

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Perry Gravely, Circuit Court Judge

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Appellate Case 2016-000902

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Jeffrey Hermann

Petitioner,

v.

State of South Carolina,

Respondent.

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APPENDIX VOLUME IV

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FEB 17 2017

S.C. SUPREME COURT

1           Body in a trunk. Dumped in  
2           the river. Shot in the ear.  
3           And we heard from Korth and  
4           Shanna Cumbee. Area that it  
5           happened in. The  
6           consistencies far outweigh the  
7           inconsistencies. Look at the  
8           evidence.

9                        I don't think that  
10           the defense is going to argue  
11           this point. I think it's  
12           absurd but they may and I have  
13           address it, that the body in  
14           the trunk is not Ali. Ladies  
15           and gentlemen, the hard hat  
16           found in the trunk. Ladies  
17           and gentlemen, the tag pulled  
18           from the car that came back to  
19           the car that belonged to Ali  
20           Sarhan. Ladies and gentlemen,  
21           a prosthetic leg on the body  
22           which we heard from the ICE  
23           agent, Ali Sarhan had a  
24           prosthetic leg. Not going to  
25           dwell on this too long. The

1 two families are hurt. And  
2 just as you as human beings,  
3 your heart goes out to them,  
4 my heart goes as well because  
5 Jason -- I'm sorry. Jeffrey  
6 Herrmann's mother doesn't  
7 deserve to be here. Father,  
8 brother, sister. But, ladies  
9 and gentlemen, it's not law  
10 enforcement or Jason Cumbee or  
11 the prosecutors that bring  
12 Mr. Herrmann here. It's his  
13 own conduct and his own  
14 admissions.

15 Likewise, if you look  
16 at our side, you won't see the  
17 name of Ali Sarhan. Ali  
18 Sarhan was a lonely disabled  
19 immigrant. His family,  
20 thousands of miles away. But  
21 he has a name. Mother,  
22 father, siblings. It's my  
23 hope that when you do justice  
24 his family will learn about it  
25 and have somewhere to visit to

1 intent, the ill will, its  
2 purpose. A lot of times in  
3 trials we have to argue about  
4 this point, and that's that  
5 malice can be formed in a  
6 second. Holding the gun. I'm  
7 going to kill someone. That's  
8 malice. We don't have to  
9 argue about that in this case  
10 because we've heard the  
11 evidence that Mr. Herrmann  
12 planned it for some time  
13 before he did it. Malice. I  
14 think I'm going to rob him.  
15 No. It would be best if I  
16 just kill him. Here's how I'm  
17 going to do it. Malice. This  
18 case is chock full of malice.  
19 A purpose. The presence of  
20 malice aforethought is not an  
21 issue in this trial. Honestly  
22 I anticipate from the defense  
23 that they're not even going to  
24 argue that what happened to  
25 Ali Sarhan wasn't murder.

1 first box you check. The  
2 defendant must be without  
3 fault for bringing on a  
4 difficulty. Self-defense  
5 claim done on box one. You  
6 heard evidence that the  
7 defendant Jeffrey Herrmann  
8 lured the victim out to  
9 McClellanville. I got your  
10 money. Come on out and get  
11 it. With the plan to shoot  
12 him. When he got there, oh,  
13 your money is somewhere else,  
14 let's get in the car together.  
15 With the plan to shoot him.  
16 The entire reason this murder  
17 occurred was on the actions of  
18 Jeffrey Herrmann. And so our  
19 first category of self-defense  
20 is done. Is shot down. We've  
21 disproved it. The defendant  
22 wasn't without fault. He had  
23 the sole fault in bringing on  
24 this difficulty. We don't  
25 even get past the first box.

1 he doesn't like me, that even  
2 if I perceive that perhaps one  
3 day he might do something rash  
4 I can't go kill him and claim  
5 self-defense at trial.

6 Jeffrey Herrmann was not in  
7 imminent danger. Jeffrey  
8 Herrmann lured Ali out to  
9 McClellanville. Second  
10 category. We don't check that  
11 box. Just like the first. We  
12 exit. Self-defense is shot  
13 down.

14 The third category  
15 that must be established for  
16 you to find self-defense is  
17 that if Jeffrey Herrmann  
18 believed he was in imminent  
19 danger, I'm paraphrasing here,  
20 a reasonable person, you, the  
21 reasonable people we select  
22 from our community, would have  
23 also believed that you were in  
24 imminent danger and that a  
25 reasonable person, you, would

1 have to find, which certainly  
2 is not in this case, that  
3 there was absolutely no other  
4 way for Jeffrey Herrmann to  
5 act other than murder Ali.

6 Ladies and gentlemen,  
7 in the months myself and Julie  
8 have spent preparing for this  
9 trial a thought has come up  
10 time and time again. Perhaps  
11 it's a little cheesy, but it's  
12 true. And that's that our  
13 country makes a promise. Our  
14 country has an aspiration and  
15 it's a promise a lot of us  
16 remember from saying the  
17 pledge of allegiance and  
18 that's justice for all. It's  
19 a promise. We, even the most  
20 basic knowledge of history  
21 knows that we have failed time  
22 and time again as a country to  
23 live up to that promise but  
24 yet people still flock to  
25 these shores because it's our

1 remains of Ali Sarhan set in a  
2 trunk in the bottom of a river  
3 for eight and a half years.  
4 The last year and a half  
5 they've been in a cardboard  
6 box. Live up to that promise.  
7 Live up to the promise of  
8 justice for all, even the  
9 lowest among us. I hope this  
10 doesn't offend anyone, but  
11 certainly a disabled Iraqi  
12 immigrant lonely, living in an  
13 R. V. deserves that promise.  
14 Live up to that promise,  
15 ladies and gentlemen. Find  
16 the defendant guilty of  
17 murderer.

18 THE COURT: Mr. Davis.

19 MR. DAVIS: Thank you,  
20 your Honor. Your Honor, could  
21 I have just a moment to set  
22 something up?

23 THE COURT: You may.

24 MR. DAVIS: May it  
25 please the Court.

1           that's your job and that's all  
2           that we ask, you speak the  
3           truth.

4                         Now, if Jason Cumbee  
5           is telling the truth then  
6           Jeffrey Herrmann is a  
7           murderer. I mean if he's  
8           telling the whole truth and  
9           nothing but the truth from  
10          this witness stand. That it  
11          should be obvious that he's  
12          not telling the truth, that he  
13          could not be believed. Not  
14          after six, seven statements.  
15          Two proffers from this  
16          Solicitor's Office. The  
17          assistance and threats from  
18          his detective buddies that he  
19          toured around Francis Marion  
20          Forest with, going to  
21          locations he knew the car  
22          wasn't at? Help getting out  
23          of jail two times when he's  
24          arrested in 2008. Sheriff's  
25          deputies got him out of a

1                   He actually thinks  
2                   he's not going to get caught.  
3                   Aaron? Aaron? Aaron doesn't  
4                   even exist. But who's going  
5                   to check that? Who's going to  
6                   check that? Jeff Harold or  
7                   something. He just doesn't  
8                   want to go to jail in July of  
9                   2008. I know where a body is.  
10                  It's Jeff somebody. I don't  
11                  know if they're going to check  
12                  it out. I just didn't want to  
13                  go to jail today.

14                  He lies about murder.  
15                  He lies about dealing drugs  
16                  with Ali. Knowing how to  
17                  call -- knowing, Ali knowing  
18                  how to call Jason's house.  
19                  Jason has as much reason to  
20                  kill Ali as anyone. Or anyone  
21                  else in McClellanville who  
22                  might have been dealing drugs  
23                  with Ali. This not a decade  
24                  long conspiracy. It's not a  
25                  decade long conspiracy. I

1 to expose the rumors and  
2 gossip and speculation that  
3 were presented from that  
4 witness stand. I'm not  
5 demanded to represent Jeff  
6 Herrmann. It's my pleasure to  
7 represent Jeff Herrmann  
8 because this is rumor and  
9 gossip. That's your  
10 government. Convict on rumor  
11 and gossip. Convict on this  
12 cast of characters that they  
13 called. Convict on that?  
14 It's my pleasure to defend  
15 Jeffrey Herrmann.

16 And I think it's  
17 pretty obvious and I'll draw a  
18 bright line between what has  
19 been proven and what is rumor  
20 and gossip and speculation.  
21 Let's look at that evidence  
22 that you'll take back to the  
23 jury room. It's out in front  
24 of you. It's on the bench,  
25 the bar in front of you.

1 up on the screen what murder  
2 is. Murder is the unlawful  
3 killing of another with malice  
4 aforethought. The State has  
5 to prove each of those things.  
6 Unlawful killing of another.  
7 Ali is dead. With malice  
8 aforethought. Evil. Cold  
9 hearted. By Jeff. They've  
10 got to prove it was Jeff. And  
11 the State mentioned  
12 self-defense. They put up the  
13 definitions of. That's  
14 obviously something that they  
15 are concerned about.

16 The evidence proves  
17 that Ali is dead. All right.  
18 We don't have the medical  
19 records. We don't have DNA  
20 match. The remains. But the  
21 remains in the car, the  
22 remains in the trunk are his.  
23 Prosthetic leg. The hardhat.  
24 The North Carolina license  
25 plate that was found in

1 Theresa Freeman? She's the  
2 last person in South Carolina  
3 to see Ali alive and the first  
4 person to report the trailer  
5 broken into, first person to  
6 report Ali missing. I don't  
7 think that she's a murderer  
8 but why not? Where is the  
9 investigation? Where is the  
10 investigation in that? Ali  
11 supposedly went to North  
12 Carolina the weekend before  
13 Theresa reported him missing.  
14 He goes there a lot. Theresa  
15 supplied some drugs? Where is  
16 the proof that he made it back  
17 to South Carolina alive?

18 Now clearly his  
19 remains are found in the trunk  
20 in Wadmalaw Creek. Where's  
21 the proof that he made it back  
22 here alive? She remembers a  
23 fight or a stabbing at a local  
24 bar where Ali supposedly  
25 stabbed someone. She's aware

1 Jason?

2 You know the Law and  
3 Order shows? The State is  
4 represented by two groups of  
5 people; the police who  
6 investigate the crime and the  
7 district attorneys who  
8 prosecute crime or something  
9 like that. Right? And these  
10 are their stories. Right.  
11 Well, this is their story.  
12 This is their story. And it's  
13 their obligation and their  
14 burden, you'll hear that term  
15 from the judge. Their burden.  
16 That just means their  
17 obligation. To prove that  
18 Jeff did what they're  
19 claiming. Now once the trial  
20 begins, you remember at the  
21 beginning I talked about Jason  
22 being the tour guide? He was.  
23 Took them to the car. Once  
24 the trial begins the attorneys  
25 at this table become your tour

1 items of evidence Mr. Groeber  
2 and I made objections during  
3 the trial. That's asking the  
4 judge to make sure you're  
5 allowed to hear it or see it.  
6 Often times you then heard or  
7 saw what we asked about. It's  
8 just asking the judge to judge  
9 what is, what you're allowed  
10 to see.

11 The best way to  
12 defend against such baseless  
13 stories is to rely on the  
14 facts. To rely on the facts.  
15 Jeff has nothing to add to  
16 this and because we presented  
17 no evidence, I get to talk to  
18 you last. Again, I'm not  
19 demanded to defend Jeff. It's  
20 my pleasure to defend him. We  
21 trust that you, the jury, will  
22 speak the truth. You will  
23 find Jeff not guilty. He's  
24 not guilty.

25 Why did, why did

1           their testimony? They built  
2           the case. They built the  
3           case. Here's what they did.  
4           Here's what we know they did.  
5           Here's what we know they did.  
6           They took statements from five  
7           people. Total. Five people.  
8           That's what we know they did.  
9           Four before they accused Jason  
10          of murder -- I'm sorry. Jeff  
11          of murder and Jason of  
12          accessory after the fact.

13                        Here's the story.  
14          Here's Jason Cumbee on July  
15          third after they helped get  
16          him out of jail. They follow  
17          him to Ali's car. Then again  
18          on July seventeenth and again  
19          on August first, August first.  
20          Person number two. Jeremy  
21          Casselman. Jeremy is Jason's  
22          sister's fiancée. Jason's  
23          sister Shanna and life-long  
24          friend Justin. Those are the  
25          four folks that they built the

1 do that? Where's Magwood and  
2 Casale? They weren't called.  
3 Did they investigate big  
4 money, the guy from Nucor who  
5 got Ali and Jeff in contact  
6 with each other? They weren't  
7 called. Did they investigate  
8 the bar fight that Ali was  
9 accused of stabbing somebody?  
10 They weren't called. Was  
11 there a victim in that that  
12 wanted to get even? Did they  
13 take the time to get phone  
14 records to see if actually Ali  
15 called Jason Cumbee's  
16 parents's house. They weren't  
17 called.

18 Did they investigate  
19 Jason's other statement about  
20 supposedly some copper was  
21 being stolen? No. Did they  
22 investigate who Ali was  
23 visiting in North Carolina?  
24 Whoever? No. Did they see if  
25 there's any phone calls from

1 evidence that you're going to  
2 take back. I mean it was  
3 enthralling testimony about  
4 the recovery of the car, about  
5 what they found. It was  
6 interesting testimony about  
7 how the two doctors pieced the  
8 skull back together and all  
9 that proves is that Ali is  
10 dead. All that proves is Ali  
11 is dead. Who killed him and  
12 how and was it with malice  
13 aforethought?

14 The State's concerned  
15 about self-defense. They have  
16 to prove that it was Jeff that  
17 did it with malice  
18 aforethought to the exclusion  
19 of any other any other  
20 reasonable conclusion that  
21 anyone else could have done  
22 it. Jeff -- or Jason did it.  
23 Jason did it. Jason knew  
24 where the car was. He  
25 deceived the detectives by

1                   Let's talk about  
2                   Bryan Korth for just a moment.  
3                   The jailhouse snitch. He's a  
4                   counterfeiter. He's playing  
5                   the system. He's been in and  
6                   out of jails and prisons. He  
7                   is manipulative. His shrinks  
8                   have told him so.  
9                   Manipulative. He got  
10                  Assistant Solicitor Julie  
11                  Cardillo to call the federal  
12                  prosecutor and say he  
13                  cooperated. He has pending  
14                  charges in the ninth circuit,  
15                  Berkeley County, but they've  
16                  not been resolved yet.  
17                  They're still pending.  
18                         Solve -- he read  
19                         about this in a newspaper  
20                         article. Then he got Jeff put  
21                         in his cell and listened to  
22                         him and took five pages of  
23                         notes. Met with the  
24                         solicitors five times  
25                         approximately to get ready for

1 through the ear. No blood?  
2 These are minor details but  
3 they matter a lot. Again he's  
4 a life-long resident of jails  
5 and prisons. He got the basic  
6 story down. And he expects  
7 something. Could he have told  
8 a different story? Could he  
9 expect a return favor?

10 Who else has a story  
11 that doesn't fit the facts and  
12 that's Melissa Hollander. How  
13 did the police even find her?  
14 Casale and Magwood weren't  
15 called. How did the police  
16 even find her? Well, we do  
17 know is when they did talk to  
18 her they already talked to  
19 everyone else. Casale and  
20 Magwood had already talked to  
21 everyone else when they talked  
22 to her. Jason three times.  
23 Shanna. Her fiancée. Jason's  
24 life-long friend. And then  
25 they talked to her. Is she

1           what does she do? Nothing.  
2           Nothing. On August the  
3           eleventh the statement is  
4           taken. That's twenty days  
5           she's been in Charleston.  
6           Report it? No. Twenty days  
7           she doesn't do anything about  
8           this confessed murderer.

9                         Now, right around the  
10           time of her statement Jeff and  
11           Jason are arrested. You saw  
12           her demeanor. It's, you know,  
13           just all too easy. Rumors are  
14           rampant. People are talking.  
15           People been arrested. She  
16           jumps on board. Her  
17           ex-boyfriend broke up with her  
18           on her birthday because she  
19           had been out all night  
20           partying. They were at her  
21           deceased grandmother's condo.  
22           He didn't even want to be down  
23           there. He's coming home.

24                         Isn't it ironic,  
25           though, that supposedly Jeff

1           you think if there was a  
2           bullet in that body or in that  
3           car or in that trunk that  
4           through that exhaustive  
5           sifting through that it would  
6           have been brought in here  
7           today and shown to you? It's  
8           not true.

9                         She gives a  
10           multiple-page statement to the  
11           Sheriff's Office, I'm not sure  
12           how they found her. That was  
13           after they talked to everybody  
14           else. Tells them -- it's  
15           important she tells them  
16           everything she knows. But the  
17           next day the detectives, I  
18           forgot to tell you, I forgot  
19           to tell you. You know what?  
20           He burglarized the trailer.  
21           He stole ten or fifteen  
22           thousand dollars. He paid  
23           people off to keep them quiet.  
24           And he burned the information  
25           and documentation in the

1 to Justin. He was read his  
2 Miranda rights. Thought he,  
3 he said ahh, they only do that  
4 to people that were going to  
5 get arrested. So he better  
6 stick with the same story. He  
7 doesn't want to get arrested.  
8 Jason's sister Shanna and her  
9 ex-boyfriend, that is Jeff's  
10 ex-girlfriend and her fiancée  
11 Jeremy.

12 Just briefly I want  
13 to go through those folks.  
14 Jeremy and Shanna. They never  
15 wanted to be in this mess I'm,  
16 I'm confident. It's her  
17 brother. Her only brother.  
18 And it's his fiancée, Jeremy's  
19 fiancée Shanna and they have  
20 of a child together. And it's  
21 clear, it's clear that when  
22 Jason got out of jail July  
23 fifth, a day, a day or two  
24 after he gets out of jail that  
25 he goes to the

1                   Now the State wants  
2                   you to recall Jason's  
3                   testimony from this witness  
4                   stand. But again the only  
5                   true testimony was the last  
6                   story. He told the whole  
7                   truth on December fourth,  
8                   2009. A month ago. He told  
9                   the whole truth when he met  
10                  with these two assistant  
11                  solicitors, Investigator  
12                  Osborne from their office, and  
13                  his attorney Mr. Smiley. Then  
14                  he tells the truth, the whole  
15                  truth, and nothing but the  
16                  truth.

17                  Second problem. They  
18                  agree a second time. What you  
19                  say we can't use against you.  
20                  Second time. He doesn't want  
21                  to go to jail. He's not going  
22                  to admit to murder. If you  
23                  hurt my sister I'll do  
24                  everything in my power to bust  
25                  your ass. I don't want the

1           that he gave statements to C.  
2           C. S. O. Charleston County  
3           Sheriff's Office. July third.  
4           Detective Casale. Detective  
5           Magwood. Where are they?  
6                         July fifth he gets  
7           out and he talks with Jeremy.  
8           Shanna's fiancée. Shanna the  
9           next day. Talks to her the  
10          next day. July seventeenth,  
11          Detective Magwood and  
12          Detective Casale talk to him  
13          again. August first they talk  
14          to him again. I need not  
15          recount all the lies. After  
16          one, two, three, four, four  
17          different statements to two  
18          different law enforcement  
19          agencies Detective Casale and  
20          Detective Magwood finally talk  
21          to a different person; Jeremy  
22          Casselman, the fiancée of  
23          Shanna Cumbee. The next day  
24          they talk to Shanna. The next  
25          day they talk to Justin. And

1                   The evidence you have  
2                   is clear as to the death of  
3                   Ali. The evidence you have as  
4                   to who done it is not. The  
5                   first story, the only story is  
6                   what Detective Casale and  
7                   Magwood ran. They run to the  
8                   solicitor's office and they  
9                   ran with his story.

10                   Jason Cumbee has not  
11                   spoken the truth. And for  
12                   reasons and motive and bias  
13                   and friendships the other  
14                   witnesses have not either.  
15                   It's not Jeff. No one has  
16                   spoken the truth. You get to  
17                   speak the truth. You get to  
18                   speak the truth.

19                   Jeff is set with the  
20                   weight of this gossip and  
21                   rumor and speculation and old  
22                   friends turning against him  
23                   since his arrest. August  
24                   eleventh. He's waited for  
25                   this day. He's not a

1                    consider only the  
2                    testimony that has been  
3                    presented from the witness  
4                    stand, any exhibits which have  
5                    been made part of the record  
6                    in this case, as well as the  
7                    stipulations of counsel.

8                    I have the additional  
9                    duty to charge you on the law  
10                   applicable to this case. As  
11                   the presiding judge I am the  
12                   sole judge of the law of this  
13                   case. It is your duty as  
14                   jurors to accept it and to  
15                   follow the law as I state it  
16                   to you now. If you have any  
17                   idea as to what the law is or  
18                   what the law ought to be and  
19                   does not agree with what I'm  
20                   about to tell you, you must  
21                   abandon your own ideas and  
22                   accept the law as I state it  
23                   to you now. In every case  
24                   tried in this court before a  
25                   jury the jury becomes the sole

1           and weight and the truth of  
2           the evidence that has been  
3           presented during this trial.

4                       The indictment  
5           charges the defendant with  
6           murder. I remind you that the  
7           fact that the defendant was  
8           arrested, charged, and  
9           indicted in this case is not  
10          evidence in this case and  
11          cannot be considered by you as  
12          evidence of guilt in this  
13          case, nor does it create any  
14          presumption or inference of  
15          guilt. This document is  
16          simply the formal written  
17          instrument which contains the  
18          charges made against the  
19          defendant. It is the formal  
20          document by which this case is  
21          brought into this Court.

22                       The defendant has  
23          pled not guilty to this  
24          indictment and that plea puts  
25          the burden on the State to

1           beyond a reasonable doubt.  
2           The presumption of innocence  
3           is like a robe of  
4           righteousness placed around  
5           the shoulders of the defendant  
6           which remains with the  
7           defendant until it has been  
8           stripped from the defendant by  
9           evidence satisfying you of the  
10          defendant's guilt beyond a  
11          reasonable doubt. The  
12          presumption of innocence is  
13          not mere legal theory. It is  
14          just not a legal phrase. It  
15          is a substantial right to  
16          which every defendant is  
17          entitled unless you, the jury,  
18          are satisfied from the  
19          evidence of the defendant's  
20          guilt beyond a reasonable  
21          doubt.

22                           The State has the  
23          burden of proving the  
24          defendant guilty beyond a  
25          reasonable doubt. Some of you

1 charged, you must find the  
2 defendant guilty. If on the  
3 other hand you think there's a  
4 real possibility that the  
5 defendant is not guilty, you  
6 must give the defendant the  
7 benefit of the doubt and find  
8 him not guilty.

9                   There are two types  
10 of evidence which are  
11 generally presented during a  
12 trial; direct evidence and  
13 circumstantial evidence.  
14 Direct evidence is the  
15 testimony of a person who  
16 claims to have actual  
17 knowledge of a fact such as an  
18 eyewitness. It is evidence  
19 which immediately establishes  
20 the main fact to be proved.  
21 Circumstantial evidence is  
22 proof of a chain of facts and  
23 circumstances indicating the  
24 existence of a fact. It is  
25 evidence which immediately

1 testified in this case.  
2 Credibility simply means  
3 believability. It becomes  
4 your duty as jurors to analyze  
5 and to evaluate the evidence  
6 and determine which evidence  
7 convinces you of its truth.  
8 In determining the  
9 believability of witnesses who  
10 have testified in this case  
11 you may believe one witness  
12 over several witnesses or  
13 several witnesses over one  
14 witness. You may believe a  
15 part of the testimony of a  
16 witness and reject the  
17 remaining part of the  
18 testimony of that same  
19 witness. You may believe the  
20 testimony of a witness in its  
21 entirety or reject the  
22 testimony of a witness in its  
23 entirety. You may consider  
24 whether any witness has  
25 exhibited to you any interest,

1           it the weight you think it  
2           deserves.

3                         If you decide that  
4           the opinion of an expert  
5           witness is not based on  
6           sufficient education and  
7           experience or if you conclude  
8           that the reasons given in  
9           support of the opinion are not  
10          sound, or that the opinion is  
11          outweighed by other evidence,  
12          you may disregard the opinion  
13          entirely. An expert witness's  
14          testimony is to be given no  
15          greater weight than that of  
16          other witnesses simply because  
17          the witness is an expert.  
18          Further, you are not required  
19          to accept an expert's opinion  
20          even though it is not  
21          contradicted.

22                         I instruct you and  
23           emphasize that the fact that  
24           while the defendant in this  
25           case chose not to testify, it

1 State for a particular crime  
2 might be purpose, intent,  
3 knowledge, recklessness, or  
4 criminal negligence. Criminal  
5 intent must be proven by the  
6 State beyond a reasonable  
7 doubt. Criminal intent is  
8 always a matter that must be  
9 determined by the jury from  
10 the circumstances surrounding  
11 the situation. There is no  
12 way to prove an intent to a  
13 mathematical certainty. There  
14 is no way that medical science  
15 can dissect a person's brain  
16 and determine what the person  
17 had in mind, so the law says  
18 that criminal intent may be  
19 inferred from the  
20 circumstances shown to have  
21 existed. This is how you make  
22 a determination of whether or  
23 not the element required for  
24 intent was present. It is not  
25 necessary to establish intent

1 defendant as the person who  
2 committed the crime charged.  
3 The State has the burden of  
4 proving identity beyond a  
5 reasonable doubt. You must be  
6 satisfied beyond a reasonable  
7 doubt of the accuracy of the  
8 identification of the  
9 defendant before you may  
10 convict the defendant.  
11 Identification testimony is an  
12 expression of belief or  
13 impression by a witness. You  
14 must determine the accuracy of  
15 the identification of the  
16 defendant. You must consider  
17 the believability of each  
18 identification witness in the  
19 same way as any other witness.  
20 You may consider whether the  
21 witness had an adequate  
22 opportunity to observe the  
23 offender at the time of the  
24 offense. This will be  
25 affected things like how long

1 person with malice  
2 aforethought. Malice is  
3 hatred, ill will, or hostility  
4 towards another person. It is  
5 the intentional doing of a  
6 wrongful act without just  
7 cause or excuse and with an  
8 intent to inflict an injury or  
9 under circumstances that the  
10 law will infer an evil intent.

11 Malice aforethought  
12 does not require that malice  
13 exist for any particular time  
14 before the act is committed  
15 but malice must exist in the  
16 mind of the defendant just  
17 before and at the time the act  
18 is committed; therefore there  
19 must be a combination of the  
20 previous evil intent and the  
21 act. Malice is shown when a  
22 person speaks words which  
23 express hatred or ill will for  
24 another or when the person  
25 prepared beforehand to do the

1 defendant's guilt after  
2 considering all of the  
3 evidence including the  
4 evidence of self-defense then  
5 you must find the defendant  
6 guilty.

7                   The following  
8 elements are required to  
9 establish self-defense.  
10 First, the defendant must be  
11 without fault in bringing on  
12 the difficulty. If the  
13 defendant's conduct was the  
14 type which was reasonably  
15 calculated to and did provoke  
16 a deadly assault the defendant  
17 would be at fault in bringing  
18 on the difficulty and would  
19 not be entitled to an  
20 acquittal based on  
21 self-defense.

22                   The second element of  
23 self-defense is that the  
24 defendant was actually in  
25 imminent danger of death or

1 facts and circumstances  
2 surrounding the crime  
3 including the physical  
4 condition and characteristics  
5 of the defendant and the  
6 victim. Evidence of prior  
7 difficulties between the  
8 defendant and the victim may  
9 be considered in deciding  
10 whether a threat existed,  
11 whether the defendant had a  
12 reason to believe the threat  
13 existed and how serious that  
14 threat was.

15                   The final element of  
16 self-defense is that the  
17 defendant had no other  
18 probable way to avoid the  
19 danger of death or serious  
20 bodily injury than to act as  
21 the defendant did in this  
22 particular instance. A person  
23 cannot be required to make an  
24 exact calculation as to the  
25 degree or amount of force

1 paper. Madam Foreperson, you  
2 are in charge and it is your  
3 responsibility and added duty  
4 to preside in the jury room  
5 during deliberations and to  
6 sign the verdict form. State  
7 of South Carolina, County of  
8 Charleston, the State of South  
9 Carolina versus Jeffrey M.  
10 Herrmann, in the Court of  
11 General Sessions, docket  
12 2009-GS-10-9048, the verdict  
13 form and again in no  
14 particular order; we the jury  
15 find the defendant not guilty  
16 or we the jury find the  
17 defendant guilty of murder.

18 Madam Foreperson, you  
19 must sign the verdict form  
20 indicating that this is the  
21 unanimous position of the  
22 jury. Sign and date it. When  
23 you have reached your verdict,  
24 please knock on the jury room  
25 door, indicate to the bailiff

1                   **MR. SIMPSON:** None from  
2 the State, your Honor.

3                   **THE COURT:** From the  
4 defendant?

5                   **MR. DAVIS:** Thank you,  
6 your Honor. Judge, just  
7 briefly. Certainly the  
8 standard charge on  
9 self-defense is that the  
10 defendant raised the defense  
11 of self-defense and that's the  
12 way it was read to the jury.  
13 In this case obviously the  
14 defense didn't but, judge,  
15 while I note an objection to  
16 the lead into the definition I  
17 do not ask for any remedy.

18                   **THE COURT:** So with  
19 that for the record no  
20 objections to the charge as  
21 read?

22                   **MR. DAVIS:** Nothing  
23 additional, judge. The only  
24 other matter I'll bring up is  
25 obviously before the jury

1           assure that everything is in  
2           order to go back.

3                   **MR. SIMPSON:**    Sure.

4                   **MR. DAVIS:**    Ma'am, I  
5           appreciate just a moment to,  
6           to speak to my client and  
7           co-counsel.  We would not be  
8           opposed to them getting the  
9           written instructions but we  
10          would ask to handle that, the  
11          issue on self-defense before  
12          its sent back or whatever time  
13          you deem appropriate.

14                   **THE COURT:**   And, Mr.  
15          Davis, again no objection to  
16          the verdict form as prepared?

17                   **MR. DAVIS:**    No  
18          objection, your Honor.

19                   **THE COURT:**   The verdict  
20          form and the indictment will  
21          go back.  And has all the  
22          evidence been examined and any  
23          concerns about what has or has  
24          not been admitted?  The  
25          defense has submitted no

1           be instructed that they may  
2           begin their deliberations.  
3           We're going to hold the  
4           alternates and they have been  
5           instructed that they are not  
6           to discuss this case among  
7           themselves either. I would  
8           hold them for approximately  
9           twenty minutes to make sure  
10          that the deliberations are  
11          under way.

12                    **MR. DAVIS:** Thank you,  
13                    your Honor.

14                    **THE COURT:** Anything  
15                    before we await the verdict.  
16                    From the State?

17                    **MR. SIMPSON:** Not from  
18                    the State, your Honor.

19                    **THE COURT:** From the  
20                    defendant?

21                    **MR. DAVIS:** No, your  
22                    Honor. Thank you.

23                    **THE COURT:** All right.  
24                    We'll be at ease awaiting the  
25                    verdict. Thank you.

1 ma'am. We have.

2 THE COURT: If you'll  
3 please hand the verdict form  
4 to the bailiff.

5 (Whereupon, the  
6 Forelady hands the verdict  
7 form to the bailiff, who in  
8 turns hands the form to the  
9 judge.)

10 THE COURT: Mr. Clerk,  
11 please read the verdict.

12 CLERK OF COURT: Yes,  
13 ma'am.

14 If the defendant will  
15 please stand.

16 (Whereupon, the  
17 defendant and his counsel  
18 rise.)

19 CLERK OF COURT: In the  
20 matter of the State of South  
21 Carolina versus Jeffrey M.  
22 Herrmann, defendant,  
23 indictment number  
24 2009-GS-10-9048, we the jury  
25 find the defendant guilty of

1 THE COURT: Yes.

2 CLERK OF COURT: Ladies  
3 and gentlemen, I will be  
4 asking you two questions. Is  
5 this your verdict and is this  
6 still your verdict. Please,  
7 as I call your number, please  
8 raise your right hand.

9 Juror number  
10 seventy-seven, is this your  
11 verdict?

12 THE JUROR: Yes, sir.

13 CLERK OF COURT: Is  
14 this still your verdict?

15 THE JUROR: Yes, sir.

16 CLERK OF COURT: Thank  
17 you.

18 Juror one  
19 eighty-eight, is this your  
20 verdict?

21 THE JUROR: Yes.

22 CLERK OF COURT: And is  
23 it still your verdict?

24 THE JUROR: Yes, sir.

25 CLERK OF COURT: Thank

1                   Juror number thirty,  
2 is this your verdict?

3                   THE JUROR: Yes.

4                   CLERK OF COURT: And is  
5 it still your verdict?

6                   THE JUROR: Yes, sir.

7                   CLERK OF COURT: Thank  
8 you.

9                   Juror one  
10 forty-three, is this your  
11 verdict?

12                   THE JUROR: Yes.

13                   CLERK OF COURT: And is  
14 it still your verdict?

15                   THE JUROR: Yes.

16                   CLERK OF COURT: Thank  
17 you.

18                   Juror two twenty-one,  
19 is this your verdict?

20                   THE JUROR: Yes.

21                   CLERK OF COURT: And is  
22 it still your verdict?

23                   THE JUROR: Yes.

24                   CLERK OF COURT: Thank  
25 you.

1           this your verdict?

2                   THE JUROR:   Yes.

3                   CLERK OF COURT:   And is  
4           it still your verdict?

5                   THE JUROR:   Yes.

6                   CLERK OF COURT:   Thank  
7           you.

8                   Is there anyone whose  
9           juror number I missed?

10                   (There is no  
11           response.)

12                   CLERK OF COURT:   Thank  
13           you.   Your Honor, the verdict  
14           stands.

15                   THE COURT:   Thank you.

16                   Anything further, Mr.  
17           Davis?

18                   MR. DAVIS:   No, ma'am.  
19           Thank you.

20                   MR. SIMPSON:   Nothing  
21           from the State, your Honor.

22                   THE COURT:   Any  
23           objections to releasing the  
24           jury?   From the State?

25                   MR. SIMPSON:   None from

1 County.

2 Please rise for the  
3 jury.

4 And you have  
5 completed your service for the  
6 next three years. Thank you.

7 (Whereupon, the jury  
8 leaves the courtroom at 3:17  
9 p.m.)

10 THE COURT: Thank you.  
11 Be seated. Mr. Simpson, are  
12 you prepared to go forward for  
13 sentencing at this time?

14 MR. SIMPSON: The State  
15 is prepared to go forward,  
16 your Honor.

17 THE COURT: Mr. Davis.

18 MR. DAVIS: Judge, of  
19 course I'll renew all of my  
20 previous motions including now  
21 a new motion for a new trial.  
22 I have no new factual  
23 arguments but I renew all  
24 prior motions, including the  
25 directed verdict, and now a

1 Mr. Simpson, Mr. Herrmann's  
2 prior convictions.

3 MR. SIMPSON: I  
4 believe, your Honor, that the  
5 issue of the prior convictions  
6 were discussed during the  
7 trial. You're well aware of  
8 the issue with the Ohio and  
9 the fact that we do not have  
10 certified convictions. You  
11 can consider that however you  
12 like concerning the facts.

13 THE COURT: Thank you,  
14 Mr. Simpson.

15 Mr. Davis, I'll be  
16 happy to hear from anyone  
17 regarding sentencing.

18 MR. DAVIS: Your Honor,  
19 if I can have a -- just a  
20 moment for that.

21 THE COURT: You may.

22 MR. DAVIS: Your Honor,  
23 if it please the Court, it had  
24 been my pleasure to represent  
25 Mr. Herrmann since his arrest

1 time remaining.

2 Judge, he, he talked  
3 to you briefly when you  
4 questioned him about whether  
5 he was going to testify or  
6 not. You know some of the  
7 medical conditions he's  
8 dealing with. Judge, in court  
9 this whole week with us has  
10 been his family members; his  
11 mother, his sister, his  
12 step-father, his brother. He  
13 comes from a good, loving  
14 family here in Charleston.

15 Judge, back in -- he  
16 was born, your Honor, in '81  
17 so we're dealing with him now  
18 a decade later almost. At the  
19 time of this incident from the  
20 witnesses you heard from, they  
21 were all around the same age.  
22 They were young folks. Again  
23 we, we use that in arguing that  
24 the mandatory minimum is more  
25 than sufficient punishment for

1            appeal to be forthcoming so I  
2            have, I've asked him not to  
3            speak. I'm not sure towards  
4            mitigation if any of his  
5            family would like to speak.  
6            I've spoken to them briefly.  
7            If anybody would want to speak  
8            I'd ask them now. Honestly,  
9            they're quite emotional about  
10           this, judge. I'm repeating  
11           myself I know, your Honor, but  
12           we would just argue that, that  
13           for as young as he was then  
14           and as young as he is now  
15           thirty years is more than a  
16           sufficient punishment. And  
17           life would be too much, judge.  
18           Life would be too much. We  
19           respect the Court's prerogative  
20           and we hope you consider that  
21           and, and we ask for you to  
22           take that in mitigation.  
23           Thank you, your Honor.

24                            **THE COURT:** Anything  
25                            further from the State?

1           you.

2                           (Whereupon, this  
3           matter is concluded at 3:25  
4           p.m.)

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STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
STATE VS.
JEFFREY M. HERRMANN
AKA:
Race: W Sex: M Age: 28
DOB: SS#:
Address:
City, State, Zip:
DL#: SID#:

INDICTMENT/CASE#: 2009GS1009048
A/W#: F348237
Date of Offense: 7/15/2000 - 8/31/2000
S.C. Code §: 16-03-0010, 0020
CDR Code #: 0116

SENTENCE SHEET

\*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was
TO: Murder

CONVICTED OF or PLEADS

in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45
w/minor 1st or Lewd Act)

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

ATTEST: Simpson, Benjamin Chad 71257 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 45 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 the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

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

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

Table with columns for Recipient, \*Fine, and various assessment codes (e.g., § 14-1-206, § 14-1-211(A)(1), etc.) with corresponding dollar amounts.

days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning
\$ paid to Public Defender Fund
Other:

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

Clerk of Court/ Deputy Clerk
Court Reporter: 1284
SCCA/217 (11/2009)

Presiding Judge
Judge Code:
Sentence Date: 1/7/10 1284

**PER CURIAM:** This appeal arises out of Appellant Jeffrey Herrmann's conviction for murder. On appeal, Herrmann argues the trial court erred by: (1) refusing to instruct the jury that the testimony of an informer who provides evidence against the defendant for expected gain, the hope of reward, or for personal advantage or vindication must be examined and weighed by the jury with greater care than the testimony of an ordinary witness; and (2) refusing to reconsider the forty-five year sentence imposed when, at sentencing, Herrmann failed to fully argue mitigation facts in support of a sentence of thirty years. We find no error of law in the trial court's decision, nor do we find any prejudice; therefore, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."); *State v. Burkhardt*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002) (noting in order "to warrant reversal, a trial judge's refusal to give a requested [jury] charge must be both erroneous and prejudicial" to the defendant); *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial."); *State v. Campbell*, 297 S.C. 24, 26, 374 S.E.2d 668, 669 (1988) ("It is elementary that in the course of the trial of a criminal case, the trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of evidence, the credibility of witnesses, the guilt of the accused, as to the controverted facts."); *State v. Gowan*, 178 S.C. 78, 86, 182 S.E. 159, 162 (1935) ("Generally speaking, any instruction is erroneous which unduly emphasizes the right of the jury to pass upon the weight and effect of the testimony of any particular witness, whether it be the defendant, or any other witness."); S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Benning*, 338 S.C. 59, 64, 524 S.E.2d 852, 856 (Ct. App. 1999) (stating this court "will not disturb a sentence, provided it is within the limits permitted by law, unless the trial judge sentenced the defendant as a result of partiality, prejudice, oppression, or corrupt motive"); *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (noting when the initial presentation of mitigation evidence does not render the desired result, the defendant does not get a second chance).

**AFFIRMED.**

**SHORT, THOMAS, and PIEPER, JJ., concur.**

ATTEST: A TRUE COPY  
 JULIE J. ARMSTRONG (SEAL)  
 CLERK, C.P. G.S. & F.C.  
 By \_\_\_\_\_  
 DEPUTY CLERK

(c) \_\_\_\_\_

6. Check whether a finding of guilty was made:

(a) after a plea of guilty N/A

(b) after a plea of not guilty X

(c) after a plea of nolo contendere N/A

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(b) the result in each such Court to which you appealed:

i. Conviction and Sentence Affirmed

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(c) the date of each such result:

i. April 17, 2013

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State v. Jeffrey, Unpublished Opinion 2013-UP-159

ii. \_\_\_\_\_

iii. \_\_\_\_\_

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) \_\_\_\_\_

(c) \_\_\_\_\_

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

iv. \_\_\_\_\_

(d) the date of each such disposition:

i. N/A

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

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

i. N/A

ii. \_\_\_\_\_

iii. \_\_\_\_\_

iv. \_\_\_\_\_

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

No

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

(a) which grounds have been presented:

i. N/A

ii. \_\_\_\_\_

iii. \_\_\_\_\_

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

i. N/A

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) Ineffective Assistance of Counsel - Can not raise on direct appeal, PCR is proper venue.

(b) \_\_\_\_\_

(c) Being held unlawfully, violation of the South Carolina and U.S. Federal constitutions 4, 5, 8, & 14th Amend.

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

STATE OF SOUTH CAROLINA )

VERIFICATION

County of DORCHESTER )

Jeffrey Herrman #338692

I, Jeffrey Herrman, 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.

x Jeffrey Herrman

SWORN to and subscribed before me this 8<sup>th</sup> day of August, 2013

Ludeman Bryant (L.S.)  
Notary Public

My Commission Expires: May 26, 2020

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, and the Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

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

1. Ineffective assistance of counsel.
2. Held unlawfully in violation of 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> amendments of the United States and South Carolina Constitutions.

## III.

First, the Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

## V.

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

## VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on the issue of ineffective assistance of counsel and that the remaining allegation be summarily dismissed.

Respectfully submitted,

ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

KAREN C. RATIGAN  
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON  
Assistant Attorney General

By:   
\_\_\_\_\_  
ATTORNEYS FOR RESPONDENT

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Feb. 6, 2014.

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	

Jeffrey Herrman,	)	
	)	
Applicant,	)	
v.	)	Case No. 13-CP-10-4994
	)	
State of South Carolina,	)	
	)	
Defendant.	)	

### TRANSCRIPT OF HEARING

The within Post-Conviction Relief Hearing in the above-captioned matter was held on January 19th, 2016, before The Honorable Perry H. Gravely, in Courtroom 3E of the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

Tristan Shaffer, Esq.  
140 Gibson Rd  
Lexington, SC 29072  
Appearing for Applicant

Rutledge Johnson, Esq.  
OFFICE OF ATTORNEY GENERAL  
P O Box 11549  
Columbia, South Carolina 29211  
Appearing for State of South Carolina

**Deborah Garrison**  
*Circuit Court Reporter – 13th Judicial Circuit*  
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## Jeffrey Herrman v. State of South Carolina

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Case No. 13-CP-10-4994

Hearing of January 19, 2016

Before The Honorable Perry H. Gravely

1 THE COURT: Be glad to hear from you.

2 MR. JOHNSON: Thank you, Your Honor.

3 This is Jeffrey Herrman versus the State of  
4 South Carolina. It is Case Number 13-CP-10-  
5 4994.

6 Mr. Herrman was indicted at the November  
7 2009 term of the Charleston County grand jury  
8 for murder. He was represented by Rodney  
9 Davis.

10 On January 4th, 2010, he proceeded to  
11 trial and was convicted as indicted.

12 He was sentenced by The Honorable Kristi  
13 B. Harrington to confinement for forty-five  
14 years.

15 After filing a timely notice of appeal,  
16 his appeal was perfected and his sentence and  
17 convictions were affirmed by the Court of  
18 Appeals. *Remittitur* was issued thereafter.

19 He filed a timely PCR application August  
20 26th, 2013 and the State filed its return  
21 February 6th, 2014.

22 He is represented here today by Tristan  
23 Shaffer.

24 TRISTAN SHAFFER: Your Honor, before we  
25 begin there is a matter. I have this case --

## Jeffrey Herrman v. State of South Carolina

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1 Your Honor. This is -- counsel has had this  
2 case over two years and has had many  
3 opportunities to amend. This is about the  
4 sixth time that this case has been called for  
5 PCR, has been continued multiple times. It  
6 was amended in December of 2014, they've had  
7 plenty of opportunity to -- and this is the  
8 first time that I've heard this is an  
9 allegation. The State has had no notice.  
10 Your Honor, I would ask you to strike this  
11 from the record.

12 THE COURT: First of all, I don't think  
13 that I have a copy of your amended  
14 application.

15 TRISTAN SHAFFER: It should have been  
16 filed in ---

17 THE COURT: I have a Motion ---

18 TRISTAN SHAFFER: Motion to amend the  
19 application, Your Honor?

20 THE COURT: Right.

21 TRISTAN SHAFFER: I apologize. That is  
22 generally -- that Motion had never actually  
23 been heard. A lot of times, in PCRs  
24 especially, ---

25 THE COURT: How are you prejudiced by

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Hearing of January 19, 2016 - Testimony of Rodney Davis  
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1 Q. Tell us a little bit about the  
2 allegations against him, just so that the  
3 court knows.

4 A. It was a very unique murder case.  
5 A body was found in the trunk of a car  
6 submerged in a river north of Charleston, in  
7 the Francis Marion Forest. The police were  
8 taken to the vehicle by a codefendant, a  
9 friend of Mr. Herrman. This case had quite  
10 some age on it from the time of death. I  
11 want to say that it was close to eight or ten  
12 years from when the victim went missing.

13 Based on the recovery of the body and  
14 information provided by the codefendant, Mr.  
15 Herrman was charged with murder.

16 Q. How did the codefendant come to  
17 speak to the police?

18 A. It was a traffic stop, I think it  
19 was a driving under suspension violation that  
20 he was being arrested for. In hopes that he  
21 could make his situation better, he indicated  
22 that he had information about a homicide,  
23 about a dead body.

24 I know there was at least one, maybe a  
25 couple of searches before they actually found

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1 in to the Berkeley County side to retrieve  
2 the vehicle. You know, we argued that was a  
3 multi search-and-seizure outside their  
4 jurisdiction.

5 But they found the vehicle submerged in  
6 that creek or that river.

7 Q. Now, was there any physical evidence  
8 linking the Applicant to the murder?

9 A. Like DNA?

10 Q. (Affirmative nod).

11 A. Fingerprints?

12 Q. Yes.

13 A. No, nothing to that effect. The  
14 primary case against my client was, like I  
15 said, a friend of his who was initially --  
16 I'd have to look, and the record may correct  
17 me whether he was charged with -- as a  
18 codefendant or ---

19 Q. Accessory?

20 A. --- or as an accessory on this case.  
21 He certainly was charged because of his  
22 knowledge of it. He was the main evidence in  
23 the case, in the beginning of the case.

24 Law enforcement indicated that a  
25 girlfriend of Mr. Herrman's had received

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1 and available, that he could -- just as  
2 easily as him pointing to Jeffrey, he could  
3 have committed the crime.

4 As to the jailhouse snitch, I certainly  
5 recall that cross. I don't recall actually  
6 the time that it took but it was one of my  
7 longest cross-examinations. He had so much  
8 information that we could attack his  
9 credibility on, so we just tried to show that  
10 rather than his cellmate, Jeffrey, telling  
11 him this information that he determined this  
12 information from the discovery that I would  
13 have sent Jeffrey to have at the county jail.  
14 So we tried to show him as not being credible  
15 and paint the codefendant as the perpetrator.

16 Q. Now, so -- for those two you were  
17 challenging, essentially, their credibility.  
18 That was your strategy. Correct?

19 A. Certainly.

20 Q. Now, I believe that there were four  
21 other witnesses; is that correct?

22 A. I -- (negative gesture).

23 Q. Somewhere in that range?

24 A. Yeah. I don't recall. Forgive me.

25 I did have the transcript -- I'll be blunt, I

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1 than that the story was not accurate -- to  
2 the jury.

3 Q. Now, during your preparation, do you  
4 remember how many times that you spoke with  
5 him?

6 A. I don't, and I'll be blunt on that.  
7 You and I were talking, again, about the  
8 matter prior to the hearing today -- and  
9 unfortunately this was in '08, August of 2008  
10 it looks like is when the case was opened to  
11 me. I'm in my twentieth year now and I did  
12 not do a good job on documenting this file on  
13 how many times we met. It would have been  
14 several times, more than half a dozen, easily  
15 beyond half a dozen. Beyond that, though, I  
16 -- I don't want to speculate. But we talked  
17 a bunch. Jeffrey was quite involved in  
18 helping me prepare this case.

19 Q. Okay. Now, Jeffrey, he was  
20 medicated during a good part of this time.  
21 Correct? Do you recall that?

22 A. I do recall some medication. You  
23 would have to give me specifics, but -- yes.

24 Q. Okay. Do you recall him -- an issue  
25 coming up in front of the court about his

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1 TRISTAN SHAFFER: It involves him --  
2 essentially he'd stopped taking his Thorazine  
3 so that he could be alert for the trial.  
4 That's essentially what -- I believe that's  
5 what he testified to.

6 THE COURT: Right, I see at the top of  
7 Page 1093 that he'd stopped taking it.

8 TRISTAN SHAFFER: Right.

9 DIRECT EXAMINATION CONTINUED

10 BY TRISTAN SHAFFER:

11 Q. Now, when preparing -- essentially  
12 you said that the case was primarily about  
13 the credibility of those witnesses. Correct?

14 A. Correct.

15 Q. Did you make any sort of argument  
16 specifically about the location of where he  
17 was indicted?

18 A. Yes, there was a Motion involving  
19 the indictment. You're going to have to  
20 flesh that out a little bit more for me. I  
21 apologize.

22 Q. Okay.

23 A. Just for the record, I was lead  
24 attorney throughout this whole process but  
25 second chair was Cody Groeber, another

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1 A. You and I.

2 Q. Yes. Okay. You got to close last,  
3 I guess?

4 A. I believe so since we did not --  
5 Jeffrey didn't testify and we didn't present  
6 any other evidence. My recollection is that  
7 we had the last argument.

8 Q. Why did Jeffrey not testify?

9 MR. JOHNSON: Objection. Speculation.

10 DIRECT EXAMINATION CONTINUED

11 BY TRISTAN SHAFFER:

12 Q. Did you have any discussions with  
13 Jeffrey about testifying?

14 A. Certainly.

15 Q. Did you encourage him to testify or  
16 not to testify, to your recollection?

17 A. The best that I can say is that  
18 there is a note in my file which connects  
19 back to something that you asked about a bit  
20 ago. When we were -- we were able to get a  
21 self-defense charge obviously during the  
22 charge conference and I felt reasonably  
23 confident that we could do that. It was  
24 never our position that he acted in self-  
25 defense but the jury has to be convinced

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1 Q. I am going to be asking you a couple  
2 of questions about the transcript.  
3 Unfortunately, I don't have an extra paper  
4 copy, so I'm going to be handing you my  
5 tablet. The first thing that I was going to  
6 ask you about is on Page 1142, I think Line  
7 20.

8 TRISTAN SHAFFER: Your Honor, this ---

9 THE COURT: Would it be easier to use  
10 this transcript?

11 TRISTAN SHAFFER: Yes, sir, Your Honor.  
12 I'll have him read the sections. It's just  
13 Volume 1 that I need.

14 THE COURT: All right, (tenders).

15 TRISTAN SHAFFER: Thank you.

16 DIRECT EXAMINATION CONTINUED

17 BY TRISTAN SHAFFER:

18 Q. (Tendering to witness).

19 A. Where at on 1142?

20 Q. On 1142, you made an objection -- I  
21 think it's around (Line) 14. You'd made an  
22 objection about a burden shifting comment.  
23 Correct?

24 A. (Upon review), if you will give me a  
25 moment. I don't see it on 1142, but ---

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1 Lines 5 through 11.

2 A. Do you mind -- the objection that I  
3 see where I actually voiced an objection is  
4 back on 1149, so I'm wondering if we on the  
5 wrong pages.

6 Q. No, ---

7 A. Because if you want me to read my  
8 objection, it's ---

9 Q. No, it's 1152. I might have had it  
10 down incorrectly.

11 A. Okay.

12 Q. If you could, read Lines 5 through  
13 10.

14 A. Okay. I'm starting on Line 4 if  
15 that is okay.

16 Q. That's fine.

17 A. (Reading): "*Jason Cumbee did not*  
18 *come out with the whole truth until December*  
19 *4th, 2009, just a little over a month ago.*  
20 *But what did Jason say when he finally*  
21 *admitted the truth? When he had hired an*  
22 *attorney and when he'd talked to that*  
23 *attorney?" -- I'm already down to Line 13.*

24 Q. Okay. I am sure you know what  
25 vouching is. Correct?

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1 most believable testimony. We certainly  
2 disputed that.

3 Q. Turn to Page 1155.

4 A. Okay.

5 Q. Looking at Lines 6 through 11.

6 A. Do you want me to read that?

7 Q. Yes.

8 A. Starting with "but" after the period  
9 of Line 6?

10 Q. That's correct.

11 A. (Reading): *"But on 12/4/2009 -- and*  
12 *I want you to remember that date because we*  
13 *are going to come back to it, he came out*  
14 *with the whole truth and what happened?"*

15 Q. And, just for the record, Jason  
16 Cumbee is the -- was the codefendant.  
17 Correct?

18 A. He was the one that originally led  
19 them to the vehicle and -- then, yes, -- was  
20 arrested; codefendant testifying, yes.

21 Q. Now, if you could -- well, if there  
22 any reason that you did not object to that?

23 A. Same thing. That was certainly the  
24 State's position, that they -- their position  
25 is that if you believe what he provides that

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1 Q. And Melissa Hollander, do you recall  
2 whether she testified against him?

3 A. (No verbal response).

4 Q. Would you disagree with me if I said  
5 that Melissa Hollander testified against him?

6 A. Forgive me for not answering the  
7 question. Yes, I believe that's who the  
8 State presented as being my client's  
9 girlfriend from out of state, who testified  
10 against him -- yes, yes. I apologize. She  
11 was a witness for the State against my  
12 client. Yes.

13 Q. And if you could turn to -- was it  
14 the same reason, why you didn't object to  
15 that?

16 A. Yes.

17 Q. Same as your previous answers?

18 A. Yes.

19 Q. If you could turn to Line -- Page  
20 1172, Lines 19 through 21.

21 A. (Reading): "*Jason Cumbee finally*  
22 *decided to tell the truth on December 4th,*  
23 *2009, and ..."* ---

24 Q. Did you object to that?

25 A. No.

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1           literally and figuratively, to vouch for  
2           their witnesses despite, you know, certain  
3           objectionable comments. So I didn't think  
4           that the State being that "forceful" was  
5           harmful enough to require me to object.

6           Q.    Okay. Now, I'd like for you to turn  
7           to Page 1193.

8           A.    Okay, (complies).

9           Q.    And versus reading line by line  
10          because it is quite a long section, I would  
11          like for you to review to refresh your  
12          recollection between 1192, Line 6, all the  
13          way through to the end of the closing  
14          argument, which is Page 1194, Line 17.

15          A.    Okay. (Upon review), all right.

16          Q.    During that, is it fair to say that  
17          was the end of the State's closing argument?

18          A.    Yes.

19          Q.    The grand finale of their argument?  
20          Correct?

21          A.    Correct.

22          Q.    Essentially what were they arguing?

23          A.    I would term it flag waving.

24          Q.    Describe that.

25          A.    That in this great country of

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1           *Liberte?* The case cite -- I'll argue during  
2 closing. The case cite is 336 South Carolina  
3 648, sometime around 2003.

4           A. (No verbal response).

5           Q. So is it your testimony that you  
6 didn't think that it was objectionable?  
7 Is that a fair characterization of your  
8 testimony?

9           A. It is. Again, I have no -- no  
10 objection objecting in closing if necessary.  
11 On the other hand, a needless objection  
12 doesn't do my client any favors, the way that  
13 the jury would view me. Again, I -- our  
14 position was that my client didn't do it.  
15 'So, yes, provide justice for the deceased  
16 but it's not at this table.'

17           So either it was that it wasn't  
18 objectionable or it wasn't worth the  
19 objection.

20           Q. Do you recall the issue that was  
21 raised on appeal in this case? I'm sort of  
22 jumping around. I apologize.

23           A. I recall having discussions with Ms.  
24 Hudgens of Appellate Defense, more than one  
25 either by e-mail or phone, prior to her -- or

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1 specifically relate to an allegation, Your  
2 Honor. It just relates to background. There  
3 was some discussion that I probably need to  
4 get on the record just because of the  
5 conversations that I've had with my client.  
6 That being said, I don't think that it raises  
7 to the level of an allegation.

8 MR. JOHNSON: Your Honor, the reason  
9 I am objecting, if I may, is because this is  
10 a hot topic issue with our Supreme Court, the  
11 failure to convey a plea offer. I do not  
12 think it is part of the case. It is not part  
13 -- in fact, it's not part of ineffective  
14 assistance of counsel and I do not think that  
15 counsel should be allowed to, you know, slip  
16 it in here now.

17 THE COURT: If it wasn't an  
18 allegation, then I'm not going to allow it.

19 DIRECT EXAMINATION CONTINUED

20 BY TRISTAN SHAFFER:

21 Q. What do you think about your chances  
22 going forward with the case, going to trial?

23 A. My position is -- I think it's  
24 written down in an e-mail to Jeff's mom.  
25 Anytime it is a swearing match case, and

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1 Hollander and then the cellmate. Yes, at  
2 least three.

3 Q. And they stated that it was over  
4 some type of drug deal?

5 A. Right.

6 Q. Apparently the victim was a big drug  
7 dealer in the area?

8 A. Correct.

9 Q. And that he killed him over a large  
10 amount of cocaine?

11 A. Either a large amount of cocaine or  
12 a large amount of money. But, yes, that was  
13 the allegations.

14 Q. And that the reason this case was  
15 kinda a dead case and then woken up, if you  
16 will, is that Mr. Cumbee was stopped for  
17 driving under suspension and that he spilled  
18 the beans. Is that correct?

19 A. Correct.

20 Q. Mr. Herrman was down in Florida with  
21 his girlfriend, correct? Was that the  
22 testimony at trial?

23 A. Correct.

24 Q. That he drives back because he  
25 realizes that somebody is looking for him,

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1 A. Correct.

2 Q. And there is a forensic anthropolo-  
3 gist that comes in and states that the skull  
4 was consistent with somebody from the Middle  
5 East?

6 A. Correct.

7 Q. Okay. And that the forensic  
8 pathologist states that there was head trauma  
9 from the right skull out the left ear.  
10 Correct?

11 A. I believe -- there was an allegation  
12 that the decedent had been driving and was  
13 shot in the car, so it would have been the  
14 path of travel; that was the allegation, yes.

15 Q. Okay.

16 A. Just to be clear, I don't recall  
17 mounting any argument that this was not --  
18 that the decedent was not the victim in the  
19 indictment. There was a hat with his name on  
20 it, a construction hat; it was his vehicle.  
21 Our defense was not that 'that's not who you  
22 say that it was', especially after some of  
23 the forensic evidence that you brought  
24 forward. But, yeah, -- the missing --  
25 missing the lower part of one of his legs and

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1 you may step down.

2 (WITNESS STEPS DOWN)

3 TRISTAN SHAFFER: We call Jeffrey  
4 Herrman.

5 (WITNESS TAKES STAND)

6 JEFFREY HERRMAN, having been sworn  
7 to tell the truth, and nothing but the  
8 truth, testified as follows:

9 DIRECT EXAMINATION

10 BY TRISTAN SHAFFER:

11 Q. Mr. Herrman, where are you housed  
12 at?

13 A. I am at the Lieber Correctional  
14 facility, property of SCDC.

15 Q. What are you currently serving, what  
16 kind of sentence?

17 A. I got a forty-five (45) year day-  
18 for-day sentence for murder.

19 Q. Are there any other charges related  
20 to this or is this -- is this conviction that  
21 is the subject of this PCR the only charge?

22 A. This is the only thing for my PCR.

23 Q. Okay, all right. Tell us a little  
24 bit about what you recall about your  
25 attorney, how many times that you met with

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1                   APPLICANT: I have an attorney.

2                   I listened to my first attorney and I ended  
3                   up with forty-five years, listening. I was  
4                   told not to testify.

5                   This is all new to me. I didn't give a  
6                   statement. I felt that an innocent man would  
7                   fight all the way to the end of everything.  
8                   I am at the point of I'm not giving up and --  
9                   I'm not a lawyer.

10                                   DIRECT EXAMINATION CONTINUED

11                   BY TRISTAN SHAFFER:

12                   Q. So tell me a little bit, uh, -- you  
13                   said that you were on Thorazine.

14                   A. Yes. I quit taking my medication  
15                   after the second day of trial. I flatly --  
16                   I understood -- like's going on here, I  
17                   understand. I understood the words and  
18                   everything. I didn't understand about the  
19                   process or -- I knew that I was on trial for  
20                   murder but other than that -- yes, I  
21                   understood the words that came out of their  
22                   mouths, I knew what was going on in the room,  
23                   who the jury was, who the judge was, whatnot.  
24                   But my thing was that I was not -- I was very  
25                   -- I said in the transcript that I was

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1           A.    Yes.  The strategy with my attorney  
2           was that the State did not prove anything,  
3           that there was nothing there.  With my co-  
4           defendant lying on the stand and three out of  
5           four people living together and traveling to  
6           court together it was in my best interest not  
7           to say anything; it didn't prove anything,  
8           and I had nothing to say.  It seemed that my  
9           codefendant had all the information of this  
10          prior to me -- to me getting thrown in.  I'm  
11          from Mt. Pleasant, they're from the country,  
12          I was an outsider and here I sit having this  
13          conversation with you people today.

14                Q.  Are you anxious today?

15           A.  I am extremely anxious.  My anxiety  
16           is off the chain.  I've had anxiety since I  
17           was a kid.  Again, SCDC says now that I'm not  
18           in mental health, they have me "cured."  But  
19           my nerves -- my hands are sweating.  This is  
20           my life.

21                And I keep finding out new things every  
22           other day.  I was supposed to know what was  
23           going on -- and it's just mind-blowing for  
24           me.

25                Q.  Okay.

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1 Your Honor.

2 THE COURT: Any redirect.

3 TRISTAN SHAFFER: None, Your Honor.

4 THE COURT: You may step down.

5 (WITNESS STEPS DOWN)

6 TRISTAN SHAFFER: Your Honor, the  
7 Applicant rests. Assuming the State doesn't  
8 have any questions, I'd ask to be allowed to  
9 have a brief argument, Your Honor.

10 THE COURT: All right, I will be glad  
11 to hear from you -- I mean, is that correct?

12 MR. JOHNSON: (Affirmative nod), no  
13 witnesses at this time, Your Honor.

14 THE COURT: Okay.

15 TRISTAN SHAFFER: Your Honor, related  
16 to this case, this case is a case of  
17 credibility. There is no physical evidence.  
18 As Mr. Davis testified, he thought that it  
19 could go either way, it was fifty-fifty.

20 In this situation, I think that it is --  
21 first of all, I think that he was deficient  
22 for not objecting during the closing argument  
23 both to the vouching and to the last argument  
24 involving passion and prejudice.

25 I would suspect that the State's argument

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1 adds to the credibility of the witness, that  
2 is inappropriate, should actually, uh, -- you  
3 know, is prejudicial to the client.'

4 In this case we have the State saying,  
5 especially about the main witness -- I count  
6 five times off my notes -- saying that he is  
7 telling the truth, 'he's telling the truth.'  
8 A fair reading of the closing argument from  
9 the State was, 'our witnesses are telling the  
10 truth'; which is consistent with what Rodney  
11 said in his defense, that they were not  
12 telling the truth.

13 I think when you have the State  
14 repeatedly saying, 'oh, he's telling the  
15 whole truth now, we're adopting this', that  
16 that is prejudicial for him to, uh, to -- I  
17 believe that's prejudicial, particularly  
18 given the number of times that he said it.  
19 I think that Mr. Davis was deficient in not  
20 objecting to that.

21 I will point the Court's attention to  
22 *Matthews v. State*. There are a lot of cases  
23 about vouching, but this was the only PCR  
24 case where I immediately found a reversal and  
25 that's the reason I am citing it. *Matthews*

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1 about that it implied some outside -- I  
2 believe that it was outside -- applying  
3 knowledge of some outside evidence.

4 But I think that's ultimately the problem  
5 with vouching in general. Whenever you say  
6 'my person is telling the truth', it's  
7 essentially implying that you know that  
8 they're telling the truth. It is not just  
9 saying 'I think they're telling the truth  
10 based on what they said on the stand.' It's  
11 saying they are telling the truth. By its  
12 very nature, I think that it implies that  
13 there is some outside knowledge that the  
14 solicitor has that the person is telling the  
15 truth.

16 Your Honor, I'm happy to supplement other  
17 cases as well if the court would like, but I  
18 can move on to my second closing argument  
19 issue.

20 The second closing argument issue  
21 obviously involves the end of their closing  
22 argument. I think that I phrased it as a  
23 grand finale during the testimony. *State v.*  
24 *Liberte*, which I think that I cited -- 336 SC  
25 648 -- in that case they say that it is

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1 testimony of the jailhouse snitch -- very,  
2 very, very detailed about what happened. I  
3 mean to the minutiae of what happened. The  
4 only -- that only Mr. Herrman would know and  
5 the only way these people only would know by  
6 him telling them about it.

7 As far as the vouching of truth, you  
8 heard Mr. Davis say, this is a credibility  
9 issue and I'm going to point you to the *State*  
10 *v. Gilchrist* case, 350 SC 221, which states  
11 that, (reading): "*Vouching occurs when a*  
12 *solicitor tends to bolster the credibility of*  
13 *a witness by placing the government's*  
14 *prestige behind a witness, by making explicit*  
15 *personal assurances of a witness' veracity or*  
16 *when implicitly vouching for a witness'*  
17 *veracity by indicating information not*  
18 *presented to the jury.*"

19 If you will turn to Page 475 of the  
20 record, this is that Jason Cumbee, the  
21 codefendant in the case, -- it actually kinda  
22 starts about 471. It talks about why he  
23 didn't tell the truth to the police early on,  
24 that he was scared for his family, that he  
25 didn't want to get his family involved. But

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1 outside the record. Clearly they did not use  
2 personal knowledge in his closing argument.

3 As far as *State v. Liberte*, if you look  
4 at what the solicitor said, he stated, "Ask  
5 yourselves is it being used as a sword to  
6 attack law and order, to attack law  
7 enforcement, to attack people who are trying  
8 to keep drugs off the street." That is  
9 completely different than what we have here.  
10 He stating we want justice for all. He  
11 doesn't say just justice for the victim, he  
12 says justice for all and that includes Mr.  
13 Herrman. So I think it is a very innocuous  
14 closing argument and there was no "flag  
15 waving."

16 I find that -- well, I hope that you find  
17 that counsel was not deficient.

18 And he also gave a reason why he did not  
19 object. First of all, he didn't think it was  
20 objectionable. Second of all -- as you see,  
21 based on the burden shifting, he's not scared  
22 to get up and object, Your Honor. So he had  
23 a valid trial strategy of why he did not  
24 stand up and argue that.

25 As far as the other allegations that

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1           *to reconstruct the circumstances of counsel's*  
2           *challenged conduct, and to evaluate the*  
3           *conduct from counsel's perspective at the*  
4           *time."*

5           Your Honor, I hope that you find that he  
6           has failed to meet his burden of proof and  
7           the State asks that you deny his application.  
8           Thank you.

9           THE COURT:     A point of clarification,  
10          Counsel.

11          TRISTAN SHAFFER:   Yes, Your Honor?

12          THE COURT:     The three -- I wrote down  
13          three different -- don't get close to the  
14          podium!

15          TRISTAN SHAFFER:   Yes, sir!

16          THE COURT:     Your three arguments are,  
17          I think:   passion at the end of the closing  
18          argument; the vouching; and the question of  
19          whether he was totally competent to make the  
20          decision not to testify.

21          TRISTAN SHAFFER:   Yes, Your Honor.  
22          Those are the primary ones.

23          THE COURT:     I will address the last one  
24          first, the drugs.   He says in the transcript  
25          that he elected not to take it, that it's an

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1           And I remember it differently. You said  
2           that it is arguing against illegal  
3           immigrants, but I think it argues -- actually  
4           what they're saying, even though maybe he was  
5           an illegal immigrant, is that he still has  
6           rights. Because the victim was actually ---

7           TRISTAN SHAFFER:     Yes, Your Honor.

8           THE COURT:        So in reading the record, I  
9           don't feel like it overstepped the boundaries  
10          of a prosecutor. I think even if it's close,  
11          in light of the testimony and the discussions  
12          about confessions and the witnesses, I think  
13          that even if there was any prejudice that --  
14          you know, that if there was any  
15          insufficiency, I don't believe that it rose  
16          to the level that would have changed the  
17          outcome.

18          The appeals court may feel different and  
19          that is, of course, your right.

20          TRISTAN SHAFFER:   Thank you.

21          THE COURT:        At this point, I deny the  
22          application. Forty-five days?

23          MR. JOHNSON:       That will be plenty.

24          Yes, sir.

25          THE COURT:        And I will issue a little

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STATE OF SOUTH CAROLINA )  
 ) CERTIFICATE  
 COUNTY OF GREENVILLE )

I, the undersigned Deborah Garrison,  
 Circuit Court Reporter for the 13th  
 Judicial Circuit, hereby certify that the  
 foregoing is a complete and accurate  
 transcript of the post-conviction relief  
 hearing held in the within action on  
 January 19, 2016, before The Honorable  
 Perry H. Gravely;

I further certify that I am neither  
 kin nor counsel to any of the parties and  
 have no interest in the outcome of this  
 action.

*Deborah Garrison*

Deborah Garrison

Greenville, South Carolina

March 3, 2016

On January 4, 2010, the Applicant proceeded to trial and was convicted as indicted. The Applicant was sentenced by the Honorable Kristi L. Harrington to confinement for a period of forty-five (45) years.

The Applicant filed a timely Notice of Appeal at the South Carolina Court of Appeals. His appeal was perfected by Katherine Hudgins, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Herrman, No. 2013-UP-159 (S.C. Ct. App. filed April 17, 2013). The remittitur was sent thereafter.

### ALLEGATIONS

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

1. Ineffective assistance of counsel.
2. Held unlawfully in violation of 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> amendments of the United States and South Carolina Constitutions.

At the hearing, Applicant proceeded on his claims of ineffective assistance of counsel for failure to object to alleged vouching by the solicitor and failure to object to an alleged improper closing argument by the solicitor. The Court also granted Applicant's Motion to Amend the Application at the time of the hearing to include a passion and prejudice argument under the improper closing argument. Also raised at the hearing was the issue of Applicant's competency during the trial.

### 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

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health and that once he arrived at the South Carolina Department of Corrections, he was taken off of the Thorzine. Applicant stated that he and his attorney talked about strategy and that their strategy revolved around trial counsel's opinion that the State would not be able to prove its case and that the co-defendant had lied.

Trial counsel testified that he was with the Public Defender's Office at the time and was appointed on this case in August of 2008. Trial counsel testified that he and the Applicant met to discuss the case in excess of half a dozen times, and the Applicant was very involved with the preparation of the case. Trial counsel noted in his file that, "Defendant heavily medicated, not good for him." Trial counsel testified that, under his supervision, second chair on this case, Cody Groeber, wrote a brief on the jurisdictional issues. Trial counsel testified that during the trial, there was a motion to suppress all evidence stemming from the recovery of the vehicle in which the victim's body was found due to the fact the Charleston County Sheriff's Office and Charleston County employees were involved in the recovery of the vehicle which was found in a stream or small river and extracted from the stream or river using a boat ramp on the Berkeley County side of said stream or river. Trial counsel testified that there was no physical evidence linking the Applicant to the murder. Trial counsel testified that at least three witnesses testified that Applicant admitted to killing the victim, one of which was Applicant's codefendant, Jason Cumbee. Trial counsel testified it was their trial strategy to attack the credibility of these witnesses and argue that the co-defendant could have been the person who committed the crime. Trial counsel stated that he was able to obtain a self-defense jury charge without putting on a defense based on evidence that had already been presented, and while it was never their position that Applicant acted in self-defense, he was going to take advantage of every defense available to Applicant. Trial counsel testified that he and Applicant have

to bring the medication issue to the trial court's attention so that it would not be a problem later. (Trial Tr. pp.1091-1094). After reviewing the trial transcript and listening to witness testimony, the Court finds that there is no evidence before it to support an allegation that Applicant was not competent to stand trial.

**B.**

Under South Carolina law, "[a] prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

Additionally, the State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 324 468 S.E.2d 620, 624 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. Three things that a court must consider when considering alleged impropriety in the solicitor's closing argument are the argument in the context of the record as a whole, if the judge's instructions cured any inappropriate argument, and if there is overwhelming evidence of guilty. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). It is the applicant's burden to prove that he did not receive a fair trial because the solicitor's comments rose to such a level that the whole trial was infected and the applicant's due process rights were denied. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

Further:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after



objected.

This Court also finds that the State did not improperly appeal to the jury's passion and prejudice. To the contrary, the State's closing argument was confined to the evidence in the record and the reasonable inferences drawn therefrom. Comments by the solicitor asking the jury to live up to the promise of justice for all did not rise to the level to overstep the boundaries and incite any improper passion or prejudice on the part of the jury. (Trial Tr. pp. 1192-94). Applicant presented no credible evidence that the Solicitor's comments infected the trial and fairness as to make the resulting conviction a denial of due process.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of Applicant. This Court also finds Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### **ALL OTHER ALLEGATIONS**

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

BCS20080804839

WITNESSES

ALBERT . CASALE  
Charleston County Sheriff

AGENCY CASE NUMBER

2000018093B

ARREST WARRANT NUMBER

F348237

DATE OF ARREST

August 8, 2008

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury  
Date:

NOV 09 2009

VERDICT

GUILTY

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2009GS1009048

The State of South Carolina  
County of Charleston

COURT OF GENERAL SESSIONS

November Term 2009

THE STATE

Vs.

JEFFREY M. HERRMANN  
DOB: 1981-01-27  
W/M

Indictment for  
Murder