

VOLUME III OF III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
G. THOMAS COOPER, Jr.

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S.C. SUPREME COURT

ALAN L. BURNS

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2019-000380

APPENDIX

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STATE OF SOUTH CAROLINA.	)	COURT OF GENERAL SESSIONS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Alan L. Burns,	)	CASE NO. 2017-CP-10-00271
	)	
APPLICANT,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	ORIGINAL
	)	
State of South Carolina,	)	
	)	
RESPONDENT.	)	

December 4, 2018

Charleston, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Jr.

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

Alan L. Burns, Pro se Applicant

Chris Murphy, Esquire
Standby Counsel For the Applicant

Megan Harrigan Jameson, Esquire
For the Respondent

Certified Transcript Provided For: SCCID

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I N D E X

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CERTIFICATION OF TRANSCRIPT

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Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

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A P P L I C A N T ' S E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>ADMIT</u>
1	'93 Contract	41	41
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1 THE COURT: All right. Ms. Jameson.

2 MS. JAMESON: Thank you, Your Honor. The next matter
3 is Alan Burns versus the State of South Carolina, Docket
4 Number 2017-CP-10-4723 (sic). During its June 2011 term
5 the Charleston County Grand Jury indicted Mr. Burns for two
6 counts of first-degree criminal sexual conduct with a
7 minor, two counts of criminal sexual -- two counts of
8 second-degree criminal sexual conduct with a minor, and
9 three counts of lewd act upon a minor.

10 In August 2011 the grand jury indicted him for two
11 additional counts of first-degree CSC with a minor and two
12 additional counts of lewd act upon a minor. And then in
13 May of 2012 the Charleston County Grand Jury subsequently
14 indicted him for an additional counts of first-degree
15 criminal sexual conduct with a minor and an additional
16 count of lewd act upon a minor.

17 Mr. Burns was appointed counsel but moved to relieve
18 counsel and he proceeded to a jury trial pro se with
19 standby counsel present before Judge Dennis on August 6th,
20 2012.

21 Assistant solicitors Debbie Herring-Lash and Randall
22 Stoney prosecuted the case. On August 10th, 2012, the jury
23 convicted Mr. Burns as indicted on all offenses. Judge
24 Dennis sentenced Ms. Burns to an aggregate 60 years
25 imprisonment.

1 Mr. Burns filed a timely notice of appeal, and he was
2 represented by Appellate Defender Susan Hackett who
3 submitted a merits brief on Mr. Burns' behalf alleging the
4 trial court erred in denying Mr. Burns' request for various
5 grand jury documents.

6 Following briefing, the Court of Appeals affirmed Mr.
7 Burns convictions and sentences finding the issue was not
8 preserved for appellate review. Mr. Burns then attempted
9 to petition for certiorari on his own through the filing of
10 various pro se documents.

11 By order dated July 1st, 2016, the Supreme Court
12 dismissed Mr. Burns' notice for certiorari and the
13 remittitur was sent on the same date.

14 He filed a timely application for post-conviction
15 relief on January 18, 2017, alleging he was not indicted by
16 a legally constituted grand jury and that he asked for and
17 did not receive empanelment documentation for the
18 Charleston County Grand Jury and the State told him it was
19 never created, did not exist and was never used.

20 The second allegation was gross territorial
21 jurisdiction violation and that police officers and/or the
22 Mount Pleasant law enforcement agencies went outside their
23 territorial jurisdiction. And then ineffective assistance
24 of appellate counsel in that appellate counsel
25 intentionally and for purposes of retaliation failed and

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1 refused to file for a rehearing or reinstatement of his
2 appeal.

3 The State served and filed a return and motion for
4 more definite statement on July 19th, 2017, seeking an
5 evidence hearing, hearing solely on the allegation that
6 appellate counsel was ineffective in seeking summary
7 dismissal of the two remaining allegations as direct
8 appeals issues that were not proper for post-conviction
9 relief and is barred by res judicata because they were
10 already raised to and ruled upon by the trial court and the
11 appellate court as to the grand jury issue.

12 On December 15th of 2017 Mr. Burns filed an amended
13 application stating he was seeking a belated appeal to
14 allow him to raise the jurisdictional issue on appeal.

15 On January 30, 2018, Mr. Burns alongside appointed
16 counsel Rodney Davis appeared before Judge Murphy for a
17 hearing on his motion to relieve Mr. Murphy -- excuse me,
18 Mr. Davis, and appear pro se.

19 After a colloquy with Mr. Burns Judge Murphy relieved
20 Mr. Davis. Shortly thereafter our Supreme Court issued a
21 published opinion in Hilton v. State. The case caption is
22 Hilton v. State 422-SC-204. It is a 2018 case, finding
23 that a PC court must obtain a valid waiver from an
24 applicant of his right to counsel after thoroughly advising
25 him of the risks and benefits of proceeding forward self .

1 represented.

2 And in light of Hilton, at the last term Judge Nettles
3 engaged in the colloquy with Mr. Burns and has appointed
4 standby counsel. And the order explicitly states that Mr.
5 Burns can represent himself but Mr. Murphy, Chris Murphy,
6 is here as standby counsel to assist.

7 THE COURT: And what -- I didn't hear your last.

8 MS. JAMESON: Mr. Chris Murphy was appointed as a
9 standby counsel to assist in the event Mr. Burns wishes
10 to -- need assistance in the case. But Judge Nettles'
11 order makes it clear that he is still representing himself
12 in proceeding forward pro se.

13 And at this time the State would renew our motion to
14 dismiss pertaining to the jurisdictional challenges and the
15 grand jury challenges. As procedurally barred, both of
16 those were direct appeal issues that involved trial court
17 error. The territorial jurisdiction issue was presented to
18 the court and ruled upon and therefore is a direct appeal
19 issue that should have and could have been raised to the
20 South Carolina Court of Appeals, our Supreme Court, had he
21 wished to proceed forward on that.

22 And regarding the grand jury empanelment that issue
23 was raised and ruled upon by our Court of Appeals finding
24 it wasn't preserved.

25 So both of those issues the State would submit are not

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1 proper for post-conviction relief. They are direct appeal
2 issues, and we ask for summary dismissal on both of those
3 claims.

4 THE COURT: All right.

5 APPLICANT BURNS: Your Honor, if it pleases the Court
6 I would like to respond to what she said.

7 THE COURT: Oh, sure. Let me ask you first ---

8 APPLICANT BURNS: Go ahead.

9 THE COURT: --- why you are in that chair.

10 APPLICANT BURNS: Because I can't walk. I can barely
11 stand up.

12 THE COURT: Okay.

13 APPLICANT BURNS: I have no control over my right leg.

14 THE COURT: How did that happen?

15 APPLICANT BURNS: I had a stroke sometime back in
16 2010, a small stroke. And from then it has just started
17 deteriorating. At present time I am going through medical
18 procedures with Richland Memorial Hospital under the care
19 of the neurologist. Who as a matter of fact I just had
20 some blood work -- having blood work done as we even speak.
21 They drew blood this morning. And I am still going through
22 tests and stuff to find if there is anything that can be
23 done about it.

24 THE COURT: All right. Do you understand what the
25 assistant attorney general has told me?

1 APPLICANT BURNS: Yes, sir.

2 THE COURT: All right. What is your position?

3 APPLICANT BURNS: First and foremost is the fact that
4 there is a claim of ineffective assistance of counsel. And
5 under ---

6 THE COURT: Wait minute. Let me just -- trial counsel
7 or appellate counsel?

8 APPLICANT BURNS: Appellate counsel.

9 THE COURT: All right. Go ahead.

10 APPLICANT BURNS: And under appellant -- under the
11 Supreme Court ruling on when there is an issue of
12 ineffective assistance of counsel the issue which I am
13 raising in regards to appellate counsel and not raising
14 the -- or not informing me of notice of my right to appeal
15 the appellate court ruling, I had -- can't raise those
16 issues in the Court of Appeals -- I mean in PCR court.

17 Your Honor, the thing is, the legal principles that
18 gives me the right to present my claims to this court for
19 adjudication, okay, this (pointing), this is a direct quote
20 from the law: Issues that could have been raised at trial
21 on direct appeal cannot be asserted in an application for
22 post-conviction relief absent a claim of ineffective
23 assistance of counsel.

24 I am raising a claim of ineffective assistance of
25 counsel. The State agrees that that issue should come

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1 before the court. So therefore it wouldn't make sense for
2 me to be able to come in the courtroom and say I make the
3 claim that appellant counsel was ineffective but I am not
4 allowed to state what she was ineffective in and what she
5 did.

6 I have to be able to show under Strickland versus
7 Washington what she did or did not do; I have to show the
8 court how that prejudiced me. So that issue would have to
9 go before the court.

10 THE COURT: All right.

11 APPLICANT BURNS: So what she is saying, it really
12 does -- it bothers me. Your Honor, like each and every
13 claim that is been brought forth here today is being done
14 so in a claim of ineffective assistance of counsel. Not
15 even the State can deny this fact. I

16 But here is the thing, Your Honor. In State V. Dudley
17 the Supreme Court held that although territorial
18 jurisdiction is not a component of subject matters
19 jurisdiction we hold that it is a fundamental issue that
20 may be raised by a party or by a court at any point in the
21 proceeding.

22 And, Your Honor, as far as back as 1930 that is how
23 far back my research took me. Our Supreme Court has held
24 objection to -- an objection to jurisdiction to entertain
25 an action can be made at any time in circuit court without

1 statutory notice. Now I found that in Williamson versus
2 Richards 155 S.E.890. And that is dated back to 1930.

3 THE COURT: All right, how does that apply to your
4 case?

5 APPLICANT BURNS: Because I am raising a
6 jurisdictional issue, the territorial jurisdiction issue.

7 THE COURT: You are, or you are saying that your
8 appellate counsel did not?

9 APPLICANT BURNS: She did not raise it in my direct
10 appeal. And I am going to get to why I should be allowed
11 to raise it here and why this court had authority to hear
12 the merits of that claim.

13 Your Honor, the Supreme Court held that defects in
14 jurisdiction require correction regardless of whether the
15 error was raised below; it can never be forfeited. That is
16 what the Supreme Court says, that it doesn't make any
17 difference whether it was raised in direct appeal. And in
18 fact even if I don't raise that issue here today I can
19 still raise it in the appeal of this post-conviction for
20 the very first time.

21 Your Honor, I guess I should have mentioned this when
22 I first cited State versus Dudley. But that court also
23 held that the exercise of extra territorial jurisdiction
24 implicates the State's sovereignty, a question so
25 implemental -- so elemental that we hold it cannot be

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1 waived by consent or by conduct.

2 But again all of this, Your Honor, will be presented
3 under the umbrella of ineffective assistance of counsel.

4 Your Honor, I present I have clear and concise
5 evidence proving appointed appellate defense counsel did in
6 retaliation and to for my appeal deprive me of due process,
7 equal treatment, and subjected me to cruel and unusual
8 punishment under ---

9 THE COURT: This is the second issue?

10 APPLICANT BURNS: All this is going to fall under the
11 same umbrella of ineffective assistance of counsel.

12 THE COURT: I understand that. But you raised a
13 jurisdictional issue a minute ago. And now you are talking
14 about something else. But it is still under that same
15 umbrella?

16 APPLICANT BURNS: Yes, sir.

17 THE COURT: Okay. I understand.

18 APPLICANT BURNS: Okay.

19 THE COURT: This is a due process?

20 APPLICANT BURNS: Yes, sir.

21 Okay. The aspects of my case is as follows: Prior to
22 the date of trial all -- and prior -- prior to the return
23 of the verdict I requested the grand jury empanelment
24 documentation for the grand jury that had allegedly
25 indicted me.

1 Counsel for the State, Assistant Solicitor Debbie
2 Herring-Lash, asserted repeatedly that such documentations
3 were never created, are never used, and that she just
4 didn't know what I was talking about.

5 Because she according to her the county grand jury is
6 totally different from the state grand jury and they don't
7 have the same authority and they don't have investigative
8 powers.

9 But the statute clearly states differently. And I am
10 going to raise all of that issue and present evidence to
11 all of that as well.

12 Your Honor, and I forgot to mention this: When I
13 represented myself at trial I was wonderfully assisted by
14 Mr. William Ted Smith and Ms. Lori Proctor of the
15 Charleston County Public Defender's office. At my PCR
16 hearings --- okay, at most of my PCR hearings ---

17 THE COURT: How many did you have --- how many did you
18 have?

19 APPLICANT BURNS: No, I am just -- I am just -- I am
20 just -- I am just -- hear me out, please, and then you will
21 understand what I am saying.

22 THE COURT: No, I won't if you ---

23 APPLICANT BURNS: Okay, at most ---

24 THE COURT: Most of your PCR hearings?

25 APPLICANT BURNS: Not mine. Not mine. All of them in

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1 general. Just that most PCR hearings in general ---

2 THE COURT: Not yours?

3 APPLICANT BURNS: --- such individuals as myself
4 normally have complaints against their trial counsel.

5 THE COURT: All right.

6 APPLICANT BURNS: I, on the other hand, I have no
7 complaints against the people that assisted me ---

8 THE COURT: Okay.

9 APPLICANT BURNS: --- with my --- in my trial.

10 THE COURT: All right.

11 APPLICANT BURNS: Okay. Your Honor, the meat of this
12 issue is that counsel abandoned her responsibilities in the
13 worst possible way, that resulted in me being denied the
14 opportunity to petition for rehearing or reinstatement and
15 above all during my direct appeal phase.

16 In direct appeal once notice of appeal is filed, the
17 briefs are filed, we wait on the court's ruling. When the
18 court's ruling comes back from the Court of Appeals, that
19 initial ruling, where the order denying or granting, that
20 order is not final until the remitter is sent. The
21 remitter is not sent so long as there is a notice of
22 appeal ---

23 THE COURT: Right.

24 APPLICANT BURNS: --- filed.

25 THE COURT: Right.

1 APPLICANT BURNS: The appointed appellate counsel did
2 not give me notice of that.

3 THE COURT: No, sir ---

4 APPLICANT BURNS: On the very -- on the very next
5 day ---

6 THE COURT: Let me understand.

7 APPLICANT BURNS: Okay.

8 THE COURT: Your notice of your right to request a
9 rehearing, is that what you are saying?

10 APPLICANT BURNS: Right. Here is what happened.
11 On the very -- the Court of Appeals denied my direct
12 appeal ---

13 THE COURT: Okay.

14 APPLICANT BURNS: --- on June -- on July 15th.

15 THE COURT: Okay.

16 APPLICANT BURNS: On July 16th the appointed counsel
17 wrote me a letter telling me that they were closing their
18 file on my case. She cut off all ties with me. I couldn't
19 call her office. I couldn't write to her. She wouldn't
20 respond in any way.

21 I attempted to file the petition for rehearing or
22 petition for reinstatement myself. The Court of Appeals
23 and the Supreme Court responded to my efforts by telling me
24 that I was still represented by counsel and that these
25 papers have to be filed by counsel.

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1 I couldn't get those done because counsel had closed
2 her file on my case.

3 THE COURT: Did you ever get a rehearing?

4 APPLICANT BURNS: No, I never got anything.

5 THE COURT: Okay.

6 APPLICANT BURNS: So that is ineffective assistance of
7 counsel. In any respect I had the right to file for -- to
8 petition for rehearing or reinstatement.

9 THE COURT: All right, that is number ---

10 APPLICANT BURNS: Absent ---

11 THE COURT: That is Number 3.

12 APPLICANT BURNS: Right. Absent me not being able to
13 do that, that means I cannot now petition to the Supreme
14 Court for a writ of cert because you have to go through
15 petition for rehearing or reinstatement first.

16 THE COURT: Got it.

17 APPLICANT BURNS: And she denied me that. And she did
18 that intentionally because I had filed a number of
19 complaints against her during the process.

20 Because at the very onset of her being appointed to my
21 case I requested -- when I wrote her and told her the two
22 issues that I wanted raised in my direct appeal, which was
23 the grand jury issue in the territorial jurisdiction, ---

24 THE COURT: Okay.

25 APPLICANT BURNS: --- she immediately responded and

1 told me that she has never raised any -- never done that
2 before or anything regarding territorial jurisdiction, she
3 doesn't -- she is not familiar with it and she is not going
4 to raise it.

5 THE COURT: Okay.

6 APPLICANT BURNS: So when I -- when she told me that,
7 I got on her and told her, well, you need to research it.

8 THE COURT: All right.

9 APPLICANT BURNS: I said everything ---

10 THE COURT: I understand. Tell me what your other
11 issues are.

12 APPLICANT BURNS: Okay.

13 THE COURT: That is three issues you have told me.

14 APPLICANT BURNS: Those are the issues.

15 THE COURT: That is it?

16 APPLICANT BURNS: That is it.

17 THE COURT: Okay.

18 APPLICANT BURNS: I only have the territorial
19 jurisdiction issue, the grand jury issue, and she was
20 ineffective in not pursuing -- not pursuing those issues.
21 That is it.

22 THE COURT: Okay.

23 APPLICANT BURNS: And each one of those issues will
24 fall under the umbrella of ineffective assistance of
25 counsel.

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1 THE COURT: Okay.

2 APPLICANT BURNS: The grand jury issue now is -- comes
3 into play because even though she raised that in a merits
4 brief -- and I asked her prior. I asked her; I said, well,
5 why don't you file an Anders brief; if you filed an Anders
6 brief that would allow me an opportunity to file my own pro
7 se brief and then I can raise both of these issues. And if
8 that had happened we wouldn't now be here today.

9 But she insisted upon filing a merits brief on the
10 grand jury issue. When the Court of Appeals issued their
11 initial denial she closed her file on me the very next day,
12 denying me any further review. I can't even raise the
13 issue in federal court because she did not go through with
14 petitioning for rehearing or reinstatement.

15 THE COURT: All right.

16 APPLICANT BURNS: That is a violation.

17 THE COURT: Okay. Now what is the State's position
18 with regard to Mr. Burns' claim of ineffective assistance
19 of appellate counsel?

20 MS. JAMESON: That he is allowed to proceed forward on
21 solely that claim. He has raised -- in his application and
22 in his amended application Mr. Burns raised it as
23 ineffective assistance of appellate counsel and then two
24 direct appeal issues pertaining to extraterritorial
25 jurisdiction and that his indictments were faulty based on

1 not receiving the grand jury empanelment documents. Those
2 were properly presented to Judge Dennis. And prior
3 judgment in pretrial motions could have and should have
4 been presented to the appellate courts. In regards to the
5 grand jury issue was presented to the appellate court.

6 So he is foreclosed -- the State's position is he is
7 foreclosed from pursuing those as trial court error. And
8 he didn't have any trial counsel, so any errors with
9 failing to properly preserve those issues would be at his
10 own detriment because he elected to proceed forward pro se,
11 but that he is allowed to proceed forward on claims against
12 Ms. Hackett. And we have Ms. Hackett here and prepared to
13 testify.

14 THE COURT: All right.

15 APPLICANT BURNS: Again, Your Honor, she is still
16 trying to say that I can't raise those issues. But those
17 issues have to be raised because that is how she was
18 ineffective.

19 THE COURT: Okay. You are on the record.

20 APPLICANT BURNS: And she admits -- and, Your Honor,
21 and for the record -- and I want to make sure that this is
22 on the record. I agree with her. She said that those
23 issues should be raised -- should have been raised in
24 direct appeal. So, yes, she is right they should have been
25 raised. Which means that appellate counsel was

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1 ineffective.

2 THE COURT: Well ---

3 APPLICANT BURNS: That is what she said, ---

4 THE COURT: I haven't ---

5 APPLICANT BURNS: --- that they should have been
6 raised. And that means she is ineffective because she
7 didn't raise that.

8 THE COURT: I haven't raised -- I haven't -- I haven't
9 ruled that.

10 APPLICANT BURNS: I understand. But I am just saying
11 that ---

12 THE COURT: All right. That is your ---

13 APPLICANT BURNS: --- that is my point ---

14 THE COURT: That is your ---

15 APPLICANT BURNS: --- that I am arguing.

16 THE COURT: All right. Call your first witness.

17 APPLICANT BURNS: Your Honor, at this time ---

18 THE COURT: No -- all right, you can call a witness.

19 APPLICANT BURNS: I am ready.

20 THE COURT: Call your witness.

21 APPLICANT BURNS: I would like to call Mr. Richard
22 Beasley for the Charleston County Planning and Zoning
23 Board. I want to present all of the evidence that I showed
24 that I presented to Ms. -- the appellate counsel so that
25 the Court will know what was presented to her and whether

1 or not she had sufficient evidence, sufficient information,
2 to pursue these issues on direct appeal. And if she had
3 the information and she just neglected to do it, grossly
4 neglected to do it, ---

5 THE COURT: All right. Okay.

6 APPLICANT BURNS: --- then she is in violation.

7 THE COURT: You just -- that is as to argument. Who
8 is this you want to call?

9 APPLICANT BURNS: Mr. Richard Beasley from the
10 Charleston County Planning and Zoning Board.

11 THE COURT: Did you subpoena him?

12 APPLICANT BURNS: Yes, sir, I subpoenaed him.

13 THE COURT: Is he here?

14 APPLICANT BURNS: There was a number of individuals
15 that I subpoenaed. And each ---

16 THE COURT: Let's just -- one at a time.

17 MS. JAMESON: Your Honor ---

18 THE COURT: Is this gentleman here?

19 MS. JAMESON: The State would object on the record.
20 We didn't ---

21 THE COURT: I am asking ---

22 MS. JAMESON: --- receive a copy of ---

23 THE COURT: --- yes or no. Is he here?

24 APPLICANT BURNS: No.

25 MS. JAMESON: I don't -- we didn't know he had

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1 subpoenaed any witnesses for this hearing.

2 THE COURT: Okay.

3 APPLICANT BURNS: Your Honor, that is not true.

4 She ---

5 THE COURT: All right, I am not ---

6 APPLICANT BURNS: Let me explain it to you.

7 THE COURT: No, you're not. You're not going to sit
8 here and argue back and forth.

9 APPLICANT BURNS: No, I'm not.

10 THE COURT: Yes, you are.

11 APPLICANT BURNS: Please I beg Your Honor. I beg you,
12 please. And I will be brief.

13 THE COURT: All right, you subpoenaed somebody and
14 that person is not here; right?

15 APPLICANT BURNS: But, see, at the other hearing I had
16 subpoenaed them at the previous hearing with Judge Nettles.
17 Judge Nettles specifically instructed counsel here to
18 ensure that these people would be here again.

19 I also turned around to ensure that they would be here
20 and I resubmitted and reserved subpoenas through the
21 Richland County Sherriff's Department.

22 THE COURT: To the Richland County.

23 APPLICANT BURNS: No, I'm sorry. I apologize.
24 Through the Charleston County Sheriff's Department.

25 THE COURT: And what is this gentleman's name?

1 APPLICANT BURNS: Mr. Richard Beasley.
2 THE COURT: Richard ---
3 APPLICANT BURNS: Beasley.
4 THE COURT: All right. He is not here.
5 APPLICANT BURNS: B-E-A-S-L-E-Y.
6 THE COURT: He is not here.
7 APPLICANT BURNS: Okay.
8 THE COURT: Who is your next witness?
9 APPLICANT BURNS: Next witness would be Mr. Edward
10 Knisley.
11 THE COURT: Who?
12 APPLICANT BURNS: Mr. Edward Knisley.
13 THE COURT: How do you spell that?
14 APPLICANT BURNS: He is deputy county attorney.
15 THE COURT: How do you spell that last name?
16 APPLICANT BURNS: K-N-I-S-L-E-Y.
17 THE COURT: All right. Was he subpoenaed?
18 APPLICANT BURNS: Yes, sir, he was.
19 THE COURT: For this hearing today ---
20 APPLICANT BURNS: For this hearing today, sir.
21 THE COURT: --- at this time?
22 APPLICANT BURNS: Yes, sir.
23 THE COURT: Is Mr. Edward Knisley present?
24 MR. MURPHY: He is not.
25 THE COURT: He is not. The chief of detectives for

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1 the Mount Pleasant Police Department, I served the Mount
2 Pleasant Police Department requesting the chief of
3 detectives from the Mount Pleasant Police Department to be
4 here.

5 THE COURT: What is his name?

6 APPLICANT BURNS: I wasn't sure what his name was. In
7 the subpoena I just directed it to the chief of detectives.
8 And when the Charleston County Sheriff Department served it
9 they served it on the police station, for whoever the chief
10 of detectives would be.

11 THE COURT: Okay. Is the chief public -- I mean chief
12 detective from Mount Pleasant Police Department present?

13 Not here.

14 APPLICANT BURNS: Okay, the next the subpoena that I
15 served was to Ms. Lori Proctor from the Charleston County
16 Public Defender's Office.

17 THE COURT: Is Ms. Lori Proctor present?
18 (WHEREUPON, not present.)

19 THE COURT: Go ahead.

20 APPLICANT BURNS: The next person that I subpoenaed
21 was with Ms. Herring-Lash from the Charleston County -- she
22 is the Charleston County assistant solicitor.

23 THE COURT: Is Ms. Lash present?

24 MS. HERRING-LASH: Judge, I am. But I did not get a
25 subpoena.

1 THE COURT: Thank you.

2 APPLICANT BURNS: Your Honor, these subpoenas were
3 served by the Charleston County Sheriff's Department.

4 THE COURT: And show me --- show me your ---

5 APPLICANT BURNS: Yes, sir.

6 THE COURT: --- certificate from the Sheriff's
7 Department.

8 APPLICANT BURNS: Yes, sir, will do.

9 (Pause.) I am sorry I am having to dig, Your Honor.
10 When I get ready to be transferred here they search through
11 my stuff and they rearrange everything. So nothing is
12 never in the order that I put it when I start out.

13 I have three of them right here. And I have got to
14 dig through for the rest of them.

15 Your Honor, let me ask you this: Is there any way I
16 can take a five-minute recess so I can dig through this
17 stuff and pull this out. Because when they searched my
18 stuff this morning -- yesterday and this morning everything
19 got rearranged. And I don't want to just have the court
20 sit here while I dig through these papers.

21 THE COURT: Well ----

22 APPLICANT BURNS: But I do have all of these papers if
23 Your Honor would give me that time. Could that be done,
24 please?

25 THE COURT: I am just looking at my schedule, Mr.

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1 Burns. Let's move on. If you can produce it today ---
2 APPLICANT BURNS: Okay.
3 THE COURT: --- I will accept that. Who else have you
4 subpoenaed?
5 APPLICANT BURNS: Those are all the ones that I served
6 subpoenas on.
7 THE COURT: All right. So that is Beasley, Knisley -
8 or Knisley - Mount Pleasant detective, Lori Proctor, and
9 Debbie Herring-Lash?
10 (WHEREUPON, applicant confers with standby counsel.)
11 THE COURT: Mr. Burns, ---
12 APPLICANT BURNS: Yes, sir.
13 THE COURT: --- just for the record who are you
14 conferring with?
15 APPLICANT BURNS: Oh, this is ---
16 THE COURT: Who are you conferring with?
17 APPLICANT BURNS: This is Mr. Christopher -- what is
18 your last name?
19 MR. MURPHY: Murphy.
20 APPLICANT BURNS: Christopher Murphy from -- he was
21 appointed as standby counsel.
22 THE COURT: I just wanted to note his appearance for
23 the record.
24 APPLICANT BURNS: I understand. I understand, Your
25 Honor. I am sorry ---

1 THE COURT: Go ahead.

2 APPLICANT BURNS: I am sorry I didn't mention that
3 sooner.

4 THE COURT: Let's move on.

5 APPLICANT BURNS: Okay.

6 THE COURT: I asked you if you were going to call a
7 witness.

8 APPLICANT BURNS: Yes, sir, well, at this time I would
9 like to call since she is here could I call Ms. Debbie
10 Herring-Lash.

11 THE COURT: Come around, Ms. Lash.

12 (WHEREUPON, the witness was duly sworn.)

13 THE CLERK: For the record please state your name and
14 spell your last.

15 THE WITNESS: Debbie Herring-Lash. H-E-R-R-I-N-G,
16 hyphen L-A-S-H.

17 **DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE**

18 **HERRING-LASH:**

19 Q. Okay. Good morning, Ms. Herring-Lash. I just want to
20 jump right straight into it with my questions. You first
21 prosecuted me in 2012 in regards to the charges that
22 counsel has mentioned a while ago; is that correct?

23 A. That is the first time I have prosecuted you on those
24 charges, yes.

25 Q. Okay. And therefore would it have been fair to say

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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- 1 that you went over the details of the testimony that the
2 witnesses were going to be giving at that trial?
- 3 A. Are you asking if I went over the testimony with the
4 witnesses prior to trial?
- 5 Q. Yes.
- 6 A. Yes.
- 7 Q. And you interviewed all of the witnesses prior to
8 trial; is that correct?
- 9 A. Yes.
- 10 Q. Okay. And tell me this: Did you review the evidence
11 to know which evidence was to be presented with the
12 testimony of each witnesses?
- 13 A. I talked to each witness about their testimony.
- 14 Q. Okay. So you vetted all of the witnesses and that
15 would include Detective Bacon who testified at trial; is
16 that correct?
- 17 A. I did meet with her prior to trial, yes.
- 18 Q. Okay. And at any point in time did you discuss with
19 Detective Bacon the fact of her jurisdiction in regards to
20 the cases?
- 21 A. What do you mean discussed her jurisdiction?
- 22 Q. She was a municipal police officer; is that correct?
- 23 A. She was Mount Pleasant detective.
- 24 Q. Right, a Mount Pleasant Municipal Police detective?
- 25 A. Right.

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 Q. Okay. Does the Mount Pleasant Municipal Police
2 Department have jurisdiction over rural Charleston County
3 areas?

4 A. Not all rural Charleston County areas. If you are
5 asking about the particular road that this -- these events
6 occurred on, they are within the county and there is a
7 contract which we -- was presented at trial that gives the
8 Mount Pleasant police and fire jurisdiction over that area
9 that is called like a doughnut hole. And that contract was
10 in existence since I think 1993.

11 Q. Okay. And when you vetted Detective Bacon did
12 Detective Bacon initially assert that she had been
13 investigating the case under a contract or was she
14 investigating the case as if she -- the area was
15 incorporated into the Town of Mount Pleasant?

16 A. Well, she had -- every since she had been a detective
17 there that area was under the jurisdiction of the Mount
18 Pleasant Police Department; so she investigated as she
19 would any other case under the jurisdiction of the Mount
20 Pleasant Police Department.

21 Q. Okay. You mentioned a few moments ago a contract.

22 A. Right.

23 Q. Give me one second, please.

24 A. That contract is Exhibit Number 22, if you have it
25 that way.

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 Q. Yeah, I am going to ask you about that in just a
2 second.

3 MS. JAMESON: Your Honor, I have copies and intended
4 to introduce it. If I may show it to Mr. Burns I might be
5 able to provide him a copy.

6 THE COURT: Well, let him look at it..

7 APPLICANT BURNS: I can find copies of it myself,
8 ma'am.

9 MS. JAMESON: Okay. If I may, I would like to pass
10 this up to the witness.

11 THE COURT: Sure.

12 A. I have got a copy of State's Exhibit Number 22.

13 THE COURT: Well, let him ---

14 Q. Do you have a copy of it? Do you have a copy of it up
15 there with you on the witness stand?

16 A. Yes.

17 Q. Okay. Would you do me a favor please and would you
18 turn to page -- in the first contract -- because there were
19 two contracts that you submitted.

20 A. Right. I only had the first one.

21 Q. Okay ---

22 A. Well, I only have the 1998 one.

23 Q. Okay ---

24 A. And three.

25 Q. Well, let's go to the 1993 one first. And if I could

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 I would like you to turn to Page 4 of 5. And I would
2 rather you read it from mine because I have a section in
3 their highlighted I want you to read.

4 A. Okay.

5 APPLICANT BURNS: Could I get you to pass it up to
6 her, please.

7 (WHEREUPON, document presented to the witness.)

8 A. Okay.

9 Q. Would you read the first highlighted section, please,
10 ma'am.

11 A. Terms and consideration.

12 Q. Yes, would you read the first line.

13 A. The term of the contract shall be from December 1st,
14 1993, to November 30th, '94.

15 Q. Okay. Would it be -- I mean I am not an attorney --
16 so I am just a layperson. But the investigation that
17 Detective Bacon conducted, that investigation went from
18 2010 to 2012 to the time I am at the trial; is that
19 correct?

20 A. Right.

21 Q. So would it be fair to say that that contract that you
22 are reading that you submitted in the court was expired at
23 the time of the investigation?

24 A. Well, according to the testimony of the county
25 attorney, Mr. Edward Knisley, there had been a continuing

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 contract since then. And in fact Mount Pleasant still to
2 this day investigates all crime within that -- the
3 jurisdiction of that doughnut hole that we are talking
4 about.

5 Q. Okay. I understand that. But just in regards to that
6 contract ---

7 A. So this one ---

8 Q. --- and from your perspective as an assistant
9 solicitor and a learned person in the law, was that
10 contract expired in its written form as you have it right
11 here before you?

12 A. This one was, but in part of the investigation I
13 talked with the chief of police and was aware that it was
14 an ongoing contract.

15 (WHEREUPON, applicant confers with standby counsel.)

16 APPLICANT BURNS: Excuse me, Your Honor. I'm sorry.

17 Q. Okay. I want to present to you the second contract as
18 well. And on this contract what I want you to do, I want
19 you to ---

20 APPLICANT BURNS: Can I get you to pass this up to her
21 please? If you don't mind. I'm sorry.

22 (WHEREUPON, document provided to the witness.)

23 Q. It is already on the correct dates.

24 A. Okay.

25 Q. Would you read for me the dates of that contract,

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 please.

2 A. September the 10th, 1998, to -- and November the 10th,
3 1998.

4 Q. Okay. And ---

5 MS. JAMESON: Your Honor, may I be shown a copy of
6 that? I'm not sure I have a copy of that document.

7 THE COURT: Look at it.

8 MS. JAMESON: May I approach?

9 THE COURT: Sure.

10 (WHEREUPON, Ms. Jameson approaches witness to review
11 document.)

12 Q. Give me one second, Ms. Herring-Lash. Now I have a
13 statute I need you to look at right quick like. If I may.

14 A. Okay.

15 Q. On that statute would you read that last sentence
16 of ---

17 THE COURT: Well, let's identify it.

18 APPLICANT BURNS: Okay.

19 Q. Would you please identify the document that you have
20 in your hand first, ma'am.

21 A. This looks like it is South Carolina Code of Laws, 23-
22 20-50, 2011.

23 Q. Okay. And have you ever -- did you review that
24 statute when you were reviewing the contracts in
25 preparation for this case?

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 A. I reviewed the contracts in preparation when you had
2 subpoenaed these the particular contracts to court. So I
3 did not look at this statute. I had talked with the people
4 at the Mount Pleasant Police Department, including the
5 chief, knowing that they had jurisdiction at the time
6 because it was a continuing contract.

7 Q. Okay. Would you do something for me now. Would you
8 please read the first line -- I mean the last sentence ---

9 A. Underlined ---

10 Q. The last sentence -- the last sentence of Section A of
11 that statute for me.

12 A. The underlined?

13 Q. Yes, it is underlined in red.

14 A. An agreement entered into with a local law enforcement
15 authority pursuant to this chapter must be approved by the
16 governing body of each jurisdiction.

17 Q. Read the last sentence.

18 A. For agreement entered into prior to June of 2000 the
19 agreement may be ratified by the governing body of each
20 jurisdiction.

21 Q. Okay. Now here is my question, the contract that you
22 have in your hand was it entered into prior to June 1st,
23 2000?

24 A. The two contracts that you subpoenaed to court were
25 '98 and '93.

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 Q. So both of those contracts were entered into prior to
2 June 1st, 2000; is that correct?

3 A. Yes.

4 Q. Okay. So were either of those contracts ever
5 ratified?

6 A. They are signed.

7 Q. No, I'm not asking you if those contracts are signed.
8 I am asking you were they ratified after the June 1st,
9 2000, date in the statute.

10 A. I can only tell you they are signed by the county --
11 the attorney for the County of Charleston and the mayor of
12 Mount Pleasant.

13 Q. Okay. Ms. Herring-Lash ---

14 A. Until -- at this point in time they are still in
15 effect.

16 Q. Ms. Herring-Lash, did you know that the Supreme Court
17 ruled that any contracts entered into prior to June 1st,
18 2000, unless those contracts were ratified after that date
19 that they are invalid?

20 A. I don't know that.

21 Q. Okay. Would you like -- well, I don't want to ask you
22 if you would like to -- I am going to pass up something
23 else to you. I need you to identify it. And after you
24 identify it please turn to Page 8.

25 MS. JAMESON: Your Honor, I would object to Ms.

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HERRING-LASH

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1 Herring-Lash continuing to read case law and statutes into
2 the record that she testified she doesn't have knowledge of
3 before or didn't review. I think that is appropriate
4 for ---

5 THE COURT: She can ---

6 MS. JAMESON: --- argument at the end.

7 THE COURT: She can always say that. She can tell us
8 whether she

9 MS. JAMESON: Thank you, Your Honor.

10 APPLICANT BURNS: Thank you, Your Honor.

11 A. I have not reviewed this case prior to seeing it right
12 here today.

13 Q. Right, but could you identify it for the record,
14 please, ma'am.

15 A. State versus Robert Boswell.

16 Q. And could you give us the citing of it?

17 A. South -- South 391, South Carolina 592, 2011.

18 Q. Okay. Would you please turn on Page 8. And it's --
19 the last paragraph, it is highlighted for you.

20 A. The last paragraph?

21 Q. Yes, ma'am.

22 A. Given this statute was in effect at the time of
23 Boswell's arrest we must assess the validity of the 1999
24 agreement. The last sentence, Subsection 8, states this
25 agreement may be ratified by governing bodies of each

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
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1 jurisdiction. The State construes the phrase "may be
2 ratified" to mean the governing bodies of Calhoun and
3 Lexington County did not have a formally approved 1990 --
4 1999 agreement after two thousand and -- 2000 amendment.
5 We disagree.

6 Q. Thank you. Flip over to Page 9 and finish. Because I
7 want you -- and that will be the last thing I need you to
8 read from any case laws or statute.

9 A. Page 9?

10 Q. Yes, at the top of the page.

11 A. In contrast to the State's interpretation we construe
12 Subsection A is requiring governing bodies to formally
13 approve a pre-existing agreement if it is to retain its
14 validity. Taking into account the significance of
15 territorial jurisdiction we believe a more stringent
16 approach needs to be followed in order to confer this type
17 of authority.

18 Q. Okay. Now that is what the Supreme Court said in
19 regards to the statute and the type of contract that you
20 presented to the court. With that now being fresh in your
21 mind would you agree that the two contracts that you
22 submitted were invalid; first they were outdated, expired,
23 and second that they were invalid based upon statute and
24 case law?

25 MS. JAMESON: Your Honor, I would object. Ms.

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HERRING-LASH

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1 Herring-Lash has testified she has not reviewed Boswell
2 before coming here today. These are all arguments he can
3 make at the end of this. This is an improper line of
4 questioning.

5 THE COURT: I am going to allow it. Go ahead.

6 A. What I can explain to you is the county attorney
7 testified that there is an ongoing contract - and we are
8 talking about -- we -- this trial was in 2012. The City of
9 Mt. Pleasant has routinely since 1990 through had -- '93
10 had jurisdiction over that area for fire, waste, and
11 police. And that continues until this day.

12 Q. But, again, my question is ---

13 THE COURT: No, no, no. She has answered your
14 question.

15 Q. I understand. I understand ---

16 THE COURT: Don't argue with her.

17 APPLICANT BURNS: Right. I understand, Your Honor.

18 Q. What I am trying to find out is absent what Mr.
19 Knisley, the county attorney, testified to, based upon your
20 knowledge and understanding of the law, based upon ---

21 THE COURT: She has answered this question.

22 APPLICANT BURNS: I understand.

23 THE COURT: She has answered this question. Move on.

24 Q. Okay. Ms. Herring-Lash, did Mr. Edwin Knisley, also
25 the county attorney, also submit an e-mail in regards to

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 the contracts in the case revolving around me?

2 A. I am not sure.

3 Q. Okay. Let me -- let me see if I can pull it up right
4 quick. Let me pass this up to you.

5 (WHEREUPON, document presented to witness.)

6 Q. Can you please identify the document that you have in
7 your hand, Ms. Herring-Lash?

8 A. This is an e-mail to -- from Ed Knisley to Ted Smith.

9 Q. Okay. And have you ever ---

10 THE COURT: Who?

11 THE WITNESS: Ed Knisley to Ted Smith. Ted Smith was
12 standby counsel.

13 THE COURT: Ted Smith. Okay.

14 THE WITNESS: Yes, Your Honor.

15 Q. Okay. And did you ever see that e-mail before, or --
16 and did you make any -- did you make any comments during
17 trial in regards to that e-mail?

18 A. I don't remember. I'm sure -- I may have seen it. I
19 just simply don't remember.

20 Q. Okay. Let me pull it up in the transcript so I can
21 see if I can refresh your memory.

22 THE COURT: What volume are you in?

23 APPLICANT BURNS: I am in Volume I. Let me get my
24 transcripts.

25 THE COURT: Whose testimony?

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 APPLICANT BURNS: It would be Ms. Herring-Lash's
2 response to that e-mail.

3 THE COURT: Well, who -- she was on the stand?

4 APPLICANT BURNS: No, she was just responding to it in
5 regards to during her argument to the court.

6 THE COURT: What kind of argument?

7 APPLICANT BURNS: During the case of the trial when
8 during -- and her response to my direct -- my -- yeah, my
9 request for direct verdict she ---

10 THE COURT: Directed verdict?

11 APPLICANT BURNS: Right, directed verdict. She
12 responded ---

13 THE COURT: At that stage?

14 APPLICANT BURNS: Right, she responded that the e-mail
15 that ---

16 THE COURT: Okay. All right.

17 APPLICANT BURNS: --- is not -- it was in reference to
18 the fact that it wasn't any specific ---

19 THE COURT: Well, let's ---

20 APPLICANT BURNS: --- investigation of anything going
21 on.

22 THE COURT: You are just testifying. Let's get to
23 what really happened.

24 (WHEREUPON, Applicant confers with standby counsel.)

25 APPLICANT BURNS: Okay. Your Honor, at this time I

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 wanted to simply move for the contracts and that statute to
2 be entered into the record as evidence.

3 THE COURT: Okay.

4 APPLICANT BURNS: And have them marked as evidence.

5 THE COURT: Without -- is there an objection?

6 MS. JAMESON: No. I just wanted to confirm it is the
7 two that were State's 22 at trial, '93 and '98.

8 APPLICANT BURNS: Yes, ma'am.

9 MS. JAMESON: No objection.

10 THE COURT: All right. Go ahead and mark them.

11 MS. JAMESON: I would also ask that ---

12 THE COURT REPORTER: Just one second.

13 THE COURT: Just wait a minute

14 APPLICANT BURNS: Oh, I'm sorry.

15 (WHEREUPON, Respondent Exhibit Number 1, '93 contract, was
16 marked for identification.)

17 (WHEREUPON, Respondent Exhibit Number 1 was admitted into
18 evidence.)

19 (WHEREUPON, Respondent Exhibit Number 2, '98 contract, was
20 marked for identification.)

21 (WHEREUPON, Respondent Exhibit Number 2 was admitted into
22 evidence.)

23 THE COURT: Did you testify in this trial?

24 APPLICANT BURNS: No, sir, I didn't.

25 THE COURT: Okay.

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 Ms. Herring-Lash, did ---

2 MS. HERRING-LASH: Yes, Your Honor.

3 THE COURT: Who moved for directed verdict, the State?

4 MS. HERRING-LASH: Mr. ---

5 THE COURT: Or did Mr. Burns?

6 MS. HERRING-LASH: Mr. Burns.

7 MS. JAMESON: It is on Page 560, Your Honor.

8 THE COURT: Okay, 560?

9 MS. JAMESON: Yes, Your Honor.

10 THE COURT: All right. The State rested.

11 (WHEREUPON, clarification of exhibits marked by
12 Respondent.)

13 THE COURT: Did you move for a directed verdict?

14 MS. HERRING-LASH: No, Your Honor.

15 APPLICANT BURNS: Your Honor, at this time I want to
16 also move for -- that case, State vs. Boswell that she read
17 from, I would like to have that entered into the record as
18 well.

19 THE COURT: Any problem with that?

20 APPLICANT BURNS: Maybe even if -- well, as a court
21 exhibit ---

22 THE COURT: Well ---

23 APPLICANT BURNS: --- if anything.

24 THE COURT: I mean a statute is a statute and ---

25 APPLICANT BURNS: The statute and ---

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 THE COURT: And -- just ---

2 APPLICANT BURNS: And the case ---

3 THE COURT: Let me finish my sentence.

4 APPLICANT BURNS: Oh, I am sorry. I apologize.

5 THE COURT: You are citing that case. I don't know
6 that the Court needs to have a copy of it. They have got
7 plenty of copies of it.

8 MS. JAMESON: The State's position ---

9 THE COURT: I mean it is what it is.

10 MS. JAMESON: It is appropriate argument and can be
11 cited to, but the State would object to it being introduced
12 at an exhibit. Particularly through this witness who
13 say ---

14 THE COURT: It is not evidence.

15 MS. JAMESON: --- she hadn't read it.

16 THE COURT: It is the law.

17 APPLICANT BURNS: Okay.

18 THE COURT: I mean.

19 APPLICANT BURNS: Your Honor, at this time I would
20 also like to move for the record to remain -- in this case
21 to be -- remain open because for -- so that I can later
22 submit or call the other witnesses that I subpoenaed.

23 And the reason I am also going back on this request is
24 because at the last hearing Judge Nettles specifically
25 instructed - and this would be in the record - the counsel

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 for the State to ensure that those witnesses would be here.
2 And he also gave those witnesses, as they all stood in the
3 back of the courtroom, gave them specific instruction to
4 return to court today. So that would all be a part of the
5 record. So therefore I would ask that this case be held
6 open until such time as we can reschedule so that I can
7 call those witnesses.

8 THE COURT: Just hold on a minute. I have his order.
9 It says here ...

10 (WHEREUPON, pause for Court to review document.)

11 THE COURT: Are you finished with this witness?

12 APPLICANT BURNS: Yes, let me look for one more fact;
13 and then I believe I am, Your Honor.

14 THE COURT: All right.

15 MS. JAMESON: Your Honor, I would like to be heard at
16 the appropriate time in regards to his motion to leave the
17 record open.

18 THE COURT: Okay. But I am looking for what he says
19 this order says.

20 APPLICANT BURNS: Well, no, it is not in the order.
21 This was just his verbal pronouncement in court prior to
22 that order. That order was drafted by and submitted as a
23 proposed order that he signed only in regards to the
24 appointment of Mr. Murphy as standby counsel. That is what
25 that order is for.

DIRECT EXAMINATION BY APPLICANT BURNS OF DEBBIE
HERRING-LASH

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1 But that was his -- but in regards to the witnesses
2 that was his in court on the record pronouncement to ---

3 THE COURT: I don't have any evidence of that.

4 APPLICANT BURNS: But that is what I am saying, that
5 is why I would ask that the court leave this case open
6 until such time as I can acquire a copy of that transcript
7 so that I can present that transcript to show that the
8 Court did make ---

9 THE COURT: All right. Okay.

10 APPLICANT BURNS: --- this announcement in court.

11 THE COURT: I understand what you are saying. Are you
12 finished with this witness?

13 APPLICANT BURNS: Yes, sir, I am.

14 THE COURT: You may come down.

15 APPLICANT BURNS: Thank you.

16 MS. JAMESON: Your Honor, I do have questions.

17 THE COURT: I'm sorry. I beg your pardon.

18 MS. JAMESON: That is all right.

19 THE COURT: I seriously beg your pardon. You may
20 proceed.

21 MS. JAMESON: Thank you, Your Honor.

22 **CROSS-EXAMINATION BY MS. JAMESON OF MS. DEBBIE**

23 **HERRING-LASH:**

24 Q. Ms. Herring-Lash, you prosecuted this case; correct?

25 A. Yes.

CROSS-EXAMINATION BY MS. JAMESON OF MS. DEBBIE
HERRING-LASH

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1 Q. When did you first become involved with it?

2 A. I can't remember the exact date. It was probably a
3 year and a half or so before the trial.

4 Q. And you were lead counsel?

5 A. Pardon me?

6 Q. You were lead counsel for the State?

7 A. Yes, I was.

8 Q. Can you briefly summarize the State's case for the
9 court?

10 A. Yes.

11 THE WITNESS: And, Your Honor, I think that
12 summarization may explain the contract issue.

13 A. When the case was first recorded the first two
14 victims, Cantrell and Yolanda, had been assaulted. I can't
15 remember the exact dates. But it was in the late '90's or
16 early 2000's. When -- and the Mount Pleasant Police
17 Department investigated those allegations.

18 During the investigation of the case what we found out
19 was that there were three prior victims that have been
20 assaulted, I think in the '80's. I am not positive of the
21 dates.

22 That is when I looked up the contract to see whose
23 jurisdiction that area was at that time frame and realized
24 that in '93 is when it became Mount Pleasant.

25 So the investigation of the three victims that were --

CROSS-EXAMINATION BY MS. JAMESON OF MS. DEBBIE
HERRING-LASH

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1 that were assaulted in the '80's I called the Charleston
2 County Sheriff's Department and they investigated those
3 three cases.

4 There was never a formal agreement between the
5 Sheriff's Department and the Mount Pleasant Police
6 Department. We found out along with Detective Bacon that
7 some of his victims actually were assaulted prior to the
8 contract beginning, and that is why three of the victim's
9 cases were prosecuted by the Charleston County Sheriff's
10 Department and the other two were prosecuted by the Mount
11 Pleasant Police Department.

12 Because, in fact, the first few victims he would be
13 accurate it would not be the Mount Pleasant jurisdiction.

14 And that is how the two jurisdictions became parallel
15 investigations.

16 THE COURT: But you tried them all at once?

17 THE WITNESS: We tried them all at once under his
18 request.

19 Q. And these five victims, they were all nieces and
20 nephews; ---

21 A. Right.

22 Q. --- correct?

23 A. They were all related.

24 Q. And the allegations were that these had happened at
25 family events or his mother's home, correct?

CROSS-EXAMINATION BY MS. JAMESON OF MS. DEBBIE
HERRING-LASH

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- 1 A. Yes, at his mother's home.
- 2 Q. And the disclosure of the sexual assaults wasn't made
3 to law enforcement until sometime after 2010, correct?
- 4 A. Right.
- 5 Q. Around 2010?
- 6 A. Right.
- 7 Q. And Cantrell Washington was the first victim who
8 disclosed, correct?
- 9 A. Cantrell was the first victim who came forward.
- 10 Q. And those allegations happened around '97 or '98,
11 correct?
- 12 A. Right.
- 13 Q. And the other victim who came forward with allegations
14 in the 90's was that [REDACTED]?
- 15 A. Yes.
- 16 Q. And those were also in the 90's, correct?
- 17 A. Yes.
- 18 Q. And those were investigated by Mount Pleasant Police
19 Department?
- 20 A. Police Department.
- 21 Q. Detective Bacon, correct?
- 22 A. Right.
- 23 Q. And the three other victims, [REDACTED] and
24 [REDACTED] those allegations were from the 1980's; correct?
- 25 A. Right.

CROSS-EXAMINATION BY MS. JAMESON OF MS. DEBBIE
HERRING-LASH

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1 Q. And there was significant delay in disclosure of those
2 to law-enforcement, correct?

3 A. They did not come forward until this investigative --
4 investigations began.

5 Q. And those were investigated by Charleston County
6 Sheriff's Department?

7 A. Yes.

8 Q. Detective Aleah?

9 A. Rita Olivia.

10 Q. Olivia?

11 A. Yes.

12 Q. You testified on direct that Applicant's Exhibit 1,
13 which is the 1993 contract, and Applicant's Exhibit 2,
14 which is the 1998 contract, those were the two that Mr.
15 Burns subpoenaed for trial; correct?

16 A. I think so.

17 Q. But it is your understanding that there were ongoing
18 continuous contracts between these two, correct?

19 A. Right. Until this -- until this day.

20 Q. And you discussed that with law enforcement from
21 Charleston County and Mount Pleasant?

22 A. In particular the Mount Pleasant police chief and the
23 detective. I mean we get ---

24 Q. And then ongoing continuous jurisdiction for fire,
25 garbage, and police services?

CROSS-EXAMINATION BY MS. JAMESON OF MS. DEBBIE
HERRING-LASH

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- 1 A. We get those cases routinely that are from those
2 areas.
- 3 Q. And Mr. Burns raised this issue at trial, correct?
- 4 A. He did.
- 5 Q. Called several witnesses about it, correct?
- 6 A. He called witnesses. And Judge Dennis heard all of
7 the testimony regarding the jurisdiction issue.
- 8 Q. In fact he called many of the witnesses that he
9 claimed he subpoenaed to be here today, correct?
- 10 A. Yes, he did.
- 11 Q. And Judge Dennis heard from all of these witnesses?
- 12 A. He did.
- 13 Q. And ruled on this jurisdictional issue, correct?
- 14 A. He did.
- 15 Q. Okay. Do you recall any issue with grand jury
16 empanelment documents coming up at trial?
- 17 A. I think Mr. Burns asked for documents that did not
18 exist. It appeared that he thought the grand jury for the
19 County would have the same kind of testimony and what as
20 the statewide grand jury.
- 21 Q. Did he raise that pretrial to Judge Jefferson?
- 22 A. I think he raised it more than once. I cannot tell
23 you exactly which judge. Because we are before lots of
24 judges for lots of motions before the trial.
- 25 Q. And if the record reflects it was also raised to Judge

1 McDonald you have any reason to dispute that?

2 A. I don't.

3 Q. And it was again renewed before Judge Dennis during
4 trial several times, correct?

5 A. Yes.

6 MS. JAMESON: A moment's indulgence, Your Honor.

7 Q. Do you recall what particular documents Mr. Burns was
8 looking for from the grand jury?

9 A. I do not. I mean I didn't understand what his
10 description was asking for because it didn't exist.

11 MS. JAMESON: A moment's indulgence, Your Honor.

12 Q. Did you have any reason to believe the grand jury
13 wasn't properly empanelled here?

14 A. No.

15 Q. You didn't notice any -- strike that.

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

17 THE COURT: Anything further?

18 APPLICANT BURNS: Yes, I would like rebuttal, Your
19 Honor.

20 THE COURT: All right.

21 APPLICANT BURNS: I would like to ask her a couple of
22 questions ---

23 THE COURT: All right. Go ahead.

24 APPLICANT BURNS: --- in rebuttal.

25 THE COURT: Go ahead.

1 REDIRECT BY APPLICANT BURNS OF DEBBIE HERRING-LASH:

2 Q. Ms. Herring-Lash, you mentioned that these alleged
3 incidents took place at my mother's house; ---

4 A. Some of them did, yes.

5 Q. --- is that what you testified to? Would you happen
6 to know the address to that home?

7 A. I do not remember.

8 Q. Let me ---

9 A. I know it was off of Venning -- a small dirt road off
10 of Venning Road.

11 Q. Okay. Let me present to you one document and see if
12 this would refresh your memory. This is a copy of the
13 incident report from the investigating detective -- and
14 investigated -- Bacon, Detective Bacon.

15 (WHEREUPON, document presented to the witness.)

16 A. And what is your question, the address?

17 Q. Yes, ma'am. Does that bring back recollection as to
18 the address?

19 A. I am looking for where the address is on here.

20 Q. It is on the upper -- in the upper left-hand corner.

21 A. Rams ---

22 Q. Ranns ---

23 A. Ranns Hill Road.

24 Q. Right, R-A-N-N-S Hill Road?

25 A. Right. That is the road off of Venning Road.

1 Q. Right. That is the address that you had visited to,
2 right; you -- did you ever go there and visit?
3 A. I went there several times.
4 Q. You went there several times. Okay. Let me ask you a
5 question.
6 (WHEREUPON, Mr. Murphy provided document to witness.)
7 THE COURT: Just stay up there and help her with that.
8 MR. MURPHY: Pardon?
9 THE COURT: Just help her with ---
10 MR. MURPHY: Yes. Yes, I will.
11 THE COURT: You don't have to point out anything.
12 MR. MURPHY: Right.
13 THE COURT: But just
14 (WHEREUPON, pause for witness to review document.)
15 A. Okay.
16 Q. All right. That map that you are holding, that is the
17 map that was entered into as evidence during the course of
18 the trial. Do you recognize that, Defendant's Exhibit 12?
19 A. Yes, Defendant's Exhibit Number 12.
20 Q. Right. You see those at the -- in the upper -- you
21 have -- I think you have it sideways up there. But if you
22 turn it right ways up with where the spacing is. Now if
23 you look over up in the upper left-hand more to just off-
24 center of the middle there is a big white arrow there ---
25 A. Right.

- 1 Q. --- pointing to the alleged crime scene area?
- 2 A. Right.
- 3 Q. Now just to the head of that arrow, just to the left
- 4 of that arrow head, there is the road there. What is the
- 5 name of the road on that map right there? That would be
- 6 the same Ranns Hill Road ---
- 7 A. Yes.
- 8 Q. --- that they referred to?
- 9 A. Right.
- 10 Q. That is the same Ranns Hill Road that is referred to -
- 11 --
- 12 A. Right, ---
- 13 Q. --- at the end to the road, ---
- 14 A. Right off Venning Road.
- 15 Q. --- right? Okay. Now I need you to look down at the
- 16 bottom right-hand corner of that map. There is a scale
- 17 down there.
- 18 A. Right.
- 19 Q. Do you see it?
- 20 A. Right.
- 21 Q. Okay.
- 22 A. Jurisdiction Mount Pleasant, Charleston County.
- 23 Q. Right. And the areas in Charleston County it is in
- 24 cross hatch -- you know, like hatchet marks.
- 25 A. Uh-huh

1 Q. Okay, the area where Ranns Hill Road is located and
2 that house is located ---

3 A. Right.

4 Q. --- is that in Charleston County or Mount Pleasant?

5 A. That is in Charleston County.

6 Q. Okay. Thank you.

7 APPLICANT BURNS: Now, Your Honor, I would like to
8 also have that entered into the record as well if I may.

9 MS. JAMESON: No objection.

10 THE COURT: The docu- -- I mean the map?

11 APPLICANT BURNS: Yes, sir, Your Honor.

12 THE COURT: It is already -- hasn't it already been in
13 the record?

14 APPLICANT BURNS: It was entered into the record
15 during trial.

16 THE COURT: How did you get it?

17 APPLICANT BURNS: I had copies of it when I went to
18 the Department of Corrections. And they lost the ones that
19 I had. And the Department of Corrections had to replace
20 it, so they put in a request to the trial judge. And the
21 trial judge told them yes and gave copies of it in
22 replacement.

23 THE COURT: That is fine. Okay.

24 THE COURT REPORTER: This will be Applicant's
25 Number 3.

1 (WHEREUPON, Applicant's Number 3, map, was marked for
2 identification.)

3 (WHEREUPON, Applicant's Number 3 was admitted into
4 evidence.)

5 APPLICANT BURNS: Okay. Thank you. The next question
6 I wanted to ask you about was the grand jury. Are there
7 any specific formats for empanelling a county grand jury?

8 A. I am not involved with the empanelling of the grand
9 jury.

10 Q. Okay. Okay. That is all I have.

11 THE COURT: All right. You may come down. Thank you
12 very much. You can give those back to him.

13 THE WITNESS: They were my copies ---

14 THE COURT: No.

15 THE WITNESS: --- except for this one thing.

16 THE COURT: No, the incident report.

17 THE WITNESS: Oh. Okay.

18 (WHEREUPON, documents returned to Applicant Burns.)

19 APPLICANT BURNS: Thank you, Your Honor.

20 THE WITNESS: Mr. Murphy had taken this one
21 (pointing).

22 THE COURT: Oh.

23 MR. MURPHY: I did. Yes, and I gave it back.

24 THE COURT: What?

25 MR. MURPHY: The incident report, Your Honor.

1 THE COURT: All right. Good.

2 APPLICANT BURNS: Oh, Your Honor, I wanted to also
3 enter into the record the e-mail from -- that she read.
4 She identified it. From -- the email from Mr. Ed Nicely,
5 the county attorney.

6 THE COURT: The State's position?

7 MS. JAMESON: The State would object. Ms. Herring-
8 Lash didn't identify it. She said she wasn't sure whether
9 she had ever seen it before.

10 THE COURT: Correct.

11 MS. JAMESON: And it is hearsay.

12 (WHEREUPON, Applicant confers with standby counsel.)

13 THE COURT: I recall that. Overruled.

14 APPLICANT BURNS: Okay. Can I proffer it, Your Honor?

15 THE COURT: You have got to proffer it with a witness.

16 APPLICANT BURNS: Right, well, that's -- I asked you
17 earlier about keeping the case open until such time as we
18 can -- I can ---

19 THE COURT: Well, if the case stays open you can bring
20 it up later.

21 (WHEREUPON, Applicant confers with standby counsel.)

22 APPLICANT BURNS: Okay. All right. Thank you, Your
23 Honor.

24 THE COURT: Next witness?

25 APPLICANT BURNS: Next witness I would call Ms. Susan

1 B. Hackett to the witness stand.

2 (WHEREUPON, the witness was duly sworn, 12/4/18, 12:21
3 p.m.)

4 THE CLERK: Please state your name and spell your last
5 name.

6 THE WITNESS: My name is Susan Hackett.
7 H-A-C-K-E-T-T.

8 **DIRECT EXAMINATION BY APPLICANT BURNS OF SUSAN HACKETT:**

9 Q. Okay. Ms. Hackett, would you please tell us your
10 occupation, please?

11 A. Yes, I am a lawyer.

12 Q. And where are you employed?

13 A. I work for the Division of Appellate Defense which is
14 part of the South Carolina Commission on Indigent Defense.

15 Q. And how long have you worked there?

16 A. Seven years.

17 Q. Okay. Prior to that where did you work?

18 A. The Office of Disciplinary Counsel.

19 Q. Okay. What year did you pass the bar and become an
20 attorney?

21 A. 2003.

22 Q. Okay. Is there any other significant educational
23 accomplishments in your background that would affect the
24 way you perform your duties as appellate defense attorney?

25 A. I was a law clerk when I first graduated, for a

1 circuit court judge. And then I began working for a small
2 criminal defense firm in Columbia where we handled criminal
3 matters, trial appellate, PCR. I focused on death penalty
4 cases.

5 And I was the executive director of the Center for
6 Capital Litigation where I focused on death-sentenced
7 individuals or people against whom the State was seeking
8 the death penalty.

9 And then I went to the Office of Disciplinary Counsel.
10 And now I have been in appellate defense for seven years.

11 I am not sure I you need any additional information
12 for education or conferences or training.

13 Q. Okay. Is the Office of the Appellate Defense the same
14 as the South Carolina Commission of Indigent Defense, or is
15 that like just a division within one of the other?

16 A. The Office of Appellate Defense is a division of the
17 Commission on Indigent Defense. The Commission has within
18 it the Office of Indigent Defense, Appellate Defense, as
19 well as the Capital Trial Division. And they -- they
20 oversee the public defender system, the statewide public
21 defender system.

22 Q. Okay. How many attorneys would you say are in this
23 division?

24 A. In the division we currently have 12 slots. We are
25 down a lawyer at the moment. So we have 11.

1 Q. Okay. And do you have any investigators in your -- in
2 that division ---

3 A. No, sir.

4 Q. --- that assist? But you do have a law clerk and a
5 paralegal or assistants or anything like that?

6 A. We have administrative assistants. We do not have law
7 clerks or paralegals.

8 Q. Okay. Would you say that you are an expert in your
9 field since you have been doing it for -- how long did you
10 say you have been doing it in the Appellate Defense Office?

11 A. Seven years.

12 Q. For seven years. Would you say that you are an expert
13 in the field of appeals, direct appeals, filing direct
14 appeals and such?

15 A. No, sir.

16 Q. You wouldn't consider yourself to be an expert?

17 A. No, sir.

18 Q. Okay. But when you file appeals most of the times you
19 look for when you get the notice of appeal and once you
20 receive the transcript you do go through there first off
21 and look for errors, right?

22 A. Yes, sir.

23 Q. Appealable errors? So you would say that you have
24 good knowledge and experience in identifying errors,
25 appealable errors?

1 A. I do my best to spot the issues.

2 Q. Okay. So when you got this case you knew what to look
3 for in so far as errors; is that -- would that be a fair
4 assessment of the situation of when you got this case?

5 A. No, sir. Every case is unique and different. And
6 each one has its own potential appealable issues. Prior to
7 my reading the transcript, however, you and I had
8 communicated quite a bit and you had pointed out several
9 issues that you would like for me to explore.

10 Q. Right, there were only two issues that I actually had.
11 Do the attorneys in your office ever handle PCR appeals,
12 appeals of PCR's?

13 A. Yes, sir.

14 Q. Okay. And those appeals are to the Court of Appeals
15 or the Supreme Court?

16 A. Those appeals we file petitions for writ of cerrertori
17 that are filed with the South Carolina Supreme Court.
18 However, under Rule 243(L) of the South Carolina Appellate
19 Court rules the Supreme Court may transfer those to the
20 Court of Appeals.

21 Q. Right. Okay, let me ask you this: When you handle a
22 direct appeal, those cases -- okay, let's see. Let me
23 start over here.

24 When you were assigned my appeal you were filing a
25 direct appeal to the Court of Appeals; is that correct, or

1 were you filing it to the Supreme Court and -- or which
2 court did you file it in?

3 A. I filed an initial brief of appellant and designation
4 of matter at the South Carolina Court of Appeals.

5 Q. Okay. So in our first communication -- in the first
6 communication between us you said that we -- I presented to
7 you a couple of issues.

8 MS. JAMESON: Objection. He is testifying.

9 THE COURT: Ask her a question.

10 APPLICANT BURNS: Okay.

11 (WHEREUPON, Applicant confers with standby counsel.)

12 Q. Would you please tell me -- tell me exactly what it
13 was we talked about in our first conversation ---

14 A. I'm sorry ---

15 Q. --- if you have -- ma'am?

16 A. I don't have a specific independent recollection of
17 our very first conversation. Generally, one of the first
18 things we talked about what that I didn't have all of the
19 transcripts.

20 And because you were representing yourself at trial
21 and we typically rely upon trial counsel to get us dates of
22 the hearings as well as judge's names and court reporter's
23 names you and I spent a considerable amount of time I think
24 trying to sort through all of your hearing dates as well as
25 the judge's names and the court reporter's names so that I

1 could get all of the transcripts in your cases -- or in
2 your case. So that was some of our initial conversations.

3 Q. Okay. And overall how many different transcripts did
4 you request in my case?

5 A. An estimate would be approximately seven. But that is
6 an estimate. I don't --

7 Q. That is how much you requested or that is how many you
8 received?

9 A. I don't remember, sir.

10 Q. Okay. Let me ask you this: Prior to coming here
11 today did you review your notes, your file notes, for this
12 case to give testimony today?

13 A. I reviewed some of them, yes, sir.

14 Q. Okay. Did you bring those notes with you?

15 A. Our files have been shredded, therefore it had -- the
16 scanned version of your file has been downloaded to a thumb
17 drive, which I have with me.

18 I did print out some aspects that I thought would
19 assist me from the witness stand.

20 Q. Okay. So let me ask this: When you receive copies of
21 the transcript is it routine -- do you routinely send the
22 client copies of the transcript as soon as you receive
23 them?

24 A. Yes, sir.

25 Q. And why is it that you send your client copies of the

1 transcript?

2 A. My client is entitled to a copy.

3 Q. Okay. And suppose the client happens to see something
4 in the transcript that he doesn't feel was actually
5 recorded, what -- how do you handle a situation such as
6 that?

7 A. If a client sees something that the client disagrees
8 with I typically ask the client for very specific
9 information to assist me in asserting a challenge. And
10 then my next course is to consult with the attorneys who
11 were present and ask for their assistance in determining
12 whether a challenge is necessary as well.

13 Q. Okay. So then if I was representing myself and at
14 these various hearings and I didn't have an attorney and I
15 received the transcript and I informed you then that the
16 transcript was inaccurately recorded how would you -- well,
17 and it doesn't have to be me. Any client that represents
18 themselves, how would you then handle that situation?

19 MS. JAMESON: Your Honor, I would object to this line
20 of questioning. Mr. Burns delineated three grounds he was
21 going forward on, and none of them were for failing to
22 challenge the accuracy of the transcript.

23 THE COURT: Well, I think he is doing a little bit of
24 preliminary questions. But if it doesn't soon get to the
25 heart of the matter then I will challenge him. But at this

1 point I am going to allow him to continue.

2 MS. JAMESON: Thank you.

3 THE COURT: We are not going to do the whole appellate
4 process.

5 APPLICANT BURNS: Okay. I understand. Thank you,
6 Your Honor.

7 THE COURT: We have got to get to why you are here.

8 APPLICANT BURNS: All right.

9 A. I would do it in the way that I just described. Any
10 specific information to assert a challenge. And where
11 there is a pro se litigant I typically would consult with
12 standby counsel.

13 Q. Okay.

14 (WHEREUPON, Applicant confers with standby counsel.)

15 Q. Okay. When -- early on when you got my case filed and
16 we started talking I asked you to raise the territorial
17 jurisdiction issue. Did you do that?

18 A. No, sir.

19 Q. And why not?

20 A. I did not think it was a meritorious issue.

21 Q. And why did you not think so?

22 A. Because of the evidence that had been put in the
23 record in front of Judge Dennis I did not think that he had
24 made an error of law.

25 Q. Okay. And did I provide for you any information in

1 regards to the territorial jurisdiction issue?

2 A. You sent to me those very large maps that I had to
3 copy actually at my own expense because my office wouldn't
4 pay for them to be copied. I also -- you asked for three
5 copies of those maps. I refuse to provide those because of
6 the expense.

7 I recall also that you wrote me regarding some case
8 law and some statutes regarding territorial jurisdiction.
9 Beyond that I don't recall any additional information.

10 (WHEREUPON, Applicant confers with standby counsel.)

11 Q. Okay. Did I also not send you a number of statutes
12 and case law as well?

13 A. I believe that is what I just said. Yes, sir.

14 Q. Okay. I'm sorry, I didn't hear you.

15 So I sent you the maps, the case law, some statutes.
16 Did I also send you a copy of the e-mail from Mr. Edward
17 Knisley?

18 A. I am not sure about that part, sir.

19 Q. Okay.

20 (WHEREUPON, pause. Applicant confers with standby
21 counsel.)

22 Q. Okay. Let me ask you one more question. Does an
23 issue have to be preserved to be raised in direct appeal?

24 A. Yes, but there are some exceptions. There are times
25 that the appellate courts have excused error preservation.

1 But it is extremely rare.

2 Q. Okay. Now let's say an issue of jurisdiction or
3 territorial jurisdiction, subject matter jurisdiction, any
4 one of these issues, if those issues were never raised in
5 the trial court can these issues be raised in direct appeal
6 for the first time?

7 A. Subject matter jurisdiction can.

8 Q. And territorial jurisdiction cannot?

9 A. I am not aware of a case that says that territorial
10 jurisdiction can be raised for the first time on appeal.
11 It may exist, but I am simply not aware of it.

12 (WHEREUPON, Applicant confers with standby counsel.)

13 Q. So a few moments ago you said that you didn't research
14 the territorial jurisdiction issue because you didn't think
15 that it was meritorious?

16 A. No, sir, that is not what I said.

17 Q. What did you say?

18 A. I was asked why I did not raise it.

19 Q. Right.

20 A. And I said I did not raise it because I did not think
21 it was meritorious.

22 Q. Okay.

23 A. I did research the issue.

24 Q. Okay. So when you researched that issue how did you
25 research -- what all did you look at in researching that

1 issue?

2 A. I read State versus Boswell, and I reviewed a number
3 of statutes that were related to territorial jurisdiction.

4 Boswell was the only published case about which I am
5 aware that discusses territorial jurisdiction. I also
6 compared the statute, the law from Boswell, with the
7 evidence I had been presented in your case including the
8 contracts, the agreements that had been made, as well as
9 the evidence that had been presented by the State, and then
10 the evidence that had been presented by you.

11 Because the way the issue was framed was a directed
12 verdict issue. Therefore, on appeal the court would be
13 required to not just consider it as it had been raised --
14 or only as to the State's evidence; the appellate court
15 would also include whatever evidence you had presented on
16 that issue. So I had to consider both aspects.

17 Q. Okay. Let me ask you this: Did I at some point in
18 time send to you a brief that I had drafted?

19 A. I believe you did. I believe it was around the time
20 that you had asked me to file an Anders brief.

21 Q. Okay. And did you ever review that brief?

22 A. Yes, sir.

23 Q. And did I not include in that brief a number of other
24 cases, a very important case such as State v. Dudley?

25 A. I believe you did. But I can't say specifically. I

1 know that you had several cases cited.

2 Q. Okay. When you reviewed that case -- I know you sent
3 me back my brief. But did you retain a copy of that brief?

4 A. I believe I did, sir.

5 Q. Okay. Do you have a copy of that brief here with you
6 today?

7 (WHEREUPON, pause for witness to retrieve document.)

8 THE COURT REPORTER: And, I'm sorry, could you repeat
9 the name of that case again, State v ...?

10 APPLICANT BURNS: State v. Dudley.

11 THE COURT REPORTER: Dudley. Thank you.

12 APPLICANT BURNS: D-U-D-L-E-Y.

13 THE COURT REPORTER: Thank you.

14 A. I do not see it in the documents that I printed for
15 myself for my testimony. But it may be in the -- on the
16 thumb drive.

17 Q. Here, let me pass up a copy of it to you and then see
18 if this will reflect

19 (WHEREUPON, document shown to counsel and presented to
20 witness.)

21 A. According to the table of authority State v. Dudley is
22 cited on Page 21 of the pro se document that you provided
23 to me. I am on Page 21.

24 Q. Okay. But first I need you to identify the document
25 that you have in your hand. That is the brief that I sent

1 you, right?

2 A. It may be. I don't have a specific recollection. It
3 is addressed to me and it is dated May 16th, 2014.

4 Q. Okay. On the front page that you are holding in your
5 hand does it have a stamp from your office?

6 A. Yes, sir.

7 Q. What is the date on the stamp on the office -- on
8 that ---

9 A. May 22nd, 2014.

10 Q. Okay. So that would be the brief that I had sent to
11 you?

12 A. It looks like it is. I just don't have a specific
13 recollection of it.

14 Q. Okay. I am going to enter that into the record, but I
15 need to ask her some specific questions first. And that is
16 the only copy of it that I have with me.

17 MS. JAMESON: No objection.

18 THE COURT REPOTER: That would be Applicant Number 4.
19 (WHEREUPON, Applicant Exhibit Number 4, brief was marked
20 for identification.)

21 (WHEREUPON, Applicant Exhibit Number 4 was admitted into
22 evidence.)

23 THE COURT: Is Mr. Kozelski here?

24 (WHEREUPON, discussions regarding scheduling for Mr.
25 Kozelski in the afternoon.)

1 Q. All right. I want to now talk to you about the grand
2 jury issue. You raised that in direct appeal as a merits
3 brief; is that correct?

4 A. Yes, sir.

5 Q. Okay. And that was because at the time you absolutely
6 thought that I had grounds for reversal for some type of
7 action on my direct appeal?

8 A. I did not think the issue was wholly frivolous.

9 Q. Okay. And but you did think that it was totally
10 meritorious?

11 A. The test is, is the issue wholly frivolous. If it is
12 wholly frivolous I am required to file an Anders brief.
13 And if it is not, I am required to file a merits brief. I
14 did not think the issue was wholly frivolous, therefore I
15 filed a merits brief.

16 Q. Okay. And are you still of that same opinion about
17 that issue?

18 A. Yes.

19 Q. Okay. And were you of that same opinion at the time
20 the Court of Appeals issued their order denying that --
21 your argument?

22 A. The Court of Appeals determined that the issue wasn't
23 preserved. I certainly did not agree with the Court of
24 Appeals opinion that it wasn't preserved. Because I
25 thought that you had made some specific arguments regarding

1 a request for empanelment documents and a challenge to the
2 legality of the grand jury.

3 However, what the State pointed out in their brief and
4 what the Court of Appeals apparently relied upon was that
5 your argument principally was centered upon the request for
6 what actually transpired in the grand jury room when they
7 were considering your indictment, which are not
8 discoverable, which cannot be revealed.

9 So at the time that I got the opinion from the Court
10 of Appeals I thought it is going to be extremely difficult
11 to overcome this preservation problem in light of how it
12 was presented at trial. However, I thought there were some
13 key words that I had tried to hang my hat on at the Court
14 of Appeals in an attempt to have it found preserved.

15 Q. Okay. And with all of that, why did you not file a
16 petition for a rehearing or reinstatement to preserve my
17 right to later petition the court of -- the Supreme Court
18 for a petition for writ?

19 A. Well, I would not file a petition for reinstatement
20 because I don't know what a petition for reinstatement is,
21 particularly in the procedural posture in which your case
22 was.

23 I did not file a petition for rehearing because I did
24 not intend to file a petition for writ of certiorari in
25 light of the preservation ruling.

1 Under Rule 242 of the South Carolina appellate court
2 rules there is certain criteria that must be considered
3 when the Supreme Court is deciding whether to hear a case.

4 Certiorari is a matter of discretion with the Supreme
5 Court. It is not a matter of right. And so I needed to
6 consider whether this was a case that the court would
7 entertain. And I did not think that we had that. I
8 thought that it would be either a cert denial or it would
9 be affirmed as unpreserved in light of the specific request
10 going to what transpired in the grand jury room as opposed
11 to more doing with how was this grand jury actually
12 empanelled.

13 Q. Okay. But the decision of not filing that petition
14 for rehearing or reinstatement, you don't think that that
15 should have been something that should have been discussed
16 with me before you just closed your file on my case?

17 A. It is my understanding that the decision to file a
18 petition for rehearing is the decision of the lawyer. It
19 is my choice of whether it is meritorious enough to
20 continue moving forward.

21 Q. Okay. Now let me ask you this: I had filed a number
22 of complaints on you in regards to rules of appellate
23 procedure. And you repeatedly -- well, let me ask you
24 this: Do you think that you violated any rules of
25 appellate procedure in the handling of my case?

1 A. No, sir.

2 Q. Okay.

3 A. And I am not aware of any complaints that you filed
4 against me.

5 Q. Okay. Let me ask you this: Are you familiar with
6 Rule 264 of the appellate court rules of procedure,
7 substitution of attorneys or guardians, withdrawals?

8 A. 264 is not a rule of which I am familiar.

9 Q. Okay. Let me ask you this: Can an appellate lawyer
10 withdraw from a -- just withdraw from a case without
11 obtaining permission from the Court of Appeals?

12 A. No, sir. As far as I am aware once our -- once I have
13 been appointed or assigned to represent someone I would
14 need to obtain the permission or an order from the Court of
15 Appeals telling me that I can withdraw.

16 I think 1.16 of the Rules of Professional Conduct also
17 address withdrawal. I am not aware of when I could
18 unilaterally withdraw.

19 Q. Okay. Now tell me this. What about abandonment; have
20 you ever heard of an attorney abandoning a client's case?

21 A. Yes.

22 Q. Okay. Give me an example of what that is or explain
23 that for me.

24 A. I think a lawyer could abandon the client by not
25 showing up at trial, not showing up for a pretrial hearing.

1 Q. Would also not filing notices or informing the client
2 of various procedures and their rights, would that also be
3 -- can that also be construed as a form of abandonment?

4 A. I'm not sure. I would need more details.

5 Q. Okay. Do you think that clients should have a right
6 to if their direct appeal is denied at -- on -- at the
7 appellate court level do you think that client should have
8 the right if he so desired to continue his appeal through
9 to the petition for rehearing, petition for writ, and even
10 federal Hague?

11 A. The review in the South Carolina Supreme Court is
12 discretionary.

13 Q. Right.

14 A. So it is not an appeal as of right.

15 Q. Right ---

16 A. So I would say under the Constitution that moving
17 forward from the petition for rehearing to petition for
18 writ of certiorari would not be included within the appeal
19 as of right.

20 Concerning federal habeas if you are regarding the
21 exhaustion doctrine that the federal habeas courts have in
22 place and the statutes have in place, our Supreme Court has
23 said that you don't have to petition for cert for it to be
24 exhausted.

25 Q. Okay. Let me ask you this: I understand that -- and

1 I am not asking you whether or not I have a right to have
2 my petition to -- for writ reviewed. I am not asking you
3 about that. I am asking you do you think the clients have
4 the right to petition for that review.

5 A. I'm sorry, I don't see the distinction.

6 Q. Okay, well, I don't have a right to have the court
7 of -- the Supreme Court review the case, but that does not
8 negate my right to submit the petition; do you understand
9 the difference there?

10 A. The petition to review ---

11 Q. Right. I mean it is like -- let me see if I can
12 explain it a little bit better for you so you can
13 understand. It is like petitioning for or filing an
14 application for PCR, I have a right to file the
15 application; I don't have the right to have this judge
16 grant my PCR, but I do have the right to petition for my
17 PCR. Would you agree with that?

18 A. Yes, sir.

19 Q. Okay. Would you agree that I have the right to
20 petition the Supreme Court for a writ even though I don't
21 have the right to force the Supreme Court to review my
22 petition?

23 A. No, sir.

24 Q. So you don't think that I have the right to petition
25 the Supreme Court?

1 A. I don't think that it is a constitutional right that
2 you can ask for -- that you get discretionary review. You
3 have the first appeal as of right. Everyone who is
4 convicted is entitled to that first appeal as of right.

5 Q. Okay.

6 A. And then if the case is meritorious enough and fits
7 within those characteristics of the considerations for
8 review under the appellate court rules then that is when
9 petition for writ of certiorari is appropriate.

10 Q. Okay. So you mentioned petition as of right.

11 When ---

12 A. No, sir. That is when a petition for writ of
13 certiorari is appropriate ---

14 Q. Okay.

15 A. --- under 242.

16 Q. Okay. So I have the right to appeal my conviction,
17 right. When does that appeal actually become final?

18 A. The ---

19 Q. Does that -- does that appeal become final with the
20 order from the Court of Appeals denying my direct appeal?

21 A. Well, the question of finality is one that is probably
22 unanswered at least in terms of federal habeas law. Often
23 we think of finality as coming when the remittitur is
24 issued, which is the document that transfers jurisdiction
25 from the appellate court back to the circuit court.

1 However, finality could be from the date that the
2 conviction is affirmed. I think the PCR statute in this
3 state talks about when the conviction becomes final.

4 I haven't seen it litigated whether finality for the
5 purposes of our state PCR statute is from the date the
6 conviction is affirmed or when remittitur comes out.

7 Q. Okay.

8 A. But I would -- I would put it at one of those two
9 dates.

10 Q. Okay. So would you agree that my appeal was not
11 final, was not final on the date you receive the order from
12 the Court of Appeals; would you agree with that?

13 A. No, sir, I don't think that the question of finality
14 has been answered.

15 Q. So my appeal wasn't final on that date, right?

16 A. It was either the date of the opinion or it is the
17 date of remittitur ---

18 Q. Okay.

19 A. --- for finality purposes. It depends on the
20 statutory definition that you are looking at.

21 Q. Okay. Well, this -- according to the rules, the
22 appeal does not -- becomes final until the remittitur is
23 sent. That is per Rule 221. Right?

24 A. 221 is the rule regarding when rehearing can be filed.
25 And then Subpart B deals with remittitur being issued.

1 Q. Okay. Rule 221, rehearing and remittitur. Rule 21(b)
2 remittitur. The appeal does not become final until the
3 remittitur is issued by the Court of Appeals and sent down
4 to the lower court?

5 A. Yes, sir.

6 Q. Okay. So then if -- and that doesn't take place until
7 after the time for filing for rehearing or reinstatement?

8 A. Again, I am not familiar with reinstatement. But the
9 remittitur does not issue until after the time for filing
10 the petition for rehearing has expired.

11 Q. Let me ask you this. In my case did you request any
12 assistance from your supervisors or anyone else in your
13 office in handling my appeal?

14 A. I spoke to my supervisor numerous times ---

15 Q. Okay.

16 A. --- regarding the appeal.

17 Q. And ---

18 A. Particularly regarding the ordering of transcripts.

19 Q. Okay. Now I am not talking about the ordering of
20 transcripts. We are done beyond that. I am talking about
21 the period from -- the order was issued by the Court of
22 Appeals on July 15th. On the very next day you closed your
23 file on my case. You sent me a letter and you included the
24 application for PCR. But at the time you did that my
25 appeal had not been final yet. And per Rule 264 -- and I

1 want you to read it right quick like. If I may. ---

2 APPLICANT BURNS: Your Honor, may I present this to
3 the witness?

4 MS. JAMESON: I don't believe there has been a
5 question. He is testifying again.

6 THE COURT: Right. I think the witness probably knows
7 what you are talking about.

8 APPLICANT BURNS: Sir?

9 THE COURT: Ask the witness a question.

10 APPLICANT BURNS: Okay.

11 Q. Did you comply with the rules of appellate procedure,
12 Rule 264(b), when you withdrew from your representation of
13 me in my case?

14 A. I did not withdraw from my representation of you in
15 the case. The representation came to an end. Your case
16 had been decided by the Court of Appeals. I had made a
17 determination that I would not be seeking a petition for
18 writ of certiorari or filing a petition from rehearing;
19 therefore, our office closed your case.

20 It is our practice to inform you as soon as the
21 opinion comes out that we are closing our file and giving
22 the PCR applications to our client because of that one-year
23 statute of limitations.

24 We tell our clients in the letter that the statute
25 starts to run at that date of the opinion. And that is so

1 that our clients have every single opportunity possible to
2 get that application in within that one-year deadline.

3 Q. But you telling your clients that, that isn't the
4 actual truth?

5 A. Yes, it is.

6 Q. No, because the date would not actually start until
7 the remittitur is sent?

8 A. I think that is an open question. I haven't seen that
9 litigated.

10 Q. That is quite simple -- that is quite plain in the
11 rules. I mean that is ---

12 THE COURT: Don't ---

13 A. Well, the statute regarding PCR discusses when the
14 appeal becomes -- the conviction becomes final.

15 Q. Okay. So let me ask you this. Because I am going to
16 try to wrap it up. All right.

17 (WHEREUPON, Applicant confers with standby counsel.)

18 Q. Okay. Do you agree that I didn't have any input in
19 the decision making as to whether or not you were going to
20 ask for cert?

21 A. You did not. I agree.

22 Q. And do you think that's right?

23 A. Yes, sir.

24 Q. So let me ask you this: In an appeal, okay, there are
25 several key players. There is the court. There is the

1 State, the counsel. There's the client, which would be me.

2 There is you. Of these which do you think has -- is most

3 important -- is the most important factor in the appeal?

4 A. The most important factor ---

5 Q. Yeah, which one ---

6 A. --- of the players?

7 Q. --- would be the --- huh?

8 A. Of the players involved?

9 Q. Yes.

10 A. Well, certainly my client is very important to me.

11 Q. Okay. Well, then if it is your client why would you

12 not revert to your client for his input as to how -- or how

13 far ---

14 THE COURT: I think she ---

15 Q. --- the appeal should actually go?

16 THE COURT: She has answered that question. She has

17 answered it twice.

18 (WHEREUPON, Applicant confers with standby counsel.)

19 APPLICANT BURNS: All right.

20 Q. Okay. Let me ask you this: Okay. In the Court of

21 Appeals ruling -- in the Court of Appeals ruling the court

22 cited Malloy versus Thompson. And that is spelled

23 M-A-L-L-O-Y versus Thompson. It alleged the issue must be

24 sufficiently clear to bring into focus the precise nature

25 of the alleged errors so that it can be reasonably

1 understood by the judge. Okay. Based upon your brief on
2 Page 12 through 13 would you agree that my arguments were
3 clearly understood?

4 A. I hoped so. That is why I raised the issue in a
5 merits brief.

6 Q. That is why -- because you -- but you -- did you
7 understand the issues that I was raising?

8 A. I did.

9 Q. Okay.

10 A. I thought that your issues got muddled, however,
11 because the coupling of the request for the empanelment
12 documents and the legality of the grand jury system was
13 muddled with a lot of information dealing with what
14 transpired in the grand jury room and the request for
15 transcripts and tapes and other reports and documents. And
16 unfortunately I think that is what made the issue where the
17 Court of Appeals determined that it wasn't preserved.

18 Q. Okay. And you also -- in the order the Court also
19 cited State v. Dunbar in stating that in order for an issue
20 to be preserved for appellate review it must have been
21 raised to and ruled upon by the trial judge. Issues not
22 raised and ruled upon by the trial court will not be
23 considered on appeal.

24 So in your opinion the issues were properly raised in
25 front of the trial -- in front of the pretrial judge and in

1 front of the trial judge, and that is why you thought the
2 issue was meritorious; is that correct?

3 A. I thought we had an argument for error preservation in
4 light of some of the keywords that, again, I was hanging my
5 hat on that had been said at those hearings.

6 Q. Okay.

7 (WHEREUPON, Applicant confers with standby counsel.)

8 APPLICANT BURNS: All right.

9 THE COURT: Anything further?

10 Q. You also raised an issue in your brief that a number
11 of the indictments didn't even list a -- list anyone in the
12 indictments; you raised an issue that you thought that some
13 of the indictments were also improper because they didn't
14 list anyone. Is that true?

15 A. I believe what you are referring to was part of the
16 argument where I pointed out that some of the indictments
17 did not list a name of a witness.

18 On the far left-hand side of the back of the
19 indictment there is a column for a witness. Some listed an
20 officer and some did not. Some just said the Charleston
21 County Sheriff's Office. And I did point that out in the
22 argument section of the brief.

23 Q. Right, and you pointed that out because you thought
24 that that was improper that the indictment should list a
25 witness -- specific witness?

1 A. Yes, I was trying to point that out to the court to
2 show some sort of irregularity in the grand jury process
3 and to hopefully be able to get us some sort of relief on
4 appeal.

5 Q. Right. And that would have -- your argument was also
6 in line with the statute because the statute actually
7 required a witness to be listed; is that correct?

8 A. Yes, sir.

9 Q. Okay.

10 THE COURT: Anything further?

11 APPLICANT BURNS: Okay.

12 THE COURT: Sir?

13 APPLICANT BURNS: No, I was just reviewing my notes to
14 make sure I had covered everything.

15 THE COURT: All right. Nothing further of this
16 witness?

17 APPLICANT BURNS: No, sir, Your Honor, nothing
18 further ---

19 THE COURT: Any cross-examination?

20 MS. JAMESON: No, Your Honor. Thank you.

21 THE COURT: Thank you very much. You may come down.
22 (WHEREUPON, witness steps down.)

23 MS. HACKETT: Thank you, Your Honor.

24 THE COURT: Yes, ma'am.

25 MS. JAMESON: Your Honor, the State would request Ms.

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1 Hackett be released from her subpoena.

2 THE COURT: Any objection?

3 APPLICANT BURNS: I didn't hear what she was saying.
4 My counsel was talking to me.

5 THE COURT: The witness -- I am going to excuse the
6 witness. I am going to ask if there is any objection.

7 APPLICANT BURNS: Oh, no, sir, no objection ---

8 THE COURT: Okay. Thank you, very much.

9 APPLICANT BURNS: --- to the witness being excused.

10 Your Honor, the only other witness that I would have
11 is the witnesses that I subpoenaed. For whatever reason, I
12 don't know whether they were served or if -- whatever. But
13 I would ask that the record remain open so that I could --
14 maybe we can reschedule a continuance of this hearing so
15 that I can have those witnesses come in and give testimony
16 or ---

17 THE COURT: Well, they wouldn't -- they wouldn't
18 appear before me. I only have one week's jurisdiction in
19 Charleston County. What is the State's position?

20 MS. JAMESON: The State would object to leaving the
21 record open. We weren't provided with any copies of these
22 subpoenas or notice that these subpoenas had been issued.
23 These subpoenas were issued for the last term of court when
24 the case was continued because he requested standby
25 counsel.

1 I would strongly disagree with his characterization
2 that Judge Nettles told the witnesses they were to be here
3 for that term of court. I have conferred with co-counsel
4 and the solicitor who was present in the courtroom. That
5 is not what transpired at all.

6 And the State didn't have notice last time that those
7 witnesses were subpoenaed to testify. So we weren't ever
8 properly notified the first time. We weren't properly
9 notified that there were going to be any witnesses here.
10 And I have yet to see any proof of served subpoenas that
11 these witnesses were told to be here.

12 Moreover, most of these witnesses testified at trial.
13 Applicant was -- and applicant's witnesses, Mr. Kingsley,
14 Richard Beasley, both testified. Lori Proctor was standby
15 counsel. So was there. And then Ms. Herring-Lash
16 testified today.

17 The chief of police from Mt. Pleasant didn't
18 testified. But the detective testified for Mt. Pleasant.

19 And he also called numerous other witnesses on this
20 jurisdictional issue at trial. These issues were all
21 already flushed out. So the State would object to the
22 record being left open.

23 THE COURT: Well, Mr. Burns, this -- this hearing
24 today as I understand it is your claim of ineffective
25 assistance of appellate counsel, ---

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1 APPLICANT BURNS: Yes, sir.

2 THE COURT: --- right? And we have heard from
3 appellate counsel. And we have heard from Ms. Herring-
4 Lash. And basically setting the groundwork -- I believe
5 you laid the groundwork for Ms. Hackett's testimony.

6 Now I don't see - and I understand based on Ms.
7 Herring-Lash's testimony - I don't see where these other
8 witnesses would be anything more than a duplication of what
9 she has testified to. And Ms. Hackett has responded to
10 your questions about this territorial jurisdiction issue.

11 If you are trying to lay the groundwork for your
12 ineffective assistance of appellate counsel position or
13 argument, Ms. Hackett has already testified about her
14 treatment of that issue.

15 So I don't -- I mean I am a little upset that these
16 individuals, if they were served, would ignore a subpoena.
17 That is a serious breach of perhaps of the law. I mean a
18 subpoena commands performance.

19 I see nothing from you at this point that you actually
20 subpoenaed them other than what you have told me. And I
21 have no confirmation that Judge Nettles told these people
22 to be here. So I am reluctant to leave the record open to
23 bring these people in when I -- to begin with I have no
24 proof that they were served with subpoenas to be here
25 today.

1 And I know that it difficult for inmates to do that.
2 I mean it is not an easy process. But I -- but you said
3 you had affidavits from law enforcement, the Sheriff's
4 Office, or somebody showing that they delivered those
5 subpoenas.

6 If they were here you could call them as witnesses.
7 But to leave this record open and come back, to begin with,
8 I only have one week's jurisdiction in this county.

9 The matter could not come back before me. And to
10 bifurcate this hearing and bring those witnesses in before
11 another judge makes it extremely difficult for any judge to
12 rule on your petition -- on your application.

13 Now how can another judge that hears -- if indeed you
14 did subpoena and if indeed they did appear, and if indeed
15 they did testify the way you think they probably would,
16 that testimony doesn't -- it would be before another judge,
17 and another judge would not have heard what I have heard
18 from Ms. Herring-Lash and Ms. Hackett.

19 MR. MURPHY: Your Honor, if I may.

20 THE COURT: Sure.

21 MR. MURPHY: And I am appointed standby, so he did --
22 and Mr. Burns asked me to articulate what he is trying to
23 say. Just for the record, I spoke with the Charleston
24 County Civil Service Department when I stepped outside.
25 And they did not -- they received his request to serve the

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1 subpoenas, but they never actually received -- or served
2 them. They didn't have time to do that. So that would be
3 the first issue.

4 The second thing is that I have explained to Mr. Burns
5 that he has put in enough information through Ms. Hackett
6 and through Ms. Herring-Lash and already in the record all
7 of the court's exhibits are part of the record to deal with
8 the territorial jurisdiction issue.

9 I have asked him if these additional witnesses what
10 would be the purpose of them. And he said that that would
11 be for the territorial jurisdiction stuff.

12 He tells me that he doesn't think the testimony would
13 be consistent. So maybe if -- one solution would be if he
14 could explain why he thinks those witnesses are needed, and
15 the Court maybe could retain jurisdiction if it thought
16 that he gave a sufficient explanation. But if it was just
17 merely cumulative evidence ---

18 THE COURT: I think.

19 MR. MURPHY: --- then it is not necessarily.

20 THE COURT: I think that is what I was trying to
21 explain to him my feeling that given the fact that Ms.
22 Herring-Lash has testified extensively on this issue,
23 including reading maps and various other things in response
24 to Mr. Burn's questions, given what I think he would ask
25 these witnesses -- because I mean the zoning gentleman

1 obviously goes to the same issue.

2 Ms. Herring-Lash has testified about the agreements
3 and her understanding that those agreements are continuing
4 agreements. I don't know if they are or not. But that is
5 the testimony.

6 Now if any of those witnesses -- if you have any
7 indication that those witness would offer testimony
8 contrary to hers then maybe there is an issue created there
9 that I haven't already heard.

10 I will tell you what I will do. I am trying to think
11 of a way that even if I retain jurisdiction those witnesses
12 -- well, they could submit affidavits. But I'm not sure
13 that would satisfy your client.

14 What is the State's position? Let me hear from you.

15 MS. JAMESON: The State's position is he didn't
16 properly serve any of these people, we weren't put on
17 notice, and it is all cumulative to the testimony we have
18 in the record.

19 Edward Kinsley testified and was called as a defense
20 witness at trial. As was Richard Beasley called as a
21 defense witness at trial. And the Mt. Pleasant Police
22 Department ---

23 THE COURT: So there is a record of their testimony?

24 MS. JAMESON: Before Your Honor currently right now in
25 this transcript.

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1 THE COURT: Okay.

2 MS. JAMESON: Yes. And -- I am trying to go through
3 the witnesses that he said he wants here.

4 The chief of police of Mt. Pleasant didn't testify.
5 But the chief investigating officer, Detective Bacon,
6 testified. And she did testify regarding these
7 jurisdictional issues. She was asked about ---

8 THE COURT: How about Lori Procter?

9 MS. JAMESON: Lori Procter was standby counsel. And
10 there's been no allegations made against her. And I don't
11 know how her testimony would be relevant to any of these
12 issues other than what is already in the transcript before
13 Your Honor.

14 THE COURT: Okay.

15 MS. JAMESON: And Ms. Herring-Lash was here. Although
16 she wasn't under subpoena. She was -- served with a
17 subpoena last time. She wasn't -- but she is here and has
18 testified.

19 THE COURT: Well, fortunately she was.

20 MS. JAMESON: Yes.

21 THE COURT: What is your -- Mr. Burns, what is your
22 issue with Lori Proctor?

23 MR. MURPHY: Lori Proctor I would say, Judge, she
24 was -- she is a public defender. And she -- he did say
25 that he didn't have any complaints as to her ---

1 APPLICANT BURNS: Right.

2 MR. MURPHY: --- at the beginning.

3 THE COURT: But he said he wanted her to testify.

4 APPLICANT BURNS: Right. That would go toward the
5 ineffective assistance of counsel. Counsel when ---

6 THE COURT: Oh, appellate counsel?

7 APPLICANT BURNS: Right. That would go towards that.
8 Even though Lori Proctor was not my counsel of record,
9 counsel, Ms. Hackett ---

10 THE COURT: What testimony could she give
11 regarding ---

12 APPLICANT BURNS: She would be testifying ---

13 THE COURT: No, let me finish the question.

14 APPLICANT BURNS: Oh, excuse me.

15 THE COURT: What testimony could she give regarding
16 the decisions made by Ms. Hackett some year or two later?
17 I mean I don't

18 APPLICANT BURNS: Well, what happened was there was a
19 problem with some of the transcript. When I addressed the
20 issue to Ms. Hackett, Ms. Hackett kept telling me she had
21 no basis for it, she had no basis for it. And instead
22 reverted to sending an e-mail to Lori Proctor to get Lori
23 Proctor to say whether or not she remembered anything about
24 the transcript, for which she didn't represent me. And
25 Lori Proctor said I don't remember.

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1 So in the end what wound up and happened was, I
2 attempted to affect my own challenges to the transcript.
3 As a result, the court reporter took it upon herself just
4 to -- okay, let me go back and check. And she clearly
5 agreed with me that, yeah, these transcripts are
6 inaccurate. And she issued a new transcript ---

7 THE COURT: Okay.

8 APPLICANT BURNS: Because of me -- because -- and this
9 was the type of problem that I was having with Ms. Susan
10 Hackett.

11 THE COURT: So it was corrected ---

12 APPLICANT BURNS: Nothing ---

13 THE COURT: --- by the court reporter?

14 APPLICANT BURNS: Right. Nothing I did -- nothing I
15 asked her to do or tell her to do or ask her to look into
16 she would look into it, would she do anything. She would
17 just make excuses about it, revert to people who had no
18 knowledge or would actually have no knowledge on it and
19 relied upon that.

20 And what she actually did was cause me to lose two
21 transcripts because ---

22 THE COURT: Two transcripts of what?

23 APPLICANT BURNS: Right, because the transcripts were
24 inaccurately recorded ---

25 THE COURT: Transcripts of what?

1 APPLICANT BURNS: Of my pretrial hearings.

2 THE COURT: Pretrial.

3 APPLICANT BURNS: Right. And the pretrial hearings
4 were as -- included in the direct appeal by both the
5 appellate counsel and by the State.

6 THE COURT: Okay. All right. Well, I don't see where
7 she can add anything to Ms. Hackett's testimony -- or I
8 don't see where she is a relevant witness on the issue that
9 is in front of the court.

10 APPLICANT BURNS: Okay.

11 THE COURT: All right. Respectfully, Mr. Burns, I
12 deny your request to leave the record open.

13 Anything further from the State?

14 MS. JAMESON: No, Your Honor.

15 THE COURT: All right. Now, Mr. Burns, at this point
16 in time I normally ask for proposed orders from the
17 litigants. Are you capable of doing that?

18 APPLICANT BURNS: Yes, sir, I think I am quite capable
19 of doing that. In fact, I have a brief that I have already
20 drafted that I can simply transform the name -- change the
21 name on it.

22 THE COURT: All right. How much time do you need?

23 APPLICANT BURNS: I guess about maybe two weeks.

24 THE COURT: How about 30 days?

25 APPLICANT BURNS: Okay, 30 days sounds good.

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1 THE COURT: That is okay?

2 APPLICANT BURNS: Yes, sir.

3 THE COURT: I mean you can comply with that?

4 APPLICANT BURNS: Okay. And would that be -- do you
5 want me to send it directly to your office or through the
6 Clerk's Office?

7 THE COURT: No, not to the Clerk Office. It has to go
8 to my office. Because I am in a retired status. I am
9 filling in for other judges.

10 APPLICANT BURNS: Okay. I understand.

11 THE COURT: I don't have any help. I don't have any
12 law clerks. I don't have any administrative assistants.
13 So it needs to be sent directly to me. Either -- as a hard
14 copy is probably the easiest thing for you I would assume,

15 APPLICANT BURNS: Yes, sir. I have a typewriter I can
16 type it on.

17 THE COURT: And is that satisfactory with the State?

18 MS. JAMESON: Yes, Your Honor.

19 THE COURT: All right. I will expect something no
20 later than 30 days from today. Which will be what, the 4th
21 of January.

22 MS. JAMESON: Yes, Your Honor.

23 APPLICANT BURNS: Yes, sir.

24 THE COURT: All right. Good luck to you, sir.
25 Especially with your physical health too.

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1 APPLICANT BURNS: Sir?

2 THE COURT: I said good luck to you with your -- with
3 regard to your physical health.

4 APPLICANT BURNS: Oh, okay. All right. Thank you,
5 sir.

6 (WHEREUPON, the hearing concluded.)

2017-CP-10-00271
Alan Burns versus State of SC

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on December 4, 2018.

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



PHYLLIS NORTON, CVR

Date: June 29, 2019

Certified Transcript Provided For: SCCID
Certification Reference #2019-0629



RECEIPT FOR EXHIBITS CHARLESTON COUNTY

Case No: 11-GJ-10-3387 et alJudge: R. M. DennisState v. Alan BurnsDate Trial Started: August 6, 2012

Date Trial Ended: _____

Received of DEBORAH GARRISON, Court Reporter for the above case, these exhibits:

Plaintiff	Defendant 4-6-10	Court Exhibits
① Photograph HOME	Statement Pg 5 of 7	Defendants Request
② Photograph Kentrie	Kentrie Washington	for voir dire
③ Photograph Interview	Statement Pgs 1-4, 6 & 7	Brady
④ Photograph TV area	Kentrie Washington	
⑤ Photograph Hallway	10 only	
⑥ Photograph yard	5-10-10 letter from Kentrie	
⑦ Photograph speakup	Photograph	
⑧ Photograph speakup	birthdays	
⑨ Photograph birthday	Photograph	
⑩ Photograph yard	birthdays	
⑪ Photograph x4 speakup	⑥ Photograph putting on necklace	
⑫ Photograph Letter	⑦ Photograph	10 only
⑬ Photograph	⑧ Photograph	
⑭ Photograph family	⑨ Photograph	
⑮ Photograph Hallway	⑩ Photograph	10 only
⑯ Photograph bedroom	⑪ Photograph	
⑰ Photograph Hallway	⑫ Photograph	
⑱ Photograph	⑬ Photograph	
⑲ Photograph interior	⑭ Photograph	
⑳ Photograph of Map	⑮ Photograph	
㉑ Map	⑯ Photograph	
㉒ Contract 9-10-98	⑰ Photograph	
㉓ County w/ Laws of US	⑱ Photograph	
㉔	⑲ Photograph	
㉕	⑳ Photograph	
㉖	㉑ Photograph	
㉗	㉒ Photograph	
㉘	㉓ Photograph	
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This _____ day of August 2012,Article
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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) A CONTRACT FOR POLICE SERVICE
) BETWEEN THE COUNTY OF CHARLESTON
) AND THE TOWN OF MOUNT PLEASANT

WHEREAS, many of the unincorporated areas of Charleston County have, in recent years, been annexed by the Town of Mount Pleasant, and

WHEREAS, the remaining unincorporated areas of the County are, in many instances, totally surrounded by the Town of Mount Pleasant, and

WHEREAS, Charleston County and the Town of Mount Pleasant believe that these small unincorporated areas, commonly referred to as "donut holes," could receive more efficient and more cost-effective police protection services from the nearby municipality and wish to begin a pilot project to offer municipal police services to these areas and the Isle of Palms Connector area, and

WHEREAS, Article 8, Section 13, of the S.C. Constitution authorizes any county to agree with any other political subdivision for the joint administration of any function, and exercise the power and the sharing of costs thereof, and Section 5-7-30 of the Code of Laws of S.C., 1976 as amended, specifically authorizes municipalities to provide police protection in contiguous unincorporated areas located not more than three (3) miles from the municipal limits upon the request of the governing body of the said municipality or the county, and

WHEREAS, Charleston County and the Town of Mount Pleasant do also intend to expand the provision of police services over a three (3) year period, until all of the unincorporated portions

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of Charleston County between the Cooper River and Charleston National Golf Course are included in the Contract. The plan is as evidenced in the map which is attached hereto and incorporated herein by reference, entitled "Exhibit B, Police Jurisdiction Map."

NOW, THEREFORE, be it agreed by and between the parties as follows:

ARTICLE I

Level of Service

1. The Town of Mount Pleasant agrees to provide total law enforcement services to the unincorporated portions of Charleston County described in Article II below and as evidenced in Exhibit A attached hereto, including but not limited to 911 service, patrol service, investigations and arrests (adults, juveniles, drugs, and crime scene work), animal control, traffic enforcement, and community services (such as the neighborhood watch).
2. The Town of Mount Pleasant agrees to provide these total law enforcement services in the same manner as if these areas were within the municipal boundaries of the Town of Mount Pleasant.
3. Charleston County will code all 911 numbers to ring at the Mount Pleasant Police Station.
4. The Town of Mount Pleasant agrees to provide good quality communication coverage.

ARTICLE II

Description of the "Donut Holes"

1. All those parcels, pieces, lots, and tracts of land not incorporated into the Town of Mount Pleasant located within the area described below:

~~Beginning at a point in Charleston Harbor at the mouth of the Wando River, proceeding in a generally north-northeasterly direction up the Wando River to Horlbeck Creek; thence proceeding in an easterly direction up Horlbeck Creek to Boone Hall Creek, and southward along Boone Hall Creek to the point where it is crossed by Long Point Rd. From that intersection, proceed along Long Point~~

A P P E L L A N T

Rd. eastward to its intersection with Highway 17; thence, proceed southwest along Highway 17 to its intersection with Venning Rd., and then proceed along Venning Rd. southeast past its intersection with Rifle Range Rd., to a point where Venning Rd., if extended, would intersect with Inlet Creek. From this point, proceed along Inlet Creek in a generally southerly direction to the Intracoastal Waterway, thence along the Intracoastal Waterway in a southwesterly direction into Charleston Harbor. Once past the Old Pitt Street Bridge, proceed along the shoreline in a westerly then northerly direction to the starting point at the mouth of the Wando River.

The stated being the same areas as set forth and identified in the map attached hereto and incorporated herein by reference, entitled "Exhibit A, Police Jurisdiction Map."

Description of Isle of Palms Connector

All of the area located in Charleston County described as the right of way of the Isle of Palms Connector from the intersection of Rifle Range Road to the lowwater mark of Hamlin Creek, also known as the corporate limits of the City of Isle of Palms.

ARTICLE III

Written Report/Committee Attendance

1. The Town of Mount Pleasant agrees to prepare a written report of the police services offered, as well as problems encountered, with statistical information concerning the success of this pilot program, on a quarterly basis. This written report shall be presented to the Public Safety Committee of Charleston County Council, as well as to the Police, Judicial and Legal Committee of the Town of Mount Pleasant.
2. In addition to a written report, County Council can request the periodic attendance of the Mount Pleasant Chief of Police at Charleston County's Public Safety Committee to discuss any problems or issues.

ARTICLE IV

Enforcement

1. The parties agree that in the event drugs are seized in any ~~of the areas which are subject to this Contract, if the drug~~ seizure is primary-agency-initiated, that agency will retain the money and property seized, and if the drug seizure is multi-jurisdictional, the DEA task force formula will be applied to the assets seized.

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2. All tickets written by the Mount Pleasant Police, pursuant to this Contract, and all violations of the law occurring within the unincorporated areas, will be tried in the Charleston County Magistrate Court located at the East Cooper Satellite Center, rather than the Municipal Court of the Town of Mount Pleasant, or the Court of General Sessions for the Ninth Judicial Circuit, if applicable. If applicable, all fines and assessments shall be processed through the County Magistrate system.

ARTICLE V

Term and Consideration

1. The term of the contract shall be from December 1, 1993, to November 30, 1994.
2. Charleston County agrees to pay to the Town of Mount Pleasant, in four (4) payments, an amount totalling \$94,166. Payments shall be made as follows:
 - a. December 10, 1993 - \$31,388.67
 - b. March 10, 1994 - 23,541.51
 - c. July 10, 1994 - 23,541.51
 - d. October 10, 1994 - 23,541.51This sum is payment in full for the provision of police services by the Town of Mount Pleasant, between December 1, 1993 and November 30, 1994 to the areas described in Article II above.
3. It is understood that either party may terminate this Contract, with 60 days written notice to the other party, after a determination has been made by the party that the contracted police services are not adequate to meet the needs of the citizens.
4. In the event this Contract is terminated, any money paid by Charleston County for capital expenditures (including uniforms, equipment and vehicles) will be returned on a pro rata basis, with the agreed-upon depreciation of the two police vehicles established at 2% per month. Any money earmarked for personnel salaries that has not yet been paid at the time of termination shall be returned in full to the County.

ARTICLE VI

Annexation

1. The undersigned parties agree that in the event any of the "donut holes" described herein or the Isle of Palms Connector area are annexed by the Town of Mount Pleasant during the term of this Contract, the parties will have the option of either increasing police service in the remaining areas, or expanding service to a similarly-sized area in Phase 2 or Phase 3 of the project.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Randy Anderson
Nancy B. Techler

COUNTY OF CHARLESTON

By: R. Keith Sommey
R. Keith Sommey, Chairman
Charleston County Council
Dated: October 14, 1993

Carol J. Hunter
R. Allen Spring

TOWN OF MOUNT PLEASANT

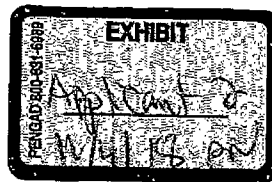
By: Cheryl N. Woods-Flowers
Cheryl N. Woods-Flowers
Mayor
Dated: October 13, 1993

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**STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
A CONTRACT FOR POLICE SERVICES
BETWEEN THE COUNTY OF CHARLESTON
AND THE TOWN OF MOUNT PLEASANT**

WHEREAS, many of the unincorporated areas of Charleston have in recent years been annexed by the Town of Mount Pleasant, and

WHEREAS, the remaining unincorporated areas of the County are, in many instances, totally surrounded by the Town of Mount Pleasant, and

WHEREAS, Charleston County and the Town of Mount Pleasant believe that these small unincorporated areas, commonly referred to as "donut holes," could receive more efficient and more cost-effective police protection services from the nearby municipality and wish to continue a pilot project to offer municipal police services to these areas and the Isle of Palms Connector area, and

WHEREAS, Article 8, Section 13 of the South Carolina Constitution authorizes any county to agree with any other political subdivision for the joint administration of any function, and exercise the power and the sharing of costs thereof, and §5-7-30 of the South Carolina Code specifically authorizes municipalities to provide police protection in contiguous unincorporated areas located not more than three miles from the municipal limits upon the request of the governing body of the said municipality or the county, and

WHEREAS, Charleston County and the Town of Mount Pleasant have expanded the provision of police protection services to all of the unincorporated portions of Charleston County between the Cooper River and Charleston National Golf Course, and all such areas are now included in the Contract. The service area is as evidenced in the map which is attached hereto and incorporated herein by reference, entitled "Exhibit B, Police Jurisdiction Map."

NOW, THEREFORE, be it agreed by and between the Parties as follows:

**ARTICLE I
Level of Service**

1. The Town of Mount Pleasant agrees to provide total law enforcement services to the unincorporated portions of Charleston County described in Article II below, and as evidenced in Exhibit "B" attached hereto, including, but not limited to, 9-1-1 service, patrol service, investigations and arrests (adults, juveniles, drugs and crime scene work), animal control, traffic enforcement, and community services (such as the neighborhood watch).

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2. The Town of Mount Pleasant agrees to provide these total law enforcement services in the same manner as if these areas were within the municipal boundaries of the Town of Mount Pleasant.
3. Charleston County will code all 9-1-1 numbers to ring at the Mount Pleasant Police Station.
4. The Town of Mount Pleasant agrees to provide good quality communication coverage.
5. The Town of Mount Pleasant recognizes that the City of Isle of Palms will patrol the right-of-way of State Highway No. 517, commonly known as the Isle of Palms Connector, between the corporate limit of the City and the terminus of the concrete-paved road-bed of the Connector which adjoins the asphalt road-bed at the mainland, but that all 9-1-1 emergency calls will to continue to ring at the Mount Pleasant Police Station, and be responded to by Mount Pleasant Police, as per the attached Contract.

ARTICLE II
Description of the "Donut Holes"
and the Isle of Palms Connector
and the Areas adjacent thereto

ALL those parcels, pieces, lots and tracts of land not incorporated into the Town of Mount Pleasant located within the area described below:

The stated being the same areas as set forth and identified in the map attached hereto and incorporated herein by reference, entitled "Exhibit B, Police Jurisdiction Map."

ARTICLE III
Written Report/Committee Attendance

1. The Town of Mount Pleasant agrees to prepare a written report of the police services offered, as well as problems encountered, with statistical information concerning the success of this pilot program, on a quarterly basis. This written report shall be presented to the Public Safety Committee of Charleston County Council, as well as to the Police, Judicial and Legal Committee of the Town of Mount Pleasant.

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2. In addition to a written report, County Council can request the periodic attendance of the Mount Pleasant Chief of Police at Charleston County's Public Safety Committee to discuss any problems or issues.

ARTICLE IV **Enforcement**

1. The Parties agree that in the event drugs are seized in any of the areas which are subject to this Contract, if the drug seizure is primary-agency-initiated, that agency will retain the money and property seized, and if the drug seizure is multi-jurisdictional, the DEA task force formula will be applied to the assets seized.
2. All tickets written by the Mount Pleasant Police, pursuant to this Contract, and all violations of the law occurring within the unincorporated areas, will be tried in the Charleston County Magistrate Court located at the East Cooper Satellite Center, rather than the Municipal Court of the Town of Mount Pleasant, or the Court of General Sessions for the Ninth Judicial Circuit, if applicable. If applicable, all fines and assessments shall be processed through the County Magistrate System.

ARTICLE V **Term and Consideration**

1. The term of the Contract shall be from January 1, 1998 to December 31, 1998. Thereafter, this Contract will automatically renew for successive one-year terms unless affirmatively terminated by a vote of either Party's governing body.
2. Charleston County agrees to pay to the Town of Mount Pleasant, in four payments, an amount totaling \$76,365.04. Payments shall be made as follows:

a.	January 1, 1998	\$19,091.26
b.	April 1, 1998	19,091.26
c.	July 1, 1998	19,091.26
d.	October 1, 1998	19,091.26

This sum is payment in full for the provision of police protection services by the Town of Mount Pleasant between January 1, 1998 to December 31, 1998 to the areas described in Article II above.

3. It is understood that either Party may terminate this Contract with 60 days' written notice to the other Party, after a determination has been made by the Party that the contracted police protection services are not adequate to meet the needs of the citizens.

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4. In the event this Contract is terminated, any money paid by Charleston County for capital expenditures (including uniforms, equipment and vehicles) will be returned on a pro rata basis, with the agreed-upon depreciation of the two police vehicles established at 2 percent per month. Any money earmarked for personnel salaries that has not yet been paid at the time of termination shall be returned in full to the County.

ARTICLE VI Annexation

1. The undersigned Parties agree that in the event any of the "donut holes" described herein or the Isle of Palms Connector are annexed by the Town of Mount Pleasant during the term of this Contract, the Parties will have the option of either increasing police service in the remaining areas, or expanding service to a similarly-sized area in Phase 2 or Phase 3 of the project.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

COUNTY OF CHARLESTON

[Signature]
[Signature]

By:

[Signature]
Michael M. Smith, Vice Chairman
Charleston County Council
Dated: 9/10/98

TOWN OF MOUNT PLEASANT

[Signature]
[Signature]

By:

[Signature]
Cheryll N. Woods-Flowers, Mayor
Dated: Nov. 10, 1998

A P P E L L A N T

E X H I B I T

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clerk of court

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Alan L. Burns, SCDC #143218

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2017-CP-10-0271

ORDER OF DISMISSAL

This matter comes before this Court by way of an application for post-conviction relief filed by Alan L. Burns (Applicant) on January 18, 2017, alleging ineffective assistance of appellate counsel, territorial jurisdiction violations, and failure of the State to provide grand jury empanelment documentation. The State of South Carolina (Respondent) served its return and motion for a more definite statement on July 19, 2017, requesting an evidentiary hearing solely on Applicant's claims of ineffective assistance of appellate counsel and seeking summary dismissal of Applicant's other two claims as improper for post-conviction relief and barred by the doctrine of res judicata. Thereafter, on December 15, 2017, Applicant filed an amended application.

An evidentiary hearing was held on December 4, 2018, before this Court at the Charleston County Courthouse. Applicant was present and appeared *pro se* with the assistance of stand-by counsel Christopher L. Murphy. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson. At the hearing, testimony was taken from appellate counsel Susan B. Hackett and prosecutor Deborah Herring-Lash.

Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

CLC

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections (SCDC) following multiple convictions in Charleston County for Applicant's sexual molestation and assault of various minor relatives of his in the 1980s and 1990s that were not disclosed to law enforcement until 2010. During its June 2011 term, the Charleston County Grand Jury indicted Applicant for two counts of first-degree criminal sexual conduct with a minor (2011-GS-10-3390, -3391), two counts of second-degree criminal sexual conduct with a minor (2011-GS-10-3387, -3388), and two counts of lewd act upon a minor (2011-GS-10-3389, -3392). In August, 2011, the Charleston County Grand Jury indicted Applicant for two additional counts of first degree criminal sexual conduct with a minor (2011-GS-10-4776, -4777) and two additional counts of lewd act upon a minor (2011-GS-4778, -4779). In May 2012, the Charleston County Grand Jury indicted Applicant for an additional count of first-degree criminal sexual conduct (2012-GS-10-3172) and an additional count of lewd act upon a minor (2012-GS-10-3173).

Applicant was appointed counsel to represent him on these indictments, but moved to relieve counsel and proceeded *pro se* with the assistance of stand-by counsels Lorelle Proctor and Ted Smith from the Charleston County Public Defender's Office. Following various pre-trial hearings before the Honorable Deadra L. Jefferson, circuit court judge, and Stephanie P. McDonald, circuit court judge, Applicant proceeded to a jury trial *pro se*, with standby counsel present, before the Honorable R. Markley Dennis, Jr., on August 6, 2012. Assistant Solicitors Debbie Herring-Lash and Randall Stoney of the Ninth Circuit Solicitor's Office prosecuted the case. On August 10, 2012, the jury convicted Applicant as indicted on all offenses. Judge Dennis sentenced Mr. Burns to an aggregate sixty-year term of imprisonment.

Applicant filed a timely notice of appeal and was represented by Appellate Defender



Susan B. Hackett of the South Carolina Commission on Indigent Defense—Division of Appellate Defense, who submitted a merits brief on Applicant's behalf, alleging the trial court erred in denying Applicant's request for grand jury documents. Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences, finding the issue was not preserved for appellate review. State v. Alan L. Burns, Unpublished Op. No. 2016-UP-287 (Ct. App. filed June 15, 2016). Applicant then attempted to petition for certiorari on his own through the filing of various *pro se* documents. By order dated July 1, 2016, the South Carolina Supreme Court dismissed Applicant's *pro se* notice of intent to seek certiorari. The remittitur was returned to the circuit court on the same date.

ALLEGATIONS RAISED IN THE APPLICATION AND AT THE HEARING

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following allegations:

1. "Was Not Indicted By Legally Constituted Grand Jury" in that the Applicant asked for and did not receive empanelment documentation for the Charleston County Grand Jury from the State;
2. "Gross Territorial Jurisdiction Violation" in that police officers from the Mount Pleasant Police Department went outside their territorial jurisdiction to investigate the case; and
3. "Ineffective Assistance of Counsel," in that Appellate Counsel "intentionally and for purpose of retaliation, failed and refused to file for rehearing and /or reinstatement following the Court of Appeals denial of Applicant's direct appeal" and refused to raise the territorial jurisdiction issue on appeal as requested by Applicant.

Respondent served a return and motion for more definite statement on July 19, 2017, seeking an evidentiary hearing solely on the allegation that appellate counsel was ineffective and seeking summary dismissal of the two remaining arguments as direct appeal issues not proper for post-conviction relief and as barred by res judicata as these issues were already raised to and ruled upon by the trial court and the appellate court (as to the grand jury issue).

On December 15, 2017, Mr. Burns filed an amended PCR application, stating he was seeking a belated appeal to allow him to raise the territorial jurisdiction issue on appeal.

At the start of the evidentiary hearing, Respondent renewed its motion to dismiss the allegations pertaining to the grand jury empanelment documents and territorial jurisdiction as improper for post-conviction relief and barred by the doctrine of res judicata because both issues had already been raised and denied by previous courts. Applicant responded that both issues would be raised as to appellate counsel's performance and her failure to properly raise these issues on his direct appeal.

At the hearing, Applicant presented testimony from the prosecutor, Assistant Solicitor Deborah Herring-Lash and his appellate counsel, Susan B. Hackett, as well as presented four exhibits. Respondent did not call any witnesses but did cross-examine both witnesses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility of all witnesses presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant has alleged his appellate counsel, Susan B. Hackett, was ineffective in three ways: first, for failing to raise his territorial jurisdiction issue on appeal despite his insistence that she do so; second, for failing to properly raise the issue pertaining to the empanelment documents for the grand jury issue; and third, for failing to petition for rehearing following the Court of Appeals opinion affirming his convictions and ultimately failing to seek certiorari from the South Carolina Supreme Court. Each allegation is addressed fully below.



Ineffective Assistance of Appellate Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRCP. When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Post-conviction relief courts are required to employ a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the court must find the applicant has established his or her counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, the court must find that counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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While the post-conviction relief court must analysis both deficiency and prejudice, there are no mechanical rules requiring the court to analyze deficiency of counsel first then undertake a prejudice analysis. Rather, the ultimate focus of the post-conviction relief court's inquiry must be on the fundamental fairness of the proceeding that is being challenged. The post-conviction relief court need not first determine whether counsel's performance was deficient before examining the whether there is any prejudice suffered by the applicant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Just as a defendant is entitled to affective representation during his general sessions proceeding, a defendant is also entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice as outlined above. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift



v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our South Carolina Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Accordingly, in order to meet his burden of proof, Applicant must establish a reasonable probability that, but for appellate counsel Hackett's failure to raise a specific issue on appeal, he would have prevailed on his appeal. Smith, 528 U.S. at 285-86. Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations against appellate counsel. Each allegation is addressed fully below:

Allegation: Failure to Raise the Territorial Jurisdiction Issue on Appeal

Applicant alleges appellate counsel was ineffective for failing to raise the issue of territorial jurisdiction, and more specifically, that the Mount Pleasant Police Department exceeded their jurisdiction in investigating his case because the location of some of the sexual assaults was not part of the Town of Mount Pleasant at the time of the offenses in the 1980s and 1990s.

At the evidentiary hearing, Assistant Solicitor Deborah Herring-Lash testified the area where some of the sexual assaults occurred was located within a small, doughnut-hole type area of unincorporated Charleston County that is entirely surrounded by Mount Pleasant but is not

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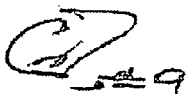
part of the Town of Mount Pleasant. She identified these areas on a large map, admitted as Applicant's Ex. No. 3 (previously Defendant's Ex. No. 12 from trial). She testified that while working on this case, she recognized the potential jurisdictional issues pertaining to the crimes and was able to obtain contracts between Charleston County and the Town of Mount Pleasant to allow Mount Pleasant to provide police, water, fire, and other similar services to these small, doughnut-hole areas. She identified two of these contracts, which were admitted as Applicant's Ex. Nos. 1 and 2 at the hearing (previously State's Ex. No. 22 from trial), from 1933 and 1998 respectively, which explicitly provided for law enforcement services in those areas to be conducted by the Town of Mount Pleasant. She testified the contracts were automatically renewed on an annual basis, as well as signed and authorized by the Mayor of the Town of Mount Pleasant and either the Chairman or Vice Chairman of the Charleston County Council. She testified that based on these contracts, the Town of Mount Pleasant, including the Mount Pleasant Police Department, had jurisdiction to handle all law enforcement matters within the subject area, including to investigate these sexual assaults, during the period of the contracts. However, because some of the sexual assaults occurred in the 1980s before the contracts, she sought and obtained involvement from the Charleston County Sheriff's Department to investigate these assaults from the 1980s, including interviewing these witnesses. The record reflects that the Charleston County Sheriff's Department did investigate and handle those assaults, as reflected by the testimony of Detective Rita Avila of the Charleston County Sheriff's Department. She testified, and the record reflects, that Applicant raised this territorial jurisdiction issue at trial, and in response, the State presented these contracts and called witnesses to testify about these contracts. She testified the trial court ultimately denied Applicant's motions based on jurisdictional challenges.



Appellate counsel Hackett testified she did not raise the issue of territorial jurisdiction on appeal because she did not believe it was meritorious. She elaborated that she reviewed case law and statutes related to the issue, but ultimately determined the trial court properly denied Applicant's motion pertaining to territorial jurisdiction because there was evidence in the record to support the trial court's ruling. Based on her research, review of the record, and appellate experience, she ultimately decided not to raise this issue on appeal and instead raised the issue pertaining to the grand jury empanelment documents, which had more merit in her opinion. She identified a copy of Applicant's *pro se* brief, admitted as Applicant's Ex. No. 4, addressing the jurisdictional issue and acknowledged Applicant indicated he wanted the issue raised on appeal. She testified it was ultimately her decision whether to raise a particular issue and did not raise this one because she did not believe it was meritorious.

This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation. Initially, this Court notes appellate counsel was not deficient in electing not to raise the issue of territorial jurisdiction, which she believed lacked merit, and instead, raise a meritorious issue pertaining to grand jury empanelment documentation. This decision clearly rested within counsel's discretion and her strategic decision as to which issues to raise on appeal do not render her performance deficient. Thrift, 302 S.C. at 539, 397 S.E.2d at 526; see also Jones, 463 U.S. at 754 ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy.")

Moreover, this Court finds Applicant cannot establish any resulting prejudice as there is no reasonable likelihood this issue would have been successful on appeal. The convictions resulting from Applicant's conduct in the 1980s were properly investigated by the Charleston County Sheriff's Department, not the Mount Pleasant Police Department, and therefore, there is



no territorial jurisdiction issue that could have been raised. The convictions from the 1990s were properly investigated by the Mount Pleasant Police Department in accordance with valid agreements signed by the Mayor of the Town of Mount Pleasant and the Chairman or Vice Chairman of the Charleston County Council, and Applicant has failed to establish any irregularity or impropriety with these contracts. Applicant contends the Agreement between the Charleston County and the Town of Mount Pleasant was not properly effectual under sections 23-20-10 et seq. or 23-1-210 of the South Carolina Code of Laws (Supp. 2002). The Agreement was in place prior to July 2000 and, therefore, did not have to be ratified by the County Council for to remain in effect.

Section 23-1-210 of the South Carolina Code (Supp. 2002), entitled "Temporary transfer of law enforcement officer; written agreement; compensation" provides as follows:

A) Any municipal or county law enforcement officer may be transferred on a temporary basis to work in law enforcement in any other municipality or county in this State under the conditions set forth in this section, and when so transferred shall have all powers and authority of a law enforcement officer employed by the jurisdiction to which he is transferred.

(B) Prior to any transfer as authorized in subsection (A), the concerned municipalities or counties shall enter into written agreements stating the conditions and terms of the temporary employment of officers to be transferred.

Further, section 23-20-30 of the South Carolina Code (Supp. 2002) provides:

A) The General Assembly recognizes the need to promote public safety and further recognizes that there may be situations where additional law enforcement officers are needed to maintain the public peace and welfare. Therefore, the General Assembly authorizes a law enforcement agency of this State to enter into contractual agreements with other law enforcement providers as may be necessary for the proper and prudent exercise of public safety functions. Public safety functions include traditional public safety activities which are performed over a specified time period for patrol services, crowd control and traffic control, and other emergency service situations.

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Pursuant to section 23-20-50 of the South Carolina Code (Supp. 2002):

(A) An agreement entered into pursuant to this chapter on behalf of a law enforcement authority must be approved by the appropriate state, county, or local law enforcement authority's chief executive officer. A state law enforcement authority must provide a copy of the agreement to the Governor and the Executive Director of the State Budget and Control Board no later than one business day after executing the agreement. An agreement entered into with a local law enforcement authority pursuant to this chapter must be approved by the governing body of each jurisdiction. For agreements entered into prior to June 1, 2000, the agreement may be ratified by the governing body of each jurisdiction.

The Agreement in this case allows for the transfer of law enforcement services from Charleston County to the Town of Mount Pleasant for the specific areas listed in the agreement, including the area where some of the sexual assaults occurred. It was properly authorized by the Charleston County Council through the signature of the Chairman or Vice Chairman of the Charleston County Council and by the Town of Mount Pleasant through the signature of the Mayor. Accordingly, Mount Pleasant law enforcement was properly within its authority to investigate and handle the sexual assault allegations from the 1990s.

Further, the Agreement in this case was entered into in before June 2000. As a result, section 23-20-50 does not require it be approved by the governing bodies of each county in order for it to remain in effect. The section states: "For agreements entered into prior to June 1, 2000, the agreement may be ratified by the governing body of each jurisdiction." S.C. Code Ann. § 23-20-50 (Supp. 2002). The section clearly presupposes written agreements existed between counties prior to the enacting of the section. Further, it assumes those agreements will continue in effect and uses the permissive "may," indicating the agreements were not required to be ratified by the governing body of each county.

Accordingly, because Charleston County and the Town of Mount Pleasant operated under a properly authorized Agreement allowing Mount Pleasant to provide law enforcement services

for the limited areas enumerated in the agreement, there is no territorial jurisdictional violation in this case. Therefore, Applicant cannot establish that appellate counsel was ineffective for failing to raise this issue as it patently lacks merit and would not have been successful on appeal.

Allegation: Failure to Properly Raise the Issues Pertaining to the Grand Jury Empanelment

Applicant alleges appellate counsel was ineffective in her handling of the grand jury empanelment issue on appeal. However, the record clearly refutes this allegation, as appellate counsel properly submitted an appellate brief to the Court of Appeals on this issue based on the arguments presented to the trial court. This Court finds Applicant failed to establish how appellate counsel performed deficiently or how raising the arguments differently would have yielded a different result. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation: Failure to Seek Rehearing or Certiorari before the South Carolina Supreme Court

Finally, Applicant alleges appellate counsel was ineffective for failing to file a petition for rehearing and ultimately failing to file a petition for certiorari to the South Carolina Supreme Court. However, Applicant had no right to seek discretionary review, and therefore, no right to effective representation when seeking discretionary review. See Douglas v. State, 369 S.C. 213, 216, 631 S.E.2d 542, 543-44 (2006) ("We find that the decision whether to pursue certiorari is a matter left solely to the appellant's attorney's professional discretion.") Cf. Jones v. Barnes, 463 U.S. 745 (1983) (Appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on direct appeal). Appellate counsel testified she did not seek certiorari because she did not think it was warranted based on her professional discretion. Therefore, Applicant cannot establish any constitutional ineffectiveness in appellate counsel's decision not to seek certiorari in his case once the Court of Appeals affirmed his convictions.

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CONCLUSION

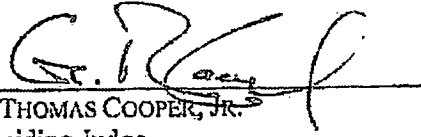
Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

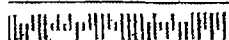
IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

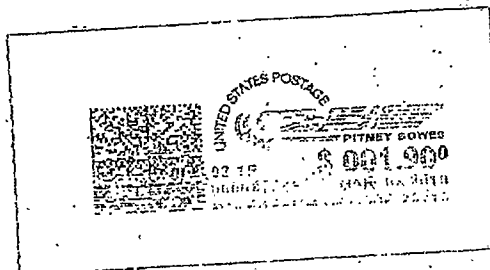
AND IT IS SO ORDERED this 20th day of February, 2019.


 G. THOMAS COOPER, JR.
 Presiding Judge
 Ninth Judicial Circuit

Charles, South Carolina



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a, South Carolina 29210 - 4047



RECEIVED

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