- (a) 6th amendment Right to a speedy trial
 (b) 5th amendment Right to Due process
 (c) 14th amendment Right to Due process

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

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

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

- (a) the specific nature thereof:
 i. petition for writ of Certiorari
 ii. petition for writ of Certiorari
 iii. Petition for Rethearing
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. South Carolina Supreme Court
 ii. United State Supreme Court
 iii. South Carolina Court of Appeals
 iv. _____
 (c) the disposition thereof:
 i. affirmed
 ii. _____
 iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. January 11, 2016
- ii. Petition for Retention
- iii. South Carolina Court of Appeals
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- Yes, 6th & 14th amendments
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. 6th & 14th amendment
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. Direct appeal
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) First collateral attack
- (b) First collateral attack
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? yes, if was
- (c) your sentencing? yes, if was
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes, if was
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes, if was
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. Thurmond Brooker, P.O. Box 1450, Florence S.C. 29503
- ii. Lanell Carter Durant, P.O. Box 11589, Columbia S.C. 29211
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial & sentencing
- ii. Court of appeals, Supreme Court, U.S. Supreme Court
- iii. _____
19. State clearly the relief you seek in filing this application:
Sentenced vacated, Conviction Reversed and Remanded
20. Are you now under sentence from any other court that you have not challenged?
No, I am not!

STATE OF SOUTH CAROLINA)

County of Marion)

VERIFICATION

FEB-8 01:01

SHAWN REAVES

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

Shawn Reaves

SWORN to and subscribed before me this 2nd
day of Feb, 2016.

Dorine Pringle (L.S.)
Notary Public

My Commission Expires: 9/27/2023

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

2019 FEB -8 AM 11:01

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

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

Shawn Leaver

Applicant

SWORN or affirmed to and subscribed before me this
2nd day of Feb., 2016.

Dorine Pringle

Notary Public

My Commission Expires: 9/27/2023

STATE OF SOUTH CAROLINA

COUNTY OF MARION

Shawn Reaves, #343643,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

TWELFTH JUDICIAL CIRCUIT

2016-CP-33-71

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed on February 8, 2016, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marion County Clerk of Court. Applicant was indicted at the August 2010 term of the Grand Jury for Marion County for one count each of Murder and Assault and Battery with Intent to Kill (2010-GS-33-0375). Applicant was represented by Thurmond Brooker, Esq. On November 8, 2010, Applicant proceeded to trial before the Honorable William H. Seals, Jr., and a jury. Applicant was convicted of the lesser-included offense of Voluntary Manslaughter. Judge Seals sentenced Applicant to a term of imprisonment of twenty-five years.

Applicant filed a timely Notice of Appeal. An appeal was perfected by LaNelle Cantey DuRant, Esq., of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Reaves, Op. No. 2014-UP-057 (S.C. Ct. App. filed February 12, 2014). Applicant's Petition for Rehearing was denied in an order filed March 21, 2014.

Applicant then petitioned the Supreme Court of South Carolina for a Writ of Certiorari to

the Court of Appeals on June 23, 2014. The Supreme Court of South Carolina granted the petition in an order filed August 22, 2014, and affirmed Applicant's conviction on September 2, 2015. State v. Reaves, Op. No. 27569 (S.C. Sup. Ct. filed September 2, 2015). The Remittitur was returned on September 18, 2015.

On November 18, 2015, Applicant filed a petition for writ of certiorari in the Supreme Court of the United States. The Supreme Court of the United States denied the petition on January 11, 2016.

Attached herewith and incorporated herein by reference are the records of the Marion County Clerk of Court regarding the subject conviction, the transcript from Applicant's trial, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections. Respondent reserves the right to amend its Return upon the receipt of other relevant records.

II.

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

1. Ineffective Assistance of Trial Counsel
 - a. "A failure to investigate facts of the case."
 - b. "Labored under a conflicting interests." (sic)
 - c. "Trial judge involvement prior to case investigation"
 - d. "Illegal search warrant"
2. Ineffective Assistance of Appellate Counsel
3. 6th and 14th Amendment Due Process Violations
 - a. "Right to a speedy trial"
 - b. "Right to due process"
 - i. "Lack of due process based on misconduct of the state in producing evidence."

Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South

Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. All amendments should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCPP.

III.

Applicant claims ineffective assistance of trial and appellate counsel in his application. Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. *See Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her application. *Id.* at 442, 334 S.E.2d at 814. Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689. 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 that counsel's performance was deficient. *Id.* Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Id.* (quoting *Strickland*, 466 U.S.

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, 300 S.C. at 117-18, 386 S.E.2d at 625.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

However, although defendant is entitled to effective assistance of appellate counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754. When a claim of ineffective assistance of 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 test regarding trial or appellate counsel. 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 also alleges a denial of due process of law due to "misconduct of the state in producing evidence." Brady v. Maryland, 373 U.S. 83 (1963), requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings. State v. Gullede, 326 S.C. 220, 487 S.E.2d 590 (1997). Rule 5(a)(1)(C) requires:

Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Id. The definition of “material” for purposes of Rule 5 is the same as the definition used in the Brady context. See Fradella v. Town of Mount Pleasant 325 S.C. 469, 482 S.E.2d 53 (Ct.App.1997) (per curiam). In order for Applicant to prevail on a Rule 5 claim, he must show not only an actual violation, but also that he suffered prejudice as a result. State v. Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Ct.App.1992); State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

Respondent submits that this ground for relief is without merit. However, the allegations concerning Brady and Rule 5 violations probably raise questions of fact that are not conclusively refuted by the record. Respondent requests an evidentiary hearing on this ground for relief. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

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

VII.

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

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

LINDSEY McCALLISTER
Assistant Attorney General

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

By:


ATTORNEYS FOR RESPONDENT

2/2, 2017

STATE OF SOUTH CAROLINA

COUNTY OF MARION

SHAWN REAVES, #343643

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent,

IN THE COURT OF COMMON PLEAS

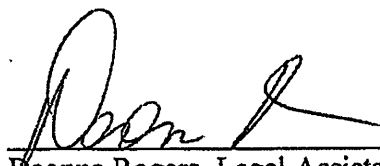
2016-CP-33-0071

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 in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jonathan D. Waller, Esquire
Giese Law Firm
1315 Blanding Street
Columbia, SC 29201

DATED this the 2nd day of February, 2017.


 Deonna Rogers, Legal Assistant
 For Respondent

State of South Carolina	)	Court of Common Pleas
	)	Twelfth Judicial Circuit
County of Marion	)	Case No. 2016-CP-33-00071
	)	
Shawn Reaves,	)	
	)	
Applicant,	)	
	)	
-vs-	)	Transcript of Record
	)	
State of South Carolina,	)	
	)	
Defendant.	)	
	)	

November 15, 2017
 Florence, South Carolina

B E F O R E:

The Honorable Michael G. Nettles, Judge

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

Jonathan Waller, Esquire
 Attorney for the Applicant

Lindsey McCallister, Esquire
 Attorney for the State

Krystal J. Smith
 Circuit Court Reporter

APPELLATE COURT

I N D E XWITNESS/DESCRIPTIONPAGE NUMBER

Shawn Reaves

Direct by Mr. Waller..... 6

Thurmond Brooker

Direct by Mr. Waller..... 18

Cross by Ms. McCallister..... 63

Court Reporter Certification..... 69

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
------------	--------------------	------------	------------

(No Exhibits Presented)

COURT REPORTER LEGEND

dashes	--	intentional or purposeful interruption
		or change in thought
ellipses	. . .	trailing off
[ph]		phonetically written
[sic]		written as said

1 NOVEMBER 15, 2017

2 (WHEREUPON, the proceedings began at 2:55 p.m.)

3 MS. MCCALLISTER: Your Honor, that's your packet up
4 there --

5 THE COURT: Okay.

6 MS. MCCALLISTER: -- for this case.

7 THE COURT: Yes, ma'am. You're recognized. You may
8 call the next case.

9 MS. MCCALLISTER: Thank you, Your Honor. This is Shawn
10 Reaves versus the State of South Carolina, 2016-CP-33-0071.
11 Your Honor, Mr. Reaves was indicted in August of 2010 for one
12 count each of murder and assault and battery with intent to
13 kill. He was represented on those charges by Thurmond
14 Brooker.

15 He proceeded to trial on November 8th, 2010, before Judge
16 Seals. He was convicted of the lesser-included offense of
17 voluntary manslaughter. He was acquitted on the murder and
18 the assault and battery with intent to kill. Your Honor,
19 Judge Seals sentenced him to a term of imprisonment of 25
20 years.

21 He filed a timely notice of appeal, and an appeal was
22 perfected by LaNelle Durant of the Office of Appellate
23 Defense. The Court of Appeals affirmed his conviction by
24 order filed February 12th, 2014.

25 Your Honor, he then petitioned to the South Carolina

1 Supreme Court for writ of certiorari. That petition was
2 granted, Your Honor, on August 22nd, 2014, and the Supreme
3 Court of South Carolina affirmed his conviction on September
4 2nd, 2015. The remittitur was returned on September 18th of
5 2015.

6 He then filed a petition for writ of certiorari in the
7 Supreme Court of the United States, and that petition was
8 denied on January 11th, 2016. He filed this application for
9 post-conviction relief on February 8th, 2016. Jonathan Waller
10 has been appointed to represent him, and both Mr. Reaves and
11 Mr. Waller are present in the courtroom today.

12 THE COURT: Mr. Waller, you're recognized.

13 MR. WALLER: Thank you.

14 THE COURT: If you could, delineate the grounds for
15 relief.

16 MR. WALLER: I will, Your Honor. If I can approach? I
17 filed an amendment to Mr. Reaves's application.

18 THE COURT: Okay. Very good.

19 MR. WALLER: Your Honor, those -- the amendments that
20 I've handed up to you -- to the Court are in addition to the
21 allegations of ineffective assistance of trial counsel that
22 were contained in his application or his original
23 application.

24 THE COURT: All right. Very good. All right. I'll be
25 glad to hear from you. Yes, sir?

SHAWN REAVES - DIRECT BY MR. WALLER

1 MR. WALLER: The applicant would call Shawn Reaves.

2 THE COURT: Mr. Reaves, please come forward. I'm going
3 to ask you, if you could, to place your left hand on the
4 Bible and raise your right hand as the clerk administers the
5 oath.

6 THE CLERK: Do you swear or affirm that the testimony
7 you give will be the truth, the whole truth, and nothing but
8 the truth, so help you God?

9 THE APPLICANT: Yes.

10 THE COURT: Have a seat in the witness chair. Pull up
11 real close to that microphone and speak loudly, clearly, and
12 slowly in order that we can hear everything that you have to
13 say and let's start with your full name.

14 THE APPLICANT: Shawn Reaves.

15 THE COURT: Very good. All right.

16 SHAWN REAVES, being first duly
17 sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. WALLER:

20 Q: Good afternoon, Mr. Reaves. How are you today?

21 A: I'm managing.

22 Q: All right. Mr. Reaves, I want to take you back, if I
23 can, to when you were arrested. Do you recall that?

24 A: I -- I believe so.

25 Q: Okay. You were -- you were arrested in Pennsylvania; is

SHAWN REAVES - DIRECT BY MR. WALLER

1 that right?

2 A: Yes.

3 Q: Okay. And you were brought back to South Carolina?

4 A: Yes.

5 Q: Okay. How did -- did you get an attorney when you --
6 when you got back here?

7 A: Actually, I had an attorney in Philly.

8 Q: Okay. Did you get an attorney on these charges when you
9 got back to South Carolina?

10 A: Yes.

11 Q: Okay. Who was your -- who was your first attorney?

12 A: I'm not sure.

13 Q: Okay. Was it a public defender maybe?

14 A: No. It was actually -- I'm not sure of his name. I'm
15 not sure of his name.

16 Q: Okay. That's okay. At some point, did Thurmond Brooker
17 become your attorney?

18 A: Yes.

19 Q: Okay. About how long after you got back to South
20 Carolina did Mr. -- did you and Mr. Brooker meet?

21 A: I'm not even sure. Probably, like, 90 -- I think it
22 was, like, 90 days as of a bond hearing, something like that.

23 Q: Okay. And you were --

24 A: No. I apologize. That was the first lawyer that done
25 the bond hearing. I want to say it was, like, approximately,

SHAWN REAVES - DIRECT BY MR. WALLER

1 like, a year.

2 Q: Okay.

3 A: Somewhere in that area.

4 Q: And let me ask you this. You were -- you were charged

5 with murder and assault and battery with intent to kill; is

6 that correct?

7 A: That is not correct.

8 Q: Okay.

9 A: I was initially charged with murder.

10 Q: Okay. Initially charged with murder and then --

11 A: And then indicted at the beginning of the first trial

12 with assault and battery with intent to kill after the murder

13 was -- was -- was announced.

14 Q: Okay. But when you went to the trial where you were

15 actually convicted, you went to trial on murder and assault

16 -- and assault and battery with intent to kill; is that

17 right?

18 A: I had a bond for murder and then I went to court for

19 murder and assault and battery with intent to kill.

20 Q: Okay. You were convicted of the lesser-included offense

21 of murder of voluntary manslaughter; is that right?

22 A: At the end of my second trial, I was indicted for

23 manslaughter and I was convicted of manslaughter.

24 Q: Okay. Did you know that was a possibility when you went

25 to your trial? When you started your trial, did you know

SHAWN REAVES - DIRECT BY MR. WALLER

1 there was a possibility you could be found guilty of
2 voluntary manslaughter?

3 A: At the beginning of my first trial, I was charged with
4 murder and assault and battery with intent to kill and, as I
5 proceeded, there was a mistrial. At the end of the mistrial,
6 we proceeded again, and I was indicted with murder and
7 assault and battery with intent to kill. At the end of my
8 second trial, after going through every testimony and all of
9 the evidence, I had been -- I call it indicted for
10 manslaughter without even the understanding of whether or not
11 it was even capable of being charged or anything. I was
12 absent-minded on the account that murder could even be
13 reduced or deduced to manslaughter or why I was even fighting
14 murder and the assault and battery with intent to kill at the
15 same time of one incident.

16 Q: Okay. Had you and Mr. Brooker discussed, first, the
17 fact that you could be found guilty of a lesser-included
18 offense?

19 A: There were no -- there were no thought that I could even
20 be charged with anything other than murder. When I proceeded
21 to the first trial, I was indicted with assault and battery
22 with intent to kill without even understanding why assault
23 and battery with intent to kill was even on the charging
24 sheet of a homicide. I don't even know.

25 Q: Okay. I want to focus on the second trial. Okay?

SHAWN REAVES - DIRECT BY MR. WALLER

1 A: That's the second trial.

2 Q: All right. Did you and Mr. Brooker ever discuss that if
3 you were found not guilty of either of the two charges, the
4 State --

5 THE COURT: Let me interrupt you. Tell me a little bit
6 about the facts. What are the facts?

7 MR. WALLER: Your Honor, Mr. Reaves was alleged to have
8 shot and killed a man in Marion County. The man was shot
9 five times, but two -- two bullets were recovered from two
10 separate weapons. Mr. Reaves was the only one arrested or
11 charged. I believe they're still looking for whoever the
12 second shooter was.

13 So he was -- it's my understanding he was charged for
14 murder and also charged for the second bullet I guess in the
15 alternative to assault and battery with intent to kill. It
16 was kind of a house party that kind of went bad, Your Honor,
17 a domestic situation involving third parties that Mr. Reaves
18 had nothing to do with.

19 THE COURT: The assault and battery with intent to kill
20 was concerning a dead body?

21 MR. WALLER: Yes, sir. They said -- I guess that bullet
22 wouldn't have killed him.

23 THE COURT: Hmm.

24 MR. WALLER: There were two shots. One was testified to
25 as the fatal shot or would have been a fatal shot, and there

SHAWN REAVES - DIRECT BY MR. WALLER

1 was another bullet recovered that was I believe just lodged
2 in his shoulder, if I'm not mistaken, that was testified it
3 would have not been a fatal shot. My understanding was that
4 it was in the alternative, although I'm not --

5 THE COURT: I assume they addressed that issue on
6 appeal, didn't they?

7 MR. WALLER: He was found not guilty of the assault and
8 battery with intent to kill.

9 THE COURT: So that wasn't really an issue?

10 MR. WALLER: It wasn't, Your Honor.

11 THE COURT: That seems odd. I don't know. That doesn't
12 seem right.

13 MR. WALLER: It doesn't, Your Honor.

14 THE COURT: But at any rate, that's really a moot issue
15 because he wasn't convicted of that.

16 MR. WALLER: It's a moot issue in respect that he wasn't
17 convicted, Your Honor. One of our contentions is that both
18 charges were presented to the jury and that that -- and that
19 they shouldn't have been.

20 And so that's one of our contentions. I believe it's
21 one of the last few on our amendments is that a directed
22 verdict motion should have been made regarding specifically
23 the assault and battery with intent to kill because all of
24 the evidence presented was that -- the State alleged Mr.
25 Reaves had fired the fatal shot. There was nothing saying

SHAWN REAVES - DIRECT BY MR. WALLER

1 that the bullet from a completely separate weapon had been
2 fired by Mr. Reaves at all. So it's our contention that only
3 the murder should have been presented to --

4 THE COURT: Okay. Go ahead.

5 MR. WALLER: -- to the jury.

6 BY MR. WALLER:

7 Q: All right. Mr. Reaves, when -- when -- when Thurmond
8 Brooker represented you and y'all were getting ready to go to
9 either trial, what did y'all talk about to get ready? What
10 did y'all talk about about the evidence against you?

11 A: I was just told that it was a factual-driven case.

12 Q: A factor-driven case?

13 A: Factual.

14 Q: Factual-driven case?

15 A: Facts.

16 Q: Okay. What do you mean by that?

17 A: By there being no substantial evidence or, like,
18 concrete evidence. There -- there wasn't -- this shouldn't
19 have been any accidents or misbelief that there was innocence
20 through I want to say testimonies that there were other
21 applicants or suspects, subjects or whoever, that my
22 innocence would be proven through nothing of evidence being
23 supported or evidence being tampered with through
24 investigation that was --

25 THE COURT: All right. Let's focus on what he says he

SHAWN REAVES - DIRECT BY MR. WALLER

1 did wrong.

2 MR. WALLER: All right.

3 THE APPLICANT: Okay.

4 BY MR. WALLER:

5 Q: To back up Judge Nettles' question, Mr. Reaves, what do
6 you think that your attorney didn't do correctly?

7 A: Well, I'm so unaware of the manslaughter being indicted.
8 So I'm just looking for ineffective assistance of counsel on
9 the manslaughter even being unacknowledged. I'm so not aware
10 of it.

11 You know, if I felt like if I was fighting charges that
12 I was able to actually see into of being guilty, I probably
13 would've pled guilty on several circumstances. I think that,
14 you know, as I was accused of murder, I fought murder as hard
15 as I could with the understanding that I didn't murder
16 anyone. I never thought that I could get --

17 THE COURT: Is the essence of this is that voluntary
18 manslaughter is not a lesser-included offense of murder?

19 MR. WALLER: No, sir.

20 THE COURT: What -- what are we talking about?

21 THE APPLICANT: I wasn't aware that I was fighting
22 manslaughter. I never -- I wasn't even aware that
23 manslaughter could even be charged at the end of the second
24 trial or the end of the trial, period.

25 MR. WALLER: That's not one of our allegations, Your

SHAWN REAVES - DIRECT BY MR. WALLER

1 Honor.

2 THE COURT: Okay. Well, let's move on to what -- what
3 the allegations are.

4 MR. WALLER: Yes, Your Honor.

5 THE COURT: Why don't you specifically ask him? Why
6 don't you start with A and then ask him what he did wrong on
7 each of those?

8 MR. WALLER: Your Honor, most of -- most of the
9 amendments that were filed concerned the actual trial itself.

10 THE COURT: Yeah.

11 MR. WALLER: And we'll get to those through a different
12 witness.

13 THE COURT: But I'm going to allow you to lead him to
14 some extent.

15 MR. WALLER: Sure.

16 THE COURT: To ask him specifically what you believe the
17 grounds should be.

18 MR. WALLER: Sure.

19 BY MR. WALLER:

20 Q: Mr. Reaves, did you and Mr. Brooker ever talk about a
21 self-defense defense?

22 A: No, sir.

23 Q: Okay. Did y'all ever discuss potentially filing a
24 motion under the Stand Your Ground Law or the Protection of
25 Persons and Properties Act?

SHAWN REAVES - DIRECT BY MR. WALLER

1 A: No, sir.

2 Q: Okay. Did y'all ever discuss that you could potentially
3 be granted immunity if a judge finds that you fit under that
4 act?

5 A: No, sir.

6 Q: Okay. Did you and Mr. Brooker discuss the -- your
7 constitutional rights when you go to trial, the right to
8 confront witnesses and those things?

9 A: No, sir..

10 Q: Okay. Mr. Reaves, in your case, there was a -- kind of
11 tangentially, there was a search warrant that had been
12 executed in the house. Okay? Judge Seals, who presided over
13 your trial, signed that search warrant as a magistrate long
14 before your trial took place. Did you and Mr. Brooker ever
15 have a chance to discuss that fact?

16 A: I think it was -- it was contested in the first trial,
17 but after the mistrial, there was no contesting on a change
18 of venue or anything of that sort of nature.

19 Q: Okay. Did you ever ask Mr. Brooker to file a motion for
20 Judge Seals to recuse himself?

21 A: Can you please repeat that?

22 Q: Did you ever ask Mr. Brooker to ask Judge Seals to
23 recuse himself based on that?

24 A: I never thought that I could actually make that happen.

25 Q: Okay. Did you and Mr. Brooker have a chance to go over

SHAWN REAVES - DIRECT BY MR. WALLER

- 1 the discovery the State provided to Mr. Brooker and to you?
- 2 A: Can you please repeat that?
- 3 Q: The discovery that was provided in your case --
- 4 A: Yes.
- 5 Q: -- in response to your or Mr. Brooker's motion pursuant
- 6 to Rule 5 of the Rules of Criminal Procedure and Brady v.
- 7 Maryland, did you all discuss the results of the State's
- 8 providing y'all evidence?
- 9 A: I haven't -- well, I think it was due to my age. I
- 10 think being 16, I wasn't able to actually review, or it was
- 11 something of that sort of nature. You may have to ask him on
- 12 what the circumstances was, but it was somewhere in there. I
- 13 think it was around in that fashion.
- 14 Q: Okay. And I should've asked you that earlier. You were
- 15 16 at the time of this; is that correct?
- 16 A: Yes.
- 17 Q: Okay. How old were you at the time of the trial?
- 18 Nineteen?
- 19 A: Approximately.
- 20 Q: Okay.
- 21 A: Somewhere in that area.
- 22 Q: When did you get a chance to actually review the
- 23 discovery?
- 24 A: I never reviewed the discovery at all.
- 25 Q: Okay. There were a number of items I guess recovered

SHAWN REAVES - DIRECT BY MR. WALLER

1 from the incident location. Did you and Mr. Brooker discuss
2 those items not being tested or being lost?

3 A: The only time I was told that anything was tampered with
4 or being lost was during the mistrial and that we had to come
5 up with a -- what is it? A new defense or a re-created
6 defense.

7 Q: Okay. Were you made aware of any -- or discussed any
8 witness statements being lost?

9 A: Can you repeat that?

10 Q: Were you made aware of any witness statements that were
11 lost during the investigation?

12 A: Yes. The statements that were actually -- the only
13 statements that were there were those that were testified to
14 that there wasn't -- that test -- that testified to that they
15 didn't write them statements.

16 Q: Okay. And you testified that Mr. Brooker told you it
17 was a factual-driven case?

18 A: Yes, sir.

19 Q: And y'all were going to trial on it?

20 A: Through those circumstances.

21 Q: Okay.

22 MR. WALLER: I have no further questions for you.

23 Please answer any questions Ms. McCallister has.

24 THE COURT: All right.

25 MS. MCCALLISTER: I do not have any questions for this

THURMOND BROOKER - DIRECT BY MR. WALLER

1 witness, Your Honor.

2 THE COURT: All right. You may step down. All right.
3 You may call your next witness.

4 MR. WALLER: Your Honor, the applicant would call
5 Thurmond Brooker.

6 THE COURT: All right. Mr. Brooker, please come
7 forward.

8 THE CLERK: Is he still under oath?

9 THE COURT: No. Place your left hand on the Bible and
10 raise your right hand as the clerk administers the oath.

11 THE WITNESS: Yes, sir.

12 THE CLERK: Do you swear or affirm that the testimony
13 you give will be the truth, the whole truth, and nothing but
14 the truth, so help you God?

15 THE WITNESS: Yes.

16 THE CLERK: Thank you.

17 THE COURT: Have a seat. Pull up real close to that
18 microphone and speak loudly, clearly, and slowly, and let's
19 have you state your full name, please.

20 THE WITNESS: Thurmond Brooker.

21 THE COURT: All right. I'll be glad to hear from you.

22 THURMOND BROOKER, being first
23 duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. WALLER:

THURMOND BROOKER - DIRECT BY MR. WALLER

1 Q: Good afternoon, Mr. Brooker. How are you today?

2 A: I'm fine. And yourself?

3 Q: I'm doing well. Mr. Brooker, if I -- if I can, how did
4 you come to represent Shawn Reaves?

5 A: My recollection is is that his -- his mother contacted
6 me. I think the -- he was originally charged with this
7 offense in 2007, and I think it was 2008 that his mother I
8 believe retained me to represent him in connection with these
9 charges.

10 MR. WALLER: Your Honor, may I approach the witness?

11 THE COURT: Yes.

12 BY MR. WALLER:

13 Q: All right. Mr. Brooker, do you recall -- how old was
14 Mr. Reaves when he was charged with these crimes?

15 A: I believe he was 16 years old at the time in which the
16 shooting took place and 17 or somewhere around 17 when I took
17 over his case.

18 Q: Okay. And if you could, so Judge Nettles is under -- is
19 aware, what were the -- what was your understanding of the
20 allegations against Mr. Reaves?

21 A: My understanding of the allegations were is is that --
22 that there was a group of people that was at a private
23 residence in Marion. That one of the individuals was a
24 female, and she was there with -- with a -- with one of the
25 gentlemen at the residence.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 That that female had a boyfriend or an ex-boyfriend.
2 That that ex-boyfriend learned that -- that -- that the
3 female or the ex-girlfriend was at the residence. That that
4 ex-boyfriend then came to the residence. That the ex-
5 boyfriend or should I say the victim -- the victim in this
6 case came to the residence. That the victim got into an
7 altercation with the ex-girlfriend.

8 That my understanding is is that the victim may -- and
9 it's conflicting, but may have gotten in an altercation with
10 -- with the defendant or some other people at the residence.
11 That a weapon was pulled. That the victim was shot in the --
12 in the yard of the residence and that that victim
13 subsequently died I think at the hospital or was pronounced
14 dead at the hospital.

15 Q: Okay. Did you and Mr. Reaves have a chance to go over
16 the discovery provided in this case?

17 A: We did. One of the things that I always do is is that
18 when I get the discovery, I always talk with the client in
19 reference to the discovery that I receive so they'll know
20 exactly what I got.

21 Q: Okay.

22 A: And so I went out to the detention center and then, of
23 course, is is that I discussed with him the discovery that
24 was contained in the file, and that includes the statements
25 that had been given against him.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 Q: Okay. Talk a little bit, if you can, about the
2 investigation that was done in this case?

3 A: Well, the investigation that was done in connection with
4 this case would have been is to try to talk with as many
5 people as possible that was there. My understanding is is
6 that at the time in which the shooting occurred that there
7 was -- that this was -- this was at a residence. That there
8 was a number of people that was at -- at the residence and,
9 of course, is is that my strategy was to talk with as many of
10 those people as possible.

11 I think I talked with the occupants of the home. There
12 were about three or four people that occupied the home,
13 including the -- the -- the ex-girlfriend of the victim. I
14 talked with I think two or three other occupants of the
15 residence. Well, three other occupants that was there living
16 at the residence. I also talked -- my recollection was is is
17 that there was a home that was across the street and I talked
18 with a -- a -- a witness who was across the street.

19 So there was about maybe five -- five, maybe -- I'm
20 guessing five or six people, somewhere in that -- in that
21 area that I talked with because it was a fact-driven case in
22 that -- that the statements -- that the reason Mr. Reaves was
23 charged was because statements alleging that he was the
24 shooter. So this was a kind of a statement-driven case with
25 respect to identifying who the shooter was.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 Q: Okay.

2 A: And there was I think at least a couple of witnesses
3 that testified that -- that Mr. Reaves had actually shot the
4 victim.

5 Q: Okay. And I want to continue with the line about
6 investigation. How was the -- what's your understanding of
7 the State's investigation of this case?

8 A: I want to make sure I understand what you --

9 Q: Were there issues with the State's investigation?

10 A: There was issues with the State's investigation. Not so
11 much with -- not so much with the State's investigation, but
12 with the State's collection and retention of evidence.

13 It is is that my understanding is is that the -- that --
14 that when the shooting took place that there was a -- a great
15 deal of physical evidence that was left on the ground, and
16 that includes some spent shell casings. Cell phones were
17 dropped. That there was a do-rag that was -- that was
18 dropped. There was a credit card or a debit card that was
19 dropped, and all of these items were dropped in the vicinity
20 of -- right in the vicinity within feet of where the shooting
21 took place. The victim's clothing was -- was lost.

22 That there was statements from witnesses that those
23 witnesses alleged that was given at the scene that when the
24 first trial came about that those witnesses testified on the
25 stand that the statements that was purported to be theirs --

THURMOND BROOKER - DIRECT BY MR. WALLER

1 that at least one of those witnesses said that that was not
2 the statement that they had given that night.

3 So there was -- which -- which is what makes me
4 sympathetic to Mr. Reaves's case. There was a lot of
5 physical evidence that was collected at the scene that was
6 lost and then, of course, there was an issue with respect to
7 statements that witnesses had given that was lost or -- or
8 either substituted with statements that those witnesses
9 didn't completely recognize when they were -- when I cross-
10 examined them on the stand in the first trial.

11 Q: So potentially, you had lost statements. You had at
12 least three lost statements and one questionable statement
13 that may have been substituted?

14 A: That's correct.

15 Q: Okay. There was also an issue with the identifications
16 with witnesses testifying that I would never -- this is not
17 the lineup I saw; is that correct?

18 A: That's correct. There was an issue with respect to the
19 lineup and, of course, this was all brought out during the
20 trial where -- where -- where the photograph lineups -- I
21 think at least one of the witnesses had indicated -- had
22 indicated at least on a photo -- on a photographic lineup and
23 picked out an individual and I think turned out not to be Mr.
24 Reaves. So there was issues with respect to the photo --
25 photo lineup as well too.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 Q: Okay. Taking out the investigation and the holes in the
2 investigation, there were testimony and statements given by
3 eyewitnesses that implicated Mr. Reaves in this shooting; is
4 that correct?

5 A: That's correct.

6 Q: Okay. And the -- the victim that Mr. Reaves allegedly
7 shot had gotten into an altercation, a physical altercation,
8 with his ex-girlfriend or current girlfriend at the time? Is
9 that your understanding?

10 A: Yes.

11 Q: And then was following her back up a set of stairs or
12 close to a set of stairs, kind of chasing her down? Is that
13 what you recall?

14 A: Yes. Similar to that, but, of course -- and, of course,
15 that was one of the issues that we got into I think at one of
16 the trials is exactly where the victim -- where the victim
17 was shot at, whether or not the victim was going up the
18 stairs or whether or not the victim was standing in the yard
19 because that would have made a tremendous difference with
20 respect to whether or not -- it made a tremendous difference
21 with respect to his possibility of -- of being successful in
22 filing a motion underneath South Carolina's Protection of
23 Person and Property Act.

24 And I think underneath that act is is that -- that the
25 dwelling is considered to be the steps and, therefore,

THURMOND BROOKER - DIRECT BY MR. WALLER

1 thought -- therefore, on -- but if the individual is in the
2 yard, then, of course, the yard is not considered to be --
3 even though it's a part of the residence, it's not a part of
4 the dwelling. So I think underneath the Protection of Person
5 and Property Act, if the individual is proceeding up the
6 steps, then that's considered to be an invasion of the home
7 and then, of course, is is that lethal force then can be
8 used.

9 Q: Was there also testimony that you recall that the
10 decedent had pushed or assaulted Mr. Reaves in some fashion,
11 possibly jerking his necklaces off, prior to Mr. Reaves
12 shooting him?

13 A: That's correct. And that was also one of the -- one of
14 the pieces of evidence that subsequently that was collected
15 by law enforcement after the shooting -- is is that -- that
16 there were three chains that were on the -- on the ground
17 and, of course, is is that it was our understanding is is
18 that -- that -- that the victim had snatched some chains from
19 around the neck -- reached and snatched some chains from
20 around the neck -- from around the neck of Mr. Reaves.

21 Q: Okay. Mr. Reaves was 16 at the time of the incident?

22 A: He was 16.

23 Q: Do you recall how physically large he was or small?

24 A: Mr. Reaves was -- was physically small, specifically in
25 comparison to the victim. The victim was I think somewhere

THURMOND BROOKER - DIRECT BY MR. WALLER

1 around six two. He was well in excess of 200 pounds. I
2 think he was military or former military. So he was quite a
3 substantial guy.

4 Mr. Reaves, at that particular period of time, probably
5 was around five six and, of course, his weight -- his weight
6 could have been, you know, roughly 75 to -- you know -- and
7 I'm guessing, but it was realistically 75 to 100 pounds less
8 than -- than the -- than the victim.

9 Q: Okay. Based on the decedent having just assaulted his
10 girlfriend --

11 A: Uh-huh.

12 Q: -- and based on him potentially assaulting Mr. Reaves,
13 did you consider filing a motion under the Protection of
14 Persons and Property Act for immunity based on those
15 circumstances, not the whole, but Mr. Reaves, his person?

16 A: Yes. And -- and I think underneath the Protection of
17 Persons -- Protection of Person and Property Act is that --
18 that -- that I think it's subsection C.

19 I think it's 16-11-44, I think, subsection C, if my
20 memory serves me correctly, allows for, you know, a person to
21 -- to file for immunity underneath the Protection of Person
22 and Property Act, but I think is is that one of the things
23 that -- that -- that I think that statute requires -- and, of
24 course, I had this in a previous case is is that you must not
25 be engaged in an unlawful act at your time.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 So basically, is is that my interpretation or at least
2 the interpretation of at least another judge that we've been
3 before in a similar situation was is is that the victim has
4 to have clean hands, which means is is that the victim can't
5 be involved in -- in -- in a crime at the time in which he is
6 seeking to exercise protection of person and property.

7 I think -- if my memory serves me correctly, I know that
8 that is a limiting [sic] factor. I don't know whether or
9 not it's underneath subsection E or either subsection C, but,
10 of course, is is that one of the problems that he would run
11 into, at least underneath subsection A, was is is that -- one
12 is that this -- there was -- there was testimony from -- from
13 witnesses that this occurred on the ground. It did not occur
14 -- occur -- that the defendant was not proceeding up the
15 steps. So this did not occur in the dwelling.

16 Underneath subsection C is is that the problem that he
17 would've had would have been is is that -- that there was
18 testimony that he was carrying a weapon. That he was an
19 unlicensed carrier of a weapon and, of course, because he --
20 because he wasn't a licensed carrier of a weapon, then, of
21 course, is is that may then complicate his ability to be able
22 to take advantage -- advantage of subsection C.

23 And then also is is that another reason why it would
24 have been -- it probably would not have been possible to file
25 that motion and for the judge to rule on it prior to the

THURMOND BROOKER - DIRECT BY MR. WALLER

1 trial is that usually underneath the motion for Protection of
2 Person and Property Act is that a lot of times is is that --
3 is that if you are in a situation where the evidence is
4 contradictory and, of course, is is that the witnesses'
5 statements are contradictory and, of course, is in a
6 Protection of Person and Property Act, if the judge is left
7 into a situation on that motion where the judge has to make
8 findings of fact, then, of course, is is that it prevents the
9 judge from then being able to -- being able to make that
10 decision.

11 In this particular situation, in order for the judge to
12 be able to find that he was available for relief, the judge
13 would have had to have made the conclusion -- a conclusive
14 decision that, one, that he did not have a weapon because
15 that would have complicated it if he was engaged in a felony
16 at the time in which he is seeking to take -- take advantage
17 of the statute and, two, the judge would have also would have
18 had to find is is that -- that -- that -- that the victim was
19 aggressively or attempting to aggressively attack Mr. Reaves
20 that would've put him in fear of great bodily harm -- great
21 bodily harm or either fear of his life and, of course, there
22 was contradictory statements of that where some witnesses
23 that I think had testified that -- that he was -- that he was
24 not after Mr. Reaves, but that he was after his girlfriend.

25 THE COURT: Mr. Brooker, was he -- were you -- was he a

THURMOND BROOKER - DIRECT BY MR. WALLER

1 convicted felon or he just was unlawful carrying of a pistol
2 because he didn't have a license to do so?

3 THE WITNESS: I don't believe he was a convicted felon
4 at 16. I think he was -- he was in possession of a weapon on
5 his body. I'm sorry. That he was in possession of a weapon
6 on his body without a carry permit.

7 THE COURT: Mr. Waller, do you think that's the state of
8 the law that -- that unlawful carrying of a weapon would
9 preclude stand your ground?

10 MR. WALLER: Your Honor, I don't think that's the state
11 of the law. I don't have anything here today to back that
12 up.

13 THE COURT: What is the -- let's see what the attorney
14 general has to say about that.

15 MS. MCCALLISTER: Your Honor, all I -- I can tell you
16 the position of the AG's office and what we have argued is
17 that it is unlawful, yes. Again, I don't have -- I don't
18 have a cite to give you.

19 THE COURT: Do y'all have an attorney general's opinion
20 to back that up?

21 MS. MCCALLISTER: We can look for one. I don't know
22 that we have one, Your Honor, but --

23 THE COURT: All right.

24 MR. WALLER: Your Honor, I think under that situation --

25 THE COURT: I was being facetious on that.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 MR. WALLER: Only a person who has a concealed weapons
2 permit would be able to avail themselves of the Protection of
3 Persons and Property Act unless I guess they're standing on
4 their porch with a shotgun, but I think it would -- it would
5 preclude a great many of citizens it was designed to protect
6 by granting them immunity if that was the case.

7 THE COURT: Hmm.

8 THE WITNESS: If I can?

9 THE COURT: Yes, sir.

10 THE WITNESS: And the reason why, like I said, we took
11 that position is is that -- is that we have encountered that
12 issue before and, of course, the Protection of Person and
13 Property Act -- and let me put it the right way.

14 At least is is that -- that we have been told is is that
15 was -- and I think -- I think in the -- in the legislative
16 act, I think there is a section that deals with the purpose
17 and intent of that and, of course, is is that one judge's
18 interpretation was that is that it was rather a -- it was
19 rather kind of a -- not necessarily a codification, but
20 similar to a codification of -- of -- and I don't know
21 whether or not that's the right way, but at least was -- was
22 -- I think codified some of the -- some of the intent of
23 self-defense and, of course, is that I think in the self-
24 defense statute is that you have to have clean hands. If
25 memory serves me right, is that you can't be responsible for

THURMOND BROOKER - DIRECT BY MR. WALLER

1 bringing on the difficulty.

2 THE COURT: At fault in bringing on the harm.

3 THE WITNESS: I think the language is fault for bringing
4 on the difficulty. And so -- and I understand that, but, of
5 course, is is that that's -- that would have been our
6 justification. Of course, what we did is --

7 THE COURT: Clarify the reason why you didn't bring the
8 stand your ground hearing.

9 THE WITNESS: Well, for those reasons -- and I'll repeat
10 that -- is we think subsection A was not applicable to him at
11 all because in order for subsection A -- I think subsection A
12 dealt with -- is that you can use -- and I'm trying to
13 remember the statute off the top of my head, but you can use
14 -- a person can use deadly force if -- if -- if someone is
15 attempting to invade their home or either invade their car.

16 THE COURT: Was this his home, by the way?

17 THE WITNESS: This was not his home. That he was at the
18 residence of another, but I think underneath the Stand Your
19 Ground Law, it still would be applicable to a visitor if the
20 visitor was at the home and then, of course, the visitor was
21 an invitee --

22 THE COURT: Right.

23 THE WITNESS: -- at the home and -- and -- and someone
24 seeks to invade the home.

25 THE COURT: All right. So you say that it wasn't his

THURMOND BROOKER - DIRECT BY MR. WALLER

1 residence and he couldn't avail himself of it because he
2 wasn't in the house or around on the curtilage?

3 THE WITNESS: Yes. Yes, is is that it's my
4 understanding is is that in order to avail yourself
5 underneath subsection A is that it says is that if there's an
6 invasion of the dwelling, that the dwelling starts at the
7 steps. That if you're out in the yard --

8 THE COURT: And secondarily, you say unlawful carrying
9 of a pistol. What's the other reason why?

10 THE WITNESS: There was an unlawful carrying of the
11 pistol and, of course, is is that the other reason why is is
12 that -- that it would have been complicated to have a stand
13 your ground hearing prior to the trial would be is is that
14 I've had stand your ground hearings and usually in those
15 stand your ground hearings is is that if there is at least
16 some consensus on some of the facts in which the judge can
17 make a determination with respect to whether or not stand --
18 whether or not stand your ground was applicable, but when
19 it's a situation where --

20 THE COURT: You're saying that there were a number of
21 different witnesses, some of which said the defendant started
22 of the fight, some of which said the victim started the
23 fight?

24 THE WITNESS: Yeah. There was a number of different
25 conflicting witnesses and then, of course --

THURMOND BROOKER - DIRECT BY MR. WALLER

1 THE COURT: Let me ask you this, Mr. Brooker. The stand
2 your ground is either granted or it's not.

3 THE WITNESS: Yeah.

4 THE COURT: You don't get to charge that. You charge
5 self-defense, if it applies, but none of that is really a
6 factual issue for the jury. It's a one-shot deal that the
7 judge has, and you just say that you felt as though it was
8 fruitless to do that?

9 THE WITNESS: I felt it was. And then, of course --

10 THE COURT: What was -- what would have been a downside
11 of just doing a cursory stand your ground just to -- just to
12 go through it? Maybe do a little discovery?

13 THE WITNESS: I don't know whether or not -- off the top
14 of my head, I don't -- but we made the tactical decision to
15 -- to -- to ask the judge for -- for an instruction of -- of
16 -- of self-defense at the trial and, of course, that's the
17 course that we took because I think --

18 THE COURT: What was the downside of asking for it is
19 what I'm asking.

20 THE WITNESS: Well, I don't think there would've been no
21 particular downside to ask for it.

22 THE COURT: You just didn't think you would prevail?

23 THE WITNESS: Yeah. I didn't think that -- that it was
24 fruitful for him at all. I didn't think that there was --
25 there was a -- there was a reasonable possibility.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 THE COURT: Do you think that the State might have
2 gained some advantage to getting a preview of what the
3 witnesses would say?

4 THE WITNESS: I think that they would have because when
5 we've conducted on stand your ground hearings before, then
6 one of the biggest decisions that we have to make is whether
7 or not we're going to put the -- the -- the defendant on the
8 stand and have the defendant to testify on the stand and
9 then, of course, is is that creates some sort of -- some sort
10 of record or give them advance notification of what our
11 defenses were. And then, of course, it locks him into that
12 particular statement later on in trial.

13 So usually, we have that difficulty of putting the
14 victim -- putting the defendant on the stand at the stand
15 your ground hearing. And, of course, is that if we were not
16 able to put them on the stand, then, of course, is is that I
17 think the chances of the judge granting it would've been weak
18 in the first place. It would have been even significantly
19 weak without him getting on the stand at that time.

20 But I still think the judge would have been left where
21 he could not have reached a conclusion because the judge is
22 not a factfinder and he would have had to have made the
23 conclusion at that hearing that he didn't -- he wasn't
24 carrying a gun and then, of course, is is that there would be
25 witnesses that say that he was carrying a gun. He would have

THURMOND BROOKER - DIRECT BY MR. WALLER

1 to make a decision also, the judge, make a fact-finding that
2 -- that -- that the victim was the aggressor and that he was
3 in fear for his life and then, of course, there was
4 contradictory evidence with respect to that. So I didn't
5 think it was fruitless to -- to go through that exercise.

6 THE COURT: Fruitful?

7 THE WITNESS: Excuse me. I'm sorry. Fruitful to go
8 through that exercise and have that when we could simply ask
9 for a charge of self-defense at the trial, which we did.

10 BY MR. WALLER:

11 Q: Mr. Brooker, what -- what was your -- what was your
12 overall theme and strategy when you ultimately got to trial?

13 A: Well, like I said, is that there was quite a bit of
14 contradictory statements at trial and then, of course, is is
15 that we had two strategies. The first strategy is is to --
16 is to -- obviously is to not concede anything and force the
17 State to prove that he had a weapon and that he was the
18 shooter. And, of course, is is that they present witnesses
19 that testify to that.

20 The second line of defense was is is that if we thought
21 that they were able to create a strong argument that Mr.
22 Reaves had a gun and that Mr. Reaves was the shooter, the
23 second argument was -- and, of course, we made that at the
24 trial was is is that -- that even if the jury reached the
25 conclusion that Mr. Reaves had a gun and that Mr. Reaves was

THURMOND BROOKER - DIRECT BY MR. WALLER

1 the shooter that Mr. Reaves was not a killer because I think
2 there was testimony from even law enforcement officers that
3 there was rounds from multiple guns and that there was
4 potentially two shooters and then, of course, is is that --
5 and this was probably the most important piece of evidence
6 and that is that all the statements -- there was one
7 consistent thing about the statements and those consistent
8 things was is is that at the time of the shooting that the
9 victim and Mr. Reaves were standing face-to-face to each
10 other.

11 And that if the jury reached the conclusion that Mr.
12 Reaves did fire the weapon, striking the victim, that Mr.
13 Reaves -- Mr. Reaves's shots would have hit the victim from
14 the front. The autopsy showed that there was a shot from the
15 rear and that the victim was struck from the rear and that
16 the rear weapon -- that the rear shot was actually the fatal
17 shot.

18 And I think that goes into I think the question that
19 Your Honor was asking before is that why did the prosecutor
20 -- I think after the first trial was declared a mistrial, why
21 would the prosecutor re-indict for assault and battery -- I
22 think what was assault and battery with intent to kill
23 because I think the prosecutor had the same idea that we did
24 is is that if a jury found that he did not shoot the fatal
25 bullet and, of course, if they could not identify the second

THURMOND BROOKER - DIRECT BY MR. WALLER

1 shooter and prove that him and the second shooter was in a
2 conspiracy, then Mr. Reaves -- Mr. Reaves could not be held
3 accountable for the conduct of the second shooter, which
4 would've been the murderer.

5 So -- so -- so you can't, you know --

6 THE COURT: All right. You know, that does -- I've
7 never even imagined such a circumstance, but I can see how
8 they would -- that makes a little bit more sense. I've never
9 really thought about it that way.

10 THE WITNESS: Yeah. And so what we were arguing is is
11 that -- is that the autopsy said that the bullet from the
12 rear was the fatal bullet. That there was no evidence that
13 Mr. Reaves was connected to the second shooter. So you can't
14 have a conspiracy.

15 So you can only charge or either convict Mr. Reaves for
16 the -- for his own conduct, and his conduct at worst would
17 have been shooting the victim from the front and wounding the
18 victim from the front, but he could not be convicted of
19 murder or either manslaughter because murder or manslaughter
20 would have -- would have required that Mr. Reaves had caused
21 the death of the victim.

22 THE COURT: Were those issues presented to the appellate
23 entity?

24 MR. WALLER: Your Honor, the --

25 THE COURT: Well, the attorney general might know. Do

THURMOND BROOKER - DIRECT BY MR. WALLER

1 you know?

2 MS. MCCALLISTER: Your Honor, yes. The two issues that
3 were appealed were the issue of -- I'm sorry. I'm pulling up
4 the briefs right now.

5 MR. WALLER: So a Rule 5 violation and a speedy trial.

6 MS. MCCALLISTER: The spoliation of evidence issues and
7 the speedy trial motion.

8 THE COURT: And so I assume that whoever the appellate
9 lawyer was felt that it was a legitimate question of fact for
10 the jury and they resolved it kind --

11 MR. WALLER: Your Honor --

12 THE COURT: -- of opposite of the --

13 MR. WALLER: I believe once he was found not guilty of
14 the assault and battery with intent to kill -- if he had been
15 found guilty of both, then I think that would have been
16 obviously an appeal issue.

17 THE COURT: I'm just -- I'm talking about the issue that
18 apparently, according to Mr. Brooker, there is uncontroverted
19 evidence that he was shooting from the front and the dead --
20 the deadly shot came from behind. According to Mr. Brooker,
21 that was uncontroverted that that was the case.

22 MR. WALLER: I believe it was. I think, Your Honor, the
23 State made the argument that as the victim fell forward, one
24 of the shots entered his upper left back I believe, and that
25 was -- that he was face-to-face, but as he fell forward -- I

THURMOND BROOKER - DIRECT BY MR. WALLER

1 think that was the State's argument. I agree with Mr.

2 Brooker though that that was not necessarily the --

3 THE COURT: The strongest argument?

4 MR. WALLER: The evidence presented.

5 THE WITNESS: Yes, Your Honor, is is that we actually
6 made a motion. We actually made a motion I think for a new
7 trial based upon that fact is is that the State made that
8 argument, if my memory serves me correctly, in closing
9 arguments, but there was no testimony during the trial.

10 We specifically had that defense in mind and when we
11 questioned the witnesses that -- that said that they
12 witnessed the shooting, we particularly -- we meticulously
13 asked those witnesses about the positions of the victim and
14 the positions of the defendant, and we specifically asked
15 whether or not he had fallen forward or whether or not he had
16 fallen back and, of course, we specifically asked, you know,
17 whether or not they had actually witnessed Mr. Reaves -- Mr.
18 Reaves shooting him from the rear.

19 And in our argument that we made I think for a new trial
20 is is that no witness alleged at any point in time that Mr.
21 Reaves ever shot the victim as he laid on the ground, but
22 that was an argument that the -- that the -- or at least it's
23 speculative consideration that -- that conclusion that the
24 State -- the solicitor raised to the jury to consider I think
25 in closing arguments, but there was no evidence presented of

THURMOND BROOKER - DIRECT BY MR. WALLER

1 that.

2 MR. WALLER: All right.

3 BY MR. WALLER:

4 Q: Mr. Brooker, if I could, procedurally, the trial where
5 Mr. Reaves was convicted was his second trial; is that right?
6 The first one ended in a mistrial?

7 A: That's correct.

8 Q: Why did the first one end in a mistrial?

9 A: The first one ended in a mistrial because of I think --
10 and these were the issues that were raised I think on appeal
11 -- is is that on day one, we were given disclosure of
12 evidence I think on the first day of trial and then, of
13 course, on the second day of trial, we were given disclosure
14 of evidence and then, of course, on the third day of trial,
15 we were also given disclosure of evidence that had not been
16 presented to us.

17 At that particular period of time is we made a motion to
18 the Court to dismiss the charges and the indictment and, if
19 my memory serves me correctly, is is that it was based upon a
20 Rule 5 and Brady violation. We also made an argument based
21 upon due process violations and then, of course, is is that
22 in the alternative we asked the Court for a mistrial.

23 They denied our motions to dismiss the indictments and
24 the judge granted a mistrial to give us time to -- to review
25 the additional evidence that was given to us during trial

THURMOND BROOKER - DIRECT BY MR. WALLER

1 and, of course, we also -- right after the mistrial, the
2 judge asked -- asked that -- the trial judge asked that there
3 be an evidentiary -- I won't say an evidentiary hearing
4 because I don't believe it was -- it was on the record, but
5 the trial judge asked that the investigating attorney get his
6 entire file and bring it to us and then, of course, is is
7 that give it to the solicitor so that we can look at it and
8 make sure that everything is closed -- was disclosed. And at
9 that time, it was determined that there was at least 20
10 pieces of additional evidence that had not been given to the
11 prosecutor's office and, therefore, had not been turned over
12 to us.

13 Q: Okay. Self-defense was charged to the jury?

14 A: That's correct.

15 Q: Correct me if I'm wrong, but that was not your argument
16 during your closing argument or your theme of the case. You
17 mostly argued the lack of investigation or the horrible
18 investigation or the things that were missing, lost, not
19 tested by SLED, those items is what your argument was based
20 on. Is that your recollection?

21 A: My recollection is is that -- that -- that our argument
22 -- our argument was -- was -- and, of course, is is that, you
23 know, we almost never make one argument exclusively and rely
24 on one argument exclusively, but we did argue to the -- to
25 the jury in closing that the investigation was botched, that

THURMOND BROOKER - DIRECT BY MR. WALLER

1 there was lost evidence, that there was witnesses who were
2 giving contradictory statements or at least were saying
3 different things from what was in their purported statements,
4 that there was reasonable doubt with respect to -- with
5 respect to whether or not he was guilty.

6 We also -- if my memory serves me correctly -- and I'm
7 going by memory is is that we also -- we may have also made
8 the argument in the alternative that if the jury did find
9 that he was the shooter and found that those witnesses were
10 credible who said that he was the shooter then, of course, is
11 this that -- I can't remember whether or not we then made the
12 argument is is that he could not be convicted of murder
13 because his shot was not the fatal shot.

14 Q: Mr. Brooker, do you have the transcript in front of you
15 there?

16 A: I do.

17 Q: Okay. I'm going to ask you to look to a couple
18 different things.

19 A: Sure.

20 Q: And I'm drawing to a close here. If you could, turn to
21 page 140 of the transcript for me.

22 A: 140?

23 Q: Mr. Brooker, this is the redirect examination of Lt.
24 Davis.

25 A: Okay. I'm at 140.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 Q: Mr. Davis testified -- starting about line 18 I believe
2 is the question and continuing down that Mr. Reaves was
3 arrested or apprehended in Philadelphia, Pennsylvania. Your
4 cross-examination never entered into those -- those factors
5 or where he was -- where he was arrested. What was the
6 strategy behind not objecting to that testimony that was
7 outside the scope of your cross-examination?

8 A: And like I said, is is that I don't know whether or not
9 there is potentially a strategy and I'll tell you is is that
10 -- and I'm -- what we normally do is is that if we think it's
11 something that is important to the case, that if an important
12 statement is being made that -- that -- that we think has an
13 impact on the case, then, of course, we get up and I'll make
14 an objection.

15 And the reason why I do that is is that if you've ever
16 tried cases, almost you can make objections to just about,
17 you know, I would say 50 or 60 percent of what's being said.
18 And so a lot of times is is that we only make objections if
19 we think it's important, and sometimes -- even sometimes if a
20 -- if a prosecutor might lead a witness a little bit, but we
21 think the area in which he's being led on, that if it's not
22 critical to the case, that it's not worth getting up every
23 time and making an objection. We will not make an objection
24 unless we think it has some sort of importance to the case.

25 Q: In this particular situation, the prosecution argued

THURMOND BROOKER - DIRECT BY MR. WALLER

1 flight as evidence of guilt in their closing argument.

2 A: Uh-huh. Okay.

3 Q: Do you still -- do you not consider that important I
4 guess to the case? Not --not important enough to draw an
5 objection? I understand what you're saying.

6 A: Yeah.

7 Q: Okay.

8 A: That flight is evidence of guilt?

9 Q: No, sir. Let me rephrase that question because it was
10 not a very good one.

11 In this case, you said that you can -- it's a strategy
12 decision not to always object because there's so many
13 objections you could make, and I completely understand that.
14 In this situation though, the evidence that came out that was
15 not subject to your cross-examination was evidence that was
16 then later used by the State and argued as evidence of guilt
17 because of his flight to Philadelphia.

18 A: Uh-huh.

19 Q: I guess my question again is was there a strategy behind
20 not objecting to that evidence?

21 A: No. There was -- at the time in which that statement
22 was made, there was no strategy behind objecting other than
23 the fact is that we didn't think it was critical to the case.

24 Q: Okay. If I can get you to turn to page 543?

25 A: Sure. I'm at 543.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 Q: Let me ask this. Did you have a definitive list of a
2 the witnesses that were at the scene? Did you ever know of
3 all the witnesses that were there?

4 A: We never I think knew the names of all the witnesses
5 that was there because my understanding at least from
6 statements that was given from witnesses that was there is
7 that there was -- that there was quite a bit of people there,
8 some of them that could be identified and some of them was
9 just, you know, identified as a crowd of people. There were
10 people there that no one knew who they were.

11 Q: Okay. Looking at -- excuse me -- page 543, beginning on
12 line 11 --

13 A: Yeah.

14 Q: This is Lt. Farmer Blue, who was the lead investigator,
15 who testifies that he -- there was a witness there that he
16 spoke to that he does not want to disclose the name because
17 it's a confidential informant and he refuses to disclose the
18 name of that witness. Were you ever made aware that there
19 was a confidential informant to law enforcement on the scene
20 that was a witness?

21 A: My recollection is is that we -- we were -- that I had
22 no knowledge of a confidential informant or -- or an
23 individual, you know, being classified as a confidential
24 informant prior to -- to -- to Lt. Blue testifying to it.

25 Q: Okay.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 A: That's my recollection.

2 Q: Okay. And this obviously was at the second trial, which
3 was subsequent to the first trial, which ended in a mistrial
4 because of evidence not turned over?

5 A: Uh-huh.

6 Q: Okay.

7 A: That's correct.

8 Q: Did you consider making a motion for a continuance or
9 motion for another mistrial based on the State failing to
10 disclose another potential witness?

11 A: No, I did not, and I -- and I can explain to you why.
12 Again, is that when -- when -- when Officer Blue I think said
13 that he had talked with a confidential informant and when Lt.
14 Blue I think indicated that the information that the -- that
15 the confidential informant -- I think he -- the information
16 that he got from the confidential informant -- I think he
17 said the confidential informant basically said that -- that
18 the people in the house didn't have anything to do with the
19 shooting, and that was the value of the confidential
20 informant. And then, of course, is is that if that was the
21 value of the confidential informant, then, of course, is is
22 that that would have been then useless to us.

23 And also is is that another reason why I didn't want to,
24 unless it was absolutely necessary, is is that, you know, we
25 liked the jury that we had. We thought the trial was going

THURMOND BROOKER - DIRECT BY MR. WALLER

1 well. At least, I thought it was going well. I thought this
2 was probably the best chance that he had. So we kind of
3 liked the jury that we had.

4 Q: Okay. But just a little on the confidential informant.
5 You didn't -- you didn't know anything more about him or her
6 other than what Lt. Blue testified to that day; is that
7 right?

8 A: Yeah. Yeah. My understanding -- nothing more than
9 that. My understanding is is that Officer Blue says that the
10 -- that -- that he was aware that there were people in the
11 house and the people in the house was not involved in the
12 shooting because a confidential informant told him so.

13 Q: Okay.

14 A: And that's all the information we had that -- that -- of
15 this purported confidential informant that he mentioned at
16 trial.

17 Q: You had no knowledge that the confidential informant
18 only had knowledge of what happened inside the house or that
19 they weren't involved in the shooting. Did you know whether
20 or not they were at the house on the outside when the
21 incident took place?

22 A: No. I had no more knowledge about the confidential
23 informant other than what -- what Lt. Blue mentioned here in
24 -- in his testimony.

25 Q: Okay. On page 619 --

THURMOND BROOKER - DIRECT BY MR. WALLER

1 A: Okay.

2 Q: You make a motion to dismiss based on prosecutorial
3 misconduct or State's misconduct I believe you call it, and
4 list various things related to the investigation, the loss of
5 the statements, the non-testing and loss of clothing. You
6 did not include the fact that the State failed to disclose a
7 confidential informant. What was the strategy behind not
8 including that, the nondisclosure of the confidential
9 informant in your motion to dismiss?

10 A: Well, because in the motion to dismiss, one of the
11 things that you have to demonstrate -- that you have to
12 demonstrate prejudice and, of course, is is that at that
13 particular period of time, I had absolutely nothing to
14 suggest that failing to disclose a confidential informant who
15 basically did not -- at least what Officer Blue disclosed,
16 did not offer any information that -- that it appeared to me
17 that would be useful to Mr. Reaves.

18 So I basically argued to the judge that -- that -- that
19 the loss of the evidence, the evidence that we could use, the
20 evidence that we could use in defending him, that that
21 nondisclosure was prejudicial, but I didn't think of
22 including the confidential informant in this is that because
23 at that time I had no evidence that the confidential
24 informant had exculpatory evidence, you know, that would
25 prejudice Mr. Reaves.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 But I thought, you know, losing the chain, losing the
2 victim's -- victim's clothing so we couldn't test them,
3 losing all the other items that was found, the cell phones,
4 all of those items that would allow us to be able to identify
5 more witness -- witnesses or potentially the people that
6 dropped them because all of those items -- and I think there
7 was about six or seven items, if I'm not mistaken, that was
8 -- that was within five feet or six feet of the shooting and,
9 of course, is is that we make the assumption that, hey, these
10 -- these items were dropped by people, you know.

11 I think there was two baseball caps. There was three
12 cell phones. There was a credit card or a debit card. There
13 was a chain. There was a do-rag.

14 We made the -- the conclusion that we're prejudiced
15 because all of those people who dropped those items when the
16 shooting started when they hit the ground, that those items
17 can be used to identify those people and, of course, those
18 people would be potential witnesses to the shooter because if
19 they were in any vicinity of where the items were -- the
20 items were within five feet of the shooting -- they would
21 have been direct witnesses.

22 And so we thought we were prejudiced by that evidence
23 not being available but, of course, is is that with respect
24 to the confidential informant, we had nothing to suggest that
25 the nondisclosure of the confidential informant was

THURMOND BROOKER - DIRECT BY MR. WALLER

1 prejudicial.

2 Q: Would the presence of a confidential informant have been
3 the same thing as that evidence could have potentially been
4 an eyewitness and also identified other eyewitnesses?

5 A: Potentially, if -- potentially, if you're asking us to
6 speculate, I mean, yeah, we could speculate what the
7 confidential informant could've potentially had and says,
8 well, what if. And yeah, you know, that is a possibility,
9 but when you're making the motion before the judge is that
10 the judge -- you have to demonstrate at that particular
11 period of time what the prejudice is and not what the
12 potential is.

13 You know, Judge, potentially this -- you know, this --
14 this guy potentially could -- you know, could solve the whole
15 case, but the judge can't grant -- can grant that based upon
16 a finding of prejudice if we're saying, Judge, we don't know
17 what this guy's got. We're just speculating that maybe --
18 you know, maybe he would've had something, but, of course,
19 with the loss of these items, we could demonstrate to the
20 judge that there was actual prejudice, but not speculation
21 about prejudice.

22 So it never dawned on me to make the argument that, hey,
23 the confidential -- you know, the nondisclosure of the
24 confidential informant is one of those items that suggested
25 prejudice is because we had nothing to suggest that the

THURMOND BROOKER - DIRECT BY MR. WALLER

1 confidential informant had anything of value, you know, that
2 we could demonstrate to the judge right then and there that
3 -- that he was actually prejudiced.

4 THE COURT: I think I got a pretty good idea about the
5 confidential informant. Let's move on.

6 MR. WALLER: Sure.

7 BY MR. WALLER:

8 Q: Mr. Brooker, if I could get you to turn to page 657?

9 A: Sure.

10 Q: I'm closing in to the finish here. The Court sustains
11 an objection and although the solicitor doesn't put his
12 grounds for the objection on the record, the judge sustains
13 the objection based on Rule 403. Was there any strategy
14 behind not requesting the judge to make a ruling on the
15 record of the factors to be considered when sustaining an
16 objection based on Rule 403?

17 A: I apologize. Are we on page 547?

18 Q: 657.

19 A: I apologize. I apologize. Let me get there. Okay.

20 I'm at 657. And is there a particular line that I can --

21 Q: Line 8.

22 A: Okay. Line 8. Yes. I didn't press the issue on that
23 objection, and the reason why I didn't is is that -- and I'll
24 be honest with you. I kind of thought the judge was right.
25 It is is that the officer had -- let me see. Let me see.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 Yeah.

2 Q: The officer had been terminated, I believe.

3 A: Yeah. The officer had -- had been terminated as a
4 result of misconduct that was made.

5 Q: Okay.

6 A: And I guess probably one of the reasons why we didn't
7 make the judge spell it out is is that we were -- I was
8 uniquely familiar with why that officer was terminated and so
9 I knew all the facts that was related to the termination of
10 the officer.

11 Q: Okay.

12 A: And I can tell -- if you want to, I can tell you why he
13 was terminated.

14 Q: I don't think that's necessary for why we're here today.

15 A: Uh-huh.

16 Q: Mr. Brooker, you make a directed verdict motion, both at
17 the close of the State's case and at the close of the defense
18 case. Was there a reason why you did not make a directed
19 verdict -- directed verdict motion specifically related to
20 the assault and battery with intent to kill charge when the
21 State's entire theory was that Mr. Reaves fired the revolver
22 that was the fatal shot? Or I guess, in the alternative, a
23 motion for the State to elect?

24 A: Well, the reason why we did not make a motion for a
25 directed verdict based upon the assault and battery with

THURMOND BROOKER - DIRECT BY MR. WALLER

1 intent to kill is is that -- is that it was underneath my
2 alternative theory that that was the only -- the only viable
3 charge that Mr. Reaves can be convicted of.

4 Is that I was -- it was our position was is is that the
5 improper charge, assuming -- of course, assuming the jury --
6 basically is is that we wanted to -- we wanted to -- at least
7 the jury to be able to consider the alternative that -- that
8 Mr. Reaves was not the -- not the -- the -- the killer, if
9 they reached the conclusion that he was the shooter because,
10 like I said, is is that we made the argument to -- to the
11 jury is is that even if they find that Mr. Reaves was the
12 shooter -- and there was evidence that Mr. Reaves was the
13 shooter, you know, but there was no evidence that Mr. Reaves
14 was the killer.

15 And so we thought that there was evidence there that
16 justified that charge, and I think the prosecutor's office
17 agreed with this and I think that's why -- I think they --
18 they later on I think after the -- I think after the -- after
19 the initial indictment for -- for murder that they
20 subsequently indicted him on that charge because I guess they
21 thought that our theory had some validity. That he may not
22 actually have been the shooter and actually may have been
23 someone that had wounded the victim but had not brought about
24 his death.

25 Q: Okay. If I could get you to turn to -- briefly to page

THURMOND BROOKER - DIRECT BY MR. WALLER

1 739 and look at line 15 for me.

2 A: Yes, sir.

3 Q: The solicitor at the beginning of his closing argument
4 tells the jury that it's their job to determine who killed
5 Mr. Applewhite. I may be splitting hairs here, but was there
6 a strategy behind not objecting to the misstatement of the
7 jury's role as to what -- as to -- during the closing
8 argument? Was it not the jury's role to determine if the
9 State had proven beyond a reasonable doubt that Shawn Reaves
10 had killed Mr. Applewhite?

11 A: Well, the reason why that that was not particularly
12 important to me is is that that is another way of saying that
13 the jury is the fact finder and -- and that would have been
14 kind of parsing hairs.

15 I think during Mr. Deberry's closing, if I can remember,
16 I made a couple of objections during his closings where I
17 thought that he had crossed the line, but when he says here
18 that it's your job to find out who killed Mr. Applewhite, a
19 loose interpretation of that is is that it's your job to
20 determine the facts as to whether or not he was the shooter.
21 So I didn't really see that to be that important.

22 Q: Understood. All right. If I could -- and what you just
23 alluded to, there are two objections that you made. So if I
24 can get you to turn to page 745 first?

25 A: Yes, sir. I'm here.

THURMOND BROOKER - DIRECT BY MR. WALLER

1 Q: I guess beginning at 744 is the improper comments that
2 you objected to. Was there any -- ever any thought to making
3 a motion for a curative instruction or requesting a curative
4 instruction or making a motion for a mistrial based on those
5 comments?

6 A: And I'm trying to remember is at the time that I made
7 the objections whether or not I ever thought about a
8 mistrial. I don't know whether or not at that particular
9 period of time that I made -- that I made -- I thought in my
10 mind after I made the objection, well, you know, this is
11 grounds for a mistrial.

12 And basically is is that, you know, obviously I made the
13 objection -- is is that because he's making kind of a
14 personal appeal to the jury and suggesting is that this is
15 our community and the community in which we live in. So I
16 objected because that was kind of making a personal appeal to
17 the jury. I guess in my mind I didn't think that him making
18 that one statement was justification for a mistrial.

19 And then also, like I previously stated before, I kind
20 of liked the jury that we had. I thought that that jury that
21 we had that day gave him his best shot -- best shot. I kind
22 of liked the way that -- you know, that his defense had went.
23 It didn't went perfectly, but, of course, is I think it went
24 as best as it was going to get.

25 So -- and, of course, is that we made a lot of

THURMOND BROOKER - DIRECT BY MR. WALLER

1 objections on appeal. So if he did lost, then, of course, is
2 is that the record would be protected and that the, you know,
3 appellate counsel would have, you know, kind of a fruitful
4 ground to plow.

5 Q: Okay. If I can get you to turn to 748?

6 A: Sure.

7 Q: The solicitor tells the jury that it's a decision that
8 they've got to live with for the rest of their life, and you
9 justifiably object, which is sustained. The same question as
10 before. Did you consider requesting a curative instruction
11 or making a motion for a mistrial at that point?

12 A: No, I didn't. Pretty much for the same reasons is is
13 that again I thought that he had kind of crossed the line a
14 little bit when he was appealing to -- you know, to -- to --
15 to the passion of the jury, but, of course, is is that I
16 don't think -- like I said, I'm trying to tell you what was
17 exactly in my mind at the time in which I made the objection
18 and this -- this thing -- I think this trial happened in
19 2010.

20 I don't know whether or not at that particular period of
21 time that I was contemplating making a motion for a mistrial.
22 I don't really have a strategy that -- that I was -- that I
23 had worked out and implemented. I was satisfied with it. I
24 didn't consider it to be -- you know, at least something that
25 would justify the -- the -- the dismissal of the -- excuse me

THURMOND BROOKER - DIRECT BY MR. WALLER

1 -- to make a motion for a mistrial.

2 Now, if I think the case was going badly and that it had
3 gone to heck and that I wanted to get out of this, then --
4 then -- then you would then make every -- every little thing
5 that happened, you'd make a motion for a mistrial.

6 Q: Okay.

7 A: But we wasn't -- I wasn't in that place.

8 Q: Okay. Last thing for you. If you could turn to page
9 773 and then continuing on to 774?

10 The -- when the verdict comes back, the judge gives kind
11 of a general all-inclusive polling of the jury on 774,
12 starting on line 14. Did you request any further polling
13 from the jury? And the reason I ask that is the preceding
14 page -- I don't believe the verdict form was filled out and
15 signed by the forelady when -- when the jury came back in.

16 A: No. I didn't ask for further polling of the jury.

17 Q: Was there a strategy behind that?

18 A: No. Not necessarily no strategy, and I don't
19 automatically ask for a polling of the jury. The only time
20 that I really automatically ask for a polling of the jury is
21 when I think it's a situation where the jury has struggled
22 with the decision and I believe that maybe there was some
23 people within the jury room that was on our side that may
24 have been compelled or either had their arms twisted a little
25 bit about -- you know, from the other jurors to reach a

THURMOND BROOKER - DIRECT BY MR. WALLER

1 conclusion and I had doubt, and then I might ask for one, you
2 know.

3 Like, for instance, if there's a situation where if the
4 Court has to give an Allen charge, then that usually tells me
5 is that, hey, there's some people back there that are not
6 convinced. In that particular period of time, if they then
7 come back after an Allen charge and say -- and all guilty, I
8 have that concern and I'll ask the judge.

9 But in this particular situation, I think the jury had
10 -- I think there was three choices: guilty or not guilty on
11 murder, guilty or not guilty on manslaughter, and guilty or
12 not guilty on -- on assault and battery with -- with intent
13 to kill, I believe. And I think they checked the one in
14 which they thought he was guilty -- that they had found him
15 guilty of, but the ones that they found him not guilty, they
16 didn't provide a check.

17 And then when the judge asked them to correct that, they
18 then checked not guilty. And so -- so them checking those
19 boxes not guilty was actually within his benefit and so I
20 didn't object to them.

21 THE COURT: Mr. Waller, do you think it's ineffective
22 not to ask to poll the jury?

23 MR. WALLER: Your Honor, in --

24 THE COURT: Have you ever seen one turned around because
25 of that?

THURMOND BROOKER - DIRECT BY MR. WALLER

1 MR. WALLER: I have not, Your Honor.

2 THE COURT: I practiced law for 20 and been on the bench
3 for 12 and I've never seen one turned around doing that. It
4 just makes everybody mad. But at any rate, go ahead.

5 BY MR. WALLER:

6 Q: The very last thing I have. Did you have an opportunity
7 to view the verdict form before it was presented to the jury?

8 A: And -- and I am -- my -- I want to give you -- I think
9 so. I'm not sure. I don't have a specific recollection. I
10 know that in just about every trial that I have, I know that
11 normally judges have a habit of showing the attorneys the
12 jury form and asking us whether or not we have any objections
13 to it.

14 And so I can't specific -- from my recollection seven or
15 eight years ago says that I did see it. I'm almost certain
16 that I did. That normally happens generally in all of my
17 trials where the judge will show us the verdict form and,
18 usually, we want to see it to make sure that -- you know,
19 that it's not somehow, you know, overly suggestive of -- of
20 one charge versus the other. So I can't give you specific
21 recollection, but I'd be surprised that if the judge had not
22 shown us the verdict form that I would not have asked him to
23 see it.

24 Q: Mr. Reaves was found guilty of the lesser-included
25 offense of the murder?

THURMOND BROOKER - DIRECT BY MR. WALLER

1 A: That's correct.

2 Q: Is that right? Not guilty of the murder and then not
3 guilty of the assault and battery with intent to kill?

4 A: Yes.

5 Q: Okay.

6 MR. WALLER: Your Honor, I have no further questions. I
7 would -- I would move to leave the record open to supplement
8 with a copy of --

9 THE COURT: What is it that you maintain that you can
10 show from seeing the verdict form? It might be the State
11 will stipulate to that.

12 MR. WALLER: Your Honor, the verdict form was listed,
13 number one, murder, number two, assault and battery with
14 intent to kill, and number three, voluntary manslaughter, and
15 it was if you find him not guilty of number one, proceed to
16 number two. If you find him not guilty of number two,
17 proceed to number three.

18 It is -- it's not I guess in order. It doesn't seem to
19 show -- it doesn't seem to indicate that voluntary
20 manslaughter is a lesser-included offense of murder because
21 it's listed down there at the bottom. It would make sense if
22 it was listed directly under murder and if they found him not
23 guilty of the murder to proceed to number two, but that's not
24 the way that the transcript reads that it was presented to
25 the jury.

1 THE COURT: I've never -- I've never done it any way
2 other than what you're talking about, but if you listen to
3 the charge and -- and I haven't looked at the charge that was
4 presented in this case, but generally they say they're
5 separate and distinct offenses. You know, really -- how
6 would it really make a difference if they heard the charge on
7 murder and they heard the charge on voluntary manslaughter
8 and they heard the charge on assault and battery with intent
9 to kill? I understand what you're saying, particularly if
10 they would have given a conflicting verdict form. That
11 would've been a real problem.

12 MR. WALLER: Your Honor, the way it reads in the
13 transcript, the way it's read out when the clerk of court is
14 announcing the verdict, it says murder, count number one, we,
15 the jury, by unanimous consent find the defendant, Shawn
16 Reaves, not guilty of murder. Proceed to number two.

17 Number two, assault and battery with intent to kill.
18 And then it says after that proceed to number three.

19 So there is no indication on the verdict form of if you
20 find the defendant not guilty of murder, then you may proceed
21 to number three in this case.

22 THE COURT: All right. All right. Well, now, will you
23 stipulate that that's what the verdict form -- the way the
24 verdict form was done?

25 MS. MCCALLISTER: Well, I don't know if I can stipulate

1 that's the way the verdict form was done. I agree -- I mean
2 that's the way the clerk reads it in the transcript. He's
3 not misquoting the transcript, but I haven't seen the verdict
4 form. So I don't know.

5 THE COURT: All right. Well --

6 MR. WALLER: Your Honor, my motion was just to leave it
7 open just to supplement with that one page so Your Honor can
8 consider that.

9 THE COURT: All right. We'll do that. And I'll tell
10 you what I'm going to do. Given the numerous grounds that
11 have been alleged, I'm going to ask that both parties draft a
12 proposed order and that it be done within 20 days of today's
13 date and -- and you need to get that verdict form. If you're
14 going to submit that as a part of the record, you need to --
15 you need to get that. And you can actually attach that to
16 the order and say that I said that we're going to supplement
17 it. Rather than having to give it to the clerk, you can just
18 attach it to the order.

19 MR. WALLER: Thank you, Your Honor.

20 THE COURT: All right. Anything further from the State?

21 MS. MCCALLISTER: Your Honor, may I have just a minute?
22 I'm trying to decide if I have a couple questions to ask.
23 I'm sorry.

24 THE COURT: Okay.

25 MS. MCCALLISTER: Your Honor, just very briefly.

THURMOND BROOKER - CROSS BY MS. MCCALLISTER

1 THE COURT: Sure. Take your time.

2 CROSS-EXAMINATION

3 BY MS. MCCALLISTER:

4 Q: On the issue of the -- the Stand Your Ground and Defense
5 of Persons and Property Act, you've gone over that in detail,
6 but I just want to be clear for the record. Was there any
7 evidence that the victim had a weapon at the time of the
8 shooting?

9 A: There was no evidence that the victim had -- had a
10 weapon at the time of the -- at the time of the shooting. No
11 witnesses testified to that. So -- so there was no evidence
12 that we were aware of.

13 Q: Okay. And you -- or Mr. Waller asked you about this
14 issue of testimony that Mr. Reaves fled to Philadelphia. Do
15 you recall if -- and Mr. Waller's objection is that that was
16 asked on redirect and was outside the scope of your cross-
17 examination. Do you recall if more than one witness
18 testified to that information?

19 A: I -- I am -- I'm not certain whether or not more witness
20 -- whether or not more than one witness may have testified to
21 that. It's possible, but I can't specifically recollect from
22 my memory.

23 Q: Okay.

24 THE COURT: Let me ask you this. On a post-conviction
25 relief, is the trial transcript automatically a part of the

1 record?

2 MS. MCCALLISTER: Yes, Your Honor.

3 THE COURT: Well, that will speak for itself. It
4 doesn't really make any difference whether he remembers it or
5 not.

6 MS. MCCALLISTER: Yes, Your Honor. And -- well, that
7 may eliminate some of my other questions.

8 THE COURT: Take your time. I was just asking. To be
9 quite honest with you, I didn't recall whether it
10 automatically was or not, but if it is, you're protected on
11 those type matters.

12 MS. MCCALLISTER: Okay. Thank you. Your Honor, I think
13 anything else that I have to say would just be argument at
14 this point.

15 THE COURT: Okay.

16 MS. MCCALLISTER: Thank you.

17 THE COURT: Well, do you want to argue some?

18 MS. MCCALLISTER: Could I just give Your Honor maybe
19 some cites in the transcript that I think are responsive to
20 some of the allegations that Mr. Waller has raised?

21 THE COURT: You can.

22 MS. MCCALLISTER: Okay. In terms of the -- the issue
23 that I just was asking about, the issue of the flight to
24 Philadelphia, Your Honor, I believe the transcript reflects
25 on page 461 that other witnesses were asked about that on

1 direct examination and testified to that. So that
2 information --

3 THE COURT: So sort of cumulative and --

4 MS. MCCALLISTER: Exactly.

5 THE COURT: -- would not warrant an objection?

6 MS. MCCALLISTER: Yes. Or was at least the State had
7 other witnesses available to testify to that in their case in
8 chief, Your Honor.

9 And then I believe it's page 296 and 297 and also page
10 582. Your Honor, on this issue of whether there was evidence
11 that the shooting happened from the front and the fatal
12 bullet came from the back, Your Honor, I do think -- I think
13 the suggestion was made that maybe the State made the
14 argument, but there was not actually evidence presented as to
15 whether the bullet -- you know, whether the victim was in a
16 position for Mr. Reaves's bullet to enter from his back.

17 I think there were several witnesses who testified that
18 he -- that the victim fell forward at the time of the
19 shooting and -- and ended up laying on his stomach in the
20 yard with his -- obviously his back kind of facing up towards
21 everybody else. So I do think that there was -- that the
22 State presented evidence to that and that there was
23 conflicting evidence as to whether, you know, that was
24 possible, whether -- whether Mr. Reaves was the fatal shooter
25 or whether he was the shot that wounded him, and I think that

1 that information goes to some of the other allegations about
2 whether there were appropriate directed verdict motions made
3 and the ABWIK charge versus the murder and the voluntary
4 manslaughter.

5 THE COURT: Okay.

6 MS. MCCALLISTER: And as to the issue with the verdict
7 form, Your Honor, on page 766, the judge, as part of his jury
8 instructions, tells the jury, you know, not to read anything
9 into the order that the charges are listed on the form. That
10 it's their decision to -- you know, to decide which --

11 THE COURT: I think he's talking about guilty first or
12 not guilty first is probably what he's talking about there.

13 MS. MCCALLISTER: He may, Your Honor, but nonetheless,
14 the jury was advised that the way the form looks should not
15 influence your decision. So, you know, I think the jury is
16 presumed to follow the judge's instructions on that issue,
17 and that is on page 766.

18 THE COURT: Instructions not to get confused? Well,
19 apparently, they did not. At least the verdict was in proper
20 form.

21 MS. MCCALLISTER: Yes. And, Your Honor, the last thing
22 --

23 THE COURT: I mean it was not -- it was not
24 inconsistent.

25 MS. MCCALLISTER: It was not inconsistent.

1 THE COURT: Right.

2 MS. MCCALLISTER: Your Honor, the last thing I would
3 raise -- I think there were a couple of issues contained in
4 the original application, as well as in some of these
5 amendments, that no evidence was presented on. Specifically,
6 I think in the original application there were some issues
7 with appellate counsel that were raised. And so we would ask
8 that those -- those allegations at least be denied and
9 dismissed since no evidence was presented.

10 THE COURT: Anything that -- and, of course, I'm going
11 to ask that you draft a proposed order and you can address
12 that --

13 MS. MCCALLISTER: Okay.

14 THE COURT: -- accordingly.

15 And Ms. McCallister has had an opportunity to argue and,
16 of course, in view of the fact that we're having competing
17 orders being sent in, I don't think that it's absolutely
18 necessary, but if you want to argue some, Mr. Waller, I'll be
19 glad to hear from you.

20 MR. WALLER: Your Honor, I don't believe any argument is
21 necessary. I'll have 20 days to --

22 THE COURT: To argue and to --

23 MR. WALLER: -- to get all the arguments together, Your
24 Honor.

25 THE COURT: Argue until the spirit moves you otherwise,

1 I reckon. All right. Can y'all think of anything else we
2 need to do before we adjourn with regard to this case?

3 MR. WALLER: Not that I'm aware of, Your Honor.

4 MS. MCCALLISTER: No, Your Honor.

5 THE COURT: All right. Good luck to you, Mr. Reaves.

6 Ms. McCallister?

7 MS. MCCALLISTER: Yes, sir?

8 THE COURT: I'm going to take this transcript because
9 I'm going to --

10 MS. MCCALLISTER: Okay.

11 THE COURT: -- have to review it. However, the other
12 ones --

13 MS. MCCALLISTER: I can take some of those back.

14 THE COURT: The other ones you can -- I'm sure y'all
15 recycle those. Killing trees.

16 MS. MCCALLISTER: Thank you.

17 THE COURT: All right.

18 (WHEREUPON, the proceedings ended at 4:25 p.m.)

19

20 --- END REQUESTED TRANSCRIPT ---

21

22

23

24

25

STATE OF SOUTH CAROLINA
COUNTY OF MARION

Shawn Reaves, #343643,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
OF THE TWELFTH JUDICIAL CIRCUIT

Case No.: 2016-CP-33-0071

ORDER OF DISMISSAL

FILED
2018 MAR -8 PM 2:07
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed February 8, 2016. Respondent made its Return on February 2, 2017. An evidentiary hearing into the matter was convened on November 15, 2017, at the Florence County Courthouse. Jonathan Waller, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Thurmond Brooker, Esquire, testified on behalf of the State. After hearing testimony and the arguments of counsel, the Court took this matter under advisement and requested proposed orders from both Applicant and Respondent. This Court now denies and dismisses the application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marion County Clerk of Court. Applicant was indicted at the August 2010 term of the Marion County Grand Jury for one count each of murder and assault and battery with intent to kill (ABWIK) (2010-GS-33-0375). Applicant was represented by Thurmond Brooker, Esquire. On August 24, 2010, a jury trial was commenced in the Marion County Court of General Sessions with the Honorable William H. Seals, Jr., presiding.

However, that trial ended in a mistrial. On November 8, 2010, Applicant again proceeded to trial before the Honorable William H. Seals, Jr., and a jury. Applicant was thereafter convicted of the lesser-included offense of voluntary manslaughter and acquitted of murder and ABWIK. Judge Seals sentenced Applicant to a term of imprisonment of twenty-five years.

Applicant filed a timely Notice of Appeal. An appeal was perfected by LaNelle Cantey DuRant, Esquire, of the South Carolina Commission on Indigent Defense - Appellate Defense Division. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Reaves, Op. No. 2014-UP-057 (S.C. Ct. App. filed February 12, 2014). Applicant's Petition for Rehearing was denied in an Order filed March 21, 2014.

Applicant then petitioned the Supreme Court of South Carolina for a Writ of Certiorari to the Court of Appeals on June 23, 2014. The Supreme Court of South Carolina granted the Petition in an order filed August 22, 2014, and affirmed Applicant's conviction on September 2, 2015. State v. Reaves, Op. No. 27569 (S.C. Sup. Ct. filed September 2, 2015). The Remittitur was returned on September 18, 2015.

On November 18, 2015, Applicant filed a petition for Writ of Certiorari in the Supreme Court of the United States. The Supreme Court of the United States denied the petition on January 11, 2016.

SUMMARY OF FACTS ADDUCED AT TRIAL

Around 10:00 p.m. on the evening of May 13, 2007, officers with the Marion Police Department received a report of a fight in progress and began responding to East Mullins Street in Marion, South Carolina. Tr. pp. 103, 105-06, 108-09, 111-12, 139, 467. A few minutes later, Lieutenant Walker Davis, Sr., of the Marion Police Department was notified shots were fired at the location of the fight, and he hurried to the scene. Tr. pp. 103-04. Upon arriving, he observed

a large crowd of people and a white car parked on the side of the road with a man slumped over inside on the back passenger seat. Tr. pp. 106, 117-18. Lieutenant Davis discovered the man in the vehicle, Ramel Keshawn Applewhite (Victim), had been shot, so he requested emergency medical assistance and secured the scene. Tr. pp. 106-07, 368. Shortly thereafter, paramedics arrived and transported Victim to a hospital. Tr. p. 107. However, Victim died as a result of the shooting. Tr. pp. 380, 384.

Following the shooting, additional officers arrived at the scene, including Lieutenant Farmer Blue of the Marion Police Department. Tr. pp. 453-54. Lieutenant Blue began investigating the incident and received information that potential suspects might have entered a nearby residence on East Mullins Street. Tr. p. 454. Lieutenant Blue obtained a search warrant, and officers entered the residence. Tr. pp. 456-57. When they did so, they found several people hiding inside of the home, including Joemilla Wilson-Dozier, Brandon Deshawn Bellamy, and Rodney McElveen. Tr. pp. 457-58. Thereafter, Detective Larry Woods of the Marion County Sheriff's Office performed gunshot residue testing on each of the individuals, which were all later determined to be negative. Tr. pp. 223-24, 228-31, 458. Meanwhile, Lieutenant Davis spoke with several witnesses at the scene, including Travis Lane and Jackie McGill, Jr., to find out what happened during the incident. Tr. pp. 116-17. Lieutenant Davis provided McGill with paper, asked him to write out a statement, and instructed him to return the statement to him when it was completed. Tr. p. 124. However, McGill never returned a completed statement to the officer. Tr. pp. 124-25.

McGill testified about the shooting, stating he met up with Victim, who was in town for Mother's Day, on the day of the incident and rode to Bellamy's house on East Mullins Street with Victim, Lane, and Victim's cousin, Karen Graves. Tr. pp. 274-77, 281. McGill indicated

ten people were congregating in the yard of the residence when they arrived and Victim asked to speak with Wilson-Dozier, who was Victim's girlfriend. Tr. pp. 282-83. McGill testified Victim then walked to the street with Wilson-Dozier, who was initially reluctant to come outside of the residence. Tr. pp. 283-84. After they did so, McGill stated Victim and Wilson-Dozier argued and began physically fighting before Victim threw Wilson-Dozier to the ground. Tr. pp. 284-85. Eventually, McGill indicated he was able to separate Victim and Wilson-Dozier and return Victim to the car. Tr. p. 286. However, he said Wilson-Dozier came over to Victim, spat on him, and then walked to the residence's porch. Tr. pp. 287-88. McGill testified Victim followed her, he saw Applicant, and then he heard gunshots. Tr. pp. 290, 293, 295-96. After the gunshots, McGill stated Victim fell to the ground, he heard clicking sounds that sounded like a gun was out of bullets, and Applicant took off running.¹ Tr. pp. 296-97, 302. McGill testified he then tried to move Victim to the car, law enforcement officers arrived on the scene, and he provided a statement to Lieutenant Davis. Tr. pp. 301-02, 308-09, 321. He stated he testified to everything contained in the statement and also claimed Lane and Graves provided statements that night as well. Tr. pp. 308-09, 321-22. However, he denied the statement introduced at trial with his and Lane's names on it was his statement. Tr. pp. 322-24. Significantly, McGill repeatedly identified Applicant as the shooter and indicated he was certain Applicant was the person he saw shoot Victim.² Tr. pp. 333, 363.

¹ During trial, Dan Defreese, the SLED firearms expert who examined the bullets recovered from Victim's body, testified a revolver would make a clicking noise if the trigger was pulled after its ammunition was exhausted but a semi-automatic pistol ordinarily would not. Tr. pp. 405-06.

² In addition to McGill's testimony identifying Reaves as the shooter, Tyler Connor, who was incarcerated in the Department of Juvenile Justice in May of 2007, testified he was placed in a cell with Applicant after the incident and spoke with him about why he was incarcerated. Tr. pp. 436-39. Connor claimed Applicant stated he was incarcerated because he shot someone with a revolver, his friend shot the person with a nine-millimeter gun, and he left town. Tr. pp. 440-41.

Latoya Davis, who lived near the scene of the shooting, also testified about the incident during trial. Tr. pp. 560-61. On the night of the shooting, Davis said she was with Wilson-Dozier at the residence on East Mullins Street but went home after Wilson-Dozier and Victim began fighting. Tr. pp. 558-61. She indicated she did not see the shooting but heard gunshots and then saw Applicant, whom she knew as "Mister," get into a vehicle and drive away. Tr. pp. 561-62. She further testified she spoke with Lieutenant Blue on the day after the shooting and provided him with a written statement. Tr. pp. 569, 574.

Furthermore, Wilson-Dozier testified about her altercation with Victim and the subsequent shooting. Tr. pp. 579-80. She stated she was in a relationship with Victim in May of 2007 but had broken up with him a month earlier. Tr. pp. 576-77, 579. Wilson-Dozier indicated she went to visit Bellamy, with whom she was involved in an intimate relationship at the time, at East Mullins Street on the day of the incident and Victim came over several times while she was there. Tr. pp. 576-79, 591-92. She testified, when Victim came over the second time, she attempted to avoid him but eventually went outside to speak with him. Tr. pp. 578-79. She stated when she did so, they argued and began physically fighting in the yard and street where approximately ten people had gathered. Tr. pp. 579-80. She stated after the fight ended, one of Victim's friends tried to get him to leave, and she walked towards the residence. Tr. pp. 581-82. Wilson-Dozier testified as she was walking up the steps to the residence, Victim pushed Applicant, whom she knew as "Mister," and grabbed Applicant's chains, at which point Applicant pulled out a silver revolver and began firing. Tr. pp. 582-83. She indicated she then hid behind a car and checked on Victim before going into the residence and remaining there. Tr. pp. 583-85. Wilson-Dozier further testified after the incident she selected Applicant from a

Connor stated Applicant said the incident occurred after he argued with someone who purchased drugs from him. Tr. pp. 447-49.

photographic line-up as the shooter, wrote a statement for Captain Gray, and had her injuries photographed by law enforcement officers. Tr. pp. 586-87, 611, 617.

Around 1:30 a.m. on the morning following the shooting, Agent Ken Kensey, a special agent with the SLED crime-scene unit, arrived at the location of the shooting to aid in processing the crime scene. Tr. pp. 142, 144. While processing the crime scene, Agent Kensey collected various pieces of evidence, including a black hat, a white hat, three gold chains, three cell phones, a mobile-phone headset, a pair of black slippers, and a credit card with the name "William A. Bellamy" on it, in the vicinity of where the shooting occurred. Tr. pp. 149, 154-56, 176, 180-81. He then provided the gold chains and cell phones to the Marion Police Department upon request and transported the other gathered evidence, along with a black t-shirt, a blue jean jacket, and the three gunshot residue kits collected by Detective Woods to the SLED crime lab for processing and analysis. Tr. pp. 149, 157-66.

Later that day, Dr. Cynthia Schandl, a forensic pathologist at the Medical University of South Carolina and an expert in forensics, performed an autopsy on Victim. Tr. pp. 365, 368. While conducting the autopsy, Dr. Schandl located five different gunshot wounds to Victim's body. Tr. p. 377. Three of the wounds – one to the right side of Victim's back, one to Victim's stomach, and one to Victim's left side – resulted from bullets that entered and exited Victim's body. Tr. pp. 377-78. The fourth wound occurred when a bullet entered and remained in Victim's shoulder. Tr. p. 378. The final gunshot wound occurred when a bullet entered Victim's upper back, struck his lung, aorta, and liver, and stopped in his colon. Tr. pp. 378-79. Both of the bullets were recovered from Victim's body during the autopsy, and Dr. Schandl concluded the bullet removed from Victim's colon led to his death. Tr. pp. 382, 386-87.

Subsequently, Dan Defreese, a SLED firearms experts, examined the bullets recovered during the Victim's autopsy. Tr. p. 395-97, 399. He concluded the bullet recovered from Victim's colon was consistent with a .38-caliber or .357-caliber cartridge and was most likely fired from a revolver. Tr. pp. 400-02. He further determined the bullet recovered from Victim's shoulder was consistent with a nine-millimeter cartridge and was most likely fired from a semi-automatic pistol. Tr. pp. 402-03. Based on his examination, he concluded the two bullets were not fired by the same gun. Tr. p. 403.

As the investigation into the incident progressed, Lieutenant Blue discovered the primary suspect in the shooting was known as "Mister," which was Applicant's alias. Tr. p. 460. Lieutenant Blue learned Applicant was observed at the scene of the shooting with a weapon and was seen fleeing from the area after the incident.³ Tr. p. 461. As a result, officers obtained warrants for Applicant's arrest, and he was apprehended in Philadelphia, Pennsylvania, several days after the shooting. Tr. pp. 140-41. Following his arrest, Applicant was transported back to South Carolina and indicted for murder and assault and battery with intent to kill. Tr. p. 6, 140.

Additionally, Lieutenant Blue testified about his involvement in the investigation into the shooting. (R. pp. 432-433). He indicated he was assigned as the lead investigator in the case two days after the shooting, obtained arrest warrants for Reaves as a result of his investigation, and was still looking for the second shooter involved in the incident. Tr. pp. 454-55, 460-62, -464. Regarding the evidence collected during the investigation, he noted his department requested the return of several items without any analysis being conducted because the owners of those items had already been identified through other means. Tr. pp. 466, 498-99, 505. He

³ During the investigation, Lieutenant Blue prepared a photographic line-up containing Applicant's photograph and showed it to McGill and Lane. Tr. pp. 522-23, 530-31. However, they did not identify Applicant as the shooter at that time and, instead, selected another photograph from the line-up. Tr. pp. 524, 530-31.

further indicated he did not know what happened to Victim's clothing after the shooting and believed another officer picked the clothing up from the hospital, but stated he had no idea where the clothing was located at that time.⁴ Tr. pp. 511-13. Additionally, Lieutenant Blue testified the credit card recovered at the scene of the shooting was released to Bellamy after he identified it as his brother's card, and he admitted he did not know where the gold chains discovered at the scene were located. Tr. pp. 498-99, 509-11. Regarding McGill's statement, Lieutenant Blue indicated the statement introduced during trial with McGill and Lane's names on it was the statement McGill provided to him after the shooting. Tr. pp. 534-35. During his testimony, Lieutenant Blue also stated he would have done many things differently if he had been in charge of the investigation from the outset, and he indicated the process of collecting evidence could have been handled in a better fashion. Tr. pp. 455-56.

At the conclusion of the State's case, Counsel moved for the charges against Applicant to be dismissed "based on the State's misconduct in connection with [Applicant's] case." Tr. p. 619. In support of the motion, Counsel argued the testimony established several witnesses had provided written statements on the night of the shooting, including McGill, Lane, Graves, Wilson-Dozier, and Davis, but those statements were not provided to him, which he maintained impacted his ability to cross-examine those witnesses. Tr. pp. 619-21. Counsel further asserted Applicant was prejudiced by the "substantial and severe negligent handling" of his case. Tr. pp. 622-23. In response, the solicitor indicated Applicant was provided with everything in the State's possession and was allowed to review the investigator's entire file. Tr. p. 623. However, he conceded Applicant was likely entitled to a charge on spoliation of evidence. Tr. p. 623. After

⁴ When asked whether the clothes of a victim could "sometimes" have evidentiary value in connection to a case, Lieutenant Blue responded: "It could. All evidence could be valuable." Tr. p. 512.

considering the arguments of counsel, the trial judge denied the motion, finding the alleged loss of the evidence impacted the credibility of the State's case but did not warrant dismissal. Tr. pp. 623-24.

Following the trial judge's ruling on Counsel's motion to dismiss the case, Counsel renewed the speedy trial motion he made prior to the beginning of trial, arguing the delay in bringing the case to trial resulted in substantial prejudice to Applicant due to the loss of various pieces of evidence. Tr. pp. 624-26. The solicitor pointed out Applicant did not seek a speedy trial until the preceding term of court, and the case was immediately scheduled for trial. Tr. pp. 626-27. Once again, the trial judge denied the speedy trial motion. Tr. pp. 627.

After the trial judge denied his motions, Counsel called several witnesses in Applicant's defense, including Captain Jim Gray, who was the chief investigator for the Marion Police Department in May of 2007. Tr. p. 667. Captain Gray stated he did not recall if he took a statement from Wilson-Dozier on the night of the shooting and indicated he did not take any statements from anyone at the scene. Tr. pp. 677, 679. However, he confirmed he photographed Wilson-Dozier on the night of the incident and placed the photographs in the case file. Tr. pp. 677-78. Captain Gray further asserted he did not receive Victim's clothing during the course of the investigation and did not know where it might be located. 679-80.

At the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury. Tr. pp. 708-09. During the defense's closing, Counsel repeatedly called the jury's attention to numerous mistakes he asserted were made during the investigation into the shooting and noted numerous items of evidence collected at the scene of the crime were never tested or analyzed. Tr. pp. 716-18, 729-30. Thereafter, the trial judge instructed the jury on the applicable law and explained: "When evidence is lost or destroyed by a party you may infer that

the evidence which was lost or destroyed by that party would have been adverse to that party." Tr. pp. 750, 753. The jury convicted Applicant of the lesser-included offense of voluntary manslaughter and acquitted him of the charges of murder and ABWIK. Tr. p. 774. The trial judge then sentenced Reaves to a twenty-five year term of imprisonment, and Reaves appealed his conviction. Tr. p. 785.

ALLEGATIONS

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

1. Ineffective Assistance of Trial Counsel
 - a. "A failure to investigate facts of the case."
 - b. "Labored under a conflicting interests." (sic)
 - c. "Trial judge involvement prior to case investigation"
 - d. "Illegal search warrant"
2. Ineffective Assistance of Appellate Counsel
3. 6th and 14th Amendment Due Process Violations
 - a. "Right to a speedy trial"
 - b. "Right to due process"
 - i. "Lack of due process based on misconduct of the state in producing evidence."

On November 10, 2017, counsel for Applicant provided Respondent with an updated and amended list of allegations via email, which was also presented to this Court at the start of the evidentiary hearing. The amendment to the application includes the following allegations:

1. Failure to object to redirect examination outside of the scope of cross-examination;
2. Failure to object to improper question about whether witness believed defendant;
3. Failure to object or make motion based on undisclosed non-testifying witness who was a confidential informant;

4. Failure to argue the non-disclosure of the confidential informant witness during Counsel's motion to dismiss;
5. Failure to request trial judge rule specifically on the factors required to sustain an objection based on Rule 403;
6. Failure to move for direct verdict as to the ABWIK charge;
7. Failure to properly object to jury charge of voluntary manslaughter;
8. Failure to object to misstatement of law regarding jury's role;
9. Failure to request curative instruction or move for mistrial following sustained objection for improper comments made by solicitor;
10. Failure to poll the jury in light of the verdict form not being filled out and signed;
11. Failure to object to the verdict form;
12. Failure to file a motion under the Protection of Persons and Property Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, an 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.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An 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, an applicant must prove that counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland, 466 U.S. 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

A. Ineffective Assistance of Trial Counsel

Regarding Applicant’s claims of ineffective assistance of counsel, this Court finds Applicant has failed to meet his burden of proof. “Counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” Strickland, 466 U.S. at 690. There is a strong presumption that trial counsel’s decisions are based on tactical strategy rather than neglect, and “[t]hat presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial

record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when 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)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

1. Failure to investigate and failure to formulate defense based on the Protection of Persons and Property Act

Applicant testified he was arrested in Pennsylvania and brought back to South Carolina to face these charges. Applicant testified he had an attorney prior to Counsel taking over the case, which was approximately one year after Applicant's arrest. Applicant further testified his first trial ended in a mistrial, and then he was convicted of voluntary manslaughter after the second trial. Applicant testified he did not realize he could be convicted of anything other than murder because he and Counsel never discussed lesser-included offenses, and Applicant did not understand how there could be multiple charges for the same incident. Applicant testified he might have pleaded guilty if he had known voluntary manslaughter was a possibility.

Applicant also testified he and Counsel did not discuss any defenses, including a "stand your ground" defense under the Protection of Persons and Property Act. Applicant testified he

was not aware that defense could potentially offer him immunity from prosecution. Applicant also stated he and Counsel did not discuss any possible defenses or challenges to the search warrant after the first trial. Applicant testified he did not know he could have made a motion to have the trial judge recused because Counsel never mentioned it.⁵ Applicant further testified he and Counsel did not discuss his constitutional rights at trial nor did they review any discovery. Applicant stated Counsel told him this was a fact-driven case with no concrete evidence against Applicant and other potential suspects. Applicant testified he and Counsel did not discuss issues with the collection and processing of evidence, nor was Applicant aware of the missing witness statements until the witnesses testified at trial.

Counsel testified he was retained by Applicant's mother approximately one year after Applicant had been arrested. Counsel testified Applicant was sixteen-years old at the time of the incident and seventeen when Counsel took over his representation. Counsel explained the shooting arose out of an incident involving Victim and his ex-girlfriend, who got into a physical altercation at a house party in Marion, and Victim was shot in the yard and died.

Counsel testified he always discusses discovery with clients, and he took copies to the detention center to review it with Applicant, including witness statements. Counsel also testified he conducted further investigation on his own, such as visiting the incident location, interviewing the occupants of the house, including Victim's ex-girlfriend, and a witness who lived in the house across the street. Counsel agreed the case was "fact-driven" in that Applicant was charged because multiple witnesses gave statements naming him as the shooter.

Counsel further testified there were significant issues with the State's investigation of the case, particularly with the collection and retention of evidence. Counsel stated multiple items

⁵ Judge Seals, who presided at both trials, signed a search warrant in this case in his capacity as a magistrate judge prior to his election to the circuit court in 2009.

which were listed as having been collected from the scene could not be located, including a credit card with another person's name on it and Victim's clothing. Additionally, witnesses testified the statements introduced by the State were incorrect or did not match the statement they had given. Counsel further testified there was an issue with the photo line-up in that one witness did not identify Applicant as the shooter, although several witnesses testified at trial and identified him. Counsel noted all of the evidence collection issues were addressed on direct appeal.

Regarding the issue of self-defense and the Defense of Persons and Property Act, Counsel explained the testimony at trial was that Victim was going up the stairs to the house after his ex-girlfriend, and it was an issue at trial as to exactly where Victim was standing when he was shot. Counsel testified this was an important fact in determining whether Applicant had an argument under the Defense of Persons and Property Act because Applicant needed to be acting in defense of a "dwelling," and it was not clear that the yard would be covered under that definition. Counsel further testified there was some evidence Victim had pushed Applicant and grabbed or ripped some gold chains from Applicant's neck. Counsel also stated Victim was a much larger man than Applicant. However, Counsel also testified there was no evidence Victim had a weapon or that he was threatening Applicant with great bodily harm.

Further, Counsel testified the Act would not apply if Applicant was engaged in an unlawful act, and Applicant was carrying an unlicensed firearm at the time. Counsel testified, in his opinion, given the witness statements saying the shooting took place in the yard and Applicant's possession of an unlicensed firearm, the situation did not fall within the scope of the Act. Counsel testified he had dealt with this issue before, and he knew at least one judge's opinion was that the Act was simply a codification of self-defense, and the defendant needed to

have clean hands in order to invoke it. Counsel explained there was conflicting testimony as to who started the fight, where exactly Victim was standing, and whether Victim was threatening Applicant, and in that situation, a judge usually cannot make a determination on whether immunity would apply prior to trial. Finally, Counsel testified he made the decision not to file a motion for immunity and instead ask for a self-defense instruction at trial because he did not see a reasonable possibility of success on the motion.

This Court finds Counsel provided effective assistance in this case. Specifically, this Court finds Counsel met with Applicant and reviewed discovery with him. Further, this Court finds credible Counsel's testimony he discussed with Applicant the myriad issues with law enforcement's investigation and the collection and retention of evidence. This Court also finds Counsel conducted a reasonable investigation into the facts and circumstances of the case, including independent interviews of various witnesses, and Counsel fully explored the issues of self-defense and immunity under the Protection of Persons and Property Act.

"[S]trategic choices made after a thorough examination of law and facts relevant to plausible options are virtually unchallengeable. . . ." *Id.* at 690. This Court finds Counsel's reading of the Protection of Persons and Property Act, and his conclusion Applicant could not avail himself of the presumptions of Section 16-11-440(A) because he was engaged in unlawful activity by possessing an unlicensed firearm, and because there was conflicting evidence as to whether Victim was in the yard or in the house at the time of the shooting, to be reasonable. *See* S.C. Code Ann. § 16-11-430(1) ("Dwelling" means a building or conveyance of any kind, including an attached porch. . . which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night."); S.C. Code Ann. § 16-11-440(B) (instructing the presumptions established by Section 16-11-440(A) do not apply if the person "who uses deadly

force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity”); see generally In re Tracy B., 391 S.C. 51, 71, 704 S.E.2d 71, 81 (Ct. App. 2010) (“Although [unlawful possession of a weapon] alone does not automatically bar a self-defense charge, it is evidence of an unlawful activity which can preclude the assertion of self-defense.”). Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in the investigation of the facts of Applicant’s case or in his preparation of Applicant’s defense.

Further, the Court finds Applicant has not met his burden of proving he was prejudiced by Counsel’s conduct. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691, 104. To establish prejudice, Applicant is required to show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. In this instance, self-defense was presented to the jury, and the trial court gave a thorough and appropriate jury instruction on that issue, which Applicant has not challenged. Tr. pp. 760-63.

2. Failure to object to questioning beyond the scope of cross-examination; failure to move for a mistrial on the basis of State’s nondisclosure of confidential informant; failure to properly preserve Rule 403 objection; failure to effectively argue motion for directed verdict; failure to properly object to jury charge on lesser-included offense of voluntary manslaughter; failure to object to improper comments during solicitor’s closing argument

Counsel also testified regarding his overall trial strategy. Counsel stated his strategy was not to concede anything and force the State to put up evidence showing Applicant had a gun and

actually fired it. Counsel further explained if the State did put up such evidence, Applicant's argument was that the unidentified second shooter fired the fatal shot, since there was some evidence Applicant and Victim were face-to-face at the time, and the testimony at trial was that the fatal bullet entered Victim from the back. Counsel stated there was no evidence of conspiracy because the second shooter has never been identified, so the jury would be forced to choose whether Applicant caused Victim's death or merely harm. Counsel testified the trial court gave a self-defense instruction, but he chose to focus his argument on the problems with the investigation and evidence.

Regarding the allegation Counsel failed to object to a question regarding Applicant's arrest which was outside the scope of cross-examination, Counsel testified he does not object if a statement is not important to the case. In this instance, Counsel testified evidence of Applicant's flight out of state was not important. In addition, a review of the transcript reveals this same information was also presented through another witness. Tr. p. 461.

Counsel testified he was not aware law enforcement had interviewed a confidential informant in connection with this case until Lieutenant Blue mentioned it during his testimony. See Tr. p. 543. Counsel testified he did not move for a mistrial on the basis of further undisclosed information for two reasons. First, Counsel explained he did not feel the information the informant allegedly gave Blue was helpful to Applicant as it was only that the people in the house across the street were not involved in the shooting. Counsel testified he had no knowledge of the informant other than what Blue said in testimony, but Blue's information did not indicate the informant had anything to do with the shooting. Second, Counsel explained he liked the jury, he felt the trial was going well for Applicant, and he thought Applicant had a good chance of acquittal.

As to Counsel's performance in arguing the motion for a directed verdict at the close of the State's case, Counsel testified he did not raise the confidential informant issue in his argument because he felt it was minor compared to much more damning exculpatory evidence that had been introduced, and the nondisclosure did not affect his ability to defend the case. Counsel further testified he could only speculate as to whether the informant had helpful information, which he did not think would be enough to grant the motion. Additionally, Counsel testified he did not make a motion for a directed verdict on the ABWIK charge, or a motion for the State to elect, because the defense's alternate theory, if the jury decided Applicant was one of the shooters, was Applicant fired non-fatal shots. Counsel stated the defense's opinion was the murder charge was the improper charge, and he felt the evidence presented supported the ABWIK charge.

Counsel also testified regarding his strategy for objections during closing arguments. Counsel testified he did not object to the solicitor telling the jury it was their job to determine who killed Victim because he did not feel it crossed the line, and the statement could be interpreted as telling the jury to determine the facts. Counsel further stated he objected at several other points during the State's closing when he felt the solicitor did cross a line with personal appeals to the jury, but he did not request curative instructions or make a motion for a mistrial because he felt the trial had gone well for Applicant. Counsel testified he felt he had made a good record for appeal, and he would have pressed those issues further if he had felt the trial had gone badly, but he made a strategic decision not to do so here.

This Court finds Counsel articulated a valid trial strategy, both overall, and in response to the specific allegations Applicant has raised regarding Counsel's performance at trial. As discussed above, "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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689.

First, although the solicitor's question regarding Applicant's arrest in Pennsylvania was objectionable, it is a valid trial strategy not to object at every opportunity. "Trial counsel is repeatedly required during any trial... to make split-second decisions on many subjects, including whether to object to testimony. There are a variety of reasons counsel may soundly choose not to make such an objection. . . . Under certain circumstances, therefore, counsel may employ a strategy of not objecting – even when counsel has a good argument for exclusion – if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration." Stone v. State, 419 S.C. 370, 383, 798 S.E.2d 561, 568 (2017). Additionally, Applicant was not prejudiced because the same information was introduced through other witnesses. Tr. p. 461. Accordingly, this allegation is denied and dismissed.

Regarding Counsel's handling of the confidential informant issue, this Court finds Counsel's decision not to move for a mistrial was reasonable as it was speculative that the informant's information was exculpatory, and Counsel felt the trial was going well for Applicant at that time. Additionally, a mistrial is granted only in rare circumstances so it is unlikely the trial court would have done so or that Applicant would have prevailed on the issue on appeal. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." State v. Kirby, 269 S.C. 25, 28-

29, 236 S.E.2d 33, 34-35 (1977). On appeal, Applicant would have to meet the high bar of showing the Court's denial of the motion for a mistrial amounted to an abuse of discretion. "The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. . . . Further, before a defendant may receive a mistrial, he or she must show both error and resulting prejudice." State v. McEachern, 399 S.C. 125, 145-46, 731 S.E.2d 604, 614 (Ct. App. 2012) (internal citations omitted). A "PCR applicant's mere speculation is insufficient to establish prejudice and, accordingly, the applicant must put forth further evidence to support his claim." Glover v. State, 318 S.C. 496, 501, 458 S.E.2d 538, 541 (1995) (Waller, J., dissenting). Therefore, this allegation is denied and dismissed.

As to Counsel's handling of the Court's ruling on the State's Rule 403 objection to Counsel's questions regarding Lieutenant Blue's employment records, this Court finds Counsel's performance was not deficient. Counsel explained he believed the trial court's reasoning in sustaining the objection was correct, and this Court finds Counsel is not required to pursue the admission of evidence he knows is improper or the preservation of an issue which is not error. See, e.g., Starnes v. State, 307 S.C. 247, 251, 414 S.E.2d 582, 584 (1991) ("Since we find no violation of the respondent's rights, counsel's performance was not deficient in failing to object or pursue objections that were made on appeal."). This allegation is therefore denied and dismissed.

"When ruling on a criminal defendant's motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight. If there is any direct or substantial evidence tending to prove the guilt of the accused, or from which guilty may be fairly and logically deduced, the case should be submitted to the jury." Sellers v. State, 362 S.C. 182, 188-

89, 607 S.E.2d 82, 85 (2005) (abrogated on other grounds by Smalls v. State, ____ S.C. ____ (2018)). After a review of the transcript, this Court finds there was evidence presented which created a fact issue for the jury as to whether Applicant and Victim were face-to-face when Victim was shot or if Applicant's shot could have hit Victim in the back. Tr. pp. 296-97, 592. This Court also finds there was evidence presented to support all three charges – murder, voluntary manslaughter, and ABWIK – which were submitted to the jury. Therefore, this Court finds no deficiency in Counsel's handling of the directed verdict motion, although this Court agrees with Applicant Counsel's argument that voluntary manslaughter is not a lesser-included offense of murder is incorrect as a matter of law. State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014) ("Voluntary and involuntary manslaughter are both lesser-included offenses of murder. Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.") (citations omitted). Therefore, even if Counsel was deficient in handling the directed verdict motion, Applicant was not prejudiced because the trial court would have been wrong to grant it. Similarly, the Court was correct to charge voluntary manslaughter because there was evidence presented to support that charge. Id. at 308, 764 S.E.2d at 513 ("The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense."). Therefore, this allegation is denied and dismissed.

Finally, this Court finds Counsel was not deficient in his handling of objections during the solicitor's closing arguments. As discussed above, Counsel is not required to object at every opportunity if there Counsel has a valid explanation for not doing so. In this case, Counsel did object to several statements where he felt the solicitor crossed the line. Further, "[i]mproper comments do not automatically require reversal if they are not prejudicial. . .," and Applicant

“has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Humphries v. State 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id. This Court finds the challenged statements do not rise to that level, and Applicant has presented no evidence that the jury was influenced by the statements. This Court finds “it [is] not reasonably likely” that the solicitor’s comment in his opening statement caused the jury to act in a “manner inconsistent with the notion that the State has the burden of proof beyond a reasonable doubt.” State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 477 (2012). Therefore, Applicant has not met his burden of showing he did not receive a fair trial due to the allegedly improper comment, and this allegation is denied and dismissed.

3. Failure to request to poll jury; failure to object to configuration of verdict form or jury’s failure to complete form correctly

Counsel testified he does not automatically ask to poll the jury absent some suggestion the jury struggled to come to a verdict. In this instance, no Allen⁶ charge was given, so he did not feel it was necessary. Regarding the verdict form, Counsel testified he does not have an independent recollection of reviewing the form, but it is his normal practice to do so to make sure it is not suggestive. Counsel stated if he felt it was overly suggestive, he would have objected. The transcript reflects the jury form was distributed to Counsel prior to closing arguments and jury instructions, and the trial judge specifically asked Counsel if he had reviewed the form. Tr. p. 708. Counsel responded he had no objection. Tr. p. 708. Counsel also testified he did not think it was an issue that the jury initially marked only the guilty line for the voluntary manslaughter charge and did not mark anything for the murder or ABWIK charges. Counsel

⁶ Allen v. United States, 164 U.S. 492 (1896).

testified he felt it was helpful for Applicant to have the not guilty lines marked, so he did not object when the judge sent the form back to the jury for correction.

A review of the transcript indicates, at the conclusions of the jury charge, the trial judge specifically noted "the order in which the choices of verdict appear on the verdict form are not suggestive of any verdict by this court," and "[t]he verdict is to be determined by. . . the jury, and not the court." Tr. p. 766. Additionally, when the trial judge noticed the error on the form, he returned it to the foreperson and indicated only that something must be checked for each charge, but did not give any further instructions. Tr. p. 773. The bailiff then published the verdict by reading from the corrected form, and the trial court inquired of the jurors if that was their verdict; all of the jurors affirmed it was. Tr. p. 773-74.

This Court finds Counsel's conduct was not deficient as he has "no affirmative duty to request the trial judge to poll the jury," particularly where, as here, there was no indication the verdict was not unanimous. Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). Further, the Court find no error in the verdict form as it contained all three charges that were submitted to the jury, along with not guilty and guilty options for each charge. This Court additionally finds Applicant has not produced any evidence Applicant was prejudiced by the verdict form. Applicant offered no testimony from any juror showing the form confused them or contributed to the verdict that was rendered, much less that any juror was not in agreement with the verdict. This is a failure of proof which is insufficient for a finding of prejudice. See Foye v. State, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) (upholding denial of PCR because applicant's claim was "not supported by any probative evidence and [was] based on pure speculation"). Accordingly, this allegation is hereby denied and dismissed.

B. Waiver of All Other Allegations

This Court finds Applicant raised several allegations in his application which were not addressed at the evidentiary hearing on this matter. Specifically as to Applicant's allegations regarding the performance of Appellate Counsel, a potential conflict of interest for Counsel, and a violation of his right to a speedy trial, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice. This Court also finds, as to all allegations relating to Appellate Counsel, Applicant failed to present evidence of such claims and thus, this Court deems them abandoned.

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

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 1 day of March, 2018.



MICHAEL G. NETTLES
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina.

WITNESSES

FARMER BL 3E
Department 1E

Marion Police

DOCKET NO. 2010-GS-33-0375

The State of South Carolina

County of

MARION

COURT OF GENERAL SESSIONS

AUGUST TERM 2010

THE STATE

vs.

SHAWN REAVES

ARREST WARRANT NUMBER

2010GS330375

2010GS330375A

ACTION OF GRAND JURY

True Bill

Robert D. Henshaw

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

Indictment for

MURDER;

ASSAULT AND BATTERY WITH INTENT TO
KILL

FILED

BOOK PAGE

2010 AUG 20 A 11:05

MARION COUNTY SC
CLERK R. RHODES
CLERK OF COURT

STATE OF SOUTH CAROLINA)

INDICTMENT FOR

COUNTY OF MARION)

MURDER

ASSAULT AND BATTERY WITH INTENT TO KILL

At a Court of General Sessions, convened on AUGUST 19, 2010 the Grand Jurors of MARION County present upon their oath:

COUNT ONE- MURDER

That SHAWN REAVES did in Marion County, on or about May 13, 2007, did feloniously, willfully, and with malice aforethought kill one Ramel Keshon Applewhite by means of shooting and that the said Ramel Keshon Applewhite did die as a proximate result thereof, in violation of Section 16-30-0020 of the Code of Laws of South Carolina (1976), as amend.

COUNT TWO- ASSAULT AND BATTERY WITH INTENT TO KILL

That SHAWN REAVES did in Marion County on or about May 13, 2007, commit an unlawful act of violent injury to the victim, Ramel Keshon Applewhite, with malice, by shooting him multiple times, committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-03-0620, S. C. Code of Laws, 1976, as amended.

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



E.L. Clements, III
TWELFTH CIRCUIT SOLICITOR

1632

2-30

STATE OF SOUTH CAROLINA
COUNTY OF Marion
STATE

VS.
SHAWN REAVES

AKA:

Race: B Sex: M Age: 20DOB: [REDACTED] SS#: 000-00-0000

Address:

City, State, Zip: MARION, SC 29571DL# * SID# *CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

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

TO: voluntary manslaughterIn violation of § 16-03-0010; 16-03-0020 of the S.C. Code of Laws, bearing CDR Code # 0217☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ \$17-25-45(CSC w/minor 1st or Lawd Act)The charges: ☐ As indicted, ☒ Lesser included Offense,☐ Defendant Waives Presentment to Grand Jury.

(Def. to Initials)

The plea is: ☐ Without Negotiations or Recommendation,☐ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

H. S. [Signature] 75573
Solicitor SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment

of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

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

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-85 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered ☐ FTUP

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

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ Set by SCOPPPS

Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____

*Fine:

§14-1-206 (Assessments 107.5%)	\$	_____
§14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$ _____
§14-1-211 (A)(2)(DUI Surcharge)	\$100	\$ _____
§56-5-2995 (DUI Assessment)	\$12	\$ _____
§56-1-286 (DUI Breath Test)	\$25	\$ _____
Proviso 47.9 (Public Def/Prob)	\$500	\$ _____
§14-1-212 (Law Enforce. Funding)	\$25	\$ _____
§14-1-213 (Drug Court Surcharge)	\$150	\$ _____
§50-21-114 (BUI Breath Test Fee)	\$50	\$ _____
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ _____
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ _____
§44-53-450(C) (Conditional Discharge)	\$350	\$ _____
3% to County (if paid in installments)		\$ _____
TOTAL		\$ _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

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

\$ _____ Paid to Public Defender Fund

Other: _____

☐ Conditional Discharge, §44-53-450(C) requires \$350 be paid to the Clerk prior to case disposition☐ Appointed PD or appointed other counsel, \$47.12 requires \$500 be paid to Clerk during probation.Presiding Judge 2 [Signature]Judge Code: 2157Sentence Date November 12, 2015Clerk of Court/Deputy Clerk Sherry R. RhodesCourt Reporter: Frances Baker Ray

SCCA217 (08/2010)