

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Paul M. Burch, Circuit Court Judge

ROBERT J. PHIPPS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001548

APPENDIX

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Marcella Bailey - Cross-examination
by Solicitor Balsa

1 Q well, did they play the tape for you, ma'am?

2 A No, they didn't. They never came back in. The guy
3 didn't come in. I had got up and left and went down to the
4 department.

5 Q So, you're telling this jury that they did not play the
6 tape for you?

7 A No, they didn't. They played the tape downtown. And
8 when they got me into the office, they, they, they explained
9 to me, you know, the seriousness of the crime and that I
10 wasn't in no kind of trouble. They just wanted me to hear
11 his voice. I said well, before I make -- I said -- they
12 said would you like to listen to the tape. I said -- they
13 said do you want to listen to the tape. I said yes, I'll
14 listen.

15 And then I said, wait a minute, let me call my father
16 cause I might be doing something I probably shouldn't be
17 doing without counsel or with somebody with me. And so, I
18 called my dad and, and I gave the phone to the guy in charge
19 and he talked to my dad and then I got the phone back. And
20 then I said what you want me to do. He said go ahead. So,
21 I did.

22 Q Did you feel you were being investigated, ma'am?

23 A I feel as though that I didn't want to have no part in
24 it, part of it cause I don't want that -- I just feel---

25 Q why not?

Marcella Bailey - Cross-examination
by Solicitor Balsa

- 1 A I just feel -- because murder is a serious charge.
2 Who, who would want to have any part of a murder?
3 Q Well, wouldn't you be concerned about the right person
4 getting arrested?
5 A Absolutely.
6 Q Okay. So, I don't understand what's so hard about
7 cooperating with the police.
8 A Because they came to my job. I didn't have a problem
9 cooperating. I did cooperate.
10 Q Okay.
11 A But I went there. I went there on my own.
12 Q Okay, ma'am. What did you do when you heard the tape?
13 A I didn't do nothing but listen to the tape.
14 Q What did you tell them?
15 A I didn't tell them nothing. They asked me, they asked
16 me the question.
17 Q All right. What did they ask you?
18 A They asked me did I recognize the voice.
19 Q And did you?
20 A No, I didn't. I couldn't hear it clearly. I couldn't
21 hear it that clearly when they first started out, and they
22 said once they, they start playing it, and I said nope,
23 don't recognize the voice.
24 Q And they played it for you two different, more than
25 once?

Marcella Bailey - Cross-examination
by Solicitor Bulsa

1 A Did they play it more than once?

2 Q Yes, ma'am.

3 A Yes, they did.

4 Q Okay. And you listened to it, and then you still
5 didn't recognize the voice?

6 A No, I didn't.

7 Q You didn't recognize the voice as being your brother?

8 A No, I didn't.

9 Q You didn't get upset when you heard it and that's what
10 made you leave?

11 A I didn't get upset at the jailhouse. I got upset at my
12 job.

13 Q And isn't, isn't your memory flawed?

14 Isn't that where you actually heard the tape?

15 A No, I never heard the tape. They never played the
16 tape. The gentleman went outside to go get the tape. He
17 left out the room.

18 Q Thank you, ma'am.

19 THE COURT: Redirect?

20 MR. BRANNON: Yes, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. BRANNON:

23 Q Marcy?

24 A Yes.

25 Q You got a phone call, a phone call from Brenda

Marcella Bailey - Redirect examination
by Mr. Brannon

1 Urquhart?

2 A Yes, sir.

3 Q You went and got your brother?

4 A Yes.

5 Q You drove him around, you stopped at a store, and went
6 back home, correct?

7 A That's correct.

8 Q What did you -- what do you remember you did the next
9 morning?

10 A I went to church.

11 Q Doesn't that mean that the day you were driving him
12 around was Saturday?

13 A Yes, I---

14 Q Okay.

15 A Yes, sir.

16 Q Well, what days do you go to church?

17 A I -- Sunday.

18 Q Okay. And you remember specifically you got up the
19 next morning and went to church?

20 A Yes, sir, the next day.

21 Q So, wouldn't that mean that driving him around was on
22 Saturday evening or Saturday night?

23 A Yes, sir.

24 Q Nothing further.

25 THE COURT: Mr. Bulsa.

1 SOLICITOR BULSA: No, nothing further.

2 THE COURT: You may step down, ma'am.

3 You want to check on your witness?

4 MR. BRANNON: Court's indulgence for a minute.

5 THE COURT: Yes, sir.

6 (Pause.)

7 MR. BRANNON: Approach, Your Honor.

8 THE COURT: Yes, sir.

9 (Whereupon, a bench conference was held out of the
10 hearing of the jury at this time.)

11 THE COURT: Ladies and gentlemen, we're going to go
12 ahead and break for lunch at this point in time. The same
13 cautions I've given you every time you've left the
14 courthouse, not to listen to, watch, or read any media
15 reports, not to discuss the case with anyone and don't allow
16 them to discuss the case with you.

17 I'll ask that you be back in the jury room let's say
18 about ten minutes after 1:00. That will give you a little
19 more than an hour to, to get where you need to go and be
20 back. So, shortly after one o'clock if you'll be back in
21 the jury room, and we should be in a position to resume the
22 case at that time.

23 At this point in time you're free to go.

24 Thank you very much.

25 Everyone remain seated while the jury retires.

1 (Whereupon, the following takes place outside the
2 presence of the jury.)

3 THE COURT: All right. Court will be in recess until
4 about ten after 1:00.

5 Thank you very much.

6 MR. BRANNON: Your Honor, requested charge, would that
7 be appropriate at one o'clock?

8 THE COURT: Yes, sir.

9 MR. BRANNON: Thank you.

10 (Whereupon, Court was in recess for the lunch hour.)

11 THE COURT: Yes, sir, Mr. Brannon.

12 MR. BRANNON: We have been unable to locate Officer
13 Scott Watts.

14 THE COURT: All right.

15 MR. BRANNON: They have been to his home. He's under
16 subpoena. They've been to his home and it's my
17 understanding they're now trying to contact his wife to find
18 out how they might be able to find him.

19 THE COURT: What type of officer is he?

20 MR. BRANNON: Spartanburg City.

21 THE COURT: City.

22 SOLICITOR BULSA: Yes, sir, he was actually put under
23 subpoena by us as a just in case witness. We never released
24 him. I, in fact, at lunchtime called him myself, the cell
25 number he gave me. I got his voice mail. I don't know what

1 further to tell the Court.

2 THE COURT: You wish to make any motion?

3 MR. BRANNON: Yeah, like to make a bunch of them.

4 THE COURT: Talking about in connection with this
5 witness.

6 MR. BRANNON: Your Honor, it's my understanding that
7 there is a supplemental report that was created by Officer
8 Watts. Well, first off, I would move for a continuance
9 until such time as we can locate the officer.

10 THE COURT: Well, I don't know whether I can give you
11 that long of a continuance. I certainly could issue a bench
12 warrant for his arrest, and have the sheriff tell me whether
13 or not that can be served.

14 MR. BRANNON: Well, Your Honor, please understand that
15 I don't, I don't want this Court to go and arrest a person
16 that I want to put on the witness stand.

17 THE COURT: Well, that's how I compel people to get
18 here.

19 MR. BRANNON: I understand that. I understand that. I
20 understand that the Court is going to draw a jury in another
21 case.

22 THE COURT: At two o'clock.

23 MR. BRANNON: Would the Court consider---

24 THE COURT: You indicated you had one other witness.

25 MR. BRANNON: I do, Your Honor, and she's here. She's

1 here.

2 THE COURT: Well, why don't we go ahead and take that
3 witness and we'll deal with this issue. And if that gets us
4 to two o'clock, then we may be in a position to go past that
5 jury selection and then make a decision. Maybe he'll appear
6 by then. And if he doesn't, as I indicated, if you've put
7 in the record that he is under subpoena and is properly
8 served, then the Court has the right to issue a warrant for
9 his arrest and I would consider continuing this case until
10 in the morning and see if he can arrive.

11 MR. BRANNON: All right.

12 THE COURT: We'll talk about that once we get to that
13 point. Let's go ahead and take the witness that is here,
14 and, of course, anybody trying to contact him, they might
15 indicate that the Court is about to issue a warrant for his
16 arrest.

17 MR. BRANNON: Thank you, Your Honor.

18 THE COURT: All right.

19 MR. BRANNON: I believe there are two officers going to
20 spread that word at this point, Your Honor.

21 THE COURT: All right. That's probably a good idea.

22 MR. BRANNON: Do you want me to go ahead and bring the
23 witness in before the jury comes in?

24 THE COURT: No, I'm just finding out if the State's
25 ready to proceed.

1 SOLICITOR BULSA: Yes, sir.

2 THE COURT: Defense ready?

3 MR. BRANNON: Yes, Your Honor.

4 THE COURT: Let's bring the jury back.

5 (Whereupon, the following takes place within the
6 presence of the jury.)

7 THE COURT: All right. The record will reflect that
8 the jury has returned to the courtroom.

9 We are in a position to continue the case, and the
10 defense was in the process of calling its witnesses.

11 Mr. Brannon.

12 MR. BRANNON: Mrs. Brenda Urquhart.

13 THE COURT: All right, sir. Excuse me.

14 Ma'am, come forward to my left to be sworn in.

15 BREND A URQUHART, being first duly
16 sworn, testified as follows:

17 THE COURT: Have a seat please. Once you're seated,
18 state your name for the record please, ma'am.

19 WITNESS: Brenda Lee Urquhart.

20 THE COURT: Mr. Brannon, it's your witness.

21 MR. BRANNON: May it please the Court?

22 THE COURT: Yes, sir.

23 DIRECT EXAMINATION

24 BY MR. BRANNON:

25 Q Mrs. Urquhart, do you live here in Spartanburg County?

Brenda Urquhart - Direct examination
by Mr. Brannon

1 A Yes.

2 Q Where do you live, ma'am?

3 A [REDACTED] Union Street.

4 Q Okay. At some point, ma'am, back in 2004, did you live
5 on Webb Drive or Webb Street?

6 A Yes.

7 Q Okay. But you don't live there now?

8 A No.

9 Q All right. From the courthouse, from where you're at
10 right now, how far away is that house on Webb Street or Webb
11 Road?

12 A About three, four miles.

13 Q Okay. But it's off of 221, right?

14 A Yeah.

15 Q Okay. So, it's three or four miles from downtown
16 Spartanburg?

17 A Yeah.

18 Q Right?

19 A Yes.

20 Q Okay. Ma'am, at one point in your lifetime were you
21 involved in a relationship with Robert Phipps?

22 A Yes.

23 Q And would that have been back in '04?

24 A Yes.

25 Q Okay. Maybe starting early '03, something like that?

Brenda Urquhart - Direct examination
by Mr. Brannon

1 A Yeah.

2 Q Okay. How long has it been since you've seen Robert
3 Phipps?

4 A I guess about five years ago I guess.

5 Q Okay. All right. So, you haven't had much contact
6 with him since some time in 2004, right?

7 A Right.

8 Q Okay. Do you remember hearing Robert Phipps talk about
9 having seen one man beat up another man?

10 A Yes.

11 Q Ma'am, do you remember the day that he told you that?

12 A Not the date. But I think it was on a Sunday morning I
13 think. I'm not sure.

14 Q You're not sure?

15 A No.

16 Q Do you remember doing anything as a result of
17 Mr. Phipps telling you that?

18 A I was comforting him.

19 Q Okay. Do you remember making a phone call?

20 A Yes.

21 Q Who did you call?

22 A His sister.

23 Q His sister.

24 okay. Did his sister come to your house?

25 A Yes.

Brenda Urquhart - Direct examination
by Mr. Brannon

1 Q And did my client leave with his sister?

2 A Yes.

3 Q Now, you, you -- did you say you remember, you think it
4 was a Sunday morning?

5 A I think so.

6 Q Okay.

7 A I'm not sure.

8 Q You're not sure.

9 All right. Did you go to church that Sunday morning?

10 A Yes.

11 Q Okay. Who did you go to church with?

12 A My children.

13 Q All right. What church did you go to?

14 A Bible Way Church.

15 Q All right. Is that the church where Mrs. Marcella
16 attends and her husband is the pastor?

17 A Yes.

18 Q Okay. Were they there that Sunday morning?

19 A Yes.

20 Q All right. Please tell the jury what Robert told you
21 he witnessed.

22 A He came in and took a shower, and came -- it was not
23 unusual if I thought he was getting ready for church. And
24 then he came to my bedroom and he was upset, crying, and I
25 asked him what was wrong, and he said he witnessed something

Brenda Urquhart - Direct examination
by Mr. Brannon

1 that no man should ever have to witness. And I asked him
2 what was that, and he said that he seen another man beat up
3 another man, and he tried to comfort that man. But when the
4 guy was not moving, he went and called the police and then
5 he came to my house.

6 Q Okay. All right. But he told you that he saw one man
7 beat up another man?

8 A Yeah.

9 Q All right. You said you tried to comfort him?

10 A Yes.

11 Q Please explain that to me.

12 A well, I held him, I held him, and I gave him a massage
13 to calm him down.

14 Q were you able to see at least the upper part of his
15 body?

16 A Yes.

17 Q Did you see his arms?

18 A Yes.

19 Q His hands?

20 A Yes.

21 Q Ma'am, did you see any bruises anywhere?

22 A No.

23 Q Did you see any cuts anywhere?

24 A No.

25 Q Did you see any, any marks that would indicate he had

Brenda Urquhart - Direct examination
by Mr. Brannon

1 been involved in an altercation himself?

2 A No.

3 Q Were you touching him?

4 A Yes.

5 Q You were close enough to reach out and put your hands
6 on him?

7 A Yes, I was holding him.

8 Q And you saw nothing that would lead you to believe that
9 he had been in a fight?

10 A Nothing.

11 Q All right. Now, ma'am, your -- I believe your
12 testimony was you think it was Sunday morning, but you're
13 not sure?

14 A I'm not sure. I'm not sure.

15 Q But you know that you called Marcy?

16 A Yeah.

17 Q She came to your house?

18 A Yes.

19 Q And then you went to church?

20 A Yes.

21 Q But Robert left with Marcy, is that correct?

22 A Yes.

23 MR. BRANNON: I have nothing further, Your Honor.

24 THE COURT: Mr. Bulsa, your witness.

25 SOLICITOR BULSA: Thank you, Your Honor.

Brenda Urquhart - Cross-examination
by Solicitor Bulsa

1 CROSS-EXAMINATION

2 BY SOLICITOR BULSA:

3 Q Mrs. Urquhart, what made you recall this incident?

4 A A couple years later I went to work for Charles Lea and
5 I met Christine and we became real good friends.

6 Q And who is Christine?

7 A She was my supervisor.

8 Q Do you know her last name?

9 A No.

10 Q Could it have been Gossett?

11 A Yeah.

12 Q Okay. So, you met Christine at Charles Lea.
13 What's that got to do with this case?

14 A We became real close. We was together almost everyday
15 and I asked her what was the worst thing that ever happened
16 to her, and I was gonna tell her the worst thing that ever
17 happened to me, and she said when her brother-in-law got
18 killed. And she described it to me and she said it was on a
19 Sunday. It happened on Collins Street, and that's when I
20 realized that it, I had heard that story before.

21 Q So, this would of been some time.

22 How many months or years I think you said?

23 A I can not, I can not remember how long ago.

24 Q Okay. So, you don't know how long it was after the
25 incident that you talked with Mrs. Gossett?

Brenda Urquhart - Cross-examination
by Solicitor Bulsa

- 1 A No.
- 2 Q The lady you called Hattie?
- 3 A No, Christine.
- 4 Q I mean Christine.
- 5 A Yeah.
- 6 Q Okay. And Christine just happened to be Samuel
- 7 Gossett's sister-in-law?
- 8 A That's what she told me.
- 9 Q Okay. Did she tell you the name of her brother,
- 10 brother-in-law?
- 11 A If she did I don't remember.
- 12 Q Okay. When she made that comment or told you that
- 13 story, what did you do?
- 14 A I said I heard that story before.
- 15 Q And what did you tell her?
- 16 A Huh?
- 17 Q What did you tell her?
- 18 A I don't -- I really don't remember the whole
- 19 conversation of how it went.
- 20 Q Did you tell her the man came in your house and told
- 21 you that he had seen something?
- 22 A Yeah, I told her that Robert came and told me the story
- 23 of something like that.
- 24 Q Uh-huh. (Affirmative).
- 25 A But it was -- she said that they, that he was lying,

Brenda Urquhart - Cross-examination
by Solicitor Bulsa

- 1 lying there on the floor and that's what Robert said. He
2 left him lying on the floor, went to go call the police.
- 3 Q Did you tell Mr. Brannon that Mr. Phipps told you that
4 he actually went to the body to check on him?
- 5 A Yeah.
- 6 Q And he saw that he wasn't moving?
- 7 A Huh?
- 8 Q And then he saw that he wasn't moving?
- 9 A He say he seen that he wasn't moving, moving.
- 10 Q Okay. Did that lead you to believe that he actually
11 went and touched the body?
- 12 A I don't know.
- 13 Q I mean you--
- 14 A He just--
- 15 Q You, you were there.
- 16 what, what did you picture when he told you that?
- 17 A To be honest with you, I didn't -- I just, I just
18 thought it was a fight and that was it.
- 19 Q Okay. One---
- 20 A And I didn't think anything of it.
- 21 Q Okay. So, Mrs., Mrs. Gossett brought that memory back
22 to your mind?
- 23 A Uh-huh. (Affirmative).
- 24 Q Right?
- 25 You're not sure exactly when?

Brenda Urquhart - Cross-examination
by Solicitor Balsa

1 A No.

2 Q Okay. Could you have the details mixed up maybe?

3 A Could I have it mixed up?

4 Q Yes, ma'am.

5 A It was a long time ago.

6 Q Okay.

7 A So---

8 Q And Mr. Brannon went over it several times about your,
9 the day and the time that you thought it was, but you,
10 you---

11 A Yeah.

12 Q ---pretty much remember it was Sunday morning that he
13 came over?

14 A Yeah, I think it was on a Sunday morning. I'm not
15 sure.

16 Q And when he came in, he went straight into the
17 bathroom?

18 A Yes.

19 Q Did you get a good look at him before he went in there?

20 A No.

21 Q Okay. And when he came out, had he changed his
22 clothes?

23 A He took a shower.

24 Q He just took a shower and changed clothes?

25 A Yeah, I don't know if he changed clothes. I know he

Brenda Urquhart - Cross-examination
by Solicitor Bulsa

1 took a shower. I don't know if he put the same clothes he
2 had on or not.

3 Q You couldn't even -- you didn't even know what kind of
4 clothes he had on when he came home?

5 A Not even when he left.

6 Q Okay. But he had clothes there that he could of
7 changed into, didn't he?

8 A Yeah.

9 Q How long had he stayed with you?

10 A Well, I guess about six months or more.

11 Q Okay. And was he actually living there at the time?

12 A Yes.

13 Q You -- he was still living with you that day?

14 A I guess.

15 Q Did not move back to his sister's house?

16 A Oh, he's back and forth.

17 Q All right. Back and forth, what does that mean?

18 A Some days he'll stay with me, and some days he'll stay
19 nights with his sister.

20 Q Had you asked him to leave?

21 A No.

22 Q Because he was doing drugs?

23 A No.

24 Q You -- did you ever ask him that?

25 A He did what he did and I did what I did.

Brenda Urquhart - Cross-examination
by Solicitor Bulsa

- 1 Q But did you, did you know that he was doing drugs?
- 2 A I wasn't sure, no. I wasn't really sure.
- 3 Q Well, when Mr. Gossett went in there and took a shower,
- 4 did he also shave his head?
- 5 A Yes.
- 6 Q Okay.
- 7 A That wasn't---
- 8 Q Was that unusual?
- 9 A No.
- 10 Q It wasn't?
- 11 A No, he, he -- cause I told him I like him bald. He
- 12 looks better bald. I, I remember that now.
- 13 Q Okay. Now?
- 14 A Yeah.
- 15 Q Okay. How did you actually meet him?
- 16 A He was like a pen pal.
- 17 Q What do you mean by pen pal?
- 18 A I wrote him a lot while he was in jail.
- 19 Q All right. Is that how you were introduced to him?
- 20 A In jail, uh-huh. (Affirmative).
- 21 Q He was in jail out-of-state?
- 22 A Yeah.
- 23 Q And his sister introduced you to him?
- 24 A Yes.
- 25 Q And y'all began writing letters?

Brenda Urquhart - Cross-examination
by Solicitor Bulsa

- 1 A Right.
- 2 Q And then when he got out of jail his sister went and
3 got him?
- 4 A Yes.
- 5 Q Brought him back to Spartanburg?
- 6 A Yes.
- 7 Q And when did he actually start living with you?
- 8 A The same day.
- 9 Q The same day?
- 10 A Yes.
- 11 Q She brought him right to your house?
- 12 A Yes.
- 13 Q Is that around Thanksgiving of 2003?
- 14 A Yes.
- 15 Q Okay. And then he stayed with you until when?
- 16 A I don't remember how long. I mean I don't remember
17 ever when he left.
- 18 Q All right. Now, the day that he came in and took a
19 shower and told you that, how was he acting?
- 20 A He was upset.
- 21 Q All right. And what did he ask you to do?
- 22 A He asked me -- he came in and he said Brenda, you're my
23 best friend, you're my confident, and I need to talk to you
24 about something, and then that's when he told me the story.
25 And he asked me would I go up there with him to see if the

Brenda Urquhart - Cross-examination
by Solicitor Bulsa

- 1 guy was okay and I told him no.
- 2 Q He told you he had already called 9-1-1, didn't he?
- 3 A Yeah, I think so.
- 4 Q You think so?
- 5 A (Witness nods affirmatively.)
- 6 Q You're certain or you don't know?
- 7 A I'm not sure. I think he did tell me that.
- 8 Q Okay. So, you saw him Sunday morning, he came in,
- 9 showered, shaved his head, he could of changed clothes,
- 10 right?
- 11 A Could of.
- 12 Q Then he began to tell you what had happened. Told you
- 13 he called 9-1-1.
- 14 A He didn't tell me he called 9-1-1.
- 15 Q He told you he had called 9-1-1?
- 16 A Yeah, I think so.
- 17 Q And then he wanted you to go back over there with him?
- 18 A Yes.
- 19 Q And what did you say?
- 20 A I told him no, I was going to church.
- 21 Q Okay. So, that reinforces your memory that it was
- 22 Sunday morning?
- 23 A I remember I was reading the Bible when he came in.
- 24 Q Okay. And so, you said no, I'm going to church.
- 25 By the way, whose church is it?

Brenda Urquhart - Cross-examination
by Solicitor Balsa

- 1 A Bible way.
- 2 Q All right. And that's Reverend Bailey's church?
- 3 A Yes.
- 4 Q You been going to that church how long?
- 5 A Fourteen years.
- 6 Q Fourteen years.
- 7 You still go there, right?
- 8 A Yes.
- 9 Q All right. And you called his sister, Marcella, right?
- 10 A Yes.
- 11 Q And she came over and got him?
- 12 A Yes.
- 13 Q Do you remember what he was driving?
- 14 A What he was driving?
- 15 Q Yes, ma'am.
- 16 A A white van.
- 17 Q He was driving the van.
- 18 What did Mrs. Bailey come get him in?
- 19 A I didn't go outside to look.
- 20 Q You didn't see what she drove?
- 21 A No.
- 22 Q Okay. Did you see Mr. Gossett after that day?
- 23 A I don't remember.
- 24 Q You don't remember?
- 25 A Hu huh. (Negative).

Brenda Urquhart - Cross-examination
by Solicitor Balsa

- 1 Q Did he take anything with him when he left?
- 2 A I didn't see -- I just don't remember. I didn't, I
- 3 didn't think that he did. I don't -- I'm not sure.
- 4 Q You're not sure?
- 5 A Hu huh. (Negative).
- 6 Q Why, why can't you remember whether you saw him again?
- 7 A Because he was always in and out. So, I don't remember
- 8 if I seen him or not. Me and him, we were good friends.
- 9 But, you know, when, whenever he came in, he came in.
- 10 Whenever he left, he left.
- 11 Q Okay. When did he leave Spartanburg?
- 12 A I don't know that.
- 13 Q Why not?
- 14 A I just don't know.
- 15 Q Okay. When did you stop knowing about him?
- 16 I mean y'all were good friends, pen pals. He comes and
- 17 lives directly with you. He's in and out and this happens
- 18 and now you can't remember when you saw him again?
- 19 A I don't remember. I really don't.
- 20 Q So, that means maybe you didn't see him again?
- 21 A Maybe, maybe not. I just don't remember.
- 22 Q What about his appearance that led you to believe he
- 23 was upset?
- 24 A He was crying.
- 25 Q He was crying?

Brenda Urquhart - Redirect examination
by Mr. Brannon

1 A (Witness nods affirmatively.)

2 Q All right. Thank you, Mrs. Urquhart. Answer anything
3 else---

4 MR. BRANNON: Very briefly, Your Honor.

5 THE COURT: Yes, sir.

6 REDIRECT EXAMINATION

7 BY MR. BRANNON:

8 Q Mrs. Brenda, he said I just saw something no man should
9 ever see?

10 A Right.

11 Q I saw one man beat another man?

12 A That's what he told me.

13 Q You actually put your hands on his body?

14 A Yes, sir.

15 Q There were no marks, no bruises, or no signs of an
16 altercation?

17 A No, sir.

18 Q And you don't know if it was Saturday or Sunday when
19 this conversation took place?

20 A I don't remember.

21 Q You do remember you were reading the Bible?

22 A I was -- yes, I was studying for my class.

23 Q Do you only read your Bible on Sunday morning?

24 A No, I do it Sunday night. I mean that, that night too.

25 Q You do it that night too, don't you?

Brenda Urquhart - Redirect examination
by Mr. Brannon

1 A Right.

2 Q Thank you. Nothing further.

3 THE COURT: Anything further from the State?

4 SOLICITOR BULSA: No, sir.

5 THE COURT: You may step down, ma'am.

6 MR. BRANNON: Your Honor?

7 THE COURT: Check and see if we got him here.

8 MR. BRANNON: He has not yet been located, Your Honor.

9 THE COURT: All right. Ladies and gentlemen of the
10 jury, we're gonna take a brief recess at this time. I'm
11 gonna ask that you retire to the jury room. And as I always
12 tell you, don't begin any discussions concerning this matter
13 until I advise you to do so.

14 You may retire to the jury room.

15 Thank you.

16 (Whereupon, the following takes place outside the
17 presence of the jury.)

18 THE COURT: All right. Mr. Brannon.

19 MR. BRANNON: I would ask the Court's assistance in
20 locating the witness.

21 THE COURT: All right, sir. I'm gonna ask that you put
22 on the record the proof that the subpoena was served upon
23 the individual.

24 MR. BRANNON: My proof is Prosecutor Derrick Bulsa.

25 THE COURT: Well, Mr. Bulsa, can you -- do you have

1 anything to indicate that he was served with a subpoena?

2 SOLICITOR BULSA: I don't know.

3 THE COURT: I've sent the clerk to get the clerk's file
4 on the case. So, we'll see what's in there.

5 MR. BRANNON: May I approach, Your Honor?

6 THE COURT: You may.

7 MR. BRANNON: Affidavit of service to S. Watts.

8 THE COURT: Just one second.

9 (Pause.)

10 THE COURT: All right. I'm going to have this made a
11 Court's Exhibit in the case.

12 (Whereupon, the subpoena was marked as Court's Exhibit
13 No. 1 for identification purposes only at this time.)

14 THE COURT: And are you -- are you requesting this
15 individual's presence?

16 MR. BRANNON: Yes, Your Honor.

17 THE COURT: Then I will issue a bench warrant to direct
18 the sheriff to pick him up and bring him in.

19 MR. BRANNON: Thank you, Your Honor.

20 I would ask the Court to grant a continuance until such
21 time---

22 THE COURT: well, what I'm going to do is I'm going to
23 go ahead and take a break in this case until after I've
24 selected a jury in the next case, and then we'll decide
25 where we are once I hear from the Sheriff's Office perhaps.

1 MR. BRANNON: Thank you, Your Honor.

2 Your Honor, before -- do you want to leave him in here
3 before -- are you going to excuse the jury or---

4 THE COURT: I'm gonna leave them right where they are
5 for the time being.

6 MR. BRANNON: Okay. Thank you.

7 THE COURT: I'll have the bailiff let them know we are
8 on an extended break and we'll probably get them some
9 refreshments. So, he can be returned.

10 I'll direct the bailiffs to inform the jury that we're
11 going to be on an extended break, that I'm having to deal
12 with picking a jury in the next case. Get them whatever
13 refreshments they wish, need and make them comfortable.

14 Thank you very much.

15 All right. Court will be recess in this case until
16 after I have selected the jury in the next case.

17 Thank you very much.

18 (Whereupon, a short recess was taken at this time.)

19 THE COURT: Mr. Kelley, do you have any specific
20 requests for charge in this case?

21 SOLICITOR KELLEY: I don't believe that Mr. Bulsa has
22 any, Your Honor. He's on his way down right now.

23 THE COURT: Mr. Brannon, you indicated you might have
24 some request for charge?

25 MR. BRANNON: Your Honor, Your Honor, no specific

1 request. I would just -- I just wanted to go down a list
2 with you is all, and I'm certain that your charges is the---

3 THE COURT: Well, tell me, tell me what you're
4 interested in.

5 MR. BRANNON: Presumption of innocence.

6 THE COURT: Yes, sir.

7 MR. BRANNON: Direct and circumstantial, circumstantial
8 evidence.

9 THE COURT: Yes, sir, criminal intent and then, of
10 course -- I will advise you that I'm contemplating a charge
11 of, on mere presence, and you can think about that. We
12 don't have to talk about it right now.

13 MR. BRANNON: Thank you, Your Honor.

14 THE COURT: I am contemplating that charge as well.

15 MR. BRANNON: Thank you, Your Honor.

16 Your Honor, do you want me to ask Officer Watts to come
17 in before the jury comes in?

18 THE COURT: Just have him come in. Yeah, he can come
19 on in and have a seat.

20 Mr. Bulsa, before you came, I asked about any specific
21 request for charge, and Mr. Kelley wasn't aware of any. I
22 thought I'd check with you just to be sure.

23 SOLICITOR BULSA: Nothing out of the ordinary, Your
24 Honor.

25 THE COURT: All right. And I did inform the defense

1 that I'm contemplating, in addition to the normal charges, a
2 charge concerning mere presence, and we can talk about that
3 later. I'll just make you aware of that.

4 SOLICITOR BULSA: Yes, sir.

5 THE COURT: All right. Is the State ready to proceed
6 at this time?

7 SOLICITOR BULSA: Yes, sir.

8 THE COURT: Defense ready?

9 MR. BRANNON: Yes, Your Honor.

10 THE COURT: All right. Let's bring the jury in.

11 SOLICITOR BULSA: Your Honor, I would like a moment to
12 have the family---

13 THE COURT: Just one second, sir.

14 SOLICITOR BULSA: The rest of the family is not here.

15 THE COURT: Hold them up for a second. Hold them up
16 for a second.

17 (Pause.)

18 THE COURT: While we're waiting, could you gentlemen
19 approach and let's talk for a second?

20 (Whereupon, a bench conference was held at this time.)

21 SOLICITOR BULSA: All right. Are we gonna take a short
22 break before we go into closings?

23 Mine's still on my computer. I didn't print it.

24 THE COURT: I'll give you a second.

25 SOLICITOR BULSA: Yes, sir.

1 (Pause.)

2 THE COURT: All right. Are we ready, Mr. Bulsa?

3 I think I see them coming through the door now.

4 SOLICITOR BULSA: Yes, sir, we can start.

5 THE COURT: Okay. Defense ready?

6 MR. BRANNON: Yes, Your Honor.

7 THE COURT: Bring the jury in.

8 (Whereupon, the following takes place within the
9 presence of the jury.)

10 THE COURT: All right. The record will reflect that
11 the jurors have returned to the courtroom.

12 First of all, I want to thank you for your patience.
13 We try to keep things moving as quickly as we can around
14 here, and as you know, things don't move very quickly around
15 here.

16 But I was selecting the jury in the next case that
17 we'll be starting tomorrow. So, I was dealing with your
18 fellow jurors. We've gotten that done and now we're ready
19 to proceed in this case.

20 So, again, thank you for you patience. But it allows
21 us to launch into the next case as soon as this one is over,
22 over so we won't be wasting Court time. I may of wasted a
23 little of your time this afternoon. So, I apologize to the
24 extent that that was necessary.

25 while, when we rested earlier, the defense was in the

Scott Watts - Direct examination
by Mr. Brannon

1 process of calling its witnesses.

2 And Mr. Brannon, you may call your next witness.

3 MR. BRANNON: Call Officer Scott Watts.

4 THE COURT: Come forward, sir, to my left to be sworn.

5 SCOTT WATTS, being first duly

6 sworn, testified as follows:

7 THE COURT: Have a seat in the witness stand, please.

8 Once seated, please state your name for the record.

9 WITNESS: Master Patrol Officer Scott Watts.

10 THE COURT: Mr. Brannon, it's your witness.

11 MR. BRANNON: Please the Court, Your Honor?

12 THE COURT: Yes, sir.

13 DIRECT EXAMINATION

14 BY MR. BRANNON:

15 Q Officer Watts, who are you employed by?

16 A City of Spartanburg.

17 Q All right. How long have you been employed by the City
18 of Spartanburg?

19 A Almost 11 years.

20 Q All right. And are you a patrol officer?

21 A Yes, sir.

22 Q Is part of the duties of a patrol officer to respond to
23 dispatch calls?

24 In other words, dispatch calls, it says go here or go
25 there?

Scott Watts - Direct examination
by Mr. Brannon

1 A Yes, sir.

2 Q All right, sir. Did you or were you dispatched on the
3 evening of April the 3rd, 2004, to an address on South
4 Center Avenue here in Spartanburg, South Carolina?

5 A Yes, sir.

6 MR. BRANNON: And may I approach the witness?

7 THE COURT: You may, yes, sir.

8 Q And did you, in fact, make a report, a supplemental
9 report of that call?

10 A The next day, yes, sir.

11 Q And is that report -- is that the report?

12 A Yes, sir.

13 Q Would you please tell the jury what, why you were
14 dispatched to that address?

15 A I was originally dispatched for a fight call that was
16 across from [REDACTED] South Center Street where a suspect, a
17 subject may be unconscious.

18 Q Okay. What time did that call come into 9-1-1?

19 A I was dispatched at 7:35 p.m.

20 Q All right. And what time did you arrive at the address
21 at South Center?

22 A At 7:42.

23 Q So, three, seven minutes after you were dispatched you
24 were at the location?

25 A Yes, sir.

Scott Watts - Direct examination
by Mr. Brannon

1 Q Correct?

2 A Yes, sir.

3 Q All right. Now, did you talk with anybody while you
4 were there?

5 A Yes, sir, as you ride up South Center, the -- ■ is
6 actually a yellow house that's up on your left-hand side.
7 There were some people out front at a dark in color sedan.
8 I talked to them. There may be three or four people. I
9 talked to them, asked them if they saw anything, know about
10 anybody fighting or anything like that. They said they were
11 not aware of anyone, and that's the only people I talked to.

12 Q Now, before you -- the dispatch actually said across
13 from ■, correct?

14 A Correct.

15 Q What house is across from ■?

16 A I do not have it noted here, the exact address, but I
17 can describe it for you.

18 Q What color is the house?

19 A It was a blue house.

20 Q Blue house.

21 So, did you, did you approach that home?

22 A Yes, sir, I did.

23 Q Did you knock on the door?

24 A Yes, sir.

25 Q Did you knock on the front door?

Scott Watts - Direct examination
by Mr. Brannon

1 A Yes, sir.

2 Q Was the front door closed?

3 A Yes, sir.

4 Q Could you hear any sounds?

5 A Don't recall anything. But I could tell that the TV
6 was on.

7 Q Thank you.

8 All right. Did you go to the back-door?

9 A Yes, sir, I did.

10 Q Did you knock on the back door?

11 A Yes, sir, I did.

12 Q Was the back-door closed?

13 A No, sir.

14 Q Did anyone ever come to either the front or the
15 back-door?

16 A No, sir.

17 Q Are you positive that those two doors were closed?

18 A Yes, sir.

19 Q No further questions. Thank you.

20 THE COURT: Mr. Kelley, your witness.

21 SOLICITOR KELLEY: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY SOLICITOR KELLEY:

24 Q Officer Watts, when you knocked on the door and didn't
25 receive any response, did you then leave the area?

Scott Watts - Cross-examination
by Solicitor Kelley

1 A After knocking on the back, then the front door again,
2 yes, sir.

3 Q And was that normal procedure given the information you
4 had about the call?

5 A Yes, sir, it is.

6 Q Okay. And why, why was that?
7 what was the nature of the call?

8 I know you've already been over that a little bit.

9 A It was a fight call across from [REDACTED] South Center where
10 someone I believe actually laying on the road or laying in a
11 yard that was unconscious. After checking the yard, and
12 checking around the house, had no exigent circumstances to
13 try to enter 690, or excuse me, the blue house. I went back
14 in service unable to locate anything.

15 Q Okay. Now, you said exigent circumstances, tell me
16 what, exactly what you mean by that please.

17 A If I'd saw any blood on the door, if I'd heard anyone
18 sounds like distress in the house while I was walking around
19 knocking on the door, that would give me a reason to go into
20 the house to check on that.

21 Q Okay. So, at the time and to the best of your
22 knowledge, you were not responding to a possible stabbing?

23 A No, sir.

24 Q Okay. So, to the best of your knowledge at the time
25 with the information you had, you followed all proper

Scott Watts - Cross-examination
by Solicitor Kelley

1 procedure?

2 A Yes, sir.

3 Q Okay. And you say that the house that you responded to
4 was on Center Street?

5 A Yes, sir.

6 Q Now, tell me, where is Center Street in relation to
7 Highway 221 in Spartanburg County?

8 A South Center Street is actually on the north side of
9 town as, off of like, you know, Wofford Street, that area,
10 keep on going down, and it's up in there.

11 Q And, and just for my benefit, where is that in relation
12 to 221?

13 Is it close?

14 Is it far?

15 How far is it if it's not close?

16 A It's a couple, a few miles --

17 Q Okay.

18 A -- away from 221.

19 Q And how about the location of Center Street in relation
20 to Hillcrest?

21 A A pretty good ways.

22 SOLICITOR KELLEY: Okay. Beg the Court's indulgence,
23 Your Honor.

24 THE COURT: Yes, sir.

25 (Pause.)

Scott Watts - Cross-examination
by Solicitor Kelley

1 Q Officer Watts, are you aware of where this 9-1-1 call
2 originated from that you were responding to that evening?

3 A No, sir.

4 Q You don't know?

5 A No, sir.

6 Q Okay. Thank you.

7 No further questions, Your Honor.

8 THE COURT: Any redirect?

9 MR. BRANNON: Yes, sir.

10 THE COURT: Yes, sir.

11 REDIRECT EXAMINATION

12 BY MR. BRANNON:

13 Q The front and back doors were closed?

14 A Correct.

15 Q No further questions.

16 THE COURT: Anything on recross?

17 SOLICITOR KELLEY: No, sir, Your Honor.

18 THE COURT: You may step down. Thank you very much.

19 Any objection to the witness now being released?

20 MR. BRANNON: None, Your Honor.

21 THE COURT: Any from the State?

22 SOLICITOR BULSA: No, sir.

23 THE COURT: You're free to go, sir. Thank you very
24 much.

25 WITNESS: Thank you, sir.

Russell Porter - Direct examination
by Solicitor Bulsa

1 THE COURT: The defense may call its next witness.

2 MR. BRANNON: Defense rests.

3 THE COURT: Does the State wish to take up anything
4 before calling reply or rebuttal witnesses?

5 SOLICITOR BULSA: No, sir, I do have one reply witness.

6 THE COURT: All right, sir. You may call that witness.

7 SOLICITOR BULSA: State calls Investigator Porter.

8 THE COURT: Sir, I'll remind you you've already been
9 placed under oath in this trial. You're still under oath at
10 this time. You may have a seat.

11 WITNESS: Yes, sir.

12 THE COURT: Mr. Bulsa, it's your witness.

13 SOLICITOR BULSA: Thank you, Your Honor.

14 RUSSELL PORTER, having been previously
15 sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY SOLICITOR BULSA:

18 Q Investigator Porter, were you one of the officers that
19 went to West Virginia to speak with the defendant?

20 A Yes, I am.

21 Q And do you recall when you went to speak with him?

22 A Exact date?

23 Q Yes, sir.

24 A In 2005. I don't remember the month.

25 Q Did you do a report?

Russell Porter - Direct examination
by Solicitor Bulsa

1 A Yes, sir, I did.

2 Q If I show you a copy of your report, will that refresh
3 your memory?

4 A Yes, sir.

5 Q And what date did you go see him?

6 A April 12th, 2005.

7 Q Okay. And when you went to see him, what was the
8 purpose of your visit?

9 A We had a belief that he was in, a witness in our, in
10 our case.

11 Q Okay. why?

12 A We had information on a possible witness in our case.

13 Q And why did you believe that?

14 A From fingerprint evidence that there was -- his name,
15 first of all, and then just to seek information about a tape
16 that I had a suspicion or, or thought that he may of made
17 the call, had information in reference to that call.

18 Q So, on April the 12th of 2005, did you have any of
19 the DNA evidence?

20 A I did not.

21 Q So, what forensic evidence did you have?

22 A I had a fingernail scraping.

23 Q No, I'm talking about when you went to visit him.

24 A Him?

25 A fingerprint.

Russell Porter - Direct examination
by Solicitor Balsa

1 Q Fingerprint.

2 A Right.

3 Q Was the only thing?

4 A Yes, sir.

5 Q Okay. And then you had the 9-1-1 call that you
6 believed he may of made?

7 A Yes, sir.

8 Q And when you went there to speak with him as a witness,
9 as a potential witness, what was the -- how was the
10 atmosphere of the interview?

11 A Once we arrived, I spoke with the officials there.
12 They went and talked to him. Let them know we were there.
13 He came in, just, you know, nothing on, no shackles or
14 anything. Just his regular outfit he had on. Chris and
15 I -- Sergeant Taylor and I were sitting at the table. He
16 came in, sat down, introduced ourselves, and just began to
17 talk.

18 Q Okay. And explain what the conversation was about?

19 A Began to talk to him. Just basically asked him been to
20 Spartanburg, know anybody in Spartanburg. We asked him
21 about the specifics about the, Mr. Gossett. Asked him to
22 listen to the tape, if he knew the person was who was making
23 that call. He denied it at that time.

24 Presented the fingerprint evidence. Still denied
25 knowing anything about it. Didn't have any idea how his

Russell Porter - Direct examination
by Solicitor Balsa

1 prints got on there, on the can that we found. And that's
2 basically about it. And then a little bit later, of course,
3 the conversation ended.

4 Q Did you have him listen to the tape?

5 A I did.

6 Q And what did he say when he heard that?

7 A Denied it being him.

8 Q Okay. Did you believe it might of been him at that
9 point?

10 A I did.

11 Q Okay. Why?

12 A Just prior to playing the tape, Mr.---

13 MR. BRANNON: Objection, Your Honor, and I'm -- my
14 objection is based on a hearing that was held in this
15 matter.

16 THE COURT: Ladies and gentlemen of the jury, I'm gonna
17 ask you to step back to the jury room at this point in time.
18 Don't begin any discussions concerning the case until I
19 advise you to do so.

20 (whereupon, the following takes place outside the
21 presence of the jury.)

22 THE COURT: Mr. Brannon.

23 MR. BRANNON: Your Honor, the Court's aware that we had
24 a Jackson v. Denno. I asked you to withhold your ruling on
25 that.

Russell Porter - Direct examination
by Solicitor Bulsa

1 THE COURT: Yes, sir.

2 MR. BRANNON: Your Honor, it's clear that there was no
3 Miranda and I would ask the Court to rule that any
4 statements made by my client at that interview in West
5 Virginia as outside the scope of this trial and should not
6 be admitted into this, into evidence.

7 THE COURT: Mr. Bulsa.

8 SOLICITOR BULSA: Well, Your Honor, I believe any
9 ruling on that might of subjected or prevented the State
10 from offering that in the case in chief. This is in reply
11 to the defendant's own testimony. So, any violation of---

12 THE COURT: As I recall, your client testified
13 concerning the nature and the extent of his conversation and
14 what he may have said in that conversation during his
15 testimony.

16 MR. BRANNON: Withdraw my objection, Your Honor.

17 THE COURT: Anything further before I bring the jury
18 back?

19 MR. BRANNON: No, Your Honor.

20 THE COURT: Bring the jury in.

21 (Whereupon, the following takes place within the
22 presence of the jury.)

23 THE COURT: All right. The record will reflect the
24 jury has returned to the courtroom.

25 The objections have been withdrawn.

Russell Porter - Direct examination
by Solicitor Bulsa

1 You may proceed, Mr. Bulsa.

2 SOLICITOR BULSA: Thank you, Your Honor.

3 CONTINUED DIRECT EXAMINATION

4 BY SOLICITOR BULSA:

5 Q I believe we were at the point where you indicated you
6 had played the 9-1-1 tape for Mr. Phipps.

7 A That's correct. Just as I started to state, just prior
8 to playing that tape, Sergeant Taylor asked Mr. Phipps to
9 pronounce a word. Asked him to pronounce the word anonymous
10 and he did. And as soon as he pronounced that word, he made
11 a mispronunciation. He left some syllables out of the, the
12 middle. I then played the tape and he mispronounced
13 anonymous exactly the same way as he did on the tape.

14 Q So -- but he still denied making that---

15 A He did.

16 Q And did you talk with him any further after that?

17 A A few minutes after, we talked to him a little bit
18 longer. He still, still denied it. Then he went on to say
19 that maybe I, I may be able to help you. Then he gave us
20 names. We gave them our business cards. He indicated he
21 would contact us later after he talked with his family.

22 Q What names did he give you?

23 A He gives us three names. New York, Dirty or King
24 Dirty, and John John.

25 Q Did he indicate what those people might have to do with

Russell Porter - Direct examination
by Solicitor Bulsa

1 this case?

2 A He did not.

3 Q Did he ever call you after you left your card?

4 A He did not.

5 Q Officer, now, did you have an occasion to meet with his
6 sister---

7 A I did.

8 Q ---Marcella Bailey?

9 A I did.

10 Q Where did you meet with her?

11 A I met with her at the District Seven Transportation
12 office, which is the bus transportation office.

13 Q And while you were at that location, did you play her
14 the 9-1-1 tape?

15 A I did.

16 Q While at that office?

17 A I did.

18 Q You didn't take her to City Hall and play it there?

19 A I did not.

20 Q Okay. And what was her response when you played that?

21 A We actually were sitting in the District Seven's break
22 room, the big -- it's a large kind of break room area. She
23 sat across the table. Myself and Investigator Hurst sat on
24 one side of the table and we talked to her and I placed the
25 tape recorder on the table. I said I want to play you

Russell Porter - Direct examination
by Solicitor Bulsa

1 something. See if you recognize this voice.

2 As soon as I pushed play, the recording came on. And
3 as soon as she, the guy began to speak, she jumps up, gets
4 angry, and storms out.

5 Q All right. And why were you playing the tape for her?

6 A Because I had information that Mr. Phipps was her
7 brother, and if anybody recognized him, it would be
8 obviously, obviously a family member. So, I played it for
9 her.

10 Q So, this was still in the investigative stage of trying
11 to find out who may of made that call?

12 A That's correct.

13 Q Thank you. Answer any questions that either counsel
14 may have.

15 THE COURT: Mr. Brannon, your witness.

16 MR. BRANNON: Thank you.

17 CROSS-EXAMINATION

18 BY MR. BRANNON:

19 Q Investigator Porter, kind of going backwards, Mrs.
20 Bailey testified today. Her testimony was that she didn't
21 hear the tape at the District Seven Office.

22 Right?

23 A She did.

24 SOLICITOR BULSA: Objection: Now I believe that's
25 pitting the witnesses.

Russell Porter - Cross-examination
by Mr. Brannon

1 THE COURT: well, I don't know exactly where he's going
2 with it. He hasn't asked to, whether or not he agrees or
3 disagrees with that.

4 But let's try not to---

5 MR. BRANNON: Okay.

6 THE COURT: ---pit the witnesses against each other.

7 Q You testified---

8 THE COURT: The jury can decide who they choose to
9 believe.

10 Q You testified just a moment ago that you started to
11 play the tape and she got up and left the office, left the,
12 the room that you were in, correct?

13 A I stated I played the tape. I played the tape. As
14 soon as the conversation, as soon as the guy made the
15 statement, she jumps up and leaves. So, the tape was
16 started. The tape played. The recording came on. The guy
17 said what he said. She gets angry, jumps up, and leaves.

18 Q Okay. I thought you said as soon as you pressed the
19 button she got up and left?

20 A No.

21 Q Okay. My bad. My bad.

22 All right. Now, you interviewed Mrs. Mills in this
23 case.

24 Do you remember that?

25 A I did.

Russell Porter - Cross-examination
by Mr. Brannon

1 Q The first time you took her statement---

2 SOLICITOR BULSA: Objection, Your Honor. That's beyond
3 the---

4 MR. BRANNON: I'm gonna, I'm gonna get back right back
5 to, to this, Your Honor.

6 THE COURT: Tie it together.

7 MR. BRANNON: I will.

8 THE COURT: You're not allowed to go beyond the scope
9 of cross-examination.

10 MR. BRANNON: I will.

11 Q The first time you talked to Mrs. Mills she did not
12 talk to you about taking those items out of the home, did
13 she?

14 A She did not.

15 Q He gave you names. He just didn't tell you everything
16 he knew.

17 Did he?

18 A That's correct.

19 Q Same thing Mrs. Mills did, right?

20 A I, I guess.

21 Q Thank you. Nothing further.

22 SOLICITOR BULSA: Nothing further.

23 THE COURT: Anything further?

24 You may step down, sir.

25 WITNESS: Thank you.

1 THE COURT: State have any other witnesses in reply or
2 rebuttal?

3 SOLICITOR BULSA: No, sir.

4 THE COURT: Ladies and gentlemen, there's some brief
5 matters I have to take up with the attorneys. It will be
6 very brief before we go into the next phase of the trial,
7 which will be the closing arguments followed by my charge on
8 the law. I'll excuse you one more time to the jury room
9 with the same instructions as always, not to begin any
10 discussions until I've advised you to do so.

11 You may retire to the jury room.

12 (Whereupon, the following takes place outside the
13 presence of the jury.)

14 THE COURT: Any motions or other matters from the State
15 before we go into closing argument?

16 SOLICITOR BULSA: Not from the State, no, sir.

17 THE COURT: Any from the defense?

18 MR. BRANNON: Renew my, renew my motion for directed
19 verdict, Your Honor, on the same grounds.

20 THE COURT: All right. And it has been, it has been
21 reviewed and I do find there still is sufficient evidence to
22 justify the case going to the jury.

23 MR. BRANNON: Thank you, Your Honor.

24 And just, for the record, I would, I would ask the
25 Court to -- I would renew those motions made during the

1 trial to preserve those motions.

2 THE COURT: I understand. It's noted.

3 All right. Then is the -- I guess you have presented
4 evidence in the case.

5 MR. BRANNON: Yes.

6 THE COURT: So you'll be going first.

7 MR. BRANNON: Yes.

8 Mr. Bulsa, you need to leave for a minute?

9 SOLICITOR BULSA: Yes.

10 May I step upstairs for one moment?

11 THE COURT: Yes, sir, take, take a brief break.

12 (Whereupon, a short recess was taken at this time.)

13 THE COURT: All right. Is the State now ready?

14 SOLICITOR BULSA: Yes, sir.

15 THE COURT: Defense ready?

16 MR. BRANNON: Yes, Your Honor.

17 May I inquire if he intends to open on the law or if
18 he's just gonna do it all at one time?

19 SOLICITOR BULSA: I waive opening on the law.

20 MR. BRANNON: Thank you.

21 THE COURT: Okay. And any comments concerning the
22 charge, any further comments?

23 SOLICITOR BULSA: No, sir, I would like to know the
24 court's definition of reasonable doubt. I'm not sure how
25 Your Honor charges it.

1 THE COURT: Well, it's to cause a reasonable person to
2 hesitate to ask, to act.

3 SOLICITOR BULSA: You use the failure to convince
4 language?

5 THE COURT: Yes.

6 SOLICITOR BULSA: Thank you.

7 MR. BRANNON: And I would ask the Court to please issue
8 the charge or mere presence.

9 THE COURT: I intend to do so.

10 MR. BRANNON: Thank you.

11 THE COURT: Bring the jury in.

12 (Whereupon, the following takes place within the
13 presence of the jury.)

14 THE COURT: All right. The record will reflect the
15 jury has returned to the courtroom.

16 I had indicated to you, at the beginning of the trial,
17 once we had finished hearing all of the evidence, we will be
18 in a position then to have the closing statements or
19 arguments made by counsel, and that's the stage of the trial
20 that we're now in, and the defense is allowed to go first.

21 Mr. Brannon, you may proceed.

22 MR. BRANNON: May it please the court?

23 THE COURT: Yes, sir.

24 MR. BRANNON: Ladies and gentlemen of the jury, first
25 please let me take this opportunity to thank you for your

1 time and your patience. I know that we've now taken close
2 to three days of your time. But I know that you've also
3 learned that this is an incredibly important case and I
4 thank you for your patience.

5 I want to go back to my opening statement, and what I'm
6 gonna ask you to do is to consider the things that we know.
7 What we know is there was a 9-1-1 call at 19:35, 7:35 p.m.
8 on Saturday, April the 3rd. We know, know that 9-1-1 call
9 came in. It was played for you. You heard it. And we know
10 that that man, my client, made that call.

11 In that 9-1-1 tape you heard my client say I just saw
12 one man beat up another man. I saw him. He was down. I
13 think he was unconscious.

14 We know what time the case, the tape was made or the
15 call was made. Excuse me. That's documented. That CD's
16 gonna go back with you. You will have it with you and
17 you'll see 19:35, 4/3/04. It's written right there. We
18 know that that's when that call came in.

19 We know that at 7:42, 19:42, Officer Scott Watts was at
20 that home. Seven minutes after the 9-1-1 call, we know that
21 Scott Watts, the guy who just testified, was there. He went
22 to the front door. He went to the back-door. He looked
23 through the yard. He knocked on the front door. He knocked
24 on the back-door. Both doors were closed.

25 we also know that 7:58 to 8:00 a.m. on April the 4th

1 that door was opened. And we know that because Sheila Mills
2 testified the door was opened. Another -- Mr. Evins
3 testified the door was opened. That door was opened.

4 What we also know is that at 7:35, when my client made
5 the 9-1-1 call, he wasn't at the house. And we know that
6 because we know that the, the 9-1-1 call came from a pay
7 phone away from that house.

8 So, somebody went into that house or came out of that
9 house after 7:42 p.m. on April the 3rd. My client wasn't
10 there. My client was with his sister. Somebody either went
11 in or came out and left the door open.

12 We know that my client was in that house at some point
13 cause we got a fingerprint from a beer can/crack pipe. We
14 know that his DNA was on the beer can, and we know that
15 there were two spots of my client's blood on Mr. Gossett's
16 pants. Somewhere in here and somewhere down here. Two
17 spots.

18 And repeatedly, throughout this trial, even the last
19 witness called in rebuttable, wants to talk about fingernail
20 scrapings. The blood that was tested in this case by the
21 SLED, the gentleman yesterday that testified, the blood that
22 was tested that was Mr. Gossett's blood chance was one in
23 three, 39 quadzillion that it wasn't Mr. Gossett's blood.
24 Five billion times the population of the earth.

25 The DNA that was tested that we know to be my client's

1 was, was reported by Mr. Bogan. The opportunity or the
2 random possibility of picking another individual with the
3 same or similar DNA pattern was one in four quintillion.
4 But then the DNA under the fingernails of Mr. Gossett --
5 now, let's, let's understand one thing. If you scrape under
6 Mr. Gossett's, Mr. Gossett's fingernails, you're gonna get
7 Mr. Gossett's DNA. You're gonna get skin cells. It's going
8 to be his. So, if there's anybody else's under there,
9 there's going to be a mixture. Mr. Gossett and somebody
10 else.

11 But the results of the fingernail scrapings was one in
12 nine. Not one in nine million. Not one in nine gazillion.
13 It was one in nine period. No zeros, no commas. One in
14 nine. There's six people in this courtroom that would have
15 the same or similar DNA match to one in nine under Sam
16 Gossett's fingernails.

17 Now, there's something else that's important that you
18 need to know about fingernail scrapings. Remember the
19 gentleman that sat here. He's the evidence guy for the
20 city. He's the one that made three trips back and forth to
21 Columbia. And he sat right here and he told Mr. Turnipseed
22 that he takes things down there and then he comes back. And
23 if the officers don't like what they get, they go back for
24 more. They went back for more and all they could get was
25 one in nine.

1 Now, we know that Sheila Mills went into that house.
2 They backed their car into the driveway for the purpose of
3 smoking crack. She tells us that she wanted to let Sammy
4 know that they were there. So, she took her hit and was
5 gonna go tell Sammy because the door was opened.

6 But we also know that Sheila Mills had another man with
7 her. She said initially that man didn't get out of the car.
8 But then she rethought it and she said oh, that's right, she
9 got out and came to the porch and got the clothes basket
10 full of the stuff that she'd stolen and put it in the car.
11 Remember when Investigator Porter was up here. He said he
12 checked DNA on three people.

13 Well, let me tell you, the man that was with Sheila
14 Mills, they didn't test his DNA. We know Sheila went in.

15 How do we not know he went in?

16 There were four other people that Porter testified that
17 he knew had been in that home. But he didn't ask for their
18 DNA. One in nine doesn't get it.

19 Sheila Mills admitted that she was smoking crack with
20 another man in the driveway of that house. Sheila Mills is
21 the one who told everybody that that door was open. But at
22 7:42 p.m., my client wasn't there. My client was making a
23 9-1-1 call. And when the officer got there, the door was
24 closed. Somebody went in.

25 One in nine went in. One in nine killed Sam Gossett.

1 Not Robert Phipps. One in nine killed Sam Gossett.

2 The door was closed at 7:42. The door was opened at
3 eight o'clock in the morning. But he wasn't there.

4 In a minute the judge is gonna tell you about
5 reasonable doubt. Reasonable doubt is that kind of doubt
6 that would make a reasonable person hesitate to act. Each
7 of you are jurors, and, therefore, you are reasonable
8 people. If you hesitate to act, there's a reasonable doubt.

9 Another point of doubt there was a Springs industry
10 card laying on the floor there. Mr. Gossett's girlfriend
11 testified yesterday and I said did Mr. Gossett have a
12 Springs Industry card and she said no. And then I don't
13 know if you saw her, but she caught somebody's eye in the
14 audience and she changed her answer. He didn't have a
15 Springs industry card. There was Springs card there that
16 had blood on it. He didn't have one. He was unemployed.

17 His wallet had been ransacked, to use the police
18 officer's word. Ransacked. Mr. Gossett didn't ransack that
19 wallet. He was unconscious. He was dead. He had been
20 stabbed 14 times. He had been beaten. He didn't go through
21 his wallet. Somebody else did.

22 There's absolutely no evidence that puts him in the
23 room. None. Somebody went through that wallet. There was
24 blood on the Springs card. There's no proof that that was
25 Samuel Gossett's Springs card. Remember she sat right here

1 and said no, he doesn't have a Springs card. And then all
2 of a sudden, somebody in the audience redirected her.

3 So, you got Sheila Mills going in. You got a Springs
4 card that didn't belong to Samuel Gossett, and then there's
5 this person named New York. Nobody knows who New York is.
6 My client pointed Investigator Porter to a man named New
7 York.

8 But what we know is every time my client has told his
9 story, there was somebody else in that house. That person
10 was Mr. New York. The only person, the only name that my
11 client knew him by was Mr. New York. He was in that house.
12 On 9-1-1 at 7:35, just saw one man beat another man. He
13 goes to Brenda's house. He said I just saw something no man
14 should of seen. I saw one man beat another man down. He
15 tried to tell his sister the same thing. But she said nope,
16 I don't want to hear it.

17 And then he got on the witness stand, a man with a
18 criminal record nine pages long, a man, if he had not taken
19 the stand you wouldn't have known about nine pages, but he
20 got on the witness stand and he told you his story. There
21 was another man in the house. His name was New York. He
22 went and beat the man down and I went and called 9-1-1 to
23 try and save his life.

24 Mr. Bulsa kept calling Mr. Gossett that nice man, and I
25 want to tell you that I know nothing about him that would

1 lead me to believe that he wasn't a nice man. But what I
2 know is he lived in a crack house. He knew crack dealers.
3 People went to his house to use crack. They were using
4 crack that day. New York brought the crack pipe. There was
5 a fight, and Mr. New York killed Sam Gossett.

6 My client, at 7:42, was not in that house, that door
7 was closed, and at eight o'clock it was opened.

8 Ladies and gentlemen, one in nine. Please compare it
9 to the other random selection possibilities. One in thirty
10 quintillion. One in twenty-nine gazillion. One in nine.
11 One in nine.

12 The Springs card wasn't his. The door was closed.
13 Reasonable doubt. His story has been the same since
14 7:35 the evening of April the 3rd, 2004.

15 New York killed him. Not him.

16 Thank you very much.

17 THE COURT: Mr. Bulsa.

18 SOLICITOR BULSA: Ladies and gentlemen, on the evening
19 of April the 3rd, 2004, Samuel Gossett was brutally beaten
20 and stabbed to death. You've heard the evidence. You've
21 seen the evidence. You'll have it in the jury room with
22 you, and I want to address the charge at hand first.

23 The crime of murder that the judge will charge you is
24 the unlawful killing of another human being with malice
25 aforethought. I couldn't show you a picture of

1 Mr. Gossett's face. You'll have a couple pictures that you
2 saw him in the background sort of. I couldn't show you the
3 injuries that he had, the stab wounds that he had. But you
4 remember Doctor Wren's testimony. It took about 15 minutes
5 for Doctor Wren to just describe the multitude of injuries
6 Mr. Gossett faced that led to his death.

7 So, that's clearly, I submit to you, a crime of murder.
8 This case has been all about who did that murder. And from
9 the Brannon's closing argument, as he argued his client's
10 point, he says it was either the defendant -- well, he says
11 it was New York. So, I submit to you it's either the
12 defendant or New York.

13 If that's, if that's your choice, who in the world do
14 you believe?

15 Look at the evidence. Mr. Brannon talks time and time
16 again about this 9-1-1 call and an officer going out and the
17 door being closed. I hope you'll have some means of playing
18 this in the jury room cause I'm gonna ask you to listen to
19 it. You only heard it one time. I don't know how well you
20 could hear it or if you can understand the words that were
21 being said or the demeanor in which it was given.

22 Listen to the lack of emotion, and the lack of clarity
23 of what this person said. It was as if he was thinking of
24 what to say so he wouldn't tell too much, and it is devoid
25 of emotion I submit to you. It is a matter of fact.

1 We know this occurred at 7:35 p.m. We know, from
2 Brenda Urquhart, his girlfriend, that he went to her house.
3 She says she was getting ready for church. She believes it
4 was Sunday morning. Not Saturday evening. Sunday morning.
5 He told her he had seen something that no man should have to
6 see before. He was emotional. He was crying. Remarkably
7 different from the man who made this call.

8 Why do I go into that?

9 Because from 7:35 until Sunday morning this man was
10 somewhere.

11 We had Officer Watts tell you about the relationship
12 between South Center Street and Highway 221 cause that's
13 where she lived off of. Just a few miles. Hillcrest, where
14 Mrs., his sister, Mrs. Bailey, lives is in a whole another
15 direction.

16 So, what does he do for those hours between this phone
17 call and going to Brenda's house?

18 I submit to you, ladies and gentlemen, that you can
19 take all the evidence and certainly surmise or infer that
20 because he went to Brenda emotional that he certainly knew
21 it was more than just somebody getting into a fight as he
22 tells the 9-1-1 operator. He knows at that point, I submit
23 to you, that that man is possibly dead. He wants Brenda to
24 go with him to check on him. She won't go. She then -- she
25 calls his sister and he gets her to take him by to check,

1 and the sister said he wanted to see if there was an
2 ambulance.

3 Now, why would there be an ambulance if nobody called
4 9-1-1?

5 You can certainly infer he went in there. He's crying
6 to Brenda. Tried to help him. Didn't. Couldn't help him.

7 I submit to you, ladies and gentlemen, that that man
8 told you the story of how this killing happened, but he
9 subjected and supplanted himself with this fictional New
10 York.

11 He told you what he did. He beat him down. He was on
12 crack. He left. We don't even know what time this all
13 occurred. We just know that a call came at nine, at 7:35.
14 we don't know how long Mr. Gossett laid there dead. Doctor
15 Wren, the expert, he said I can't give you a definite time.
16 I can give you a range, 12 to 30 hours, 12 to 30 hours.

17 He was smoking crack, drinking beer. Listen to this, I
18 submit to you he settled down before he actually called.
19 The last person that we know to see Sammy alive was Rosylind
20 Garrett, the morning he left to go check on the house. No
21 other witnesses came in here and said I saw him alive. He
22 was there all day.

23 No telling when, no telling when this assault occurred.
24 No telling when. You got a 12 to 30 hour window where we
25 can back up and we know it was more like 12 to 24 hours

1 because he was found about 24 hours -- actually no. That's
2 about right, 12 to 30, nine o'clock the previous morning,
3 April the 3rd. Mrs. Gossett, Mrs. Rosylind Garrett saw him
4 last at 7:30, 8:00 when he went over there till the time of
5 autopsy, which was three o'clock on April the 4th.

6 So, your 12 to 30 hours goes from three o'clock in the
7 morning, April the fourth, back to nine o'clock in the
8 morning April the 3rd.

9 Does this sound like a man on crack and drinking?

10 Listen to it.

11 It doesn't. He sobered up, went back and realized what
12 he had done, went to Brenda crying, and went in and
13 showered, changed clothes, shaved his head, and then he
14 begged to go over there or to go check on him.

15 Mr. Brannon speaks about this one in nine. They're
16 only, by his testimony, only three people there. I submit
17 to you there's only two people there. So, that one in nine
18 is looking pretty good as one in two.

19 Mr. Brannon pounds on that one in nine, one in nine,
20 one in nine. That's not very much. Well, he seems to
21 overlook the fact that he has, his blood is on Mr. Gossett's
22 pants remarkably near a pocket where he could of easily been
23 holding his wallet. Blood that could of been transferred
24 from a cut that he'd sustained while he was stabbing
25 Mr. Gossett.

1 As the expert pathologist told you, blood is slippery,
2 the knife can be slick. If someone's fighting back, you
3 could easily cut yourself. And in this case, ladies and
4 gentlemen, murder, the murder weapon found on the bed is
5 broken. This man could of easily rifled through the
6 pockets, left the door open to make it look like a burglary
7 or a robbery.

8 But he certainly bled on Mr. Gossett. No doubt about
9 that. He bled on Mr. Gossett.

10 And how did he do that?

11 He was over his body going through his pockets. He
12 killed him. Perhaps he was high on crack and went out of
13 control. But he's a cold blooded murderer because innocent
14 men don't lie. Innocent men don't continue to deny it to
15 the police when they're, when he's in custody as nothing, no
16 further fear of violation of his probation. He's back in
17 jail.

18 If he sincerely wanted to help and was merely just a
19 witness, why lie?

20 why lie?

21 why lie?

22 why lie?

23 Because he did it.

24 Mr. Brannon wants to compare him with Sheila Mills and
25 even somehow suggest that maybe she did it or the guy was

1 with her did it. Well, that was one of the reasons we're
2 having her testify, to show you the kind of person she was.
3 She's probably one of the most honest people that testified,
4 a crack head thief who steals to get high. But she
5 certainly didn't kill the man. It doesn't even fit the time
6 frame. Nobody that morning killed the man. Doesn't fit the
7 time frame the expert pathologist told you.

8 But she was questioned about whether she had taken
9 things out of there and she told. He was questioned time
10 and time again by the police in West Virginia. Listen, we
11 got this tape.

12 Is this you?

13 Do you know something about this?

14 We got your fingerprint. Tell us something. Help us
15 out. Help us solve this case. Lie, lie, lie.

16 I want to comment on some of the evidence. I know it
17 was kind of tedious yesterday, it may of seemed, when we
18 went through the officer at the scene. Officer Hogsed, who
19 went through the house and snapping pictures, collecting
20 evidence. We do that for a reason. So you can tell the
21 extent of the investigation, the extent of the search, and
22 how they are trying to identify who did this. Spent over
23 eight hours there searching and looking. Even shuffled
24 through the clothes.

25 And isn't it odd that this was just a simple beating,

1 that items of blood and the knife even was somehow covered
2 in layers of clothes on the bed?

3 Somebody was trying to hide this and make it appear
4 that something else happened. Physical evidence supports
5 that. That's just -- remember how he talked. He's got --
6 you got pictures you'll see.

7 The full story didn't come out, but the forensic,
8 forensic evidence doesn't lie. He was in the house. He was
9 smoking dope, he was drinking beer, cut himself, and bled on
10 Mr. Gossett as he was beaten. That's the only logical
11 explanation.

12 There was no New York. There was no New York. There
13 was two people. That's all the forensic evidence revealed.
14 Remember every piece, that they had enough evidence, this
15 Ken Bogan, this DNA expert, every piece of evidence that he
16 had enough substance to develop a DNA profile either came
17 back to Mr. Gossett or Mr. Phipps or a mixture. Nothing
18 else from any other possible person. Every piece that he
19 could develop enough after this extensive search by law
20 enforcement comes back to two people. The two people that
21 were in the house. One dead man and the one man who killed
22 him.

23 Think through this logically, use your common sense.
24 Use your common world experiences, and look at this
25 evidence, and review the photos. If you want to look at the

1 clothes, we can get you some gloves if you want to pull them
2 out and look at them. One's on the inside of the leg.

3 Ones' near the pocket. She cut them out. Had them tested.

4 We spent time with Officer Hogsed and David Reeves
5 going over how the evidence was handled. That's important.
6 We didn't know if somebody might raise some question as to
7 whether the police tampered with the evidence, planted his
8 blood on it, which it's clear that didn't happen. You have
9 to be confident of the evidence collected and how it was
10 secured.

11 Mr. Brannon mischaracterizes Mr. Reeves' comment about
12 taking other trips down there. He took one set of evidence
13 down one time because that's all SLED would take and then he
14 takes another set down. Say test this. And by the way,
15 here's Mr. Phipps' DNA standard to compare, and you-all
16 heard the results. We go through that extensive questioning
17 of the evidence technicians and Officer Bogan so you're
18 confident that it wasn't mishandled there. Verona Gibson
19 who looked at these pants never had contact with his blood.
20 She made the cutting. She analyzed it, and made the
21 cuttings, and sent it for analysis.

22 So, we got kind of long and drawn out yesterday. But
23 there were reasons. The reasons, so you could hear the
24 police investigation, and how they handled this evidence
25 because it's important. This forensic evidence doesn't lie

1 unlike some people.

2 Now, the State called Mrs. Rosylind Garrett at the end
3 to give you an understanding a little bit more about
4 Mr. Gossett and how he lived and where he kept his wallet.
5 That was a big point. Kept it on his person in his pocket.

6 Mr. Brannon goes into the fact of whether he worked,
7 and he wants to hammer up here that she said this Springs
8 card wasn't Mr. Gossett's and then she changed her
9 testimony. But what he forget to remind you is, is when he
10 asked her where he last worked, when he asked Mrs. Garrett
11 where Mr. Gossett last worked, this was before he mentioned
12 the card, Mrs. Garrett said he last worked at Springs
13 Industries. That's where he last worked.

14 So, it's common sense that he would still have his
15 Springs card. Maybe she didn't realize he had a Springs
16 card. But he certainly last worked there and she knew that.
17 That Springs card is not left there by the, by the culprit.
18 It was taken from the wallet that was rifled through after
19 Mr. Gossett was killed.

20 You have the defendant calling his sister and
21 Mrs. Urquhart along with himself. And I asked Mr. Phipps
22 several questions that I considered open ended. I didn't
23 want to lead him to the answer all the time. I wanted to
24 hear what his description would be of what happened. Unlike
25 his direct testimony. He was led all over the place. I

1 wanted to hear how he would tell this story.

2 And you remember his demeanor. He had to kick back and
3 look up multiple times before he could even answer.
4 Something that's been on his mind for at least four years
5 because the police went and interviewed him April of '05.
6 He had plenty of time to recall what occurred. His sister,
7 first lady of the church, she was inconsistent with
8 Mr. Phipps. She wanted -- he wanted her to take her over
9 there to see if there was an ambulance?

10 Why go see if there's an ambulance if 9-1-1 hasn't
11 already been called?

12 I went -- we went to a store to make a phone call. I'm
13 real sure if she really remembered that well. But she
14 stayed in the car. Phipps said she went out. Went in the
15 store. She didn't see him doing anything. That is
16 inconsistent with that time of -- that time of the 9-1-1
17 call is wholly inconsistent with Brenda Urquhart.

18 And Brenda's probably one of saddest parts of this
19 case. She's put in the middle of this because she was his
20 girlfriend, and she still goes to church with the Bailey's,
21 his brother and sister, his family. And that's why the
22 State didn't call her as a witness. We had an idea what she
23 was gonna say. I didn't want to subject her to that. I
24 didn't know what she was gonna say, and she did what we
25 thought. She tailored her testimony to an extent to try to

1 help him and minimize it.

2 But the reason we have people sitting outside in these
3 rules of sequestration is so they can't hear everybody
4 testify and they can't measure their testimony against the
5 others. And that's why, when you heard the witnesses on
6 this side come in, they were inconsistent, inconsistent,
7 inconsistent. She didn't know what Mr. Phipps had said.
8 she didn't know what Mrs. Bailey had said. She was
9 certainly inconsistent that she felt it was Sunday morning,
10 and he had called 9-1-1 by the time he got to her house, and
11 that he was emotional, she had to comfort him.

12 Ladies and gentlemen, the defendant described to you
13 what happened. He put himself in the place of New York or
14 he put New York in the place of him.

15 I ask you, on behalf of the family, Mr. Sammy Gossett,
16 to do your duty, review this evidence, seek justice, and
17 find a verdict that speaks the truth. In this case, ladies
18 and gentlemen, it's guilty.

19 Thank you.

20 THE COURT: Ladies and gentlemen of the jury, that
21 completes the closing arguments to be made by counsel. I
22 told you that when we reached this stage of the trial it
23 would be my duty and responsibility to charge you concerning
24 the law to be applied in this case.

25 I began this trial a couple of days ago by going over

1 with you the indictment in this case, and that indictment is
2 for the charge of murder. I remind you of the fact that a,
3 the fact that a defendant has been arrested, charged, and
4 indicted in this case is not evidence in the case. It can
5 not be considered by you as evidence of guilt in this case
6 nor does it create a presumption of guilt. The document,
7 the indictment is simply the formal document that brings the
8 case before this Court for trial. It informs the defendant
9 of the charges that have been lodged against him.

10 Now, to the indictment that was presented to this
11 Court, the defendant has pled not guilty. That plea, under
12 the law and the Constitution of our State, puts the burden
13 upon the State to prove the defendant guilty.

14 A person charged with the commission of a criminal
15 offense in South Carolina is never required to prove himself
16 innocent of that charge. It's an important rule of law that
17 governs our Courts. That is, that a defendant in a criminal
18 trial, no matter what the seriousness of the charge might
19 be, is always presumed to be innocent of the crime for which
20 the indictment has been issued unless guilt has been proven
21 by evidence satisfying you, the jury, of that guilt beyond a
22 reasonable doubt.

23 The presumption of innocence does not end when you
24 begin your deliberations. It accompanies the defendant
25 throughout the proceedings until such time as you reach a

1 verdict of guilt based on evidence satisfying you of that
2 guilt beyond a reasonable doubt.

3 Many people describe the presumption of innocence that
4 a defendant has in this courtroom somewhat like the robe
5 that I wear into the courtroom on a daily basis. That is,
6 that presumption of innocence remains about the shoulders of
7 the defendant throughout the proceedings and into your
8 deliberations until that robe has been stripped from the
9 defendant by proof or evidence that satisfies you of that
10 defendant's guilt beyond a reasonable doubt.

11 The presumption of innocence is not a mere legal
12 theory. It's not just a legal phrase. It's a substantial
13 right that every citizen and defendant is entitled to unless
14 you, the jury, are satisfied, from the evidence, of the
15 defendant's guilt beyond a reasonable doubt.

16 Now, you've already heard me use that phrase beyond a
17 reasonable doubt several times in my charge. I hope you
18 understand it's an important concept in our legal system
19 that someone charged with a crime is entitled to have that,
20 that, his guilt proven beyond a reasonable doubt. You may
21 ask yourself well, just what is meant by the legal phrase
22 proof beyond a reasonable doubt.

23 A reasonable doubt is that kind of doubt which would
24 cause a reasonable person to hesitate to act. I remind you
25 that, during this trial, that you and I have had different

1 functions to perform, different things to, to do, and it's
2 been my duty to preside over the trial and it's been your
3 duty to listen to the evidence and weigh the evidence as the
4 trial has gone on.

5 Now, proof beyond a reasonable doubt is that kind of
6 proof that would leave you firmly convinced of the
7 defendant's guilt. If, after considering all of the
8 evidence, you believe that there is a real possibility or a
9 reasonable doubt of the defendant's guilt, you must find the
10 defendant not guilty. If, however, on the other hand, you
11 are firmly convinced from the evidence of the defendant's
12 guilt beyond a reasonable doubt, it would be your duty and
13 responsibility to return a verdict of guilty in this case.

14 Now, throughout the trial, as you've heard the
15 evidence, it's been my responsibility to rule on the
16 admissibility of evidence or on the appropriateness of
17 questions and on occasion I have had to ask you to step
18 outside of the courtroom while I perform my duties as the
19 presiding officer in this case. I told you, at the
20 beginning of the trial, and I will reaffirm to you at this
21 time, please don't take from anything that I have done in
22 the discharge of my duties that I have any opinion
23 whatsoever as to how you determine the facts in this case.
24 The law doesn't allow me an opinion on that subject. I
25 don't have an opinion as to how you determine the facts in

1 this case.

2 You are the sole judges of the facts. The same law
3 that makes you the sole judges of the facts makes me the
4 sole judge of the law in this case. It's your duty, under
5 your oath, to accept the law as I now give it to you, apply
6 it to the facts as you find them to be. That should put you
7 in a position to reach a just and a true verdict in this
8 case.

9 Now, I told you at the beginning of trial also that you
10 have, if you had any notion or opinion as to what the law is
11 or what the law ought to be, leave those notions outside of
12 the jury room. It's your duty, again, to take the law as I
13 give it to you, apply it to facts as you find them to be,
14 and reach a just and a true verdict in this case.

15 Now, in deciding, in looking at the evidence, there are
16 two types of evidence which you have the right to consider.
17 Let me explain the difference between those two types of
18 evidence that you can consider.

19 The first type of evidence that I'm going to describe
20 to you is what is called direct evidence. Direct evidence
21 is testimony from a witness who claims to have direct
22 knowledge concerning a fact that might be in controversy.
23 Such as an eye witness. Someone who claims to have actually
24 seen or experienced or heard or felt or touched or smelled
25 the thing about which they testified. They testified that

1 they have direct knowledge on the issue that's in
2 controversy. That's what's meant by direct evidence.

3 Circumstantial evidence is the other type of evidence
4 that our law allows you to consider in reaching a verdict.
5 Circumstantial evidence is proof of a chain of facts or
6 circumstances which indicate the existence of another fact.
7 It is evidence which immediately establishes collateral
8 facts from which a main fact might be reasonably inferred.
9 Circumstantial evidence, therefore, is based upon inference
10 and not upon personal knowledge or observation.

11 I use a very common example in all of my charges
12 concerning circumstantial and direct evidence to give you an
13 idea of what we might mean by proving a fact by
14 circumstantial evidence. Let's say sometime during this
15 week you went to bed at night, you looked outside of your
16 home. The yard outside of your home was dry. The stars
17 were shining. You slept well all night, didn't wake up.
18 The next morning you looked out that same window. The sun
19 might be shining. But there's water dripping from all the
20 trees. There's puddles in the driveway. The road in front
21 of the house is soaking wet.

22 Now, you didn't see it rain. You didn't hear it rain.
23 But from the chain of facts and circumstances that you know
24 to be true, you might reasonably infer that at some time
25 during the night it, in fact, did rain. Now, that's what we

1 mean by proof of collateral facts from which a main fact
2 might be reasonably inferred.

3 Now, the law makes absolutely no distinction between
4 the weight or the value to be given by you, the jury, to
5 either direct or circumstantial evidence. Nor is a greater
6 degree of certainty required of circumstantial evidence than
7 that of direct evidence. Your job, as jurors, is to weigh
8 all of the evidence in the case. And after weighing all of
9 the evidence, if you are not convinced of the guilt of the
10 defendant beyond a reasonable doubt, you must find the
11 defendant not guilty. If, however, you are firmly convinced
12 of the defendant's guilt beyond a reasonable doubt, it would
13 be your duty to find the defendant guilty in the case.

14 Now, as the finders of the fact, I told you facts
15 that -- I told you at the beginning of the trial it's your
16 duty also to determine the credibility and the believability
17 of the witnesses, and I'm gonna go back over that function
18 that you have as jurors in this case. Necessarily, you must
19 determine the credibility of the witnesses who have
20 testified in this case and credibility simply means
21 believability. It's your duty, as jurors, to analyze the
22 evidence, evaluate the evidence, determine which evidence
23 convinces you of its truth.

24 In determining the believability of witnesses who have
25 testified in this case, you have the right, as jurors, to

1 believe one witness against all the others, all the others
2 against one. You can believe part of the testimony of a
3 witness and reject the remaining part of the testimony. You
4 may believe the testimony of a witness in its entirety or
5 reject portions of it. You have the right, as, as the sole
6 judges of the facts, to consider the evidence and testimony
7 of the witnesses and determine if that testimony exhibits
8 any interest, bias, prejudice, or other motive in the case.
9 You can consider the appearance and the manner in which a
10 witness is testified. In other words, as I told you at the
11 beginning of the trial, use your own good common sense in
12 determining which witnesses you choose to believe and assign
13 a finding of credibility or believability too. And what
14 weight you choose to decide to give to each witness is up to
15 you as the sole judges of the facts.

16 Now, I will charge you that, under the law of this
17 state, the mere presence of someone at the scene of a crime
18 is not sufficient to prove someone guilty of the crime. A
19 defendant's presence where a crime is being committed or
20 mere association with a person who commits a crime does not
21 make a defendant an accomplice, an aider, or an abettor of
22 the person who commits the crime. The burden is upon the
23 State to prove every element of the crimes which have been
24 charged.

25 And if you find, after reviewing all of the evidence,

1 that the State has proven that the defendant was only
2 present at the scene of a crime, and that they have not
3 proved, beyond a reasonable doubt, any other participation
4 in the crime, then you must find the defendant not guilty.
5 The law that is, is that, proof of presence at the scene of
6 a crime is not sufficient to find someone guilty of that
7 crime.

8 Now, also I told you that I would discuss with you in a
9 little more detail the effect or the, the, expert witness
10 testifying in a case, and we had a couple of witnesses who
11 were qualified as experts in the case. And I explained to
12 you at that time that there's an exception to our general
13 rule concerning individuals testifying that allows expert
14 witnesses to offer their opinions within the area of their
15 expertise and to state the reasons for those opinions.

16 You should weigh the testimony of an expert like any
17 other witness who is testified in this case. You give it
18 the weight that you think it deserves. If you find that the
19 expert's expertise is lacking in some fashion or they lack
20 sufficient knowledge or lack sufficient experience in which
21 to give the, the opinion that they gave, or if the reasons
22 that they gave in support of their opinion is outweighed by
23 other evidence, you are not required to accept the testimony
24 of an expert merely because that person is an expert. You
25 should give it the weight that you think it deserves. You

1 have the right to disregard a expert's opinion like any
2 other witness that is testified in this case.

3 In other words, give that testimony the weight that you
4 think it deserves based on all the facts and circumstances
5 that you consider in the case. Simply because someone is an
6 expert though does not require that you accept their opinion
7 even though it might not be contradicted by other testimony
8 in the record if you find that the reasons given or the
9 basis for the opinions are not sound.

10 Now, in order to establish criminal liability, criminal
11 intent is required. And in a few minutes I'm going to
12 charge you concerning the law on murder in this, this state,
13 which is the charge that is contained in the indictment.
14 And in every charge there is a degree of criminal intent
15 that is required to be proven by the State beyond a
16 reasonable doubt before someone can be found guilty of that
17 crime.

18 Now, criminal intent is the mental state required to be
19 proven by the State for a particular crime. And depending
20 on the crime, it might be purpose, intent, knowledge,
21 recklessness, or criminal negligence. Criminal intent,
22 again, must be proven by the State beyond a reasonable
23 doubt. Criminal intent is always a matter for the jury to
24 determine from the circumstances surrounding the case
25 because there is no way to prove someone's intent by direct

1 evidence. Science doesn't allow us to take someone's head
2 and pull it open and look at their brain and see what they
3 intended to do at any given time. Therefore, there's no way
4 that medical science can tell you what someone's intent was
5 in any given situation.

6 So, the law says that criminal intent may be inferred
7 from the circumstances that were shown to have existed at
8 the time of the alleged incident. That's how you make a
9 determination of whether or not the necessary elements
10 requiring intent, whether or not they were present.

11 It is not necessary to establish intent by direct or
12 positive evidence, but intent may be established by
13 inference, the same way any other fact can be established,
14 taking into consideration the acts of the parties, and all
15 the facts and circumstances surrounding the alleged incident
16 in this case.

17 Criminal intent is a mental state. It's a conscious
18 wrongdoing. It's up to you to determine what the defendant
19 intended to do based on the circumstances shown to have
20 existed at the time as you find them to be from the
21 evidence. Criminal intent can also arise from action, and
22 under law, it can arise from a failure to act.

23 Now, as I indicated to you, the charge in this case
24 that's charged in the indictment is murder. The defendant
25 is charged with murder, and the State must prove, beyond a

1 reasonable doubt, that the defendant killed another person
2 with malice aforethought.

3 Now, malice is a little bit different than words as far
4 as its legal definition than you might think in your
5 ordinary day-to-day usage. Let me explain what is legally
6 meant by the phrase malice.

7 Malice is hatred. It's ill will or hostility towards
8 another person. It is the intentional doing of a wrongful
9 act without just cause or excuse with the intent to inflict
10 an injury or under circumstances that the law will infer an
11 evil intent.

12 Malice aforethought does not require that the malice
13 exist for any particular length of time before the act is
14 committed. But malice must exist in the mind of the
15 defendant just before and at the time that the act is
16 committed. Therefore, there must be a combination of the
17 previous evil intent and the act.

18 Malice aforethought can be either expressed or
19 inferred. There comes that word inference again. These
20 terms express and inferred don't refer to different kinds of
21 malice. It refers to the way or the manner in which malice
22 may be shown to have existed. That is either by direct
23 evidence or by inference from the facts and circumstances
24 which are proven.

25 Express malice is shown when a person speaks words

1 which express, express hatred or ill will for another person
2 or when a person prepares beforehand to do the act which was
3 later accomplished. For example, lying in wait for a person
4 or other acts in preparation going to show that the deed was
5 within the defendant's mind would be express malice.

6 Now, inferred malice, it can be inferred from conduct
7 showing a total disregard for human life. Inferred malice
8 may also arise when the deed is done with a deadly weapon.
9 A deadly weapon is any article, instrument, or substance
10 which is likely to cause death or great bodily harm.
11 whether an instrument has been used as a deadly weapon will
12 depend upon the facts and the circumstances of each case.

13 To give you examples of items which our Courts have
14 determined in other cases to be deadly weapons, they include
15 such things as pistols, shotgun, rifle, a dirk, a dagger, a
16 knife, a slingshot, metal knuckles, razors, gasoline, fire
17 bombs, Molotov cocktails, and lighter fluid. Those are
18 examples of things which have been found to be deadly
19 weapons in our state.

20 Now, ladies and gentlemen, there's going to be two
21 possible verdicts that you can reach in this case. That is
22 a verdict of either guilty or not guilty of the crime of
23 murder.

24 Now, I'm going to give you a verdict form in a few
25 minutes. That verdict form will have on it the caption of

1 the case. It will state the indictment and what the charge
2 is for and that you, the jury, unanimously find the
3 defendant, they'll be a blank for not guilty where you would
4 check it, or another blank for guilty where you would check
5 it.

6 Please don't take from the order that I have put that
7 or the form that I have any opinion one way or the other as
8 to how you should determine the facts and, in this case. In
9 fact, I have not read that yet and I don't know what order
10 they're in at this point in time. But I know they'll both
11 be there and they'll be in some, in some order, one or the
12 other. But those will be the two choices.

13 In order for you to reach a verdict in this case, you
14 must reach that verdict unanimously. That means each and
15 every one of you must agree upon the verdict before it
16 becomes the verdict of the jury.

17 Now, I'm gonna ask Mr. Springer to raise his hand.

18 (Juror complies.)

19 THE COURT: Mr. Springer, you're going to be the
20 foreperson of the jury. That means it will be your
21 responsibility to preside over the deliberations of the jury
22 as they go forward. It gives you no greater say in the
23 outcome of the case than any other juror since the verdict
24 must be unanimous in order for the jury to reach that
25 verdict.

1 During the deliberations, if the jury should have any
2 questions concerning matters that you think that the Court
3 can answer, I'll ask that you record those questions in
4 writing, knock on door, hand them to the bailiff, the
5 bailiff will return those questions to me, and I'll
6 determine the appropriate answers to give to the questions.
7 I'll caution you, I'm not allowed to answer each and every
8 question that you might have during your deliberations
9 because, as I've already explained, I can't enter into your
10 determination of the facts in the case.

11 I can respond to questions concerning the procedure,
12 the evidence that's been admitted, the law that's been
13 charged to you, things of that nature. But I'm not telling
14 you not to ask your questions. Ask whatever question you
15 think is appropriate. I'll determine what the response is
16 appropriate to the questions that you might have to ask.

17 The evidence will be submitted back to the jury room
18 with you. We do not have means in the jury room for you to
19 play the CD's. If that is necessary to be done, please let
20 the bailiff know. We'll bring you into the courtroom and
21 we'll arrange to play those so that you can hear them in the
22 courtroom. So, if that's necessary, just let us know.
23 We'll make every arrangement for you to be able to listen to
24 those things if you think that is necessary.

25 Again, when a verdict is been unanimously reached, it

1 will be the foreperson's job to record that verdict on the
2 verdict form I'll provide you, and knock on the door and
3 inform the bailiff that a verdict has been reached, and
4 you'll be asked to step back into the courtroom for us to
5 receive the verdict at that time.

6 I've gone over a lot of things with you. I've --
7 before I tell you to begin your deliberations, I'm going to
8 go over my charge with the jury. I'm going to be sure that
9 only the properly admitted evidence is coming back to the
10 jury room with you, and we'll go over the verdict form
11 before I tell you to begin your deliberations.

12 So, one last time I'm going to ask you to step into the
13 jury room. Don't begin your deliberations or discussions
14 until you've been brought back and given final instructions.

15 You may retire to the jury room.

16 (Whereupon, the following takes place outside the
17 presence of the jury.)

18 THE COURT: Any objection to the charge from the State?

19 SOLICITOR BULSA: No, Your Honor.

20 THE COURT: Any from the defense?

21 MR. BRANNON: None.

22 THE COURT: Gentlemen, if you'll step forward. I have
23 the verdict form. I'll let you take a look at that and
24 then, if you will, go over the evidence and be sure we have
25 the correct evidence together.

1 (Pause.)

2 THE COURT: All right. Have we got an agreement on the
3 exhibits to go back from the state?

4 SOLICITOR BULSA: Yes, sir.

5 MR. BRANNON: Yes.

6 THE COURT: Defense?

7 All right. Bring the jury -- no objection to the
8 verdict form from the state?

9 SOLICITOR BULSA: No, sir.

10 MR. BRANNON: No, Your Honor.

11 THE COURT: Thank you.

12 (Whereupon, the following takes place within the
13 presence of the jury.)

14 THE COURT: All right. The record will reflect that
15 the jury has returned to the courtroom.

16 Mr. Bailiff, if you will, hand this form over to
17 Mr. Springer for me.

18 Mr. Springer, that is the verdict form that's going to
19 be in use in this case, and I'll go over it with you
20 briefly.

21 At the top you'll see that it does indicate the county
22 and the State and the Court that we're in and the caption of
23 the case is the State versus, of course, Mr. Phipps. It
24 does indicate that it's a verdict form. The single question
25 to be responded to has to do with the indictment in this

1 case for murder, and the two choices for a verdict there are
2 not guilty or guilty.

3 If you'll check the appropriate blank. And again, as I
4 told you, the order they're in, it makes no difference.
5 These are the only two choices and that's the order that
6 they're in. Then you would sign it at the appropriate line
7 and let us know your verdict has been reached.

8 Now, I realize that we're sending you out to begin
9 deliberations at, at about -- well, it's just a little,
10 about 25 minutes until 5:00 and I indicated to you, when
11 Court started on Monday, that I don't try to keep you past
12 5:30. It's the middle of the week. So, we won't be staying
13 in deliberations late.

14 If we get to the point around 5:30 that you feel like,
15 Mr. Foreman, and the rest of the jury, that you'd like to
16 come back tomorrow, just knock on the door and let the
17 bailiff know. We'll be glad to adjourn and bring you back
18 in the morning to complete your deliberations. I'm not
19 trying to put pressure on you as to when.

20 You take as much time as you need to reach your
21 verdict. But again, I'll try to, to get you out if you feel
22 that you'd like to come back in the morning and resume your
23 deliberations. Just let us know and we'll, we'll make
24 arrangements for you to be able to do that.

25 Now, let's see. Mrs. Laura Moore, will you raise your

1 hand please, ma'am.

2 (Juror complies.)

3 THE COURT: You are the alternate in the case. You
4 will not be entering the jury room for deliberations. We're
5 gonna let you have a seat in, back in the jury assembly
6 room. You'll be present because if someone were to fall ill
7 or if someone had a death in the family, something happened,
8 you would be asked to join the deliberations and the
9 deliberations would start anew at that point in time. So,
10 you're still fulfilling a function here in case we need you
11 to complete this case.

12 And so, we'll try to make you comfortable. But don't
13 discuss the case with anyone at all at this time. You're
14 still on the jury as far as an alternate is concerned, and
15 you have certain responsibilities in that regard. But the
16 bailiffs will take you to a different location.

17 Now, at this point in time I'm going to ask the jury to
18 retire to the jury room. We'll deliver the evidence to you.
19 And again, if any of the evidence that requires playing is
20 necessary, just let us know. We'll make arrangements for
21 that to occur as well.

22 So, I'm gonna ask the jury at this time to retire to
23 the jury room and begin your deliberations in the case.

24 THE COURT: Ma'am, if you'll just step out and this
25 gentlemen will be showing you where to go.

1 Thank you very much.

2 WITNESS: Thank you.

3 (The following takes place outside the presence of the
4 jury.)

5 THE COURT: Pick up the evidence and deliver it to them
6 please.

7 Mr. Bailiff, let them know if they need any gloves to
8 handle the items let us know. We'll provide those as well.

9 THE COURT: All right, sir.

10 BAILIFF: Thank you.

11 THE COURT: Any objection to my final instruction from
12 the state?

13 SOLICITOR BULSA: No, Your Honor.

14 THE COURT: Any from the defense?

15 MR. BRANNON: No.

16 THE COURT: All right. Court will remain then in
17 recess until such time as a verdict has been reached.

18 Thank you very much.

19 (Whereupon, the jury began deliberations at 4:39 and
20 returned with a question at 6:00.)

21 THE COURT: All right. I've received an inquiry from
22 the jury. They would like to listen to the CD with the
23 9-1-1 call at 19:35 on three, 4/3/04. Signed by the
24 foreperson of the jury.

25 My understanding that's been set up to play, is that

1 right?

2 SOLICITOR BULSA: Yes, sir, it's my, right here.

3 THE COURT: All right. Let's bring the jury in.

4 (Whereupon, the following takes place within the
5 presence of the jury.)

6 THE COURT: All right. The record will reflect that
7 the jury has returned to the courtroom.

8 I've received an inquiry, Mr. Springer, from the jury
9 that you would like to hear the CD of the 9-1-1 call on
10 4/3/04 at hours 19:35. We've set that up with the speaker
11 to play for you. At this time we'll do that for you.

12 You may proceed, Mr. Bulsa.

13 (Whereupon, Defendant's Exhibit No. 2 was played for
14 the jury at this time.)

15 THE COURT: All right. Mr. Foreman, that is the 9-1-1
16 call. There was also a dispatch that went with that. I
17 don't know if you wanted that played as well.

18 I'll ask you is that something you think the jury would
19 like to hear or not?

20 FOREMAN: I don't believe so. We just wanted to listen
21 to the, to the 9-1-1 call.

22 THE COURT: You want us to play it one more time or is
23 that sufficient?

24 FOREMAN: Please.

25 THE COURT: One more time.

1 One more time if you would play it, Mr. Bulsa.

2 SOLICITOR BULSA: Yes, sir.

3 (Whereupon, Defendant's Exhibit No. 2 was played again
4 for the jury.)

5 THE COURT: Now, Mr. Foreman, I'm, I'm just gonna ask
6 you, when you step back in, if you would inquire of the
7 other members of the jury. If you're, if you would like to
8 continue deliberations, we're gonna do everything we do to
9 accommodate that including if we need to order supper for
10 you. If you'd like for us to do that, let us know. We'll
11 take care of that as well.

12 Also, if they're any phone numbers that we need to
13 call, the clerk can call and let them know you're here in
14 deliberations. We'll take care of that for you as well if
15 that's what you choose to do. I'm not trying to influence
16 you as to how you proceed. I'm simply gonna try to
17 accommodate you if you wish to continue with your
18 deliberations at evening.

19 So, if you'll just inform the bailiff if you do wish to
20 order supper. It takes about 45 minutes to an hour from the
21 time you order it for it to be delivered here at the
22 courthouse. And if there are people that you'd like to
23 inform as to your whereabouts, if you pass a note out to the
24 bailiff, we'll see that that gets taken care of. We'll call
25 people and tell them that you're here in deliberations.

1 I'll let you discuss that with the jury, and you just
2 let us know how you to wish proceed.

3 FOREMAN: Do you need an answer now or---

4 THE COURT: No, I want you to go back in and discuss it
5 among yourselves and tell us how you wish to proceed.

6 FOREMAN: We, we know how we want to proceed.

7 Do you need to go in and give it, in writing, back to
8 you?

9 THE COURT: Yes, sir, if you don't mind.

10 FOREMAN: Okay.

11 THE COURT: As to whether you want to order or whether
12 you want us to make phone calls.

13 (The following takes place outside the presence of the
14 jury.)

15 THE COURT: Any objection to my response and
16 communications from the State?

17 SOLICITOR BULSA: No, sir.

18 THE COURT: Any from the defense?

19 MR. BRANNON: No, Your Honor. But I would ask for a
20 point of clarification. I think the first time you sent
21 them out you told them that they could stay till 5:30 and go
22 home and come back in the morning.

23 THE COURT: I told them to knock on the door and let
24 the bailiff know if they wish to leave.

25 MR. BRANNON: Okay. All right. But no, no question as

1 to this, Your Honor.

2 THE COURT: Yeah, they have, they have not -- in fact,
3 they apparently do wish to continue from what I'm just told.
4 So, that -- it's -- I'm not gonna try to tell them how to
5 deliberate. If they wish to stay and deliberate, we'll sure
6 let them do so.

7 This is a the Court's Exhibit.

8 (Whereupon, the note from the jury was marked as
9 Court's Exhibit No. 2 for identification purposes only at
10 this time.)

11 THE COURT: Court's in recess until such time as a
12 verdict might be reached.

13 (Whereupon, the jury began deliberations again at 6:05,
14 and returned to the courtroom at 6:31.)

15 THE COURT: All right. Bring the jury in and the
16 alternate please.

17 (Whereupon, the following takes place within the
18 presence of the jury.)

19 THE COURT: All right. Mr. Foreman, I've received
20 communication from the jury that you would like to continue
21 deliberations in the morning. So, I'm going to excuse you
22 for the evening, ask that you be back in your jury room by
23 nine o'clock in the morning. At that time I will, once
24 everyone's here, I will, will instruct you to begin your
25 deliberations again. So, wait until I've advise you to do

1 that.

2 Over the evening, the same instructions go that have
3 gone all along. Please don't discuss the case with anyone,
4 and don't allow anyone to discuss it with you. Don't watch,
5 read, or listen to any media reports. Don't attempt to
6 gather any information outside of the courthouse. And
7 should anyone attempt to contact you about your
8 participation in the case, please let me know upon your
9 return.

10 We'll resume again at nine o'clock in the morning. Be
11 back in the, your jury room.

12 Ma'am, you'll need to return as well at that point in
13 time. Please -- the bailiffs will take you again to the
14 assembly room rather than put you in the jury room with
15 other jurors.

16 At this point in time I'm going to excuse you for the
17 evening, and look forward to seeing you in the morning.

18 You're free to go at this time.

19 All the exhibits should be left in the jury room.

20 BAILIFF: I've got them.

21 THE COURT: Have you taken them up already?

22 BAILIFF: Yes, sir.

23 THE COURT: Very good. That's fine. Thank you.

24 (The following takes place outside the presence of the
25 jury.)

1 THE COURT: Any objection to my communication from the
2 State?

3 SOLICITOR BULSA: No, sir.

4 THE COURT: Any from the defense?

5 MR. BRANNON: None, Your Honor. Thank you.

6 THE COURT: All right. The note will become a Court's
7 Exhibit.

8 (Whereupon, the note from the jury was marked as
9 Court's Exhibit No. 3 for identification purposes only at
10 this time.)

11 THE COURT: This case will be adjourned until nine
12 o'clock in the morning at which time deliberations will
13 resume.

14 Defendant remains in custody.

15 MR. BRANNON: Thank you.

16 THE COURT: Thank you very much.

17

18 (Whereupon, Court was in recess for the evening.)

19

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25

1 Thursday, April 16th, 2009

2
3 THE COURT: I'm informed all the jurors have returned.
4 As soon as the defendant comes in we'll bring them in and
5 get them started again.

6 MR. BRANNON: Your Honor, Mr. Turnipseed is on his way.
7 But he doesn't necessarily have to be here for this.

8 THE COURT: I understand.

9 All right. Mr. Bailiff, let's bring the jury panel in.

10 (Whereupon, the following takes place within the
11 presence of the jury.)

12 THE COURT: All right. The record will reflect that
13 all jurors have returned to the courtroom this morning.

14 I trust everyone had a good evening. I'll remind you
15 that you remain under oath for answers to my questions and
16 I'm just going to ask you about a couple things.

17 First of all, had, during our break, did, was anyone
18 contacted by anyone concerning their participation in this
19 trial, if that is true, please stand.

20 (No response.)

21 THE COURT: Has anyone had any discussions with or
22 gathered any information concerning this case outside of the
23 courtroom, if that is true, please stand.

24 (No response.)

25 THE COURT: All right. It appears then that you're

1 ready to resume your deliberations.

2 Mr. Foreman, I'm going to direct that the jury retire
3 to the jury room to continue deliberations. The evidence
4 will be delivered to you upon your return. And again, as
5 far as the information that needs to be played, if you have
6 need of that, let us know and we'll be happy to provide that
7 to you.

8 Ma'am, you're the alternate. Again, you'll be asked to
9 have a seat in another location. And if necessary, you may
10 be asked to join the jury during deliberations.

11 At this time, you may retire to the jury room to begin
12 your deliberations anew.

13 (Whereupon, the following takes place outside the
14 presence of the jury.)

15 THE COURT: Any objection to my communications with the
16 jury?

17 SOLICITOR BULSA: Not by the State, Your Honor.

18 MR. BRANNON: None, Your Honor. Thank you.

19 THE COURT: All right. Then, then we'll remain in
20 recess in this case until such time as a verdict might be
21 reached.

22 Thank you very much.

23 (Whereupon, the jury began deliberations again at 9:02,
24 and returned with a verdict at 10:40.)

25 THE COURT: All right. I'm informed that a verdict has

1 been reached.

2 Is the State ready?

3 SOLICITOR BULSA: Yes, sir.

4 THE COURT: Defense ready?

5 MR. BRANNON: Yes, Your Honor.

6 THE COURT: I will caution those of you who are in the
7 audience, this Court does not tolerate outbursts upon the
8 reading of a verdict. If you feel that you will not be able
9 to control your emotions at that time, I would urge you to
10 leave the courtroom at this point in time. Otherwise, if
11 you stay, you will be expected to conduct yourself with
12 decorum, and, of course, if you fail to do so, this Court
13 would consider that activity to be contempt of Court.

14 So, again, if you have any problem in controlling your
15 emotions at this time, please leave the courtroom at this
16 time so that we don't have those problems.

17 You can bring the jury back.

18 BAILIFF: Do you want the alternate?

19 THE COURT: Bring the alternate in too please.

20 (Whereupon, the following takes place within the
21 presence of the jury.)

22 THE COURT: The record will reflect that all jurors
23 have returned to the courtroom.

24 Mr. Foreman, I'm informed by the bailiff that a verdict
25 has been reached.

1 Is that true?

2 FOREMAN: Yes, that's true.

3 THE COURT: If you'll pass the form to the bailiff.

4 (Foreman complies.)

5 THE COURT: Thank you, sir.

6 Madam Clerk, I'll ask you publish the verdict please.

7 CLERK: State of South Carolina, County of Spartanburg,
8 State versus Robert J. Phipps, Indictment Number
9 2007-GS-42-2902, as the, as to the Indictment
10 2007-GS-42-2902 for murder, we, the jury, by unanimous
11 consent, find the defendant, Robert Phipps, guilty. Signed
12 today's date, Judson Springer.

13 Ladies and gentlemen, if this is your verdict and still
14 your verdict, please raise right, your right-hand.

15 (Whereupon, all jurors raise their hands at this time.)

16 CLERK: So say you all.

17 THE COURT: Anything from the State before I release
18 the jury panel?

19 SOLICITOR BULSA: No, Your Honor.

20 THE COURT: Anything from the defense before I release
21 the jury panel?

22 MR. BRANNON: Ask the Court to poll the jury.

23 THE COURT: Madam Clerk, please poll the jury.

24 CLERK: Yes, sir. Ladies and gentlemen, I will pose to
25 you a question. That question being is this your verdict

1 and still your verdict. When I call your name, please
2 answer yes or no.

3 Judson Springer.

4 JUROR: Yes.

5 CLERK: James Jacobs.

6 JUROR: Yes.

7 CLERK: Alberta Carree.

8 JUROR: Yes.

9 CLERK: Steve Sloan.

10 JUROR: Yes.

11 CLERK: James Beeler.

12 JUROR: Yes.

13 CLERK: Brendalyn Myers.

14 JUROR: Yes.

15 CLERK: Yvonne Harris.

16 JUROR: Yes.

17 CLERK: Frances Ford.

18 JUROR: Yes.

19 CLERK: April Harrison.

20 JUROR: Yes.

21 CLERK: James Oliver.

22 JUROR: Yes.

23 CLERK: Roger Gregory.

24 JUROR: Yes.

25 CLERK: Sunshine Wilson.

1 JUROR: Yes.

2 CLERK: The jury has been polled, Your Honor.

3 THE COURT: Anything further from the defense before I
4 release the jury?

5 MR. BRANNON: No, Your Honor.

6 THE COURT: Thank you very much.

7 (Whereupon, the jury panel was released at this time.)

8 THE COURT: Anything further from the State before we
9 proceed to sentencing?

10 SOLICITOR BULSA: You want to read his---

11 THE COURT: All right. I'm just gonna check with you.
12 Is there anything else you want to take up before we do
13 sentencing?

14 SOLICITOR BULSA: No, nothing else.

15 THE COURT: Anything else from the defense before we
16 take up sentencing?

17 MR. BRANNON: Yes, Your Honor. I would move for
18 judgment notwithstanding the verdict. I don't believe the
19 State proved its case sufficient to support the jury's
20 verdict.

21 THE COURT: well, again, I have to view the fact that
22 there was evidence upon which a jury could of based its
23 verdict and I find that there was, and, therefore, I'll deny
24 the motion at this point.

25 MR. BRANNON: Then move for a new trial, Your Honor.

1 THE COURT: Yes, sir, I'll deny that motion as well.

2 MR. BRANNON: Thank you, Your Honor.

3 THE COURT: All right. Are you ready to proceed with
4 sentencing?

5 MR. BRANNON: Yes, Your Honor.

6 THE COURT: All right. If you'll approach the bar
7 please.

8 (Parties comply.)

9 THE COURT: You want to pass the documents up,
10 Mr. Bulsa?

11 You can approach.

12 (Solicitor complies.)

13 THE COURT: All right. Mr. Phipps, having been found
14 guilty by a jury of your peers, at this point in time we'll
15 proceed with sentencing. I'll allow Mr. Brannon to speak in
16 mitigation.

17 MR. BRANNON: Your Honor, this Court has heard all of
18 the evidence in this matter. We did not hide from the Court
19 or from the jury that my client has a significant criminal
20 record. However, none of those previous arrests or crimes
21 for which he was convicted or pled guilty were of a violent
22 nature in that he'd never hurt anyone.

23 Your Honor, I would ask the Court to be as lenient as
24 possible. Anything else would be superfluous.

25 THE COURT: Mr. Phipps -- Mr. Turnipseed, do you wish

1 to make any comments on sentencing?

2 MR. TURNIPSEED: No, sir.

3 THE COURT: Mr. Phipps, you have the opportunity, at
4 this time, to say anything you'd like concerning this
5 matter. I'll be happy to hear from you.

6 DEFENDANT: No comment.

7 THE COURT: I'll hear from the State, first of all,
8 concerning his prior record.

9 SOLICITOR BULSA: Yes, sir, Your Honor.

10 Dating -- these are from the State of Ohio, dating back
11 to 1977, burglary, robbery, and forgery.

12 1981, grand theft.

13 1984, theft. Appears to be two counts.

14 1991, drug abuse. That's the way they phrased it on
15 the rap sheet. Two counts of drug abuse.

16 2001, bank robbery.

17 THE COURT: Does the victim's family wish to be heard?

18 SOLICITOR BULSA: Yes, ma'am. Yes, sir. Ramona Wood
19 would like to speak.

20 THE COURT: Yes, ma'am.

21 MRS. WOOD: Your Honor, since my brother's death, it
22 has taken a toll on our family.

23 THE COURT: Just one second.

24 I'm sorry. Go ahead.

25 MRS. WOOD: To the extent of, of the way he was killed.

1 No human being should have to suffer that kind of cruelty.
2 My brother was a good hearted person. He would do anything
3 for anybody. And if -- I believe him when he said he didn't
4 know him because if he had of known my brother he couldn't
5 have, he wouldn't have killed my brother the way he did. He
6 wouldn't have hurt anyone. And I just pray that this
7 doesn't happen to anyone else, that he's not allowed to do
8 this to anybody else.

9 THE COURT: Thank you, ma'am.

10 Anything further from any member of the family?

11 SOLICITOR BULSA: No, sir.

12 THE COURT: Mr. Phipps, having considered all the
13 relevant factors, it is the Order of this Court that you be
14 confined in the State Department of Corrections for the
15 period of your life.

16 Good luck to you, sir.

17

18 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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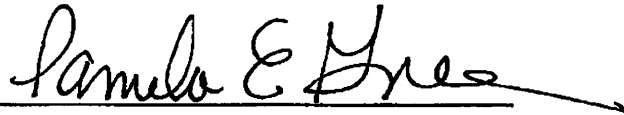
25

C E R T I F I C A T E

1
2
3 I, Pamela E. Green, Official Court Reporter for the
4 Seventh Judicial Circuit of the State of South Carolina, do
5 hereby certify that the foregoing is a true, accurate and
6 complete Transcript of Record of the proceedings had and
7 evidence introduced in the trial of the captioned case,
8 relative to appeal, in the Court of General Sessions for
9 Spartanburg County, South Carolina, on the 13th, 14th, 15th,
10 and 16th day of April, 2009.

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

13
14 June 29th, 2009

15
16 
17

18 PAMELA E. GREEN, Court Reporter
19
20
21
22
23
24
25

WITNESSES

Spartanburg Public Safety Department

1. SENTENCE MADE

2. REPORTED

3. CARD FILLED

4. INDEXED

5. CHECKED WARRANTS

ARREST WARRANT NUMBER

6. CHECKED SIGNATURE

7. ASSIGNMENT AND

FINE CARD MADE

K-006885

TRAFFIC VIOLATIONS COST

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO.

07-GS-42-2902

The State of South Carolina

County of Spartanburg

TREY GOWDY, SOLICITOR

COURT OF GENERAL SESSIONS

JUN 11 2007

TERM

THE STATE
vs.

Robert J. Phipps

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

MARC KITCHENS

2007 JUN 14 PM 5:39

FILED
CLERK OF COURT
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

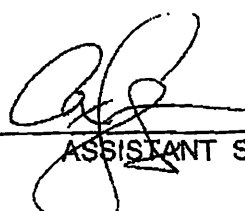
INDICTMENT

At a Court of General Sessions, convened on JUN 07 2007, the
Grand Jurors of Spartanburg County present upon their oath:

MURDER

That Robert Phipps did in Spartanburg County on or about April 4, 2004, feloniously, willfully, and with malice aforethought kill Samuel Gossett by stabbing him in the head, neck and/or body with a knife, and that the victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, *The South Carolina Code of Laws*, (1976, as amended).

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



ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS 607

COUNTY OF SPARTANBURG

STATE

VS.

Robert Jr Phipps

AKA:

Race: B Sex: M 49

DOB:

Address:

DL#: SID#:

INDICTMENT/CASE#: 2007GS4202902

A/W#: K006885

Date of Offense: 5/15/2007

S.C. Code § : 16-03-0010.

CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Murder / Murder

in violation of § 16-03-0010, 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. (Defendant initial)

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

ATTEST:

B. B. Bulsa 15264 Robert Phipps H. Nathan Johnson 68798
BULSA, DERRICK SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of life 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.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____

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

Payment Terms:

☐ set by SCDPPPS _____

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$ 25.00
§ 35.13 (Public Def/Prob)	\$500	\$
§ 73.3, 1B TP (Law Enforce. Funding)	\$25	\$
§ 33.7, 1B TP (Drug Court Surcharge)	\$100	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$	\$ 3.15
§ 90.11 TP (SCCJA Surcharge)	\$5	\$ 5.15
TOTAL		\$ 133.90

R. Bennett
Clerk of Court/ Deputy Clerk

Court Reporter:

_____ 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, §35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 217 1 315

Sentence Date: 4/16/09

SCCA/217 (03/2009)

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

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

The State,

Respondent,

v.

Robert J. Phipps,

Appellant.

Appeal From Spartanburg County
Roger L. Couch, Special Circuit Court Judge

Unpublished Opinion No. 2012-UP-018
Heard December 7, 2011 – Filed January 25, 2012

AFFIRMED

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

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Deputy Attorney General Donald J. Zelenka, Senior
Assistant Attorney General William Edgar Salter, III,

all of Columbia; and Solicitor Barry Barnette, of Spartanburg, for Respondent.

PER CURIAM: Robert Phipps appeals his murder conviction and sentence. He contends the trial court erred in denying his motion to dismiss and in excluding testimony regarding an anonymous tip. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to whether the trial court erred in denying Phipps's motion to dismiss: State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001) (requiring a defendant seeking dismissal based on loss of evidence prove either (1) the State destroyed the evidence in bad faith or (2) the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means).

2. As to whether the trial court erred in excluding testimony regarding an anonymous tip: Rule 804(b)(2), SCRE (providing that, in order for statement made under belief of impending death to qualify for exception to rule excluding hearsay, declarant must have made statement while believing his death was imminent); Rule 804(b)(3), SCRE (providing that, in order for statement against interest to qualify for exception to rule excluding hearsay, statement must have so far tended to subject declarant to criminal liability that no reasonable person in declarant's position would have made statement unless he believed it was true); State v. Kinloch, 338 S.C. 385, 389, 526 S.E.2d 705, 707 (2000) (holding statement tending to expose declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the statement was actually made); State v. Burgess, 391 S.C. 15, 22, 703 S.E.2d 512, 516 (Ct. App. 2010) (holding defendant's right to present complete defense was not violated when the trial court correctly excluded evidence under valid evidence rule).

AFFIRMED.

FEW, C.J., and THOMAS and KONDUROS, JJ., concur.

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF

IN THE COURT OF COMMON PLEAS

2014-CP-42-2049

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

MR ROBERT J. Phipps
#334249#
State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention LIEBER, CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence 7th Judicial Circuit
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: LIFE IMPRISONMENT
 - (a) -2007-07-GS-42-2902
 - (b) N/A
 - (c) N/A
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) APRIL 16, 2009 LIFE IMPRISONMENT
 - (b) N/A

- (c) N/A
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty N/A
- (b) after a plea of not guilty yes
- (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. The Court of Appeals
- ii. ORAL ARGUMENTS ON December 7, 2011
- iii. CERTIORARI State Court
- (b) the result in each such Court to which you appealed:
- i. AFFIRMED the CONVICTION AND SENTENCE
- ii. Rehearing Court of Appeal DENIED
- iii. Writ of Certiorari WAS DENIED
- (c) the date of each such result:
- i. September 7, 2010
- ii. Heard ORAL ARGUMENTS ON Dec 7, 2011 -
- iii. Writ Certiorari WAS August 20, 2013 JAN 25, 2012
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. AFFIRMED. NO
- ii. UNpublished opinion 2012-UP-018
- iii. DENYING the petition FOR Writ 2012-YP-018
OF CERTIORARI ON AUG-20, 2013
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A
- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: please see ADDITIONAL PAGE
please see ADDITIONAL PAGE

- (a) Please See Additional PAGE
 (b) Please SEE Additional PAGE
 (c) please see Additional PAGE
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) Please See Additional PAGE
 (b) please SEE Additional PAGE
 (c) please SEE Additional PAGE
12. Prior to this application have you filed with respect to this conviction:
 (a) any petition in a State Court under South Carolina Law? YES
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? YES
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
 (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
 (a) the specific nature thereof:
 i. N/A
 ii. N/A
 iii. N/A
 iv. N/A
 (b) the name and location of the Court in which each was filed:
 i. N/A
 ii. N/A
 iii. N/A
 iv. N/A
 (c) the disposition thereof:
 i. N/A
 ii. N/A
 iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

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

i. N/A

ii. N/A

iii. N/A

iv. N/A

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. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

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) 1st PCR

(b) 1st PCR

(c) 1st PCR

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

- (a) your arraignment and plea? N/A
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

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

- (a) the name and address of each attorney who represented you:
- i. MR DOUG BRANNON, trial counsel, (SPARTANBURG COUNTY)
 - ii. MR BRAC TURNIPSEED trial counsel, SPARTANBURG COUNTY
 - iii. MRS KATHRINE H. HUGGIN, Columbia
- (b) the proceedings at which each such attorney represented you:
- i. TRIAL AND SENTENCE
 - ii. TRIAL AND SENTENCE
 - iii. Appellate Defender - APPEAL

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

PLEASE SEE ADDITIONAL PAGE

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

N/A

STATE OF SOUTH CAROLINA)

VERIFICATION

County of)

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

Mr Robert Phipps Jr

SWORN to and subscribed before me this MAY
day of 13th, 2014

Ludrea Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

2014 MAY 19 PM 3:21
M. HUNT BRADLEY

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

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

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

Mr Robert Phipps Jr
Applicant

SWORN or affirmed to and subscribed before me this
MAY day of 13th, 2014
Luchean Bryant
Notary Public

My Commission Expires: May 26, 2020

MAY 19 PM 3:21
 CLERK OF COURT
 11.101E CLERK

Phipps v. State
Post Convict ReliefQuestion number (10) From Application
Form # (5) FiveNumber 10

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

A.

Ineffective Assistance of trial Counsel / Deficient performance,
Fundamentally fair procedures, A pervasive and unreasonable risk
of Constitutional rights violations:

B.

The Show of Prejudice and Court error,
Community's sense of fair play,
Reasonable probability,

Burden of proof:

C.

Malicious prosecution, Insufficient to constitute guilt,
Mere prescience, Brady Violation,
Suppressed evidence,Directed Verdict, Due-process,
competency Evaluation / criminal responsibility:"Note" The applicant reserves the right
to amend at a later date:

Phipps V. State
Post-Conviction Relief
 Form # 5

Question number (11)

State Concisely and in the same order the facts which support each of the grounds set out in question number (10) ten.

(A.)
Ineffective assistance of trial counsels / Deficient performance:

My trial counsels presented a significant obstacle in preparing a adequate defense in receiving a fair trial.

There are several separate showings to demonstrate, that there is an reasonable probability that for my ~~trial~~ counsels unprofessional errors, that the outcome of my trial would have been different.

The cumulative effect of which I was deprived the level of legal assistance guaranteed by the sixth 6th amendment of the United States Constitution.

For example :

My trial counsels were ineffective for failing to afford me representation within the range of competence, demanded of attorneys in Criminal Cases.

If defense counsels are unprepared to try a ~~case~~ they, are also inadequately prepared to advise their client to testify in a case that is calling for a Substantial Sentence.

The prejudice that I suffered is apparent, throughout the trial proceeding.

My trial counsels, did not articulate any strategy for not challenging the state on the indictments that was over (2) two years old.

Now the applicant would take the position that the law would require by South Carolina - Const. art. 1, § 14. The right of trial by Jury shall be preserved inviolate.

Any person charged with an offense shall enjoy the right to a Speedy trial an public trial by an impartial Jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witness against him, to have compulsory process for obtaining witness in his favor, and to be fully heard in his defense by himself or by his counsel or by both, to accept any document which a defendant wishes to file regardless whether that document is submitted through counsel.

My trial counsels, failed to oppose the prosecution case throughout specific points in the trial and at the Sentence proceeding.

The Very premise of our adversary System of Criminal Justice is that partisam advocacy on both sides of a case will best promote the ultimate objective that the guilt be convicted and the innocent go free, with a meaningful adversarial testing of the prosecution's case see → Cronic, 466 U.S. at 659.

My trial counsels, failed to make a motion, when the trial court errored → The trial court is required to chgroe a Jury on a lesser → included offense if there is any evidence from which it could be inferred the lesser rather than the greater, offense was committed see → Suber V. State, 371 S.C. 640 S.E.2d. 884 (2007); also citing State V. Gourdine, 322 S.C. 396, 398, 472 S.E.2d. 241, 242 (1996).

4-OF-4

620 My trial counsels failure, to make the required contemporaneous objection, to the court, as to require the trial court to order for an competency, Evaluation, and criminal responsibility, pursuant to the McNaughten test, also the requirement of the law, (Section 17-24-20 (A), code of laws of South Carolina 1976).

My trial counsels performance was deficient such that it falls below an objective standard of reasonableness see → Strickland V. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d. 674, 693 (1984).

There is an reasonable probability, but for counsel's unprofessional errors, that the result of my trial would have been different. see → Strickland, 466 U.S. at 687.

There are several other showings that deprived me of the level of legal assistance guaranteed by the United States and the South Carolina State Constitution, that I will at this time reserve the right to amend at a later date.

Question number (19)

State clearly the relief you seek in filing this application:

The factual allegations set forth in this application is sufficient to raise a right to relief, above the speculative level—to the relevant portion thereof, by protecting the applicant's rights to a fair trial, with trial counsels being deficient and with all the court's errors, and the several constitutional violations, that the sentence and conviction, accompanied by such events, do not meet any civilized conception of due-process of the law, that alone is sufficient, to vacate the conviction and sentence, at this time, and remand this case back to Spartanburg, County for a new trial.

This 10th day of May, 2014

Respectfully Submitted

Robert J. Phipps #334249

PCR

14-2049

621

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Robert J. Phipps, # 334249)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

Indict. # 07-GS-42-2902

C/A: _____

APPLICANT'S
AMENDED RESPONSE
POST-CONVICTION RELIEF

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Applicant's trial counsel presented a significant obstacle in preparing an adequate defense in receiving a fair trial. Applicant's counsel can not be allowed to take action of depriving individuals of one of the most basic principles, and essential rights, or proceedings that are in our constitution.

There are several separate showing to demonstrate, that applicant's trial counsel was ineffective.

Applicant's trial counsel is an experience defense attorney, and should have made several motions, and arguments regarding the State's case.

At this time petitioner would like to "FRAME" all of the court's errors, and the constitution violations, under ineffective assistance of counsel.

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STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

Robert J. Phipps, # 334249)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

Indict. #07-GS-42-2902

C/A. _____

"APPLICANT'S AMENDED
 APPLICATION FOR
 POST-CONVICTION RELIEF"

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By and through his undersigned counsel, Applicant, Robert J. Phipps #334249,
 hereby amends his application in a timely manner, for post conviction relief, hereinafter
 Applicant, answering questions (9) (10), and (19) of his application filed on or about
 _____ 2014 as follows, applicant reserves the right to amend

Question #9:

State concisely the grounds on which you base your allegations that you are
 being held in custody unlawfully?

Amended Response:

Ineffective assistance of counsel, state failed to present sufficient evidence,
 presumption of innocence instruction, Due-process, Mere-present charge to the Jury,
 Court Error, State Shifts the burden, Mistrial; and Criminal responsibility:

Question 10:

State concisely and in the same order the facts / which support each of the
 grounds set out in (9)?

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

Robert J. Phipps, # 334249)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Indict. #07-GS-42-2902

C/A. _____

MEMORANDUM IN SUPPORT OF
APPLICATION FOR
POST-CONVICTION RELIEF
PURSUANT TO S.C. CODE ANN.
§17-27-20 THROUGH §17-27-160

COMES NOW, the above captioned applicant Robert J. Phipps contends, that his rights were violated during his trial on April 13 through the 17th of 2009, in a number of ways, including, but not limited to his (6th) sixth Amendment right to the effective assistance of counsel, and his (14th) fourteenth Amendment right to a fair trial.

Applicant believes through the issues presented, statements of facts, and citations of authorities relied on he will show unto this Honorable Court his entitlement to the requested relief of vacation of sentence and conviction, reversed and remanded for either a dismissal, and or in the alternative, a new trial.

Respectfully Submitted,

Robert Phipps Jr

Robert J. Phipps #334249
Lieber Corr. Inst. SA-33
P.O. Box 205
Ridgeville, SC 29472-0205

This 9 day of 29 2014.

NOTARY TO AND SUBSCRIBED BEFORE ME

THIS 29th DAY OF Sept

2014
Deborah Bryant

NOTARY PUBLIC
STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES May 26, 2020

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PHIPPS V. STATE

"INEFFECTIVE ASSISTANCE OF COUNSEL"

Applicant's trial counsel entirely failed to subject the state's prosecution case to a meaningful adversarial testing *see Cronin*, supra, at 659. It is the applicants right to expect that his trial attorney will use every skill, expend every energy, and tap every legitimate resource in exercise of independent professional judgment on behalf of his client, in undertaking representation on the client's behalf.

Thus, an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure the trial is fair *see Strickland*, 466 U.S. at 685; 104 S.Ct. at 2063.

In other words, the assistance to which a defendant is entitled must be "effective" *id.* at 686, 104 S.Ct. at 2064, unhindered either by the state or by counsel's constitutionally deficient performance.

The applicant contends that numerous reversible errors were committed in the trial and at the sentencing phases of the proceeding.

Applicant contends that counsel was ineffective for failing to conduct an independent investigation, lack of preparation, and failure to make an informed evaluation of his, potentially viable defense, when taken together, amounts to ineffective assistance of counsel, *Steven v. Johnson*, 575 F. Supp. 88 (1983).

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PHIPPS V. STATE

"INEFFECTIVE ASSISTANCE OF COUNSEL"

Applicant's Counsel was ineffective for failing to request the court to give a presumption of innocence instruction, and the mere presence charge to the jury, which denied applicant, of a fair trial, in violation of the due process clause of the fourteenth amendment. *See ~> trial-transcript of record – page 584- line 21.*

A. While the legal scholars may understand that the presumption of innocence and the prosecutor's burden of proof are logically similar, the ordinary citizen may draw significant additional guidance from an instruction on the presumption of innocence, the mere presence charge.

The applicant in the case, basis of evidence on solely that the applicant was at the house in question, had trial counsel argued this issue, or motion for a mere presence charge/ instruction to the jury, the outcome would have been different. The jury's verdict was influenced by applicant's trial counsel not challenging the lack of evidence thereof *Id.* at 374, 642 S.E.2d at 611. It is difficult to imagine why any competent lawyer would so readily abandon any effort to persuade the court to instruct, the jury on the mere presence charge. This cannot justify such absolute dereliction of a lawyer's duty to the client especially a client facing a large sentence.

B. An instruction on the presumption and the mere presence, is a way of impressing upon the jury the importance of an accused's right to have his guilty or innocence determined solely on the basis of evidence introduced at trial and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

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C. The prosecutor's remark during his opening and closing statements, together with the skeletal instructions of the trial court, gave rise to a genuine risk that the jury would convict applicant on the basis of extraneous considerations, rather than on the proof adduced at the trial.

D. That the trial court instructions as to the burden of proof beyond a reasonable doubt did not obviate the necessity for a presumption-of-innocence instructions and the mere-presence instruction, in view of the special purpose of such an instruction and the particular need for both of the instruction in this case.

E. Nor did the fact that trial defense counsel argued the presumption of innocence or the mere-presence, in both his opening or closing statements dispense with the need for both charges to the jury, since arguments of counsel cannot substitute for instructions by the court.

The United States Supreme Court has observed that the "presumption-of-innocence, and the mere-presence, although not articulated in the constitution, is a basis component of a fair trial under our system of justice, see *Estelle v. Williams* 425 U.S. 501, 503.

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"INEFFECTIVE ASSISTANCE OF COUNSEL"

Failure to properly instruct the jury on the mere-presence or the presumption of innocence vitiates all the jury's findings. *See, Jackson v. Virginia, ~> Sullivan v. Louisiana. In re Winship*, to what was decided in 1970 that the "reasonable doubt" standard was an implicit component of the due process, and in the case at hand, so should the mere-presence along with the presumption of innocence. Also this should have been required to be applied by the fact finders (Jury) in criminal cases. The reason why the (2) two instructions should have been applied, and it bears repeating in this case, A higher quantum of proof "reduces" the risk of convictions resting on factual error and it provides concrete substance for the presumption of innocence. Petitioner would ask this court to applied the burden of proof to each element of the offense, as that of in *Jackson*, emphasizing again that the instruction of mere-presence, and the presumption of innocence operates to ensure against unjust convictions. That there is a reasonable probability that, the result of the proceeding would have been different. *Id.* at 203.

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Ineffective Assistance Of Counsel / Due-Process

To establish a due process violation, a defendant must demonstrate (1) that the state destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means.

- The state lost the CD of the 911 call, or the state destroyed the evidence in bad faith. Moreover, the state can not show that there was an legitimate or logical reason for there losing or destroying the (911) CD/evidence.

- Considering all the circumstances pertaining to the (911) call, this gave the state/prosecutors a powerful rhetorical tool, in a variety of ways.

- In any event, the evidence possessed on exculpatory value in the case, this was apparent before the evidence was destroyed, and the state or the defendant cannot obtain other evidence of comparable value by other.

- Applicant, has an extremely high level of rationality, but thinks that it is highly unusual that the state would lose something that is more valuable to the defendant. The prejudice that the petitioner obtains in this case is to the principles of fundamental fairness.

- Exclusion of evidence, to warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice *see ~> State v. Whit*, 372 S.C. 364, 373, 642 S.E.2d. 607, 611 (ct.App.2007). To prove prejudice the complaining party must show there is a reasonable probability

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"that the jury's verdict was influenced by the challenged evidence or lack thereof" *Id.* at 374, 642 S.E. 2d at 611.

- Violation of petitioner's 5th and 14th, fifth and fourteenth Amendment Due-Process right because of the criminal process. This also violated petitioner's Sixth Amendment right of a guarantee to effective assistance of counsel.

- Without the (CD) ~>"911-call" this seriously diminished the defendant / applicant ability to ever let the jury know that there was crucial evidence. The County of Spartanburg / The State, should not make the defendant/ petitioner liable for the state mistake. It is the state's responsibility to safeguard evidence, before and after trial.

- The state has forced the applicant to meet an already inappropriately difficult standard because the state lost the evidence that could have potentially exonerated him.

- There was material variance, and the applicant was entitled to a directed verdict. The state failed to meet all the requirements of said offense of murder. The applicant would like to illustrate this point, The state did not prove every ingredient of the offense of murder beyond a reasonable doubt, with the absence of malice or motive in this case, and the tactical advantage the state had over this case, was used to confusion of the issues, and mislead the jury. Applicant thinks that it was improper, so that, it infected the trial with unfairness, as to make the resulting conviction a denial of due process.

- A *Brady* ~> *Brady* provides that a criminal defendant denied due process when the prosecution suppresses evidence that is favorable to him. *Brady v. Maryland*, 373 U.S. 83-87, 83 S.Ct. 1194, 10 L.ED 2d 215 (1963). Failed to disclose ~> constituted a denial of due process and the United States Supreme Court agreed. Although *Brady*

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provides a bright-line rule for the disclosure requirements necessary to guarantee that a criminal defendant receives due-process, it is equally fundamental that due-process requirements are not rigid and inflexible *see ~> Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. ED 2d 18 (1976). In this case a caller indicted that the person they were looking for was in Atlanta *see ~>* (Tr. P. 41 lines 1-25). The court commented in

- *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L. ED. 2d 252 (1960). That this fundamental protection, is designed as a means, not only of bringing to trial person accused of public offenses upon just grounds, but also as means of protecting the citizen against unfounded accusation, whether it comes from the government, or be prompted by partisan passion or private enmity. To allow the state / prosecution or the courts to make a subsequent guess as to what was on the lost cassette tape, is to deprive the defendant of the basic protection of the due-process, was designed to secure. The lost tape implicated a third party. The sentence is the judgment *see ~> Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.ED.2d (2004) cannot be applied in this case. If in fact the fourteenth amendment entitles applicant to a new trial on the issue of guilty, and or the "mere-presence" as well as punishment, the ruling of the court has seriously prejudiced the applicant in this case. That the applicant in this case is just on mere-presence and that it presents a serious and unsettled question, that the state can convict a person of guilt, for just mere-presence.

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VANDERPOSSER, JR. ERROR
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"COURT ERROR"

Because the evidence adduced at trial was consistent with both innocence and guilt, it was constitutional error by the court not to grant Applicant's motion for a direct verdict.

In this case the appellate, it was stipulated and admitted that the appellant was at the house in question. The threshold question in this case is whether the trial court was in error, by not granting applicant's motion for a direct verdict.

If the court would look at what the trial judge said, "that this case is only circumstantial evidence". The only evidence in this case is that the applicant was at the house, to which is unequivocal, and it portrays that the applicant, did not know the victim in this case, and there could not have been any malice to which is need in this case. Under these circumstances, it is applicants proposition that the trial court should have granted the applicants motion for a direct verdict for the following particulars:

A. Defense counsel should have argued to the trial judge that he had to consider the evidence in light most favorable to applicant and charge involuntary manslaughter if there was any evidence of that lesser included offense. ~> *see State v. Knotten*, 347 S.C. 96 302, 555 S.E2d 391, 394 2001; *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000).

This was an true error of law *see State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216, 220 (2006). The trial abuse its discretion by not granting the direct verdict *see ~> State v. Aleksey*, 343 S.C. 20, 35, 528 S.E.2d. 248, 256 (2000).

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B. When analyzing the denial of a direct verdict motion, this court must view the evidence in the light most favorable to the state. The court during this stage must be concerned with the existence or nonexistence of evidence, not with its weight.

The trial courts decision must be affirmed on appeal if the record contains any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, or from which guilt may be fairly and logically deduced, *State v. Thompson* 374 S.C. 257, 647 S.E.2d. 702 (App. 2007).

C. The undisputed relevant facts in this case, that the state can convict a person of "murder" from a fingerprint form a (bear can), in this case dictate that applicant guilt cannot be fairly and logically deduced when petitioner is averring that he did not murder Mr. Gosset, and no one is testifying that applicant murder Mr. Gosset. The trial court was on notice that applicant did report a incident that took place, several hours later.

It is well recognized within the American Jurisprudence that a conviction consistent with both innocence and guilt cannot support a conviction, *Jackson v. Virginia* 443 U.S. 307, 99 S.Ct. 2781 (1979), *U.S. v. Varoz*, 740 F.2d. 772 (10th Cir. 1984). *U.S. v. Ortiz*, 445 F.2d. 1100 (1971).

The South Carolina Supreme Court has held that a court should not refuse to grant a motion for a direct verdict when the evidence merely raises a suspicion that the accused is guilty.

D. *In Re Jeremiah*, 353 S.C. 90, 576 S.E.2d. 185 (S.C. App.2003). In this case, there was only a suspicion that the applicant was guilty, based on the fact there was no trauma to the alleged victim, accompanied by her lack of diligence to report this matter

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and to get help, if a rape had occurred. If applicant had killed Mr. Gosset, why would he call "911) to report the matter?

Under the American Jurisprudence, when the alleged victim testifies that a crime has been committed against them with no supporting evidence, and the accused states he did not commit the crime, then the motion for a direct verdict must be granted in the favor of the accused,. Because there is no evidence to submit to the jury where the accused guilty can be fairly and logically deduced. The applicant 14th Amendment right to the U.S. Constitution was violated in this matter. With applicants counsel and the trial court's error that there is a reasonable probability that, the result of the proceeding would have been different. *Id.* at 203.

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Mandatory Presumption and Impermissibly

Shifts the burden of proof

- Apparently the state / prosecution was aware of the existence of the (911) tape, with the jury not having this knowledge the state / prosecution created a mandatory presumption and impermissibly shifted the burden of proof to the defense, in this case in violation of the due-process clause of the (14) fourteenth Amendment.

- This is also called "Harboring Exculpatory " information, involving the (911) tape, to what would have shown, the possibly of applicant's innocence.

- This information is a causative factor in the presumption of innocence.
- This meaningfully impaired the defendant's ability to defend against the charge of the violation of the due-process clause of the 5th Amendment, that this shift was more prejudicial than probative.

- In such a case, this shift of the burden of proof, the error is not harmless, was unfairly prejudicial such that it suggested a decision upon an improper basis, the unfair prejudice that should have been avoided.

Applicant thinks that this was deliberate and a clear vengeance, for not taken the plea offer that the state had to offer.

- This burden shift, made a high conflict situation, and aroused the passions and prejudices of the jurors, causing them to base their decisions on their emotions and not the evidence.

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Mere-Presence Charge

- The thrust of the state's case was on mere-presence. ~> Mere-presence is not sufficient to convict, without more, where evidence supported such charge, and failure to give such charge on request or the trial court failed to, constitutes reversible error, or to what verdict would have been if the jury had been given the correct charge, but whether the erroneous charges contributed to the verdict rendered.
- That it is quite evident and clear from the testimony from the trial, that being at or near a crime scene (mere-presence), is insufficient to constitute guilt *see ~> State v. Kimbrell*, 362 S.E.2d 630 (1987)

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(MISTRIAL)

The decision whether to order a mistrial lies within the discretion of the trial judge, to be exercised upon the happening of some prejudicial event rendering a fair and impartial impossible. *State v. McLaughlin*, 323 N.C. 68, 96 372 S.E.2d. 49, 68 (1988). Cert. Granted and judgment vacated, the court and trial was so grossly improper that the trial court abused it's discretion in failing to intervene *State v. Allen*, 323 N.C. 208, 372 S.E.2d. 855 (1988).

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The State Failed to Present Sufficient Evidence

The state failed to present or all the requirements of the offense. The states casual connection between the "stereotype" and the biased investigation did no more that to magnify this case erroneously, or to say to bolster it.

- The state, to what is very interesting in this case, had no immediate physical evidence... (One-fingerprint), no fibers, no hair, or epithelia's to make a case.
- Applicant's trial counsel did not articulate any strategy for challenging the state's case. The state acted intentionally to gain a tactical advantage over the trial. The state whole case was based circumstantial evidence.
- The thrust of this (PCR) is that the state failed to present sufficient evidence for a conviction. Also trial counsel failing to conduct an independent investigation, lack of preparation, and failure to make an informed evaluation of this potentially viable defense, when taken together, it amounts to ineffective assistance of counsel.
- *In Re Winship*, 90 S.ct. 1068 (1970) the Supreme Court has also stated that due process commands that (NO MAN) shall lose his liberty unless the state / Government has borne the burden of producing the evidence and convincing the fact-finder of his or her guilt. *See Spieser v. Randall*, 78 S.ct. 1332 (1958). In petitioner's case trial, the state failed to borne that burden at all. It frankly surprises the applicant in this case that the state would promote an indefensible noncompliance with a tenet of constitutional law, or to assure a trial, which comports with due process *i.e.*, fundamental fairness. The applicant is not asking for this court to usurp the jury's role to determine guilt.

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innocence, but for this court to achieve fairness in his criminal trial to the greatest possible extent. That applicant's trial was not just merely unfair, it was unconstitutional.

Applicant maintains Failure to motion the court to order for a competency and evaluation and criminal responsibility.

Section 17-24-20 (a), code of laws of the State of South Carolina (1976)
And the Mental Capacity to stand trial section (44-23-410 (1)) or section (44-23-410 (2))
code of laws of South Carolina (1976)

- Applicant's trial counsel, refused to entertain the potential motion to the court for an order requiring the defendant to be examined pursuant to the statutory provision of this state of South Carolina. Not only for his mental capacity to stand trial, but also for his responsibility pursuant to the *McNaughten* test.

- If found responsible pursuant to the *McNaughten* test, examined as afore said to determine whether or not, because of mental disease or defect, the defendant lacks sufficient capacity to confirm his conduct to the requirements of the law. Section 17-24-20 (A) code of laws of South Carolina (1976).

- That he was prejudiced because, his trial counsel was unable to present relevant and important evidence in his case, and failure to use all his resources available to him to defend him against the false accusation.

- Challenging defendant's competency *See ~> Becton v. Barnett*, 920 F.2d. 1190 (4th Cir 1990). Trial counsel's failure to investigate defendant's competence and failure to file an appeal, constituted a colorable claim of ineffective assistance of counsel, which required and evidentiary hearing to resolve the claim.

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JAMES E. HARRIS

Phipps vs. State

Question # 19

State clearly the relief you seek in filing this application:

The applicant has established several factors to be considered in this "PCR" That the state's case relied solely on stereotype, biased investigation and prejudice.

It also was insufficient to constitute guilt. That the factual allegations set forth in this "PCR" is sufficient to raise a right to relief, above the speculative level to the relevant portion there are, by protecting the applicant's right to a fair trial. With all of the court's errors and the several constitutional violations that the conviction accompanied by such events do not meet any civilized conception of Due process of the law. That alone is sufficient to vacate the conviction and sentence, at this time, remand this case back to the county of Spartanburg, for a new trial, and put the burden of proof, back on the state where it constitutional belongs.

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Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
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M. Hope Blackley
Clerk of Court

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From: Clerk of Court, Spartanburg County, South Carolina

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Process

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

Gail Moffitt
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From: Clerk of Court, Spartanburg County, South Carolina

The enclosed document is being returned for the following reason(s):

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Please make necessary corrections and return for recording. Thank you for your assistance.

Staff initials: MM Date: 10-3-14

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2014-CP-42-2049
Robert J. Phipps., #334249,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed May 19, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the June 2007 term of the Spartanburg County Grand Jury for murder (2007-GS-42-2902). The Applicant was represented by N. Douglas Brannon, Esquire, and Brac Turnipseed, Esquire. The Applicant proceeded to trial on April 13, 2009, and on April 16, 2009, was convicted by a jury as indicted. The Honorable Roger L. Couch sentenced Applicant to imprisonment for life.

A timely notice of appeal and brief was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Phipps, Op. No. 2012-UP-018 (S.C. Ct. App. filed January 25, 2012). A Petition for Writ of Certiorari was filed to the South Carolina Supreme Court, which was denied on August 8, 2013. The Remittitur was returned on August 12, 2013.

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

II.

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

1. Ineffective assistance of trial counsel; specifically
 - a. Failure to prepare;
 - b. Failure to oppose the State's case;
 - c. Failure to request lesser included offenses;
 - d. Failure to object to competency and criminal responsibility evaluation;
 - e. Cumulative error.

III.

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, (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).

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

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

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the claim of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

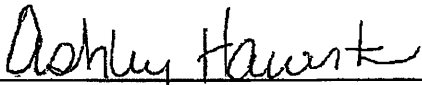
KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
ROBERT J. PHIPPS, #334249	)	2014-CP-42-2049
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Mr. John Brandt Rucker, Esquire
Brandt Rucker Attorney At Law
522 North Church Street
Greenville, SC 29601

DATED this 27TH day of October, 2014.


 Ashley Haworth, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Robert J. Phipps., #334249,	)	Case No.: 2014-CP-42-2049
	)	
Applicant,	)	
	)	AMENDED RETURN AND MOTION
v.	)	FOR MORE DEFINITE STATEMENT
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Amended Return and Motion for More Definite Statement in response to the application for post-conviction relief (PCR) filed May 19, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2007 term of the Spartanburg County Grand Jury for murder (2007-GS-42-2902). N. Douglas Brannon, Esquire, and Brac Turnipseed, Esquire, represented Applicant. Applicant was tried before the Honorable Roger L. Couch and a jury April 13-16, 2009. On April 16, 2009, the jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to imprisonment for life.

A timely notice of appeal and brief was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Phipps, Op. No. 2012-UP-018 (S.C. Ct. App. filed January 25, 2012). A Petition for Writ of Certiorari was filed to the South Carolina Supreme Court, which was denied on August 8, 2013. The Remittitur returned on August 12, 2013.

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

II.

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

1. Ineffective assistance of trial counsel; specifically
 - a. "Counsel presented a significant obstacle in preparing [an] adequate defense"
 - b. "Failure to afford the representation within the range of competence, demanded of attorneys in criminal cases";
 - c. "If defense counsels are unprepared to try a case they are also inadequately prepared to advise their client to testify in a case that is calling for a substantial sentence";
 - d. "Counsel did not articulate any strategy for not challenging the state on indictments that [were] over two years old";
 - e. "Counsel failed to oppose the State's case throughout specific points in the trial and at the sentence proceeding";
 - f. Counsel failed to make a motion when the trial court failed to "charge the jury on a lesser included offense";
 - g. Counsel failed "to make the required contemporaneous objection, to the court, as to require the trial court to order for an competency evaluation, and criminal responsibility";
 - h. "[but] for my trial counsel's unprofessional errors, . . . the outcome of my trial would have been different. The cumulative effect of which I was deprived the level of legal assistance guaranteed by the Sixth Amendment to the United States Constitution"

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III.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. In a PCR action, Applicant bears the burden of proving the allegations in his 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, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant "must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." Walker v. State, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014).

First, the applicant must show that counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional representation, the outcome of the trial would have been different."

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probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges counsel was ineffective for failing to challenge the indictment. Respondent submits Applicant has alleged no facts to support this allegation and it should be dismissed as a matter of law. An indictment is purely a notice document. S.C. Code Ann. § 17-19-20 (2012) ("Every indictment shall be deemed and judged sufficient and good in law which . . . charges the crime . . . so plainly that the nature of the offense charged may be easily understood."). "The primary purpose of an indictment is to put the defendant on notice of what he [charged with], by apprising him of the elements of the offense, and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgement to pronounce if the defendant is convicted." State v. Smalls, 364 S.C. 343, 346-47, 613 S.E.2d 754, 756 (2005). The court determines the sufficiency of an indictment by analyzing: "whether (1) the offense is stated with sufficient certainty . . . to enable the court to know what judgement to pronounce, and the defendant to know what he is called upon to answer . . . and (2) whether it apprises [him] of the elements of the offense." State v. Gentry, 363 S.C. 93, 102-03, 610 S.E.2d 494, 500 (2005) (citing State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003)). "In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances." Id. (citing State v. Adams, 277 S.C. 277, 344 S.E.2d 844 (1985)).

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115, 283 S.E.2d 582 (1981)). "[W]hether the indictment could be more definite or certain is irrelevant." *Id.* (citing *State v. Knuckles*, 354 S.C. 626, 583 S.E.2d 51 (2003)). See also *State v. Tumbleston*, 376 S.C. 90, 97-98, 654 S.E.2d 849, 853 (2007) (citing *Evans v. State*, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005)) (noting that all of the surrounding circumstances must be weighted to make an accurate determination of whether the defendant was prejudiced by a lack of notice and an insufficient indictment).

Applicant has alleged no facts in support of this allegation. Furthermore, Respondent submits the record reflects that Petitioner was fully aware of the charge he faced. Therefore, this allegation is without merit and should be summarily dismissed.

V.

Respondent also moves for a more definite statement. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Applicant has wholly failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his claims are based. Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application well in advance and set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing.¹ Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

¹ Applicant's attorney has been notified this hearing is expected to take place during the week of September 19, 2016. Therefore, Respondent requests Applicant provide Respondent with an amendment specifically setting forth the factual grounds for his allegations no later than thirty days from the date of service of this Return.

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VI.

Applicant must specify any claims she intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing.

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

VII.

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

VIII.

WHEREFORE, having made its Return and Motion for a More Definite Statement, Respondent requests that Applicant amend his application to set forth the factual grounds supporting his allegation of ineffective assistance of counsel. Respondent further requests an evidentiary hearing be held solely on the claims of ineffective assistance of counsel.

[Signature block on following page]

CLERK OF COURT
SPARTANBURG COUNTY
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M. HOPE BLACKLEY

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA VALENZUELA
Senior Assistant Deputy Attorney General

ALICIA A. OLIVE
Assistant Attorney General

By: *Alicia A. Olive*
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

July 22nd, 2016.

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF SPARTANBURG)

COURT OF COMMON PLEAS NONJURY

3
4 ROBERT J. PHIPPS,)

5 APPLICANT,)

6 VS.)

7 THE STATE OF SOUTH CAROLINA,)

8 DEFENDANT.)

TRANSCRIPT

OF

RECORD

2014-CP-42-2049

9
10 September 19th, 2016
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 THE HONORABLE PAUL M. BURCH, Judge.

15
16 A P P E A R A N C E S:

17 J. BRANDT RUCKER
18 ESQ.
Attorney for the Applicant

19 RUSTON W. NEELY
20 ASSISTANT ATTORNEY GENERAL
Attorney for the Defendant

21
22
23 PAMELA E. GREEN
24 Circuit Court Reporter
25 Seventh Judicial Circuit

I N D E X O F W I T N E S S E SWITNESSESPAGE

ROBERT PHIPPS

Direct examination by Mr. Rucker

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Cross-examination by Mr. Neely

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DOUGLAS BRANNON

Direct examination by Mr. Neely

36

Cross-examination by Mr. Rucker

41

Redirect examination by Mr. Neely

52

Certificate

58

P R O C E E D I N G S

MR. NEELY: May it please the Court?

THE COURT: Yes, sir.

MR. NEELY: Your Honor, this is the case of Robert J. Phipps versus the State of South Carolina. Case Number is 2014-CP-42-2049.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to Orders of Commitment by Spartanburg County Clerk of Court. Indicted in June of 2,007 term of Spartanburg County Grand Jury. That Indictment Number is 2007-GS-42-2902. He was represented by Mr. Doug Brannon, and Brac Turn -- Turnipseed. He was tried and found guilty April 16th, 2009. Judge Couch sentenced Applicant to imprisonment for life.

Timely Notice of Appeal was filed on Applicant's behalf. The Court of Appeals affirmed Applicant's conviction and sentence in State v. Phipps. Opinion number 2012-UP-018. Petition for Writ of Certiorari was filed in the South Carolina Supreme Court. It was denied August 8th, 2013.

Applicant alleges ineffective assistance, assistance of counsel. Specifically counsel presented a significant obstacle in preparing an adequate defense, failure to afford representation within a range of competence.

1 Defense counsel was unprepared to try the case.

2 They were inadequately prepared to advise their client
3 to testify in the case.

4 Did not articulate any strategy for challenging the
5 State on indictments that were two years old.

6 Failed to oppose the State's case through specific
7 points in the trial and in the sentence proceeding.

8 Failed to make a motion when the Trial Court failed to
9 charge the jury on lesser included offense.

10 Failed to make required contemporaneous objection to
11 the Court as required the Trial Court to order a competency
12 evaluation for criminal responsibility, and alleges that,
13 but for those unprofessional errors, the outcome of the
14 trial would of been different.

15 THE COURT: All right. Counsel.

16 MR. RUCKER: I call my client, Robert Phipps, to the
17 stand.

18 ROBERT PHIPPS, being first duly
19 sworn, testified as follows:

20 MR. RUCKER: May it please the Court?

21 THE COURT: Yes, sir.

22 DIRECT EXAMINATION

23 BY MR. RUCKER:

24 Q Robert, I want you to tell the Court what sentence --
25 what your sentence currently is.

Robert Phipps - Direct examination
by Mr. Rucker

- 1 A Life in prison for a murder.
- 2 Q Okay. Was that based on a trial here in Spartanburg?
- 3 A Yes. Yes, sir.
- 4 Q Who was your attorney at that trial?
- 5 A Mr. Brannon. Doug Brannon.
- 6 Q Okay. Did you have any other attorneys in this case?
- 7 A He had an associate. I forgot his name.
- 8 Q Was that Brac Turnipseed?
- 9 A Yes, sir.
- 10 Q Okay.
- 11 A That's his name.
- 12 Q How many times did you talk with Mr. Turnipseed?
- 13 A I don't believe I ever talked to him until trial --
- 14 until the day of trial started.
- 15 Q And what did he do for you during trial?
- 16 A He made -- he made some, some comments, but I really
- 17 don't quite recall what they was.
- 18 Q Okay. Was he a minor part of the case then?
- 19 A Yes.
- 20 Q Okay. And your, your claims are against Mr. Brannon,
- 21 not Mr. Turnipseed.
- 22 Is that fair?
- 23 A Yes, sir.
- 24 Q Okay. Going through your trial process -- before we
- 25 get there.

Robert Phipps - Direct examination
by Mr. Rucker

1 Were you, to your knowledge, were you ever offered a
2 plea deal in this case?

3 A I think I was. Yeah, I think I was.

4 Q Do you recall what that was?

5 A I believe it was 30 I believe.

6 Q Okay. And did you discuss that plea offer with Mr.
7 Brannon?

8 A Yes, sir.

9 Q And what was that discussion about?

10 I mean I know it's about the plea, but what did y'all
11 discuss as far as strategy?

12 A That we would just, just gonna go to trial, and, and,
13 and speak up different aspects of, of the case, and, and
14 about missing evidence or something like that that was --
15 should have been presented at the trial.

16 Q Was, was Mr. Brannon an appointed attorney meaning a
17 public defender or did you hire him?

18 A Oh, he was hired.

19 Q Okay. How long before the trial was he hired?

20 A Maybe a month or two months. Maybe. I don't quite
21 remember.

22 Q Do you -- did you pay for him or did family members pay
23 for him?

24 A My family did.

25 Q Okay. And do you know how much he was paid?

Robert Phipps - Direct examination
by Mr. Rucker

1 A Over \$10,000.

2 Q Okay. Did -- how many times did you meet with him?

3 A Maybe, maybe, maybe, maybe three.

4 Q Okay. How long were those meetings?

5 A Maybe about an hour. About an hour I would say.

6 Q For each one?

7 A Yes, sir.

8 Q Did y'all go over the discovery, the evidence against
9 you?

10 A Yes, sir.

11 Q Okay. Did Mr. Brannon tell you he thought it was a
12 good idea to go to trial?

13 A Yes. On the -- yes, that, that I -- I, I was -- I was
14 totally against, you know, going to trial because, two days
15 before trial, I was presented with some legal documents that
16 he came to the county to talk to me about, which was on a --
17 was that Friday, April the -- I think April the 9th I
18 believe was, and he, he discussed some -- about me -- I, I
19 wanted a continuance because we had just -- we had asked
20 repeatedly did the, the DA, did they have any more motions
21 of discovery.

22 Q Okay.

23 A And we was told that there wasn't any. Prior before
24 this, before this incident came where -- I was presented
25 with this evidence on that Friday.

Robert Phipps - Direct examination
by Mr. Rucker

1 Q All right. Let's go back through this.

2 Were you in custody the whole time awaiting trial?

3 A Yes, sir.

4 Q At the jail?

5 A Yes, sir.

6 Q And Mr. Brannon came to you shortly before the trial?

7 A Yes.

8 Q And he brought new evidence?

9 A Right, new---

10 Q Okay. What was that evidence?

11 A That was a -- some specimen of some, some DNA, and, and
12 I was -- and I, and I tell him, I said, well, we should go
13 ahead, and I, I would like to go ahead and have this further
14 investigated. So, why don't we have a continuance on this,
15 you know, because this is, this is all new. This is all
16 sudden, you know, sudden. It was just suddenly a -- brought
17 to us two days before the trial. So---

18 Q How---

19 A ---he informed me that -- he informed me that it
20 wouldn't be really necessary because what he say?

21 This -- he believe the Statute, the Statute of
22 Limitation on it had, had expired or -- and he wouldn't be
23 able to use it against me in a Court of law, you know.

24 Q Did they, in fact, use it against you in Court though?

25 A Yes, sir.

Robert Phipps - Direct examination
by Mr. Rucker

1 Q All right. How long were you actually in custody
2 between the time you were arrested and the time you went to
3 trial?

4 A Over, over two years.

5 Q And when did y'all first file for discovery?

6 A I filed for discovery with a legal aid attorney.

7 Q Okay.

8 A Mr. -- oh, man, what is his name?

9 McPherson --

10 Q Okay.

11 A -- you know and he would be -- he gave me the evidence
12 that I had.

13 Q How, how long after you were arrested did you file and
14 receive discovery?

15 A I got a -- they brung me in the county in May. I
16 believe I got that in like August. Yeah, maybe about August
17 or July. Some -- somewhere around that area.

18 Q Okay. So, you were arrested in May, and you got your
19 discovery responses in August?

20 A Right.

21 Q Okay. At some point later you hired Mr. Brannon,
22 right?

23 A Yes.

24 Q Did you re -- did you have the discovery files or did
25 your legal aid attorney have or public defender have the

Robert Phipps - Direct examination
by Mr. Rucker

1 discovery files?

2 A My public defender had them the first, and then he
3 came, came to the detention center and gave them to me.

4 Q Okay. And when -- around when was that?

5 I'm just establishing a timeline.

6 A Mr. McPherson gave me that motion of discovery. It had
7 to be -- it had to be in August or maybe September. One of
8 the -- I'm, I'm not too for sure, but---

9 Q Was that---

10 A ---it was---

11 Q Was that the following year?

12 A No, it was---

13 Q Was that the same year?

14 A The same year.

15 Q Okay. And so you had hired Mr. Brannon at---

16 A Right.

17 Q ---at that point?

18 A No, about a year after that---

19 Q Okay.

20 A I hired Mr. Brannon.

21 Q All right. Did you give him the discovery that you
22 received from your public defender?

23 A Yes, sir.

24 Q Okay. And did y'all go over it together?

25 A Several times.

Robert Phipps - Direct examination
by Mr. Rucker

1 Q How long after the first time you went over the
2 discovery with him did this DNA evidence pop up?

3 A This, this DNA evidence didn't pop up until two days
4 before trial.

5 Q To your knowledge, did he move to suppress that
6 evidence being admitted in a trial?

7 A No, he didn't. No, not that I know of. He just said
8 it wouldn't be, it wouldn't be allowed to be used against me
9 because of some kind of Statute of Limitations that the
10 State -- the State has ten days, ten working days or
11 something he mentioned of, ten working days before -- in
12 order for them to be able to use that against me.
13 Something -- something like that. It was something of that
14 nature.

15 Q Did he make that motion at trial?
16 Do you recall?

17 A No, I don't believe he did.

18 Q Okay. Did you talk to him about that issue during the
19 trial?

20 A Yes, and he said something of the fact of that it would
21 of -- don't worry about it. I got, I got it under control.

22 Q Okay.

23 A Something like that.

24 Q We're gonna work our way through your claims obviously
25 in your application, but did he discuss a strategy with you

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by Mr. Rucker

1 of what his arguments were gonna be to try to get you
2 acquitted?

3 A Um. I'm -- he's -- not really. You know, I don't
4 remember. All I remember was we was talking about that,
5 that the, the, the, the evidence that they had that was
6 missing, and, and that's about all I remember I think.
7 That's all I remember.

8 Q Okay. What was the evidence that was missing?

9 A It was a, it was a, a tape that either someone that was
10 in custody had made or, or it was a call to the, to the
11 police station that someone had made that would explain it
12 to them that, that it had -- they knew who the, who the
13 other person was that done it.

14 Q So, did he talk to you about alibi witness or alibi
15 evidence?

16 A I don't remember. I don't remember.

17 Q Okay. Did he talk -- do you remember him discussing
18 Brady material, I know that's technical, but Brady versus
19 Maryland material---

20 A Right.

21 Q ---that showed that you didn't do it?

22 A Right. Yeah, he was -- I remember him saying, yeah,
23 something about that fact.

24 Q Okay. Do you recall him making a motion to the Court
25 bringing that issue to the Court's attention?

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by Mr. Rucker

1 A Yes, sir.

2 Q Okay. And what was the ruling by the Court on that?

3 A It was -- I think it was, it was inex -- inexcusable.

4 Inex -- let's see. I can't remember the technical name of
5 it, but it was denied some, some kind of way.

6 Q So, the Judge wouldn't even let him mention that to the
7 jury?

8 A Right, or call the guy that was responsible for the
9 missing evidence to come --

10 Q Okay.

11 A -- to come forth and take the stand even though they
12 called a recess for him to go back to the police station to
13 look for it. They still wasn't allowed for him to come on
14 the stand, take the stand when that happened.

15 Q Okay. Was that a surprise to you?

16 A Yes, because I would think that, you know, you know, if
17 something that could have helped me in my case, and that,
18 that the Detective Porter go to the -- they stopped trial
19 for the Detective Porter to go to retrieve it, and then come
20 back and not have it. I would -- I thought that that would
21 allow him to allow my attorney to call him to the stand, and
22 ask, you know, you know, ask about it, talk about it.

23 Q Was part of the reason you did not take a plea offer in
24 this case is because you thought that evidence, evidence was
25 gonna be produced at trial?

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1 A Exactly.

2 Q And did Mr. Brannon tell you that, that would be an
3 issue he could address in front of the jury or at least
4 maybe get the case dismissed?

5 A Yes, sir.

6 Q Okay. All right. Working through your application
7 more directly, let's just start from the beginning.

8 What do you believe, in addition to what we've already
9 discussed, Mr. Brannon did incorrectly?

10 A Let me get him -- take my glasses off for a minute.

11 Q All right.

12 A Like, first of all, the -- like I said, it was the
13 first and most critical issue like I had with Mr. Brannon
14 was about him not allowing me to have a continuance when
15 this new motion, motion of discovery, the new documents
16 appeared, and was presented to me, you know, because I, you
17 know, I would have definitely had retrieved a team of DNA
18 experts, you know what I'm saying, to reexamine this new
19 specimen that was, you know, presented to me at this short
20 period of time.

21 I mean I didn't have no way to even -- I wanted to
22 present it to the, you know, and, and examine it, and have
23 it analyzed and dissected. But, like I say, you know, he --
24 like Mr. Brannon was telling me, he said there is no -- he
25 says there's no reason to, to, to, to halt this -- to get a

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1 continuance if, you know what I'm saying, it won't be used
2 against you.

3 So, that, and not only that, but the other thing that
4 was, was puzzling to me was that I had given him names and
5 addresses of people that I wanted him to investigate who
6 said that they knew the other perpetrator that was
7 responsible for this crime. And I asked him did -- can he
8 go have it checked out, and he said it would be taken care
9 of, you know, and that was never -- there was no -- there
10 was no lead in that. I mean he, he just take the -- he
11 didn't take initiative to go and have that checked out.

12 Q Who were those witnesses that you wanted him to talk
13 to?

14 A It was a, a person that was, that was -- said they was
15 being -- I got his name. One of them name was Jake, Jake,
16 Jake Brown or something like that who was -- said that he
17 was around him, you know, in another drug house getting
18 high. He was bragging on this.

19 So, I had this dude address that I wanted him to go and
20 check out. I gave it to him. And, and a couple of girls
21 that I know that was, you know, drug addicts and stuff that,
22 that knew about his bragging and stuff. And I wanted him to
23 check them out.

24 Q Did you -- was any -- were any of these witnesses
25 reflected in the discovery y'all got from the Solicitor's

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by Mr. Rucker

1 Office?

2 A No.

3 Q Especially that first person?

4 A No, sir.

5 Q How did you know about these people?

6 A Because I was told through other sources in the county
7 jail at the time I was at, where I was at, and they was
8 telling me man, ah man, I know, I know people that said that
9 they was around him, and that he was bragging on it, talking
10 about it to people, you know, and that, you know what I'm
11 saying, he, he was -- he was getting high, and, and, and he
12 was bragging on this. You know, so, I was wanting Mr.
13 Brannon to check it out.

14 Q And, to your knowledge, he never followed up on that?

15 A No, sir.

16 Q Did you ever confront him with that, that he had not
17 talked to him?

18 A Yes, sir, he, he said that he going to get on that
19 because he just been busy with other cases, but he's gonna
20 get on to that.

21 Q But, to your knowledge, he never looked into it?

22 A He never looked into it.

23 Q All right.

24 A And then, the other issue I had with Mr. Brannon was --
25 I believe that, that I was -- I believe that what he

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by Mr. Rucker

1 didn't -- he didn't make no kind of motions or file any
2 written when I believe that there was an error in the, in
3 the Judge's decision when he didn't allow the Grand Jury to
4 hear motion on -- that they could of came with a lesser
5 charge of manslaughter --

6 Q All right. When you say Grand Jury---

7 A -- then murder.

8 Q When you say Grand Jury, you're talking about the trial
9 jury or the Grand Jury that puts the indictment down?

10 A The trial jury.

11 Q Okay.

12 A Okay. When the --.

13 Q And why do you believe that you -- there should of been
14 a lesser charge, charge to the jury?

15 A I believe because mitigating factors was involved. I
16 believe that, you know, that if, you know, a person ain't in
17 his right mind, you know what I'm saying, and he's, he's
18 constant -- his mind is being altered, you know what I'm
19 saying, and when drugs or alcohol or something like that, I,
20 I don't believe that a person, you know, and I was -- this
21 was what I, you know, I believed that if a person ain't in
22 his right mind time of offense or something like this
23 occurred, then I do believe that a person should have, have
24 a chance to be able to not be charged intentionally with
25 such a hinderous (phonetic), and I feel that, if, if I'm

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by Mr. Rucker

1 being accused of something like that, in a drug house, in a
2 drug infested environment where people was in there, we was
3 all -- everybody was getting -- doing, you know, doing
4 drugs, that, you know what I'm saying, if something like
5 this would occur, that a person couldn't be in his right
6 mind.

7 Q Did you discuss that issue with Mr. Brannon?

8 A Yes, sir.

9 Q Did he talk -- did he inform you that, in South
10 Carolina, voluntary intoxication is not a defense to
11 anything?

12 A No, he didn't. He, he, he wrote some stuff down, but
13 he never did proceeded -- proceed with it.

14 Q Did he tell you he thought he could get a manslaughter
15 charge for you as the trial progressed?

16 A He said that he would mention it, you know what I'm
17 saying, he would, you know, he would mention it, or
18 something like that, to the, to the, to the Judge or to the
19 jury or something. And he never did. That's what I thought
20 he would at least say, you know, in this area.

21 Q If, if you knew that you could not have gotten that
22 manslaughter jury charge, that it was only gonna be murder,
23 would you have accepted the plea instead?

24 A No, sir.

25 Q Okay. And why is that?

Robert Phipps - Direct examination
by Mr. Rucker

1 A Because it carries life without parole.

2 Q But were you offered 30 years on the murder?

3 A Yes.

4 Q And did that -- did him telling you that he could work
5 on that charge affect your ability to, to determine whether
6 you should take that plea?

7 A Right.

8 Q Okay.

9 A Yeah.

10 Q All right. Let's move on to your next issue, the
11 mental evaluation.

12 why do you think you would -- you deserved or should of
13 had a mental evaluation in this case?

14 A I believe that if, if a person -- this is, this is what
15 I was told. I just believe that the person kept telling me
16 over and over to have, have -- talk to Mr. Brannon about
17 making sure that, before you even go to trial, that your
18 mental capacity, you know what I'm saying, is, is, is
19 focused, you know, is, is, is -- that your mental capacity
20 is above the average, you know what I'm saying, person.

21 Q Okay.

22 A You know, the average -- that, you know, that you ain't
23 illiterate, in other words.

24 Q And why do you believe your mental capacity should of
25 been at issue?

Robert Phipps - Direct examination
by Mr. Rucker

1 A Because, you know what I'm saying, when I, when I first
2 was -- got apprehended and stuff from Ohio, you know what
3 I'm saying, I was, I was, I was on drugs real hard, bad, you
4 know, you know. So, I really, you know, a lot of things
5 that was being said, I wasn't, I wasn't comprehending real
6 clearly.

7 Q Okay. Did you give a statement in this case or
8 confession?

9 A Excuse me?
10 Say that again.

11 Q Did you confess to anything to anybody in this case?

12 A No, sir.

13 Q Okay. What -- how would your mental -- your issues
14 with your mental state affect the outcome of the trial?

15 A Well, I believe that if, if, if, if I was, you know, a
16 high and stuff coming in, and, and, and being told to take
17 DNA and examples and all stuff like that, that it's
18 throwing -- it's confusing me, and I don't know exactly what
19 I should be, you know, if, if what I should be -- what he's
20 telling me -- well, see, I was, I was brought before the
21 judge without an attorney to really represent me in this DNA
22 procedures and stuff, right.

23 Q Uh-huh. (Affirmative).

24 A And I didn't really know too much about what was going
25 on when I first was apprehended in this, you know, this case

Robert Phipps - Direct examination
by Mr. Rucker

1 in here.

2 Q Uh-huh. (Affirmative).

3 Did, did you challenged that -- first of all, did you
4 ask for an attorney when you were arrested?

5 A Yeah, I think I did. I think I did.

6 Q Was it---

7 A I think they, they presented me with an attorney.

8 Q Was that before or after the DNA sample was taken?

9 A That was after.

10 Q Okay. Did your---

11 A I got an attorney after. He gave me attorney
12 afterwards.

13 Q Okay. But had you asked for an attorney before that?

14 A Yeah. Yes, I wanted to go in a courtroom with an
15 attorney.

16 Q Did Mr. Brannon discuss the effects that could have on
17 the DNA that they took from you?

18 A No.

19 Q Okay. Did you talk to him about -- DNA was a part of
20 the -- a large part of the case, correct?

21 A Yes.

22 Q All right. When you talked to him about the DNA
23 experts that he want to bring -- that you wanted him to
24 bring in, what was his response to you?

25 A His response was that, that don't, don't -- we -- you

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by Mr. Rucker

1 wouldn't -- you ain't gonna need all that because the, the
2 specimen that they say that they -- the new discovered --
3 the newly discovered evidence that they have against me
4 would not be able to be presented, would not be allowed in
5 Court.

6 Q Did he ever tell you it would be too expensive to hire
7 an expert or anything like that?

8 A No.

9 Q Okay. What are your issues as to the indictments?

10 A Um.

11 The issues of the indictment was --.

12 Q You've alleged in your application---

13 A Oh, yeah. That, that the, the indictment was -- my
14 issues I had with the indictment was that they didn't --
15 that I, I was innocent of it, you know, of this crime
16 because I was just, you know, at a house or something of a
17 violent nature happening, you know.

18 Q All right. Did, did Mr. -- to your knowledge, did Mr.
19 Brannon ever investigate or, or ask whether the Sheriff's
20 office or the police department had investigated this other
21 person for this crime?

22 A Yes, he said -- yes, he did.

23 Q He told you he -- they did, and what, what were they
24 doing to investigate that person?

25 A They was taking DNA samples and they -- and lie

Robert Phipps - Direct examination
by Mr. Rucker

1 detector tests and stuff of this nature.

2 Q Okay. And what DNA sample did they actually take from
3 you?

4 A They took, I think, a swab of my --.

5 Q Okay. Was that a cheek cell?

6 was that from in your mouth or did -- how, how did they
7 obtain it?

8 A Through my mouth.

9 Q Okay. And how did they connect that to the deceased,
10 to the victim?

11 what -- how did that play into the Court?

12 A Due to the pans (phonetic) or the speck, the speck --
13 this newly discovered evidence---

14 Q Okay.

15 A Respect---

16 Q That was based on something taken off the victim?

17 A Yes. Yeah, the speck on his pants.

18 Q All right. Did you know this victim beforehand?

19 A No.

20 Q Had you ever been around the victim beforehand?

21 A No.

22 Q Okay. Did you trade clothes or anything with anyone?

23 A No. All I, all I ever done with the vic -- that close
24 to him was when a fight broke out at the house that we was
25 in -- that we was at, I had got between them, you know,

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by Mr. Rucker

1 twice, you know what I'm saying, and, and broke it up. And
2 that as far as I have ever gotten to, to close to --
3 close -- that close to the victim.

4 Q But you had actual physical contact with him at one
5 point?

6 A Yeah, him and the other guy that was, yeah, that was
7 fighting.

8 Q Did you discuss that with Mr. Brannon?

9 A Yes, I did.

10 Q Did he use that as part of your defense at trial?

11 A I believe he did.

12 Q What -- in what was he ineffective---

13 A Yeah.

14 Q ---in arguing the DNA at trial related to how it got
15 there?

16 A He, he expressed the fact that the DNA got there
17 between a scuffle between him and another man and me
18 breaking it up.

19 Q Okay. And what do you think he could of done
20 differently on that point?

21 A I think that he could have demonstrated more of a, of
22 what happened -- how, you know, what was happening because,
23 like I had told him and the Courts, that, when I was -- got
24 between him, Mr. Samuel, and this New York, that man had a,
25 a, a glass pipe that they smoke crack out of.

Robert Phipps - Direct examination
by Mr. Rucker

1 Q All right. Before we get too far, the Judge will have
2 the transcript, but---

3 A Okay. Oh, yeah. My bad.

4 Q But who -- tell the Court who Samuel is and who New
5 York is.

6 A The New York was the, the, the perpetrator that was
7 fighting Mr. Sam.

8 Q Okay. Do you know his real name?

9 A I never did know his last name, his whole full complete
10 name.

11 Q Okay. And then who, of course, was Samuel?

12 A Samuel was the deceased.

13 Q Okay. And go ahead about the con -- the struggle.

14 A Okay. It was struggling because Samuel wanted to push
15 his, his pipe that he had after he took a, a puff, after he
16 took a hit on it. Okay. Then Samuel said don't push my
17 pipe, you know what I'm saying.

18 As I'm sitting down observing this, you know what I'm
19 saying, and I, I see the friction -- you know, I see like,
20 you know, the friction between them, and I said man, y'all
21 just cool out. But before I knew it, he, he had Samuel by
22 his neck --

23 Q Okay.

24 A -- you know what I'm saying, and I went up there and I
25 jumped up and broke it, got between them with this -- only

Robert Phipps - Direct examination
by Mr. Rucker

1 thing he had in his hands I remember was a, a pipe stem,
2 what they call stem or whatever, it's a pipe, and he had a
3 little handle that he push it, puts the crack in, in his
4 hands, and, like I say, I got in-between both of them.

5 Q Were you able to stop the fight?

6 A Yes, I was.

7 Q When you---

8 A That wasn't---

9 Q Go ahead. I'm sorry.

10 A That one -- they had fought twice. One in the kitchen.
11 One in the front room.

12 Q Okay. To your knowledge, if you have any knowledge,
13 when did the murder actually occur?

14 A The murder, the murder happened when Mr. Samuel told
15 the -- told New York that -- to get out of his house, and he
16 went to the back room, and he said I ain't, I ain't going
17 nowhere, and he went to the back room. Samuel went to the
18 back, to the back room, and he followed him back there. And
19 that's when the -- I heard a bunch of, you know, rumbling
20 and going on back there.

21 Q Okay. How, how often had you been at that house before
22 that day?

23 A I had never been in that house.

24 Q How long---

25 A Never.

Robert Phipps - Direct examination
by Mr. Rucker

1 Q How long were you there that day?

2 A Maybe, maybe about a good 45-minutes, maybe, to an hour
3 at the most.

4 Q How many other people were in the house at the time?

5 A It was just -- it was just New York, and me, and
6 Samuel. There was another person, but he came and left. He
7 bought some crack, and then he left.

8 Q Okay. To your knowledge, was DNA evidence ever
9 acquired from New York, from the person known as New York?

10 A Yes, from, from Terrence Griffin, from the transcript I
11 read, they had got partial plants of a -- partial plants --
12 prints -- fingerprints of a, another individual --

13 Q Okay.

14 A -- other than me and Samuel.

15 Q Okay. Did you discuss all this -- what actually
16 happened that day with Mr. Brannon?

17 A Yes, I did.

18 Q Did he talk to you about you testifying in the case?

19 A At first, he wasn't, but, but when they came up with
20 this, this newly discovered evidence, he said would -- it
21 would be best to take the stand.

22 Q And did you, in fact, testify in the case?

23 A Yes, I did.

24 Q Did you discuss -- what -- did you have a prior record?

25 A Yes, I did.

Robert Phipps - Direct examination
by Mr. Rucker

1 Q What was that prior record?

2 A Prior records I had was grand theft, theft, robbery.

3 That's, that's about all I remember, remember I have -- got

4 have. I mean I was just -- I did some robberies. I robbed

5 a bank, you know what I'm saying, used notes, you know.

6 Never, you know, used nothing -- no, no firearms or no

7 weapons. Just always --.

8 Q Before you---

9 A That's all I ever done.

10 Q And you had a Jackson---

11 A At first---

12 Q Go ahead. I'm sorry.

13 A And then I had a few burglaries.

14 Q Okay. Did -- before you had the Jackson -- first of

15 all, do you know what a Jackson versus Denno hearing is?

16 I know it's in your application.

17 A Excuse me?

18 Q Do you know what a Jackson versus Denno hearing is?

19 It's in your application, but do you know what that
20 means?

21 A No, not quite. I just know that --.

22 Q All right. Well, separately, separately, did -- before

23 you testified, did the Judge go over your rights not to

24 testify with you separate from any Jackson versus Denno

25 hearing issue?

Robert Phipps - Direct examination
by Mr. Rucker

1 A Yes.

2 Q Okay. Did, did Mr. -- did he explain to you that they
3 could use some of those prior convictions against you?

4 A Yes.

5 Q Did -- have you talked with Mr. Brannon about that?

6 A Yes.

7 Q And did he inform you that could affect the jury's
8 ability to see whether you're telling the truth or not?

9 A Right. Yes.

10 Q Did you have enough time to meet with Doug Brannon to
11 talk about a -- you testifying in this case?

12 A Yes.

13 Q Did y'all decide, earlier in the case, that you would
14 testify or did you just decide that a couple days before
15 trial?

16 A Well, yeah, because I -- yeah, I, I wanted to testify.
17 I wanted to testify and just tell them the, the, the -- what
18 happened, what actually happened at the house.

19 Q Did Mr., did Mr. Brannon encourage you to testify or
20 tell you it was a dangerous thing to do?

21 A He encouraged me.

22 Q Okay. All right. Do you -- I, I think we've gone over
23 your issues. I want to make sure I didn't miss anything.

24 Based on your application, were there additional issues
25 that we have not discussed or I haven't questioned you about

Robert Phipps - Direct examination
by Mr. Rucker

1 in front of the Judge?

2 A Okay. Did we, did we talk about the photos?

3 Q Oh, of course.

4 Discuss the photo issue -- tell me specifically what
5 Mr. Brannon did wrong with the photos that were shown to the
6 jury.

7 A I, I believe he allowed the, the jury to look at some
8 photos that they wasn't suppose to have looked at.

9 Q And what was in the photos that they saw?

10 A The deceased.

11 Q Okay. And why do you believe the jury should not have
12 seen those photos?

13 A Because I, I believe that it would -- it, it, it, it,
14 it plants the wrong type of idea into the jury's mind of
15 give them a -- it gives them an in -- a false impression of
16 a person that's sitting across the hall, across the table
17 there as, you know, why, you know, sympathy, you know, like
18 looking at this man in this picture, and oh, you know, he's,
19 he's real, he's real hurt, and then looking at me over there
20 in -- at the jury -- at the, at the defense table, and
21 saying wow, I think that he -- how could he do something
22 like that?

23 You know, how -- I'm just thinking that it was more or
24 less biased more or less, you know, by showing it to the
25 jury in -- and planting the wrong type of seed into their

Robert Phipps - Direct examination
by Mr. Rucker

1 head.

2 Q Do you believe that it inflamed the jury because of the
3 goriness and the bloodiness of the pictures?

4 A I believe it, I believe it, it played a part.

5 Q Okay. And did -- to your knowledge, did Mr. Brannon
6 object to -- and try to keep those pictures out from in
7 front of the jury?

8 A No, sir.

9 Q All right. Have we covered all your issues now?

10 A well, let me see. Make sure everything. The
11 mitigation.

12 (Pause.)

13 A Yeah. Yes, sir, I believe we covered everything, sir.

14 MR. RUCKER: No further questions, Your Honor.

15 MR. NEELY: May it please the Court?

16 THE COURT: Uh-huh. (Affirmative).

17 CROSS-EXAMINATION

18 BY MR. NEELY:

19 Q Mr. Phipps, you testified earlier that, that you were
20 totally against a trial, that you would of pled to a 30 year
21 plea deal.

22 Is that correct?

23 A I don't -- I don't think I would of exactly pled to a
24 30 year deal. I mean I wanted to -- a case -- I wanted to
25 have the case continued.

Robert Phipps - Cross-examination
by Mr. Neely

1 Q Okay. So, it wasn't, it wasn't the fact that you
2 wanted to plea, it was that you wanted the case continued?

3 A Yeah, I wanted to have the case move -- examined, the
4 specimen that was given to us on a two days notice to have
5 the case continued.

6 Q Okay. And when you spoke to your attorney, you spoke
7 to Mr. Brannon, did you tell him your side of the story?

8 A Yes, I told him, I told him what, what happened. Yes,
9 I did.

10 Q Okay. And, and your side of the story, you're innocent
11 completely?

12 A Yes.

13 Q Okay. So, you didn't tell him that you were -- you
14 killed the victim, but you were high?

15 A Excuse me?

16 Q You didn't tell Mr. Brannon that you actually committed
17 the murder, but you were high, so you wanted the lesser
18 included?

19 A Nah, I ain't, I ain't tell him I killed nobody.

20 Q You didn't tell him the victim fought back or he---

21 A No.

22 Q ---he started, he started the fight?

23 A No. No, I told him that I broke up a fight. I never
24 fought the victim.

25 Q And the victim never fought you?

Robert Phipps - Cross-examination
by Mr. Neely

1 A No.

2 Q Okay.

3 A No, I was just in the middle of a fight that broke up.
4 Broke up a fight.

5 Q So, you, you consistently maintained to Mr. Brannon
6 that you were innocent of this crime?

7 A Yes.

8 Q Okay. Do you remember the Judge going over things,
9 over matters before you could testify?

10 The Judge would of made you stand up and swear under
11 oath, and that you would of had a conversation with you?

12 Do you remember that?

13 A Yeah, I think the Judge did. Yeah, I remember having a
14 conversation, but I think with the Judge.

15 Q Okay. Do you remember the Judge explaining to you all
16 the rights that you'd be giving up if you testified?

17 A Yeah, I believe so. I believe so.

18 Q Okay. Do, do you remember the Judge asking you if you
19 understood everything he explained to you, and you saying
20 yes, sir?

21 A Yeah.

22 Q Do you remember the Judge asking you if you had any
23 questions and you saying no, sir?

24 A I don't, I don't remember.

25 MR. NEELY: Your Honor, may I, may I approach?

Robert Phipps - Cross-examination
by Mr. Neely

- 1 THE COURT: Yes, sir.
- 2 A The judge there---
- 3 Q Mr. Phipps, this is the tran---
- 4 A Before I took a -- what, what you mean did I have -- he
- 5 asked me questions about what?
- 6 Q Well, that's what I'm here to show you.
- 7 A Okay.
- 8 Q This is a transcript of your trial.
- 9 A Yes, sir.
- 10 Q And this is the Judge explaining your rights to you
- 11 before you testify.
- 12 Okay. This is on Page 384 of the transcript.
- 13 A Okay.
- 14 Q Do you see where the Judge says do you understand
- 15 everything I've explained to you and you said yes, sir?
- 16 A Yes.
- 17 Q And it says do you have any questions about what I have
- 18 explained and you said no, sir?
- 19 A Right. Okay. Yeah.
- 20 Q Okay.
- 21 A Okay.
- 22 Q And then, further along in the transcript, do you
- 23 recall the Judge giving you the night to think about it
- 24 before you made the decision whether you wanted to testify
- 25 or not?

Robert Phipps - Cross-examination
by Mr. Neely

1 A Okay. Yeah, I -- he, he -- yeah, I believe he did.

2 Yeah, he did.

3 Q And when, when you came back to Court that next
4 morning, do you recall the Judge asking you if you had the
5 opportunity to discuss this with your attorney?

6 A Right.

7 Q And you said yes, sir?

8 A Yeah, I went to -- yes, sir.

9 Q And the Judge asked if you were satisfied with those
10 conversations?

11 A Yes, sir.

12 Q And you said yes, sir.

13 And then the Judge asked you if you need any more time
14 to discuss with your attorney and you said no, sir?

15 A Yes, sir.

16 Q Is that correct?

17 A Right.

18 Q And I believe it was your testimony that you wanted to
19 testify and tell the jurors what actually happened?

20 A Yeah, at the house, yes, sir.

21 MR. NEELY: Okay. That's all the questions I have of
22 this witness, Your Honor.

23 MR. RUCKER: Nothing further, Your Honor.

24 THE COURT: You may step down, Mr. Phipps. Thank you.

25 MR. RUCKER: No further witnesses, Your Honor.

Douglas Brannon - Direct examination
by Mr. Neely

1 MR. NEELY: The State would call Doug Brannon to the
2 stand.

3 DOUGLAS BRANNON, being first duly
4 sworn, testified as follows:

5 THE COURT: Thank you, sir.

6 DIRECT EXAMINATION

7 BY MR. NEELY:

8 Q Mr. Brannon, let me go over some preliminary issues
9 with you.

10 How long have you been barred in the State of South
11 Carolina?

12 A Sixteen years.

13 Q And what areas of law do you practice?

14 A Family Court and criminal defense.

15 Q And what would you say your percentage of criminal
16 defense is?

17 A Sixty/forty Family Court.

18 Q Okay. But you're still very experienced in Criminal
19 Court?

20 A I try a lot of criminal cases, yes.

21 Q Okay. And do you recall being retained by
22 Mr. Phipps---

23 A I do.

24 Q ---in this case?

25 A I recall being retained on behalf of Mr. Phipps by his

Douglas Brannon - Direct examination
by Mr. Neely

1 sister.

2 Q Okay. Do you recall how times you met with him?

3 A I didn't until just shortly go over -- review my notes.

4 We had six meetings including the night before the trial
5 started.

6 Q Okay. Do you recall about how long those were?

7 A Not specifically. My notes don't indicate, but I can
8 tell you that, at the first four meetings, I took four and a
9 half pages -- four to five pages of notes in each meeting.

10 Q And do you recall, at any of those meetings, Mr. Phipps
11 asking for a plea deal?

12 A No, it -- we need to be very clear. I was retained
13 four weeks before this trial. He had been represented by
14 Mr. McPherson leading up to the trial. It was made very
15 clear to me that I was being retained to try this case.

16 Q And, obviously, you did, in fact, try this case?

17 A Correct.

18 Q At trial and before trial, did you have any concerns
19 that would align, align Mr. Phipps concerns about Brady
20 violations?

21 A No.

22 Q Did you make a Brady motion in this case?

23 A I did. I did.

24 Q And did you proffer testimony about a, a 9-1-1 call
25 about a potential alibi, or not alibi witness, but a

Douglas Brannon - Direct examination
by Mr. Neely

1 potential third party defense?

2 A Third party guilt, yes. Yeah.

3 Q And did you also go through a Jackson v. Denno --

4 A we did.

5 Q -- in this case?

6 What was your trial strategy for obtaining a not guilty
7 verdict in this case?

8 A The trial strategy was he didn't do it, that -- I mean
9 his story, and I -- to his credit, sir, his story has not
10 changed from the first time I met him until he testified
11 here today. That he was in the house, but that he did not
12 cause the man's death.

13 Q And that is the theory you went forward with?

14 A Absolutely.

15 Q And that's the theory you pursued your, your basic
16 trial strategy around?

17 A I -- it was, it was in my opening statement, and my
18 closing statement.

19 Q And, in your closing argument, I believe you even
20 mentioned the fact -- mentioned your client's record --

21 A Correct.

22 Q -- as to bolster his testimony?

23 A Well, I -- the way I described it to my client is that
24 I told him I was gonna put bullet holes in front. I was
25 gonna tell the jury that yes, he's got a significant

Douglas Brannon - Direct examination
by Mr. Neely

1 criminal record, but, as he said, none of them were
2 physically violent crimes. They met the statutory
3 definition of violent, but he never -- he had never hurt
4 anybody. He'd never used a weapon in any of his, his
5 previous crimes. That was the point I was trying to make.

6 Q At any point in your discussions, either before trial
7 or during the trial, did you become concerned about
8 Mr. Phipps competency?

9 A No, I knew that Mr. Phipps had had a significant and
10 lengthy drug history, but his competence was not -- he never
11 raised that issue, and I never -- he always appeared to
12 understand my questions. He was able to assist me in
13 answering the questions that I asked him. So, no, I did not
14 question his competence.

15 Q And when you came to represent Mr. Phipps, he had been
16 in jail for sometime?

17 A Correct.

18 Q So, drugs would no longer of had an effect on him?

19 A That's correct.

20 Q During the trial, was there any opportunity for you to
21 pursue a lesser included offense?

22 A Well, we, we talked about that, but there was no way
23 for me to pursue the defense that it was not him, and get in
24 the required testimony to, to get a lesser included offense.
25 I mean I couldn't go from he didn't do it, but say well, if

Douglas Brannon - Direct examination
by Mr. Neely

1 you did, did you intend to do it. I mean the trial strategy
2 was it was not me, and we got the charge on mere presence.
3 So, I -- that, that was where we had to go.

4 Q There's been a lot of testimony from Mr. Phipps in this
5 case about the DNA results that were obtained two days prior
6 to trial.

7 Do you -- is that, is that a correct timeline?

8 A I know that it came in after I was retained. It came
9 in -- and it, and it was DNA -- they found one spot of
10 blood, I believe, on the victim's left pant leg that they
11 matched to my client. I will tell you that he and I --
12 certainly not saying that he's incorrect, but I have no
13 recollection of talking about a DNA expert at all.

14 But the reason I don't believe we had that conversation
15 is we weren't trying to say he wasn't in the house. I mean
16 he, he dialed 9-1-1. He told them he was there. So, the
17 fact that a spot of his blood was found in the house was
18 not, in my opinion, proof of anything other than what he had
19 already admitted to. He told law enforcement or he told the
20 9-1-1 operator that he had broken up the fight. So, my
21 position was that that DNA evidence really didn't hurt us.

22 Okay?

23 Q So, it was consistent with his story---

24 A Correct.

25 Q ---the whole time?

Douglas Brannon - Direct examination
by Mr. Neely

1 A Correct.

2 Q And then you received the full discovery file from the
3 public defender, Mr. McPherson?

4 A I don't know how I got it, but I can tell you that I
5 got everything. I, I reviewed the file and I, I served a
6 Brady and discovery request on the Solicitor's Office. And
7 I wrote a letter to Mr. McPherson. So, I may of gotten it
8 through both sources, and I, I deal pretty well with Derrick
9 Bulsa. So, I know that I got stuff from Derrick.

10 Q But you were satisfied with the State's discovery
11 response?

12 A Yes. Yes.

13 Q And you had time, once receiving all the discovery, to
14 prepare a proper defense for trial?

15 A I certainly believed I did, yes.

16 Q And that, that belief hasn't changed today?

17 A No.

18 MR. NEELY: That's all the questions I have, Your
19 Honor.

20 MR. RUCKER: May it please the Court?

21 THE COURT: Yes, sir.

22 CROSS-EXAMINATION

23 BY MR. RUCKER:

24 Q Mr. Brannon, you had this case for four weeks.

25 Is that right?

Douglas Brannon - Cross-examination
by Mr. Rucker

1 A Yes.

2 Q You think that's enough time to try a murder case?

3 A I thought so, yes.

4 Q All right. Did you get the discovery the date -- the
5 first day that you were hired?

6 A I had, I had it within a few days, and, keep in mind,
7 the day that his sister hired me, I went and saw him and he
8 had the discovery already in his possession.

9 Q All right.

10 A So, we went over that that he had at the detention
11 center.

12 Q Was the DNA evidence in that---

13 A I---

14 Q ---discovery material?

15 A Sir, I don't, I don't recall.

16 Q You do believe that it came late?

17 A I, I -- with -- let me rephrase. Let me retract my
18 last answer. I know that I got that DNA evidence after
19 first meeting with my client.

20 Q Okay. So, within three or four weeks of trial?

21 A Correct.

22 Q Okay. It was already on the trial docket?

23 A Correct.

24 Q No plea offer was made?

25 A Well, I think there was a plea offer made, but it had

Douglas Brannon - Cross-examination
by Mr. Rucker

1 been relayed through Mr. McPherson. And, and no, it -- no
2 change in plea offer had -- was ever offered to me or
3 presented to me.

4 Q You did not try to work on the solicitor's office
5 trying to get a better plea deal---

6 A I---

7 Q ---I assume?

8 A I guess the answer to that question is no.

9 Q Because you were hired for trial, that didn't make you
10 not try to find a plea?

11 A No.

12 Q A way to get out of the---

13 A And I will tell you that the morning that -- before we
14 picked a jury, I asked Mr. Phipps, I said you understand
15 they're, they're -- that offer may still be on the table.
16 Are you sure you don't want to take it.

17 Q Okay.

18 A He said no.

19 Q All right. The DNA evidence, you're saying it was one
20 spot of blood on my client's pants or on the victim's pants?

21 A On the victim's pants. On Sam's pants.

22 Q Was there any other DNA evidence linking my client,
23 your former client, to the crime?

24 A Not that I'm aware of.

25 Q All right. What actually -- before the DNA evidence,

Douglas Brannon - Cross-examination
by Mr. Rucker

1 what evidence did they have against him that was enough to
2 get to the jury and show beyond a reasonable doubt he did
3 this?

4 A I, I don't know that there was any, and I, I mean the
5 evidence that they had was the 9-1-1 tape that put him in,
6 in the house.

7 Q Okay. Was the 9-1-1 tape played at trial?

8 A Yes.

9 Q All right. Did you object to it being played at trial?

10 A I'm -- I don't think I did because I thought it handed
11 it -- I thought it was his defense. Let me, let me retract.
12 Let me rephrase that. I thought it, it bolstered his
13 defense.

14 Q Were there eye witnesses in the crack house that said
15 my client did it?

16 A Well, no, because there were three people in the house
17 initially. I, I mean I don't know who New York is, but it
18 was New York, it was Mr. Phipps, and Sam. Another woman
19 came into the house, but she came into the house after the,
20 after the fight. That's my recollection.

21 Q I'm just making it -- I'm asking you if there's any
22 other evidence, any eye witness testimony or anything but
23 this tape without -- we don't know who called it in?

24 A Correct.

25 Q And the DNA evidence?

Douglas Brannon - Cross-examination
by Mr. Rucker

1 A Correct.

2 Q That's it?

3 A That's it.

4 Q Do you think this tape -- this case came down to
5 credibility of my client?

6 A I think it could have.

7 Q well, if it's not that, what did it come down to in
8 your view?

9 A Sir, you're asking me to, to guess at what the jury
10 hung their hat on, and I can't do that. I -- kind of change
11 gears here. The only thing that I don't absolutely agree
12 with Mr. Phipps testimony on here today, as he told this
13 Court, he wanted to testify.

14 Q Right.

15 A He wanted to testify. I did not encourage him to
16 testify. I will tell you that I discouraged him, but I mean
17 he made it clear, from the minute I met him, that he wanted
18 to testify. And, and, and then please understand that once,
19 once he testified, once he got on the witness stand, he kind
20 of went off the track, and started testifying about smoking
21 crack out of a beer can that had been crushed, and a hole
22 poked in the top of it. I mean he, he went off the tracks.

23 Q He didn't confess or admit to this crime?

24 A No, he did not. He did not.

25 Q All right. Did you challenge the convictions that were

Douglas Brannon - Cross-examination
by Mr. Rucker

1 used against him to attack his credibility?

2 A I, I did, and, and I don't believe they used anything
3 that was more than ten years old.

4 Q Well, do you recall, based on your review of the file,
5 what convictions they actually did use?

6 A I'm sorry. I don't remember that.

7 Q All right. Do you recall them using a bank robbery?

8 A Again, I, I don't recall specifically.

9 Q All right. The Judge will obviously have the
10 transcript.

11 A Correct.

12 Q Do you -- if one -- did you open the door to any of
13 the -- did you mention the convictions when he first
14 testified?

15 A I, I -- now that you mentioned that, I did -- again, I
16 was trying to put my bullet holes in front, and so I did,
17 yes.

18 Q Would you agree that if any of those convictions could
19 not of been used based on a 403 balancing test that that
20 could prejudice the jury against my client?

21 A It could have.

22 Q And that could of---

23 A It could have.

24 Q ---affected his credibility?

25 A It could have.

Douglas Brannon - Cross-examination
by Mr. Rucker

1 Q So, it's like -- as likely they convicted him on
2 that -- on the prior convictions as it is any of the other
3 evidence?

4 MR. NEELY: Your Honor, I'm gonna object right there.
5 It's, again, calling for him to look in the jury's mind on
6 what the jury was---

7 THE COURT: Speculation, yeah.

8 MR. RUCKER: All right. I'll, I'll, I'll rephrase.

9 Was it part of your strategy to open the door to
10 convictions that could not be used against my client in
11 front of that jury?

12 A It was not.

13 Q Okay. So---

14 A And -- but I would, I would, again, go into the --
15 even, even if I said, if I mentioned a crime that would not
16 have been admissible on the 403 balancing scale, nobody got
17 hurt, there were -- was no weapons used, and, and that was
18 the point that I was trying to make. While, while he had a
19 criminal history, it was not a physically violent criminal
20 history.

21 Q But, by definition, under the law, those crimes are
22 limited in their -- in front of the jury because it can
23 prejudice the jury?

24 A I agree with that statement.

25 Q And you have no reason to believe that it, in this

Douglas Brannon - Cross-examination
by Mr. Rucker

1 case, if some of them were admitted that shouldn't of been
2 admitted, that it would of -- it could of prejudiced the
3 jury?

4 A It could have.

5 Q It could of called the trial into question of whether
6 the actual facts of the case were being tried or the
7 reputation of my character -- of my client's character was
8 being tried?

9 A It could have.

10 Q All right. So, we're down to his credibility, a drop
11 of blood, and a 9-1-1 uncorroborated statement or tipster
12 uncorroborated statement?

13 A I think so, yes.

14 Q All right. You couldn't get them to come down off a
15 life without parole murder based on those simple -- I mean
16 that's all they had.

17 A well, they didn't. I mean your question was I couldn't
18 get them, and the answer is they didn't.

19 Q I'm just making -- did you, in fact, work on them to
20 get that plea deal?

21 A I will tell you that, that I spoke to---

22 Q To get a reasonable plea?

23 A ---Derrick Bulsa about a plea earlier -- early the
24 morning that we picked the jury. My client indicated he was
25 not interested in a plea. He wanted to go to trial.

Douglas Brannon - Cross-examination
by Mr. Rucker

1 Q Okay. Did you explain to my client that voluntarily
2 intoxication is not a defense?

3 A I---

4 Q ---in South Carolina?

5 A I think what I said -- he, he told me that there was
6 some point in the, in the date of the incident that he
7 doesn't remember something. He doesn't remember everything
8 that happened that day. I asked him why he didn't remember,
9 and he said because he'd been smoking crack all day long. I
10 did and would have said to him the fact that you were drunk
11 or stoned doesn't give you a legal defense.

12 Q Okay. What -- but -- I'm gonna -- before I move on,
13 let's talk about that DNA evidence. I meant to get into
14 this more.

15 What's the -- why would it come in so late?

16 Did they explain that?

17 A I, I -- no, they didn't explain that, but Mr. Bulsa was
18 very convincing in front of Judge Couch. At some point,
19 he -- I just got it and I produced it as quickly as I got
20 it. I mean Mr. Bulsa said to me, I didn't, I didn't sit on
21 this. You got it the minute I got it.

22 Q All right. Did you -- did they include a chain of
23 custody or anything like that showing they got it when they
24 said they got it?

25 A They did.

Douglas Brannon - Cross-examination
by Mr. Rucker

1 Q Okay. Did you call and talk to the people who were in
2 that chain of custody?

3 A I, I -- no, I didn't because, again, that DNA evidence
4 didn't, in my opinion, didn't negatively impact my case.

5 Q How, how long after my client was arrested did they do
6 the cheek cell swab?

7 A I wasn't his attorney at that point. I don't, I don't
8 know the answer to that question.

9 Q Did you look in the file to see?

10 A I'm sure that I did, but I don't have that information
11 here today.

12 Q Okay. But you checked up to see if they did that, that
13 procedure---

14 A I did.

15 Q ---properly?

16 A Yes.

17 Q Was that under Court order or not?

18 A I believe it was.

19 Q Did -- had he asked for an attorney before that?

20 A I can't -- I don't know the answer to that question.

21 Q Did they have an actual hearing to determine that?

22 A Don't know the answer to that question.

23 Q Was that in the discovery either or too?

24 A I didn't look at that. I don't know.

25 Q When you reviewed your case file, did you see it in

Douglas Brannon - Cross-examination
by Mr. Rucker

1 preparation for today?

2 A I did not. I did not see it.

3 Q All right.

4 A I, I -- well, let me rephrase that. It's not that I
5 didn't see it, I didn't look for it. I read the transcript.

6 Q Okay.

7 A Okay.

8 Q All right. So, for two years -- how, how long was this
9 outstanding -- this case outstanding between arrest and
10 trial?

11 A Oh. well, I mean the incident occurred in 2004. It
12 came to trial in 2007, seven. 2000---

13 Q Okay. But at least two years before---

14 A No, 2009 was when it came to trial.

15 Q They did the cheek cell swab with him years before they
16 actually went to trial?

17 A I believe that is correct, yes.

18 Q What was the explanation at the lab or wherever of why
19 it took so long to get the sample back?

20 A I don't know the answer to that question.

21 Q And it just happened to come two days before the trial
22 was gonna be called?

23 A Yes.

24 Q And the Judge may not be familiar with the system up
25 here, but does the solicitor call the cases or is it on a

Douglas Brannon - Cross-examination
by Mr. Rucker

1 docketing system through the judge -- through a Circuit
2 Judge?

3 A I believe, at that time, it was the solicitor calling
4 the cases.

5 Q Okay. Did you---

6 A We're now on a docketing system, but I believe, at that
7 point, it was the, the solicitor calling the cases.

8 Q Was that case called before they got that DNA -- was it
9 put on the trial docket before they got that DNA?

10 A I'm sure that it was.

11 Q Do you think they had enough without the DNA sample to
12 make the case without my -- our client testifying?

13 A I didn't think they had enough with it.

14 MR. RUCKER: All right. No further questions.

15 MR. NEELY: Brief redirect, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. NEELY:

18 Q Mr. Rucker went a little bit into the entirety of the
19 case, that evidence they had against Mr. Phipps.

20 Isn't it also true that they had a fingerprint from
21 Mr. Phipps on that crack can?

22 A On that crack can, yeah.

23 Q So, that linked him to the scene as well?

24 A Right, but we didn't deny he was there.

25 Q Right.

Douglas Brannon - Redirect examination
by Mr. Neely

1 But just -- in a matter of -- going with your theory,
2 the blood only put him in the house?

3 A Correct.

4 Q And the fingerprint would of also put him in the house?

5 A Well, I -- and he, he testified here that he was
6 smoking crack out of a can.

7 Q Right.

8 And that -- the police actually went and interviewed
9 him whenever he was being held in federal detention,
10 correct?

11 A In, in -- I think he was like in the State of Virginia
12 or something like that.

13 Q I think it's Virginia or Pennsylvania.

14 A Yeah.

15 Q Somewhere---

16 A Yeah.

17 Q ---up north in federal custody.

18 A Right.

19 Q And when they interviewed him, he denied knowing about
20 the incident, correct?

21 A I, I, I don't necessarily recall that.

22 Q Okay. But, but -- and do you recall him giving four
23 names to law enforcement?

24 A Yeah.

25 Q One of which was New York?

Douglas Brannon - Redirect examination
by Mr. Neely

1 A Yeah.

2 Q And these were all facts that the Solicitor's Office
3 used against you in trial?

4 A Correct.

5 Q And attacked Mr. Phipps credibility with?

6 A Correct.

7 Q And during Mr. Phipps testimony at trial that he wanted
8 to give, would you say the fact that he kept going over
9 crack use, and how, how to use crack, and the, the lifestyle
10 of the crack user also damaged his credibility to the jury?

11 A Like I said, he went off the tracks, yeah.

12 Q So, you would agree that that damaged his credibility?

13 A It probably did.

14 Q And did you go over with him the potential for him to
15 damage his own credibility?

16 A I, I -- not only did I go over that, I went over the
17 impact of those -- of that significant criminal record. I
18 mean I, I think it was nine pages long is what I told the
19 jury.

20 Q And you've been -- but you'd also used that as a sword
21 in your closing argument that he, he wouldn't have testified
22 knowing that's going to come in---

23 A Right.

24 Q ---unless he's telling the truth?

25 A Right.

Douglas Brannon - Redirect examination
by Mr. Neely

1 Q And you -- did you see the need to pursue other
2 defenses or speak deeply on other defenses including
3 voluntary intoxication, went over his defense that I
4 wasn't -- I didn't do it?

5 A I didn't do it, that was, that was the defense.

6 Q And so there was no need to pursue lesser included if
7 that was what you were trying to get?

8 A I may have been wrong, but I don't believe that I
9 could, I could convince 12 people that he didn't do it if I
10 also tried to get them to believe that he didn't mean to do
11 it.

12 Q And Mr. Rucker also went into the nine -- 9-1-1 tape.

13 A Uh-huh. (Affirmative).

14 Q It's my recollection that you actually brought the
15 9-1-1 tape in in the defense cause it couldn't be brought in
16 since it was hearsay?

17 A Right.

18 Q So, you brought it in to show your client called law
19 enforcement to tell them about the fight that had happened?

20 A Correct.

21 Q Because you believe it went with your client's
22 testimony and his version of events?

23 A Well, it, it -- I, I -- and I had this lengthy
24 conversation with the client that, if I got the 9-1-1 tape
25 in, he didn't really have to testify because that was that,

Douglas Brannon - Redirect examination
by Mr. Neely

1 was his story.

2 Q Right.

3 But that changed during trial?

4 A Yeah.

5 Q And so because of the Judge's ruling, you had to
6 change---

7 A Yeah.

8 Q ---your, your strategy?

9 A Yes, sir.

10 MR. NEELY: Thank you, Your Honor. That's all I have.

11 MR. RUCKER: No further questions, Your Honor.

12 THE COURT: You may step down.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: Anything further?

15 MR. NEELY: Nothing from the State, Your Honor.

16 MR. RUCKER: Nothing from us, Your Honor.

17 THE COURT: All right. I'm gonna put this one under
18 advisement. I want to go through this transcript.

19 THE WITNESS: May I be excused, Your Honor?

20 MR. RUCKER: No objection.

21 THE COURT: Yes, sir.

22 THE WITNESS: Thank you.

23 MR. RUCKER: Thank you, Your Honor.

24 MR. NEELY: Thank you, Your Honor.

25

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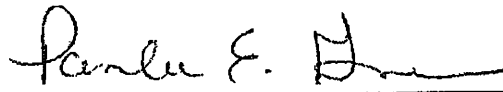
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I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 19th day of September, 2016.

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

September 26th, 2018



PAMELA E. GREEN, Court Reporter

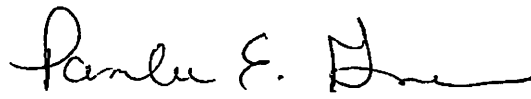
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I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 19th day of September, 2016.

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

September 26th, 2018



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Robert J. Phipps, #334249)

Case No. 2014-CP-42-2049

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

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This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 19, 2014, and amended application filed October 3, 2014. Respondent made a Return on October 27, 2014, and an amended return and motion for more definite statement on July 22, 2016. The Court convened an evidentiary hearing into the matter on September 19, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by J. Brandt Rucker, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, N. Douglas Brannon, Esquire ("Trial Counsel"), also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the pleadings in this matter, the record on appeal, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June

2007 term of the Spartanburg County Grand Jury for murder (2007-GS-42-2902). N. Douglas Brannon, Esquire, and Brac Turnipseed, Esquire,¹ represented Applicant. Applicant was tried before the Honorable Roger L. Couch and a jury April 13-16, 2009. On April 16, 2009, the jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to imprisonment for life.

A timely notice of appeal and brief was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Phipps, Op. No. 2012-UP-018 (S.C. Ct. App. filed January 25, 2012). A Petition for Writ of Certiorari was filed to the South Carolina Supreme Court, which was denied on August 8, 2013. The Remittitur was returned on August 12, 2013.

II. ALLEGATIONS

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

1. Ineffective assistance of trial counsel; specifically
 - a. Counsel presented a significant obstacle in preparing adequate defense.
 - b. Failure to afford the representation within the range of competence, demanded of attorneys in criminal cases.
 - c. If defense counsels are unprepared to try a case they are also inadequately prepared to advise their client to testify in a case that is calling for a substantial sentence.
 - d. Counsel did not articulate any strategy for not challenging the state on indictments that [were] over two years old.
 - e. Counsel failed to oppose the State's case throughout specific points in the trial and at the sentence proceeding.
 - f. Counsel failed to make a motion when the trial court failed to charge the jury on a lesser included offense.
 - g. Counsel failed to make the required contemporaneous objection, to the court, as to

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¹ Mr. Turnipseed is now deceased.

require the trial court to order for an competency evaluation, and criminal responsibility.

- h. "for my trial counsel's unprofessional errors, . . . the outcome of my trial would have been different. The cumulative effect of which I was deprived the level of legal assistance guaranteed by the Sixth Amendment to the United States Constitution"

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III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court reviewed the record in its entirety and heard the testimony and arguments presented at the evidentiary hearing. The Court further had the opportunity to observe each witness who testified at the hearing, and to closely appraise his individual credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

IV. SUMMARY OF TESTIMONY

Applicant testified the State offered him a plea deal of thirty years. Applicant stated Trial Counsel was hired a matter of months before trial and he met with counsel about three times. Applicant stated Trial Counsel discussed the discovery and evidence the State had provided. Applicant testified he wanted a trial eventually, but wanted a continuance because DNA evidence was given to Trial Counsel within a month before trial. Applicant stated he wanted a team of experts to review the DNA evidence and have further investigation done. Applicant stated Trial Counsel told him the DNA evidence couldn't be used against him. Applicant also testified Trial Counsel told him the strategy was to attack missing evidence, specifically a tape. Applicant stated he told Trial Counsel of potential third parties who admitted to the crime. Applicant admitted the potential suspects were never identified and he knew of their existence only from conversations with other inmates in the county jail. Applicant stated Trial Counsel

should have asked for a mental evaluation for Applicant because of his drug use. Applicant stated Trial Counsel encouraged him to testify.

Trial Counsel testified his trial strategy was based around the version of events that Applicant relayed to him during their meetings. Namely, there was a third unidentified party, who went by the alias "New York." New York got into a fight with the deceased, at which point Applicant left the scene. Trial Counsel testified that the fingerprint found at the scene of the crime was consistent with Applicant's story and testimony. Applicant admitted he was at the scene of the crime. Trial Counsel believed the forensic evidence reinforced the story Applicant presented and was not harmful to the defense strategy. Trial Counsel testified there was no discussion between himself and Applicant about a continuance in order to hire a team of DNA experts, nor did he believe such a team would have been helpful. Trial Counsel also credibly testified he never encouraged Applicant to testify. Applicant's position from the beginning of Trial Counsel's representation was always that Applicant wanted to tell his side of the story.

A. Ineffective Assistance of Trial Counsel

In a PCR action, Applicant bears the burden of proving the allegations in his 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, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386

S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to Challenge Indictments

Applicant alleges Trial Counsel was ineffective for failing to challenge his indictment because it was two years old. This Court finds Applicant has failed to prove either deficiency or prejudice with respect to this allegation.

An indictment is a "notice document." State v. Tumbleston, 376 S.C. 90, 95 S.E.2d 849, 852 (Ct. App. 2007) (citing S.C. Const. art. I, § 11; S.C. Code Ann. § 17-19-10 (2003)). An indictment is sufficient if "it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972) (citing State v. McIntire, 221 S.C. 504, 509, 71 S.E.2d 410, 412 (1952)) ("The general rule on this question is that the offense must be so described that the accused may know how to answer the charge, the court what judgment to

pronounce, and conviction or acquittal thereon may be pleaded in bar to any subsequent prosecution.”).

Applicant was indicted in June 2007 and tried less than two years later in April 2009 on a charge of murder. This Court finds Applicant has set forth no evidence to show that Trial Counsel was deficient for failing to challenge the indictment or that he had any basis for doing so.

Regardless, this Court finds Applicant has failed to show there is a reasonable probability that the challenge would have been successful. South Carolina courts have long held that there is no strict limit to the time by which indictments are brought. See State v. Wade, 306 S.C. 79, 85, 409 S.E.2d 780, 783 (1991) (noting “that [South Carolina] [is] not alone in approving of lengthy indictment periods when the circumstances of the case demand it.” (citing United States v. Roman, 728 F.2d 846 (7th Cir.1984) (eleven year and five month indictment period approved); People v. Patrick, 38 Ill.2d 255, 230 N.E.2d 843 (1967) (two years, twenty days approved); Waitt v. Commonwealth, 207 Va. 230, 148 S.E.2d 805 (1966) (sixteen months approved))).

Applicant has failed to carry his burden to prove Trial Counsel’s failure to challenge the indictment was deficient or that such deficiency prejudiced him. Accordingly, this allegation is denied and dismissed.

Failure to Prepare or Investigate

This Court finds Applicant made no showing that Trial Counsel’s preparation fell below an objective standard of reasonableness and has therefore failed to overcome the presumption that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See Strickland v. Washington, 466 U.S. 668, 690 (1984). Counsel had a duty to conduct an investigation that was reasonable under the circumstances.

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Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). In addition, failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

Here, Trial Counsel reviewed all discovery in Applicant's case and went over that discovery with Applicant. Trial Counsel testified that he was hired by Applicant's family to take Applicant's case to trial. Applicant testified that he met with Trial Counsel three or so times for over an hour and went over discovery and potential trial arguments and defenses. This Court finds Trial Counsel conducted a reasonable investigation under the circumstances, and Applicant has failed to satisfy his burden of proving any deficiency as to this allegation.

Furthermore, Applicant presented no evidence that he was prejudiced by the alleged failure to Counsel to prepare for trial. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 368 (1998) (holding PCR applicant was not entitled to relief where he failed to show how counsel's lack of preparation prejudiced him); See also Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (holding, where applicant alleged counsel was ineffective for failing to call certain witnesses, applicant's "mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Applicant has presented absolutely no evidence of what information Counsel failed to uncover or what defense was not pursued. Therefore, Applicant has failed to prove prejudice with respect to this allegation. Because Applicant has failed to demonstrate either deficiency or prejudice, this allegation is denied and dismissed.

Failure to Move for Continuance

Applicant has failed to show Counsel was deficient for failing to seek a continuance. Applicant has presented no evidence to show that Trial Counsel had any basis to move for a continuance. Trial Counsel had over a month to prepare and received discovery shortly after taking Applicant's case. Trial Counsel reviewed that discovery and discussed it with Applicant. He also discussed trial strategy and any available defenses and prepared Applicant for trial. Trial Counsel credibly testified he understood the short time frame to prepare for trial when he was retained to represent the Applicant and that he adequately prepared for trial during that time frame.

Applicant has made no showing that Trial Counsel's failure to request a continuance prejudiced him because he has failed to show there was a reasonable probability that a continuance would have been granted or changed the outcome of the trial. Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested, counsel pursue had counsel more fully prepared for the trial.").

Failure to Obtain DNA Expert

Applicant likewise failed to show either deficiency or prejudice with respect to this allegation. Trial Counsel testified he did not believe there was a need to hire a DNA expert to counter the State's expert witness. He testified the DNA evidence that the State presented did not contradict his strategy of presenting his client's story to the jury. Trial Counsel further testified he never told Applicant that DNA experts were not available due to lack of funding and never discussed opposing DNA expert witnesses with Applicant. Therefore, Applicant has failed to show that Trial Counsel was deficient for failing to present or obtain an expert. Likewise,

Applicant presented no expert or other evidence at the PCR hearing to demonstrate that he was prejudiced by Counsel's decision not to present or obtain an expert. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))).

Failure to Investigate Third Party Guilt

Applicant presented no evidence that Trial Counsel "failed to investigate possible third party guilt. To the contrary, Trial Counsel testified and the record reflects that the entire strategy or theory of the case was that someone other than Applicant was responsible for the murder. In fact, the alleged third party, New York, was a key part of the trial and closing argument by Trial Counsel. Therefore, Applicant has presented no evidence to show either deficiency or prejudice with respect to this allegation and it is therefore denied and dismissed.

Failure to Request a Jury Charge on a Lesser Included Offense

To mitigate a charge of murder to the offense of voluntary manslaughter, a defendant must show that the killing occurred "in sudden heat of passion upon sufficient legal provocation," Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000), which "must be such as would render the mind of an ordinary person incapable of cool reflection, and produce . . . 'an uncontrollable impulse to do violence.'" State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993). Applicant's testimony at trial, which mirrored his discussions with Trial Counsel, was his complete innocence and lack of involvement with the murder. Accordingly, Trial Counsel moved forward with the strategy to present Applicant's story as the truth. Based on this strategy, trial counsel presented no mitigating evidence. See Strickland v. Washington, 466 U.S. 668, 691, 104

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S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984) ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.").

At the evidentiary hearing, the only potential mitigation evidence offered by the Applicant was his intoxicated state at the alleged time of the incident. PCR counsel correctly mentioned that voluntary intoxication is not a defense in South Carolina. State v. Vaughn, 268 S.C. 119, 125, 232 S.E.2d 328, 330-31 (1977) ("We adopt the rule that voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime, regardless of whether the intent involved be general or specific. Reason requires that a man who voluntarily renders himself intoxicated be no less responsible for his acts while in such condition."). Therefore, no evidence was presented at trial to mitigate the charge from murder to voluntary or involuntary manslaughter. Furthermore, Trial Counsel testified there was no way to argue for a lesser included without weakening his argument for complete innocence. Applicant provided no valid explanation how any lesser included offense could have been charged. Accordingly, Applicant has failed to prove either deficiency or prejudice with respect to this allegation. Nor has Applicant shown there is a reasonable probability he would have been convicted of the lesser included offense had the charge been given. Therefore, this allegation is denied and dismissed.

Failure to Obtain Competency Evaluation

Applicant presented no evidence that he lacked competency at the time of trial. Applicant testified he had a serious drug addiction that affected his mental capacity. However, Trial Counsel testified Applicant had been in jail for a number of months, providing plenty of time for

Applicant to become sober. Trial Counsel likewise testified he was never concerned with Applicant's mental capacity. He felt Applicant understand his questions and participated in his own defense and preparation for trial and has therefore failed to demonstrate that his competency was in question. Applicant has therefore failed to overcome the presumption that "counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. 668, 690 (1984).

Applicant has also failed to present evidence that he was prejudiced by the alleged deficiency. Prior to Applicant's decision to testify, the trial judge reviewed Applicant's rights and potential dangers of testifying at trial with him and was satisfied with his responses. Applicant did not seek an evaluation as part of this action and has not presented any testimony to show that he lacked the ability to participate in his defense. Therefore, Applicant's mere speculation that he would have been found incompetent is insufficient to show prejudice. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (holding, applicant's "mere speculation what [a] witness['] testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

B. All Other Allegations

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

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.

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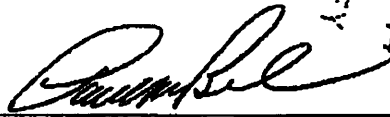
Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED THAT:

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

AND IT IS SO ORDERED this 24th day of May 2017.


 PAUL M. BURCH
 Presiding Judge
 Seventh Judicial Circuit

Dillon, South Carolina