

24372

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

DAVID DWIGHT SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000262

APPENDIX

LAURA R. BAER
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JORDAN COX
Assistant Attorney General
Rembert Dennis Building
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

ATTORNEYS FOR RESPONDENT

RECEIVED
OCT 15 2018
SC Court of Appeals

TABLE OF CONTENTS

INDEX	i
TRIAL TRANSCRIPT (Oct. 31, 2005).....	1
FINAL BRIEF OF APPELLANT	322
FINAL BRIEF OF RESPONDENT	337
S.C. COURT OF APPEALS OPINION, <u>State v. Smith</u> , OP. NO. 2008-UP-194 (S.C. Ct. App. filed Mar. 20, 2008)	352
STATE’S PETITION FOR REHEARING.....	356
ORDER DENYING REHEARING.....	366
ORDER DENYING REHEARING <i>EN BANC</i>	368
STATE’S PETITION FOR WRIT OF CERTIORARI	370
RETURN TO PETITION FOR WRIT OF CERTIORARI	391
ORDER GRANTING CERTIORARI	404
BRIEF OF PETITIONER	405
BRIEF OF RESPONDENT	427
S.C. SUPREME COURT OPINION, <u>State v. Smith</u> , 391 S.C. 408, 706 S.E.2d 12 (2011)	440
REMITTITUR	446
APPLICATION FOR POST-CONVICTION RELIEF	447
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	454
STATE’S RETURN.....	462
SUPERSEDING AMENDED POST-CONVICTION RELIEF APPLICATION.....	471
TRANSCRIPT OF POST-CONVICTION RELIEF HEARING (June 11, 2015)	480

POST-CONVICTION RELIEF HEARING EXHIBITS

APPLICANT'S EXHIBIT 1 (Affidavit of discovery).....	596
APPLICANT'S EXHIBIT 2 (Statement of Angie Smith).....	597
APPLICANT'S EXHIBIT 3 (Handwritten note)	605
APPLICANT'S EXHIBIT 4 (Statement of Otis Hyder)	606
APPLICANT'S EXHIBIT 5 (Autopsy report)	609
APPLICANT'S EXHIBIT 6 (Statement of Terry Bradley)	614
APPLICANT'S EXHIBIT 7 (Investigation report - Kitts).....	617
APPLICANT'S EXHIBIT 8 (Crime scene log)	625
APPLICANT'S EXHIBIT 9 (Statement of Morgan Simmons)	629
APPLICANT'S EXHIBIT 10 (Toxicology report)	634
APPLICANT'S EXHIBIT 11 (Investigation report - Gregory)	635
APPLICANT'S EXHIBIT 12 (Arrest warrant)	639
APPLICANT'S EXHIBIT 13 (Transcript excerpt)	640
MEMORANDUM IN SUPPORT OF POST-CONVICTION RELIEF	660
ORDER OF DISMISSAL.....	697
RULE 59(e) MOTION TO ALTER OR AMEND	714
ORDER DENYING MOTION TO ALTER OR AMEND	724
INDICTMENT.....	725

**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
PCR HEARING EXHIBITS - APPLICANT'S EXHIBITS NOS. 2, 9, and 11¹**

¹ Pursuant to Rule 210(f), SCACR, transportation is being requested for designated exhibits nos. 2, 9, and 11 because they could not be accurately reproduced by copying into the Appendix.

1 involved in this. It has not been so long for me.

2 In the first PCR hearing, you were able to
3 demonstrate that there were notes in the solicitor's
4 file that someone, a prosecutor from the solicitor's
5 office, acknowledged in the PCR hearing came right out
6 of his file?

7 A Uh-huh. He had to.

8 Q Well, he had to. But he did. I mean, he admitted
9 it on the record, right?

10 A Yep. That would be Tommy Wall.

11 In fact, that was one page handwritten unsigned,
12 if I remember correctly.

13 MS. SHURLING: Your Honor, I'm going to be going
14 back and forth so often, with the Court's indulgence,
15 I'm not going to ask for leave to approach every single
16 time.

17 THE COURT: That's fine.

18 MS. SHURLING: I'm not forgetting my courtroom
19 etiquette, but we would use a lot of wasted time doing
20 that, there's going to be so much I need to hand him.

21 Q Is that it?

22 A That's it. Lovely piece of paper.

23 Q Lovely piece of paper. And in that piece of
24 paper, the person that your solicitor witness testified
25 to was an investigator he believed for the solicitor's

1 office, but he wasn't even real sure which
2 investigator, correct?

3 A That's true. I personally think it was Charlie
4 Hunter, but I think he sort of ended up in prison for
5 drugs himself.

6 Q Well, did you ever interview Mr. Hunter?

7 A No, because he was gone at that point in time, if
8 I remember correctly. Tommy Wall could not tell me who
9 made those notes. And, basically, the only way that I
10 ended up with them, when I went to pick up the file
11 after I had subpoenaed the information from the
12 solicitor's office, they didn't have it ready. And I
13 went back and the file was in a jumble, in an expando
14 folder, and she wasn't able to feed the copier. She
15 had to actually put some on page at a time. And for
16 whatever reason she allowed me back there when they
17 were -- when she was doing that. And I found that
18 piece of paper, and I said, "I want a copy of this."

19 Q And the operative portion of this is where this
20 investigator in his interview notes says, "That's when
21 Finley reached for Smith. He intended to take drugs
22 from him"?

23 A Uh-huh. And I misspoke. It's not Charlie Hunter.
24 It's Charlie Henderson.

25 Q Thank you.

1 MS. SHURLING: Your Honor, this was previously
2 marked Applicant's 2 at the last PCR hearing. I think
3 at this point it would be Applicant's 3 in today's
4 proceeding. Is that right? I'm on 3, aren't I? I
5 think I'm on 3.

6 MS. WHITE: Actually, just have -- yeah. Yeah.
7 Yeah.

8 THE COURT: Be admitted without objection.
9 (WHEREUPON, Applicant's Exhibit Number 3
10 was marked for identification.)
11 (WHEREUPON, Applicant's Exhibit Number 3 was
12 admitted into evidence.)

13 BY MS. SHURLING:

14 Q Okay. Now, did you also have in the discovery
15 copies of Mr. Hyder's statement to law enforcement?

16 A You know, since my file was destroyed, I don't
17 know. But if you're telling me that you have it in
18 your discovery, I am sure that I had it in mine.

19 Q Thank you.

20 In his statement to law enforcement on page one,
21 Otis Hyder or Pops is referring to Angie Smith as this
22 "black woman." "A colored woman," excuse me, is what
23 he called her. And then "this woman" in another place,
24 correct?

25 A On the page that you showed me?

1 Q I'm sorry. On page one of one on Otis Hyder's
2 written statement to law enforcement given on
3 January 12th --

4 A Yes, you are correct.

5 Q Okay. And in this statement and in his trial
6 testimony in 1997, he indicated that he didn't know
7 that woman, right?

8 A If you're saying that's in the transcript, I
9 agree.

10 Q Okay. And had you noticed in Angie Smith's
11 statement to law enforcement that she was referring to
12 him by the affectionate nickname Pops, would you have
13 questioned him harder concerning whether or not he, in
14 fact, actually knew Angie Smith?

15 A Yes.

16 Q And do you acknowledge now that that's an
17 opportunity for impeachment that you didn't have
18 because he didn't --

19 A It is.

20 Q -- appear as a witness at the 2005 trial but Angie
21 Smith did?

22 A Right.

23 Q Okay. I don't want to lose track. Did we mark
24 Hyder's --

25 MS. WHITE: No, you haven't put that in yet.

1 MS. SHURLING: Let me get a copy of Hyder's.
2 There it is. Okay.

3 (WHEREUPON, Applicant's Exhibit Number 4
4 was marked for identification.)

5 MS. SHURLING: Your Honor, I have -- this will be
6 Applicant's 4. Where I have extras, your Honor, I will
7 pass them up.

8 THE COURT: Thank you.

9 This will be Number 4 without objection?

10 MS. WHITE: Yes, your Honor.

11 (WHEREUPON, Applicant's Exhibit Number 4 was
12 admitted into evidence.)

13 BY MS. SHURLING:

14 Q When you were trying the case in 2005, the State
15 made it known ahead of time that they weren't going to
16 be able to produce or weren't planning on producing
17 Otis Hyder, Sr., as a witness at the 2005 trial,
18 correct?

19 A That is correct.

20 Q And you initially strenuously objected to him
21 being introduced as an unavailable witness?

22 A I did. I wanted to try to -- yeah.

23 Q And then at some point you suddenly withdrew your
24 objection under 804(a)(4) and let it in?

25 A Uh-huh.

1 Q Let in his testimony from the 1997 trial. Why did
2 you do that?

3 A Well, they told me that he was dead. I had a
4 private investigator that had worked with me on the PCR
5 and also on this case. His name was Ed McCall. Ed
6 told me that the guy was dead. So that's basically
7 where I was with it.

8 Q Okay. At some point Judge Early said that he was
9 going to have to have a tad bit more than y'all just
10 thinking the man -- the solicitor just thinking the man
11 was dead, didn't he?

12 A Yep.

13 Q And gave them, I believe it was overnight or over
14 lunch -- I think it was overnight -- to determine
15 whether or not Thomas Hyder, Sr., could, in fact, be
16 located, correct?

17 A Yes.

18 Q And not unlike David Harwell once said, "Rumors of
19 my death have been greatly exaggerated," rumors of
20 Thomas Hyder, Sr.'s, death had been greatly
21 exaggerated, had they not?

22 A That's true. Ed was wrong.

23 Q And at that point the solicitor's office brought
24 into the courtroom Otis Hyder, Jr., and basically
25 informed Judge Early that Otis Hyder was old and feeble

1 and just not able to come, right?

2 A Yes. Among other things, yes.

3 Q Okay. And is there any particular reason why you
4 did not object to the judge allowing them to produce
5 the testimony from the trial in 1997 on that scant
6 record?

7 A I just did not object.

8 Q Okay. The son wasn't even put under oath, was he?

9 A I don't remember, honestly.

10 Q Okay. And there were no medical records, no
11 letters from doctors, no anything to establish what the
12 gentleman's physical condition was and why he would not
13 be capable of coming to court and testifying; is that
14 correct?

15 A That's correct.

16 Q And you initially -- again, you initially objected
17 to them being allowed to use the testimony from 1997,
18 but then suddenly you just withdrew the objection and
19 my question was: Why? Why did you just withdraw your
20 objection?

21 A I don't remember.

22 Q Do you remember your previous conversations with
23 me about this subject?

24 A No. I know I talked with you on the phone several
25 months ago.

1 Q Do you recall being under the impression that Otis
2 Hyder would verify that there had been a struggle
3 between the victim and the defendant before the shot
4 was fired, you needed him for that?

5 A I said that to you in a telephone call?

6 Q I'm asking you if you recall that conversation,
7 yes, sir.

8 A I do not recall the conversation, but I'm
9 certainly not going to dispute you if you say that I
10 said that.

11 Q Yes, sir. Do you recall the testimony that Otis
12 Hyder had given in '97? You had a transcript of it,
13 I'm sure, right?

14 A Right.

15 Q And do you recall that in that transcript Otis
16 Hyder had, in fact, vehemently denied having ever told
17 law enforcement that they scuffled?

18 A I don't -- I really don't remember.

19 Q In Otis Hyder's testimony at the 1997 trial, he
20 also identified himself as being legally blind and
21 unable to see, correct?

22 A That's correct.

23 Q Did you ever consider objecting to the
24 introduction of his prior sworn testimony on the ground
25 that you, you know, certainly were not his --

1 Mr. Smith's lawyer at the first trial, but that you had
2 not had the opportunity to impeach him concerning,
3 among other things, the fact that he was legally blind
4 and by his own admission couldn't see anything but
5 shapes, I believe is what he said?

6 A That's correct. I did not do that.

7 Q There was also testimony during the PCR and in the
8 ultimate ruling of the Court in the PCR that there were
9 photographs which you introduced copies of in the PCR
10 that illustrated that there was part of a doorjamb that
11 had been broken off, and there were a couple shattered
12 pieces of it in the doorway. Do you recall that?

13 A Yes.

14 Q And the 1997 testimony -- and, again, I recognize
15 that was Tom Cox, not you -- but in 1997 when Mr. Hyder
16 testified, Tom Cox did not cross-examine Mr. Hyder's
17 assertion that there had not been a scuffle preceding
18 the shooting based on the crime scene photos that
19 showed part of the doorjamb had been broken off and the
20 shattered pieces were right there, right?

21 A If that's in the transcript, I agree with you. I
22 don't have any personal knowledge of that now.

23 Q And would that not have also been an additional
24 basis for --

25 A Sure.

1 Q -- objecting to that testimony coming in?

2 A Yes.

3 Q Okay. It's also true, is it not, that Otis Hyder,
4 Sr., was not questioned about what knowledge, if any,
5 he had concerning the portion of drugs the applicant
6 testified that he had left at the scene on the night of
7 this incident?

8 A If you're telling me that's in the transcript, I
9 agree with you.

10 Q Okay. And is that something else that you would
11 have wanted, if Otis Hyder had been alive and present,
12 you would have wanted to question him about?

13 A Could have, yes.

14 Q How about Terry Bradley that was asleep on the
15 sofa supposedly when all that happened? What did you
16 do to investigate Mr. Bradley?

17 A Other than the discovery, I had Ed McCall doing
18 his thing. I learned nothing, basically, from Ed
19 McCall, and I was left with the discovery. And,
20 frankly, I don't remember much else about Mr. -- every
21 crime has somebody asleep on a sofa, don't they, but I
22 don't remember much else about that fella.

23 Q Okay. The transcript will reflect that Angie
24 Smith testified that they were going there because the
25 victim wanted a 50. Do you recall that?

1 **A** I don't, but if it's in the transcript, it's
2 there.

3 **Q** Okay. And she also recalled watching or testified
4 to watching Mr. Smith, Mr. David Smith, count out five
5 rocks to take inside, correct?

6 **A** If it's in the transcript, it's there.

7 **Q** Okay. And, of course, your client's testimony,
8 eventual testimony, was that when they wouldn't do
9 business with Angie, he went in and had laid down the
10 five rocks on a table, and his testimony indicates that
11 he thought they were out to get the rest of what he had
12 on him?

13 **A** Right.

14 **Q** Okay. So his testimony asserted that it was a
15 setup, that they were looking to rob him, correct?

16 **A** Yes.

17 **Q** Well, would you disagree with me that the
18 testimony from the 1997 proceeding does not question
19 Mr. Otis Hyder, Sr., about his possible involvement in
20 the plan to rob Mr. Smith?

21 **A** If that's what the transcript says, I agree with
22 you.

23 **Q** And given the fact that his claim was that the
24 victim had come over to his home at 2:00 or 3:00 in the
25 morning just to use the telephone, and the fact that in

1 his own statement he alluded to the fact that that's
2 when I think he was going to take the drugs, remember
3 that? Didn't you, in fact, have a basis for
4 questioning whether he was not a party to a plan to rob
5 Mr. Smith?

6 A I could have.

7 Q And should you not have raised an objection to the
8 testimony of Otis Hyder, Sr., from '97, 1997 trial,
9 coming in in 2005 on the ground -- again you weren't
10 trial attorney in '97, but the lawyer who was had not
11 cross-examined Otis Hyder, Sr., concerning his
12 potential exposure as a principal to a plot to rob
13 David Smith?

14 A That's true.

15 Q And that he hadn't been charged with anything,
16 right?

17 A That's correct.

18 Q Okay. Now, Mr. Hyder testified in '97 that this
19 Terry Bradley guy was asleep on the sofa when Angie and
20 subsequently David Smith arrived, right?

21 A Yes.

22 Q And he indicated that that guy didn't wake up --

23 A Yes.

24 Q -- until shots were fired?

25 Mr. Godfrey, you appear to be getting extremely

1 uncomfortable. Will you please let us know when you're
2 at a point where you feel like you need a short break?

3 A I don't really need a break as much as I need to
4 stand up and stretch out my legs because right now the
5 muscles are seizing up. If I stand up, once I get over
6 the shakes, I can go.

7 THE COURT: Let's take about five minutes.

8 MS. SHURLING: Thank you, your Honor.

9 THE COURT: Let's take about a five-minute break.

10 (WHEREUPON, a recess was taken from
11 11:30 a.m. to 11:35 a.m.)

12 MS. SHURLING: Your Honor, given how much my
13 client needs to look at paperwork and pass me notes,
14 could I ask that at least one hand be uncuffed?

15 THE COURT: I think we'll leave him just like he
16 is.

17 MS. SHURLING: I understand, your Honor. I had to
18 ask.

19 THE COURT: We're now ready to resume.

20 BY MS. SHURLING:

21 Q Ready, Mr. Godfrey?

22 A Ready.

23 Q Thank you.

24 Who was the lead prosecutor in this case? Was it
25 Robert Coler or Sarah?

1 A It was Bob Coler.

2 Q And would you agree with me that Bob Coler had a
3 tendency to be a little heavy-handed with leading
4 during his examination of the State's witness?

5 A He led everybody.

6 Q Pardon?

7 A He led everyone.

8 Q Okay. And at various points did he lead until he
9 eventually got an answer that was inconsistent with the
10 witness' original response?

11 A If he did, I'm not aware of it. I know that was
12 part of your allegations. I had the other transcript
13 with me, but as you know, during a trial, it's hard to
14 listen and read and keep up when they start changing
15 where the questions are. I learned or memorized as
16 much of that transcript as I could, and, you know, if I
17 missed something, I just plain missed it. Okay?

18 Q I understand. And I, by the way, am referring to
19 the 2005 transcript, the one where you were counsel.

20 If we can go back for just a minute to Angie
21 Smith's statement that we've already introduced. In
22 her statement, which I believe I gave you a copy of,
23 Bill, didn't I?

24 A Yes, you did.

25 MS. SHURLING: A moment's indulgence, your Honor.

1 I have got to find the right spot.

2 Q On page five of seven, near the top of her
3 handwritten statement, Ms. Smith describes, "The next
4 thing I know, Robert and David were falling out the
5 door. I saw David coming out first. I heard a pop."
6 See that?

7 A That's five of seven of the handwritten?

8 Q Yes, sir.

9 A Yes.

10 Q And if you go to page four of the typed one, "The
11 next thing I knew, Robert and David were falling out
12 the door. I saw David coming out first. I heard a
13 pop." And the next thing she says, "I saw Robert lying
14 on the steps." Do you see that?

15 A I'm sure it's here -- yes. I've got it right now.

16 Q And during her trial testimony, do you recall that
17 initially that's how she testified, that she saw them
18 scuffling, tussling, whatever you want to call it, and
19 then heard the pop?

20 A Right.

21 Q But after extensive leading by the prosecution, he
22 eventually got her to say she heard the pop and then
23 saw them falling to the ground, didn't he?

24 A If that's in the transcript, it's there.

25 Q And if, in fact, the solicitor was able to lead

1 this witness along to the point where he got her to do
2 a 360 on that point, is there any reason why you didn't
3 object to that leading?

4 A No.

5 Q And is there any reason why you would not have
6 cross-examined her more directly on the fact that her
7 statement to law enforcement, made more contemporaneous
8 with the incident, clearly indicated that the tussle or
9 the commotion -- I believe they called it scuffle --
10 preceded hearing the shot?

11 A They were scuffling as the shot went off, so based
12 on the evidence that I saw.

13 Q Okay.

14 A And also based on what Don Girndt had to say.

15 Q Well, and based on the State's evidence and the
16 testimony of your witness, what you were saying was
17 that they began to scuffle, and in the process of the
18 scuffle, a shot went off, correct?

19 A Correct.

20 Q And her statement to law enforcement and her
21 initial testimony in the courtroom was consistent with
22 that to the extent that she was indicating that she saw
23 some kind of physical commotion between the two of them
24 before she heard the shot?

25 A Right.

1 Q I'm not saying that the scuffle or whatever was
2 completely over, but her statement and her testimony
3 tended to indicate that it -- it began before she heard
4 the pop?

5 A Right.

6 Q Okay. And my question is: Why didn't you use her
7 statement to law enforcement to better impeach her
8 concerning the fact that she had allowed the State to
9 get her to turn her testimony around on that point?

10 A Honestly, I don't know.

11 Q Okay. Is that something you think you should have
12 done?

13 A Again, I don't know. I can't put myself back at
14 that particular place. I thought it was clear, and
15 maybe I'm misremembering, but I thought it was clear
16 based on the testimony that the pop occurred as these
17 guys fell out the door together. But maybe I'm wrong
18 about that.

19 Q Well, I'm not going to spend a great deal of time
20 on this, but let's look at -- do you have your copy of
21 the trial record?

22 A Yeah. But if it's in the transcript, it's in the
23 transcript. I'm not going to dispute a transcript.

24 Q Okay.

25 MS. SHURLING: Well, I will cite to the express --

1 the specific portions of the record in our memorandum,
2 your Honor.

3 Q Let's go back again to you have no recollection at
4 all as to why you just abandoned your objections to the
5 testimony of Otis Hyder, Sr., coming in -- let me --
6 I'm not being articulate -- to his prior testimony from
7 the '97 trial coming in in lieu of live testimony?

8 A No. Right now I have -- I do not remember why I
9 did that. There's parts of that trial, as I told you
10 from the beginning, I don't remember a lot about it at
11 all, and I don't know why because my memory used to be
12 much better. I have no clue what's happened to me.

13 Q I understand, sir. And I'm not trying to make
14 this more difficult, but you did have a copy of Otis
15 Hyder's testimony from the '97 trial --

16 A Sure.

17 Q -- in your trial preparation for the 2005 trial?

18 A Yes.

19 Q So if in that testimony he disputed there having
20 been any kind of scuffle between your client and the
21 victim, you knew that in advance --

22 A Yes.

23 Q -- correct? Okay. All right. Let's move on.

24 Do you recall the testimony of Dr. Wren, the
25 pathologist in this case?

1 A No, I do not.

2 Q Would it help if I asked if you remember him
3 testifying concerning certain abrasions that were found
4 on the victim?

5 A I know he did that, and I think at one point, not
6 during his testimony, that we put in a picture of those
7 abrasions, I think. I don't remember for sure.

8 Q Okay. Would you agree with me that you have a
9 copy of the autopsy report?

10 A Sure.

11 Q And is there any particular reason why you did not
12 make more specific reference to the portion of the
13 autopsy report -- and I'm going to hand you a copy.
14 I'm forgetting my manners.

15 If you will go to the very last page, the second
16 paragraph, "There were lacerations with abrasions and
17 contusions to the face and body which were consistent
18 with the decedent falling and striking his head"?

19 A Uh-huh.

20 Q Okay. And if you did not fully cross-examine
21 Dr. Wren concerning that portion of the autopsy report,
22 was that intentional or just an oversight?

23 A No. That was intentional.

24 Q Okay.

25 A I did not want him or Bob Coler, for that matter,

1 asking him, "If the decedent had been struck in the
2 head with a pistol, what would that have caused,
3 what -- how would he have reacted to that? Would he
4 have been stunned?" I don't -- I did not know where he
5 was going with that, and I was not going to ask that
6 question. Now, that was intentional. If it was wrong,
7 I did it wrong, but it was intentional.

8 Q Okay. Well, let me ask you this: Your theory of
9 the case was that the victim had lunged at your client
10 to try to grab the rest of the drugs the client had or
11 money or whatever he wanted to rob him of, right?

12 A Right.

13 Q And your client had said that he at some point
14 tried to use the gun to -- not to shoot the individual
15 but had it in his hand and brandished it and had it in
16 his hand as they were falling, correct?

17 A Yes.

18 Q They kind of lost balance and went to fall down
19 the little stairs at the entranceway to the trailer?

20 A Pretty good fall.

21 Q Okay. Did you consider asking Dr. Wren whether
22 any abrasions on the victim's face could have come from
23 the gun grips?

24 A I did not, and -- well, I was not going to ask the
25 doctor anything about the gun hitting the face. We had

1 pictures, which I thought anybody that looked at would
2 realize it was a gun that hit the face. I don't
3 remember whether Wren was qualified as an anatomical
4 pathologist or a forensic pathologist, but either way I
5 was not going to ask him that question.

6 MS. SHURLING: Your Honor, I would move to
7 introduce a copy of the autopsy report.

8 THE COURT: Okay. It will be admitted without
9 objection.

10 (WHEREUPON, Applicant's Exhibit Number 5
11 was marked for identification.)

12 (WHEREUPON, Applicant's Exhibit Number 5 was
13 admitted into evidence.)

14 BY MS. SHURLING:

15 Q Sticking with Dr. Wren for a moment, do you recall
16 that in the incident reports in this case, the first
17 officers on the scene initially referred to the victim
18 being face down?

19 A I do not recall that, no. But if it's in the
20 discovery or in the transcript, I will not dispute it.

21 Q Okay.

22 MS. SHURLING: One moment's indulgence, your
23 Honor.

24 Your Honor, my flag on that point has fallen off.
25 I will come back to it if I find it or reference it in

1 my memo.

2 Q But do you recall Dr. Wren testifying that he
3 assumed that law enforcement might have moved the body
4 because in the photographs it was face up?

5 A I don't remember Dr. Wren saying that, but Don
6 Girndt certainly said the body was moved.

7 Q And, in fact, there were descriptions by Dr. Wren
8 of the fact that the body appeared to be in a rather
9 twisted or contorted position in the photographs. Do
10 you recall that?

11 A If it's in the transcript, it's there.

12 Q Okay. When Dr. Wren specifically testified that
13 law enforcement probably moved the deceased's body, did
14 you consider objecting to that?

15 A I don't -- I don't remember that.

16 Q Okay. If you had made note of it at the time it
17 was said, would you have had objected to it as
18 supposition?

19 A Yes.

20 Q And outside the field of expertise for which he
21 was qualified as an expert?

22 A Yes.

23 Q Okay. And one of the grounds that you won your
24 PCR on for Mr. Smith was the failure to present an
25 expert that would give a forensic explanation for some

1 of the things found at the crime scene, correct?

2 A Yes.

3 Q And you were able to introduce the same witness at
4 the 2005 trial that you were able to utilize
5 effectively in the PCR proceeding, Mr. Don Girndt?

6 A Yes.

7 Q The statement -- let me rephrase that.

8 You knew going into trial your client was going to
9 testify, right?

10 A Yes.

11 Q And you knew what his testimony had been in '97,
12 so you pretty much knew what his story was and what it
13 was going to be at the new trial, right?

14 A Yes.

15 Q Okay. So with that in mind, did you consider
16 fleshing out the record, if you will, concerning the
17 people who were present at the time of the shooting and
18 what happened with them, specifically Terry Bradley, in
19 the immediate aftermath of the shooting?

20 A Well, I don't remember what I did. Obviously, I
21 didn't, so I'll agree with you.

22 Q Okay. Well, let's put it this way. Your client
23 testified that he had taken out the quantity that the
24 victim wanted to buy and that he put it on the table
25 right there in the trailer when they were talking,

1 right?

2 A That's correct.

3 Q And that when the gentleman began saying he didn't
4 have the money to pay him and your client, according to
5 not only his testimony but, frankly, Otis Hyder's,
6 began backing out of the trailer, your client indicated
7 that he didn't grab up those five rocks and try to take
8 them with him, he just left them there, right?

9 A That's correct.

10 Q And that left the State in the position of making,
11 a big deal about the fact that a subsequent search of
12 the trailer when law enforcement got there yielded no
13 crack cocaine, right?

14 A If that's in the transcript or discovery, that's
15 what it says.

16 Q Okay. And so that would rather directly
17 contradict, in the view of the prosecution anyway, your
18 client's claim that the five pieces that were supposed
19 to be the 50 that he was there to sell the victim were
20 left at the scene. And so law enforcement, trying to
21 poke holes in your client's story, says what, no
22 cocaine found at the scene, right?

23 A That's correct.

24 Q Well, do you recall getting in discovery
25 statements -- well, there are statements in the

1 statement of Angie Smith and the testimony of Otis
2 Hyder as well, but there was also a statement given to
3 law enforcement by Tony -- excuse me, Terry Bradley,
4 right?

5 A I don't remember.

6 Q We had a blind eyewitness and we had a sleeping
7 eyewitness?

8 A Well, the sleeping eyewitness, whether or not he
9 gave a statement, I don't remember. I know there was a
10 sleeping eyewitness in the trailer.

11 Q Okay. And I should not introduce levity into
12 something this serious. I apologize. But Mr. Bradley
13 was the gentleman who was on the sofa and who,
14 according to Mr. Hyder, was asleep until a pop went
15 off, right?

16 A That's correct.

17 MS. SHURLING: Your Honor, I would move to
18 introduce this, I believe, is Applicant's 6.

19 THE COURT: Any objection?

20 MS. WHITE: No objection.

21 THE COURT: Admitted without objection.

22 (WHEREUPON, Applicant's Exhibit Number 6
23 was marked for identification.)

24 (WHEREUPON, Applicant's Exhibit Number 6 was
25 admitted into evidence.)

1 BY MS. SHURLING:

2 Q And this one is easy to read because it's one
3 paragraph long. Have you had a chance to review it?

4 A Yeah.

5 Q Okay. He claims that he was asleep on the sofa,
6 was waked by the pop and instructed by Otis Hyder, Sr.,
7 to call 911 and that he then left the scene and went to
8 go get the victim's -- he doesn't say the victim's
9 girlfriend, he says "I got Morgan" who was identified
10 at trial as the victim's girlfriend, correct?

11 A That's correct.

12 Q And he told her Robert had been shot, and he went
13 back to the trailer and sat on the couch and that
14 Morgan came down and sat beside Robert, and then the
15 police and the ambulance arrived?

16 A Yep.

17 Q That's about it, right?

18 A That's what's in the paragraph.

19 Q Did you consider arguing in the trial the fact
20 that the State had not presented Terry Bradley as a
21 witness, the missing witness argument?

22 A No.

23 Q Did you consider arguing that there was one pretty
24 obvious explanation for where the crack had gone since
25 Mr. Terry Bradley had jumped up and left the scene

1 before the cops got there?

2 A I did not do that.

3 Q In retrospect, is that something you should have
4 done?

5 A Probably.

6 Q Okay. Did you do any investigation into Julian
7 Terry Bradley?

8 A The investigation in the case was handled by
9 Private Investigator Ed McCall. He was supposed to
10 investigate each witness that we had a statement from
11 and anybody else that may have been around the scene.
12 And Don Girndt was provided a copy of all the discovery
13 along with a copy of all the pictures, so that was the
14 investigation in the case.

15 Q Well, did you try to locate Terry Bradley as a
16 witness for the trial?

17 A I don't remember now whether we did or whether we
18 didn't. I'm sorry, ten years is a long time. I don't
19 remember and I don't have a file.

20 Q I will tell a funny story on myself. I recently
21 quipped that I was a victim of "old timer's disease"
22 myself in a courtroom. And I only recently got the
23 transcript, and the court reporter referred to my
24 saying that I was a victim of Alzheimer's. So I'm
25 going to be careful about joking. But I share your

1 problem with memory.

2 But the bottom line is you had a statement from
3 Mr. Bradley in which he acknowledged that he left the
4 scene immediately afterward?

5 A That's true.

6 Q And came back?

7 A That's true.

8 Q And is there any mention, to the best of your
9 recollection, in any of the incident reports,
10 supplemental incident reports issued by law
11 enforcement, of any investigation into Terry Bradley
12 and what role he might have had in this case?

13 A You know my file was destroyed.

14 Q Yes, sir.

15 A You know this case is ten years old.

16 Q Yes, sir.

17 A I don't remember, and I can't get any better than
18 that.

19 Q Okay. Well, that's --

20 A I don't have Alzheimer's, but I do have a problem
21 with my memory and have had since the three back
22 surgeries, and I don't know whether that's caused by
23 the medication or not, but I'll tell you, I don't
24 remember.

25 Q Okay. I'll move on.

1 After telling me that you did not have a file in
2 this case, which I certainly understood, did I ask you
3 to check your computer records to see if any portion of
4 your file could be retrieved off your hard drive?

5 A You did, and I don't have anything on there other
6 than the motions that we submitted.

7 MS. SHURLING: Your Honor, a moment's indulgence.

8 Q During your PCR representation of Mr. Smith, do
9 you recall making an issue of the fact that a Mike
10 Kitts from the sheriff's department had been at the
11 scene?

12 A No. Is that part -- well, you can tell me.

13 Q And do you recall it being made an issue that he
14 was there and that he referenced in some portion of his
15 statement that they had been told that the deceased had
16 attempted to rob another drug dealer earlier that day?

17 A I don't remember that now, but I'm sure that you
18 have it since you're looking at the paperwork.

19 Q Okay. More specifically, I'm going to hand you a
20 copy of the investigative report dated 1/14/97, and
21 there is a reference on the very last line of that
22 report.

23 A (Witness reading document.)

24 Q Do you recall that?

25 A I read it now, but I don't recall it.

1 Q Okay.

2 A I mean, I'm not disputing that it's there.

3 Q I understand.

4 MS. SHURLING: Your Honor, this would be
5 Applicant's 7.

6 THE COURT: Any objection?

7 MS. WHITE: No objection.

8 (WHEREUPON, Applicant's Exhibit Number 7 was
9 marked for identification.)

10 (WHEREUPON, Applicant's Exhibit Number 7 was
11 admitted into evidence.)

12 BY MS. SHURLING:

13 Q And having this investigative report in the
14 discovery materials and having the findings of the PCR
15 judge now Justice Don Beatty in your arsenal, was there
16 any particular reason why you didn't call Mike Kitts to
17 the stand when the State didn't?

18 A I don't know why. I don't remember. He should
19 have been called.

20 Q Thank you.

21 (WHEREUPON, Applicant's Exhibit Number 8 was
22 marked for identification.)

23 MS. SHURLING: Your Honor, I also have from the
24 discovery materials a document that's labeled
25 "Spartanburg County Sheriff's Office, Please List All

1 Persons Entering Crime Scene."

2 Q And this document, on page three of four,
3 confirms, does it not, that Mike Kitts was one of the
4 officers on the scene?

5 A Yes.

6 MS. SHURLING: Move to introduce as Applicant's 8.

7 MS. WHITE: Without objection.

8 THE COURT: Admitted without objection.

9 (WHEREUPON, Applicant's Exhibit Number 8 was
10 admitted into evidence.)

11 BY MS. SHURLING:

12 Q Now, we mentioned a moment ago the fact that there
13 was an individual referenced as Morgan who was the
14 deceased's girlfriend, correct?

15 A Yes.

16 MS. SHURLING: Your Honor, I would move to
17 introduce the statement of Morgan Simmons as
18 Applicant's 9.

19 MS. WHITE: No objection.

20 THE COURT: It will be entered without objection.

21 (WHEREUPON, Applicant's Exhibit Number 9
22 was marked for identification.)

23 (WHEREUPON, Applicant's Exhibit Number 9 was
24 admitted into evidence.)

25 BY MS. SHURLING:

1 Q Now, in her statement to law enforcement, the
2 typed version, she doesn't say anything about him
3 coming back -- leaving the trailer that they shared and
4 coming back about 30 to 45 minutes later and saying he
5 had tried to rob a drug dealer, does she?

6 A That's correct.

7 Q If you go to the handwritten version from which
8 the typed version was supposedly transcribed and look
9 at the last page, six lines down, do you see where she
10 said he came back about 30 to 45 minutes later and said
11 that he had tried to rob a drug dealer?

12 A Yes.

13 Q See that?

14 A Yes.

15 Q Okay. Why didn't you put Ms. Simmons up as a
16 witness for the defense? And I realize she was the
17 dead guy's girlfriend, but why didn't you present her
18 as a witness for the defense?

19 A I really don't know.

20 Q In retrospect, is that something you think you
21 should have done?

22 A Sure.

23 Q Your theory of the defense was that the shooting
24 had occurred while the victim was trying to rob your
25 client?

1 A Correct.

2 Q And certainly the fact that he had tried to rob
3 someone earlier in the evening would have been relevant
4 to that discussion?

5 A Yes.

6 Q Okay. How about the fact that in her statement
7 she also says -- and you can look at page two of the
8 typed version -- that at some point after he had come
9 back, she heard the door open, asked him where he was
10 going, and he said what?

11 A He was going to Pops to get him a hit.

12 Q Going to Pops to get him a hit. Not to use the
13 phone, to get him a hit, right?

14 A That's correct.

15 Q And what would be, as a defense attorney, the
16 logical inference for you to argue from that?

17 A He had gone over there to get some drugs.

18 Q Would that not also have been a reason that you
19 would have wanted to call Morgan Simmons as a witness?

20 A Sure.

21 Q All right. Let's move along.

22 MS. SHURLING: Your Honor, I will state under a
23 very old case that -- I believe it's In re Cabbagestock
24 opinion -- that I have, as an officer of the court,
25 made numerous attempts to locate Morgan Simmons as well

1 as Julian Terry Bradley and that my paralegal staff and
2 I have exhausted all services available to us to locate
3 those individuals so that we could present them as
4 witnesses here today. And all these many years later,
5 they simply could not be found by me to introduce as
6 witnesses.

7 THE COURT: So noted.

8 MS. SHURLING: Thank you.

9 BY MS. SHURLING:

10 Q Well, had you made note of that portion of Morgan
11 Simmons' statement, that would have provided yet
12 another issue to argue that Otis Hyder, Sr., wasn't
13 cross-examined concerning as well, right?

14 A That's true.

15 Q And, of course, it would have put you in the
16 position as the defense attorney to argue that it made
17 a lot more sense for somebody to be going to somebody's
18 house at 2:00 or 3:00 in the morning to do some drugs
19 than just to borrow a phone?

20 A That's true.

21 Q Okay. Now, when you worked -- before you withdrew
22 your objection to Thomas Hyder, Sr.'s, testimony coming
23 in from the 1997 trial, did you consider arguing that
24 the very reason your client or one of the important
25 reasons your client had been granted a new trial had

1 been the fact that there was this evidence that there
2 was some indication that the victim intended to rob
3 your client that Otis Hyder had not been questioned
4 about?

5 A I don't remember what I thought about at that
6 point in time. I'm sorry, I just don't.

7 Q Okay.

8 A What you say is logical, but I'm not saying that I
9 thought that.

10 Q And, of course, the PCR hearing transcript and the
11 order of the Court in that matter will speak for
12 themselves.

13 A Right.

14 Q Okay. How about the fact that all this -- first
15 off, the State had first come in and just said Otis
16 Hyder is dead. And had it not been for Judge Early,
17 y'all would have just proceeded on?

18 MS. WHITE: I hate to object, but I think we've
19 already gone over whether or not he recalls why he
20 withdrew the objection to Otis Hyder's testimony coming
21 in.

22 THE COURT: All right. Ms. Shurling, move on to
23 another matter.

24 MS. SHURLING: I did have a different question.

25 Q Did you consider specifically, to the best of your

1 recollection, arguing that the State had not presented
2 any medical testimony or testimony of a full-time
3 caregiver or anybody under oath to document that he
4 was, in fact, unavailable within the parameters of
5 804(a)(4)?

6 A You've already asked that.

7 Q Then my memory is catching up with me. I
8 apologize.

9 Did you notice in reviewing the previous testimony
10 of Otis Hyder, Sr., the admissions he was making
11 concerning his vision?

12 A The admissions he was making concerning his
13 vision, is that what you said?

14 Q Right. Saying that he was legally blind and there
15 were two or three --

16 A I understand that was his statement, yes.

17 Q And did you consider arguing the fact that he had
18 not been cross-examined about his competence to give
19 eyewitness testimony in '97 and, therefore, that his
20 2005 testimony should not be admitted for that basis,
21 on that basis as well as the others we've covered?

22 MS. WHITE: I would just say it's the same -- I
23 think he said several times that he cannot recall why
24 he withdrew the objection. I think that's in line --

25 THE COURT: I think this has been covered.

1 MS. SHURLING: I understand, your Honor. And I
2 apologize --

3 THE COURT: We need to move on.

4 MS. SHURLING: Unfortunately, I just see way too
5 many appellate decisions where the Court says if this
6 specific question wasn't asked, we lose. So I
7 apologize, but I'm trying to be thorough.

8 Q Did you consider objecting to the self-defense
9 instruction that was given at the 2005 trial?

10 A Well, I didn't object, so I would assume at the
11 time I didn't see a problem with it.

12 Q Okay. Do you recall a portion of the self-defense
13 instruction that discussed at length the concept of
14 mutual combat and how it affected the standard for
15 self-defense?

16 A If -- you know, if it's in the transcript, I agree
17 with it. I mean, I don't remember. The transcript can
18 speak for itself.

19 Q Was there any evidence of consensual mutual combat
20 between the victim and your client?

21 A In my view there wasn't.

22 Q And had you made note of the lengthy portion of
23 the self-defense instruction addressing mutual combat,
24 would you have objected to that portion of the charge?

25 A Based on the facts that the judge had before him,

1 I believe that a person could have thought that there
2 was mutual combat. You know, I did not object. If
3 that was a mistake, it's a mistake.

4 Q During the charge conference, do you recall at one
5 point the judge coming right out and asking, "Well,
6 what evidence is there to support the defendant's
7 theory?"

8 A Well, Judge Early being Judge Early, he's very
9 blunt. I'm sure he said that, but I don't remember it.

10 Q And is there any particular reason why you did not
11 at that point outline with specificity which portions
12 of the testimony that had been introduced would sustain
13 the giving of a charge on self-defense?

14 A I thought I did and I thought he did.

15 Q Okay. Well, he did charge it, but if the record
16 reflects that you did not go through all of the
17 evidence as it pertained to the individual prongs of a
18 self-defense defense, was there any particular reason
19 why you didn't do that?

20 A Well, whatever is in the transcript is in the
21 transcript. I don't know if anything was done off
22 record or not. I don't remember that either.

23 Q Okay.

24 A It could have been.

25 Q Did you follow up -- did you have an opportunity

1 to review the opinion of the Supreme Court of South
2 Carolina when it reversed the decision of the court of
3 appeals to grant Mr. Smith a new trial?

4 A I'm sure that I read that a couple of years ago,
5 but I have -- I've told you I have difficulty reading
6 anything anymore without falling asleep.

7 Q Well, this opinion would have come out in February
8 of 2011. Was your ability to perceive somewhat better
9 at that point to read?

10 A In -- my first surgery was in 2010. I nearly
11 committed suicide in the end of 2010. I think I was
12 out for about six months in 2011.

13 Q Well, I'm very sorry to hear that, and I hope you
14 never go to that dark place again.

15 MS. SHURLING: Your Honor, I would ask at this
16 time, I believe respondent told me that copies of these
17 opinions were in the packet.

18 MS. WHITE: Yes.

19 MS. SHURLING: I was specifically referencing
20 footnote two in which the Court basically indicates
21 that they don't see where there was ever a basis for
22 charging self-defense to begin with.

23 THE COURT: Wait a minute. Are you referring to
24 the supreme court opinion or the court of appeals?

25 MS. SHURLING: Pardon me. The court of appeals.

1 I apologize.

2 THE COURT: And this is the footnote you're
3 referring to, the footnote that says no issues on
4 appeal have been argued as to the judge's charge of
5 self-defense? Is that what you're referring to?

6 MS. SHURLING: Yes, sir. It is -- basically they
7 say that the trial court correctly observed that there
8 was no evidence of self-defense and quoted the judge as
9 saying, I don't see how in the world that the evidence
10 can be construed --

11 MS. WHITE: That's the supreme court opinion.

12 MS. SHURLING: I was going to say, I didn't think
13 I was confused. That's the supreme court opinion.

14 THE COURT: But the footnote you're mentioning is
15 actually in the court of appeals?

16 MS. SHURLING: No, sir. It's in the supreme
17 court.

18 THE COURT: Where is the --

19 MS. SHURLING: Footnote two in the supreme court
20 opinion -- here. Is that what I passed up to your
21 Honor, or did I give you the wrong one?

22 THE COURT: I see what you're talking about.
23 Thank you. This would be under -- on the same page as
24 B, involuntary manslaughter. The trial court correctly
25 observed there was no evidence. I was looking at

1 footnote two in the other opinion.

2 MS. SHURLING: That's okay. I was afraid I had
3 gotten confused, too.

4 THE COURT: Okay.

5 MS. SHURLING: Now, in the court of appeals
6 decision, as the Court has noted, there was a reference
7 to the fact that no issues on appeal have been argued
8 as to the judge's charge of self-defense. And that's
9 footnote two in the court of appeals decision.

10 Q Which, Mr. Godfrey, goes back to, I believe you've
11 already testified that you -- you didn't see anything
12 you thought of as a basis for an objection to the
13 self-defense charge; is that correct?

14 A That's correct.

15 Q Okay.

16 MS. WHITE: Your Honor, can we take another
17 five-minute break?

18 THE COURT: That's fine, if he needs to stretch
19 his legs.

20 MS. WHITE: Yes, sir.

21 (WHEREUPON, a recess was taken from
22 12:19 p.m. to 2:03 p.m.)

23 THE COURT: Ms. Shurling, we are ready to proceed?

24 MS. SHURLING: We are indeed, your Honor.

25 Q Bill, during the testimony of Angie Smith, when

1 the prosecution was trying to ask her questions about
2 you having a gun and you having crack, do you recall
3 her making the statement, quote, to her understanding,
4 you had crack and a gun?

5 A No, I don't.

6 Q Okay. Had you caught that as it came out in the
7 testimony, would you have objected to that testimony?

8 A Yes.

9 Q Okay. During your cross-examination of Angie
10 Smith concerning this case, did you consider
11 cross-examining her as to whether or not she had been
12 part of some plan to set up your client to be robbed?

13 A No.

14 Q In retrospect, do you think you should have
15 considered that option?

16 A Sure.

17 Q Detective Steve Denton testified at length in this
18 trial, and at one point he testified that the gun was
19 discharged towards the trailer. And that's a direct
20 quote, "towards the trailer." Did you consider
21 objecting to that statement on the ground that there
22 was no ballistics evidence to support that conclusion?

23 A No.

24 Q Was that not -- that wasn't a strategic or a
25 tactical decision, was it?

1 A No.

2 Q Also, Detective Denton's testimony is somewhat
3 peppered with what I would call ballistics evidence
4 testimony. Did you consider objecting to those
5 portions of Detective Denton's testimony on the ground
6 that he had not been qualified as an expert in the
7 field of ballistics?

8 A I thought about it, but I didn't do it.

9 Q Was there a strategic or tactical reason?

10 A No.

11 Q In retrospect, do you think that's something you
12 should have done?

13 A Sure.

14 Q Detective Denton testified --

15 MS. SHURLING: And, your Honor, I'm referring to
16 page 137, line 21, through 138, line 25.

17 Q -- that when he first spoke with you about the --
18 pardon me. When he first spoke with our mutual client,
19 Mr. Smith, about the case, that Mr. Smith wanted to
20 know if it was about, quote, a murder case in
21 Spartanburg. Do you recall that?

22 A No.

23 Q If I tell you there's a point in the record at
24 page 138, lines 4 through 21, where you objected to
25 that, you objected to his characterization of your

1 client's statement to law enforcement as calling this
2 incident a murder, and then the testimony continued
3 forward without the judge ever making a ruling on your
4 objection -- that's at page 138, line 10. Your
5 objection is at line 12 -- you say, "Objection;
6 leading." And the Court -- I mean the solicitor just
7 charges forward and says, "What, if anything," Denton
8 says, "During," and the next line is, "Did he mention
9 about murder?" And it goes from there. It goes on as
10 a discussion about your client asking about a murder.

11 Was there some particular reason why you didn't
12 object to the solicitor going forward with that
13 damaging testimony without getting a ruling from the
14 judge on that characterization of your client's
15 statements?

16 A I have no idea. Should have.

17 Q Thank you. I appreciate that.

18 Did you consider during the investigation of --
19 pardon me, the cross-examination of Detective Denton
20 questioning why on earth law enforcement hadn't done
21 anything further to investigate the involvement of
22 Julian Terry Bradley in this case and what role he
23 might have had in this -- your theory of defense was
24 this was an attempted robbery of your client who was
25 targeted as a drug dealer, right?

1 A Correct.

2 Q Was there any strategic or tactical reason why you
3 would not have cross-examined Detective Denton about
4 the fact that here's this guy that was right there in
5 the trailer, and they've got a little, about five,
6 six-line statement from him and that's it. He's not
7 mentioned in any of the investigative reports or
8 anything beyond that other than referencing statements
9 he made to police that night that were consistent with
10 his little short statement. Did you consider
11 cross-examining Detective Denton or anyone else in law
12 enforcement as to, "Hey, where is this guy? Why don't
13 we know more about him? What did you do to investigate
14 him?"

15 A No. Basically same answer from this morning. No,
16 I didn't think about that and I should have.

17 Q Thank you.

18 MS. SHURLING: Excuse me, your Honor. I want to
19 check off as we go or I'll replot the same ground.

20 Q Before the lunch break I believe we covered the
21 question of failing to object to Dr. Wren's testimony
22 that the body had probably been moved?

23 A Right.

24 Q We covered that already.

25 How about did you consider arguing in addition to

1 the expert testimony you presented from Don Girndt, did
2 you consider arguing that in the process of falling out
3 the door, that it was possible that your client had
4 inadvertently put pressure on the trigger that caused
5 it to fire?

6 A I didn't do it in those exact words, but I would
7 believe that in my argument to the jury, there was at
8 least something in there about the gun going off. That
9 was a bad gun to begin with. I wish we had it because
10 the gun that David had was not even allowed to be sold
11 in South Carolina.

12 Q And that was one of the avenues that you had
13 successfully pursued in the PCR and you were able to
14 pursue at the trial, correct?

15 A Yes.

16 Q Okay. Let's move on then.
17 How big a guy was the victim?

18 A He was about my size. He was a lot bigger than
19 David. You see David now. If you look at him, he's,
20 unfortunately, put on some weight. And David has a
21 heart condition. He doesn't need to be -- he needs to
22 be slimmed back down.

23 Q Would you look at the first three sentences of the
24 external description of the victim's body in the
25 autopsy report.

1 **A** Uh-huh. "This is a body of a well-developed,
2 well-nourished white male appearing slightly older than
3 stated age measuring 74 inches in length with an
4 estimated weight of 220 pounds."

5 **Q** Okay.

6 **A** To put it another way, you had a guy that looked
7 like a linebacker against a fellow who at the time was
8 quite skinny and shorter.

9 **Q** Well, and you jumped right ahead to the next thing
10 I was going to mention. Did you consider anything you
11 had available to you to establish for the record
12 exactly what your clients's height and weight were?

13 **A** Other than them visually seeing him, no, I did
14 not.

15 **Q** Are you aware that the arrest warrants in this
16 very case document your client's height at 5'8" and
17 165 pounds?

18 **A** I'm sure they do, yeah.

19 **Q** Okay. And did you consider utilizing the
20 information on the warrant to establish for the jury
21 the great disparity in their size and height and
22 weight?

23 **A** No. I didn't think about using the warrant for
24 that.

25 **Q** In retrospect, would that have been something you

1 would have wanted to do?

2 A I could have, but --

3 Q Okay.

4 A -- David was sitting beside me, and I wasn't
5 exactly small at the time.

6 Q Thank you.

7 Now, let me ask you this: The State was arguing
8 that this was somehow motivated by Mr. Smith being
9 angry about a \$40 drug debt, correct?

10 A Yes.

11 Q Did you consider arguing that if your client
12 was -- had gone there with malicious intent with regard
13 to a \$40 drug debt, that he would not have let someone
14 as big and drunk as the victim to have gotten the drop
15 on him, gotten right on top of him before he pulled a
16 gun?

17 A That may be true. Think about a single-wide
18 trailer. You think about what's in it. And I don't
19 remember now all the stuff, but there was a heater
20 there, there was a chair that was there, there was a
21 kitchen counter that was there. They were going to be
22 in close proximity, anyway. The bottom line for me and
23 what I can't believe nobody has ever believed, and to
24 me it's just remarkable, if David was going to kill
25 somebody, if he wanted to kill somebody, the fella was

1 right in front of him. All he had to do was pull the
2 trigger. He didn't have to get into a scuffle. He
3 didn't have to get pushed to the door. They didn't
4 have to fall out the door together. If he had malice
5 towards that victim, that victim would have been dead
6 inside that trailer. And, you know, he may have
7 touched David, he may have been that close, but there
8 wouldn't have been a scuffle.

9 Q And I think what you just testified to is
10 effectively the other side of what I was suggesting, is
11 did you consider establishing for the jury your
12 client's height and weight, the dead guy's height and
13 weight, and basically saying why would he wait until
14 this massive man was literally grabbing at him to, for
15 the first time, brandish a weapon? If he went there
16 with the intent to kill him to begin with, then why on
17 earth would he wait until somebody that big had a
18 physical drop on him?

19 A Agreed.

20 Q Okay. Speaking of which, do you recall seeing in
21 the discovery package a SLED toxicology report for the
22 victim?

23 A I'm sure that I looked for a toxicology report,
24 and I have no memory of whether there was or was not
25 one. I'm assuming that there would be because

1 otherwise I would have been raising some Cain about
2 that.

3 MS. SHURLING: Your Honor, we move to introduce
4 this as Applicant's 10.

5 THE COURT: Any objection?

6 MS. WHITE: No objection.

7 THE COURT: All right. It will be admitted
8 without objection.

9 (WHEREUPON, Applicant's Exhibit Number 10
10 was marked for identification.)

11 (WHEREUPON, Applicant's Exhibit Number 10 was
12 admitted into evidence.)

13 BY MS. SHURLING:

14 Q Under the results of this SLED toxicology report,
15 what does it indicate that the victim's blood alcohol
16 level was?

17 A .229 percent.

18 Q Point what?

19 A I'm sorry. I was looking down under the other
20 results, urine.

21 Q The blood alcohol?

22 A .151 blood alcohol found. .229 was ethanol found
23 in urine.

24 Q Okay. So .151, if I'm looking at that correctly,
25 that is very close to twice what is now the legal

1 limit, right?

2 A Yes.

3 Q And there was also evidence of a substance which
4 is the major metabolite of cocaine in the man's system?

5 A Yes.

6 Q Okay. Did you consider introducing this report
7 and arguing it as part of your case for the fact that
8 this drunken -- this man with cocaine in his system and
9 a tremendous amount of alcohol was the aggressor in
10 this situation?

11 A I thought that we talked -- I don't remember about
12 the toxicology. The basic answer is I agree with you.
13 I just don't remember what happened or what I did.

14 Q Okay. Well, if the record reflects that it was
15 not introduced into evidence, is that something you now
16 believe you should have introduced?

17 A Yes.

18 Q Thank you.

19 I think I got something a little mixed up earlier,
20 and I apologize to the Court. We were talking about
21 your not outlining with sufficient specificity for the
22 jury the evidence that had been introduced that would
23 have supported the lesser included offense of voluntary
24 manslaughter. But I believe earlier I said
25 self-defense, but I meant voluntary manslaughter. Do

1 you recall that?

2 A Yes.

3 Q And, likewise, though, if you did not in the
4 record, would there have been any strategic or tactical
5 reason why you would not have gone through the standard
6 elements of self-defense and gone over what evidence in
7 this record supported a claim of self-defense as well?

8 A To whom?

9 Q Pardon?

10 A Who am I making that statement to?

11 Q To the jury.

12 A To the jury. Normally when I argue to the jury, I
13 leave off legal terms and legal elements and try to be
14 a real person and talk to them and lay it out. And
15 then when the judge does whatever he does, they can
16 make their decision.

17 Q Okay.

18 A But as -- as a practice of mine, I don't go over
19 the elements and talk about each element when I close.
20 I may mention a word here or there which is part of the
21 elements, but I never have done that, and I've had a
22 lot of success with that.

23 Q Well --

24 A So, you know, it can be done your way. A lot of
25 folks do it your way. Some folks do it my way.

1 Q Well, at the end of the day -- and I'm talking
2 specifically on self-defense at the moment -- at the
3 end of the day, even the supreme court said the record
4 didn't clearly present a case for self-defense and they
5 didn't know why it even got charged, right?

6 A Well, that's what they said, but I respectfully
7 disagree with the supreme court, especially with their
8 decision on this case.

9 Q I understand. But my question would be: With
10 that in mind, do you not recognize that it would have
11 been potentially beneficial to your client to have been
12 more specific about which portions of the evidence
13 supported a claim of self-defense?

14 A I'll go along with you just so you can move on.

15 Q Don't quit on me. I'm almost done.

16 Likewise, with regard to voluntary manslaughter,
17 was there any reason why you would not have laid out
18 with more specificity for the judge exactly what in the
19 evidence supported the request for that lesser included
20 offense?

21 A No.

22 Q And we know, do we not, from a note that was sent
23 back by the jury that they wanted to know if they
24 didn't find self-defense, could they still find
25 Mr. Smith guilty of some kind of lesser included.

1 Remember that?

2 A Yes.

3 Q So the jury was wanting to consider or at least a
4 note tends to reflect that the jury was wanting to
5 consider or was discussing lesser offenses, and there
6 were none there for them?

7 A That's right.

8 Q Were there any aspects of the self-defense charge
9 as given by the Court that you considered to be burden
10 shifting and constitutionally inappropriate?

11 A Well, I didn't at the time because I didn't
12 object, and right now I can't tell you because I'd have
13 to reread them all.

14 Q Had you recognized any aspect of the self-defense
15 charge as tending to reduce the State's burden of
16 proof, would you have objected?

17 A Yes.

18 Q When at some point the trial judge asked what
19 evidence existed that supported your theory of the
20 case, and before you could answer the prosecution said,
21 "Nothing, your Honor, there is none," or "nothing,"
22 something to that effect --

23 A Right.

24 Q -- was there any particular reason why you would
25 not have objected to that response and then presented

1 the Court with an answer with regard to what did, in
2 fact, support your position?

3 A As I recall, the jury was not in the room. But
4 no.

5 Q But you wanted your voluntary manslaughter charge,
6 right?

7 A Yes, I did.

8 Q Okay. Were there any problems with the malice
9 instruction in this case that you recognized?

10 A Since I did not take exception to it at the time,
11 I would say I didn't see anything then. As it is now,
12 I'd have to reread it and see.

13 Q So simply put, if there's anything wrong with the
14 malice instruction as given, your failure to object to
15 the instruction and put your grounds on the record was
16 not reflective of a strategic or tactical reason?

17 A No. No, absolutely not.

18 Q Okay. Let's talk about State v. Belcher. Are you
19 at all familiar, Bill, with that case? It came out in
20 2009 when your practice was sort of on its way down so
21 you might not remember it.

22 It is the case where the supreme court held that
23 the jury charge on the permissible inference of malice
24 from the use of a deadly weapon should not be given
25 where there was at issue some claim to a lessening of

1 the charge for murder, whether it was self-defense or
2 manslaughter. Are you familiar with that decision?

3 A I -- I remember hearing about it, but, well, you
4 know, 2009 I was out for a good while with surgery on
5 my foot. They had to reconstruct the tendon and move
6 the heel, and so I wasn't around too much then either.

7 Q Just very simply put, did you consider raising an
8 objection to the malice instruction that was given on
9 the inference of malice from the use of a deadly weapon
10 on the ground that that charge would be inconsistent
11 with your claim of self-defense?

12 A No, I did not think about that.

13 Q Okay.

14 MS. SHURLING: A moment's indulgence, your Honor.
15 The biggie.

16 Q When you represented David Smith in his PCR, you
17 were able to establish that material evidence, or at
18 least as found to be material by Justice Beatty, had
19 not been provided to Louis Cox.

20 MS. SHURLING: And I apologize, your Honor.
21 Earlier I think I called him Tom Cox. I went to law
22 school with Tom Cox. That's why I made that mistake.

23 Q Anyway, the basis for your finding on PCR was that
24 there was material evidence that the Court found in a
25 very lengthy, articulated PCR order that would have

1 been beneficial to the defense. You had testimony on
2 the record that it was in their file, correct?

3 A Correct.

4 Q When they called Mr. Smith's case back for
5 retrial, did you consider arguing that the retrial of
6 this case was barred by double jeopardy?

7 A I considered it, but it was -- from the testimony
8 at the PCR trial, I don't ever think that I could have
9 proven that it was an intentional withholding of
10 evidence. And so I did not proceed on that because it
11 was not, in my view, based on the PCR testimony that I
12 heard and the order that I wrote which was later
13 signed, I -- it was not intentional, so I did not go
14 forward with a motion like that.

15 Q Well, the piece of paper was in the prosecution's
16 file, right?

17 A It was in the prosecution's file when I saw it.

18 Q Okay. And, in fact, I'm sure you're aware there's
19 case law that has held the prosecution arm responsible
20 for evidence that was even in a law enforcement file,
21 not even in the solicitor's file, right?

22 A I've seen some to that effect, yes.

23 Q Okay. So would you not have considered arguing
24 that they knew or should have known that those notes
25 were in their file, that this investigator employed by

1 them had put them in there?

2 A I could have done that but did not.

3 Q What would have been the downside?

4 A Probably nothing.

5 Q And if you had, in fact, argued that, even if your
6 motion to bar retrial under double jeopardy had been
7 denied, that issue would have been preserved for
8 appellate review, correct?

9 A Yes.

10 Q Given the fact that there was no downside, why
11 would you not at least have tried that?

12 A I didn't think it had any chance of winning
13 because it was not an intentional act on the part of
14 Tommy Wall. But, you know, looking back on it, I
15 should have.

16 Q Okay. One last thing that is really germane to
17 the claim of ineffective assistance of appellate
18 counsel, but you were there, you tried the case. When
19 you made the motion for directed verdict of acquittal
20 in this case, did you feel that you had a reasonable
21 basis for arguing that the State had not put forth
22 evidence that your client killed, deliberately killed
23 with malice aforethought?

24 A I thought there were questions there. I thought
25 it was a legitimate motion.

1 Q Were you surprised to find that that issue had not
2 been raised on direct appeal?

3 A You know, I don't know what Joey does and doesn't
4 do. I can't speak for Joey Savitz. The only thing I
5 know about Savitz is that many times he is a very
6 excellent and effective appellate counsel, and what he
7 did on this one, I can't speak for him because I don't
8 know. Joey -- Joey has always helped me out, as did
9 Dan Stacy before he left. Of course, now Joey is gone,
10 too.

11 MS. SHURLING: Thank you very much. No further
12 questions.

13 MS. WHITE: I'm kind of -- and I know I told Bill
14 that I was not going to ask any questions. I don't
15 know if I can have ten minutes.

16 THE WITNESS: Sure.

17 MS. WHITE: Do you need to stand up or --

18 THE WITNESS: If I stand up, let's just keep
19 going, and once I get the vibration over with, I'm
20 fine.

21 MS. WHITE: All right. Whatever is best for you.
22 You tell me.

23 THE WITNESS: I'll stand up.

24 Don't worry. I'm not going to fall.

25 MS. WHITE: I don't want the chair to fall back.

24 A You know, honestly, it's like if it's in the
25 transcript, it's in the transcript.

1 Q Right.

2 A I have no memory of that anymore.

3 Q Okay. And so in the times when you have testified
4 today that there are things that you could embrace
5 questions to or maybe you should have, you would agree
6 that there might be instances in the record that show
7 that you were either able to rehab a witness or able to
8 question them to either counteract the leading or other
9 things that have been mentioned here today?

10 A Yes.

11 Q Okay. And in your experience as a lawyer,
12 obviously, at the time you represented him in 2005, you
13 had practiced 30 years?

14 A No. I graduated law school in 1989.

15 Q Okay. I was a little -- I'm sorry. Sorry. I'm
16 bad with my math.

17 But at that time did you maintain legal research?
18 You said you had an investigator?

19 A Yeah. Ed McCall worked for me for a number of
20 years. I ended up firing him for misconduct, but --
21 and I had used Don Girndt on several cases. And the
22 only law that I actually practiced was federal and
23 state criminal defense.

24 Q So you felt that you remained updated and were
25 able to review case law and stay up to date on issues

1 that could be used?

2 A Yes.

3 Q Okay. And, again, in regards to the testimony
4 about the documents that were introduced, you said that
5 most likely in discovery if we have them from the
6 solicitor's file in discovery, you had them at the
7 time?

8 A That's correct.

9 Q Okay.

10 A I mean, I can't believe -- that doggone file, when
11 I looked at it, was messed up to hmm and back. And
12 that's why it took so long to copy it. And then, of
13 course, now when I see this nice little table of
14 contents where they had everything all put together and
15 labeled out, that ain't what I saw.

16 Q Can I tell you, that's what my law clerk did. Our
17 law clerk put together the table of contents of the
18 solicitor's file, so I don't want them being accused of
19 coming up with something. But, okay. All right.

20 MS. WHITE: Your Honor, I think that's all.

21 THE COURT: Thank you.

22 Any redirect?

23 MS. SHURLING: Only, your Honor, that I wanted to
24 introduce, although it's technically part of the Clerk
25 of Court's records, but the arrest warrant.

1 MS. WHITE: It's already in the record. It should
2 be.

3 MS. SHURLING: The reason I like to mark them as
4 an exhibit is that I can put it in the appendix that
5 way and make it convenient for the Court's reference if
6 there is an appeal.

7 (WHEREUPON, Applicant's Exhibit Number 12
8 was marked for identification.)

9 THE COURT: Any objection to Number 12?

10 MS. WHITE: No objection.

11 THE COURT: Be admitted without objection.

12 (WHEREUPON, Applicant's Exhibit Number 12 was
13 admitted into evidence.)

14 MS. SHURLING: And the partial transcript from the
15 1997 trial that is the testimony of Otis Hyder, Sr.,
16 which was marked as Court's Exhibit 2 at the 2005
17 trial, and I would like to have it marked as an exhibit
18 in this proceeding.

19 THE COURT: Any objection?

20 MS. WHITE: No, your Honor.

21 THE COURT: Admitted without objection. That
22 would be number 13.

23 (WHEREUPON, Applicant's Exhibit Number 13
24 was marked for identification.)

25 (WHEREUPON, Applicant's Exhibit Number 13

1 was admitted into evidence.)

2 THE COURT: Anything further for this witness?

3 MS. WHITE: Nothing further from the State.

4 THE COURT: Any objection to this witness being
5 excused?

6 MS. WHITE: No.

7 MS. SHURLING: None.

8 THE COURT: Thank you, Mr. Godfrey.

9 (WHEREUPON, recess taken from 2:37 p.m.
10 to 2:41 p.m.)

11 THE COURT: We're ready to resume?

12 MS. SHURLING: We are, your Honor.

13 THE COURT: Call your next witness.

14 MS. SHURLING: I would call the applicant, David
15 Smith.

16 THE COURT: Mr. Smith, come around to the witness
17 chair, please, sir.

18 MS. SHURLING: And, you know, I haven't prepped
19 him, your Honor, by how shocked he just looked when he
20 found out he was going to testify.

21 DAVID SMITH,

22 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

23 THE COURT: Please state your name for the record.

24 THE WITNESS: David Dwight Smith.

25 THE COURT: Have a seat, Mr. Smith.

1 Your witness, Ms. Shurling.

2 DIRECT EXAMINATION

3 BY MS. SHURLING:

4 Q Mr. Smith, I'm not going to have you up there a
5 fraction of the time I had Mr. Godfrey. I know that
6 makes you happy.

7 You've gone over the superseding indictment --
8 amended application prior to today, correct?

9 A Yes.

10 Q Do you believe that I have covered each of those
11 issues with regard to trial counsel -- now, we haven't
12 gotten to appellate counsel yet, but have I covered the
13 issues with regard to trial counsel to your
14 satisfaction?

15 A Yes.

16 Q Okay. Now, also there are a few things that have
17 been argued in this case that address issues that can
18 be gleaned directly from the record and evidence that
19 was introduced. So I'm not going to go through each of
20 those issues with you. It's pointless. Okay?

21 A All right.

22 Q But there are a couple of things I need to ask you
23 about. Do you recall the testimony at your trial in
24 2005 when Detective Denton claimed that when he first
25 spoke with you, you asked whether or not it was about a

1 murder in Spartanburg?

2 A I remember that.

3 Q Did you ever say anything like that to Detective
4 Denton?

5 A No, I didn't.

6 Q Do you recall what you did say to Detective
7 Denton?

8 A Yes. I told Detective Denton that I had been
9 informed that he had been in my home and spoke with my
10 wife already about a case he was working on, a killing
11 in Spartanburg.

12 Q Okay. So you made him aware that you had already
13 communicated with your wife?

14 A Right.

15 Q And you let him know that you knew law enforcement
16 was looking for you to talk to you?

17 A Right.

18 Q And you characterized it as about a killing in
19 Spartanburg?

20 A Right.

21 Q Did you at any time refer to that incident in
22 terms of being a murder?

23 A No, I did not.

24 Q Do you recall when Mr. Bill Godfrey objected to
25 that testimony during your trial?

1 A Yes.

2 Q And then the solicitor just charged forward
3 without getting a ruling from the judge?

4 A Right.

5 Q Would you have wanted him to get a ruling on that
6 issue?

7 A Yes.

8 Q Okay. Now, let's talk about the whole business
9 about Otis Senior's testimony, Mr. Hyder's testimony
10 from your first trial. Okay?

11 A All right.

12 Q We've gone over here today the portion of the
13 record where Mr. Godfrey was arguing against the State
14 being able to introduce that testimony under 804(a)(3),
15 I believe it is?

16 A Correct.

17 Q And you were in the courtroom during that
18 discussion?

19 A Right.

20 Q Prior to that part in the trial transcript,
21 earlier in the trial, had your lawyer made you aware
22 that the State was going to try to introduce Mr. Hyder,
23 Sr.'s, testimony from the first trial?

24 A He had.

25 Q He had mentioned that that was going on?

1 **A** Correct.

2 **Q** Did he go over with you under the rules of
3 evidence in South Carolina what the State would need to
4 establish in order to be able to lawfully introduce
5 sworn testimony from a prior proceeding?

6 **A** No, he didn't. He did not.

7 **Q** Did he discuss with you the Crawford decision and
8 other matters that would tend to go towards that
9 testimony not being admissible?

10 **A** No, he did not.

11 **Q** He did not?

12 **A** No.

13 **Q** When the trial recessed and you came back the
14 following day, as we've gone over here --

15 **A** Right.

16 **Q** -- Mr. Godfrey said that he was withdrawing his
17 objection to Mr. Hyder, Sr.'s, testimony from the 1997
18 trial coming in, and the judge asked him if he had
19 discussed it with you?

20 **A** Right.

21 **Q** Had he discussed it with you and given you the
22 opportunity to make the decision?

23 **A** No, he had not. I believe that the record
24 reflects that I asked to speak to Mr. Godfrey, and this
25 was right before they put me on the stand, before I was

1 put on the stand. We left the courtroom, and that's
2 when we talked.

3 Q But the night before when the case was recessed
4 for the evening, did he discuss with you the pros and
5 cons for letting Mr. Hyder's testimony come in from the
6 first trial and the reasons why you might not want to?

7 A No, he didn't do that. If I could explain. The
8 next day when I was set to testify, my question to him
9 was about taking the stand for one and why he wasn't
10 fighting against it, letting Mr. Hyder's testimony come
11 in.

12 Q Well, there is a place in the transcript where the
13 judge asks Mr. Godfrey about this decision, and
14 Mr. Godfrey says he discussed it with you. I believe
15 he says he discussed it with your family, and then the
16 judge asked -- does not ask you whether you're in
17 agreement with the decision, just asked you if you have
18 any questions about it. Do you recall that?

19 A Right. I recall that.

20 Q Okay. Now, when Mr. Hyder, Sr.'s, testimony came
21 in, were you expecting there to be anything else that
22 would come into evidence as a result of that statement
23 being introduced?

24 A Right. I was expecting for Mr. Hyder's statement,
25 his actual statement be included in the record, and if

1 that came, if that testimony was allowed in, because
2 last I knew that he was fighting against it, would also
3 that come in and the statement from Mike Kitts and
4 everything else, the other investigator, any of that
5 evidence.

6 Q So you had been there, obviously, for the PCR
7 proceeding, correct?

8 A Right.

9 Q And you knew you won the PCR?

10 A Right.

11 Q And part of the reason you won the PCR was that
12 there was all this information available to Louis Cox
13 to use to impeach, among other people, Mr. Hyder, Sr.,
14 correct?

15 A Correct.

16 Q So you're saying that you thought that when
17 Mr. Hyder's '97 testimony came in, that all this other
18 stuff that had been the subject of the PCR would also
19 come in?

20 A Correct.

21 Q And you didn't understand that that was not going
22 to be the case?

23 A Correct.

24 Q If you had understood that that was not going to
25 be the case, when the judge asked if you had had any

1 questions, would you have spoken up right then and
2 there?

3 A Of course.

4 Q Okay. There are a number of ineffective
5 assistance of appellate counsel issues that I have
6 added to your post-conviction relief case. But a
7 couple of them are personal to you, so let me stop and
8 ask about that.

9 You at some point asked Joey Savitz to provide you
10 with documentation in your case?

11 A Correct.

12 Q What were you asking him for?

13 A I was asking for all of those records that I had
14 asked for originally to support what he did have on the
15 record because I felt like it needed to be on the
16 record to support it on the appeal.

17 Q So let me stop you. What you said a few moments
18 ago is that when Hyder's testimony came in, you were
19 expecting all this stuff that the PCR was about to also
20 come in?

21 A Right.

22 Q And then it didn't?

23 A Right.

24 Q And then your case is on appeal, and Joey Savitz
25 is your appeal lawyer?

1 A Correct.

2 Q So you were trying to get copies of the documents
3 and things that were the subject of the PCR?

4 A Correct.

5 Q From Mr. Savitz?

6 A Yes, ma'am, correct.

7 Q At some point did that turn into a bit of a
8 disagreement between you and Mr. Savitz?

9 A Well, I couldn't reach Mr. Savitz, and I wrote him
10 several letters. And I ended up filing with the
11 supreme court or disciplinary council because I
12 couldn't have any communication with him, and I felt
13 like it was that important that it be there, and I
14 filed with the supreme court.

15 Q Okay. And once that happened, did you have any
16 discussion with Mr. Savitz at all about whether or not
17 it would be appropriate for him to continue on as your
18 lawyer in your direct appeal?

19 A Yes. Well, I actually got something back from
20 disciplinary council, and I wrote the supreme court
21 also saying that they would not remove Mr. Savitz
22 because I felt like it was a conflict. He didn't have
23 time to represent me.

24 Q And your motion was denied?

25 A Correct.

1 Q But did Mr. Savitz, did he respond to your request
2 that he be relieved as counsel?

3 A No, he didn't.

4 Q And you feel that he should have made the Court
5 aware of the fact that there had been a deterioration
6 in his relationship with you as a result of the
7 grievance?

8 A Correct.

9 Q Now, the man won for you in the court of appeals.
10 You understand that, right?

11 A Right.

12 Q But when the supreme court reversed the favorable
13 decision of the court of appeals, did you want him to
14 file a petition for rehearing in the supreme court?

15 A Yes, I did.

16 Q And did you discuss that with him?

17 A I was never able to get in touch with Mr. Savitz
18 because Mr. Savitz retired. And so I wrote appellate
19 counsel, and their response was to send me a PCR
20 application, and they didn't assist me with an appeal.

21 Q And did you attempt to file a petition for
22 rehearing on your own in the supreme court?

23 A Yes, I did. And I got a decision, well, actually
24 from the clerk of court of the supreme court saying
25 that since I was represented by counsel, that I could

1 not file any type of appeal or petition for rehearing.

2 So it was denied.

3 Q And that correspondence from the Court was citing
4 the rule against hybrid representation?

5 A Correct.

6 Q And basically informed you if one was going to be
7 filed, it had to be filed by your lawyer?

8 A Correct.

9 Q Okay. When you won in the court of appeals, did
10 Mr. Savitz notify you when the State filed a notice of
11 appeal from the court of appeals decision?

12 A No, he did not.

13 Q How long was it before you realized that the State
14 was actually appealing the victory you had had in the
15 court of appeals?

16 A Almost two years. When I received the documents,
17 when he actually sent me the documents where I was
18 denied, I received a copy of it and all that other
19 stuff together which was the petition for certiorari
20 and all of that where they had already filed that stuff
21 and they had briefs.

22 Q So the first you knew about your case being
23 appealed by the State was when the case had already
24 been decided and you received the State's petition for
25 writ of certiorari, Mr. Savitz's return, the Court's

1 ruling, everything in one fell swoop, you got it all at
2 one time?

3 A Correct.

4 Q And at that point is that when you contacted him
5 or attempted to contact him to ask him to file a
6 petition for rehearing?

7 A Yes.

8 Q And at that time you were told he had retired?

9 A Correct.

10 Q Do you have a copy of the letter that Mr. Savitz
11 sent you notifying you of the result in the State's
12 appeal?

13 A Well, I checked my documents, but I know they are
14 in a file. I don't -- I don't have it on me. But I do
15 have it, and I did take -- I did take liberty. I sent
16 you one. You may not have gotten it yet, but I did
17 make note of it.

18 MS. SHURLING: Your Honor, I would ask that the
19 record be held open for like ten days to give me a
20 chance to get a copy of that documentation from the
21 office of appellate defense. This is the first I've
22 understood Mr. Smith to be saying that he got all of
23 those documents sent to him at one time. I worked in
24 appellate defense for 15 and a half years, so there
25 should be a transmittal letter readily available from

1 them that will document that, and I'd like to have the
2 record held open for that. Do you mind?

3 MS. WHITE: Exactly what documents?

4 MS. SHURLING: He says that the court of appeals
5 ruled in his favor, and then for like two years he
6 didn't know what was going on, and then he gets a
7 letter from Joey Savitz sending him the State's
8 certiorari petition, Mr. Savitz's return and the
9 opinion of the supreme court reversing the court of
10 appeals, that he got it all at one time in one mailing.
11 And this is the first I have understood that from
12 Mr. Smith, and I just want the record to have that
13 document that will document that everything was sent to
14 him at one time.

15 MS. WHITE: No objection.

16 THE COURT: Ladies, from our pretrial discussion,
17 it's my understanding that each of you wish to be able
18 to brief your respective positions after getting a
19 transcript.

20 MS. SHURLING: Yes, sir.

21 THE COURT: So why don't we just add any
22 additional period to supplement the record like you
23 request within this ten-day frame. I think that's a
24 reasonable amount of time.

25 MS. SHURLING: Well, your Honor, we're actually

1 going to have to request a transcript of today's
2 proceeding which will probably take 30 days, and then I
3 would ask, based on the length of today's proceeding
4 and the complexity of the case, for 30 days to brief
5 it, so.

6 THE COURT: All right. That's -- that's fine.
7 That's fine. I mean, because I would imagine we have
8 taken up most of the day, so I would imagine the
9 transcript will take a fair amount of time for the
10 court reporter to prepare. She may be able to get it
11 done quicker than that, but certainly she has a lot of
12 other requests, too. So 30 days is probably a
13 reasonable estimation or estimate of what that's going
14 to take. And let's just say that you will receive the
15 transcript, you will have 30 days to brief your
16 respective positions, then you may supplement the
17 record.

18 MS. SHURLING: Any time before that is filed?

19 THE COURT: That would be fine. But you would
20 have to have any materials that you want to supplement
21 the record done with that brief.

22 MS. SHURLING: Your Honor, what I will do since
23 Ms. White is leaving the attorney general's office, I
24 will send anything I find to Justin who has worked with
25 her on this case -- and I'll copy Ms. White, but she

1 will be at the public defender's office by then -- and
2 we'll resolve among ourselves any discussion and/or
3 objection before we actually physically file.

4 THE COURT: That's fine. That's fine.

5 BY MS. SHURLING:

6 Q Mr. Smith, with regard -- I'm going to do a big
7 catchall here. With regard to all the various things
8 that I have gone over with Mr. Godfrey today that we
9 submit he should have done, could have done, are each
10 of those things things that you would have wanted and
11 expected your defense attorney that was fighting for
12 your life to do for you?

13 A Correct. I would have.

14 Q You also felt strongly that Mr. Savitz should have
15 briefed the denial of your request for a directed
16 verdict of acquittal?

17 A Correct.

18 Q All right. And real important issue. State v.
19 Belcher. You're familiar with that decision and what
20 it did in terms of charging permissive inference of
21 malice in the presence of something that would mitigate
22 a charge of murder to a lesser or a self-defense case,
23 correct?

24 A Correct.

25 Q And it is your position that you would have wanted

1 Mr. Godfrey to raise that issue on your behalf at
2 trial?

3 A Correct. Well, a similar issue, which was malice,
4 the inference of malice, and he -- all of this evidence
5 was there. He already knew.

6 Q Okay. You would like him to have raised the
7 fundamental -- the basic issue that became the Belcher
8 case, you would have expected him to raise on your
9 behalf on the facts of your case at your trial?

10 A Yes.

11 Q You also believe that there are other problems
12 with your malice instruction that he should have
13 objected to above and beyond that consideration of the
14 Belcher case?

15 A Yes.

16 Q Okay. Now, is there anything else that I've left
17 out?

18 A No. You haven't left anything out. I'm satisfied
19 that we have covered all of the issues.

20 Q Any of the appellate counsel issues that I have
21 not completely covered will be covered as matters of
22 law in the memorandum. You understand that?

23 A Yes.

24 Q So with the exception of that, have we touched on
25 everything here today?

1 **A** Yes.

2 MS. SHURLING: No further questions.

3 THE COURT: Ms. White, your witness.

4 MS. WHITE: Thank you, your Honor.

5 CROSS-EXAMINATION

6 BY MS. WHITE:

7 **Q** Mr. Smith, I'm just going to ask you a couple
8 questions going over mostly about how the trial was
9 handled and some of the testimony that came forward.

10 The testimony of Angie Smith is obviously the
11 person that was with you that evening when you went to
12 the trailer?

13 **A** Yes.

14 **Q** And we've talked about whether or not she was
15 properly cross-examined or some things were objected to
16 by the attorney. You would agree with me, though, that
17 if the transcript reflects that during her testimony
18 she referenced you and the victim either falling out of
19 the trailer, scuffling or fighting about 15 times --

20 **A** It was referenced in both trials.

21 **Q** And, in fact, during this trial, your attorney
22 cross-examined her about the fact that you and
23 Mr. Finley were fighting or scuffling and that she
24 heard the pop at the same time and you fell; is that
25 right?

1 A Not in that exact order, but if I may, simply what
2 she said changed two or three times, but she did say
3 that when she turned and looked up, she saw us like
4 this. She didn't see us fighting. She said it was
5 like they were scuffling, and that's what she says she
6 saw.

7 Q Okay. Pages 84 and 85 of the transcript, though,
8 you would agree with me, though, if it says in here
9 that Bill cross-examined her and said, "They were
10 falling at that point in time?" "Yes, sir." "Is that
11 when you heard the pop?" "I heard the pop, yes, sir."
12 "That was when they were falling?" Then she said,
13 "Before they were falling, there was scuffling,
14 scuffling." And then Bill said, "So they were
15 fighting?" And she said, "Well, yes, in so many
16 words." So she did say that you were fighting?

17 A Correct or something.

18 Q Okay. He also asked her about the fact that she
19 used crack cocaine and had gotten crack from you before
20 without paying; is that right?

21 A She had.

22 Q He also asked about the fact that -- the fact that
23 she got in the car and told you where to go to get to
24 the trailer?

25 A She did.

1 Q And he asked her, "What directions did you give
2 him?" And she started explaining, and he said, "So
3 didn't you, in fact, tell David Smith where to go"?

4 A She did.

5 Q Okay. And so she also said at one point, he said,
6 "Did you ever see a gun?" And she said, "No, I did
7 not, sir." "You never saw a gun, right?" "No, I did
8 not see the gun." So she gave conflicting testimony,
9 obviously?

10 A Right.

11 Q Okay. And your attorney attempted to point that
12 out during his examination of her?

13 A He did.

14 Q Okay. In regards to Otis Hyder -- and
15 Ms. Shurling talked about it -- on page 161, the Court
16 asked Mr. Godfrey when he indicated he was withdrawing
17 his objection to Mr. Hyder's prior testimony coming in,
18 he said he had had an opportunity to speak with you
19 briefly about the issue this morning and spoke to his
20 family about it last night. And then the Court asked
21 you if you had any questions about that, and you said
22 "No, sir." Do you recall that?

23 A I -- I recall saying that. We had a brief, what
24 do you call it, a break for me to talk to him, but as
25 far as it being that he and I had discussed that issue,

1 we didn't discuss it that night. And from what I
2 recall, my family, my mother who was here and the rest
3 of my family, what I discussed with them was the fact
4 that Mr. Godfrey wanted me to testify because I hadn't
5 testified, and he wanted me to testify. And I was
6 looking for where is my defense because he told me it
7 was only two witnesses, myself and Donald Girndt. So I
8 wanted to know what am I testifying? Where is all this
9 other stuff?

10 Q And I understand that might be a conversation, but
11 at this point in the record the Court asks Mr. Godfrey
12 and said, "You're going to withdraw your objection and
13 allow the testimony from the prior proceeding to be
14 introduced into the trial of this case." And then he
15 said, "Have you had an opportunity to discuss that with
16 Mr. Smith?" And Mr. Godfrey, on the record to the
17 Court that day said, "Yes, I spoke with him briefly
18 about that this morning and spoke to his family about
19 it last night."

20 Your testimony today is that was only about
21 whether or not you were going to testify, that that had
22 nothing to do with Otis Hyder's testimony?

23 A Correct. Because we kind of had some
24 confrontation. As I said, I was wondering where is the
25 rest of the evidence you didn't present? That's what

1 we were discussing and whether or not I was going to
2 testify because he hadn't presented a defense.

3 Q Now, in regards to the other witnesses, you don't
4 have any evidence to support a claim that Terry
5 Bradley, Julian Terry Bradley, was involved, took
6 drugs, or had anything to do with you getting
7 potentially robbed that night, do you?

8 A I don't have any direct evidence.

9 Q It's just a possible idea?

10 A They were there.

11 Q Okay. You also don't have any evidence that
12 Mr. Bradley or Ms. Smith or anyone received any kind of
13 deal or consideration in conjunction with their
14 testimony?

15 A Well, I can say this: I knew Ms. Smith and I knew
16 about her past, and, I mean, I don't know how Ms. Smith
17 was not, in fact, charged with anything.

18 Q Okay. So there were never any charges against
19 anyone related to this incident that were dropped, to
20 your knowledge?

21 A Not to my knowledge.

22 Q No one was ever charged?

23 A Right. Not to my knowledge.

24 Q Okay.

25 A Except -- take that back. Except for my wife

1 initially was charged because she was my wife.

2 Q Okay. But that ended up being dismissed?

3 A Right.

4 Q Okay.

5 MS. WHITE: Just a moment, please, your Honor.

6 BY MS. WHITE:

7 Q Your attorney requested in regards to jury
8 charges, he requested involuntary manslaughter,
9 voluntary manslaughter and accident, didn't he?

10 A He did.

11 Q All those were denied, but you were given a murder
12 and a self-defense charge; is that right?

13 A Correct.

14 Q Okay. In regards to the argument, obviously, as
15 Mr. Godfrey testified, as you've testified, it was a
16 self-defense argument; is that right? Essentially that
17 you were robbed or you were being targeted to rob, and
18 in the midst of that when you took your gun out to
19 scare him and began scuffling, it went off in that
20 midst; is that kind of in a nutshell a very basic --

21 A What happened was I was -- he was approaching me
22 or encroaching on me. I didn't take a gun out to scare
23 him, but I saw the need to defend myself. As I said,
24 there was three people in the trailer. And then this
25 guy is coming with me and he's serious. I'm taking

1 this. I'm taking this. So I don't know what to do. I
2 take it out, but I didn't point it at him. I just took
3 it out. And he saw the gun and started talking about
4 it, but he's still coming towards me as if like I'm
5 not -- "Okay, I see what you're saying," or whatever,
6 but to put his hands on me. So that's what happened in
7 that situation.

8 Q And, in fact, his body, when the police got there,
9 he was out of the trailer partially, so it's clear
10 that, obviously, whatever -- there was some interaction
11 not in the trailer but it occurred kind of either as
12 you were walking out or at the doorway?

13 A Well, we were at the doorway when, you know, I was
14 trying to get out and we were falling out of the door.

15 Q Now, during your attorney's closing argument, he
16 argued several times that this was self-defense, that
17 there was a scuffle, that you had come falling out of
18 the trailer, that you were being robbed. Page 279,
19 your attorney says, "He was basically robbing David
20 Smith. He knew David Smith had more drugs on him." He
21 also said, "Otis Hyder says that Robert Finley grabbed
22 the drugs." He then references the fact that the
23 victim looked wild, was walking towards you and is 6'2"
24 and over 200 pounds. Do you recall him telling the
25 jury that in closing?

1 A Correct.

2 Q He also said that you pulled the gun out just
3 because you wanted to stop anything else from
4 happening, but the victim came and swatted at the gun,
5 came at you; is that right?

6 A Right. He disregarded it and continued his
7 attack.

8 Q And then Mr. Godfrey also informed the jury that,
9 again, the victim had his hands on you, you were
10 hitting him trying to get off and somehow the gun
11 discharged. You were being attacked and this was a
12 case of self-defense. He said that three or four times
13 during his closing, did he not?

14 A I'm not sure if it was that many, but he never
15 mentioned that I didn't pull the trigger.

16 Q Okay. And you would agree with me, though, if it
17 says that in the transcript, that's probably what he
18 said at different times?

19 A Correct.

20 Q And you said he never said that you pulled the
21 trigger, but he's also talking to the jury about the
22 fact that if you've got the gun, you had no intention
23 of hurting the man because if you were standing there
24 and at close range, you wouldn't have shot him in the
25 head, you would have maybe shot him in the body, that

1 that was more of a natural thing, that obviously from
2 where the shot was it was more of the reaction and the
3 gun just discharged?

4 A Well, I believe he said something about the gun
5 discharging. The thing of it is I went through two
6 trials. The first trial they said I simply stood there
7 and shot the man until they found out he was 6'2" and
8 the bullet went up in the air and not down. He was
9 6'2" and I was shorter than him. So that was the
10 prosecution's theory the first time.

11 Then the second time -- you know, that's one of
12 the reasons I didn't understand how I was being retried
13 in a whole new, what do you want to call it, theory,
14 you know. So it didn't make sense to me why we didn't
15 get the same charge, but then at the same time you got
16 different prosecutors. You're guessing at different
17 things.

18 Q Right. And the testimony -- the witnesses that
19 were presented by the State, they were almost identical
20 except for Ms. Morgan Simmons; is that right?

21 A Well, all of the people that testified at the
22 first trial were not at the second trial.

23 Q Okay. And everyone that testified -- your
24 testimony is that not everyone that testified at the
25 first trial testified at the second?

1 A Correct.

2 Q Could it be that the only person that did not
3 testify is Morgan Simmons for the State? I know there
4 were a couple of people that testified for you at the
5 first trial.

6 A Right. I understand what you're saying, but
7 everybody did not testify. You had all type of other
8 people who were in law enforcement that testified, but,
9 no, everybody didn't testify.

10 Q All right. And Mr. Godfrey represented you at the
11 first PCR. That was in 2000; is that right?

12 A I believe it could have been 2002.

13 Q Okay. The first trial was in 2000; is that right?

14 A No, it was in 1997. I could have it wrong, but I
15 thought I went to PCR either in 2002 or 2001, I
16 believe.

17 Q I apologize. These dates are getting mixed up.

18 So he represented you from the first PCR until the
19 time of your second trial which was in 2005?

20 A Well, once he represented me, I was released.

21 Q Right.

22 A And when it came to an attorney, I was in another
23 state, so I just chose Mr. Godfrey.

24 Q Right. And that's once the State decided to
25 recharge you and retry it?

1 A Right. Because when I left here, I was let go and
2 told that I didn't have any charges against me. So,
3 you know, I didn't do anything wrong in leaving, but I
4 left because I didn't have any charges and I just had
5 heart surgery, so I left the state to be close to
6 family.

7 Q But you would agree with me that Mr. Godfrey was
8 pretty familiar with your case after representing you
9 on PCR and being involved with it to that extent before
10 your second trial?

11 A Well, I would say he was familiar, but in the
12 trial he did nothing like he did in the PCR because I
13 was wondering what's wrong with him, what's going on
14 because he had all of this stuff before, but I asked
15 for my files. He didn't have them, so, you know, we
16 don't know what he had basically. At least I don't
17 know what he had.

18 MS. WHITE: Your Honor, I think that's all I have
19 of this witness.

20 THE COURT: Any redirect?

21 REDIRECT EXAMINATION

22 BY MS. SHURLING:

23 Q Angie wasn't charged with anything that was
24 subsequently dismissed, I believe was your testimony a
25 moment ago, correct?

1 A Correct. That I know of.

2 Q But the fact of the matter is from 1997 when she
3 first testified against you all the way through 2005
4 when she testified against you at the second trial, she
5 was never charged with the drugs she admitted
6 distributing or with being party to this murder, right?

7 A Correct.

8 Q And would you agree that not being charged at all
9 is even better than being charged and it being
10 dismissed?

11 A Right.

12 Q And at the time of her testimony, she would not
13 have had any way to know whether or not the State might
14 charge her yet if they weren't pleased with her
15 testimony, right?

16 A Correct. I don't know what she had, what all.

17 Q And so she admits that she set up a drug deal with
18 the deceased, that she called and asked you to go sell
19 this man some drugs, and it was her deal. She set it
20 up. And, in fact, she got ahold of your drugs that
21 night and passed them on to other people, and yet she
22 got no charges either in connection with the drugs or
23 the murder, right?

24 A As far as I know, correct.

25 Q But your wife, who had done nothing more than

1 arguably try to cover for her husband, got charged with
2 accessory after the fact to murder; isn't that true?

3 A She did.

4 Q And would you have wanted your attorney to point
5 out the disparity in treatment between people who did
6 testify for the State and people who didn't?

7 A Yes.

8 MS. SHURLING: No further questions.

9 MS. WHITE: Nothing further from the State, your
10 Honor.

11 THE COURT: Thank you, Mr. Smith. You may step
12 down.

13 MS. SHURLING: Your Honor, it's my understanding
14 from Ms. White that the State will immediately order
15 the transcript from today's proceeding, and then
16 whenever we get it, that we will then have 30 days from
17 receipt of that record to get your Honor either a
18 memorandum or proposed -- memos in the form of proposed
19 orders.

20 THE COURT: That is correct.

21 MS. SHURLING: Thank you very much.

22 MS. WHITE: Yes, your Honor.

23 MS. SHURLING: Thank you for your patience with a
24 rather complicated case.

25 THE COURT: Well, I would commend the attorneys.

1 You got through a very complicated and lengthy process
2 in an expedited manner today. I understand you were
3 dealing with a witness that has serious health issues,
4 and the Court appreciates your efforts to get him in
5 and out with as little disruption in his life as
6 possible.

7 MS. SHURLING: Thank you.

8 I should put on the record -- this sounds maybe a
9 little trivial, but I always point things like this
10 out. I have shared with Mr. Smith the fact that I know
11 Steve Denton who is now in private practice of law,
12 that I was involved in a major drug case in South
13 Carolina a few years back when he was still with the
14 sheriff's department and met him at that time along
15 with Steve Cooper, who is the head of their narcotics
16 division and that I know them casually, socially and
17 professionally.

18 I assured Mr. Smith then and I do now that that
19 wouldn't have any impact whatsoever on my
20 representation of him in this case, and he had no
21 problem with me handling it even though I disclosed
22 that information to him.

23 I just want to verify for the record that that was
24 disclosed and that you didn't have a problem with me
25 continuing with the case; is that correct?

1 MR. SMITH: Right.

2 MS. SHURLING: Thank you.

3 THE COURT: Thank you, Mr. Smith.

4 All right. We're now adjourned.

5 MS. WHITE: Thank you, your Honor.

6 (WHEREUPON, the hearing ended at 3:21 p.m.)

7 ***END OF REQUESTED TRANSCRIPT OF RECORD***

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

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

August 11, 2015

Diane L. Marcengill, RPR, CRR
Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF GENERAL SESSIONS
SEVENTH JUDICIAL CIRCUIT

The State of South Carolina,

AFFIDAVIT OF DISCOVERY

Indictment No(s):

Warrant No(s):

Y.

David Smith

Defendant.

PCR Hearing

PERSONALLY APPEARED BEFORE ME, the undersigned deponent who being duly sworn, says that he/she copied the following materials and provided same to the Defendant's attorney of record by:

☒ HARD COPY; ☐ ELECTRONICALLY (e-mail); ☒ MEDIA (CD, DVD)

DOCUMENT	Page No.	DOCUMENT	Page No.
☐ Warrant(s) or Ticket(s)		☐ Forensic Report(s) (ID Reports)	
☐ Incident Report(s)		☐ Evidence Sheet(s)	
☐ Investigation Report(s)		☐ Photograph(s)	
☐ Supplemental Report(s)		☐ Line-up(s)	
☐ Waiver of Rights Form(s)		☐ Video/DVD	
☐ Voluntary Statement(s)		☐ SLED Request Form(s)	
☐ Witnesses Written Statement(s)		☐ Children's Advocacy Center Report	
☐ Defendant's NCIC (Rap)		☐ CAC Video	
☐ Consent to Search Form(s)		☐ DSS records	
☐ Search Warrant and Return			
☐ Drug Report(s)			
☐ SLED Lab Report(s)			
☐ Hospital Lab Report(s)			
☒ Solicitor's Reciprocal Rule 5			

☒ Other:

1 CD of photos + 189 pages

TOTAL COPIED/NUMBERED: 194 DATED

I, Wade Sharline, attorney for the Defendant(s) or his/her designee, have reviewed the above-referenced Affidavit and/or documents and accept them as the response to the Rule 5/Brady Motion in this matter. I also accept service of the Solicitor's Reciprocal Rule 5.

Signed/Accepted this 12 day of September, 2014

Jay Goodwin
Attorney or Designee

C. B. Lindse
SOLICITOR'S OFFICE

~~SEP~~ 16 2014

SWORN to before me this _____ day

of _____, 20____

Notary Public for South Carolina

My commission expires:





SPARTANBURG COUNTY SHERIFF'S OFFICE
BILL COFFEY, SHERIFF

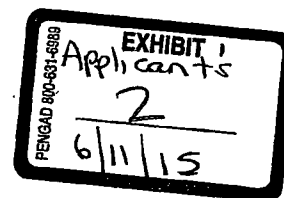
I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God.

Angela Denise Smith
(Signature)

1/13/97
(date)

SWORN to before me this 13
day of January, 1996.

[Signature] (SEAL)
Notary Public for South Carolina
My Commission expires: Dec. 1, 2001



SPARTANBURG COUNTY SHERIFFS DEPARTMENT
Spartanburg, South Carolina

5-3

INTERROGATION WAIVER FORM

Name

Angela D. Smith

Address



John Doe

Age

34

Date

1/13/97

Time

11:33 AM

Location

Sherriff Office

401. I have the right to remain silent. A.S.
402. Anything I say can and will be used against me in a court of law. A.S.
403. I have the right to talk to a lawyer and to have him present with me while I am being questioned. A.S.
404. If I cannot afford to hire a lawyer, one will be appointed to represent me before any questioning, if I so wish. A.S.
405. I have the right to stop answering questions at any point in the questioning. A.S.

The above rights have been read to me by

A. J. Denton

I have read same and I understand my rights fully.

Witness

A. J. Denton

Signed

Angela D. Smith

I waive (give up) my rights as explained above and agree to talk to officer

Det. Denton

in reference to

Homicide of Robert Taylor

(CASES OR CHARGES)

and any statement that I may

make is of my own free will, without fear, threat or promise or favor or reward of any kind.

I am able to read and write the English Language and finished 72 years in school.

Witnessed

A. J. Denton

Signed

Angela D. Smith

Notorized

A. J. Denton

Expiration Date

Dec 9, 2000

11:38 AM

STATEMENT OF: ANGELA DENISE SMITH AGE 34 DATE 011397

ADDRESS: FISHER AVENUE SPARTANBURG SC 29301

PHONE # CASE:

ON SUNDAY MORNING ABOUT 2:00 OR A LITTLE AFTER 2:00 A.M., I LOOKED OUT AND SAW DAVID SMITH'S CAR OUTSIDE MY HOUSE. I HAD BEEPED HIM, HIS NUMBER IS PIN

HE USUALLY CALLS BEFORE HE COMES OVER. BUT HE MUST HAVE JUST CAME STRAIGHT OVER. I WALKED OUTSIDE. I HAD MY JEANS ON, I PUT SOME SWEATPANTS ON OVER THEM. I GOT IN THE CAR WITH HIM. WE WENT OVER TO ROBERTS. HE CALLED EARLIER, MY BROTHER RODNEY GAVE ME THE PHONE, ROBERT WANTED SOME ROCKS, FIFTY DOLLARS WORTH. WE LEFT AND DROVE TO ROBERTS. ACROSS TEXTILE ROAD, DOWN WILLIAMS STREET, CROSSED THE WOODEN BRIDGE, LEFT ON FARLEY AVENUE, RIGHT ONTO CASE AVENUE, THEN RIGHT ON ROAD WHERE ROBERT LIVES, WE PULLED UP POPS TRAILER. ON THE WAY OVER, HE SAID ROBERT OWES \$40.00. HE SAID WHAT DOES HE WANT- I SAID A FIFTY. ROBERT LOOKED OUT WINDOW. DAVID WAS COUNTING THE ROCKS. HE HAD FIVE ROCKS IN HIS HAND. HE SAID "GET OUT AND GET HIS MONEY FIRST". I GOT OUT AND WENT TO THE DOOR. I WENT IN. I SAW HIM AND THE OLD MAN AND I SPOKE WO THE OLD MAN AND SOMEONE WAS ON THE COUCH WITH THE COVER OVER THEM. I SAID, "ROBERT. YOU GOT THE MONEY, DAVID WON'T GIVE YOU THE RIGHT STUFF WITHOUT THE MONEY". ~~IN ROBERTS MIDDAVED DVHONENIT GIVEOME THE DRUGS WITHOUT THE MONEY. I LEFT AND TOLD DAVID.~~ I LEFT AND TOLD DAVID. DAVID WENT IN THE TRAILER. HE WAS IN THERE ABOUT 5 OR 7 MINUTES. THE NEXT THING I KNEW, ROBERT AND DAVID WERE FALLING OUT THE DOOR. I SAW DAVID COMING OUT FIRST. I HEARD A "POP". IT WASN'T LOUD. I SAW ROBERT LYING ON THE STEPS. I WAS FREAKED OUT. I'VE BEEN FREAKED OUT EVER SINCE. DAVID RAN AROUND THE BACK OF THE CAR. HE GOT IN THE CAR. HE DROVE OFF IN A HURRY. WE GOT TO WOFFORD STREET AND TURNED LEFT ONTO WOFFORD STREET OFF TEXTILE ROAD. HE KEPT SAYING "YOU DON'T KNOW NOTHING, YOU AIN'T SEEN NOTHING". I KEPT ASKING DAVID TO LET ME OUT OF THE CAR. HE SAID "I GOT TO GET RID OF THE GUN, AND THE DOPE". HE KEPT GOING INTO THE POCKET SAYING "I GOT TO GET RID OF THE GUN AND THE DOPE". "I GOT TO GET RID OF THE GUN AND THE DOPE". HE LET ME OUT AT HERBERT STREET. HE TOLD ME AGAIN,

I have read this statement consisting of 2 page(s), and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 12:55 P.M. on the 13 day of JANUARY, 19 97.

WITNESS: *[Signature]* Angela D. Smith

STATEMENT OF: ANGELA DENISE SMITH AGE 34 DATE 011397
ADDRESS: FISHER AVENUE SPARTANBURG SC 29301
PHONE # CASE:

"I GOT TO GET RID OF THE GUN, DON'T SAY NOTHING. YOU DON'T KNOW NOTHING". I WENT TO MIKE'S NEIGHBORS HOUSE. MIKE IS ROBERT LEE'S BROTHER. I ALWAYS VISIT MIKE. SOMETIMES. THE NEIGHBOR DIDN'T HAVE A PHONE. I WENT TO MIKE'S, HE LET ME USE THE PHONE. I CALLED MY HOUSE. THE PHONE WAS OFF THE HOOK. I CALLED DAVID'S HOUSE. DAVID ANSWERED THE PHONE. HE SAID KAREN WAS GONE IN THE BURGANDY BAR, WHEN I ASKED FOR HER. I FINALLY CALLED MY HOUSE AGAIN. I STARTED TO TELL MIKE WHAT HAPPENED. I CALLED MY NEIGHBOR KIM, TO TELL MY MOM TO PUT THE PHONE ON THE HOOK. KAREN ANSWERED THE PHONE. I TOLD HER THAT DAVID HAD JUST SHOT SOMEONE. WE WERE IN THE BURGANDY CAR WHEN THIS HAPPENED. SHE CAME AND GOT ME. KAREN DID. KAREN WAS IN THE SAME CAR DAVID AND I WERE IN WHEN DAVID SHOT ROBERT. KAREN FREAKED OUT. SHE WANTED A CIGARETTE. SHE HAD HER CIGARETTES. WE DROVE BACK TO MY HOUSE. MIKE CAME WITH US. HE KNEW BY THEN TOO. KAREN JUST FREAKED OUT. SHE TOLD ME DAVID CAME HOME. TOLD HER TO GET HER DRUGS AND LEAVE. THAT'S WHEN SHE HAD COME TO MY HOUSE BEFORE I CALLED HOME. SHE SAID SHE WAS GOING HOME, IT WAS 8:00 A.M. OR SO. AND TALK TO DAVID. SHE CALLED HOME. THEN SHE WENT HOME. SHE GAVE MIKE A RIDE HOME. I CALLED HER LATER ON. SHE SAID SHE HAD JUST GOT UP. SHE ACTED LIKE SHE COULDN'T TALK. I FINALLY TOLD RODNEY WHAT HAPPENED. I TOLD HIM DAVID HAD SHOT ROBERT. I KEPT TELLING DAVID AFTER HE SHOT ROBERT TO LET ME OUT OF THE CAR. I WAS SCARED OF HIM. I THOUGHT HE MIGHT SHOOT ME. ALSO ONE DAY LAST WEEK, DAVID CAME INTO THE ROOM, OVER AT DAVID'S HOUSE AND HE HAD A REAL LITTLE GUN. IT WAS SILVER AND HAD A BEIGE HANDLE. HE SAID HE WAS GIVING IT TO KAREN FOR WHEN HE WENT OUT OF TOWN.*****

*****END OF STATEMENT*****

I have read this statement consisting of 2 page(s), and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 12:55 P.M. on the 13 day of JANUARY, 1997.

WITNESS:

WITNESS:

Signature of person making statement

STATEMENT OF: Angela Denise Smith AGE 34 DATE 1/13/97
 ADDRESS: Fisher Avenue Stry, S.C.

PHONE # _____ CASE: _____

On Sunday morning about 2:00 or a little after 2:00 A.M. I looked out and I saw David Smith's car outside my house. I had heard him; his number is

He usually calls before he comes over. But he must have just come straight over. I walked outside. I had my jeans on I put some sweat pants on over them. I got in the car with him. We went over to Roberts. He called earlier, my brother Kathy gave me the phone. Robert wanted some rocks just dollars worth. We left and drove to Roberts, across Leetle Rd. down Williams Street crossed the wooden bridge, left on Fisher Ave. right onto Case Ave, then right on road above Robert lives, we pulled up to Pope's trailer. On the way over, he said Robert owed \$40⁰⁰. He said what does he want - he said a fifty. Robert looked out window. David was counting the rocks. He had five rocks in his hand. He said "get out and get his money first." I got out

I have read this statement consisting of 4 page(s), and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 12:55 P.M. on the 13 day of January, 1996.

WITNESS: [Signature] Angela D. Smith
 Signature of witness and declarant

AGE

DATE _____

PHONE #

CASE:

PHONE # _____ CASE: _____

and went to the door. I went in. I saw him and the old man and I spoke to the ~~other~~ old man and someone was on the couch with the cover over them. I said "Robert, you got the money, David won't give you the stuff without the money." Robert said I have money. I told him David wouldn't give me the drugs without the money. I left and told David. David went in the trailer. He was in there about 5 or 7 minutes. The next thing I know, Robert and David were talking out the door. I saw David coming out just I heard a "pop", it wasn't loud. I saw Robert lying on the steps. I was freaked out. I've been freaked out ever since. David ran around the back of the car. He got in the car. He drove off in a hurry. We got to Hopedale Street and turned left onto Wofford off Textile Rd. He kept saying "You don't know nothing, you ain't seen nothing." I kept telling David to give me the gun & the cash. I had to get rid of the gun, and the dope.

I have read this statement consisting of 4 page(s), and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 12:33 P.M. on the

13

Day of

January

.15

WITNESS:

WITNESS:

Signature of Person giving notice

STATEMENT OF: Angela Louise Smith AGE 24 DATE 1/13/97

ADDRESS: _____

PHONE # _____ CASE: _____

He kept going into his pocket saying "I got to get rid of the gun and the dope." I got to get rid of the gun and the dope. He let me out ~~at~~ at Herbert Street. He told me again, "I got to get rid of the gun, don't say nothing, you don't know nothing." I went to Mike's neighbor house. Mike is Robert's brother. I always visit Mike, sometimes. The neighbor didn't have a phone. I went to Mike's. He let me use his phone. I called my house. The phone was off the hook. I called David's house. David answered the phone, he said Karen was gone in the Burgundy car, when I asked for her. I finally called my house again. I started to call Mike what happened. I called my neighbor from, to tell my mom to pick the phone on the hook. Karen answered the phone. I told her that David had just shot someone. We were in the Burgundy car when this happened. She came and got me, Karen did. Karen has in the same car David and I were

I have read this statement consisting of 4 page(s), and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 12:55 P. M. on the 13 day of January, 1996.

WITNESS:

J. J. [Signature]

Angela L. Smith

WITNESS:

STATEMENT OF:

Angela Denise Smith

AGE

34

DATE

1/13/97

ADDRESS:

PHONE #

CASE:

in when David shot Robert. Karen freaked out. She wanted a cigarette. She had her cigarettes. We drove back to my house. Mike came with us. He knew her too. Karen just freaked out. She told me David came home, told her to get her things and leave. That's when she had come to my house before I called home. She said she was going home, it was 8:00 A.M. or so, and she called David. She called home, then she went home. She gave Mike a ride home. I called her later on, she said she had just got up, she acted like she couldn't talk. I finally told Rodney what happened. I told him David had shot Robert. I kept telling David after he shot Robert to let me out the car. I was scared of him. I thought he might shoot me. Also one day last week, David came into the rooming apartment at David's house and he had a real little gun. I was silver and had a key handle. He said he was giving it to Karen for when he went out of town.

I have read this statement consisting of _____ page(s), and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at _____ M. on the _____ day of _____, 19____.

WITNESS:

Angela D. Smith
Signature of person giving voluntary statement



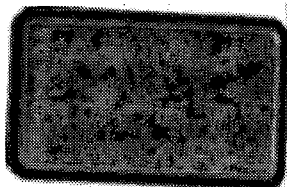
1 - Otis Hyder Sr.
WATKINS ST.

Finley came to trailer late at night + wanted to use phone. Called someone - didn't hear conversation. Few minutes, car pulls up. Female ^{Black} voice - Robert said "I don't want to see you. I want to see him." Black male voice was heard. Figures standing about arm's length apart. No fight. "Go ahead & shoot me. Give me gun + I'll do it myself." Smith backed off - Finley reached for him. Heard 1 "pop". Knew it was gunfire. Yelled at Terry Bradley who was ~~asleep~~ asleep on couch to call 911.

Thinks when Finley reached for Smith, he intended to take drugs from him.

2 - Julian Terry Bradley

Drinking beer all day. Passed out on couch. Heard 1 "pop" + woke up. Hyder yelling "Robert's been shot - call 911." Scared - ~~he~~ dialed 911 + gave phone to Hyder. Ran to Robert's trailer to get Morgan.





SPARTANBURG COUNTY SHERIFF'S OFFICE
BILL COFFEY, SHERIFF

I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God.

[Signature]
(Signature)

1-12-97
(date)

SWORN to before me this 12th
day of Jan., 1997.

Dwight D. Smith (SEAL)
Notary Public for South Carolina
My Commission expires: 7-28-2004



STATEMENT OF: Othis Calvin Hyder Sr. AGE 72 DATE 1-12-97ADDRESS: Spartanburg, S.C. 29301PHONE # CASE: Written By Doug Smith At my request. X

Robert Finley woke me up about 2:30 A.M. He knocked on the door and said that he needed to use the phone. About 15 or 20 mins later a colored woman knocked on the door and came in. I felt like this had something to do with drugs. Robert didn't want to deal with this woman. She went outside and a black man came inside. I heard Robert tell him that he did not have any money. Robert grabbed something from the man. I heard Robert say, shut me, what are you going to do, shut me. "Give me the gun and I'll pull the trigger!"

The man backed out of the trailer. I heard a gun shot and Robert fell forward out of the trailer. I woke Terry up and told him to call 911. After Terry called I got on the phone and talk to 911. Then I told Terry to go get Morgan, that's Robert's girl friend. Terry and Morgan came back and then the police arrived.

End of Statement

I have read this statement consisting of page(s) and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 4:22 A.M. on the 12th day of Jan 1997

WITNESS:

Doug SmithOthis C Hyder Sr.

WITNESS:

Signature of person giving statement

STATEMENT OF: OTIS CALVIN HYDER, SR. AGE 72 DATE 1-12-97 H-2
ADDRESS: Lavone Dr. Spartanburg, SC 29301
PHONE # CASE:

Written by Doug Smith at my request.

Robert Finley woke me up about 2:30 AM. He knocked on the door and said that he needed to use the phone. About 15 or 20 minutes later a colored woman knocked on the door and came in. I felt like this had something to do with drugs. Robert didn't want to deal with this woman. She went outside and a black man came inside. I heard Robert tell him that he did not have any money. Robert grabbed something from the man. I heard Robert say, "Shoot me, what are you going to do, shoot me!" "Give me the gun and I'll pull the trigger!"

The man backed out of the trailer. I heard a gun shot and Robert fell toward out of the trailer. I woke Terry up and told him to call 911. After Terry called I got on the phone and talked to 911. Then I told Terry to go get Morgan, that's Robert's girlfriend. Terry and Morgan came back and then the Police arrived.

END OF STATEMENT.

I have read this statement consisting of _____ page(s) and I certify that the facts contained therein are true and correct. I further certify that I have no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prevented from saying in this statement.

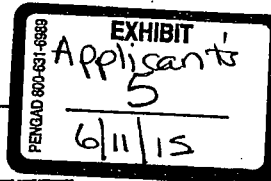
This statement was completed at _____ M. on the _____ day of _____, 19____.

WITNESS:

WITNESS:

Signature of person giving voluntary statement

**SPARTANBURG REGIONAL MEDICAL CENTER
AUTOPSY REPORT**



A-11-97 FINLEY, ROBERT A. AGE: 32 SEX: MALE RACE: WHITE
SRMC MEDICAL RECORD #46-29-15
CORONER/SEAY
DR. J. D. WREN, PATHOLOGIST
DATE OF AUTOPSY: 1/12/97 @ 9:10AM DATE OF DICTATION: 1/12/97
DATE OF TRANSCRIPTION: 1/13/97

BRIEF HISTORY: This history was provided by Spartanburg County Coroner's Investigator, Mr. Richard Seay. According to Mr. Seay, this 32 year old white male apparently was shot by a crack dealer who reported that there was an altercation after the decedent did not pay him for his drugs. The decedent was dead at the scene.

DESCRIPTION OF CLOTHING: The decedent is fully clothed in a multicolored zip-up jacket, a pair of denim jeans with black belt through the loops, and a pair of dirty white socks. A pair of high-top brown work boots accompany the body with no obvious blood stains on the soles. The hands are bagged.

EXTERNAL DESCRIPTION: This is the body of a well developed, well nourished white male appearing slightly older than stated age measuring 74 inches in length with an estimated weight of 220 pounds. There is fixed rigor mortis of the extremities, and there is posterior easily blanching livor mortis. Inspection of the head reveals the decedent to have a full head of long curly black hair with no palpable scalp trauma. There is blood about the face draining from the nostrils and mouth some of which is dried in both directions toward the ears. In the mid-forehead, there is an irregular deep superficial abrasion with accompanying laceration with the abraded area more directed to the right and inferiorly measuring 9.0 by 5.5 centimeters in overall dimensions with the laceration at the superior portion measuring 2.2 by 1.0 centimeters without underlying palpable skull fracture. There is also a vertically oriented superficial abrasion along the right upper face lateral to the eye covering an area of 6.0 by 2.5 centimeters. A small 0.5 centimeter area of superficial abrasion is present in the right ear itself. The left eye contains a periorbital hematoma with some stippling present in the lid region, and the eye is extensively fragmented and hemorrhagic presumably secondary to a close range gunshot wound. The right iris is hazel in color with the pupil dilated to 8.0 millimeters. There is a laceration along the bridge of the nose measuring up to 1.5 centimeters with abrasion about this area and extending all the way to the tip of the nose covering an overall area of 5.0 by 3.0 centimeters. There is no palpable fracture of the nose, however. The ears are unremarkable except for the abrasion along the antihelix described previously. The decedent has a full reddish brown moustache in a FuManchu-type configuration and several day's growth of beard otherwise. There is a laceration along the mid-upper lip just

**SPARTANBURG REGIONAL MEDICAL CENTER
AUTOPSY REPORT**

A-11-97 FINLEY, ROBERT A.

Page 2

beneath the nose with surrounding abrasion covering 2.0 by 1.0 centimeters in overall dimensions. The teeth are in reasonable state of repair with the frenulum of the upper lip mildly torn with surrounding hemorrhage up to 2.0 centimeters in diameter. There is a very mild horizontal superficial abrasion along the mid-left mandible measuring 1.0 by 0.2 centimeters in overall dimensions. Inspection of the neck reveals a small area of superficial abrasion along the left sternoclavicular joint area measuring 2.5 by 1.25 centimeters in overall dimensions. The chest and abdomen are unremarkable. The decedent has normal male external genitalia with circumcised penis and bilaterally descended testicles. Inspection of the back reveals no abnormalities to be present except that there is a 15.0 centimeter healed scar along the left flank region overlying the lower rib cage. Inspection of the upper extremities reveals old scars about the forearms bilaterally with a possible needle puncture mark present in the left antecubital fossa. There is a superficial abrasion along the dorsal right wrist measuring 2.0 by 1.0 centimeters in overall dimensions with a stippled surface. Two punctate abrasions are present overlying the right knuckle of the middle finger each approximately 0.3 centimeters in diameter and closely approximated. There are several scratch marks which may be healing along the upper right forearm on the dorsal surface. There is a small area of contusion overlying the right dorsal hand essentially between the middle and ring fingers covering an area of 1.0 centimeters with slight discoloration of the knuckles in this area. Inspection of the lower extremities reveals an area of superficial abrasion and contusion of the right leg superiorly to the patella converging an area of 5.0 by 4.0 centimeters with a superficial abrasion overlying the patella 0.5 centimeters in diameter. The tibial regions in the mid-portion of the lower legs contain superficial abrasions and contusions measuring 6.0 by 1.5 centimeters on the right and 4.0 by 1.0 centimeters on the left, respectively. No other obvious acute injuries are appreciated.

INTERNAL DESCRIPTION: The body is opened with a standard Y-shaped incision to reveal no injuries to the soft tissues of the thorax, abdomen, or strap muscles of the neck with the hyoid bone intact. Removal of the chest plate reveals no excess accumulations of fluid within respective body cavities. The heart is mildly enlarged within the pericardial sac with the lungs bilaterally congested. There is mild to moderate hepatosplenomegaly.

DESCRIPTION OF ORGAN SYSTEMS

THYROID: The thyroid weighs approximately 25 grams with brownish granular cut surfaces without masses.

**SPARTANBURG REGIONAL MEDICAL CENTER
AUTOPSY REPORT**

A-11-97 FINLEY, ROBERT A.

Page 3

CARDIOVASCULAR SYSTEM: The heart is mildly enlarged with left ventricular hypertrophy weighing 400 grams. Sectioning of the coronary arteries reveals large caliber vessels with only minimal atherosclerosis focally. Valves and valve cusps appear normal. Sectioning of the myocardium reveals dark reddish brown cut surfaces without lesions. The aorta contains no significant atherosclerosis.

RESPIRATORY SYSTEM: There is a small amount of blood tinged edema fluid within the trachea and major bronchi bilaterally with submucosal congestion. The lungs bilaterally contain mild anthracosis with the pleural surfaces having a mottled bluish to tan congested appearance. The right and left lungs weigh 740 and 602 grams, respectively, with sectioning revealing no masses although there is moderate congestion and pulmonary edema.

GASTROINTESTINAL SYSTEM: The esophagus is unremarkable. The stomach contains approximately 20 ounces of partially digested semi solids with an odor of beer with no mucosal abnormalities. The remainder of the GI tract appears to be within normal limits with the appendix present.

LIVER AND GALLBLADDER: The liver is mildly enlarged with a mottled reddish to brownish tan serosa weighing 2,160 grams. Sectioning reveals a grainy cut surface without masses. The gallbladder contains approximately 20 cc's of dark green bile without mucosal lesions.

PANCREAS: The pancreas weighs approximately 125 grams with agonal congestion and mild autolysis but otherwise yellowish tan lobular architecture.

SPLEEN: The spleen has a tense dark blue capsule weighing 375 grams with congestion and indistinct Malpighian corpuscles.

ADRENAL GLANDS: Each adrenal gland weighs approximately 6 grams with thin yellow cortex and autolyzed grayish tan medulla.

URINARY SYSTEM: The right and left kidneys weigh 205 and 220 grams, respectively, with congested smooth cortical surfaces with indistinct fetal lobulations. There are no masses on sectioning. The ureters are unremarkable. The bladder contains approximately 250 cc's of clear urine without mucosal lesions.

SH

**SPARTANBURG REGIONAL MEDICAL CENTER
AUTOPSY REPORT**

A-11-97 FINLEY, ROBERT A.

Page 4

PROSTATE: The prostate weighs approximately 10 grams with glistening tan cut surfaces.

TESTICLES: Palpably normal.

LYMPHOID SYSTEM AND BONE MARROW: Unremarkable.

CENTRAL NERVOUS SYSTEM: Reflection of the scalp reveals no hemorrhages or contusions other than an area in the left occipital region where there is a fracture of the calvarium with a copper jacketed lead bullet recovered from the area. Removal of the calvarium reveals no additional fractures to be present. The brain contains no epidural hemorrhage and only a very small amount of subdural hemorrhage with diffuse subarachnoid hemorrhage which is rather severe along the superior cerebrum near the vertex and around the brain stem including the cerebellum. A bullet wound tract appears to progress from the anterior pole of the left temporal lobe through the substance of the brain to exit near the visual cortex in the occipital region. There is moderate amount of maceration and hemorrhage surrounding the area. No vascular lesions or aneurysms are noted. Sectioning of the brain reveals no additional lesions to be present with the brain weighing 1,330 grams. After removal of the brain, an entrance gunshot wound into the area of the middle fossa through the lower border of the petrous bone is identified.

DESCRIPTION OF GUNSHOT WOUND: A single gunshot wound appears in the left eye 4.0 inches from the top of the head and 1.5 inches to the left of midline. The eye is extensively macerated and hemorrhagic secondary to the gunshot wound with indistinct diameter. Moreover, the vitreous has drained from the chamber. There is some stippling or petechial hemorrhage surrounding the wound up to 1.0 inch in width predominantly along the eyelids. The bullet appears to pass front to back, neither left nor right, and essentially horizontally to pass into the left middle fossa through the anterior pole of the temporal lobe and exit in the left occipital lobe at the visual cortex to come to rest in the deep scalp tissue after fracturing the occipital bone. A copper jacketed lead bullet with visible lands and grooves is recovered from the soft tissues measuring 0.25 inches in diameter at the base by up to 0.39 inches in length with a somewhat flattened nose and slightly distorted side. The base is round. This bullet is labeled with the Arabic number "1" and the Greek letter "Delta" and forwarded to Officer Deanna Arnold of the Spartanburg County Police Department.

Sh

**SPARTANBURG REGIONAL MEDICAL CENTER
AUTOPSY REPORT**

A-11-97 FINLEY, ROBERT A.

Page 5

FINAL SUMMARY: This autopsy was done at the request of and after due authorization of the Spartanburg County Coroner's Office in the SRMC Autopsy Room on 1/12/97 beginning at approximately 9:10AM.

Postmortem examination and autopsy of the body of Robert A. Finley, 32 year old white male, revealed a single probably close range gunshot wound to the left eye appearing 4.0 inches from the top of the head and 1.5 inches to the left of midline. The bullet passed backward, essentially horizontally, and neither right nor left to pass through the left cerebrum with exit in the left occipital bone where a small caliber copper jacketed lead bullet with visible lands and grooves was recovered. [There were lacerations with abrasions and contusions to the face and body which were consistent with the decedent falling and striking his head.] These injuries are described in the Gross Autopsy Protocol under the heading of External Description. At autopsy, no significant disease processes leading to the demise of this individual were identified. Body fluids removed at autopsy were forwarded to the Coroner for toxicological examination with results pending.

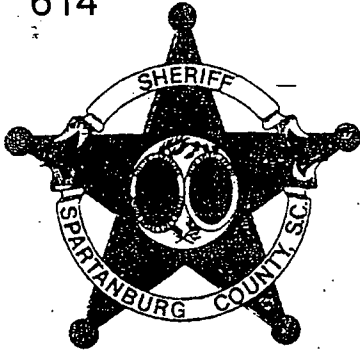
Based on the history and autopsy findings as stated in this protocol, it is my opinion that this individual died as the result of a gunshot wound to the left eye and head. The manner of death is under investigation by the Coroner's Office and Police Authorities.

FINAL NECROPSY DIAGNOSES

- 1) Single, probably close range, fatal small caliber gunshot wound to left eye with through-and-through penetration of left cerebrum with accompanying hemorrhage and maceration of brain, diffuse subarachnoid hemorrhage of brain and brain stem.
- 2) Mild cardiomegaly with concentric left ventricular hypertrophy.
- 3) Acute passive congestion and acute pulmonary edema of lungs bilaterally.
- 4) Mild hepatosplenomegaly, etiology undetermined grossly.
- 5) Visceral congestion, generalized.
- 6) Lacerations and abrasions to head and body consistent with collapse.

J. David Wren 1/14/97
J. David Wren, M.D., Ph.D.
Pathologist

JDW/lsw



SPARTANBURG COUNTY SHERIFF'S OFFICE
BILL COFFEY, SHERIFF

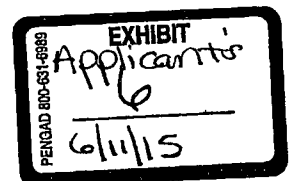
I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God.

Jerry Bradley
(Signature)

1-12-97
(date)

SWORN to before me this 12th
day of Jan, 1997.

Dwight D. Smith (SEAL)
Notary Public for South Carolina
My Commission expires: 7-28-2004



STATEMENT OF: JULIAN TERRY BRADLEY AGE 42 DATE 1-12-97

ADDRESS: Lavone Dr. Spartanburg, SC 29301

B-3

PHONE # CASE:

Written by Doug Smith at my request.

I was on the couch asleep. I heard a pop that woke me up. Otis told me that Robert had been shot. I jumped up and called 911. I handed the phone to Otis. I looked and saw Robert lying face down outside the doorway. I stepped beside him and ran and got Morgan. I told her Robert had been shot and I went back to the trailer and sat on the couch. Morgan came down and sat beside Robert. Then the Police and ambulance arrived.

I had went to bed around 10:00 pm. I had not seen or heard anything until I heard the pop.

END OF STATEMENT

I have read this statement consisting of _____ page(s) and I certify that the facts contained therein are true and correct. I further certify that I have requested for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at _____ on the _____ day of _____

19

WITNESS:

STATEMENT OF: Julian Terry Bradley AGE 42 DATE 1-12-97
ADDRESS: LAVON Dr. Spartanburg, S.C.
PHONE # _____ CASE: _____

Written By Doug Smith at my request. x Terry Bradley

I was on the couch asleep. I heard a pop, that woke me up. Otis told me that Robert had been shot. I jumped up and called 911. I handed the phone to Otis. I looked out and saw Robert lying face down outside the doorway. I stepped beside him and ran and got Morgan. I told her Robert had been shot and I went back to the trailer and sat on the couch. Morgan came down and sat beside Robert. Then the police and ambulance arrived.

I had went to bed around 10:00 P.M. I had not seen or heard anything until I heard the pop.

End of Statement

I have read this statement consisting of 1 page(s) and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 4:40 P.M. on the 12th day of Jan 1997

WITNESS

Doug Smith

Terry Bradley

Signature of person giving voluntary statement

INVESTIGATION REPORT

7-63

Page 617 of 8

SC0420000	TYPE: ☐ PRELIMINARY ☐ CONTINUING	CASE NUMBER 51002
INCIDENT TYPE DER	VICTIM Finley, Robert	
LOCATION La Bon Drive, Spartanburg, SC		
On 1-12-97 at approximately 0315 hrs., I was notified that I was requested at the scene of a murder at La Bon Dr., which ran off Case Avenue in the Saxon area of Spartanburg. I also learned that Det. Lewis Burns, Det. Steve Denton and Det. Doug Smith were also either in route or at the scene. I responded and arrived at 0345 hrs. Sgt. Rick Gregory was also present. The body of a white male was observed lying in the doorway of the trailer at La Bon Dr. The body was later identified as Robert Finley. The victim was lying on his back on a sidewalk that connected the driveway with the door. The feet of the victim were still lying just inside the door and his legs were across the two steps leading up to the door from the sidewalk. There was a fair amount of blood on the face of the victim and appeared to be emitting from his mouth and nose. At the time I viewed the body, the temperature was approximately 20 degrees and the weather clear. It also appeared the body was beginning to stiffen. Det. Denton had spoken to the owner of the trailer where the body was located, Otis Hyder. Hyder told Denton that Finley had come down to use the telephone. Finley, who lived at La Bon with his girlfriend Morgan Simmons, did not have a phone. At the time the incident occurred, another white male, Terry Bradley, was asleep on Hyder's couch in the living room. Finley supposedly told someone he was going to rob a Crack		
ESTIGATOR Investigator: Mike Kitts (I-29)	REPORT DATE 1-14-97	
OFFICER WORKING CASE	INCIDENT DATE	
MOVING OFFICER	DATE RECORDED	



SC0420000	TYPE: ☐ PRELIMINARY ☐ CONTINUING	CASE NUMBER 51002
INCIDENT TYPE HOMICIDE	VICTIM Finley, Robert	
LOCATION La Bon Drive, Spartanburg, SC		
dealer for some Crack. Finley called someone from Hyder's trailer and a short time later, a car pulled up in Hyder's driveway. Finley spoke to a black female who came to the door and said he wasn't going to deal with her. She then went back to the car and a black male came up to Finley who was standing in the doorway. Hyder, who is legally blind, heard them arguing and because he can see shapes, saw them struggle. Hyder then heard Finley say, "go ahead, shoot me, give me the gun and I'll do it myself". Afterwards, Hyder heard a shot and Finley fell out the door. The suspect then left in his vehicle, but Hyder could not describe it. The shot woke Bradley who called 911, gave the phone to Hyder and ran to get Simmons. Simmons came to the scene and stayed with Finley until the Police and EMS units arrived. Steve Denton had spoken to Simmons who said Finley had been strung out on prescription medications and Crack. She also told us that she believed the shooter was a black male, that a friend of Finley's, another black male named Rodney had looked him up. Finley had failed to pay \$40.00 to his dealer for a Crack debt. The subject had told Finley he wanted his money and had even come by his job at the Express Mart on Sibley St. and told him to have Finley pay the debt. At that time, she tried to give us directions to Rodney's house which she showed us as a residence on Saxon Ave. We spoke to the		
INVESTIGATOR Investigator: Mike Kitts (I-29)	REPORT DATE 1-14-97	
OFFICER WORKING CASE	INCIDENT DATE	
MOVING OFFICER	DATE RECORDED	

INVESTIGATION REPORT

Page 619 of 8

SC0420000	TYPE: ☐ PRELIMINARY ☐ CONTINUING	CASE NUMBER 51002
INCIDENT TYPE ORDER	VICTIM Finley, Robert	
LOCATION La Bon Drive, Spartanburg, SC		
people in the house and there was a black male named Rodney Salters who lived there but he denied knowing Finley.		
We eventually took Simmons to this residence and she viewed Salters but said he was not the Rodney she knew.		
We went back to Finley and Simmon's trailer to look for any phone numbers. Richard Seay of the Coroner's Office who was a the initial scene, searched Finley's body at the morgue at SRMC but did not find any phone numbers.		
Simmons did provide several numbers which we took to the Office and tried to cross reference. While at the Office, Simmons had inform Officers call us to tell us she had found another number. We went to the scene, retrieved the number, and Det. Denton called it which turned out to be to a pager. A number was left and when the call came in, Sgt. Dan Jeter fielded the call. The caller hung up twice, but eventually a Rodney Smith called back and spoke to Det. Denton. He agreed to talk to us and told us he lived at Fisher Ave.		
We went to Smith's residence. He told us he thought that David Smith was the one who shot Finley. He told us he knew Finley and Smith had introduced them about 3-4 months ago. Finley had purchased Crack 3-4 times from David Smith and eventually fronted Finley \$40.00 worth of Crack. Finley never paid the debt and Smith became angry. He had approached Rodney, Finley and Simmons about the debt. Rodney also		
INVESTIGATOR	Investigator: Mike Kitts (I-29)	REPORT DATE 1-14-97
APPROVING OFFICER	APPROVING OFFICER	INCIDENT DATE
		DATE RECORDED

SC0420000	TYPE: ☐ PRELIMINARY ☐ CONTINUING	CASE NUMBER 51002
INCIDENT TYPE DER	VICTIM Finley, Robert	
LOCATION La Bon Drive, Spartanburg, SC		
told us that approximately a week ago, David Smith had purchased a 25 automatic from someone "on the street". David told him he bought the gun for protection after his brother was beat up. Rodney told us that he had spoken to Finley several times in the week prior to his death and he wasn't worried about paying the money back. He had also spoke to David on 1-11 when he came by his house to show Rodney a TV he had bought that could play in a car. Rodney said David made no mention of the debt owed to him by Finley at that time. Rodney agreed to accompany us to the Office and gave a written statement. He also gave us David's address, ., Sptbg. Det. Denton went by this residence while I obtained Rodney's statement. He later told us that as he went by the residence he saw a black male that he was later able to identify as David Smith at a residence on Farley Ave. directly across from David's residence. The time was approximately 1200 hrs. At 1300 hrs. Det. Denton, Smith and I went to Smith's residence. We spoke to his wife Karen who told us David had left approximately 1 hr. ago to go to Greensboro to a job at McDonald's Douglas Aircraft. She told us David was a jet mechanic and had just received a call about 1000 hrs. that morning. She also told us that they owned 2 vehicles, a burgundy Olds Cutlass and a '96 Nissan Maxima, dark green in color.		
INVESTIGATOR	Investigator: Mike Kitts (I-29)	REPORT DATE 1-14-97
OFFICER WORKING CASE		INCIDENT DATE
ISSUING OFFICER		DATE RECORDED

INVESTIGATION REPORT

I-67

Page 621 of 8

SC0420000	TYPE: ☐ PRELIMINARY ☐ CONTINUING	CASE NUMBER 51002
INCIDENT TYPE IDER	VICTIM Finley, Robert	
LOCATION La Bon Drive, Spartanburg, SC		
Denton stressed the importance of having David contact us. Karen told us he would page David and have him call us. We then returned to the office to see if he would call. At approximately 1500 hrs., David called Denton. After speaking briefly with him, David told Denton he was on "other side of Charlotte", but would be returning. At approximately 1745 hrs., David showed up at the Office with Karen. Det. Denton interviewed David while I interviewed Karen. Karen told us that on the previous day, she and David stayed at their house. A friend of hers, Eddie Gilmore arrived and at about 1200 hrs. David left and was "in and out" the rest of the evening. She said that Samuel Smith, David's mother, came by with his girlfriend Kim, (last name unknown), and they drank and listened to music. We had received information that Karen was heavily involved in Crack Cocaine. I asked her this but she denied smoking Crack. She did say she had done smoked in the past, as did David, but both were clean. She then told me that at 2300 hrs., David was back home and went into the bedroom to watch a fight on TV. At 2400 hrs. she and Eddie walked across the street to her brother, Toney Murphy's house (where Denton saw David earlier) at Farley Avenue. She said she and Eddie didn't stay long and walked back to her house. By 0130-0200 hrs., everyone had left and David was still		
ESTIGATOR	Investigator: Mike Kitts (I-29)	REPORT DATE 1-14-97
FC OFFICER WORKING CASE		INCIDENT DATE
MOVING OFFICER		DATE RECORDED

SC0420000	TYPE: ☐ PRELIMINARY ☐ CONTINUING	CASE NUMBER 51002
INCIDENT TYPE ORDER	VICTIM Finley, Robert	
LOCATION La Bon Drive, Spartanburg, SC		
in the bedroom watching TV.		
At 0300 hrs., she left and went to see Angie Smith who is Rodney's sister at their house on Fisher Avenue. She told me Angie wasn't there, so she stayed and talked to Rodney and his mother, Betty till about 07:00 hrs. when she went home. She said David was asleep in the bed and she cleaned house till about 1000 hrs., when David's job called.		
A written statement was taken by me from Karen Smith. Afterwards, we spoke and Denton said David was denying everything but said he had let Finley "borrow" \$40.00 but denied he had anything to do with Crack.		
At that time, we did not have enough to hold David Smith and he and Karen were released.		
On 1-13, Sgt. Gregory and Det. Denton went back to Rodney Smith's house to speak further with him. While there, Angie Smith came out of a back room and said she wanted to tell them the truth about what happened the previous day. She was brought to the office and a written statement was obtained. She said she was with David and had in fact arranged for a Crack deal between Finley and David that night. She said they went to the trailer where Finley was at and David sent her to get the money from Finley but he wouldn't deal with her. David went to the door and after a short period of time, saw them struggling and heard a		
VESTIGATOR Investigator: Mike Kitts (I-29)	REPORT DATE 1-14-97	
OFFICER WORKING CASE	INCIDENT DATE	
PROVING OFFICER	DATE RECORDED	

INVESTIGATION REPORT

I-69

Page 623 of 8

SC0420000		TYPE: ☐ PRELIMINARY ☐ CONTINUING		CASE NUMBER 51002
INCIDENT TYPE DER		VICTIM Finley, Robert		
LOCATION La Bon Drive, Spartanburg, SC				
pop. David came back to the car and they left. David told her not to say anything and dropped her off at a house. Eventually she made contact with her house and Karen answered the phone. Karen came to get Angie and Angie told her what had happened.				
Det. Denton asked me to go and locate Karen Smith to speak with her about what Angie had said. I went to her house but no one was there. I then went to her brother, Toney Murphy's house and he said she was at their mother's house in Gramency Park. He called her for me, I spoke to her and she said she would come to the office around 1300 hrs., but would not tell me the address of her mother.				
After speaking to her, I went to Gramency Park off Reidville Rd. and watched the main entrance. At about 1230 hrs. Karen drove out in the burgundy Olds. I tailed her to the office.				
Karen was interviewed by Det. Denton and Sgt. Gregory about Angie's statement but denied everything and asked for an Attorney.				
Denton asked me to fill out her booking card and booking sheet. While obtaining this information, Karen admitted that she had a serious Crack problem and had lost her nursing license over forging a prescription several years back but had recently regained her license but was no longer working. She also told me that David had a girlfriend who he had a child by and in fact, the girlfriend called the house repeatedly to have him run errands for her. She also told me that the girlfriend				
VESTIGATOR		Investigator: Mike Kitts (I-29)		REPORT DATE 1-14-97
OFFICER WORKING CASE				INCIDENT DATE
PROVING OFFICER				DATE RECORDED

624

INVESTIGATION REPORT I-70

Page 8 of 8

SC0420000	TYPE: ☐ PRELIMINARY ☐ CONTINUING	CASE NUMBER: 51002
INCIDENT TYPE RDER	VICTIM Finley, Robert	
LOCATION La Bon Drive, Spartanburg, SC		
accompanied him to the job sites where he would stay for months at a time. She said she had left him and filed for divorce but eventually went back to him but didn't understand herself why she returned as she no longer loved him. Karen was charged with Accessory After The Fact of a murder and taken to the County jail. AT NO TIME during our conversation were any questions asked about the murder of Finley. Later that day, Det. Denton found out that David, who we had not been able to locate that day was in Greensboro, NC. Greensboro P.D. was notified and after the Warrant was signed on David Smith for the murder of Robert Finley, arrested Smith at the hotel where he was staying. Crack Cocaine was found in his pockets but a weapon was not recovered. Smith was charged with the drugs and held on our Warrant pending extradition. Karen Smith was given a \$10,000 Surety bond by Judge Hutchinson and released later on 1-13-97.		
INVESTIGATOR Investigator: Mike Kitts (I-29)		
OFFICER WORKING CASE		REPORT DATE 1-14-97
PROVING OFFICER		INCIDENT DATE
		DATE RECORDED

71-46
625

Spartanburg County Sheriff's Office

Please List All Persons Entering Crime Scene

Incident Type:

Homicide

Location:

La bon St Saxon

Date:

01/12/97

Name:

Camp

Agency:

S.O.

Phone: (Home)

(Work)

Date:

01/12/97

Time In:

0237

Time Out:

0250

Reason for Entry:

1st on scene

Name:

Dennis Sprouse

Agency:

S.O.

Phone: (Home)

(Work)

Date:

01/12/97

Time In:

0238

Time Out:

0309

Reason for Entry:

2nd on scene

Name:

Charles Wright

Agency:

SO

Phone: (Home)

(Work)

Date:

1/12/97

Time In:

0238

Time Out:

0255

Reason for Entry:

- 3RD ON SCENE

Name:

William T Rhine

Agency:

SO

Phone: (Home)

(Work)

Date:

1/12/97

Time In:

0240

Time Out:

0255

Reason for Entry:

4th on scene

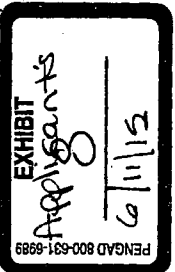
Completed By:

R.D. Camp

Signature:

Date:

01/12/97



Spartanburg County Sheriff's Office

Please List All Persons Entering Crime Scene

Incident Type: _____

Location: _____

Date: _____

Name: _____

Chris McBee

Agency: _____

SCSC

Phone: (Home) _____

(Work) _____

Date: _____

01/12/97

Time In: _____

0240

Time Out: _____

Reason for Entry: _____

Responding Officer

Name: _____

Curtis Reynolds

Agency: _____

S.O.

Phone: (Home) _____

(Work) _____

Date: _____

01/12/97

Time In: _____

0324

Time Out: _____

0420

Reason for Entry: _____

ID Officer

Name: _____

Steve Denton

Agency: _____

SCSC

Phone: (Home) _____

(Work) _____

Date: _____

01/12/97

Time In: _____

0320 hr

Time Out: _____

0420

Reason for Entry: _____

Investigating Detective

Name: _____

Richard Sany

Agency: _____

Coroner's Office

Phone: (Home) _____

(Work) _____

Date: _____

01/12/97

Time In: _____

0324

Time Out: _____

0420

Reason for Entry: _____

Coroner's Office

Completed By: _____

Date: _____

/

/

Signature

51005
627-48

Spartanburg County Sheriff's Office

Please List All Persons Entering Crime Scene

Incident Type: _____

Location: _____ Date: 1 / 1 / 1

Name: Allen Newman Agency: Arcadia Fire Dept

Phone: (Home) _____ (Work) B.e.p.e.r.

Date: 1 / 1 / 1 Time In: _____ Time Out: _____

Reason for Entry: Fire & Rescue

Name: Robert Burgess Agency: Arcadia Fire Dept

Phone: (Home) _____ (Work) _____

Date: 1 / 1 / 1 Time In: _____ Time Out: _____

Reason for Entry: Fire & Rescue

Name: BO Helton Agency: Arcadia Fire Dept

Phone: (Home) _____ (Work) ?

Date: 1 / 1 / 1 Time In: _____ Time Out: _____

Reason for Entry: _____

Name: Mike Kirts Agency: SO.

Phone: (Home) _____ (Work) _____

Date: 1 / 12 / 97 Time In: 0700 Time Out: 0420

Reason for Entry: Inv.

Completed By: _____ Date: 1 / 1 / 1

Signature

Spartanburg County Sheriff's Office

Please List All Persons Entering Crime Scene

Incident Type: _____

Location: _____

Date: ____/____/____

Name: Rich GroganAgency: S.O.

Phone: (Home) _____

(Work) _____

Date: 1/12/97Time In: 0400Time Out: 0420Reason for Entry: Inu.Name: Steve Denton
Mike Kitts & Doug SmithAgency: S.O.

Phone: (Home) _____

(Work) _____

Date: 1/12/97Time In: 1:18 P.M.Time Out: 2:10 P.M.

Reason for Entry: _____

Name: Deana ArnoldAgency: S.O.

Phone: (Home) _____

(Work) _____

Date: 1/12/97Time In: 1:39 P.M.Time Out: 2:10 P.M.

Reason for Entry: _____

Name: _____

Agency: _____

Phone: (Home) _____

(Work) _____

Date: ____/____/____

Time In: _____

Time Out: _____

Reason for Entry: _____

Completed By: _____

Date: ____/____/____

Signature



SPARTANBURG COUNTY SHERIFF'S OFFICE
BILL COFFEY, SHERIFF

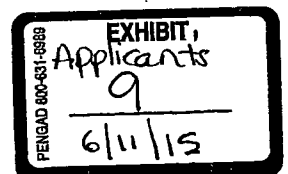
I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God.

X Morgan Simon
(Signature)

1-12-97
(date)

SWORN to before me this 12th
day of January, 1997.

James B. Till (SEAL)
Notary Public for South Carolina
My Commission expires: June 16, 2003



He had some Jive Juice, a little bit of a little bit. He also had a little bit of Jive Juice. He was drinking and taking pills. We went to sleep and woke up today around 2 p.m. We talked for a while and he said that he wanted to go to Holmview treatment center for help. He was watching the basketball game on TV and drinking. He said that he wanted to get some crack. I tried to stop him, he took a handful of Percodans and was still drinking Jive Juice. Robert got his drugs from several people. He got it mainly from a black male named Rodney, who lives at a tan house across from the recreation center. Rodney is about 6'1, broad shoulders, around 30 to 35 yrs. Sometimes he has a thin moustache, and light eyes. The other person he buys from is Mark, B/M, early 30's. I was down at Top's when Rodney brought the other black male that Robert was going to buy from. He is about 6'0, muscular, moustache, soft spoken, and he wears a lot of jewelry. This was a couple of months ago. He lives somewhere near Rodney. Robert said that he used his money, and has owed him 40 dollars for about a month. He came by the house in a new looking dark green sedan, sporty, like a Taurus. He was looking for Robert and I told him not to come back. This was the Friday after Christmas, while Robert was gone. I have seen him before driving a black truck. Robert was raised up in the pills and alcohol. We went to the store and got a 12 pack of beer. When we got back, he said that he had to go get some crack and left. He came back about a couple of hours later and then he sat down in front of the TV and fell

one used the statement regarding the "page 1" and "page 2" and the words mentioned therein are true and correct. The statement is as required for the purpose of submission of a longer affidavit in having the last of this statement, and all the other affidavits, was dropped. The statement is dropped. It was further that I was not told of anything when he was in the statement. The statement was dropped as well as the other.

100-443887-100

100

Abstract

1998

五、

... was just going to get up and go to the
from the front. When I went to the front, I heard the shot, I took
him where he was going and he said that he was going to go to get his
a hit. The best thing I have was a .38 Smith & Wesson .38 S&W
that Robert had been shot. I have seen Robert's body from behind.

End of statement.

I have read this statement, knowing of its contents, and I have not heard of any other person who has heard of the statement, and I have not heard of any other person who has heard of the statement, and I have not heard of any other person who has heard of the statement.

Witness

Witness

Signature of person giving statement

STATEMENT OF Robert Smith AGE 32 DATE 12-12-78
ADDRESS 1014 E. 1st St. Dallas, Texas
PHONE 734-1111 CASE 78-1014

Robert has been gone for about 2 weeks. He came home yesterday. He had some pills which he got from Dr. Boyd. He also had a quart of Jim Beam. He was drinking and taking pills. We went to sleep and woke up today around 2pm. We talked for a while and he said that he wanted to go to Holmesview Treatment Center for help. He was watching the Basketball game on TV and drinking. He said that he wanted to get some crack. I tried to stop him, he took a hand full of percodans and was still drinking Jim Beam. Robert got his drugs from several people. He got it mainly from a Black male named Rodney who lives at a tan house across from the recreation center. Rodney is about 6'1" broad shoulders, around 30 to 35 yrs. Sometimes he has a thin mustache and big eyes. The other person he buys from is Mark B/M. Early 30's. I was down at Tops when Rodney brought the other Black male that Robert was going to buy from. He is about 6'0", muscular, mustache, soft spoken and he wears a lot of jewelry. This was a couple of months ago. He lives somewhere near Rodney. Robert said that he owed him money, and has owed him \$1000.00 for about a month. He came by the house in a new looking Dark Green Sedan, Sporty, like a Texas. He was looking for Robert and told him not to come back.

I have read this statement consisting of 2 page(s), and I certify that the facts contained therein are true and correct. I further certify that I do not request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 0545 AM on the 12th day of January 1979

WITNESS: for W.B. Smith X Moore Signature of person giving voluntary statement

WITNESS: _____

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

DAVID M. BEASLEY
GOVERNOR



ROBERT M. STEWART
CHIEF

TOXICOLOGY DEPARTMENT

March 25, 1997
SLED Lab No: L9700765
Your Case No: C977024
Incident Date: January 12, 1997
(V) Finley, Robert

Richard Seay
Spartanburg County Coroner's Office
366 N Church Street
Spartanburg, SC 29303

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case has been or will be conducted by any other Laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Item 2: Blood labeled "Finley, Robert"

RESULTS:

0.151 % blood alcohol found.

0.24 mg/L Benzoyllecgonine found in blood; Benzoyllecgonine is the major metabolite of cocaine.

Item 3: Urine

RESULTS:

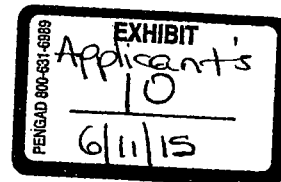
0.229 % ethanol found in urine.

Negative screen for Barbiturates.
(Secobarbital et al.)

Urine threshold 0.2 mg/L; blood threshold 2.0 mg/L.

Negative screen for Opiates.
(Morphine, codeine, et al.)

Urine threshold 0.2 mg/L; blood threshold 0.2 mg/L.



MAR 28 1997

INVESTIGATION REPORT

I-72 635

SC0420000	TYPE: ☐ PRELIMINARY ☐ CONTINUING	CASE NUMBER 51002
INCIDENT TYPE Death Investigation	VICTIM Robert Andrew Finley	
LOCATION Labon Drive, Spartanburg, South Carolina		
On January 12, 1997 at approximately 3:00 a.m., Investigator Steve Denton advised me that he was being dispatched to a death on Labon Drive. I arrived on Labon Drive with Investigator Denton at approximately 3:45 a.m. I observed a white male lying in the doorway of a single wide trailer. The subject appeared to have an injury to his head area. Detective Denton advised that a witness to the incident had advised that the victim had called someone in an effort to obtain crack and that a black female had arrived, along with a black male, shortly after Robert had made the call. Some sort of argument ensued and Robert was shot by the black male. The witness is an elderly white male, who is legally blind. He stated that he did not see the vehicle that the suspects were in. Detective Mike Kitts and Detective Doug Smith also responded, along with Detective Lewis Burns. The victim's wife was taken to the Sheriff's Office where Detective Burns took a statement from her. Otis Hyder was also taken to the office and Detective Doug Smith obtained a voluntary statement from him. Through Detective Denton's investigation, he was able to obtain the name of a David Dwight Smith as a possible suspect. David Smith had told several individuals, including a Rodney Smith (no relation) and the victim's wife, that Robert Finley owed him \$40.00 for crack. According to Otis Hyder, he had heard the victim and the black male discussing the matter.		
INVESTIGATOR Detective Sergeant Rick Gregory (I-72)	REPORT DATE 01/14/97	
UNIFORM OFFICER WORKING CASE	INCIDENT DATE 01/12/97	
APPROVING OFFICER	DATE RECORDED	

EXHIBIT
Applicants
6/11/97

SC0420000	TYPE: ☐ PRELIMINARY ☐ CONTINUING	CASE NUMBER 51002
INCIDENT TYPE Death Investigation	VICTIM Robert Andrew Finley	
Labon Drive, Spartanburg, South Carolina		
by the victim to the black male just before the shooting. Through the investigation it was determined David Smith had a girlfriend by the name of Shirley Floyd at Creek Ridge Apartments, Spartanburg. David Smith is also married. His wife's name is Karen Smith.		
Detective Denton had obtained a statement from Karen Smith that David Smith was with her from approximately 12:00 a.m. to 3:00 a.m. on 01/12/97 and that she had no knowledge of the death of Robert Finley.		
At approximately 10:00 p.m. on 01/12/97 I contacted Det. Richard Gary and requested that he and Det. Lewis Burns attempt to locate Shirley Floyd at her home address. At approximately 11:00 p.m. on 01/12/97, Detective Gary and Detective Burns responded to Apartment , Creek Ridge Drive. They were advised by a neighbor that Shirley Floyd had just left, and that they had missed her by approximately 20 minutes. The neighbor advised that a black male with a receding hairline, light-skinned, driving a green colored vehicle had helped Shirley Floyd pack up some belongings and that they had packed up the car in the dark without turning any lights on. David Smith drives a 1996 dark green Maxima and is light skinned with a receding hairline.		
On 01/13/97, myself and Detective Denton went back to the residence of Rodney Smith. Rodney was a friend of both Robert Finley and David Smith and was aware Robert owed David money. We arrived at approximately 11:00 a.m. We were invited in and as we entered the house, a black		
INVESTIGATOR Detective Sergeant Rick Gregory (1-2)	REPORT DATE 01/14/97	
UNIFORM OFFICER WORKING CASE	INCIDENT DATE 01/12/97	
PROVING OFFICER	DATE RECORDED	

INVESTIGATION REPORT

I-637
CASE NUMBER

51002

SC0420000

TYPE: ☐ PRELIMINARY ☐ CONTINUING

INCIDENT TYPE

Death Investigation

VICTIM

Robert Andrew Finley

LOCATION

Labon Drive, Spartanburg, South Carolina

female ^{Annie Smith} ~~within the residence~~ stated that she needed to talk with us, but that she was very much afraid of what might happen to her. She stated that she had been trying to contact us and wanted to tell us what she knew about Robert's death. She then accompanied us back to the Sheriff's Office. She was read her rights by Detective Steve Denton and signed a Rights Waiver. She advised us that she had been called by Robert Finley, who stated that he wanted \$50.00 worth of crack. She then paged David Smith. David came by and picked her up and the two of them went to Robert's house to deliver the crack. She stated that David sat in the car holding five rocks of crack in his hand. He sent her in to get the money. When she went in, she stated that Robert told her he had the money, but he wanted to deal with David. She went back out to the car and sent David in. She stated she was sitting in the car smoking a cigarette. David went in and stayed about five minutes. She then saw the two of them at the door and then heard a pop and saw David running back toward the car. She stated David ran toward her side of the car and she thought David wanted to shoot her. She stated she did not know that he had a gun before she heard the pop. She told David, "please don't shoot me" and covered up her head and face. David then ran around the back of the car, jumped in the vehicle and began telling her that she was not to say anything or hear anything and for her to keep her mouth shut. She stated that she repeatedly asked him just to let her out of the car.

INVESTIGATOR

Detective Sergeant Rick Gregory (1-2)

REPORT DATE

01/14/97

UNIFORM OFFICER WORKING CASE

INCIDENT DATE 01/12/97

APPROVING OFFICER

DATE RECORDED

638

INVESTIGATION REPORT

I-75

SC0420000	TYPE: ☐ PRELIMINARY ☐ CONTINUING	CASE NUMBER 51002
INCIDENT TYPE Death Investigation	VICTIM Robert Andrew Finley	
LOCATION Labon Drive, Spartanburg, South Carolina		
He kept ~~stating~~ ^{Karen Smith} ~~he needed~~ to get rid of the gun and the drugs. She finally got out of the car off of Wofford Street and went to a friend's house where she was able to contact Karen Smith, David's wife. She stated she told Karen what had happened, that David had shot Robert and asked Karen to come pick her up, which she did. We then had Karen Smith come back to the office and myself and Detective Denton again asked her to tell us the truth of what she knew concerning Robert's death. She again stated that she told us all she knew and that she had told the truth. After consulting with the Solicitor's Office, Karen Smith was charged with Accessory after the Fact of Murder. A warrant was obtained by Detective Denton on David Dwight Smith for murder. He was later apprehended in Greensboro, North Carolina by the Greensboro Police.		
INVESTIGATOR Detective Sergeant Rick Gregory (1-2)		
REPORT DATE 01/14/97		
UNIFORM OFFICER WORKING CASE		
INCIDENT DATE 01/12/97		
APPROVING OFFICER		
DATE RECORDED		

AFFIDAVIT

F- 426015

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
SPARTANBURG

THE STATE
against

05-85-97

Computer

County/ Municipality of

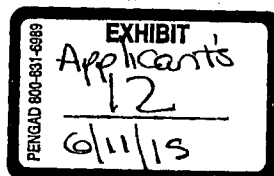
Personally appeared before me the affiant DENTON, STEVE
being duly sworn deposes and says that defendant SMITH, DAVID DWIGHT
did within this county and state on 01/12/97 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of)
in the following particulars:

DESCRIPTION OF OFFENSE:
MURDER

16-3-10/16-3-20

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:
THE DEFENDANT DID FELONIOUSLY, INTENTIONALLY, AND WITH
MALICE AFORETHOUGHT CAUSE THE DEATH OF ONE ROBERT ANDREW
FINLEY BY SHOOTING THE VICTIM IN THE HEAD.

WARRANT BASED ON POLICE INVESTIGATION.



Sworn to and subscribed before me
on 01/13/97

Signature of Issuing Judge

Signature of Affiant
Affiant's Address SHERIFF DEPT.
Affiant's Telephone

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
SPARTANBURG

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
on 01/12/97 defendant SMITH, DAVID DWIGHT
did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☐ Municipality of) as set forth below:

DESCRIPTION OF OFFENSE: MURDER
16-3-10/16-3-20

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Issuing Judge JAMES B. PASLAY (L.S.)
Judge Code: 483
Judge's Address SPARTANBURG MAGISTRATE COURT
SPARTANBURG COUNTY, SPARTANBURG SC 29306
Judge's Telephone 864-596-2564
Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality of
The accused
to be arrested and brought before me to be
dealt with according to law.

Signature of Judge (L.S.)

to:

RETURN

copy of this arrest warrant was delivered to
defendant DAVID SMITH

2-6-97

County JONES

Signature of Constable/Law Enforcement Officer

TURN WARRANT TO:

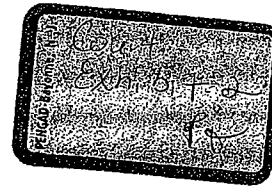
SPARTANBURG MAGISTRATE COURT
SPARTANBURG COUNTY COURTHOUSE
SPARTANBURG, SC 29306-2392
MAG. 17-GS-426015 F

ORIGINAL

FILED
CLERK OF COURT
SPARTANBURG COUNTY
1997 FEB 10 PM 4:58

639

OTIS HYDER - DIRECT BY SOL. WALL



1 Q Okay.

2 (Pause.)

3 SOL. WALL: No further questions, Your Honor.

4 MR. COX: That's all. Thank you.

5 THE COURT: Step down.

6 SOL. WALL: Otis Hyder.

7 OTIS HYDER, being first
8 duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY SOL. WALL:

11 Q Would you state your full name, please.

12 A Otis C. Hyder.

13 Q When this occurred in January of '97, where were you
14 living?

15 A I was living at Labon Drive.

16 Q You knew the victim in this case, Robert Finley.

17 A Yes. I did.

18 Q How long had you known him?

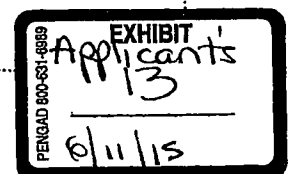
19 A A little over a year.

20 Q Okay. How did you know him?

21 A How did I? Well, we lived in the same trailer park.
22 And being old as I am, Robert used to go to the store for
23 me if I needed anything.

24 Q All right. How is your vision, Mr. Hyder?

25 A My vision is terrible. I'm completely blind just



OTIS HYDER - DIRECT BY SOL. WALL

1 about it.

2 Q Are you able to see images or---

3 A Oh, yeah. Yeah. But I got very good hearing,
4 though.

5 Q All right. Where were you in the early morning of
6 January 12, 1997, just after midnight?

7 A I was in my trailer. Setting in the recliner.

8 Q All right. Did someone knock on the door about
9 2 a.m. or so?

10 A Yes, sir.

11 Q Who was that?

12 A That was Robert.

13 Q What did he want?

14 A Robert wanted to use the telephone.

15 Q Did he do that?

16 A Yes, he did.

17 Q Did anyone else come to the door after that?

18 A Yes. About fifteen minutes later a car stopped
19 outside. And this young lady came in first. I believe
20 her name's Angie.

21 Q Okay. What happened when she came inside?

22 A Well, her and Robert talked a few minutes. And
23 Robert told her he'd rather talk to the -- to David.

24 Q Did you know Angie Smith? I mean, do you know her?

25 A No, sir; I didn't.

OTIS HYDER - DIRECT BY SOL. WALL

1 Q Do you know her brother, Rodney Smith?

2 A I've heard of Rodney's name. But I didn't even know
3 him.

4 Q Okay. What happened after she came in and she left?
5 Did anyone else come in?

6 A Yes. The -- this Smith boy, David Smith, came in.
7 He and Robert started talking. I was standing over at
8 the table when he come in. But I went up -- back to my
9 recliner and sat down.

10 Q Okay.

11 A And they -- I heard 'em talking over there. I told
12 'em, If y'all gonna start fussing, now, you're gonna have
13 to go outside.

14 Q Where were they at?

15 A They was over by the table, eating table. Or close
16 by.

17 Q Is that in the kitchen area?

18 A Yes, sir.

19 Q All right. What if anything were you able to hear
20 that they were saying?

21 A Well, I wasn't able to hear too much. I did hear
22 something about the -- I heard Robert tell him, said he
23 didn't have his \$40, his money yet. But said as soon as
24 he got a job he would pay him.

25 And then -- and I didn't want 'em to get to start

OTIS HYDER - DIRECT BY SOL. WALL

1 fussing in there so I told 'em they better go outside if
2 they fussing.

3 Q What if anything did the defendant's tone appear to
4 be, or his body, his voice?

5 A Well---

6 Q Did he appear agitated?

7 A Yeah, uh-huh. He sounded agitated. So he turned
8 around and walked out and Robert followed him.

9 Q Okay. Let me stop you one second, first.

10 A Okay.

11 Q Spend some more time with while they were in there.
12 What if any yelling were they doing?

13 A No, sir; they weren't yelling. No, sir.

14 Q Okay. What---

15 A Just in case they did I told 'em they would have to
16 go outside.

17 Q What if any pushing or shoving was going on?

18 A No, sir. No pushing or shoving. No.

19 Q But you told them at some point, Y'all need to go
20 outside.

21 A Yes, sir.

22 Q Okay. And then what happened then?

23 A Well, David walked outside. And Robert went to the
24 door but he -- Robert stayed at the door, with his left
25 shoulder against the door facing.

OTIS HYDER - DIRECT BY SOL. WALL

1 Q Okay. When they turned from the kitchen area to go
2 outside, did David go ahead of Robert?

3 A Yes.

4 Q Okay. I'm going to have to ask you to step down
5 just so we can show the jury some photos. I know it's...

6 (Whereupon the witness stepped down from the
7 stand.)

8 Q If you could come over here.

9 A Okay.

10 Q I'll bring you as close as you need to.

11 I show you what's marked as State's Exhibit 4 and
12 State's Exhibit 5. Do those appear to be photos of the
13 inside of your trailer?

14 A Yes, uh-huh. This is my recliner here. This is
15 where I usually sit in front of the TV. The breakfast
16 nook...

17 Q I'm going to turn it on around just a little bit.
18 Go ahead.

19 A Okay. And the breakfast nook is in this -- up in
20 this area.

21 Q Okay.

22 A And right here by -- this is my TV and the front
23 door. So you see how close I was to the front door.

24 Q Okay. Does this show the kitchen area that you were
25 describing?

OTIS HYDER - DIRECT BY SOL. WALL

1 A Yes. This is -- this is the breakfast nook right
2 over here. And that -- and when they came in -- I had --
3 I had seen David before. But I seen him that night when
4 he come in, too.

5 Q Okay. And is this the doorway that Robert was
6 standing in?

7 A Yes.

8 Q Okay. You can go ahead and take your witness seat.

9 (Whereupon the witness returned to the stand.)

10 Q And you say Robert was leaning against the doorway?

11 A Yeah. With his left shoulder against the door
12 facing.

13 Q All right. What was he doing? Was he...

14 A Well, they were talking, now. I couldn't hear what
15 they were saying. But I seen Robert's left shoulder
16 move. And I don't -- I don't -- I wasn't outside, so I
17 didn't see what he was doing, you know.

18 Q All right. Before that did you hear Robert say
19 anything?

20 A No, I didn't hear no conversation after they went to
21 the door.

22 Q Okay. At some point -- what if anything did you
23 hear Robert saying about the defendant having a gun?

24 A Well, he -- Robert asked him, "Was you gonna shoot
25 me?" And Robert -- and -- I forgot what his comment.

OTIS HYDER - DIRECT BY SOL. WALL

1 But Robert says, "Well, if you will give me the gun I'll
2 hep (sic) you."

3 Q And this was standing at the doorway.

4 A Or just before they went out to the doorway. Yeah.

5 Q Okay. Was it after that that you saw the shoulder
6 move?

7 A Yes, uh-huh.

8 Q Robert's shoulder move?

9 A Yeah.

10 Q What happened right after his shoulder moved?

11 A The gun -- he was -- he was shot right then.

12 Q Was that -- was that immediately?

13 A Immediately. Yeah.

14 Q What if anything happened after that?

15 A Well, I got on the phone and called 911. And I
16 called my son, who came down there within about five
17 minutes. He don't live a block away from the trailer.

18 Q Now, while they were inside the -- your trailer, was
19 there any fighting in any way?

20 A No, sir.

21 Q Any kind of scuffling?

22 A No, sir.

23 SOL. WALL: No further questions, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. COX:

OTIS HYDER - CROSS BY MR. COX

1 Q Mr. Hyder---

2 A Yes.

3 Q You, of course, remember talking with the police
4 about this, telling them what happened?

5 A Yes.

6 Q You remember that. Now. Let me refresh your memory
7 a little bit. When the lady came in that you mentioned,
8 the black lady, Robert said he didn't want to deal with
9 her.

10 A Right.

11 Q You said that.

12 A Sure did.

13 Q And she went back out. And in a little while a
14 black man came in.

15 A Right.

16 Q Which was David Smith.

17 A Right.

18 Q And -- and they had some altercation in there.
19 First of all, Robert told the man he didn't have the
20 money. Is that correct?

21 A You're exactly right. Said as soon as he got him a
22 job he would pay him.

23 Q But David laid the drugs down on the table.

24 A No.

25 Q Huh?

OTIS HYDER - CROSS BY MR. COX

1 A Wasn't no drugs laid down on no damn table.

2 Q Wasn't none laid on the table.

3 A No, sir.

4 Q Well, why would you say, then, that Robert grabbed
5 something from the man?

6 A I didn't say Robert grabbed anything from the man.

7 Q Now, Mr. Hyder, on January 12 of '97 -- I -- I'm
8 quoting from the police statement taken from you. That's
9 what I'm reading. And that's what they say you told
10 them.

11 A No, I didn't, either.

12 Q Said, "Robert grabbed something from the man. And I
13 heard Robert say, 'Shoot me. What are you going to do,
14 shoot me?'" and "'Give me the gun; I'll pull the
15 trigger.'"

16 A Yeah. Yeah, that's exactly what he said. But he---

17 Q All right.

18 A But I did not say that Robert hit him.

19 Q And the man -- you didn't say that---

20 A No, I didn't.

21 Q ---he grabbed something from the man?

22 A I didn't see him grab anything from him.

23 Q You didn't---

24 A No, sir.

25 Q ---say that? You didn't tell the police?

OTIS HYDER - CROSS BY MR. COX

1 A No, huh-uh. Not that I know of.

2 Q You got any idea why they would put it in the
3 statement---

4 A I don't know.

5 Q ---if you didn't tell them?

6 A I don't know, sir. But I would like -- I would like
7 to see the report from 'em.

8 Q I've got it, if you want to read it.

9 A No, I don't think I can read it.

10 Q You can read the whole thing if you wish.

11 A No, sir.

12 SOL. WALL: I've got a photocopy of it. We can get
13 the original, Your Honor.

14 (Pause.)

15 (Whereupon Sol. Wall handed document to
16 Mr. Cox.)

17 Q Now here are both statements, one of them written in
18 longhand by the police officer and---

19 A And what does it say? You know I cannot read.

20 Q You can't read it?

21 A No, sir.

22 Q Well, I'll read it to you, then; and you tell me if
23 that's correct. That -- first of all, you can see that
24 that's your signature; can't you?

25 A It could be. Yes, sir.

OTIS HYDER - CROSS BY MR. COX

1 Q You remember -- do you remember talking to the
2 police?

3 A Oh, yes, sir.

4 Q All right.

5 A I'm very alert.

6 Q Very alert. Okay. Now. This was written by Doug
7 Smith, who is a police officer, at -- at your request.
8 That's what this says.

9 A At my request?

10 Q At your request. That he would write it for you
11 'cause you can't -- obviously can't see well. All right?
12 And I'm going to read this to you.

13 A You go ahead. Yes, sir.

14 Q "Robert Finley woke me up at about 2:30 a.m. He kn
15 oc
16 ke
17 d
18 on
19 th
20 e
21 do
22 or
23 an
24 d
25 sa

OTIS HYDER - CROSS BY MR. COX

1	id
2	th
3	at
4	he
5	ne
6	ed
7	ed
8	to
9	us
10	e
11	th
12	e
13	ph
14	on
15	e.
16	Ab
17	ou
18	t
19	15
20	or
21	20
22	mi
23	nu
24	te
25	s

OTIS HYDER - CROSS BY MR. COX

1	la
2	te
3	r
4	a
5	co
6	lo
7	re
8	d
9	wo
10	ma
11	n
12	kn
13	oc
14	ke
15	d
16	on
17	th
18	e
19	do
20	or
21	an
22	d
23	ca
24	me
25	in

OTIS HYDER - CROSS BY MR. COX

1	.
2	I
3	fe
4	lt
5	li
6	ke
7	th
8	is
9	ha
10	d
11	so
12	me
13	th
14	in
15	g
16	to
17	do
18	wi
19	th
20	dr
21	ug
22	s.
23	Ro
24	be
25	rt

OTIS HYDER - CROSS BY MR. COX

1 di
2 dn
3 't
4 wa
5 nt
6 to
7 de
8 al
9 wi
10 th
11 th
12 is
13 wo
14 ma
15 n.

16 "She went outside and a black man came inside.
17 I heard Robert tell him that he did not have any
18 money. Robert grabbed something from the man. I
19 heard Robert say, 'Shoot me. What are you going to
20 do, shoot me? Give me the gun and I'll pull the
21 trigger.'

22 "The man backed out of the trailer. I heard a
23 gunshot and Robert fell out of the trailer"---

24 A Who backed outside the trailer?

25 Q The man backed out of the---

OTIS HYDER - CROSS BY MR. COX

1 A What man?

2 Q Well, the -- it was apparently David Smith.

3 A No. David Smith didn't back out the door. He
4 walked out the door.

5 Q Well, anyway, this -- I'm telling you the statement.

6 "The man backed out of the trailer"---

7 A Well, I must of been sick when I give them that
8 report.

9 Q Well, it was the next day, sir.

10 A Yeah, I know that.

11 Q The same day.

12 A Yeah, the same -- I remember -- yeah.

13 Q You would have remembered more---

14 A Yeah.

15 Q ---at that time than you do now, though.

16 A I know what was going on.

17 Q Okay.

18 A But at that time I might of been a little upset over
19 Robert getting killed.

20 Q Okay.

21 "The man backed out of the trailer. I heard a
22 gunshot and Robert fell forward out of the trailer.

23 "I woke Terry up and told him to call 911. And
24 after Terry called I got on the phone and talked to
25 911. Then I told Terry to go get Morgan. That's

OTIS HYDER - CROSS BY MR. COX

1 Robert's girlfriend. Terry and Morgan came back and
2 the police arrived."

3 Now, that is your statement that was given---

4 A Well, I'm sorry---

5 Q ---January 12.

6 A I give it to them erroneous 'cause he did not back
7 out no damn trailer.

8 Q Well, that's what you told them that day.

9 A Well, I must of been---

10 Q Told the police. When they---

11 A I --- I---

12 Q ---investigated this matter.

13 A I must of been upset.

14 Q So now, after almost a year, you are saying you
15 remember it differently than you did that day, at that
16 point. Is that what you're telling us? That's what the
17 jury -- you want the jury to believe?

18 A No, I don't want the jury to believe. I just want
19 the jury to believe me.

20 Q Uh-huh. And not your statement given that day.

21 A Oh, I probably was upset over that statement, at the
22 time I gave that statement. I was upset over Robert
23 getting killed. 'Specially in my damn house.

24 Q Well, I agree with that. But you -- just tell us
25 why you would say that Robert grabbed something from the

OTIS HYDER - CROSS BY MR. COX
- REDIRECT BY SOL. WALL

1 man if he didn't.

2 A Robert didn't grab nothing from him or nobody else.

3 Q All right. That's all. Thank you.

4 SOL. WALL: Just a few questions, Your Honor.

5 REDIRECT EXAMINATION

6 BY SOL. WALL:

7 Q This statement was taken from you at 4:22 in the
8 morning---

9 A Yeah.

10 Q ---on January 12, 1997. So it would have been---

11 A A couple of hours after Robert was killed.

12 Q Less than two hours after---

13 A Yes, sir.

14 Q ---the time he was killed.

15 A Yes, sir.

16 Q Are you normally awake at that time of the morning?

17 A Well, I had been awake all night.

18 Q Were you upset by what had happened?

19 A Yes, sir. Sure was. Robert and I was good friends.

20 Q From the -- and you showed the jury; I won't ask you
21 to stand down again. But from where you were sitting in
22 the living room, in your chair, could you see outside of
23 the trailer? In other words, could you---

24 A No, sir. No; sir.

25 Q From your angle you could only see Robert's back---

OTIS HYDER - REDIRECT BY SOL. WALL

1 A Right.

2 Q ---and shoulders.

3 A Right, sir. Right.

4 Q So would you have any way of knowing what he did
5 with his arms?

6 A No, sir.

7 Q You just saw a shoulder move---

8 A Well, I could see his shoulder move. But I didn't
9 see his -- you know, I wasn't out there to see his arms
10 or his -- you know. But I would imagine that what he was
11 doing, with the shoulder moving.

12 Q And this statement was written for you by the
13 officer. Right?

14 A I don't -- I don't even remember.

15 Q You don't remember what happened shortly thereafter?

16 A I -- I knew what was going -- I knew what happened.
17 I knew Robert got killed and everything. But when I went
18 down there at -- it was about 4:20 in the morning, or
19 something like that. We was all give out and tired, you
20 know, and upset.

21 Q Okay.

22 SOL. WALL: No further questions, Your Honor.

23 MR. COX: I think not.

24 THE COURT: You may step down.

25 SOL. WALL: We would like to ask that Mr. Hyder be

1 excused, Your Honor.

2 MR. COX: No objection.

3 THE COURT: He may be.

4 SOL. WALL: May I approach, Your Honor?

5 THE COURT: Uh-huh.

6 (Whereupon a bench conference was held, off the
7 record, within the presence but out of hearing
8 of the jury.)

9 THE COURT: All right. Ladies and gentlemen, we
10 need to take just a very short recess before we take up
11 the next witness. So I'm going to ask you to please go
12 to your jury room.

13 At no time are you to discuss the case until,
14 its conclusion when you are asked to begin your
15 deliberations. So keep that in mind at any time when we
16 take a recess.

17 It should be only five minutes and we'll bring
18 you back to conclude before lunch.

19 Please go to your jury room. Don't discuss the
20 case. We'll bring you back in just a few minutes.

21 (The following took place outside the presence
22 of the jury:)

23 THE COURT: All right. Take five minutes.

24 SOL. WALL: Thank you, Your Honor.

25 (Whereupon the Court took a brief recess.)

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

DAVID DWIGHT SMITH, 245760,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

2011-CP-42-01283

**MEMORANDUM IN SUPPORT OF PCR
IN THE FORM OF A
PROPOSED ORDER**

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on March 17, 2011.

I**PROCEDURAL HISTORY**

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the April 1997 term of General Sessions for murder and possession of a weapon during the commission of a violent crime (97-GS-42-1639, counts 1 and 2). The Applicant was first tried on these charges in 1997 and represented by T. Louis Cox, Esquire. On December 4, 1997, the Applicant was found guilty, after a trial by jury, of both charges. The Honorable J. Derham Cole sentenced Applicant to life for the murder and to a concurrent term of five years for the possession of weapon during the commission of a violent crime charge.

The Applicant appealed his convictions and sentences to the South Carolina Supreme Court. The South Carolina Supreme Court dismissed the appeal in an Order dated December 2, 1999 and

denied the Applicant's Petition for Rehearing in an Order dated April 6, 2000. The Applicant subsequently filed an Application for Post-Conviction Relief on June 7, 2000. An evidentiary hearing was held at which the Applicant was present and represented by E. P. "Bill" Godfrey, Esquire. The Honorable Donald W. Beatty, then circuit court judge, granted Post-Conviction Relief by written Order dated May 23, 2003. Respondents filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on December 1, 2004. The Remittitur was returned on December 17, 2004.

Applicant next proceeded to a second trial on these charges. E. P. "Bill" Godfrey, Esquire, represented the Applicant on retrial. On November 1, 2005, the Applicant was convicted of these charges by a jury. The Honorable Doyet A. Early, III sentenced the Applicant to concurrent terms of thirty-five years for murder and five years for possession of a weapon during the commission of a violent crime.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals reversed Applicant's convictions and sentences and remanded the case for a new trial. *State v. Smith*, Op. No. 2008-UP-194 (filed March 20, 2008). The Respondent filed a Petition for Rehearing and a Petition for Rehearing *En Banc*, both of which were subsequently denied on May 27, 2008. Respondent then filed a Petition for Writ of Certiorari, which was granted by the South Carolina Supreme Court on April 10, 2009. Following the submission of briefs by the parties, the South Carolina Supreme Court reversed the decision of the Court of Appeals and reinstated the Applicant's convictions and sentences. *State v. Smith*, Op. No. 26926 (filed February 7, 2011). The Remittitur was returned on February 24, 2011.

This current Post-Conviction Relief action was filed on March 17, 2011. Respondent filed its Return on May 1, 2012. In his Application for Post-Conviction Relief the Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of Trial Counsel, in that;
 - a. Counsel failed to secure State witness statements and testimony or double jeopardy claim,
 - b. Counsel failed to request specific instructions,
2. Ineffective assistance of appellate counsel, in that;
 - a. Appellate Counsel made itself unavailable,
3. Double jeopardy;
4. *Brady* violation;
5. Abuse of discretion;
6. Newly discovered law;
 - a. *State v. Belcher*, 685 S.E.2d 802 (2009), Melker and Light.
7. Violation of the State, United States, and Federal Constitution;
 - a. Violation of the 6th, 8th, and 14th Amendments of the State, United States and Federal Constitution.

The Applicant filed an Amended Application for Post-Conviction Relief on March 18, 2015. On June 11, 2015, Applicant filed a Superseding Amended Application for Post-Conviction Relief in which he restated the allegations from the first Amended Application and added additional Sixth Amendment claims. The allegations raised in the Superseding Application are as follows:

1. Trial Counsel was ineffective for failing to question witnesses for the State concerning any deals they may have been given, or any favorable consideration they hoped to receive, at the time of their original testimony, in exchange for their cooperation and testimony at Applicant's first trial in 1997.

2. Trial Counsel was ineffective for failing to question witnesses for the State concerning any deals they may have been given, or any favorable consideration they hoped to receive, in exchange for their cooperation and testimony at Applicant's second trial in 2005.
3. Trial Counsel was ineffective for failing to question witnesses for the prosecution concerning charges that could have been brought against them concerning this case, and any conversations they had with law enforcement, or anyone affiliated with the Solicitor's Office, concerning their potential exposure to criminal charges.
4. Trial Counsel was ineffective for failing to consistently object to leading questions posed by the State where said examination either directly suggested the desired inculpatory response or lead witnesses to alter previous testimony which was advantageous to the defense.
5. Trial Counsel was ineffective for failing to cross-examine Dr. Wren concerning whether some of the abrasions reported in the autopsy may have been caused by a surface on the grips of the hand gun involved in this case. Tr. p. 176, l. 4- p. 179, l. 4.
6. Trial Counsel was ineffective for failing to interview and investigate Julian Terry Bradley as a potential witness in this case where Bradley was present at the scene of this shooting, and left the location for a period of time before law enforcement arrived to investigate this incident.
7. Trial Counsel was ineffective for failing to request criminal records on all the State's witnesses who were neither law enforcement nor experts.
8. Trial Counsel was ineffective for failing to obtain criminal records for Julian Terry Bradley, who was present at the scene of the shooting in this case
9. Trial Counsel was ineffective for failing to request criminal records for the victim, Robert A. Findley.
10. Trial Counsel was ineffective for failing to argue that Terry Bradley could have removed the five (5) rocks of crack cocaine delivered to, and left at, the scene by Applicant.
11. Trial Counsel was ineffective for failing to adequately argue that the prior testimony of Otis Hyder, Sr. could not be introduced in Applicant's second trial where Hyder was not impeached at the first trial with the notes from an investigator from the Solicitor's Office which were subsequently part of the basis for a reversal of Applicant's first conviction in a PCR action.

12. Trial Counsel was ineffective for failing to argue that the prior testimony of Otis Hyder, Sr. was not admissible under Rule 804 (a) (4) SCRE where the State failed to present competent evidence that the witness was unavailable to present live testimony.
13. Trial Counsel was ineffective for counseling Applicant to withdraw his objection to the previous testimony of Otis Hyder, Sr., *where at the first trial*, this witness was not cross-examined concerning the following:
 - i. The content of notes taken by an investigator for the Solicitor's Office (introduced Court's Exhibit No. One at Trial No. Two);
 - ii. His prior criminal record;
 - iii. His knowledge of what happened to the drugs left at the scene by the Applicant;
 - iv. His involvement in a preconceived plan to rob Applicant;
 - v. His potential criminal exposure in this case, and any concessions made by the prosecution in exchange for his cooperation against Applicant; and
 - vi. Details concerning his visual impairment.
14. Trial Counsel was ineffective for failing to adequately cross-examine Otis Hyder, Sr. concerning the nature and severity of his visual impairment at the time of this incident.
15. Trial Counsel was ineffective for failing to present Morgan Simmons Ortez as a witness at Applicant's second trial where her testimony was necessary to establish that she had reported to law enforcement that earlier on the evening of his death the victim confessed to her that he had tried to rob another drug dealer.
16. Trial Counsel did not provide Applicant effective assistance of counsel where he failed to be prepared to use the transcript from his first PCR case to establish that Defense Counsel from Applicant's first trial, Attorney Cox, would have cross-examined Otis Hyder, Sr. differently had he been aware of the existence of the notes of an investigator from the Solicitor's Office marked as Court's Exhibit No. 1, at Trial II.
17. Trial Counsel was ineffective for failing to object to the introduction of Otis Hyder, Sr.'s testimony from Applicant's previous trial where Hyder

was not cross-examined at the first trial concerning when the damage to the door frame at his home, the crime scene, occurred.

18. Trial Counsel was ineffective for failing to object to the self-defense charge given at Applicant's trial where the charge given was confusing, addressed facts not present in Applicant's case, and deprived him of the opportunity to have this defense given appropriate consideration by the jury.
19. Trial Counsel was ineffective for failing to object to testimony from Angie Smith wherein she asserted it was "*to her understanding*" the Applicant had crack and a gun. Tr. p. 89, l. 17-90, l. 10.
20. Trial Counsel was ineffective for neglecting to cross-examine Angie Smith concerning whether she had ever been charged with, or threatened with, drug charges, in connection with her involvement in the drug transaction she admitted participating in with the victim and the Applicant.
21. Trial Counsel was ineffective for failing to cross-examine Angie Smith concerning what, if any, charges had been brought against her in conjunction with the crack cocaine she admitted distributing after it was given to her by the Applicant after the shooting. Tr. p. 90, l. 15-24.
22. Trial Counsel was ineffective for failing to cross-examine Angie Smith concerning whether she had set the Applicant up to be robbed on the night of the shooting by Otis Hyder, Sr. and/or Julian Terry Bradley.
23. Trial Counsel was ineffective for failing to object to the prosecution not only leading, but misstating previous witness testimony, in its examination of witnesses. See, Tr. 92, ll. 15-17, Tr. p. 92, ll. 18-20 *But see*, Tr. p. 88, ll. 17-19, and Tr. p. 80, l. 17-90, 10
24. Trial Counsel was ineffective for neglecting to ascertain what State witness Cynthia Roseburgh was referencing when stated that, "well, both of them got it wrong." Tr. p. 102, l. 5.
25. Trial Counsel was ineffective for failing to cross-examine Detective Denton about his claim that there had been testimony that the gun was discharged "*towards the trailer*" where the record did not support that assertion.
26. Trial Counsel was ineffective for failing to object to Detective Denton's testimony concerning ballistics when he had not been qualified as an expert in that field. Tr. p. 134, ll. 6-11 and Tr. p. 133, l. 17- p. 134, l. 2.

27. Trial Counsel was ineffective for failing to obtain a ruling from the Court concerning Applicant's objection to testimony from Detective Denton wherein he stated that when he first spoke with the Applicant he wanted to know if it was about "*a murder case*" in Spartanburg. Tr. p. 137, ll. 21- p. 138, l. 25.
28. Trial Counsel was ineffective for failing to adequately cross-examine Detective Denton concerning his use of the term *murder* when recalling Applicant's statements to him in their initial conversation.
29. Trial Counsel was ineffective for failing to obtain a ruling from the trial judge concerning his objection to leading by the prosecution regarding the crucial assertion that Applicant used the term "murder" when asking law enforcement why they wanted to talk to him shortly after this incident. See, Tr. p. 138, ll. 4-21.
30. Trial Counsel was ineffective for failing to cross-examine Detective Denton concerning law enforcement's investigation of Julian Terry Bradley and his role in this case.
31. Trial Counsel was ineffective for failing to object to testimony from Dr. Wren in which he states that law enforcement probably moved the deceased body. Tr. p. 176, l. 3 Tr. p. 52, ll. 22-23 Tr. p. 54, ll. 12-13, Tr. p. 46, ll. 15-18, Tr. 54, ll. 1-8, Tr. p. 60, ll. 1-15.
32. Trial Counsel was ineffective for failing to object to the introduction of the previous testimony of Otis Hyder, Sr., on the ground that this witness could not give competent eye witness testimony when, by his own account, he was virtually blind.
33. Trial Counsel was ineffective for failing to make an objection to Applicant's re-trial on grounds of double jeopardy where his original convictions and sentences were overturned on the ground that certain exculpatory evidence, known to the State, had not been turned over to the defense by the State.
34. Trial Counsel was ineffective for failing to argue that Applicant may have unintentionally put pressure on the trigger as a reflex reaction to losing his balance during his struggle with the victim.
35. Trial Counsel was ineffective for failing to argue that if Applicant had intended to kill the victim over a \$40.00 debt he would not have let

someone as big as the victim get that close to him, and thereby risk losing control over the gun, before firing.

36. Trial Counsel was ineffective for failing to present a closing argument to the jury in which he adequately reviewed the standard for self-defense and illustrated for the jury how the evidence adduced at Applicant's trial fit that standard.
37. Trial Counsel was ineffective for failing to object to the self-defense charge in this case where a portion of that charge indicated that the Applicant had a burden of proof and therefore, was unconstitutionally burden shifting and violated Applicant's right to due process of law where the instruction in question diluted the State's burden of proof beyond a reasonable doubt.
38. Trial Counsel was ineffective for failing to object, or otherwise respond, when the prosecution answered negatively when asked by the Court what evidence existed which supported Applicant's theory of the case.
39. Trial Counsel was ineffective for failing to object to an improper jury instruction on malice given at his jury trial.
40. Applicant received ineffective assistance of counsel on direct appeal where appellate counsel, Joseph L. Savitz, continued to represent Applicant on direct appeal after Applicant filed a grievance against Savitz without advising the Court of a conflict of interest arising from that grievance which compromised Attorney Savitz's ability to represent Applicant.
41. Applicant received ineffective assistance of counsel on direct appeal where Attorney Savitz failed to notify Applicant of the State's appeal from the favorable decision of the South Carolina Court of Appeals for nearly two years.
42. Applicant received ineffective assistance of appellate counsel where Savitz failed to file a Petition for Rehearing following the Supreme Court's reversal of the Opinion of the South Carolina Court of Appeals' opinion granting Applicant a new trial.
43. On appeal in the Supreme Court of South Carolina, Appellate Counsel was ineffective for failing to file a cross-appeal on the issuance of an improper malice instruction in the trial court following the Supreme Court's decision in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (S.Ct., decided October 12, 2009), where Applicant's jury was charged on the law of self-defense and the inference of malice from the use of a deadly weapon.

44. Applicant received ineffective assistance of counsel on direct appeal where Attorney Savitz neglected to submit as an appellate issue the failure of the trial court to grant Applicant a directed verdict of acquittal.

An evidentiary hearing was convened on June 11, 2015 during which the Applicant was present and represented by Tara Dawn Shurling, Esquire and the State was represented by Assistant Deputy Attorney General, Suzanne H. White. Applicant was present at this proceeding and testified in support of this Application. In addition, Applicant presented testimony from his Trial Counsel, Everett P. Godfrey, Jr. In addition to this testimony, Applicant presented thirteen exhibits in support of his application. No exhibits were offered by Respondent. In addition to the PCR hearing testimony and exhibits, this Court has before it copies of the transcripts from Applicant's 1997 jury trial and his 2005 jury trial, copies of the pleadings, hearing transcript and Order issued in Applicant's first PCR action, a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections. The appellate records from both of Applicant's prior direct appeals are also before this Court.

II

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000); *Rule 71.1(e), SCRPC*. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable

professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of Trial Counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that,

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

A defendant is entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999); U.S. Const. amend. VI. Under the two-pronged standard for establishing a claim of ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, the defendant must show first

that counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Then, the defendant must show that, but for counsel's deficient representation, the outcome of the proceeding would have been different. *Id.*

III

SUMMARY OF RELEVANT TESTIMONY AND EVIDENCE

Trial Counsel at Applicant's second jury trial, Everette P. Godfrey, Jr.¹, had previously represented Applicant in a successful Post-Conviction Relief² action that followed Applicant's conviction at his first trial. PCR II, p. 7, ll. 14-24. At the time of the current PCR action, Trial Counsel was medically disabled and reviewed for the Court the medications he was taking on the day of his PCR testimony. PCR II, p.8, l. 12-p.10-l. 22. He expressed the opinion that his cognitive abilities were not impaired by any of his medications. PCR II, p. 10, l. 23 – p. 11, l. 11. When asked if there had been any reason why he had not questioned any witnesses for the State concerning any favorable consideration they had either been lead to hope they would receive, or hoped to receive, in exchange for their testimony at the original trial³, Trial Counsel admitted that, "I didn't think of that." PCR II, p. 11, ll. 12-24. The transcript of the October 31, 2005 trial verifies that neither the prosecution nor the defense questioned Angie Smith⁴ about any charges she potentially faced in connection with this case. Likewise, she was never questioned about any favorable consideration she had received, or hoped to receive as a result of her testimony. Trial 2005, p. 62, l. 5 – p. 97, l. 11. The Record on Appeal from Applicant's 1997 trial contained the entire testimony of Angie Smith. This record reflects that Applicant's previous trial attorney, Louis

¹ Hereafter, Trial Counsel.

² Hereafter, PCR.

³ 1997.

⁴ Hereafter, Angie.

Cox, did not question Angie Smith concerning any favorable consideration she received, or hoped to receive, in exchange for her cooperation and testimony. Neither did the State. Trial 1997, p. 62, l. 16 – p. 83, l. 5. Next Trial Counsel was questioned as to why he did not question any of the State's witnesses concerning their expectation, or hope, of reward for their testimony at the second trial in 2005; Trial Counsel initially said that to the best of his recollection the State would not have had anything to offer any of these witnesses. PCR II, p. 11, l. 25-p. 12, l. 14. The transcript of the 1997 trial verifies that Otis Hyder, Sr., the owner of the trailer where the shooting in this case occurred was not questioned by the State, or the defense, concerning any favorable consideration he either received, or hoped to receive, in exchange for his cooperation and testimony. Trial 1997, p. 83, l. 7 – p. 101, l. 24. This testimony was subsequently published under rule 804(a) (4), SCRE, at Applicant's 2005 trial. Trial 2005, p. 183; Court's Exhibit No. 2.

Rodney Smith, Angie Smith's brother testified that he and his sister are not related to Applicant. His testimony for the State outlined his limited involvement with the deceased, Robert Findley,⁵ on the evening before he was killed, his own history of drug dealing, his history of being supplied with drugs by Applicant and his own history of selling drugs to Robert. He testified to his knowledge concerning Applicant being owed \$40.00 by Robert. Once again, this witness was not questioned by anyone concerning any favorable consideration he either received, or hoped to receive, in exchange of his cooperation and testimony. Trial 2005, p. 103, l. 22 – p. 121, l. 13. Trial Counsel acknowledged, however, that the State witness named Angie claimed she called Applicant and took him over to the trailer that was the crime scene because her brother, a drug dealer, didn't want to service Robert when he called seeking to purchase drugs. It was the State's theory of prosecution that Applicant shot Robert because he owed him money for drugs.⁶ There was

⁵ Hereafter, Robert.

⁶ See, State's Opening Statement to jury. Trial 2005, p. 34, l. 14 – p. 41, l. 20.

evidence that Robert had said he was going to rob a drug dealer. When Angie and Applicant arrived at the trailer, she went in to consummate the drug deal, but came back out claiming the caller would not deal with her and wanted to deal with Applicant. It was, as Trial Counsel acknowledged, the theory of the defense that Robert intended to rob Applicant. PCR II, p. 12, l. 15 – p. 13, l. 17.⁷ Trial Counsel was asked if he ever considered the possibility that Angie, who claimed she responded to Robert's desire to buy drugs when her brother refused, may have been in on the plan to rob Applicant. Trial Counsel claimed that based upon his conversations with Applicant and his review of the discovery materials, that idea "never really came up." PCR II, p. 13, l. 6 – p. 14, l. 7.⁸

The statement of Angie Smith given to law enforcement after Robert was killed was introduced at the PCR hearing held on Applicant's current application as Applicant's Exhibit No. 2, PCR II, p. 16, ll. 7-8 and p. 18, l. 19. In her statement, Angie Smith stated that she and Applicant had driven to Robert's.⁹ She went on to state that they "pulled up at Pops' trailer." At trial, Angie Smith acknowledged knowing Robert, but referenced the trailer where the shooting occurred as belonging to "the man in the wheelchair" and said he was "a white man." She also indicated *she* called him "Pops" and described him as an "older man." Trial, 2005, p. 72, l. 20 – p. 73, l. 13. In her testimony at the 1997 trial, she referred to Hyder as "the man in the wheelchair" and said, *they* call him "Pops." Trial 1997, p. 65, ll. 16-18, p. 66, ll. 6-7 and p. 67, ll. 15-16. At trial, Angie Smith testified that she thought Robert lived right up the street from Pop's mobile home. She stated that Robert would go to Pops' to use the phone. Trial 2005, p. 73, ll. 10-13. She provided absolutely no explanation for why, once the telephone call placing the drug order was made, she would have delivered the drugs to Robert at Pops' home; even going inside the home to conduct the transaction.

⁷ See also, Trial Counsel's opening statement. Trial 2005, p. 41, l. 22- p. 44, l. 13.

⁸ Due to a flood at his office, Trial Counsel's file was destroyed and unavailable for review by current PCR Counsel. A complete copy of the discovery provided to Trial Counsel by the Solicitor's office was admitted as Applicant's Exhibit No. 1. PCR II, p. 15, l. 2 – p. 16, l. 6.

⁹ The deceased was named, Robert Findley. See, Applicant's Exhibit No. 12.

In her trial testimony, Angie Smith testified that after the shooting Applicant gave her a stash of cocaine that he needed to get rid of and, significantly, that she then gave that cocaine to someone else. Trial 2005, p. 90, ll. 15-22. Trial Counsel acknowledged that this admitted conduct constituted distribution, but initially explained his failure to question her about what if any potential benefit she received in exchange for her testimony by stating, "[t]here were no charges." PCR II, p. 18, l. 24 – p. 19, l. 14. Ultimately, Trial Counsel admitted that he should have impeached her with the fact that she received no charges for her admitted distribution of crack cocaine. PCR II, p. 19, ll. 15-20. He eventually acknowledged that Angie Smith could have been charged with murder under the theory of accomplice liability where the killing in this case took place during a drug deal she set up and even, according to her own testimony, attempted to consummate. PCR II, p. 20, ll. 3-23.

In the PCR action pursued by Applicant following his 1997 conviction, then circuit court judge, Beatty, granted Applicant's request for a new trial. Relief was granted in part because notes, not turned over to the defense prior to trial, quoted Otis Hyder saying, "That's when Finley reached for Smith. He intended to take drugs from him." PCR II, p. 20, l. 24-p. 24, l. 3; Applicant's Exhibit No. 3. The statement given to law enforcement by the man who owned the trailer where the shooting happened, Otis "Pops" Hyder, was introduced at the hearing on Applicant's current PCR action as Applicant's Exhibit No. 4, PCR II, p. 25, l. 23 – p. 26, l. 12. During the PCR hearing Trial Counsel acknowledged that in his statement Hyder referenced to Angie Smith as "a colored woman" and "this woman." He further acknowledged that in his testimony at Applicant's 1997 trial, Hyder claimed he did not know Angie Smith. Trial 1997, p. 84, ll. 24-25. Trial Counsel admitted that had he noticed Angie Smith referenced Hyder as "Pops" in her statement to law enforcement, and her trial testimony, he would have wanted to question Hyder about his claim that he didn't know Angie Smith. Hyder did not testify at Applicant's 2005 trial. PCR II, p. 24, l. 14 –

p. 25, l. 22. Prior to Applicant's second trial, in 2005, the State advised the defense that Hyder was not going to be an available witness. In his PCR testimony, Trial Counsel acknowledged that he initially strenuously objected to him being declared an unavailable witness under Rule 804(a)(4), but then reversed his position and withdrew his objection to his prior testimony from the 1997 trial being introduced at the retrial in 2005. PCR II, p. 26, ll. 14-25. He explained that change in position by noting that the State had informed him Hyder was dead and a private investigator he knew, named Ed McCall, confirmed that Hyder was deceased. PCR II, p. 27, ll. 1-7. Trial Counsel admitted that the trial judge gave the State overnight to produce more concrete evidence that Hyder was in fact dead.

Trial Counsel recalled that the following day the State admitted they were wrong and produced Otis Hyder, Jr. who informed the Court, without being put under oath, that his father was just not able to come to court. Trial Counsel acknowledged that the State produced no evidence concerning Hyder's condition and did not even require Hyder's son to provide sworn testimony. He testified that he could not recall why he withdrew his objection to Hyder's 1997 testimony being admitted. He further testified that he could not recall a conversation with PCR counsel in which he stated that he needed to question Hyder about there having been a struggle between Applicant and Robert before the shot occurred. He further admitted that he could not remember Hyder's testimony in 1997 including vehement claims that he never told law enforcement the shooting was preceded by a scuffle. PCR II, p. 28, l. 22 – p. 29, l. 18; Trial 1997, p. 89, ll. 18-22. Trial Counsel did recall that in 1997, Hyder testified that he was legally blind. He acknowledged that he did not object to Hyder's 1997 testimony coming in on the ground that he had not been able to cross-examine Hyder about his eyesight, his claim that no scuffle had taken place or his knowledge concerning any other

aspect of this shooting. He admitted that he could have questioned Hyder about what happened to the portion of drugs Applicant left at the scene, PCR II, p. 29, l. 11 – p. 31, l. 13.

Hyder's statement and his 1997 trial testimony indicated that a third man, Terry Bradley, was supposedly asleep on the sofa when this shooting occurred. When Trial Counsel was asked what investigation he had engaged in with regard to this individual, who had not testified at the 1997 trial, Trial Counsel testified that he got nothing from his investigator, Ed McCall and "was left with the discovery." Trial Counsel added that, "every crime has somebody asleep on a sofa, don't they, but I don't remember much else about that fella." PCR II, p. 31, ll. 14-22.

Trial Counsel acknowledged in his PCR testimony that Applicant's trial testimony indicated that once the customer wouldn't do business with Angie Smith, he thought they were after the rest of what he had, not just the five rocks he set out on the table because Angie had reported that the customer wanted "a 50." PCR II, p. 31, l. 23 – p. 32, l. 13. Trial Counsel recalled that Applicant's testimony asserted the situation was a set-up, and they were looking to rob him. PCR II, p. 31, l. 23 – p. 32, l. 16. Trial Counsel did not dispute the fact that the transcript of the 1997 trial confirms that Hyder was never questioned about his possible involvement in the plan to rob Applicant. Despite Hyder's claim that the much younger deceased just came to his trailer at 2:00 a.m. to use the telephone, no one questioned him about the portion of his statement in which he indicated that "that's when I think he was going to take the drugs." Trial Counsel admitted that he should have argued the fact that Hyder had not been cross-examined about his potential involvement as a basis for disallowing the 1997 testimony to come in under 804(a)(4), SCRE. Likewise, he admitted that Hyder had not been cross-examined about his exposure as a principal to the plot to rob Applicant. PCR II, p. 32, l. 17 – p. 33, l. 14. He recalled that Hyder had not been charged with anything. PCR II, p. 33, ll. 15-17. The 1997 trial record verifies that Hyder was not questioned concerning his

exposure on charges of robbery, or murder, during the 1997 trial. Applicant's Exhibit No. 13; 1997 Hyder Testimony.

In her statement to the police, Angie Smith specifically recalled Applicant and the deceased falling out the door. She reported seeing Applicant coming out first, the two men falling out the door and then hearing a pop. Trial Counsel recalled that in her testimony at the 2005 trial, Angie testified that she observed the two men tussling and *then* heard a pop. PCR II, p. 34, l. 24 - p. 36, l. 20. Trial Counsel indicated that if the 2005 trial record verified that the Solicitor lead Angie Smith extensively, and eventually got her to say the "pop" preceded her seeing Applicant and the deceased fall out the door, he had no reason for not objecting. PCR II, p. 36, l. 21 - p. 39, l. 2. The incident reports in the discovery package indicate that the first officers on the scene described the deceased being face down. Dr. Wren, the prosecuting pathologist at the autopsy performed on the deceased, testified that he assumed law enforcement may have moved the body because in the crime scene photographs, the deceased was face up. Trial Counsel did not recall Dr. Wren's testimony that law enforcement probably moved the body of the deceased, but admitted that if he had noted that testimony at the time of the trial, he would have objected. PCR II, p. 42, l. 15 - p. 43, l. 22.

At both trials, Applicant testified that once Angie Smith told him the buyer wanted to deal with him directly, he counted out the five pieces for "the 50" the customer wanted. Trial Counsel acknowledged that he knew from the record of the 1997 trial that it was Applicant's position that the five pieces of cocaine were left at the scene when he commenced his hasty departure from the scene. Trial Counsel likewise acknowledged that he was on notice that the State would use the fact that no drugs were found at the scene to challenge Applicant's version of the facts. Despite this fact, Trial Counsel testified that he did not even consider arguing that the "missing witness" Terry Bradley admitted leaving the scene immediately after the shooting and therefore, had every

opportunity to have removed the five cocaine rocks from the scene. He admitted that he probably should have raised this point at trial. PCR II, p. 46, l. 11 – p. 48, l. 5. Trial Counsel candidly admitted that he had no recollection as to whether the discovery indicated that Terry Bradley's potential involvement in this case was ever investigated by law enforcement. PCR II, p. 49, ll. 2-24.

Trial Counsel was also questioned about the fact that Mike Kitts from the Spartanburg Sheriff's Department was at the scene. Trial Counsel was asked if he recalled Officer Kitts' investigative report, dated 1/14/97, in which he documented that law enforcement had been told that the deceased had attempted to rob another drug dealer earlier that day. Trial Counsel testified that he did not recall that investigative report, but had reviewed it prior to the PCR hearing and acknowledged it contained the information in question. Although he could not recall why Mike Kitts was not called to the stand at trial, Trial Counsel admitted that he should have been called as a witness at Applicant's trial. PCR II, p. 50, l. 8 – p. 51, l. 19. Officer Kitts' report was introduced in this PCR action as Applicant's Exhibit No. 7. In addition, Applicant introduced as Applicant's Exhibit No. 8, a document from the discovery package labeled "Spartanburg County Sheriff's Department, List of Persons Entering Crime Scene." That document confirms that Mike Kitts was one of the officers on the scene following this shooting. PCR II, p. 51, l. 21 - p. 52, l. 10.

The deceased girlfriend, Morgan Simmons' statement to law enforcement was introduced during this PCR hearing as Applicant's Exhibit No. 9. Applicant questioned Trial Counsel about the fact that the typed version of Ms. Simmons' statement did not contain everything that was in her handwritten statement. Specifically, Trial Counsel acknowledged that in her handwritten statement she stated that earlier the evening before the shooting, Robert left the trailer they shared. When he came back 30 – 45 minutes later, he said he had tried to rob a drug dealer. Trial Counsel specifically agreed that the transcription of this statement excluded this crucial version of Ms.

Simmons' statement. He testified that he didn't know why he did not call Ms. Simmons as a witness for the defense, but acknowledged that he should have. PCR II, p. 52, l. 12 – p. 53, l. 22. He agreed that the content of her statement would have been relevant to the defense's theory of the case. He further conceded that Ms. Simmons' statement indicated that when the deceased left their trailer again, he told her he was going to Pops' to "get him a hit." Once again, Trial Counsel agreed that testimony from Ms. Simmons concerning this point would have refuted the State's position that the deceased went to Hyder's trailer solely to use his phone. PCR II, p. 54, ll. 6-20.

During the PCR hearing, PCR Counsel advised the Court that she had made numerous attempts to locate Morgan Simmons and Terry Bradley to produce them as witnesses in Applicant's PCR hearing. She stated, as an officer of the Court, that using all the resources available to her, she and her paralegal staff had been unable to find either of these individuals to subpoena them to appear at the PCR hearing. PCR II, p. 54, l. 22 – p. 55, l. 8. Trial Counsel admitted that if he had noted these specific portions of Ms. Simmons' statement before trial, they would have provided yet another basis for arguing against the admission of Hyder's 1997 testimony by pointing out that Hyder was not cross-examined about drug use with the deceased during the 1997 trial. Likewise, Trial Counsel admitted that testimony from Ms. Simmons concerning this point would have put him in the position to argue that Hyder was involved somehow with this drug deal and that this scenario made more sense than the claim that this much older man allowed a young drug using neighbor to come in his home at 2:00 a.m. to use the telephone. PCR II, p. 55, ll. 10-20.

When questioned concerning why he did not object to the portion of the trial court's jury instruction on self-defense which addressed mutual combat, Trial Counsel initially testified that in his view there wasn't any evidence of consensual mutual combat in this case. PCR II, p. 58, ll. 8-21. When asked if he would have objected to the mutual combat component of the self-defense

charge if he had noted it at trial, Trial Counsel totally reversed himself and claimed there were facts before the Court at trial from which “a person could have thought that there was mutual combat.” PCR II, p. 58, l. 22 – p. 59, l. 3.

With regard to Angie Smith, Trial Counsel admitted that he never considered cross-examining her concerning whether she had in fact been part of a plan to set Applicant up and rob him. He admitted that in retrospect that was an option he should have considered. PCR II, p. 63, ll. 9-16.

During the 2005 jury trial, homicide Detective Steve Denton testified that the gun was discharged “towards the trailer.” Trial Counsel admitted that, despite the absence of any ballistics testimony to support that assertion, he never considered objecting to this testimony. He testified that his failure to object to this, and other ballistics testimony from Investigator Denton, was not a tactical or strategy decision. He acknowledged that he should have objected to this line of testimony from Detective Denton. PCR II, p. 63, l. 17 – p. 64, l. 13. Likewise, Detective Denton testified to Applicant asking law enforcement if they were trying to talk to him about “a murder case in Spartanburg” when they first spoke with him after this shooting. Trial Counsel objected to the characterization of Applicant’s statement referencing this shooting as a murder, but the State proceeded with this testimony without the Court having issued a ruling on this objection. Trial 2005, p. 137, l. 21 – p. 138, l. 21. Trial Counsel testified that he had “no idea” why he did not object to the State being allowed to go forward with this line of testimony without the Court ruling on his objection. He admitted that he “should have.” PCR II, p. 64, l. 14 – p. 65, l. 16.

Trial Counsel also admitted that he did not think to cross-examine Detective Denton concerning why law enforcement had not done more to investigate Terry Bradley’s involvement in this case. He acknowledged that he should have. PCR II, p. 65, l. 18 – p. 66, l. 17.

According to the autopsy report, the deceased was 6'2" and weighed approximately 220 pounds. Trial Counsel acknowledged that the warrants in this case had Applicant's height at 5'8" and his weight at 165 pounds. Trial Counsel acknowledged that he could have used the warrants to establish Applicant's height and weight, but felt it was not necessary since the jury saw Applicant at trial. He did not, however, ever offer a clear explanation for failing to establish the deceased's height and weight at trial with an eye toward establishing that if, as the State argued, Applicant went there to kill Robert over a \$40.00 debt, he certainly would not have let this massive man get the drop on him before firing his weapon. PCR II, p. 70, ll. 9-19. Additionally Trial Counsel admitted that he should have introduced the toxicology report from the autopsy to show that the high alcohol level and presence of cocaine metabolite supported Applicant's claim that the deceased was the aggressor in this situation. PCR II, p. 71, l. 14 – p. 72, l. 18.

Trial Counsel admitted that there was no specific reason why he did not lay out with specificity the evidence in this case that supported his request for a lesser-included offense instruction on the crime of voluntary manslaughter. He acknowledged that the jury came back with a note, asking if they could find Applicant guilty of some lesser crime if they did not find self-defense. PCR II, p. 74, l. 16 – p. 75, l. 7. Likewise Trial Counsel offered no explanation for not going over the elements of self-defense, and the evidence that supported each, in his closing arguments to the jury. He simply stated that he did not, as a practice, "do it that way". PCR II, p. 73, l. 3 – p. 74, l. 14.

Trial Counsel testified that he did not consider objecting to the malice charge in Applicant's case on the grounds that would subsequently be the basis for the decision, in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (S.C. decided, October 12, 2009). PCR II, p. 76, l. 8 – p. 77, l. 13.

Trial Counsel testified that following the first PCR case, he considered raising a double jeopardy claim to bar Applicant's retrial. He concluded that Applicant would not prevail on such an argument inasmuch as they could not establish that the State acted deliberately when it failed to turn the notes that were not in the discovery materials over to law enforcement. He testified that, looking back on it, he should have. PCR II, p. 78, l. 4 – p. 79, l. 15. Trial Counsel testified that, on the facts of this case, there was a legitimate basis for the directed verdict motion he made on Applicant's murder charge. PCR II, p. 79, ll. 16-25.

The arrest warrant reflecting Applicant's height and weight was introduced as Applicant's Exhibit No. 12. The portion of the 1997 trial record containing the testimony of Otis Hyder, Sr. was introduced as Applicant's Exhibit No. 13.

Applicant testified at his PCR hearing. His testimony confirms that when he spoke with Detective Denton after his wife told him that the Sheriff's Department wanted to speak with him, he told Detective Denton that he understood they waited to speak with him about "a killing in Spartanburg." He expressly denied ever referencing the incident in terms of being a murder. PCR II, p. 86, l. 23 – p. 87, l. 23. Applicant recalled Trial Counsel making an objection to testimony regarding this issue and testified that he would have wanted him to ask for a ruling on this issue before allowing that line of testimony to continue. PCR II, p. 87, l. 24 – p. 88, l. 7.

With regard to the introduction of the testimony of Hyder from the 1997 trial, Applicant said he understood that Trial Counsel was fighting it. He testified that following the evening recess, Trial Counsel had no discussions with him about the pros and cons of letting Hyder's testimony in. When the judge asked Applicant if he had any questions about this decision, the Court did not ask him if he was in agreement with the decision as stated by Trial Counsel. Significantly, Applicant testified that, in light of the ruling in his PCR action granting him a new trial, he thought that if

Hyder's 1997 testimony was allowed into evidence that the material which was the basis for the PCR Order granting him a new trial would also come in. He testified that if he had understood that was not the case, he would have spoken up when he was briefly questioned by the Court concerning this decision. PCR II, p. 88, l. 8 – p. 92, l. 3.

Applicant testified that he did not discover that the State had appealed his victory in the South Carolina Court of Appeals until he received the State's Certiorari petition, the Return filed by his appellate counsel and the Supreme Court's decision reversing the favorable decision of the Court of Appeals *all* at the same time. PCR II, p. 95, l. 9 – p. 96, l. 3. Applicant attempted to contact Appellate Counsel about having a Petition for Rehearing but was told he had retired. PCR II, p. 96, ll. 4-9. Applicant attempted to file a *pro se* Petition for Rehearing, but was told by the Supreme Court that he could not because he was represented by Counsel. PCR II, p. 94, l. 12 – p. 95, l. 8. At the conclusion of Applicant's PCR hearing, this Court held the record open for documentation from the Appellate Division of the South Carolina Commission on Indigent Defense concerning the manner and timing of Applicant's notification that the Supreme Court of South Carolina had reversed the decision of the Court of Appeals granting him a new trial. Those documents were subsequently submitted to the Spartanburg County Clerk of Court's office for filing as Applicant's Exhibit 14.

Applicant testified that he felt that appellate counsel was ineffective for failing to brief the trial court's failure to grant his directed verdict motion. PCR II, p. 99, ll. 14-17. Applicant also testified that appellate counsel should have briefed the issue decided in *State v. Belcher, supra*. He also testified that appellate counsel should have objected to other aspects of the malice charge as given. PCR II, p. 100, ll. 11-15.

IV

DISCUSSION

Having thoroughly reviewed all the testimony and evidence presented by Applicant, this Court is constrained to find that he has met his burden of proof with regard to his claim that his Sixth Amendment right to effective assistance of Counsel was violated prior to and during his 2005 jury trial. While it is a moot point considering this Court's grant of relief on trial related issues, this Court additionally finds that Applicant's right to effective assistance of Counsel on appeal was violated in the direct appeal process. The findings of fact and rulings of law required by S.C. Code Ann. § 17-27-80 on each of Applicant's allegations are set forth below.

A.

Trial Counsel's failures to cross examine State witnesses concerning any favorable consideration they received, or hoped to receive, in exchange for their cooperation with the prosecution.

Superseding Application for PCR, Allegations 1,2, 3, 20, 21 and 22

As summarized at length in the summary of testimony, *supra*, the record of Applicant's 2005 trial reveals that Trial Counsel did not question key witnesses in this case concerning what if anything they had been given, or hoped to be given, in exchange for their testimony. Likewise, Hyder, the owner of the trailer where this shooting occurred, was not questioned about this subject in his 1997 trial testimony. That testimony was ultimately introduced, without objection by Trial Counsel, at the 2005 trial. Applicant clearly had a right to impeach the credibility of these witnesses based upon their potential for gain. U. S. Const. amend. VI; *State v. Gracely*, 399 S.C. 363, 731 S.E.2d 880 (2012); *State v. Clark*, 315 S. C. 478, 481, 445 S.E.2d 633, 634 (1994); *Delaware v. Van Arsdall*, 475 U. S. 673 (1986).

Trial Counsel has forthrightly admitted that he never considered this line of impeachment with these witnesses because they did not have any charges pending at the time of trial. He conceded that he should have. Trial Counsel's failure to cross-examine the State's witnesses on this crucial issue is not justified by the fact that they had no pending charges at the time of this trial. In the view of this Court, where an individual has not been charged with offenses which clearly could have been brought against them, the ability to impeach them and challenge the reliability of their testimony is just as valuable, if not more so, than with an individual who has been charged. The threat that charges could still be brought by the State if their testimony does not please the State creates the same motive to lie held by someone who hopes to have an existing charge reduced, dropped or punished more lightly than it might otherwise have been without their cooperation with the prosecution. To rule otherwise would encourage the State to try and circumvent a defendant's right of confrontation by delaying bringing charges against accomplice witnesses until after their cooperation was completed.

On the facts of this case, Angie Smith could easily well have been charged with Murder under a theory of accomplice liability. At sheer minimum, she had admitted conspiring to distribute drugs to the victim and to subsequently distributing the crack cocaine the Applicant gave her following the shooting to a third party. Likewise, there was adequate evidence from which the State could have charged Hyder with complicity in this case. Certainly he had a motive not to confess that he knew in advance that Robert planned to rob Applicant *in his home*. Given the significance of this testimony to the State's case against Applicant, this Court is constrained to find that Trial Counsel was ineffective for failing to cross examine Angie Smith concerning any deals she had made with the State, and/or what hopes she had to avoid charges, if the State was pleased with her cooperation and testimony against Applicant. Where these witnesses had not yet been charged with

any crimes in connection with this case, Applicant would have been within his rights to have these witnesses questioned as to whether they had been threatened with charges or even more subtly reminded by the prosecution that they could still be charged in the future.

On the facts of this case, the jury may well have suspected that Hyder and Terry Bradley were somehow involved in the drug transaction in this case. Bradley was not a witness in this case, but Hyder's 1997 testimony came in without Trial Counsel objecting to its admission on the ground that he had not been adequately cross-examined concerning any promise or hope of gain at the 1997 trial.

Given the significance of the testimony supplied by these witnesses for the State, this Court finds that Applicant has not only met his burden of proof with regard to the first prong of the *Strickland* standard, but he has demonstrated prejudice as well. As noted *supra*, the jury in Applicant's case had apparent misgivings about finding him guilty of murder as evidenced by their question to the Court during their deliberations. Therefore, it is clear that any available means of impeaching the State's key witnesses would have had a high probability of effecting the outcome of Applicant's trial. Therefore, this Court finds that Applicant is entitled to a new trial on these grounds.

B

Trial Counsel was ineffective for failing to interview and investigate Julian Terry Bradley as a potential witness in this case where Bradley was present at the scene of this shooting, and left the location for a period of time before law enforcement arrived to investigate this incident. Trial Counsel was ineffective for failing to argue that Terry Bradley could have removed the five (5) rocks of crack cocaine delivered to, and left at, the scene by Applicant.

Superseding Application for PCR, Allegations 5 and 10

As covered in the summary of testimony above, Terry Bradley was, according to Hyder's 1997 trial testimony, asleep on the sofa at his trailer at the time of this drug deal gone bad and the

shooting. If Hyder is to be believed, this man was asleep on the sofa in the same room where the dispute took place and slept right through the scuffle and the shooting. According to Hyder, immediately after the shooting he sent Bradley to get Robert's girlfriend. Applicant's testimony was that he had laid out five rocks of cocaine on a table and left them there when he began to retreat. The State was allowed, without challenge by Trial Counsel, to point to the fact that no drugs were found by law enforcement in Hyder's trailer as evidence that Applicant was lying. This was a key piece of the puzzle for the State's theory of the case, which was that Applicant shot Robert in anger of a \$40.00 debt.

Simply put, Trial Counsel's explanation for his failure to investigate Terry Bradley as a potential witness is not adequate to explain away this omission. Even in the absence of Bradley as a witness, Trial Counsel could still have argued to the jury that Bradley had every opportunity to have removed the drugs in question when he left the trailer. Furthermore, Trial Counsel could have urged the jury to question why there was no evidence that law enforcement had searched Bradley at the scene. Likewise, there was no evidence that the pathway to the girlfriend's home had been searched for these drugs in the immediate aftermath of this shooting. Once again, in light of the jury's obvious concerns in this case, as evidenced by their question during deliberations, this Court can not conclude that these omissions were harmless. Applicant is entitled to relief on these allegations as well.

C

Trial Counsel was ineffective for failing to adequately argue that the prior testimony of Otis Hyder, Sr. could not be introduced in Applicant's second trial where Hyder was not impeached at the first trial with the notes from an investigator from the Solicitor's Office which were subsequently part of the basis for a reversal of Applicant's first conviction in a PCR action.

Superseding Application for PCR, Allegation 11

Trial Counsel's PCR testimony clearly establishes that his theory of defense in this case was that Applicant was set up and that he was lured to the trailer to be robbed. The Statement given by Robert's girlfriend to law enforcement immediately after this shooting actually confirmed that earlier in the evening he had left their home and when he returned he confessed to her that he had tried to rob a drug dealer. In the first PCR action pursued by Applicant he was granted a new trial in part due to the presence of investigative notes in the Solicitor's file referencing a statement by Hyder that, *"That's when Findley (deceased) reached for Smith, he intended to take drugs from him."* Order of Dismissal, 200-CP-42-1649, p. 4, para. 2 (Emphasis added). The defense had not been given this material in discovery. As Judge Beatty found in that PCR action, this evidence *"would have clearly aided the defense in establishing that the Applicant was robbed and attacked by the deceased. This evidence goes directly to the lack of malice on the part of Applicant and helps to establish both his claim of self-defense and accident."* Order of Dismissal, 200-CP-42-1649, p.4, para. 3, (Emphasis added). This Court finds that Applicant has met his burden of proof with regard to this Sixth Amendment claim and further finds that Counsel's deficiency on this point was highly prejudicial to Applicant. It can not be over emphasized that this jury asked a question which indicates that they were at least seriously considering Applicant's self-defense claim. Had Hyder been available for cross-examination and impeachment with this prior statement, it may well have turned the tide in this trial. In light of that factor, Trial Counsel was ineffective for failing to strenuously maintain his objection to the introduction of Hyder's 1997 testimony on the ground that he was not cross-examined at that trial with the very information that formed the basis for then Circuit Court Judge Beatty to grant Applicant a new trial in his first PCR.

The failure of Counsel to argue against Hyder's 1997 testimony being introduced on this ground may also have effected the outcome of Applicant's direct appeal. The Court of Appeals

granted Applicant a new trial on direct appeal on the ground that the Court should have charged the jury on Voluntary Manslaughter as a lesser included offense. The Supreme Court of South Carolina subsequently reversed that decision finding that there was no evidence that Applicant acted in sudden heat of passion upon sufficient legal provocation. *State v. Smith*, 391 S.C.408, 412, 706 S.E.2d 12, 16 (2011). Had Hyder testified, and been subject to cross-examination concerning this statement, that testimony would have provided a basis for a finding of sudden heat and passion upon sufficient legal provocation inasmuch as the jury would have been free to consider Hyder's prior inconsistent statement as evidence of the matter asserted and not simply for impeachment purposes. *State v. Copeland*, 278 S.C. 572, 300S.E.2d 63 (1982).. Clearly, as Judge Beatty concluded in his PCR order, this evidence would have gone to the heart of the issue of malice and would have supported Applicant's position that he was attacked by Robert.

D

Trial Counsel was ineffective for failing to argue that the prior testimony of Otis Hyder, Sr. was not admissible under Rule 804 (a) (4) SCRE where the State failed to present competent evidence that the witness was unavailable to present live testimony. Trial Counsel was ineffective for counseling Applicant to agree to withdraw his objection to the previous testimony of Otis Hyder, Sr., *where at the first trial*, this witness was not cross-examined concerning several relevant matters.

Superseding Application for PCR, Allegations 12, 13, 14 and 32

As noted *infra*, the State initially sought to get the 1997 testimony of Hyder in based upon him being deceased. When the trial judge indicated that he would require evidence to support that assertion and deferred ruling until the following day, the State found that their initial claim was incorrect; Hyder was in fact alive. The Court then permitted the State to introduce the 1997 testimony of Hyder into evidence, without objection, despite the fact that the State produced nothing more than the unsworn assertions of Hyder's son that his father was not up to a court appearance.

Although he initially objected to the introduction of Hyder's 1997 testimony when the State said he was dead, Trial Counsel inexplicably abandoned any challenge to the admissibility of that testimony under Rule 804(a)(4), SCRE, once the State admitted the witness was alive. Trial Counsel did not ask that the State be required to present medical records, a statement from a treating physician, or even sworn testimony from the son, concerning exactly what condition prohibited Hyder presenting live testimony. In light of the rulings on the first PCR, which resulted in the 2005 trial being granted, this omission by Trial Counsel constituted ineffective assistance of counsel warranting reversal and the grant of a new trial.

In addition, the record supports Applicant's position that Trial Counsel should have argued that he was being deprived of the opportunity to cross-examine Hyder concerning other relevant matters including,

1. His knowledge of what happened to the drugs left at the scene by the Applicant;
2. His involvement in a preconceived plan to rob Applicant;
3. His potential criminal exposure in this case, and any concessions made by the prosecution in exchange for his cooperation against Applicant; and
4. The nature and severity of his visual impairment at the time of this incident in light of his own admission that he was basically blind.

E.

Trial Counsel was ineffective for failing to object to the self-defense charge given at Applicant's trial where the charge given was confusing, addressed facts not present in Applicant's case, and deprived him of the opportunity to have this defense given appropriate consideration by the jury.

Superseding Application for PCR, Allegation 18

The self-defense instruction given in Applicant's case included a confusing charge on the law of self defense as it relates to mutual combat. Trial 2005, p. 305, l. 24 – p. 306, l. 12. Trial Counsel initially admitted in his PCR testimony that there was no evidence in this case which supported the idea of consensual mutual combat. He then, almost immediately, testified that there was evidence from which someone could have found mutual combat. Notwithstanding Trial Counsel's confusing PCR testimony on this point, there was no evidence adduced at this trial from which the jury could have found mutual combat. The instruction was not appropriate to the facts of this case and should have been objected to as improper and confusing. Once again, this Court must note that this jury was obviously struggling with the self-defense claim in this case. There exists a realistic probability that a clear and appropriate self-defense instruction may have changed the outcome of Applicant's trial. Relief is granted on this ground as well.

F

Trial Counsel was ineffective for failing to present Morgan Simmons Ortez as a witness at Applicant's second trial where her testimony was necessary to establish that she had reported to law enforcement that earlier on the evening of his death the victim confessed to her that he had tried to rob another drug dealer.

Superseding Application for PCR, Allegation 14

Trial Counsel's failure to call this witness constituted ineffective assistance of counsel warranting a new trial. She did not witness the shooting and therefore, there was little risk that she would, as the deceased's girlfriend, testify to something damaging factually to the assertions of the defense. In truth, her testimony was crucial to establish that Robert had admitted to her that he had

already tried to rob another drug dealer before he ever went to Hyder's trailer in the early morning hours before he was killed. If she had testified in a manner inconsistent with that statement Trial Counsel could have impeached her with her previous inconsistent statements. And once again, those statements could have been considered by the jury for their substantive value as well. *Copeland, supra*. In addition, as previously noted in the summary above, the girlfriend's testimony could have established that Robert told her he was going to Hyder's to "get a hit" as opposed to just going to use the phone as the State claimed. In his PCR Order, Judge Beatty found that the notes from Hyder's interview found in the Solicitor's file would have been valuable to the defense where they would have corroborated the girlfriend's testimony. PCR Order, p. 5, para. 2. Trial Counsel's failure to introduce testimony from this witness can not be explained by any valid strategy and clearly prejudiced Applicant. This omission constituted ineffective assistance of counsel which warrants the grant of a new trial.

G

Trial Counsel was ineffective for failing to adequately cross-examine Detective Denton concerning his use of the term *murder* when recalling Applicant's statements to him in their initial conversation.. Trial Counsel was ineffective for failing to obtain a ruling from the trial judge concerning his objection to leading by the prosecution regarding the crucial assertion that Applicant used the term "murder" when asking law enforcement why they wanted to talk to him shortly after this incident. See, Tr. p. 138, ll. 4-21.

The record below indicates that Trial Counsel simply abandoned his objection on this point when failed to secure a ruling from the Court on his objection. Where the jury in Applicant's case may have taken this statement to be a virtual confession to a deliberate murder, the prejudice arising from this error is obvious. Relief is warranted on this ground as well as those discussed above.

H.

Applicant received ineffective assistance of counsel on direct appeal where Attorney Savitz neglected to submit as an appellate issue the failure of the trial court to grant Applicant a directed verdict of acquittal.

Superseding Application for PCR, Allegation 44

The record of Applicant's 2005 jury trial presents no direct evidence, nor any substantial circumstantial evidence, which supported the claim that Applicant intentionally shot Robert with malice aforethought. The testimony of Hyder described Robert grabbing something from Applicant, the men falling out the door and a hot being heard. Angie Smith's testimony likewise indicated that these two men were tussling and falling out the door at the time the "pop" of gun fire was heard. The State did not present sufficient evidence to send this case to the jury. Appellate Counsel was ineffective for failing to raise this claim on behalf of Applicant. The ineffectiveness of appellate counsel becomes mute in light of the grant of a new trial on the other grounds addressed above, however, to the extent necessary to preserve the ruling of this Court on this issue, it is hereby found that Applicant is entitled to a new trial on this ground as well.

I

Trial Counsel was ineffective for failing to make an objection to Applicant's re-trial on grounds of double jeopardy where his original convictions and sentences were overturned on the ground that certain exculpatory evidence, known to the State, had not been turned over to the defense by the State.

Superseding Application for PCR, Allegation 33

Where the investigative notes which provided the basis for the first PCR reversal were in the Solicitor's file, Trial Counsel was ineffective for neglecting to make a Motion to prohibit Applicant's retrial on the ground that it would violate his right to due process of law and his rights under the

double jeopardy protections of the United State's Constitution. *U.S. Con. Amend. V*; *United States v. DiFrancesco*, 449 U.S. 117 (1980); *Green V. United States*, 355 U.S. 184 (1957). Counsel's failure to make this motion not only deprived him of the right to be heard on this issue, and possibly avoid being put through a second trial, but it deprived him of the opportunity to present this claim on direct appeal. Relief is warranted on this ground as well.

CONCLUSION

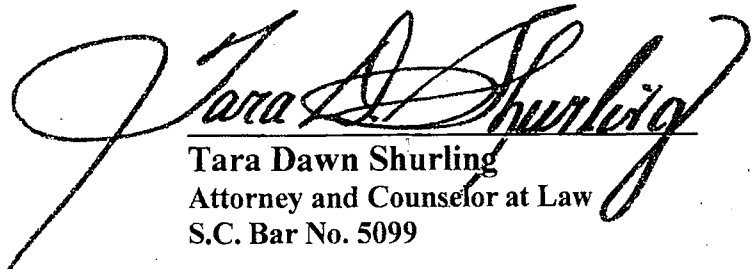
For all the reasons set forth above, this Court finds that the Applicant has met his burden of proof with regard to his claim that he received ineffective assistance of counsel during his 2005 jury trial. This Court finds that there is a reasonable probability that the outcome of the trial would have been different but for the errors and omissions of Trial Counsel addressed herein. Accordingly, all the judgments and sentences entered against Applicant at his 2005 jury trial, are hereby vacated and the Applicant's charges are remanded to the Spartanburg County Court of General Sessions for re-sentencing. Any allegations raised by Applicant which are not addressed herein are deemed to have been fully reviewed by this Court and found not to have merit. Applicant's right to appeal on any such issues is preserved for review by a higher court.

IT IS SO ORDERED.

The above proposed order, with signature line for the Honorable R. Scott Sprouse, presiding PCR Judge, has been duly served upon Judge Spouse and Assistant Attorney General Alicia Olive, this 2nd day of December, 2015. Any issues raised by Applicant in his pleadings, and addressed by the testimony and evidence presented at his evidentiary hearing,

which may not be covered in this proposed order *are not* being waived. On any such issues, Applicant relies upon the allegations as raised in his Superseding Amended Application and the testimony and evidence related thereto presented at his evidentiary hearing held on June 11, 2015.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099

Law Office of Tara Dawn Shurling, PA
3614 Landmark Drive
Suite A
Columbia, South Carolina 29204
(803)738-8622 Phone
(803)738-1600 Fax
tdslaw@shurlinglaw.com

ATTORNEY FOR APPLICANT

This 2nd day of December, 2015

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 DEC -8 AM 10:17
H. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

DAVID DWIGHT SMITH, 245760,

2011-CP-42-01283

Applicant,

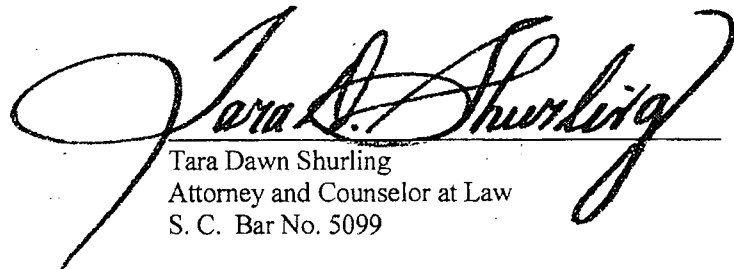
CERTIFICATE OF SERVICE

v.

STATE OF SOUTH CAROLINA,
Respondent.

The undersigned attorney hereby certifies that one copy of the Memorandum in Support of Post-Conviction Relief Application in the Form of a Proposed Order in the above-entitled cause has been served upon, Assistant Attorney General, Alicia Olive, by U. S. Mail on this the 2nd day of December, 2015 to:

Alicia Olive
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

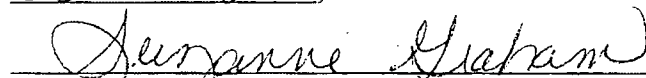

Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT

SWORN TO BEFORE ME this 2nd day of

December, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/24

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 DEC -8 AM 10:17
M. J. PECKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

DAVID DWIGHT SMITH, 245760,

2011-CP-42-01283

Applicant,

CERTIFICATE OF SERVICE

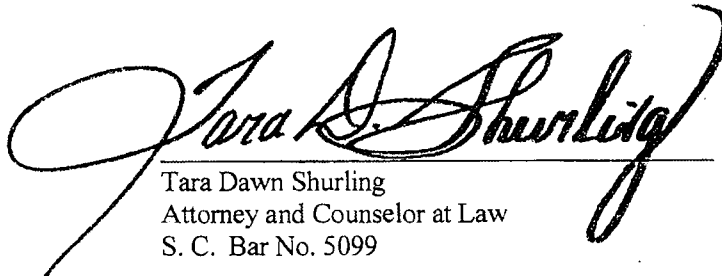
v.

STATE OF SOUTH CAROLINA,

Respondent.

The undersigned attorney hereby certifies that one copy of the Memorandum in Support of Post-Conviction Relief Application in the Form of a Proposed Order in the above-entitled cause has been served upon, the Honorable R. Scott Sprouse, Circuit Court Judge by U. S. Mail on this the 2nd day of December, 2015 to:

The Honorable R. Scott Sprouse
Circuit Court Judge for the
Tenth Judicial Circuit
P. O. Box 1277
Walhalla, South Carolina 29691

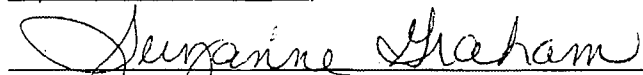

Tara Dawn Shurling
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Dr., Ste. A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 (Fax)
Email: tdslaw@shurlinglaw.com

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 2nd day of

December, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/24

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2015 DEC -8 AM 10:17
HIDE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

David Dwight Smith, #245760,

Case No.: 2011-CP-42-1283

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the court pursuant to an application for Post-Conviction Relief (PCR) filed March 17, 2011, and superseding amended application filed June 11, 2015.

A PCR hearing into the matter was convened on June 11, 2015, at the Spartanburg County Courthouse before the undersigned. Applicant was present and represented by Tara D. Shurling, Esquire. Assistant Attorney General Suzanne H. White Represented the State. Trial counsel, E. P. "Bill" Godfrey, Esquire ("Counsel"), testified on Applicant's behalf. Applicant also testified.

I. PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. Applicant was indicted at the April 1997 term of the Spartanburg County Grand Jury for murder and possession of a weapon during the commission of a violent crime (97-GS-42-1639, counts 1 and 2). The Applicant was first tried on these charges in 1997 before the Honorable J. Derham Cole and a jury. T. Louis Cox, Esquire, represented him at that trial. On December 4, 1997, the jury found Applicant guilty of both charges. Judge Cole sentenced Applicant to life for murder and five years for possession of weapon during the commission of a violent crime.

 COAHNED

245

CLERK OF COURT
SPARTANBURG COUNTY
2015 DEC 14 AM 11:19
A. H. B. JACKLEY

Applicant appealed his conviction or sentence to the South Carolina Supreme Court. The court dismissed the appeal in an Order dated December 2, 1999 and denied the Applicant's Petition for Rehearing in an Order dated April 6, 2000. Applicant subsequently filed an application for PCR on June 7, 2000. An evidentiary hearing was held at which the Applicant was present and represented by E. P. "Bill" Godfrey, Esquire. The Honorable Donald W. Beatty granted relief by written Order dated May 23, 2003. Respondents filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on December 1, 2004. The Remittitur was returned on December 17, 2004.

Applicant then proceeded to trial a second time on these charges. E. P. "Bill" Godfrey, Esquire, represented the Applicant at his second trial. On November 1, 2005, the Applicant was convicted of these charges by a jury. The Honorable Doyet A. Early III sentenced the Applicant to concurrent terms of thirty-five years for murder and five years for possession of a weapon during the commission of a violent crime.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals reversed Applicant's conviction and sentence and remanded the case for a new trial. State v. Smith, Op. No. 2008-UP-194 (filed March 20, 2008). The Respondent filed a Petition for Rehearing and a Petition for Rehearing En Banc, both of which were subsequently denied on May 27, 2008. Respondent then filed a Petition for Writ of Certiorari, which was granted by the South Carolina Supreme Court on April 10, 2009. The South Carolina Supreme Court reversed the decision of the Court of Appeals and reinstated the Applicant's convictions and sentence. State v. Smith, Op. No. 26926 (filed February 7, 2011). The Remittitur was returned on February 24, 2011.

2011 DEC 14 AM 11:19
HOPKINS COUNTY
BLACKLEY

II. ALLEGATIONS

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

Ineffective Assistance of Counsel, in that;

a. Counsel failed to effectively cross examine, specifically:

- i. Counsel failed to cross examine State's witnesses concerning any deals they may have been given or favorable consideration they received for testimony at Applicant's first trial in 1997 (App. Para. 1) or at his second trial in 2005 (App. Para. 2);
- ii. Counsel failed to cross examine Dr. Wren regarding whether abrasions and lacerations reported in the autopsy report may be from the surface of the gun grips and consistent with being struck with the gun (App. Paras. 4 and 28);
- iii. Counsel failed to cross examine Angie Smith regarding:
 1. Whether she had been charged with or threatened with drug charges in connection with this case (App. Paras. 17 & 18); or
 2. Whether she set Applicant up to be robbed on the night of the shooting (App. para. 19);
- iv. Counsel failed to cross examine Cynthia Roseburgh to ascertain what she meant when she said "well, both of them got it wrong." (App. para. 21);
- v. With respect to Detective Denton's testimony:
 1. Counsel failed to impeach Detective Denton with crime scene photographs regarding his assertion there had been no struggle. (App. paras. 22 & 13);
 2. Counsel failed to cross examine Denton about his assertion that there had been testimony that the gun was discharged towards the trailer. (App. para. 23);
 3. Counsel failed to cross examine Denton about his use of the term "murder" when recalling his initial discussions with Applicant. (App. par. 26);

CLERK OF COURT
SPRINGFIELD COUNTY
2015 DEC 4 AM 11:19
M. H. BLACKLEY

4. Counsel failed to cross examine Denton about his investigation of Julian Terry Bradley (Bradley) and his role in this case. (App. para. 27);

b. Counsel failed to object, specifically:

- i. Counsel failed to consistently object to the prosecution asking leading questions and misstating previous witness testimony (App. paras. 3 & 20);
- ii. Counsel failed to object to the introduction of Otis Hyder's trial testimony on the grounds that:
 1. he was not cross-examined at the first trial about when the damage to the door frame occurred (App. para. 14); and
 2. he was virtually blind. (App. para. 30).
- iii. Counsel failed to object to the self-defense charge on the grounds that:
 1. it was confusing and addressed facts not present in his case (App. para. 15); and
 2. it was unconstitutionally burden shifting. (App. para. 35).
- iv. Counsel failed to object to Angie Smith's testimony that it was "her understanding" that Applicant had crack and a gun. (App. para. 16);
- v. Counsel failed to object to Denton's ballistics testimony on the grounds that he was not an expert. (App. para. 24);
- vi. Counsel failed to object to Denton's testimony that Applicant "wanted to know if it was about 'a murder case' in Spartanburg." (App. para. 25);
- vii. Counsel failed to object to Dr. Wren's testimony that law enforcement probably moved the deceased's body. (App. para. 29);
- viii. Counsel failed to object to Applicant's retrial on grounds that double jeopardy prevented a retrial because certain exculpatory evidence had not been handed over at the first trial. (App. para. 31).

c. Counsel failed to investigate, specifically:

- i. Counsel failed to interview and investigate Julian Terry Bradley as a potential witness in this case where Bradley was present at the scene at the time of this shooting (App. para. 5);
- ii. Counsel failed to request criminal records on all the State's witnesses who were neither law enforcement or experts (App. para. 6);
- iii. Counsel failed to request criminal records for the victim, Robert Finley (App. para. 7);
- iv. Counsel failed to call Morgan Simmons Ortiz to testify at trial; (App. para. 12);

CLERK OF COURT
SPARTANBURG COUNTY
2018 DEC 17 AM 11:19
MORRIS BLACKLEY

d. Counsel failed to argue that:

- i. Terry Bradley could have removed the five rocks of crack cocaine from the scene (App. para. 8);
- ii. Hyder's prior testimony should not be introduced because:
 1. he was not impeached at the trial with the notes from an investigator from the Solicitor's Office (App. para. 9); and
 2. it was inadmissible under Rule 804(a)(4), SCRE, where the State failed to present competent evidence that Hyder was unavailable (App. para. 10).
- iii. Applicant may have intentionally put pressure on the trigger as a reflex reaction to losing his balance during his struggle with the victim (App. para. 32);
- iv. Applicant would not have let someone as large as the victim get so close to him had he intended to kill the victim over the \$40 debt (App. para. 33);
- e. Counsel failed to present a closing argument to the jury in which he reviewed the standard for self-defense and illustrated for the jury how the evidence fit the standard (App. para. 34);
- f. Counsel failed to counsel Applicant against withdrawing his objection to Hyder's testimony at the first trial (App. para. 11).

III. APPLICABLE LAW

In a PCR action, the applicant has 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, the applicant must show counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant must prove both that counsel's performance was deficient and that such deficient performance prejudiced him. Strickland, 466 U.S. at 688.

CLERK OF COURT
SPRINGDALE COUNTY
2018 DEC 14 AM 11:19
S. HOE BLACKLEY

The Court measures counsel's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117-18, 326 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). In other words, the question is whether counsel "provided representation within the range of competence required" in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 687). The Court strongly presumes counsel rendered adequate assistance, Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002) (citing Strickland v. Washington, 466 U.S. 668, (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989), and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814. An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "[Applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689. In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id.

To show prejudice, the applicant must affirmatively prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the

2015 DEC 19 AM 11:19
M. JOPELACKLEY
CLERK OF COURT
SARASOTA COUNTY

[applicant] to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the 2005 trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the appellate records, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Failure to Cross-Examine

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987). Counsel must be given leeway to make reasonable strategic decisions at trial. Strickland, 446 U.S. at 681-82. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996).

Applicant alleges that Counsel was ineffective for failing to cross-examine State's witnesses regarding favorable treatment they may have had in exchange for their testimony at both the 1997 and 2005 trials. (App. Paras. 1 and 2). Applicant produced no evidence at the PCR hearing that there were any charges that were either dismissed or not pursued. Additionally,

CLERK OF COURT
PALMER COUNTY
2015 DEC 14 AM 11:19
M. HOPE BLANKLEY

Applicant testified at the PCR hearing that to his knowledge, there were never any potential charges against anyone related to the incident that were either dropped or not pursued. (Tr. p. 105). This Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to these allegations.

Applicant alleges Counsel failed to cross examine Dr. Wren, the pathologist, about whether abrasions and lacerations reported in the autopsy may have been caused by the surface of the gun grips and consistent with being struck with the gun (App. Paras. 4 and 28). Counsel testified at the PCR hearing that his decision not to cross-examine Dr. Wren on these matters was intentional. Counsel testified in essence he did not know whether Dr. Wren's testimony would be favorable on that issue. Counsel further testified he thought anyone who looked at the photographs of the injuries "would realize it was a gun that hit the face." Accordingly, the Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to these allegations.

Applicant alleges Counsel failed to impeach Denton with crime scene photographs to refute his testimony at trial that he found no signs of struggle inside the trailer. (App. paras. 13 & 22). The photographs at issue were introduced as exhibits at Applicant's second trial, and though Counsel did not specifically impeach Denton with the photographs, he cross-examined him about the crime scene and his statement that he had seen no evidence of struggle in the trailer. Therefore, this Court finds Applicant has failed to satisfy his burden of showing error or resulting prejudice as to this allegation.

Applicant also alleges Counsel failed to cross-examine Denton regarding "their investigation of Julian Terry Bradley." (App. para. 27). Applicant failed to present Bradley at the hearing, though PCR counsel established for the record that she could not locate him. The only

CLERK OF COURT
SHERIDAN COUNTY
2015 DEC 14 AM 11:19
A. H. BE BACKLEY

testimony presented was that Bradley was asleep on the couch. Applicant has failed to show his testimony would have been different or more favorable than that of Hyder's testimony. This Court finds applicant has failed to establish his burden of proving error or prejudice as to this allegation.

Applicant also alleges Counsel failed to cross-examine Denton regarding his use of the term "murder" when recalling Applicant's statements to him (App. para. 26). Counsel did object to the use of the term murder at the trial. Applicant did not question Counsel about cross-examining Denton on this point. Applicant has failed to demonstrate that any cross-examination in that respect would have assisted in his defense. Therefore, this Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to this allegation.

Applicant alleges Counsel failed to cross-examine Angie Smith regarding whether she had been charged with or threatened with any potential charges in connection with drugs involved in the incident. (App. paras. 17 & 18). Counsel testified he did not cross examine her on that basis because she was not charged. At the PCR hearing, Applicant testified that to his knowledge there were never any charges against anyone related to the incident that were either dropped or not pursued. Applicant also failed to produce any evidence that Angie Smith faced any potential charges, other than Counsel's speculative testimony that the state could have brought charges against her. Therefore, this Court finds Applicant has failed to satisfy his burden of proving error or prejudice.

Applicant also alleges Counsel was ineffective for failing to cross-examine Angie Smith about whether she had set Applicant up to be robbed on the night of the shooting. (App. para. 19). Counsel testified he did not recall questioning her on this point. The record reflects that he extensively cross-examined Angie Smith at trial and was even able to elicit favorable

2015 DEC 14 PM 11:20
M. HOFER BL ACKLEY
SPRINGFIELD COUNTY
CLERK OF COURT

testimony from her on several points. Counsel testified that on cross-examination he highlighted inconsistencies in her testimony. This Court finds Applicant has failed to satisfy his burden of showing error or prejudice as to this allegation.

Failure to Argue

Counsel must be given leeway to make reasonable strategic decisions at trial. Strickland, 446 U.S. at 681-82. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 446 U.S. at 689.

Applicant alleges that Counsel was ineffective for failing to argue that Hyder's testimony could not be introduced because Hyder was not impeached at the original trial with certain notes taken by an investigator. (App. para. 9). Applicant has failed to satisfy his burden of proving this allegation. Counsel raised this issue at the trial and couched it as a Crawford issue. Judge Early reviewed Cox's cross-examination of Hyder, Hyder's statement, and Exhibit 1 and considered the arguments of Counsel and the State. Judge Early stated that Hyder's statement "pretty much does mirror Court's Exhibit 1." Judge Early further stated he would give counsel the evening to further research the issue but that "unless [they] [came] up with something different, it appears . . . that it falls within all four corners" of Rule 804(b)(1). (Trial Tr. pp. 146-60) The following morning after the solicitor's office confirmed Hyder was in fact alive but homebound, Counsel withdrew his motion. This Court finds Applicant has failed to satisfy his burden of showing error or prejudice in this regard.

CLERK OF COURT
SPALDING COUNTY
2011 DEC 14 AM 11:20
MHOPE BLACKLEY

Applicant alleges Counsel was ineffective for failing to argue Terry Bradley could have removed the five crack rocks at the scene. (App. para. 8). Counsel agreed with PCR counsel that in retrospect, it was probably something he should have done. At the PCR hearing, Applicant testified he did not "have any direct evidence" that Bradley was involved, took drugs, or had anything to do with the incident. This Court finds applicant has failed to satisfy his burden of establishing counsel was ineffective for failing to argue Bradley could have removed the five crack rocks at the scene, or that there was a reasonable probability that had he done so the outcome would have been different.

Applicant alleges Counsel failed to make certain arguments at trial. (App. paras. 32-33). The record reflects that counsel made both arguments, either indirectly through testimony he elicited at trial, or directly in his closing argument. Counsel testified to that effect at the PCR hearing as well. Applicant also alleges that in his closing argument, Counsel failed to specifically enumerate the elements of self-defense and illustrate how the evidence fit that standard. (App. para. 34). Counsel testified that as a practice he does not go through each element of the charge when he closes and that he has a lot of success that way. Therefore, this Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to this allegation.

Failure to Advise

Applicant alleges Counsel was ineffective for failing to advise Applicant against withdrawing his objection to the previous testimony of Hyder. (App. para. 11). At trial, counsel told Judge Early that he discussed it with Applicant that morning and had spoken with his family about it the night before. Applicant did not question Counsel about this specifically at the PCR hearing. At the trial, the Court asked Applicant if he had any questions about it and he said no. Applicant testified at the PCR hearing that Counsel did not discuss with him what the State

CLERK OF COURT
SPRINGFIELD COUNTY
2015 DEC 14 AM 11:20
J. HOE B. BLACKLEY

would have to establish to introduce Hyder's testimony. This Court finds Applicant has failed to satisfy his burden of proving either error or prejudice as to this allegation.

Failure to Investigate

Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported by mere speculation as to the result. Rollinson v. State, 346 S.C. 506, 552 S.E.2d 290 (2001). An Applicant's mere speculation as to what an alleged beneficial witness' testimony would have been does not satisfy the prejudice prong. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 446 U.S. at 689.

Applicant alleges Counsel was ineffective for failing to interview and investigate Terry Bradley as a potential witness. (App. para. 5). Though Counsel could not recall a specific reason why he did not call Bradley to testify, he testified that he employed a private investigator and had him look into Bradley, but that he "learned nothing" and was "left with the discovery." When questioned again later in the hearing, Counsel testified he did not recall whether they tried to locate Bradley or whether there was any mention in the discovery of any investigation into Bradley and what role he might have had. PCR Counsel noted at the hearing that she attempted to find Morgan Simmons and Terry Bradley to testify at the hearing but had been unable to locate either. This Court finds Counsel made a reasonable investigation into Terry Bradley. Further, Bradley was apparently asleep on the couch in the trailer. Applicant has failed to show there is a reasonable probability that had Bradley been called the outcome of the trial would have

DEEDS COUNTY
 CLERK
 2015 DEC 14 AM 11:20
 M. HOPE BLACKLEY

been different. Applicant has failed to satisfy his burden of proving either error or resulting prejudice as to this allegation.

Applicant alleges Counsel was ineffective for failing to present Morgan Simmons as a witness at trial because she gave a written statement that the victim had said "he had tried to rob a drug dealer." (App. para. 12). Counsel testified he did not know why he did not present Simmons as a witness. Counsel also testified he employed an investigator who was responsible for interviewing any potential witnesses, including those who had given statements. This Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to this allegation.

Applicant alleges Counsel was ineffective for failing to request criminal records of State's witnesses or the victim. (App. paras 6 & 7). Applicant failed to elicit any testimony or otherwise produce any competent evidence pertaining to this allegation. Therefore, this Court finds Applicant has failed to satisfy his burden of proving either error or prejudice in this regard.

Failure to Object

Applicant argues Counsel was ineffective for failing to consistently object to the State asking leading questions. (App. paras. 3 & 20). Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. SCRE 611(C). Applicant highlights certain excerpts of Angie Smith's testimony but has failed to present any evidence that Counsel failed to object to improper leading questions. Moreover, this Court finds Counsel extensively cross-examined Angie Smith at trial and was even able to elicit favorable testimony that was inconsistent with her statements on direct examination. Therefore, this Court finds Applicant has failed to satisfy his burden of proving error or prejudice with respect to this allegation.

CLERK OF COURT
SPARTANBURG COUNTY
2015 DEC 14 AM 11:20
HOPE BLACKLEY

Applicant alleges Counsel was ineffective for failing to object to the admission of Hyder's testimony under 804(a)(4) because: (1) the State failed to present competent evidence Hyder was unavailable (App. para. 10); (2) Hyder had not been cross-examined about his admission in his prior testimony that he was legally blind (App. para. 30); and (3) Hyder had not been cross-examined about when the damage to the doorjamb occurred (App. para. 14). However, Counsel used favorable points from Hyder's prior testimony in his closing argument. Additionally, both Angie Smith and Applicant testified at trial that there had been a scuffle or fight between Applicant and the victim and that the two of them fell out of the door of the trailer. Photographs of the scene were also introduced as exhibits at trial. Regarding Hyder's unavailability at the second trial, the record shows Counsel and the solicitor made an effort to get Hyder to court. Hyder's son came to court and told the judge and counsel Hyder was alive but ill. This Court finds Applicant has failed to satisfy his burden of showing error or prejudice as to this allegation.

Applicant alleges Counsel was ineffective for failing to object to Angie Smith's testimony that it was "to her understanding" the Applicant had crack and a gun. (App. para. 16). Counsel testified he did not recall her making such statement at trial, and agreed with PCR counsel that if he had "caught" it at trial he would have objected. However, the record reflects Counsel cross examined her on this point at trial and was able to elicit favorable testimony. Therefore, this Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to this allegation.

Applicant alleges Counsel was ineffective for failing to object to Denton's testimony that Applicant had asked about a "murder" investigation. (App. para. 25). The record reflects Counsel

did object to this testimony, though the Court did not make a specific ruling. This Court finds Applicant has failed to establish either error or prejudice as to this allegation.

Applicant alleges Counsel should have objected to Dr. Wren's testimony that law enforcement probably moved the deceased's body. Several witnesses testified the body had not been moved prior to the time the photographs were taken. Applicant has failed to establish error or prejudice with respect to this claim.

Applicant alleges Counsel should have objected to or cross-examined Denton regarding his ballistics testimony when he had not been qualified in that field. (App. paras. 23 & 24). Objectionable testimony may not be prejudicial where it is merely cumulative to other evidence presented at trial. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294 at 1321. Applicant failed to establish that Denton's testimony that the gun was fired in the direction of the door to the trailer undermined Applicant's defense or was anything but cumulative to other evidence presented at trial. Accordingly, this Court finds Applicant has failed to satisfy his burden of showing error or prejudice as to these allegations.

Applicant alleges Counsel should have objected to Applicant's retrial on grounds of double-jeopardy because certain exculpatory evidence had not been turned over by the state. Counsel testified he considered it but that he did not "ever think [he] could have proven that it was an intentional withholding of evidence. Counsel testified that even though there was "no downside" to making the argument, he did not do so because he did not "think it had any chance of winning because it was not an intentional act on the part of [the solicitor]." The Court finds Applicant has failed to establish error or prejudice as to this allegation.

CLERK OF COURT
SPARTANBURG COUNTY
2015 DEC 14 AM 11:20
M. HOPE BLACKLEY

Finally, Applicant alleges Counsel should have objected to the self-defense charge as given at Applicant's trial because it was confusing and unconstitutionally burden shifting. Counsel testified he did not feel there was any problem with the instruction as given at trial. The Court notes that the instruction was a standard jury charge on self-defense at the time. As PCR Counsel pointed out, the South Carolina Supreme Court even noted that based on its review of the record, a self-defense instructive was not merited at all. The case Applicant relies on, Belcher,¹ was not decided until 2009—roughly four years after Applicant's second trial. The Courts "have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial." State v. Gilmore, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994). This Court finds Applicant has failed to show counsel's performance fell below an objective standard of reasonableness.

To show prejudice as to this allegation, Applicant must also establish he was entitled to a self-defense charge based on the evidence presented at trial. The elements of self-defense are as follows:

- (1) The defendant was without fault in bringing on the difficulty;
- (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
- (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and
- (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (citing State v. Wiggins, 385 S.C. 538, 543, 500 S.E.2d 489, 492 (1998)).

¹ State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

Here, no evidence or testimony was presented either at trial or at the PCR hearing that anyone in the trailer was armed with a deadly weapon except Applicant. The only evidence that Applicant believed he was in imminent danger is that Applicant weight 165 pounds and was 5'8 and the victim weighed about 220 and was 6'2. This Court finds Applicant has failed to establish that there is a reasonable probability that but for Counsel's failure to object to the self-defense instruction, the outcome of the proceeding would have been different.

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.

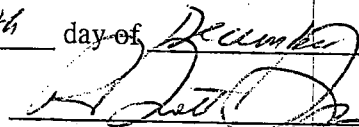
V. CONCLUSION

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. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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 10th day of December


THE HONORABLE R. SCOTT SPROUSE
Presiding Judge

Walthell, South Carolina

M. HOPE BLACKLEY

2015 DEC 14 AM 11:20

CLERK OF COURT
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

DAVID DWIGHT SMITH, 245760,)
Applicant,)

2011-CP-42-01283

RULE 59(e) SCRCP, MOTION TO
ALTER OR AMEND

v.)

STATE OF SOUTH CAROLINA,)
Respondent.)

NOW COMES the Applicant in the above-captioned case, acting by and through undersigned counsel, respectfully moving this Court pursuant to Rule 59(e), SCRCP, to alter or amend its Order of Dismissal filed December 14, 2015. The Application for Post-Conviction Relief in this matter was filed on March 17, 2011, and a Superseding Amended Application was filed on June 11, 2015. An evidentiary hearing was convened on June 11, 2015, in which the State was represented by Assistant Attorney General, Suzanne H. White and the Applicant was represented by Tara Dawn Shurling, Esquire. In support of this motion, the Applicant would show unto this Honorable Court the following with regard to issues that were either not addressed at all in the Order of Dismissal, or, were inadequately addressed.

The Order of Dismissal in this matter touches on Applicant's allegations concerning the failure of Trial Counsel to adequately cross-examine witnesses for the State concerning their bias in Applicant's case based upon their potential for gain. Order of Dismissal pp. 7-10. In denying relief on these allegations, the Order simply states that "*Applicant produced no evidence at the PCR hearing that there were any charges that were either dismissed or not pursued.*" The Order

further relies upon PCR testimony from Applicant that, "*to his knowledge, there were never any potential charges against anyone related to the incident that were either dropped or not pursued.*" Order of Dismissal, pp. 7-8. (Emphasis added). Both these factual findings are inaccurate. In his Memorandum in Support, in the form of a proposed order, Applicant set forth with specificity the testimony from the proceedings below which supported Applicant's position that Angie Smith had clear criminal exposure for several charges. Since she admitted setting up the drug transaction between Applicant and the deceased, and going there with Applicant to complete the drug deal she, *at minimum*, faced a drug charge for her involvement in that transaction. She also potentially faced a murder on a theory of accomplice liability. *Memorandum*, pp. 11-23. During his PCR testimony, Trial Counsel was asked why he had not questioned any witnesses for the State concerning any favorable consideration they had either been lead to hope they would receive, or hoped to receive, in exchange for their testimony at Applicant's original trial, he admitted, "*I didn't think of that.*" PCR II, p. 11, ll 12-24. The transcript of this October, 2005 trial confirms Trial Counsel did not question Angie Smith about this subject at Applicant's second trial. Trial 2005, p. 62, l. 5-p. 97, l. 11. Applicant's previous lawyer, Louis Cox, did not pursue this line of impeachment at the 1997 trial either. Likewise, Attorney Cox did not cross-examine Mr. Hyder concerning any favorable consideration he either received, or hoped to receive, at the 1997 trial. He was not cross-examined about the facts and circumstances which suggested his own involvement in the drug deal which was set up to take place at his home. His testimony from that trial was ultimately admitted at the 2005 trial. Trial 1997, p. 83, l. 7-p. 101, l. 24 and Trial 2005, p. 183; Court's Exhibit No. 2.

Applicant's PCR testimony on this point is likewise erroneously set forth in the Order of Dismissal. Order of Dismissal, pp. 7-8. On the very page of the PCR hearing transcript

referenced in this portion of the Order of Dismissal, PCR p. 105, the following testimony is found.

Q. Now, in regards to the other witnesses, you don't have any evidence to support a claim that Terry Bradley, Julian Terry Bradley, was involved, took drugs, or had anything to do with you getting potentially robbed that night, do you?

A. I don't have any direct evidence.

Q. It's just a possible idea?

A. There were there.

Q. Okay, You also don't have any evidence that Mr. Bradley or Ms. Smith or anyone received any kind of deal or consideration in conjunction with their testimony?

A. Well, I can say this: I knew Ms. Smith and I knew about her past, and, I mean, I don't know how Ms. Smith was not, in fact, charged with anything.

Q. Okay. So there were never any charges against anyone related to this incident that were dropped, to your knowledge?

A. Not to my knowledge.

Q. No one was ever charged?

A. Right. Not to my knowledge.

Q. Okay.

DE
SMITH, J.
2016 JAN -4 PM 1:34
M. HOPE BLACKLEY

PCR p. 105, ll. 2-24. Thus, while Applicant admitted not having any *direct evidence* of others involvement in a plan to rob him, he asserted, "*They were there*". PCR p. 105, ll. 3-10. With regard to Angie Smith, he expressly stated that he didn't "*know how Ms. Smith was not, in fact, charged with anything.*" PCR p. 105, ll. 11-17. While he did go on to admit that he didn't know

of any charges relating to this incident "*that were dropped*", he did not, as the Order states, say he had no knowledge of any charges that were "*not pursued*." Order of Dismissal, p. 8; PCR p. 105, ll. 18-24.

Applicant most respectfully submits that the findings of the Court on these allegations, appear to reflect a fundamental misunderstanding of Applicant's position. With regard to Smith, Applicant has demonstrated that there was a strong factual basis for at least two drug charges against her; as well as a murder charge under a theory of accomplice liability. The fact that she wasn't charged with anything speaks directly to the fact that she obviously had received a benefit in exchange for her cooperation and testimony; avoiding criminal prosecution on multiple charges.

Applying the analysis found in the Order of Dismissal would allow the State to totally circumvent well established law. If the State could avoid having a witness questioned about potential consideration received in exchange for their cooperation, or their hope of potential gain, by simply not bringing charges against a potential co-defendant, the very spirit of the Confrontation Clause would be violated. On the facts of this case, there is absolutely no question about the fact that Angie Smith conspired with Appellant to distribute drugs. She admitted it and Applicant's testimony confirmed it. Under standard accomplice liability law, she had exposure to a charge of murder right along with Applicant. If she had been tried for murder, it would have been a jury question whether the death of the victim was a foreseeable consequence of the acts mutually agreed-upon by Applicant and Smith. Likewise, if the jury believed, as may readily have been inferred from the record, that Angie Smith was actually involved in a plan to rob Applicant, that too could have been taken into consideration by the jury.

In addition, Angie Smith admitted that after this shooting, Applicant gave her the drugs that he had on his person. Once again, Applicant's trial testimony confirmed that he gave Smith the remainder of the drugs in his possession after the shooting. Smith went on to admit distributing those drugs to a third-party. These facts, without question, constitute a second drug crime that Smith could have been charged with and was not. The fact that she had not been charged with these crimes, in and of itself, demonstrated obvious potential gain. Trial Counsel was clearly ineffective for failing to question Smith concerning what if any agreements had been reached with the State concerning her prosecution for these offenses. Trial Counsel should have questioned her concerning whether there has been discussion about the fact that, although she had not yet been charged, the State might still decide to bring charges against her after her testimony at Applicant's trial. Applicant had the right to have this key witness against him cross-examined concerning the fact that she had a powerful incentive to lie.

In a typical impeachment situation, a cooperating witness may admit that they have been allowed to plead guilty to a lesser charge and that they have yet to be sentenced. In other cases, a cooperating witness may admit that they have been charged and are hoping that the State will take their cooperation into account when deciding how to proceed with their prosecution. The obvious potential for bias and motive to lie is no less serious when someone who obviously could have been charged with crimes is not charged and testifies for the State. In Applicant's situation, a key witness cooperated and testified under a cloud of fear that the State yet might charge her if her testimony did not meet the expectations of the State and the outcome of the trial was not that hoped for by the prosecution. For these reasons, whether Smith was ever charged with any crimes relating to this case is not the operative question. Where she clearly could have been, Trial Counsel was ineffective for failing to cross-examine Smith concerning her

understanding of why she had not been charged, what if any discussion had taken place about the fact that she still could be charged, and what hopes she had concerning the impact of her cooperation on the State's ultimate prosecution decisions.

The same analysis applicable to Smith, as discussed at length above, applied to Hyder. Applicant has alleged that Trial Counsel was effective for advising Applicant to waive any objections to the introduction of Hyder's 1997 testimony. He further alleged that Trial Counsel should have argued the fact that Applicant's original trial lawyer, Louis Cox, did not cross-examine Hyder concerning his own criminal involvement in this case, and the fact that he could have been charged criminally, as an additional basis for the exclusion of Hyder's 1997 testimony at the 2005 re-trial. The Order of Dismissal does not address this aspect of Applicant's PCR claims. Applicant now asks that this Honorable Court reconsider its decision to deny relief on these grounds. In the alternative, Applicant asks that the Court at minimum issue an Amended Order of Dismissal which makes adequate findings of fact and rulings law with regard to these allegations.

The Order of Dismissal filed in this case also fails to address Allegation 18 raised in Applicant's pleadings and developed at his PCR hearing. That allegation, as set forth in Applicant's Superseding Application, addressed Trial Counsel's failure to object to the self-defense charge given at Applicant's trial. See, Applicant's Memorandum at Section E, pp. 30-31. Applicant asks that the Court reconsider its denial of relief based upon this allegation. In the alternative, he requests an Amended Order of Dismissal making the required findings of fact and rulings of law on this allegation.

In addition to the above, the Order of Dismissal fails to address any of the allegations of ineffective assistance of Appellate Counsel raised and developed by the Applicant. The failure

of Appellate Counsel to brief the question of whether the lower court should have granted Applicant a directed verdict of acquittal was addressed in Applicant's pleadings and in the memorandum filed in support of this PCR action following the evidentiary hearing held in this case. Applicant's Memorandum, Section H, p. 33. The evidence introduced by the State at Applicant's trial failed to produce any direct evidence, or any substantial circumstantial evidence, from which the Applicant's guilt could be found beyond a reasonable doubt. The testimony of Smith and Hyder indicated that the gun went off as the deceased and Applicant were tussling as Applicant backed out of the door of this mobile home. Based upon the evidence adduced at trial, there was simply no evidence that Applicant deliberately shot the deceased with malice aforethought. While the State's theory that this incident happened because Applicant was angry over a \$40 debt might have played a role in the jury finding malice, the legal reality is that this factor had no logical relevance to the question of guilt where there was no evidence that the shot was deliberately fired. Applicant asks that this Court reconsider its previous ruling and grant Applicant Post-Conviction Relief on this ground. On the facts of this case, the appropriate remedy would be for this Court to find Appellate Counsel ineffective, rule that Applicant was prejudiced by Appellate Counsel's deficiency where the issue he failed to brief was at least as meritorious as the issues advanced on direct appeal, find that the issue in question had sufficient merit that it would likely have changed the outcome of Applicant's direct appeal and therefore, hold that Applicant is entitled to have his convictions and sentences vacated.

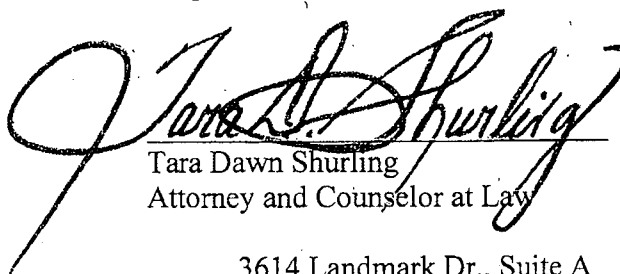
CONCLUSION

For all the above reasons, the Applicant now prays that this Court might amend its Order pursuant to Rule 59(e), SCRCP, grant relief and remand the Applicant's case to the Spartanburg

CLERK OF COURT
SPARTANBURG COUNTY
2014 APR 4 PM 1:34
MHOPE BLACKLEY

County Court of General Sessions. In the alternative, the Applicant would respectfully request that the Court issue an Amended Order of Dismissal addressing the allegations and arguments which were not addressed in the Order of Dismissal filed December 14, 2015. The Applicant asserts that his request for an Amended Order is necessary in order to preserve these claims for appellate review.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 (fax)
tdslaw@shurlinglaw.com

Attorney for the Applicant

This 29th day of December, 2015.

SPACED OUT
2016 JAN -4 PM 1:34
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

DAVID DWIGHT SMITH, 245760,

2011-CP-42-01283

Applicant,

CERTIFICATE OF SERVICE

v.

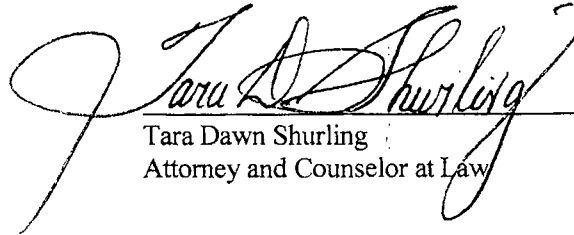
STATE OF SOUTH CAROLINA,

Respondent.

The undersigned attorney hereby certifies that one copy of the Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP in the above-entitled cause has been served upon, Assistant Attorney General, Alicia Olive, by U. S. Mail on this the 29th day of December, 2015 to:

Alicia Olive
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

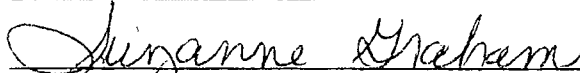
The original having been mailed to the Spartanburg County Clerk of Court for filing.


Tara Dawn Shurling
Attorney and Counselor at Law

SPARTANBURG COUNTY
2016 JAN -4 PM 1:34
M. HOPE BLACKLEY

SWORN TO BEFORE ME this 29th day of

December, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 2/28/24

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

DAVID DWIGHT SMITH, 245760,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

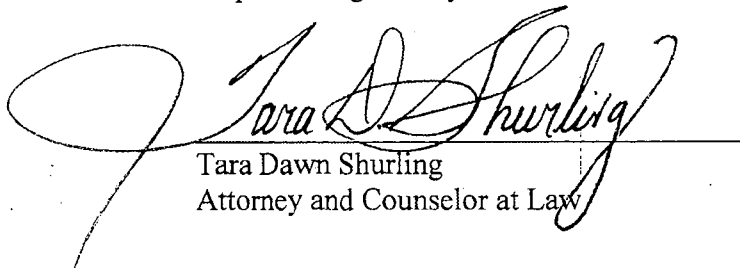
2011-CP-42-01283

CERTIFICATE OF SERVICE

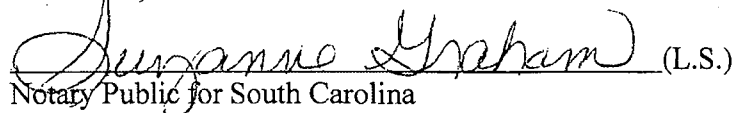
The undersigned hereby certifies that a true copy of the Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP, in the above matter has been served on the Honorable R. Scott Sprouse, Circuit Court Judge, by U. S. Mail this 29th day of December, 2015 to:

The Honorable R. Scott Sprouse
Circuit Court Judge
P. O. Box 1277
Walhalla, SC 29691

The original having been mailed to the Spartanburg County Clerk of Court for filing.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE ME this 29th day of
December, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 2/28/24

SPARTANBURG
2016 JAN -4 PM 1:34
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

David Dwight Smith, 245760

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2011-CP-42-01283

ORDER DENYING APPLICANT'S MOTION
FOR RECONSIDERATION

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Plaintiff's Motion, pursuant to Rule 59, SCRPC,¹ is DENIED.

AND, IT IS SO ORDERED.



R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina

1-11, 2016

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRPC.

2016 JAN 13 AM 9:06
CLERK OF COURT

And Direct Ind.
WITNESSES

Denton
Spartanburg County Sheriff's Dept.
71
Spartanburg, SC 29304

EMMADE ☐
ENDED ☐
ILED ☐
D WARRANT ☒
D WARRANT ☒
ARRANT NO. *14287* ☒
AND MADE ☒
VIOLATIONS COPY ☒

ION OF GRAND JURY

Bill

Up A Bush
and Jury

VERDICT

Guilty of Murder

Guilty
12/4/97
Date:

DOCKET NO. 1

The State of South Carolina,

County of Spartanburg (02)

02/06/97

COURT OF GENERAL SESSIONS

APR 27 1997

TERM

THE STATE

vs.

David Dwight Smith

Indictment for

MURDER AND POSSESSION OF
FIREARM OR KNIFE DURING
COMMISSION OF OR ATTEMPT
TO COMMIT A VIOLENT CRIME

Holman C. Gossett

BW #14287- Issued 2-9-95

STATE OF SOUTH CAROLINA)
COUNTY OF Spartanburg)

INDICTMENT FOR
MURDER AND POSSESSION OF FIREARM
OR KNIFE DURING COMMISSION OF OR
ATTEMPT TO COMMIT A VIOLENT CRIME

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

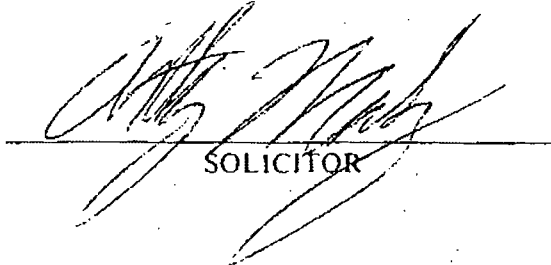
COUNT ONE - MURDER

That David Dwight Smith did in Spartanburg County on or about January 12, 1997, feloniously, wilfully and with malice aforethought, kill one Robert Andrew Finley, by shooting the victim by means of a gun, and that the said victim died as a proximate result thereof.

COUNT TWO - POSSESSION OF FIREARM OR KNIFE DURING COMMISSION
OF OR ATTEMPT TO COMMIT A VIOLENT CRIME

That David Dwight Smith did in Spartanburg County on or about January 12, 1997, possess or visibly display a firearm or visibly display a knife during the commission or attempted commission of a violent crime, to-wit: MURDER, in violation of Code Section 16-23-490, CODE OF LAWS OF SOUTH CAROLINA, (1976), as amended.

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


SOLICITOR