

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

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IN THE SUPREME COURT

FEB 28 2013

Appeal from Spartanburg County

S.C. Supreme Court

Frank R. Addy, Circuit Court Judge

KENNETH LEE HUCKABEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212320

APPENDIX

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Applicants refusal to write a statement. On direct examination by prosecutor Able Gray, Investigator Bryant testified as follows:

Q: Did you take a written statement from Huckabee?

A: No, sir. I did not.

Q: Why not?

A: He didn't want to moralize his statement in writing.

Q: Did he tell you why?

A: He said he didn't want to put anything on paper.

Q: Did he continue to talk to you?

A: "Absolutely." Transcript pg. 273 lines 7-14.

Applicant asserts it was his constitutional right guaranteed by his fifth amendment privilege against self-incrimination not to write a statement. The first part of the prosecutor's direct examination consisted of questions and answers about the standard procedure and process of completing a pre-interrogation waiver form to begin with an interview. The prosecutor then goes straight into the subject and questions of Applicants refusal to write a voluntary statement. Transcript pg. 271 lines 4-25; pg. 272 lines 1-25; pg. 273 lines 1-12. After the questions on pg. 273 lines 7-14, as shown above, the prosecutor only asked one more single question, which was about what Applicant supposedly told the investigator during the interview, which the officer answered with one long answer. Transcript pg. 273 lines 16-25; pg. 274 lines 1-16. Yet in Guam v. Veloria 136 F. 3. D 648, the officer made only one reference to the defendant's post-arrest silence, but the officer's entire testimony contained

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no substantive information for the jury. In fact, it was difficult to determine why the government put the officer on the stand. The officer's entire testimony regarding the post-arrest silence cannot, in this context, be characterized as innocuous. However, in this case, the officer's testimony consisted of little else, and the jury was never cautioned or instructed to disregard his testimony regarding the defendant's post-arrest silence. The case was reversed.

Applicant contends his refusal to write a statement should have been recognized that, Applicants was asserting his right to remain silent and privilege against self incrimination.

Miranda v. Arizona 86 S. Ct. 1602 states, "Once warnings have been given, if the individual indicates in any manner, at any time, prior to, or during questioning that he wishes to remain silent, interrogation must cease."

At the end of Investigator Bryant's answer to the prosecutors last question on direct, following questions of Applicants refusal to write a statement, the investigator told the jury Applicant said he was, "guilty and wanted to plead." At that response, prosecutor stated no further questions. Transcript pg. 274 lines 15-17. At this point defense counsel questioned the investigator on cross about the fact that the interview became heated showing Applicants lack of co-operation since the investigator tried to paint a picture to the jury that Applicant co-operated "verbally." The statements the investigator testified Applicant made during the interview were in dispute, and other than the investigators testimony, there were no other evidence or proof that Applicant made the verbal statements. Transcript pg. 274 lines 21-25; pg. 275 lines 1-25; pg. 276 lines 1-25; pg. 277 lines 1-25; pg. 278 lines 1-23.

prosecutor was tying Applicants guilt to his refusal to write a statement, in an attempt to prejudice Applicant by attempting to create an inference of guilt in the mind of the jury. Its proved by not once, but twice, on direct and redirect, following questions that Applicants refused to write a statement, the prosecutor made it specific that Applicant was guilty. Transcript pg. 274 lines 15-16; pg. 279 lines 3-4; pg. 273 lines 7-12.

Applicant argues it was his constitutional right guaranteed by the Fifth Amendment against self-incrimination and the right to remain silent, to refuse to write a voluntary statement.

It may be disputed that Applicant never remained silent since there was testimony that Applicant made some verbal statements at time of arrest and offered an exculpatory story that he shot in self-defense after being fired at first, ending up on the ground where he returned his two shots. Transcript pg. 273 lines 13-14; pg. 274 lines 10-14; pg. 336 lines 23-24; pg. 329 lines 13-16; pg. 398 lines 20-23.

Miranda v. Arizona 86 S. Ct. 1602 states "mere fact that accused may have answered some questions or volunteered some statements on his own, does not deprive him of the right to refrain answering any further inquiries until he has consulted with an attorney or thereafter consents to be questioned. Once warnings have been given, if the individual indicates in any manner, at any time, prior to, or during questioning, that he wishes to remain silent, interrogation must cease." Notice Miranda states "if the individual indicates in any manner." Miranda also states "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is in police custodial interrogation. The

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prosecution may not therefore use at trial the fact he stood mute or claimed his privilege in the face of accusation."

See United States v. Velarde-Gomez 269 F. 3d. 1023. This case states, "whether the government argues that a defendant remained silent or 'describes' the defendant's silence, the practical effect is the same."

In United States v. Newman 943 F. 2d. 1155, the court related Velarde's silence to his demeanor.

Applicant argues that these cases relate to his because the prosecution put the fact that he refused to write a statement before the jury, giving the same effect of telling the jury he remained silent or exercised his Fifth Amendment privilege in the face of accusation. Applicant's refusal to write a statement was an act that indicated in a manner that he was choosing to remain silent and exercised his privilege against self-incrimination. Applicant's refusal to write a statement describes to the jury his silence; the same as the blank voluntary statement form that was marked as an exhibit at trial.

United States v. Harrold 796 F. 2d. 1275 stated, "Defendant in his later conversation answered some questions and refused to answer others. We believe the partial silence does not preclude him from arguing that a Doyle v. Ohio 96 S. Ct. 2240, violation, occurred. To the extent that a defendant clearly relies on Miranda warnings to refuse to answer specific questions, he has been induced by the government to do so, and his silence may not be used against him."

Applicant argues that his refusal to write a statement should be recognized as at least a partial silence and his refusal to write a statement or partial silence was used against him. Transcript pg. 273 lines 7-12.

In Phelps v. Duckworth 772 F. 2d. 1410 says "it can be read to indicate the Doyle only applies, if a defendant remains almost completely silent following Miranda warnings. In Phelps, however, the defendant never asserted his Miranda warnings at all; instead he offered an exculpatory story at the time of arrest. In contrast defendant here specifically invoked his Miranda rights to specific questions. Therefore, he relied on governmental action and is entitled to the protection of Doyle."

In United States v. Hockenbury 718 F. 2d. 159, the courts held, "however, the Sixth Circuit specifically stated that Doyle protects a defendant who has refused to answer specific questions after Miranda warnings have been given."

Therefore, whether Applicant chooses to give an exculpatory story at time of arrest and later chose to exercise his rights to remain silent and exercise his privilege against self-incrimination by refusing to write a statement; it was his constitutional right to do so.

In Doyle v. Ohio 96 S. Ct. 2240, the courts held, "although the Miranda warnings, i.e. warnings of right to remain silent or to counsel, contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings, and hence, it would be fundamentally unfair and a deprivation of due process to allow defendants silence at time of arrest to be used to impeach his exculpatory story proffered for the first time at trial, regardless of reliance on the Miranda warnings that is offered as a justification in

objecting to such cross-examination. USCA Constitution Amendment 14. An accused has the right to remain silent and the exercise cannot be used against him. The state cannot through evidence or the solicitors agreement, comment on the accused failure to testify or make a statement."

The jury considered the self-defense theory as evidenced by the questions they presented to the court. The first question concerned the definition of self-defense, provocation and clarification of the term without fault as it related to self-defense. Transcript pg. 440 lines 5-10.

The jury again asked the second time for clarification concerning being without fault in bringing on a difficulty as related to self-defense. Transcript pg. 444 lines 8-13.

These questions indicate that there was a reasonable probability that the jury was considering the self-defense theory and that Applicant was prejudiced by the testimony of Investigator Bryant. But for his testimony, there was a reasonable probability that at least one juror would found Applicant not guilty. The prosecutor argued the testimony of Investigator Bryant in his closing argument in a highly prejudicial manner which was very prejudicial to Applicant. The prosecutor told the jury this was not a self-defense case. He told the jury: ***"I'm not putting anything on paper. And you know why? Because this wasn't his first run-in. He knows not to put anything on paper. In his mind, don't write anything down, it can't be used against you later, because since 1999 and 2007 he's been in and out of jail. He knows the system. He knows how it works. He refused to talk to Detective Taylor."*** Transcript pg. 398 lines 14-20; pg. 403 lines 14-16.

Then three lines down, the prosecutor argued again that Applicant is guilty. This is the third time the prosecutor ties Applicant exercise of his *Rights* to his guilt. Once on direct of Investigator Bryant, once on redirect of Bryant, and here in arguments.

Applicant is not challenging the fact that Investigator Bryant testified to some verbal statement he made even though there was a dispute to some of the statements Bryant testified Applicant made. Applicant's arguing that he was prejudiced by testimony and comments that he exercised his Fifth Amendment privileges against self-incrimination in refusing to write a statement and refusing to talk to Detective Taylor, attempting to or actually creating an inference of guilt in the mind of the jury. Applicant wisely chose not to write a statement that would have been used against him. Yet, even though it was his right not to write a statement and he invoked his right, it was used by the prosecutor to penalize him for doing so. Counsel failed to object to the prosecutor's violating Applicant for exercising his constitutional rights in Miranda guaranteed by the Fifth Amendment of the United States Constitution and South Carolina laws. See U.S. Constitutional Amendment 5 and 14, S.C. Const. Art. 1{ 3, and 12. Counsel was ineffective. The case should be reversed and remanded for new trial.

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Argument #2

Trial Counsel was ineffective for failing to object and move for mistrial or request curative instruction when prosecutor violated Applicants constitutional rights due to comments during closing arguments of Applicants refusal to write a statement of Applicants Fifth and Fourteenth Amendments privileges against self-incrimination and rights to remain silent.

Applicant argues he is being held unlawfully and was deprived of a fair trial due to: the prosecutor's questions on direct examination of Investigator Bryant of Applicants refusal to write a statement, where he laid the foundation for his comments in closing arguments that Applicant refused to write a statement and refusal to talk to Detective Taylor. This constituted a clear infringement of his Fifth and Fourteenth Amendment privileges against self-incrimination and right to remain silent. Counsel failed to object and was ineffective. Transcript pg. 273 lines 7-12; pg. 398 lines 14-20.

On direct examination of Investigator Bryant, in the state's case in chief, the prosecutor questioned of Applicants refusal to write a statement laying his foundation for his closing arguments. The testimony was as follows:

Q: Did you take a written statement from Mr. Huckabee?

A: No, sir, I did not.

Q: Why not?

A: He didn't want to moralize his statement in writing.

Q: Did he tell you why no

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A: He said "he didn't want to put anything on paper."

Transcript pg. 273 lines 7-12.

The prosecutor elicited this testimony of Applicants refusal to write a statement to lay foundation for his comments in closing arguments where Applicants refusal to write a statement and refusal to talk to Detective Taylor was heavily relied upon. The jury was told by the prosecutor during closing arguments as follows:

"I'm not putting anything on paper. And you know why? Because this wasn't

his first run-in. He knows not to put anything on paper. In his mind, don't write anything down, it can't be used against you later, because since 1999

and 2007 he's been in and out of jail. He knows the system. He knows how

it works. He "refused" to talk to Detective Taylor. Transcript pg. 398 lines 14-20.

Here the comments were not only intended to infer guilt in the mind of the jury, but to attack Applicants credibility. The prosecutor's comments, surrounding his comments of Applicants refusal to write a statement and refusal to talk to Detective Taylor, show the prosecutor was attacking Applicants credibility and exculpatory story. The prosecutor told the jury right before his comments that Applicant refused to write a statement and talk to Detective Taylor that Applicant made everything up and was apprehended through trickery. Transcript pg. 398 lines 4-4; 10-11. The prosecutor three lines after comments of Applicants refusal to write a statement and talk to Detective Taylor, comments to the jury by telling the jury, "I shot him and I want to plead guilty; I shot him and I want to plead

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guilty." This is the third time the prosecutor relates Applicants guilt to Applicants refusal to write a statement and talk to Detective Taylor. Prosecutor not only follows his questioning of Investigator Bryant on direct and redirect, but here again he follows his comments in closing arguments with comments of guilt. Transcript pg. 273 lines 7-12; pg. 274 lines 15-16; pg. 279 lines 3-4; pg. 398 lines 14-20; pg. 398 lines 23-24.

Then prosecutor goes back to Applicants credibility on the next page on 399 lines 1-15. Prosecutor surrounds his comments and questions of Applicants refusal to write a statement and talk to Detective Taylor with direct testimony and comments of guilt and credibility. Such testimony and comments show that prosecutor elicited testimony and made comments to put before the jury that Applicant refused to talk to Detective Taylor remaining silent and exercised his Fifth Amendment privilege against self-incrimination in the face of accusation to prejudice Applicant by attempting to create an inference of guilt in the mind of the jury. That made three times the prosecutor tied Applicants refusal to write a statement and talk to Detective Taylor to his guilt.

The case of United States v. Velarde-Gomez 269 F. 3d. 1023 speaks of United States v. Newman 943 F. 2d. 1155. "The first Newman factor requires us to consider the extent of the comments made by the witness regarding the defendant's silence. Here the qualitative extent of Agent Salazaras testimony about Velarde's pre-miranda silence and demeanor was not great in relation to the remainder of his testimony. The government correctly notes the bulk of Agent Salazaras testimony related to a variety of other matters, notably the discovery of the marijuana, the inconsistencies of Velarde's stories, and other

results of this investigation. However, the qualitative extent, i.e., the manner of questioning and the repeated nature of the questions, endowed the fact of Velarde's silence with great significance and laid foundation for the prosecutors closing arguments where his silence was heavily relied upon. Thus, this factor weighs against a finding of harmless error." This case was reversed.

This case can be compared to Applicant's case. In Applicants case, the prosecutor questioned Investigator Bryant of his refusal to write a statement and the exercise of his Fifth Amendment privilege against self-incrimination to lay his foundation for his closing arguments where Applicants post arrest refusal to write a statement and refusal to talk to Detective Taylor was heavily relied upon. Both instances were tied to Applicants guilt. This weighs against finding of harmless error.

See Greer v. Miller 107 S. Ct. 3102. This court has found that three improper questions and answers require reversal, despite a strong jury instruction to disregard the questions.

In Applicants case, prosecutor asked three improper questions followed by three improper answers without a strong jury instruction to disregard the questions. Applicant contends that according to Greer v. Miller 104 S. Ct. 3102, this requires reversal.

In Edmond v. State 534 S. E. 2d 682, "petitioner contends the PCR judge erred in denying his claim that the detective's testimony and prosecutor's argument violated his right under the state and federal constitutions. See U. S. Const. Amend. Five and Fourteen, S. C. Const. Art. 1{{ 3 and 12. He further argues and agrees the error was prejudicial. WE AGREE! Petitioner on PCR had asserted trial

counsel was ineffective in failing to object to improper references to the invocation of his constitutional rights and to remain silent during detective's testimony and prosecutors closing arguments. Petitioners' trial counsel testified he did not know why he failed to object to the testimony and comments. The PCR judge denied petitioners PCR application. The courts reversed the denial of PCR and remanded petitioner's case for new trial. No probative evidence supported the PCR judge's denial and the PCR judge committed error. "In *Edmond*, the courts said," in deciding the prejudice prong in this PCR action, we examined the following factors, which are the same ones analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt. Such an error will not be prejudicial when the record shows the reference to the defendants right to silence or to an attorney was a "single" reference, which was not repeated or alluded to; the prosecutor did not tie the defendants exercise of his rights directly to his exculpatory story; the story was totally implausible; and the evidence of guilt was overwhelming.

However in Applicants case, Applicant argues the prosecutor asked three questions of his refusal to write a statement and his silence in refusing to talk to Detective Taylor. Transcript pg. 273 lines 7-12; pg. 398 lines 14-20.

Right before the comments, the prosecutor told the jury Applicant made everything up referring to and attacking Applicants exculpatory story. Transcript pg. 398 lines 4-5. The prosecutor places his comments of Applicants refusal to write a statement and talk to Detective Taylor in the middle of his attacking Applicants exculpatory story attacking Applicants credibility and guilt. Transcript pg. 397 lines 6-25; pg. 398 lines 1-25; pg. 399 lines 1-16.

Prosecutor follows his comments of Applicants refusal to write a statement and talk to Detective Taylor with more comments that Applicants story continues to change, thus attacking Applicants credibility. Transcript pg. lines 10-15.

Applicants' story was very believable and guilt was not overwhelming. The states two key witnesses from the crime scene were proven to have lied to police. Tavenier testified she lied to police initially about her name. Transcript pg. 100 lines 3-25; pg. 101 line 1. Tavenier testified she was Bridwells caretaker and that he didn't take pills. She testified that Mr. Bridwell hadn't left the house all day because she had the truck landscaping all day. She testified that Applicant was driving a white car. Transcript pg. 91 lines 10-24; pg. 99 lines 11-25; pg. 100 lines 1-25; pg. 102 lines 16-25; pg. 103 lines 1-25; pg. 104 lines 1-25; pg. 105 lines 1-5; pg. 363 lines 17-24; pg. 364 lines 1-25.

Yet Hudani testified that Tavenier and Bridwell bought pills from him and he bought pill from them. He also testified that he was taken by Bridwell that morning to buy pills and crack in the same truck that Tavenier testified she'd had all day doing landscaping. Hudani testified the car Applicant drove wasn't white. Hudani admitted he lied twice in both of his written statements. Transcript pg. 163 lines 10-15; pg. 162 lines 21-25; pg. 158 lines 12-25; pg. 159 lines 1-16; pg. 167 lines 1-25; pg. 168 lines 1-25; pg. 169 lines 1-7.

Angelina Faehnrich, the owner of the car Applicant was driving testified the car was black, Hudani testified it was a dark colored car, Gregg Carver testified it was a dark colored car, and Kenneth Huckabee testified it was a black car. Transcript pg. 127 lines 17-25; pg. 161 lines 17-22; pg. 238 lines 24-25; pg. 312 lines 24-25; pg. 313 lines 1-10. Tavenier, even though witnesses were sequestered, remained

in the court room since her testimony as the state's first witness and heard all other witnesses testify that the car wasn't white and that the car was black or a dark colored car. She heard the owner of the car testify that the car was black. Over objection by defense counsel because of the sequestration order, Tavenier got back on the stand and still claimed the car was a white car. Transcript pg. 362 lines 13-25; pg. 363 lines 17-25; pg. 364 lines 1-25.

Applicant testified he fired two shots after he was fired at first by the female driving the victims' truck. Applicant testified he ended up on the ground and was being fired at by the female driving victim's truck, in which he returned fire from the ground. Evidence proved Applicants story and testimony to be very believable because wooden dowels rods were placed through the holes in the seat where victim was sitting when Applicant shot him. The dowels were running from a downward angle going up, which verified Applicant was laying down when he fired. A bullet was recovered from the road where Applicant testified he was on the ground and the female was shooting down at the ground at him. Evidence showed that there were only two shell casings on crime scene from Applicants gun. There were only two bullet holes in the truck seat and two bullets were removed from the victim. Those are Applicants two-shots. The bullet in the road made a third shot. Applicant testified the female shot at him with a chrome revolver. That could explain why there were only two shell casings on crime scene but three bullets. The female claiming to be a victim, when she first spoke to police, lied about her name giving a false name. When the female was tested for GSR, she had a highly elevated amount of lead on her hands. A GSR expert testified she could not rule out the fact that the female driver had fired a gun. The GSR expert testified she did not find GSR present but there were some

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concentrations of metals but that if someone had fired a gun and the gunshot residue was removed in some way, she would receive the quantities she found on the females hands. Transcript pg. 322 lines 16-25; pg. 323 lines 1-25; pg. 258 lines 22-25; pg. 259 lines 1-6; pg. 261 lines 5-17; pg. 242 lines 1-21; pg. 250 lines 10-25; pg. 254 line 25; pg. 255 lines 1-8; pg. 342 lines 6-9; pg. 100 lines 6-15; pg. 204 lines 24-25; pg. 205 lines 1-9; pg. 203 lines 12-14.

So, therefore Applicant contends evidence of guilt was not overwhelming. Applicant argues that according to Edmond he has proved prejudice and the questions and comments were not harmless.

In United States v. Perez 116 F. 3d. 848, the courts said, "furthermore we are concerned about the prosecutors lack of self-restraint in the face of clearly announced rules of constitutional protection, the conduct is indefensible and the prosecutor should have been the first one in the court room to know it."

United States v. Wycoff 545 F. 2d. 679 state "such error, when left unchallenged by the defense or the court, seriously affects the integrity and public reputation of the judicial proceedings."

Compare the prosecutors' comments in his closing argument to Miranda warning. The prosecutor told the jury in his closing arguments that Applicant invoked his Miranda Rights when he refused to write a statement by telling the jury, "In his mind, doesn't write anything down, it can't be used against you later." This is exact comparison to Miranda and according to the prosecutor; Applicant invoked his Miranda Rights when he didn't write anything down. By the way the prosecutor molded his comment around Miranda warnings, it must be recognized that Applicant refused to write a statement so as to not incriminate himself.

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Miranda states "if he does make a statement, it will be used against him." So, therefore Applicant made the decision not to write a statement. The prosecutor's comments show that when Applicant refused to write a statement, he was thinking of Miranda in his mind. The prosecutor even told the jury that Applicant "knows not to write anything down." Transcript pg. 398 lines 15-17.

The only way it can be recognized that Applicant knew not to write anything down is because of the instructions in Miranda warnings that tells Applicant he has the rights to remain silent and anything he says can and will be used against him. Applicant chose not to write a statement because he had a right to do so and did not want the statement to be used against him to incriminate him as Miranda promises. Applicants' choosing to not incriminate him was his constitutional right and by him invoking his right, he was penalized. The prosecutor made it clear that Applicant understood his right to remain silent when he told the jury that Applicant, "knows not to write anything down," and that Applicant had in his mind what Miranda says when he told the jury, "*in his mind, don't write anything down, it can't be used against you later.*" Applicant had his mind on what Miranda warnings say according to the prosecutors comment in his argument. Applicant's actions in not writing a statement show Applicants chose to follow the rules of Miranda so as not to incriminate himself and that was his constitutional right to do so. Followed by comments of Applicants guilt, the prosecutor clearly intended to create an inference of guilt in the mind of the jury by putting before the jury the fact that Applicant exercised his rights. The tying of the two is dangerously prejudicial since it recognized that in the mind of an ordinary person, an innocent person would not remain silent in the face of accusation. Yet the constitutional rights promised in Miranda give a

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defendant the right to remain silent and the exercise of that right cannot be used against the defendant. Doyle v. Ohio 96 S. Ct. 2240 and Miranda v. Arizona 86 S. Ct., 1602.

By a showing that Applicant remained silent it is possible and very likely the jury recognized the silence and refusal to write a statement as a sign of guilt. Following evidence of silence with testimony and comments of guilt was dangerous.

The jury considered the self-defense theory as evidenced by the questions they presented to the court. The first question concerned the definition of legal provocation and clarification of the term without fault as it related to self-defense. Transcript pg. 440 lines 5-10.

The jury again asked for the second time for clarification concerning being without fault in bringing on a difficulty as related to self-defense. Transcript pg. 444 lines 8-13.

These questions indicate that there was a reasonable probability that the jury was considering the self-defense theory and that Applicant was prejudiced by the prosecutors questions and comments followed by evidence and comment that Applicant was guilty. But for the questions and comments, tied to Applicants guilt, there was a reasonable probability that at least one juror would have found Applicant not guilty.

Investigator Bryant testified due to the prosecutors' questions, that Applicant refused to write a statement and specifically that Applicant was guilty. Transcript ps. 273 lines 7-12; pg. 274 lines; pg. 279 lines 3-4.

The prosecutor then argued the testimony of Bryant in closing arguments that Applicant refused to write a statement and refused to talk to Detective Taylor in a very highly prejudicial manner. The prosecutor molded the argument firmly around Miranda warnings and for the third time, tied Applicants exercise of his rights to his guilt. Transcript pg. 398 lines 14-23.

Applicant was prejudiced by the prosecutors conduct and showing of the fact remained silent and refused to write a statement invoking his Miranda Rights guaranteed by the Fifth Amendment of the United States Constitution and South Carolina laws. See Const. Amend. Five and Fourteen, S. C. Const. Art. 1, § 3 and 12.

The prosecutor function and the defense function, American Bar Association, standards relating to the Administration of Criminal Justice (1971) Section 5.6 (6) pg. 119 (also see commentary pg. 120-121) states: "It is unprofessional conduct for prosecutors knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury."

As Mr. Justice Sutherland said in Berger v. United States 55 S. Ct. 629, again bears repeating: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty who's obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor –indeed, he should do so. But

while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods, calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. 295 U. S. at 88, 55 S. Ct. 633.

Applicant was prejudiced by the prosecutor's foul blows to his constitutional rights. Applicant exercised his rights and was penalized for doing so. Counsel failed to object and the jury went uninstructed. Counsel's performance was deficient and his deficient performance prejudiced Applicant. The case should be reversed and remanded for a new trial.

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Argument #3

Counsel was ineffective for failing to object to prosecutors closing arguments when the prosecutor spoke of evidence not adduced at trial or in the record. The comments were prejudicial.

In closing arguments the prosecutor spoke of evidence not in the record and told the jury Applicant refused to talk to Detective Taylor. Transcript pg. 398 line 20. He was speaking of evidence not in the record.

The prosecutors comment was the first of evidence to mention Applicants refusal to *talk* to Detective Taylor and also violating Applicants Fifth Amendment to remain silent. This was highly prejudicial. The comments were followed by comments that Applicant was guilty. This infected the trial with unfairness, and went against Miranda's "***right to remain silent.***" Const. Amend. 5 and 14.

The prosecutor told the jury in closing arguments that Applicant was apprehended through trickery. Transcript pg. 398 lines 10-11. Evidence that Applicant was apprehended through trickery is nowhere in the record and it is clear the prosecutor made this comment to attack Applicant credibility and what really made this comment dangerous was that *it* was followed by comments of Applicants refusal to write a statement and refusal to talk to Detective Taylor as well as comments of guilt. Transcript pg. 398 lines 14-24. Guilt and credibility tied to comments of Applicants refusal to write a statement and refusal to talk to Detective Taylor is very highly prejudicial. See United States v. Wycoff 545 F. 2d. 679.

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The prosecutor told jury in closing arguments, "according to Mr. Brannon, he fell down and continued to fire once the truck sped off. Once the threat, if there was a threat, once the threat was leaving, he kept firing." This comment the prosecutor said Mr. Brannon, Applicant's attorney, made, is nowhere in the record. Transcript pg. 403 lines 4-6. Counsel never objected and Applicant was prejudiced by prosecutors' comments and counsel failure to object. Counsel's performance was deficient.

State v. Bottoms 195 S. E. 2d. 116 (1973) states "we held that the prosecutor cannot reply, in closing arguments, on statements not in evidence."

State v. Cannon 93 S. E. 2d. 889 states, "the solicitor in making his closing arguments to the jury should at all times confine himself to evidence adduced at trial."

This leads to State v. Caldwell 388 S. E. 2d. 816; "review of closing arguments is based upon whether the prosecutors closing arguments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Const. Amend. 14. The comments of applicants refusal to talk to Detective Taylor violated Applicants rights to remain silent followed by comments attacking credibility and guilt that were not in record was highly prejudicial and denied Applicants due process. Case should be reviewed.

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Argument #4

Trial judge committed error in admitting inadmissible testimony of Officer Greene in the state's case in chief that was clearly a Miranda violation.

Applicant argues that a Miranda violation occurred when the trial court admitted the testimony of Officer Kelly Greene, of the Spartanburg County Detention Facility. A Jackson v. Denno hearing was held out of the presence of the jury due to defense counsels objection. Transcript pg. 59-63.

In the Jackson v. Denno on direct by prosecutor Able Gray, officer Greene testified that he walked into a shower where Applicant was talking and the officer about how many times he'd been in jail. At that point Officer Greene testifies he ask Applicant what he was talking about. Officer Greene testified that in response to his question, Applicant made the statement, "I shot him. The motherfucker had a gun. I shot the motherfucker. I'd shoot him again." The officer testified he then went and wrote a report. On cross examination of the officer, defense counsel questions the officer of when did he Mirandize Applicant. The officer's response was that he didn't question the Applicant. Defense counsel approaches witness stand with a copy of the officer's report, at which counsel shows the officer a portion of his report that was underlined where the officer documented in the report that he ask Applicant, "What are you talking about?" Transcript pg. 60 lines 8-20; pg. 62 lines 2-15.

Defense counsel proved the officer asked a question, which in return caused a response and went and documented the response and was there in court to testify as to the response he received due to the questions using Applicants

response against him, even though no Miranda warning was given. Transcript pg. 62 lines 8-25; pg. 63 lines 1-7.

The courts admitted the statement Applicant made as voluntary and it was used against Applicant in trial before the jury. Officer Greene testified in the States case in chief.

On direct, Officer Greene testified on pg. 211, Lines 7-16 in quote, 'There was another officer in there, (shower) but I don't know if he was talking to him or not. He said basically, this is nothing, and you know how many times I've been in jail. And I just kinda looked at him and said, 'Huckabee, what are you talking about, 'because I have dealt with Mr. Huckabee in the past. And he replied, 'I shot him. The motherfucker had a gun, I shot the motherfucker and I'd shoot him again.' After that he said that I kinda looked at him and turned around and walked out and wrote my statement." Transcript pg. 211 lines 7-16.

Then on cross by defense counsel, the officer testified as follows:

Q: Okay. And he's saying something about having been in jail before?

A: Yes, sir.

Q: Okay. And you asked him a question?

A: I just asked him what are you talking about, because, like I said, I had dealt with Mr. Huckabee in the past. And part of my job is if inmates, you know, feel like what the inmates are going through, find out if there's a problem.

And the way he was talking, I was like, well, what are you talking about?

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Q: Okay. So you asked him a question?

A: Yes, sir.

Q: Did you read him some Miranda Rights before you did that?

A: No, sir, because it was not in the intent of being interrogation. It was just to find out what was wrong with him.

Q: Right. But then you went out and wrote a statement. And you're here testifying about this statement today. Right?

A: Yes, Yes, sir.

Q: What's that something in the Miranda that says anything you say and will be used against you? Isn't that part of Miranda?

A: Yes, sir.

Q: And you asked a question?

A: Uh-Huh.

Q: And you had on a badge.

A: Yes, sir.

Q: And he answered your question. And then you wrote a statement.

A: Yes, sir.

Q: And now you're telling the jury about it.

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A: Yes, sir. Transcript pg. 214 lines 1-20.

Then on redirect, the officer testifies to the prosecutor that he knows the victims daughter and had seen her the day he wrote his report. The officer testified the victim's daughter used to work at the jail. Transcript pg. 215 lines 10-13; pg. 216 lines 1-13. Defense counsel asks the officer on re-cross why he failed to mention in his statement that he knew the victims daughter. The questioning went as follows:

Q: This is a copy of your statement. Right?

A: Most likely. I wouldn't doubt it. Yes, sir.

Q: Where do you put in there that you knew the victims daughter.

A: I didn't feel it was relevant to the statement. If it was asked of me, I answered it.

Q: Okay. So you wrote a statement only as to what my client said, but you didn't write in here that you knew the victims daughter and that had seen the victim's daughter that day.

A: No, sir.

Q: You left that out.

A: Yes, sir. But it was common knowledge that she did, she did used to work at the detention facility. And the family was present during the bond hearing." Transcript pg. 215 lines 24-25.

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Applicant testified on his own behalf in trial. On direct, defense counsel never questioned Applicant of the situation with Officer Greene, so Applicant never had the chance to dispute what Officer Greene testified to. Then on cross-examination, the prosecutor questioned Applicant of the situation with Officer Greene. Applicant's testimony about the way things occurred were a little different. Officer Greene testified when he walked into the showers, Applicant was talking to another officer when Officer Greene asked what he was talking about at which Officer Greene testified Applicant's response was, "I shot him. The motherfucker had a gun. I shot the motherfucker and I'd shoot him again." Transcript pg. 211 lines 13-14.

Applicant argues it's hard to see where his response could come from the officer's question if Applicant was talking to another officer about how many times he'd been in jail. The responses of Applicant don't go with what Greene testified Applicant was talking to the other officer about. Applicant asserts his testimony fits Officer Greene's scenario more sensibly. The cross of Applicant goes as follows:

Q: Now, who did you tell she had a gun?

A: The investigator.

Q: Did you tell somebody he had a gun?

A: No, sir.

Q: Think carefully now to Officer Greene.

A: No, sir. I did not say he had a gun.

Q: You didn't say I shot the motherfucker and I'll shoot him again, he had a gun?

A: It was something like that, but I didn't say he had a gun. But I did say that. I was angry. He — they had kept me in booking for three days and hadn't fed me. And I was fussing, he's a sergeant, he's a supervisor, and they hadn't fed me for three days. So I started fussing about it, and he came into the shower. And I was like man, ya'll haven't fed me for three days. And he was like, well, you shouldn't have shot nobody. And I was like, yeah, I shot them, they shot at me, they had a gun

Shooting at me and I shot back. And that's what I said. And he made

it out to be something it wasn't. Transcript pg. 336 lines 23-25; pg. 337 lines 1-17.

Defense counsel argued in closing arguments to the testimony of Greene. The prosecutor argued in his closing arguments to the testimony of Officer Greene of Applicants statements. Transcript pg. 386 lines 7-25; pg. 387 lines 8; pg. 398 line 25; pg. 399 lines 1-9.

Applicant argues this testimony and comments were prejudicial and were not harmless. The statement of Officer Greene was entered as an exhibit #4 at Applicant's trial. This was a Miranda violation and was inadmissible.

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Harryman v. Estelle 616 F. 2d. 870, is the case Applicant relies on and Applicant argues according to Harryman, Officer Greene's testimony and statement was inadmissible. In Harryman the question, "What is this?" was asked by the arresting officer out of shock and surprise at finding condom containing white powdered substance tucked under the waistband of his trousers. Defendants' rights were violated when the officer asked the defendant a question, defendant made direct response. Defendant was in custody at the time and had not yet received recitation of Miranda Rights, and prosecution used the response at trial as part of its case in chief, and it was a constitutional error in admitting defendant's response, "Oh, you know what it is. Its heroine," to arresting officer but was harmless as to the fact that the statement when admitted had no effect on other evidence adduced against defendant at trial, and the other evidence was overwhelming, (unlike Applicants case where Applicants guilt was not overwhelming) and admission of the statement had no effect on conduct of defense. (In Applicants case credibility was a major issue of defense and following Officer Greene's testimony, in closing arguments, the prosecutor made his comments in reference to Officer Greene's testimony tied with comments of Applicants guilt, possibly attempting to create an inference of guilt in the mind of the jury.) Const. Amend. 5.

The courts in Harryman, [2] "held" it seems plain that Miranda was violated here. It's uncontested that a police officer asked Harryman a question that made a direct response, that Harryman was in custody at the time, and that he had not yet received a recitation of his rights. The prosecution used the response at trial as part of its case in chief, (the same as Applicants case). The basis of the state's contention that Miranda wasn't violated is its claim that Harryman was not

subjected to the kind of police questioning that the Supreme Court in Miranda sought to control. It argues that the question asked Harryman was not an attempt to elicit an answer of any sort, much less of a crime, but was rather an exclamation of surprise, (same as Officer Greene testified). This argument misunderstands Miranda. Prior to Miranda, the Supreme Court attempted to protect an accused of improper police questioning by holding inadmissible statements that appeared to have been involuntary in light of their surrounding circumstances, including the characteristics of the accused. See Schneckloth v. Bustamonte 93 S. Ct. 2041, Spano v. New York 79 S. Ct. 1202. Where we followed such an approach here, we might well find that Harryman's statement was voluntary and therefore admissible.

BUT, in Miranda, the court found the totality of the circumstances approach inadequate. Recognizing that in custody questioning was inherently coercive tendencies, the court adopted in its place a set of procedural rules. It held that until these rules have been followed, and an accused has been adequately informed of and waived his rights, he may not be questioned. **If he is questioned, any statements he makes in response cannot be presented by the prosecutor as part of its proof in trial.** 384, U. S., at 444-91, 86 S. Ct. at 1612-36. See Michigan v. Tucker 417 U. S. 433-44, 94 S. Ct. 2357, 2363, 41 L. E. 2d. 182 (1974) "when law enforcement officer asks a question of an accused, without the benefit of Miranda safeguards, answers, the totality of the circumstances is irrelevant. The accused's answer is simply "inadmissible" at trial as part of the prosecution case in chief."

"The state suggests that we abandon Miranda's rigidly her and temper its prohibition of all unsafeguarded police questions must be declined. It is not for us to redefine Miranda." In Fare v. Michael 99 S. Ct. 2561, the courts stated, "for the purpose of Miranda, and the accused Fifth Amendment Right not to be compelled to incriminate himself, it is enough to decide that what the officer said could reasonably have had the force of a question on the accused. In finding that a Miranda violation occurred in this case, the majority holds that no statement made in response to an officer's excited utterance is admissible if the excited utterance is followed by a question mark when transcribed. The response was admitted only if the officer was able to postpone his shock and surprise until the Miranda warnings have been read. Therefore the statements of Officer Greene of Applicants response to his question while Applicant was in custody without Miranda warnings were inadmissible and prejudiced Applicants defense. The state used the statement of Officer Greene in its case in chief. Applicant contends the case should therefore be reversed and remanded.

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Argument # 5

Counsel was ineffective for violating Applicants constitutional rights against privileges of self-incrimination due to questions and comments of Applicants refusal to write a voluntary statement. Const. Amend. 5 and 14.

Applicant contends counsel, instead of objecting and allowing the judge to grant mistrial or give curative instruction to the jury, questioned Investigator Bryant further into the inquiry that Applicant refused to write a statement. Counsel also commented on Applicants refusal to write a statement in his closing arguments. Transcript pg. 276 lines 11-15; pg. 385 lines 21-22.

Applicant argues counsel also made him admit on redirect that he refused to write a statement. Transcript pg. 358 lines 1-2.

Applicant argues that counsel's questions and comments really show the ineffectiveness and deficient performance of his trial counsel. It was not counsel's place to question further into the fact that Applicant refused to write a written voluntary statement, therefore invoking his *Fifth Amendment* privileges, but that counsel's duty was to object so that the jury could be instructed to disregard the incompetent evidence. State v. Smith 350 S.E. 2d. 923 stated, "Great care should be exercised in the delicate, difficult, and important matter, of instructing the jury to disregard incompetent evidence. 75 Am Jur. 2d Trial Section 748." "The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations." "The error, and the trial judge's failure to take adequate steps to cure the error, requires reversal for new trial."

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Applicant contends counsel failed to object to prosecutor's questions and comments of his exercise *Fifth Amendment* privileges, but also violated his rights of Fifth Amendment privileges with his own questions and comments. Counsel violated Applicants rights the same as the prosecutors. Counsel's questions and comments prejudiced Applicant and fell below the reasonable standards of representation.

Along with all other prejudiced questions and comments of Applicants refusal to write a statement violating Applicants constitutional rights, counsel conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Counsel's deficient performance prejudiced Applicants defense and the case should therefore be reversed and remanded for a new trial. Strickland v. Washington 466 U.S.668, 104 S. Ct. 2052, 2064 (1984).

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Ineffective Assistance of Counsel

In order for Applicant to prove counsel was ineffective, Applicant must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.

Strickland v. Washington 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State 286 S. C. 441, 334, S.E. 2d, 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington The Applicant must overcome this presumption in order to receive relief. Cherry v. State 300 S.C. 115 386 S.E. 2d, 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State citing Strickland v. Washington.

Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry v. State, *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State 325 S. C. 182, 480 S. E. 2d 733 (1997).

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Applicant contends counsel was deficient by failing to object many accounts of his constitutional rights being violated that were tied to his guilt as well as violating constitutional rights the same as the prosecutor. Counsel deprived Applicant due process. Constitutional Amendment 5 and 14.

Counsel failed to object to Investigator Bryant being questioned by prosecutor of Applicants refusal to write a voluntary written statement exercising his fifth amendment privileges against self-incrimination. Counsel was deficient and his deficient performance prejudiced Applicants defense depriving Applicant of fair trial. Transcript pg. 273 lines 7-12.

Counsel failed to object to prosecutor's comments in closing arguments of Applicants refusal to write a voluntary written statement exercising his fifth amendment privileges against self-incrimination. Counsel was deficient and his deficient performance prejudiced Applicants defense. Counsel deprived Applicant of fair trial. Transcript pg. 398 lines 14-20.

Counsel failed to object to prosecutors closing arguments when prosecutor commented that Applicant refused to talk to Detective Taylor exercising his right to remain silent guaranteed by fifth amendment privileges against self-incrimination. Counsel's performance was deficient and counsel's deficient performance prejudiced Applicants defense and deprived Applicant of fair trial. Transcript pg. 398 line 20.

Counsel failed to object to prosecutors closing argument when prosecutor made comments of evidence not in the record including evidence that Applicant remained silent, post arrest, Counsel's performance was deficient and counsel's deficient performance prejudiced Applicants defense and deprived Applicant fair

trial. Transcript pg. 398 lines 10-11; pg. 398 lines 14-24; pg. 398 line 20; pg. 403 lines 4-6.

Counsel violated Applicants constitutional rights in questioning Investigator Bryant of Applicants refusal to write a statement. Counsel also questioned Applicant on redirect making Applicant admit he refused to write a statement which was a clear infringement on Applicants privileges against self-incrimination guaranteed by the fifth amendment of the United States Constitution. All accounts of Applicants being prejudiced by questions and comments that Applicant refused to write a statement or remained silent went unobjected to with no curative instructions to the jury. Counsel's performance was deficient and counsel's deficient performance definitely prejudiced Applicants' defense and penalized Applicant for exercising his fifth amendment privileges the same as the prosecutor due to absence of curative instruction to the jury. Transcript pg. 358 lines 1-2; pg. 276 lines 11-15; pg. 385 lines 21-22.

Every time the prosecutor spoke of Applicants exercise of his fifth amendment privileges against self-incrimination and exercise of his right to remain silent, the prosecutor tied Applicant's exercise of his rights to his guilt.

This is "not" HARMLESS ERROR. Counsel "never" objected not one time to the repeated violations of Applicants rights. Without a curative instruction to the jury, Applicant was prejudiced and counsel's overall performance fell way below the professional norms of representation. Counsel allowed Applicants constitutional rights go right out the window and allowed the prosecution to repeatedly assault Applicant for invoking his constitutional rights as well as the Applicants exercise of his rights to his guilt and credibility.

Applicant contends that absence curative instruction to the jury, that an inference of guilt was put in the mind of the jury due to prosecutors conduct. Counsel failed to object.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Kenneth Lee Huckabee, #275354,	)	2010-CP-42-5548
	)	
Applicant,	)	
	)	
v.	)	SECOND AMENDED APPLICATION
	)	FOR POST-CONVICTION RELIEF
State of South Carolina,	)	
	)	
Respondent.	)	

Petitioner hereby adds the following cause of action and allegations:

1. Petitioner hereby alleges a Doyle violation in connection with the cross-examination of Applicant during the jury trial. Specifically, Applicant's trial counsel was ineffective in failing to object to the cross-examination of Applicant when the prosecutor questioned Applicant as to why the Applicant did not tell officers at the Sheriff's Office the address of Applicant or where Applicant lived when Applicant was in custody, thereby focusing the jury's attention on Applicant's silence and attacking Applicant's credibility. Such Doyle violation is in violation of the Fifth Amendment and Fourteenth Amendment of the United States Constitution. Please see attached as **Exhibit A** Applicant's argument in support of this amendment to Applicant's Application for Post-Conviction Relief.

December 15, 2011

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Counsel was ineffective ^{in failing} to object to cross-examination of applicant when the prosecutor questioned applicant why he ^{didn't} tell officers at Sheriff's Office his address or where he lived when he was in custody focusing the jury's attention on applicants silence attacking applicants credibility. Doyle Violation. Const. Amend. 5 and 14.

The prosecutor questioned applicant on cross-examination as to why he did not tell officers at the Sheriff's Office his home address or where he lived focusing the jury's ~~attention~~ attention on applicants silence thus attacking applicants credibility. The way the prosecutor cross-examined applicant here made it look like to the jury that applicant was not credible for not volunteering his home address to officers at the Sheriff's Office after arrest. The cross-examination went as follows:

Q - Well, you talked to officers at the Sheriff's Office, correct? A - Yes, sir.

Q - And you've seen your warrants. What's the address on those warrants?

A - That's 295 Hill Rd. That's my grandmother's address where if anything needs -- it'll always be the same. So I always put my grandmother's address on important things. Q - Why can't you tell the truth about something like that as your address? A - Because I don't live with my grandmother.

Q - Why couldn't you just tell the officers where you lived when you were in custody, something that simple? A - That is. That's where I live.

Q - Which one, 295? A - No, Stone Station Rd. Q - Stone Station Rd. A - Yes, sir.

Q - Why couldn't you tell officers that's your home address? A - Because anything important, I give them my grandmother's address. Q - You being arrested for murder isn't important? A - I didn't give them my address. They got that off my driver's license. Q - But you don't have a driver's license. A - Well, my ID. Transcript pg. 335 Lines 3-25; pg. 336 Lines 1-5.

Applicant contends it was his constitutional right not to volunteer any information or tell officers anything. If he remained silent it was his right to do so. According to testimony Applicant didn't give any address to officers at the Sheriff's Office. Applicant asserts he was never asked his address at the Sheriff's Office and the address on the warrant was already on it when he was arrested.

On redirect, defense counsel questions applicant as follows:

Q- And we've gone on back and forth with police officers. You told them you weren't writing a statement, correct? A- Yes, sir. Q- Did you ever write anything while you were at the sheriff's department? A- No, sir. Q- So the fact that some address might be on a piece of paper, you didn't write it, did you? A- No, sir. Q- Okay. A- I did sign my name on a, a piece of paper, but that's it. Q- But you didn't write your address there, did you? A- No, sir. Transcript pg. 357 line 25; pg. 358 lines 1-

Due to defense counsel's failure to object to the cross-examination and requesting a curative instruction from the trial judge, here defense counsel dangerously brings the applicant to admit to his refusal to write a statement. Applicant's refusal to write a statement was his constitutional right and by bringing this to the attention of the jury violates applicant's rights of privileges against self-incrimination and right to remain silent. Applicant's refusal to write a statement was a major issue in this trial that was used to prejudice applicant violating his constitutional rights.

On redirect of applicant by ~~the~~ defense counsel, the questions were intended to explain ~~the~~ to the jury that applicant had nothing to do with the address that was on the warrant and to try to straighten out any confusion that may have been created by the cross-examination of applicant by the prosecutor. However, the questions were dangerous and instead of the redirect, counsel should have objected to the examination and requested a curative instruction. Yet he failed to do so and have made the situation worse, especially with the way the cross-examination prejudiced applicant's credibility.

The cross-examination of applicant by the prosecutor as to the fact that applicant did not tell officers that his home address was different from the address on his warrant, was a Doyle violation. Applicant contends he has a right not to volunteer information.

In Doyle v. Ohio 96 S.Ct. 2243-2244, the state prosecutor presented evidence a police informant sold marijuana to defendants. The defendants testified they had been framed by the informant because they were not the sellers but had intended to buy marijuana from the informant. Both were arrested within minutes of the alleged crime, were advised of their miranda rights, and chose not to make any substantive post-arrest statements. During cross-examination at separate trials, the prosecutor questioned the defendants why

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540 they did not promptly assert their innocence after their arrest by telling police their exculpatory story.

Doyle says silence in the wake of these warnings may be nothing more than the arrestees exercise of these miranda rights. Thus, every post-arrest silence is insolvably ambiguous because of what the state is required to advise the person arrested. While it is true the miranda warnings contain no express assurance that silence will carry no penalty, such an assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested persons silence to be used to impeach an explanation subsequently offered at trial. Const Amend. 5 and 14.

The prosecutor used applicants silence to ~~impeach~~^{attack} his credibility. The prosecutor prejudiced applicant with the cross-examination attacking his credibility due to the fact that he didn't volunteer information to police as to where he lived at.

See State v. Gray 405 S.E. 2d 420 (Ct. App. 1991) finding Doyle violation where solicitor cross-examined defendant on failure to tell police his exculpatory story; and granting new trial as violation was not harmless.

The prosecutors cross-examination of applicant painted a picture to the jury that applicant was wrong in not telling officers at the sheriffs office ~~that~~ where he lived.

Applicant proffered testimony on direct examination by defense counsel for the 1st time at trial that he was living at 2814 Stone Station Rd in ~~the~~ when he was arrested. Transcript pg. 306 Lines 10-16. On cross-examination the prosecutor attempts to impeach applicants testimony with a different address that was on the applicants warrant. Applicant testified he didn't give the police the address that was on the warrant and that police got the address that was on the warrant from his ID. Transcript pg. 335 Lines 3-12; pg. 336 Lines 1-5.

However, applicant testified ~~that~~ on cross-examination by the prosecutor that he lived at Stone Station Rd. That he didn't give the police the address on the warrant. The prosecutor asked applicant three questions as to why applicant didn't tell officers where he lived when he was in custody. Transcript pg. 335 Lines 3-23.

The prosecutor asked specifically why applicant couldn't just tell the truth about something as simple as his address. Transcript pg. 335 Lines 11-12, attacking credibility of applicant.

> See State v. Reeves 391 S.E.2d 241 (1990) Error which substantially damages the 541
defendants credibility cannot be held harmless where such credibility is essential to his
defense.

In applicants case, evidence was not overwhelming. The states case against
applicant was built from two witnesses with extensive drug and alcohol histories. Both
witnesses admitted they lied to police. Physical evidence corroborated applicants
story testified in trial. The testimony of the key witnesses could not be deemed
overwhelming, particularly when viewed in light of the likely impact the states
improper questioning had on jurors perception of applicants credibility.
Transcript pg. 100 Lines 19-25; pg 101 Line 1; pg. 116 Lines 9-17; pg. 157 Lines 15-22
pg. 168 Lines 14-25; pg. 169 Lines 1-7.

⊖ Applicant testified he fired from the ground in self-defense due to being shot at
by the female driving victims truck. A projectile was found in the road where applicant
claimed to be laying when he was being shot at. Wooden dowel rods were placed through
the holes in the seat the victim was sitting in to get a general path the bullets traveled
that came from ~~the~~ applicants gun. They were going from a downward angle going up.

There were two bullets ~~in~~ holes in the victims seat, two bullets removed from victims body
and two shell casings on crime scene. Those are applicants two shots. The bullet in road show
a third shot that the state could not prove came from applicants gun. Applicant testified he was
⊖ shot at with a chrome revolver. That could explain why there were ~~three~~ ^{two} bullets
at crime scene and only two shells. Transcript pg. 249 Lines 8-9; pg. 250 Lines 13-17; pg. 258
Lines 22-25; pg. 259 Lines 1-6; pg. 322 Lines 4-25; pg. 323 Lines 1-10; pg. 342 Lines 6-10

See State v. McIntosh 595 S.E.2d 484 where evidence against petitioner was not overwhelming
No physical or trace evidence was introduced linking petitioner to the crimes. The case against
petitioner consisted primarily of the testimony of two witnesses, Davis and Ransom. Both
testified about their extensive history of alcohol and substance abuse, as well as their memory
lapses, before and during the period the crimes occurred. Both Davis and Ransom were
interviewed numerous of times and faced the death penalty until they began cooperating. The
testimony of these key witnesses cannot be deemed overwhelming, particularly when viewed
in light of the likely impact the states improper questioning had on jurors perception of
petitioners credibility.

542. See State v. Smith ⁴²⁴ ~~350~~ S.E.2d 496 (1992) admission of testimony about prior drug use which likely destroyed defendants credibility in a case where witness credibility was crucial to jury's determination of who and what to believe, could not be deemed harmless.

SFE State v. Smith 350 S.E.2d 923, The solicitors questions were intended to focus the jury's attention on Petitioners post-arrest silence as substantive evidence of his guilt, a prohibited tactic.

See State v. Holliday 509 S.E.2d 280, noting that solicitors have been repeatedly warned by appellate courts against violation of Doyle prohibitions; and granting new trial as violation was not harmless error.

However applicants attorney never objected. The prosecutor committed a Doyle violation and due to defense counsels failure to object, there was no curative instruction to the jury. This violation was crucial to applicants credibility and applicant was prejudiced. The case should be reversed and remanded for new trial. Const. Amend. 5 and 14.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Kenneth Lee Huckabee, #275354,	)	2010-CP-42-5548
Applicant,	)	
	)	
v.	)	THIRD AMENDED APPLICATION
	)	FOR POST-CONVICTION RELIEF
State of South Carolina,	)	
	)	
Respondent.	)	

Applicant hereby adds the following cause of action and allegations:

1. Applicant hereby alleges his trial counsel was ineffective for opening the door for the State of South Carolina/prosecution to speak on Applicant's post-arrest silence in closing arguments. Applicant's trial counsel said in his closing arguments that Applicant made it clear that Applicant was not writing anything down which would open the door for the prosecutor to talk about Applicant's refusal to write a statement.

2. Applicant hereby alleges his trial counsel was ineffective for opening the door for the State of South Carolina/prosecution to speak or otherwise enter evidence not in the record during closing arguments by doing so first.

3. Further, Applicant hereby amends his argument number four (4) on page four (4) of his brief that has been filed in this Court from Trial Judge committing error to: "Counsel was ineffective in failing to suppress inadmissible testimony of Officer Greene in the State's case in chief that was clearly a Miranda violation."

February 2, 2012

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	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Kenneth Lee Huckabee, #275354,	)	2010-CP-42-5548
	)	
Applicant,	)	
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v.	)	RETURN
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State of South Carolina,	)	
	)	
Respondent.	)	

In response to the post-conviction relief application filed on October 15, 2010, and the subsequent amendment filed March 11, 2011, the Respondent would show this Court:

I.

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the October 2007 term of General Sessions for assault with intent to kill (2007-GS-42-5176) and murder (2007-GS-42-5177). N. Douglas Brannon, Esquire, represented the Applicant. On March 6, 2008, the Applicant was convicted of these charges by a jury. The Honorable J. Derham Cole sentenced the Applicant to confinement for ten (10) years for the assault with the intent to kill charge, and thirty (30) years for the murder charge, running concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Huckabee, Op. No. 2010-UP-4696 (filed June 9, 2010). A Petition for Rehearing was filed and subsequently denied on July 20, 2010. Applicant then filed a Petition for Writ of Certiorari,

which was denied by the South Carolina Supreme Court on January 20, 2011. The Remittitur was returned on January 26, 2011.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to object to Prosecutor's closing argument,
 - b. Counsel failed to object to impeachment of State's own witness Hudani,
 - c. Counsel failed to object to State's cross-examination of Applicant,
 - d. Counsel failed to object to Prosecutor's questioning of investigator regarding Applicant's refusal to write a statement,
 - e. Counsel failed to object to State's use of perjured testimony,
 - f. Counsel failed to call witnesses who were not called by the State, but had favorable information,
 - g. Counsel failed to object to jury charge regarding armed robbery,
 - h. Counsel failed to make motion to quash indictment for assault with intent to kill because of defects in the indictment,
 - i. Counsel failed to secure a preliminary hearing for Applicant,
2. Ineffective assistance of appellate counsel, in that;
 - a. Appellate counsel failed to raise the issue of the trial court's denial of Applicant's motions for directed verdict and judgment notwithstanding verdict,
 - b. Appellate counsel failed to raise issue of the trial court's denial of Applicant's motion for new trial,
3. Prosecutorial misconduct, in that;
 - a. Prosecutor commented on Applicant's post-arrest silence during closing arguments,
 - b. Prosecutor questioned investigator regarding Applicant's refusal to write a statement,
 - c. Prosecutor made various statements during closing arguments which misstated evidence and testimony,
 - d. Prosecutor attempted to appeal to personal bias of jurors by comments during closing arguments;
 - e. Prosecutor used perjured testimony,
4. Juror misconduct, in that;
 - a. Juror told counsel that because Applicant was a drug dealer, jury did not want Applicant to walk away, but they believed

Applicant acted in self-defense and did not want him to receive thirty years,

5. Newly discovered evidence, in that;
 - a. Affidavit of juror regarding jury not wanting Applicant to receive thirty years because it was self-defense. Applicant believes that trial counsel had affidavit, but refused to turn information over.

For the purpose of this Return, the Respondent incorporates the transcript, the Clerk of Court records, the South Carolina Department of Corrections' records, and Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent interprets both the first and third claims as claims of ineffective assistance of counsel. Respondent asserts that the Applicant's allegations of ineffective assistance of trial counsel are without merit. Respondent asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The Applicant must overcome this

presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland v. Washington. Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry v. State, *Id.*. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524

S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. *Id.* Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. *Id.* Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *Griffin v. Aiken*, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

The Respondent submits that the Applicant cannot satisfy either requirement of the *Strickland v. Washington* test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

The Applicant also alleges juror misconduct, in that a juror allegedly made statements regarding finding Applicant guilty based on the fact that he was a drug dealer. Respondent submits that this allegation is without merit. The South Carolina Supreme Court established that a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial. *Shumpert v. State*, 378 S.C. 62, 67, 661 S.E.2d 369, 371 (2008). Respondent submits that

the Applicant has failed to offer any support for his claim and this Court should summarily dismiss this allegation.

VI.

The Applicant's final claim is an allegation that newly discovered or after discovered evidence exists. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant alleges that this evidence came to light shortly after his trial in March 2008. The statute of limitations for filing a claim for a new trial based on newly discovered evidence is one year from the time the evidence was or could have been discovered. Respondent submits that this claim does not meet the requirements of after discovered evidence. Furthermore, Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant probably would not "change the result if a new trial was had." Hayden, Id. The Court should summarily dismiss this allegation.

VII.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VIII.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

Respectfully submitted,

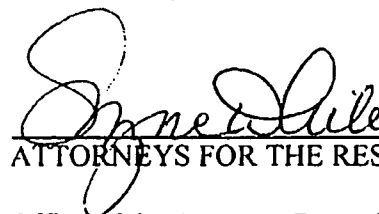
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

SUZANNE H. WHITE
Staff Attorney

By:



ATTORNEYS FOR THE RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

July 15, 2011

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

) IN THE COURT OF COMMON PLEAS
) SEVENTH JUDICIAL CIRCUIT

Kenneth Lee Huckabee,

) 2010-CP-42-5548
)

) Applicant,
)

) v.
)

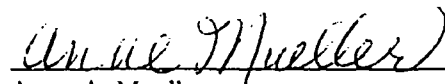
CERTIFICATE OF SERVICE BY MAIL

) State of South Carolina,
)

) Respondent.
)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Respondent's Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Max T. Hyde, Jr., Esquire
Hyde Law Firm, P.A.
517 E. Saint John Street
Spartanburg, South Carolina 29302



Anne A. Mueller
Legal Assistant for the Respondent

DATED this 15th day of July, 2011.

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

2010-CP-42-05548

KENNETH LEE HUCKABEE,

-VS-

THE STATE of SOUTH CAROLINA,

Defendant.

TRANSCRIPT OF RECORD

March 9, 2012

Spartanburg, South Carolina

Ordered: July 22, 2012

Delivered: September 21, 2012

B E F O R E:

THE HONORABLE FRANK R. ADDY, Presiding Judge.

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

MS. SUZANNE H. WHITE, Esquire,
Assistant Attorney General Appearing for the State

MR. MAX HYDE, Esquire
Attorney Appearing for the Applicant

Pamela Faucette
Circuit Court Reporter

I N D E X

KENNETH L. HUCKABEE PCR

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E X H I B I T S

Applicant's Exhibits:

Marked:

Received

(None)

Respondent's Exhibits:

Marked:

Received

(None)

Court's Exhibits:

Marked:

Received

(None)

Page:

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Reporter's Note: This transcript may contain quoted

material. Such material is reproduced as read or quoted

by the speaker.

Kenneth Huckabee PCR -March 9, 2012

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1 March 9, 2012

9:21 A.M.

2 (Brief pause while Mr. Huckabee is brought into the
3 courtroom.)

4 (Off-the-Record Comments)

5 THE COURT: All right. Just so that the record is
6 clear, on the last case that we were trying, the absent
7 juror has arrived and the jury has now resumed its
8 deliberations I'm told by the bailiff. We are going to
9 take a break from that case.

10 And we are now on the record, I believe on case 10-
11 CP-42-5548, *Kenneth B. Huckabee vs. the State*. Ms. White,
12 if you would, introduce the case and the issues involved
13 here.

14 MS. WHITE: Thank you, Your Honor. Mr. Huckabee was
15 indicted originally in October of '07 on charges of murder
16 and assault with intent to kill.

17 He was represented at the time by Mr. Doug Brannon
18 and Mr. Shawn Campbell at trial; went to trial March 6th of
19 two thousand and eight (2008), was found guilty of the
20 lesser included charges of voluntary manslaughter and
21 assault of an high and aggravated nature.

22 He was sentenced by Judge Cole. He was sentenced to
23 thirty (3) years for voluntary manslaughter and a
24 concurrent sentence of ten (10) years for assault of high
25 and aggravated nature.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 He proceeded with an appeal before the Court of
2 Appeals, which was affirmed on June 9th, two thousand and
3 ten (2010). A petition for rehearing was then filed.
4 That was denied in July of that year.

5 The petition of writ of assert to the South Carolina
6 Supreme Court was filed, which was then denied January
7 20th of two thousand and eleven (2011). So, this PCR was
8 filed March 11th of two thousand and eleven (2011).

9 He's alleged various things: Ineffective assistance
10 of trial counsel, ineffective assistance of appellant
11 counsel, prosecutorial misconduct, and juror misconduct.

12 We've received several amendments since then and
13 probably -- including the amendments we have probably I
14 would say close to about twenty (20) something or so
15 allegations under each topic.

16 So, I don't know if you want me to detail each of
17 those or if I'll just turn it over to Max Hyde, his
18 attorney, to let him announce maybe which allegations
19 we're proceeding forward with today.

20 THE COURT: All right. Mr. Hyde, have you been
21 able to narrow the issues that we're dealing with at all
22 or are we -- where we are, we are. And, if you want
23 proceed at this point, feel free.

24 MR. HYDE: If we can proceed, Your Honor, we would
25 appreciate it.

Kenneth Huckabee - Direct by Mr. Hyde

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1 THE COURT: Very good. Call your first witness.

2 MR. HYDE: Your Honor, we'd call Kenneth Huckabee.

3 THE COURT: Sir, if you would come forward, please.

4 I'll swear him in.

5 (The witness complied with the Court's request.)

6 (Off-the-Record Comments)

7 (Whereupon,

8 KENNETH L. HUCKABEE

9 having been duly sworn, testified as follows:)

10 THE COURT: Have a seat, please, Mr. Huckabee.

11 DIRECT EXAMINATION by MR. HYDE:

12 Q. Mr. Huckabee, would you give the Court your full
13 name?

14 A. Kenneth Lee Huckabee.

15 THE COURT: Are you okay to sit, Mr. Huckabee, or do
16 you need -- does he have to be in those things? I mean,
17 it's okay if he is and it's okay if he's not, I don't
18 care.

19 DEPUTY: We have to leave them on.

20 THE COURT: You have to keep them on per your boss?
21 All right.

22 Q. (By Mr. Hyde) Mr. Huckabee, you've heard the
23 attorney general recite the underlying background of this
24 case. Did she state the background correctly?

25 A. Yes, sir.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 Q. You're serving a thirty (30) year sentence?

2 A. Yes, sir.

3 Q. And you filed an original application for post-
4 conviction relief yourself?

5 A. Yes, sir.

6 Q. And is it true that, on your behalf, I filed three
7 (3) different amendments; an amended, a second amended, and
8 third amended application?

9 A. Yes, sir.

10 Q. Now, in connection with the filing of the amended
11 application for the post conviction relief, I filed a brief
12 that you had written, correct?

13 A. Yes, sir.

14 Q. What I'd like to do is go through the points you
15 brought to the Court's attention and give you an example to
16 elaborate on the reasons which you believe justify your
17 allegations, okay?

18 A. Yes, sir.

19 Q. Now, first of all, in your brief you said that the
20 trial counsel, Mr. Brannon, was ineffective for failing to
21 object to move for a mistrial or request a curative
22 instruction when the prosecutor, Mr. Gray, violated your
23 Constitutional Rights with the question that you refused to
24 write a statement, which constituted a clear Constitutional
25 infringement.

Kenneth Huckabee - Direct by Mr. Hyde

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1 Can you elaborate on that? Did you refuse to write
2 a statement?

3 A. Yes, sir.

4 Q. All right. And who asked you to write a statement?
5 Can you give a little more specific information?

6 A. The detectives, when I got arrested and got to the
7 sheriff's office. When we went in, I basically told them what
8 happened as far as answering questions.

9 I answered some, but I told them, you know, exactly
10 what happened. Then I refused to write -- they asked me to
11 sign a preprinted voluntary waiver form.

12 I refused to write a statement. However, I did sign
13 the top saying that I had been advised of my rights. At the
14 bottom in the space designed for a statement, I left blank.

15 Q. And, for the Court's understanding of this matter,
16 would you mind just giving your review of what happened during
17 the incident, your theory of the case?

18 A. You talking about what happened -- what my side of
19 the story is?

20 Q. Yes, sir.

21 A. Okay. I was work -- working at Ryan's at the Dorman
22 Center and met with a guy name Kareem Hudani (phonetic). I
23 admitted in trial that I was a drug dealer. I sold crack.

24 I had a gun, a concealed weapon. Kareem Hudani
25 called me to take him to sell his Lortabs; said that he had

Kenneth Huckabee - Direct by Mr. Hyde

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1 somebody wanted to buy his Lortabs.

2 He was going to then buy a half ounce of crack from
3 me. He didn't have a ride, so, therefore, he wanted me to
4 carry him.

5 So me and my -- my baby's mother, Angelina Finger
6 (phonetic) and my little girl, my two (2) year old daughter,
7 Minor (phonetic), we went and pick up Kareem Hudani and took
8 Kareem Hudani by his mother's house, Ms. Fields (phonetic).

9 We, then, went and met with the -- the victim and
10 the -- the lady, Michelle Hudson (phonetic) or Kelly Tabner
11 (phonetic) -- she used two names when she first spoke with
12 police -- at a car wash over behind Cool World (phonetic).

13 And he spoke to them briefly. The lady was driving.
14 The victim was in the passenger seat.

15 He then comes and tells me that he's going to ride
16 with them; to follow them. And they go kind of directly
17 across the street kind of to the right and, then, a quick
18 left. And I followed them down that road.

19 It's a dead end road. They turn around. I turn
20 around behind them. Kareem Hudani, then, gets out of the
21 passenger side of the truck -- and this was a 2007 Chevy
22 Silverado with a third door.

23 He gets out of the back of the truck, comes to my
24 car, to the passenger side, says that -- that the people in
25 the truck want to buy some crack.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

Kenneth Huckabee - Direct by Mr. Hyde

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1 Okay. I get out of the car, walk around to the
2 passenger side of the vehicle. The victim is sitting in the
3 passenger seat. The female driver is sitting in the driver
4 seat with a pocketbook or a bag on the console.

5 I asked them what did they want. And the -- the
6 woman driving the truck said let her see how much money she
7 got.

8 She unzipped the purse. She reached in her purse,
9 pulled out a chrome revolver, pointed it at me, demanded my
10 money and dope. I said I don't have no money. The dope is in
11 the car.

12 I went to step back, she shot me, boom, boom. I
13 slipped and fell. She continued firing. I pulled my gun and
14 shot back two times.

15 At that point, she sped off in the truck. I didn't know
16 I had shot anybody, run back over there. I get into with
17 Kareem Hudani, "You set me up. You set me up to be robbed. I
18 got my little girl in the car. Blah, blah, blah."

19 He's saying, "I didn't know nothing. I didn't have
20 nothing to do with it." I took him and dropped him off.

21 The next day Kareem Hudani calls me to bring him
22 some crack to the BP on Ezel Boulevard, which was a set up
23 from the Spartanburg County Sheriff's Department.

24 Once I showed up to the BP to sell the man the
25 crack, officers surrounded my car and apprehended me there.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

Kenneth Huckabee - Direct by Mr. Hyde

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1 I've been locked up ever since.

2 Q. Is it fair to say that your basic theory of the case
3 was self defense?

4 A. Yes, sir. They were wooden dowel rods placed
5 through the seat to show the general perjectory and path the
6 bullets traveled. They were going from a downward angle going
7 up.

8 There were two (2) shell casings found on the crime
9 scene, which I admitted I shot with an automatic. There
10 were two (2) bullet holes in the truck in the seat of the
11 truck, one (1) from back of the back rest to the front, going
12 from the back to the front.

13 And there were two (2) bullets holes and there were
14 two (2) bullets removed from the man's body, from the victim's
15 body.

16 So, if you take the bullets from his body and pull
17 them through them two (2) holes in the truck and put them back
18 in the shell, that's my two (2) admitted shots.

19 They found a bullet lodged in the road that made a
20 third shot. Now, I told investigators at the sheriff's
21 office, the day after the incident, before anybody knew any of
22 the evidence, that I was on the ground being fired at;

23 That she shot me with a chrome revolver. And an
24 investigator testified, Investigator Bryant (phonetic)
25 testified that I told him that she shot me with a chrome gun;

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

Kenneth Huckabee - Direct by Mr. Hyde

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1 That she shot me to the ground with a chrome gun.

2 (Brief Pause)

3 A. My mind went blank.

4 Q. Well, let me -- let me ask you a -- a few questions,
5 okay? First of all, you understand the purpose of today's
6 hearing is not to retry ---

7 A. Yes.

8 Q. --- the -- the case?

9 A. Yes, yes, yes.

10 Q. And I've -- I've explained to you that, if you're
11 successful with this effort of your application for post
12 conviction relief, the effect would be to start over?

13 A. Yes, sir.

14 Q. And you could receive a worse or a better sentence,
15 correct?

16 A. Yes. See, I'm not trying to prove my innocence or
17 my guilt. All I'm verifying is -- part of my argument is that
18 the -- the evidence of guilt can't be overwhelming and to show
19 erroneous error in what I'm fixing to present.

20 Q. All right. Well, what you've been talking about so
21 far seems to center on your allegation that your attorney was
22 ineffective.

23 A. Yes, sir.

24 Q. Is that true?

25 A. Yes, sir.

1 Q. All right. Now, you -- you -- you basically said
2 that your attorney should have objected more about your
3 failure to give a statement; is that right?

4 A. Yes, sir. My defense counselor failed to object to
5 the questions of Investigator Bryant on direct examination by
6 the State as the State's witness in the State's case in chief.

7 The State first pursued the line of questioning of
8 my refusal to write a statement. On direct examination by
9 prosecutor Abel Gray, Investigator Bryant testified as follows
10 to the these questions:

11 The question starts out, "Did you take a written
12 statement from Mr. Huckabee?" Answer: "No, sir, I did not."
13 "Why not?" "He didn't memorialize his statement in writing."

14 "Did he tell you why?" "He said he didn't want to put
15 anything on paper." "Did he continued to talk with you?"
16 "Absolutely." That's transcript Page 273 Lines 7 through 14.

17 I asserted my Constitutional Right guaranteed by my
18 Fifth Amendment privilege against self incrimination not to
19 write a statement.

20 The first part of the prosecutor's whole direct
21 examination consented of questions and answers about the
22 standard procedure and process in completing the pre-
23 interrogation waiver form to begin.

24 And, then, the prosecutors, then, go straight into
25 the subject and questioning of my refusal to write a voluntary

Kenneth Huckabee - Direct by Mr. Hyde

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1 statement. Transcript Page 271, Lines 4 through 25; Page 272,
2 Lines 1 through 25; Page 274, Lines 1 through 12.

3 And after the questions on Page 273, Lines 7 through
4 14, as shown above, the prosecutor only ask one (1) more
5 single question which was what I supposedly told the
6 investigator during the interview, which the officer answered
7 with only one long answer which -- and he also stated in his
8 answer that I said that I was guilty and wanted to plea.

9 Q. Well, if I may, you're reading from your brief,
10 right?

11 A. Yes, sir.

12 Q. Why don't you just tell the Court in your own words
13 -- basically, you're alleging a Doyle (phonetic) violation as
14 it's stated; is that right?

15 A. Yes, sir.

16 Q. Okay. And you're saying that you refused to give a
17 statement and you believe that it was prejudicial in your
18 trial that your failure to give a statement was used against
19 you and shouldn't have been?

20 A. Yes, sir.

21 Q. And -- and why don't you just tell the Court clearly
22 and specifically at what points in the trial that failure to
23 give a statement was used against you to your prejudice?

24 A. Well ---

25 Q. You mentioned the prosecutor's questioning?

1 A. Yeah. The -- the testimony that I just read, which
2 is another argument. Do you want me to -- to stay on this one
3 argument or do you want to go -- do you want me to speak on
4 the fact that it was argued in closing arguments?

5 Q. I want you to tell the Court why you think a *Doyle*
6 violation occurred? Where are the specific points in the
7 trial? You mentioned the prosecutor's questions. And you
8 mentioned the closing arguments.

9 A. Yes.

10 Q. Any other elements?

11 A. Because the -- the fact is that it was my
12 Constitutional Right against self -- and my privilege against
13 self incrimination not to right a statement. That's why it's
14 not a voluntary statement.

15 I feel like that, by him showing the jury that I
16 refused to write a statement, which was basically showing
17 silence, that my attorney should have objected to that.

18 Q. And in your brief you -- you referred to this
19 concept as your post-arrest silence ---

20 A. Yes, sir.

21 Q. --- right? Do you believe that, if your post-arrest
22 silence had not been an issue in the trial, that the outcome
23 of the trial would have been different?

24 A. Yes, sir, because the prosecutor, he related -- he
25 -- he tied my refusal to write a statement to my guilt. His

Kenneth Huckabee - Direct by Mr. Hyde

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1 whole -- his redirect only consisted -- okay, like I just
2 said, at the end of the investigator's testimony, there was
3 only five (5) questions which contained -- which was searching
4 for substantial evidence of guilt. And three (3) of those
5 were on the fact that I refused to write a statement.

6 The last one, at the end of his testimony, that I
7 was guilty and wanted to plea. Then, the prosecutor comes
8 back on redirect and ask only one (1) single question, on Page
9 279, Lines 3 through 4, He said, "Briefly, did Mr. Huckabee
10 tell you he was guilty?"

11 That's the second time when my guilt was brought to
12 the attention of the jury following the fact that I refused to
13 write a statement; that I invoked my Constitutional Right not
14 to incriminate myself.

15 Q. All right. Now let's move to another topic. It's
16 also your contention that the prosecutor commented on evidence
17 that was never presented at trial in his closing arguments; is
18 that correct?

19 A. Yes, sir.

20 Q. Okay. Can you be specific about that allegation?

21 A. Okay. One thing he told the jury during his closing
22 argument that I had no job. And, so, I was perfect -- no
23 income, so, I had a perfect opportunity to rob the victim.

24 There was evidence in trial and I did have a job. I
25 was working at Ryan's.

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1 He also told the jury during closing arguments that
2 -- that I refused to talk to Detective Taylor, which was
3 commenting on my post-arrest silence.

4 He told the jury that Doug Brannon, my attorney,
5 said that, after the truck sped off, once the threat was
6 leaving, if there was a threat, that I continued firing.

7 Okay. That would fly -- that would eliminate the
8 fourth prong of self defense on a fact that -- the retreat
9 issue.

10 If I would have kept firing once the threat was
11 gone, therefore, I didn't attempt to retreat. There's nowhere
12 in the record that Doug Brannon said anything of such.

13 Q. Now you also ---

14 A. And there was no objection.

15 Q. You also have an issue, I think, with the
16 prosecutor's allegation, in the closing argument, that you had
17 to be apprehended by means to trickery?

18 A. Yes, sir, yes, sir. He -- he -- like I said, they
19 -- they called me -- they had him -- he told -- Kareem Hudani
20 told the -- the investigators, the sheriff's office, that once
21 I found out about the charges that I was going to run.

22 That's when he agreed to help catch me.. So, he
23 called and ordered up some crack for me to bring to the BP.
24 When I showed up at the BP, they surrounded my car and
25 arrested me.

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1 There was nowhere in the record and there was
2 nowhere in the trial brought out until the prosecutor told the
3 jury that I was apprehended through trickery.

4 Q. All right. Are there any other bits of information
5 you'd like to tell the Court in connection with your
6 allegation of prosecutorial misconduct?

7 A. Yes, sir. The prosecutor told the jury that --
8 during closing arguments as quotes -- to the -- to the
9 testimony of Investigator Bryant, he argued in closing
10 arguments regarding my -- my *Miranda* he said, as quotes: "I'm
11 not putting anything on paper. And you know why? Because
12 this wasn't his first rodeo. He knows not to put anything on
13 paper.

14 "In his mind, don't write anything down, it can't be
15 used against you later because since 1999 and 2007, he's been
16 in and out of jail. He knows the system. He knows how it
17 works. He refused to talk to Detective Taylor."

18 Transcript Page 398 Lines 14 through 20; Page 403,
19 Lines 14 through 16.

20 Then, three (3) lines down, he once again told the
21 jury, "I shot him and I want to plead guilty. I shot him and
22 I want to plead guilty."

23 So that's the third time that he tied my guilt to my
24 refusal to write a statement and refusal to talk to
25 Investigator Taylor; once on direct, once on redirect, and,

1 then, here again in closing arguments.

2 And he emphasized it twice by the way he said it in
3 closing arguments. So my guilt was stressed to the jury on
4 the fact about my silence.

5 Q. All right. And -- and this silence again goes back
6 to your memorializing allegation. Now are you saying that
7 your *Miranda* rights were violated?

8 A. Yes, sir. It -- *Miranda* says, if -- if I make a
9 statement that it will be used against me. So, therefore, I
10 chose to rely on *Miranda*, but the prosecutor ---

11 Q. When were your *Miranda* rights violated? How were --
12 were you not read your *Miranda* rights at some point and, then,
13 gave some statement?

14 A. I was read my *Miranda* rights. *Miranda* says that, if
15 the defendant -- if the defendant -- it tells me I have the
16 right to remain silent.

17 That's my Constitutional Right. And, if I invoke
18 that right, that right cannot be used against me in trial.

19 Q. Well, when should you have been *Mirandized* when you
20 weren't?

21 A. No, I was *Mirandized* as soon as I got there. But,
22 then, that's when I remained silent. I refused to write a
23 statement and talk to Detective Taylor.

24 Q. All right.

25 A. Counsel never objected me to the fact that the

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1 prosecutor stressed it to the jury that I refused to write a
2 statement, refused to talk to Detective Taylor, and tied it to
3 my guilt.

4 Q. Okay.

5 A. That's -- that's my whole point that he's stressed
6 my guilt.

7 Q. Well, didn't you make an allegation in your papers
8 that you filed where a detention officer asked you a question?

9 A. Oh, yes, sir.

10 Q. Okay. And you weren't Mirandized but, then, you
11 said something that you believed incriminated you?

12 A. Yes, sir, I did.

13 Q. All right. Tell the Court about that.

14 A. Okay. I was -- when I first got arrested, I was
15 housed in booking for like three (3) days. They were finally
16 dressing me out to take me to the back to house me.

17 I was talking to another officer about the fact that
18 I had been housed in booking for three (3) days and hadn't
19 been fed.

20 Officer Green, then, walks into the shower and hears
21 me talking to another officer and asked me, "What -- what did
22 you say?" I said, "I've been up here for three (3) days and
23 you all hadn't fed me." He said, "You shouldn't have shot
24 nobody."

25 And I said, "Yeah, I shot him. They had a gun

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1 shooting at me. I shot him and I'd do it again."

2 I admitted it in trial that that's what I said. I
3 was in custody at the time. The case used -- the -- the
4 prosecution used that in their case in chief.

5 Doug Brannon did prove that he did ask me a
6 question. He did go out and write a statement. He was there
7 testifying about that statement to -- to the jury without no
8 Miranda warning being read to me at all.

9 So I was not Mirandized due to the question and that
10 -- what he said was that I told him that, "Yeah, I shot the
11 motherfucker. The motherfucker had a gun and I'd shoot him
12 again."

13 That's what he said I said. So, yeah, it was
14 prejudicial. It should have never been brought out in the
15 first place because I was never mirandized and the statement
16 was inadmissible.

17 Q. So that was Officer Green?

18 A. Yes, sir. That was Officer Green. Counsel never
19 objected to that either.

20 Q. Okay. Now, there was some GSRs, some gunshot
21 residue tests, that were done in this case; is that right?

22 A. Yes, sir.

23 Q. And was there a gunshot residue test done regarding
24 the truck where Hudani had been in the truck with Kelly
25 Taberney (phonetic) or also she went by Michelle Nunson ---

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1 A. No, sir.

2 Q. --- and, then, Mr. Hudani ---

3 A. What -- what happened there was she fired at me from
4 inside the truck. The GSR experts from SLED from Columbia
5 came to testify during the trial that the truck could have
6 been tested for gunshot residue and that she had received
7 positive results for gunshot residue on testing the interior
8 cloth or anything like that.

9 Doug Brannon brought it out specific, if -- if that
10 could have been done. Officer I think it was Nick testified
11 that Investigator Taylor told him specifically not to test the
12 inside of the truck for gunshot residue.

13 In closing arguments, Doug Brannon -- okay,
14 Detective Taylor was never called to testify. Doug Brannon
15 accused Detective Taylor of not doing his job for the simple
16 fact that he never had the inside of the truck tested for
17 gunshot residue; that he specifically told one of his officers
18 not to test the inside of the truck for gunshot residue.

19 Doug Brannon had a private investigator. Doug
20 Brannon himself could have had the inside of the truck tested
21 for gunshot residue, which would have further proved my
22 defense of self defense on what I was saying since everything
23 else that I said had verified my story.

24 I feel like that had he had the inside of the truck
25 tested for gunshot residue, and a positive result was

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1 produced, that it would have been -- changed the outcome of
2 the trial definitely.

3 Q. And to be clear, the victim was Mr. Gridwell
4 (phonetic)?

5 A. Yes.

6 Q. Okay. And -- and your view is that he and Michelle
7 Nunson or Kelly Taberney, they were sitting together and that
8 she pulled a gun and pointed the gun at you. And, then, you
9 reacted in self defense. That's basically your position,
10 right?

11 A. Yes, sir.

12 Q. From -- from the ground that's ---

13 Q. And you -- you -- you think that the trial team you
14 had shouldn't have called Detective Taylor to the stand to
15 cross examine him or -- or question him ---

16 A. Yes, sir.

17 Q. --- and ask him why didn't he do a GSR test on the
18 truck?

19 A. Exactly. Why -- why did you tell your officers
20 specifically not to test the inside of the truck for gunshot
21 residue when I told you that the female driving the truck
22 fired a weapon at me from the inside of the truck.

23 Q. And you're saying not only was it not enough that,
24 that officer wasn't called by your trial team, but you're also
25 saying that your trial team should have affirmatively called

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1 your own private investigator, Pete Heist (phonetic),
2 should've had him do a GSR test on the truck. And they should
3 have -- and you all should have done your own testing of the
4 truck for GSR? Is that what you're telling the Court?

5 A. Yes, sir, because, if he knew that the investigator
6 didn't do his job on testing the truck for gunshot residue,
7 then, why didn't he do the job himself if he knew that would
8 prove my defense.

9 Q. Okay. Now we've gone through the different
10 violations you're alleging, constitutional or otherwise.
11 You've also alleged that your statement was not voluntary,
12 that it was coerced under *Jackson v. Denno*; is that right?

13 A. No. He -- we did a *Jackson v. Denno* hearing to see
14 if my statement was voluntary.

15 Q. Well, I understand that -- but there was a *Jackson*
16 *v. Denno* hearing?

17 A. Yes, sir.

18 Q. Okay. But I think your question about the *Jackson*
19 *v. Denno* issue, you think that your trial team should have
20 objected in the trial as to the *Jackson v. Denno* in addition
21 to requesting a *Jackson v. Denno* hearing; is that right?

22 A. He didn't object to the *Jackson v. Denno* hearing as
23 to was my statement voluntary. I feel like my trial
24 counselor, instead of doing *Jackson versus Denno* on Officer
25 Green's -- what I said to Officer Green, instead of doing

1 Jackson vs. Denno, he should have objected to the testimony as
2 inadmissible evidence since there was a *Miranda* violation
3 since I was never Mirandized. And the officer questioned me
4 on -- on the fact of what I said. And ---

5 THE COURT: And that's on the second point where
6 you're in the detention center and you're complaining
7 about not having eaten for three (3) days?

8 A. Yes, sir.

9 THE COURT: All right.

10 A. Yes, sir.

11 THE COURT: But that's only as to that statement
12 that you're saying that there was a violation of *Miranda*,
13 correct?

14 A. Yes, sir.

15 THE COURT: All right. The other statement that
16 you gave previously to the investigator, you were
17 Mirandized?

18 A. Yes, sir. I was Mirandized ---

19 THE COURT: Okay.

20 A. --- from the very beginning, yes, sir.

21 THE COURT: All right. That was ---

22 A. On the -- on the Officer Green, I -- I base that on
23 *Harriman vs. The State*, which is 626, Federal 2387 (phonetic)

24 THE COURT: Sorry to interrupt, Mr. Hyde. Please
25 continue.

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1 MR. HYDE: Thank you, Your Honor.

2 Q. (By Mr. Hyde) Now you know today is your one shot
3 with -- with PCR?

4 A. Yes, sir.

5 Q. So we're trying to go through everything you've ever
6 thought of, written down, or filed, right?

7 A. Ah...

8 Q. Now are there any other issues ---

9 A. Yes, sir.

10 Q. --- that you ever may want to bring to the Court's
11 attention about this case?

12 A. Yes, sir. Counsel was ineffective for opening the
13 door for the State to speak on evidence not in the record by
14 himself, speaking on evidence not in the record first.

15 By counsel speaking of evidence not on the record
16 first, he opened the door for the prosecutor to speak on the
17 fact that I had no income when the record showed that I did
18 have income;

19 That I was apprehended through trickery, which is
20 nowhere in the record, and on the fact that my counsel said
21 that I continued to fire once the truck -- once the threat, if
22 there was a threat, sped off that I continued to fire.

23 So counsel never objected to closing arguments.
24 Counsel never objected to the -- him speaking on evidence not
25 in the record; never by -- he never objected to when the

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1 prosecutor violated my Constitutional Rights due to closing
2 arguments about my refusal to write a statement and post-
3 arrest silence and refusing to speak to Detective Taylor.

4 And on the fact that he tied it to my guilt. That's
5 what I'm stressing about that because I believe it created an
6 inference of guilt in the minds of the jury.

7 Also, on the fact of the arm robbery charge during
8 the malice charge, the -- the judge instructed the jury on the
9 date -- or instructed that armed robbery is classified as a
10 felony in the State of South Carolina during his malice
11 charge.

12 I was not charged with armed robbery in this case.
13 And I feel like that, by the Judge instructing the jury on
14 armed robbery, I believe that basically he was vouching for
15 the State's theory that I went down there with the intention
16 to rob the victim; because that was the State's theory, that I
17 went to -- to rob the victim. And my theory -- theory was
18 that they attempted to rob me.

19 Q. So, you've alleged numerous defects in the trial,
20 right?

21 A. Yes.

22 Q. And is it your position that but for these defects
23 you would have had a different outcome of the trial?

24 A. Yes, sir.

25 Q. Is there anything else you'd like to tell the Court

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1 today?

2 A. Well, it's -- it's -- there -- there were two (2)
3 questions as to -- as relates to self defense. It's -- it's
4 proven that the jury did at least consider the self defense
5 theory by the questions they asked during deliberations.

6 The first one was to explain without fault in
7 bringing on the difficulty as it relates to self defense. And
8 the second one was also as to the fact that they questioned
9 about fault as it related to self defense.

10 They also asked was selling crack in South Carolina
11 a felony. So, when the judge instructed the jury that armed
12 robbery is classified as a felony in the State of South
13 Carolina, that could have portrayed -- persuaded the jury's
14 mind to think that, that would put me at fault in bringing on
15 the difficulty, which would eliminate me from the first prong
16 of self defense.

17 MR. HYDE: Thank you. Please answer any questions
18 of the attorney general.

19 MR. HUCKABEE: All right.

20 THE COURT: Ms. White?

21 MS. WHITE: Thank you.

22 CROSS EXAMINATION by MS. WHITE:

23 Q. Mr. Huckabee, you started off with talking about
24 your statements a lot and your right to remain silent. You
25 testified that you were Mirandized when you were arrested; is

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1 that right?

2 A. Yes, ma'am.

3 Q. Okay. And you gave a voluntary verbal statement to
4 police; is that right?

5 A. Yes, yes, ma'am.

6 Q. Okay. So you spoke with police verbally about the
7 incident and told them your side of the story that night?

8 A. Exactly.

9 Q. Okay. But -- and you acknowledged that you were
10 told your rights and you didn't ask for an attorney at that
11 time?

12 A. Yes, yes, ma'am.

13 Q. Okay. And the thing that you refused to do was
14 actually write it down; is that right?

15 A. Yes, ma'am.

16 Q. Okay. And, so, your contention here is that ---

17 A. At that point, I just quit talking. That's why he
18 got mad and left. I refused to write a statement. I remained
19 silent.

20 I'm not arguing the fact that he did say that I did
21 make a verbal statement. I'm not arguing the fact that what
22 he said that I said. I'm arguing the fact that why did he
23 bring to the jury's attention the fact that I refused to write
24 a statement.

25 Q. Okay.

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1 A. What was the point of that?

2 Q. So you -- but you do acknowledge that you did give
3 the verbal statement first? You told them what happened and,
4 then, they were able to present that, once you gave a verbal
5 statement, you refused to write it down and stopped at that
6 point?

7 A. Well, when I first came in I told them, I said,
8 "Look, I'm going to tell you like this, this is what happened,
9 boom, boom, boom. I'm not writing anything down. I'm not
10 answering any more questions."

11 And at that point he got mad, he stormed out, and
12 the other officer stayed in there with me and tried to get me
13 to write a statement. Continued to beg me to try to write a
14 statement and talk to him.

15 At that point, when I said I wasn't going to write a
16 statement I was through talking, take me jail, that's when he
17 ended the interview.

18 Q. Okay. The statement that you made, while you were
19 actually in the detention center, I guess, at that point, that
20 was not in response to a question other than, "What are you
21 talking about?"

22 The -- the officer didn't ask you, "Did you do it?
23 Did you shoot this victim? Did you do anything?" You just
24 made the outright statement when you started talking about you
25 hadn't had any feed in a couple of days; wasn't that right?

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1 A. Nah, I made my statement. He come and asked me a
2 question to the answer of my question. He said, "You
3 shouldn't have shot nobody." He knowed the family of the
4 victim. He has seen the -- the family of the victim that day.
5 She used to work at the detention center. So ---

6 Q. But my question is did you ---

7 A. --- my response was from his question. It was
8 caused -- his question caused a response which he came in and
9 wrote the statement and came and -- and testified it to the
10 jury.

11 Q. Right. But his question, he didn't ask you a
12 question about the event. He said, "What are you talking
13 about," right? And, then, he made a statement that you
14 responded to; is that correct?

15 A. Yes, ma'am.

16 Q. Okay. And your attorney, including your statements
17 to police at first when you were arrested, he also questioned
18 that officer about the bond hearing as to that statement as to
19 whether or not that can be introduced at trial, didn't he,
20 during your *Jackson v. Denno* hearing?

21 A. Yes, ma'am.

22 Q. Okay. In fact, there were three (3) different
23 officers that were questioned that had talked to you that
24 evening or while you were arrested that you had given
25 statements to?

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1 A. Yeah, as to the voluntariness of what I said. Like
2 I said, I'm not -- I'm not arguing nothing about what was
3 said; I'm arguing the fact that, okay, in *Harriman* the
4 question, "What is this" was asked by the arresting officer
5 out of shock and surprise at finding a condom containing a
6 white powder substance that was in the waistband of his
7 trousers (phonetic).

8 "The Defendant's rights were violated when the
9 officer asked the Defendant a question and the Defendant made
10 a direct response. The Defendant was in custody at the time
11 and had not yet received recitation of *Miranda* rights.

12 "Prosecution used the response at trial as part of
13 his case in chief. It's uncontested that the police asked
14 *Harriman* a question that made a direct response; that *Harriman*
15 was in custody at the time and had not yet received recitation
16 of his rights."

17 Q. Okay.

18 A. "The basis of the State's contention is that *Miranda*
19 wasn't violated and has claimed that *Harriman* was not subject
20 to the kind of police questioning that the Supreme Court and
21 *Miranda* sought to control.

22 "It argues that the question asked *Harriman* was not
23 an attempt to elicit an answer of any sort, much less of a
24 crime, but was rather an exclamation of surprise," the same as
25 Officer Green testified in my case.

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1 "This argument misunderstands *Miranda*. In *Miranda*
2 the Court found the totality of the circumstances and approach
3 inadequate, recognizing that in-custody questioning was
4 inherently coercive tendencies. The Court adopted in its
5 place a set of procedural rules.

6 "It held that until these rules have been followed
7 and the accused has been adequately informed and waived his
8 rights, he may not be questioned. If he is questioned, any
9 statements he makes in response to the prosecutor -- to the --
10 cannot be presented by the prosecutor as part of his proof in
11 trial.

12 "When a law enforcement officer asks a question of
13 an accused, without the benefit of *Miranda* safeguards, an
14 answer of the totality of the circumstances is irrelevant.
15 The accused's answer is simply inadmissible at trial as part
16 of the production -- as part of the prosecution State's case
17 in chief.

18 "The State suggested that we're abandoned
19 *Miranda's* rigid inherence and temper it's prohibition and all
20 offers of safeguards of free expression must be declined."
21 (Phonetic). It's not for us to redefine it."

22 Q. Mr. Huckabee, I'm going to stop you right there
23 because I don't need you to read another case -- case law out
24 to us. I'm going to ask you some questions.

25 A. Okay.

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1 Q. And I need for you to respond to my questions.

2 A. All right.

3 Q. Did the judge -- during the *Jackson v. Denno*, he
4 ruled that, that statement was a spontaneous statement that
5 you made, not in response to any questioning or interrogation
6 by Mr. Green; is that right?

7 A. Yes, ma'am.

8 Q. Okay. And, therefore, he was going to allow that
9 spontaneous question to be used at trial?

10 A. Yes, ma'am.

11 Q. Okay. Now you testified that the prosecutor told
12 the jury facts not in evidence that -- that you didn't have a
13 job and no income. You testified at trial, didn't you?

14 A. Yes, ma'am.

15 Q. Okay. And isn't it true that you actually testified
16 that you had a job at fast food or Ryan's but no job, nothing
17 you could do nothing with, that you were really struggling?

18 A. Yeah, yes, ma'am, that I was -- but I was working
19 but I was selling drugs on the side. Yes, I admit that.

20 Q. Okay. So ---

21 A. But I did have a job.

22 Q. --- when he said you really didn't have a job and
23 you didn't have much money ---

24 A. No, I never said I didn't have no job.

25 Q. Okay.

1 A. I had -- I had -- I had a job. I quit that job,
2 started a job, and I was also going to school at Spartanburg
3 Technical College taking computer technology.

4 Q. Okay.

5 A. So, I did have a job. But he said, by me not having
6 a job and no income, I saw a perfect opportunity to rob the
7 victim. There's nowhere in the record that I didn't have a
8 job.

9 Q. Okay. So, when he said after you got out of prison
10 what kind of jobs you were able to get and you said not ❖-
11 ❖Fast food jobs, Ryan's, not really nothing I could do nothing
12 with; I was really struggling when I got out of prison...❖

13 A. Yes, ma'am. But ---

14 Q. Okay.

15 A. --- still I had a job.

16 Q. Okay. And he says, "As a result of the lack of
17 earning capacity, you started selling dope, right?"

18 A. Yes, ma'am.

19 Q. And that's ---

20 A. I wasn't making but seven dollars (\$7.00) an hour.

21 Q. All right.

22 A. But that's a job.

23 Q. All right. Now you also testified that your
24 attorney brought it out at trial that the State didn't do
25 gunshot residue testing on the truck; is that right?

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1 A. Yes, ma'am.

2 Q. All right. And -- and your attorney was able to
3 bring it out that they had done gunshot testing -- gunshot
4 residue testing on the other victim, Ms. Nunson. And they
5 found some lead particles, but it could have been rubbed off
6 on the blanket or something like that; is that right?

7 A. Yes, ma'am.

8 Q. But he was able to actually, in closing arguments,
9 argue that -- that Sergeant Taylor didn't do a good job and
10 had failed to do his job because he didn't do that; is that
11 right?

12 A. He argued that Detective Taylor specifically told an
13 officer not to test inside the truck for gunshot residue.

14 Q. So, he -- he was trying to accuse Detective Taylor
15 of not doing a -- a good job on the investigation; is that ---

16 A. Yes, ma'am.

17 Q. --- right? Okay. And so ---

18 A. But ---

19 Q. --- he was trying ---

20 A. Yeah, that's not -- that's not -- that's not what I
21 was saying. What I'm saying is, if he knew that this man
22 didn't do a good job that this could have been in my favor
23 that this would prove my story, would have proved my
24 innocence, that -- that a gun -- a gun was fired.

25 And the State tried to say that she never fired a

1 weapon; however, what I'm saying is, if -- if he accuses this
2 man of not testing the inside of the truck for gunshot residue
3 and not doing his job, and he had a private investigator, he
4 should have had his private investigator himself testing the
5 inside of the truck for gunshot residue.

6 And if it had produced a positive result, as the
7 SLED agent testified that it could have, then, that would
8 verified -- that would have went against the State's theory
9 that she didn't fire a weapon.

10 Q. Was there a gun found with -- with the victim, with
11 either of the victims ----

12 A. They didn't ---

13 Q. --- that evening?

14 A. There wasn't no gun found period in the whole case;
15 my gun, their gun, nothing. But the -- the lady from SLED
16 testified that she had a controlled situation, had someone
17 fire a weapon and tested negative for gunshot residue. And
18 that had the -- the -- the lady Michelle Nunson, she testified
19 that had the lady Michelle Nunson somehow wiped -- had the
20 gunshot residue been wiped away somehow by the blanket or the
21 blood or anything like that, that she -- the quantities that
22 they received on her hand would have been what they would have
23 found had the gunshot residue been removed in a way -- in some
24 type of way.

25 And -- and the testimony from the officer was that,

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1 when he arrived at the scene, she was holding a blanket and
2 switching hands as her arms got tired to the wound of the
3 victim.

4 Q. Okay.

5 A. And that all you could see was that there was a lot
6 of blood. Well the lady testified that the blood, if blood
7 gets on the gunshot residue, that the gunshot residue probably
8 would be -- would be -- would be removed.

9 Q. Okay. And your attorney was able to bring that out
10 to the jury, right ---

11 A. Yeah, he brought it out.

12 Q. --- through testimony?

13 A. He brought it out to the jury. And he -- and -- and
14 I'm not saying that he -- he was wrong in bringing that out to
15 the jury. I'm saying that had he had the inside of the truck
16 tested for gunshot residue or had his private investigator do
17 it, that would have verified my defense.

18 Q. Okay.

19 A. That would have proved that the weapon was fired
20 from inside the truck and would've went against the State's
21 theory that a weapon was not fired from inside the truck.

22 Q. Now your attorney argued and requested that the
23 judge charge the jury with the charges for voluntary
24 manslaughter, involuntary manslaughter, self-defense, and
25 requiring the State to -- to disprove that and criminal

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1 negligence. The State objected to several of those and
2 offered support for that, but the jury -- the jury actually
3 heard the charges for voluntary manslaughter, assault of a
4 high and aggravated nature, and self-defense, and the State's
5 burden to disprove, didn't they?

6 A. Yes, ma'am, but ---

7 Q. So ---

8 A. It was murder, voluntary manslaughter, assault with
9 intent to kill, and assault of a high and aggravated nature,
10 and yes, ma'am ---

11 Q. And, then, the self-defense charge?

12 A. Self-defense and the -- the -- it was on them to
13 disprove self defense.

14 Q. Okay.

15 A. Yes, ma'am.

16 Q. So the jury heard all the evidence and, then, had
17 those options in which to decide. And they actually found you
18 guilty not of -- of the original murder and assault with
19 intent to kill, but guilty of the lesser charges, the
20 voluntary manslaughter and assault of an high and aggravated
21 nature; is that right?

22 A. Yes, ma'am.

23 MS. WHITE: Your Honor, I think that's all the
24 questions I have of this witness.

25 THE COURT: All right. Very good. Anything else

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1 on redirect?

2 MR. HYDE: Just one other question ---

3 THE COURT: Yes, sir.

4 MR. HYDE: --- Your Honor.

5 REDIRECT EXAMINATION by MR. HYDE:

6 Q. Did you ever indicate to anybody at any time that
7 you wanted to plead guilty?

8 A. No, sir.

9 Q. Was there any inference that, that had been done in
10 the trial?

11 A. Yes, sir. The -- Investigator Bryant testified that
12 I told him I was guilty at the sheriff's office and that I
13 wanted to plead. I never said that.

14 I testified in trial that I was not guilty and that
15 I did -- that I did not say that I was guilty and wanted to
16 plead.

17 Like I said my guilt was stressed to the jury pretty
18 heavily once in direct, once in redirect. The whole redirect
19 consisted of one question which was about my guilt.

20 And, then again, it was emphasized twice in closing
21 arguments of the prosecutor following directly on the fact
22 that I remained silent; that I refused to talk to Detective
23 Taylor and that I refused to write a statement invoking my
24 Fifth Amendment Constitutional Right.

25 Q. So do you believe it was prosec -- prosecutorial

1 misconduct, as well as ineffective of assistance of counsel,
2 as to -- regarding this issue of you having to want to plead
3 guilty but in fact you hadn't wanted to do that? And you
4 think the fact that, that came out hurt you and led to your
5 verdict?

6 A. Yes, sir, I do because like *The United States versus*
7 *Lockhart* (phonetic) says, the reason for testimony admitted
8 like that is to create a inference of guilt in the mind of the
9 jury.

10 And I feel like that, by my guilt being stressed to
11 the jury by -- by me remaining silent that, that created an
12 inference of guilt in the mind of the jury.

13 Now, at the trial, Doug Brannon called my family to
14 his office and said that a jury member contacted either him or
15 Trey Gowdy and that the jury member said that they thought
16 that I reacted in self-defense, but that, that they did not
17 want to let me walk scot free because I was a drug dealer.

18 They seen that I got thirty (30) years in the paper
19 the next day and said that -- that -- Doug Brannon said that
20 he told her, "Well you can't convict him of drug crime because
21 he wasn't on trial for drugs." And she said that she knew and
22 that's why she was there about that.

23 And she was very disturbed at the time that I got,
24 that they wanted to teach me a lesson but they didn't want me
25 to get that much time.

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1 I -- I wrote Doug Brannon to try to get him to get
2 the affidavit or send me the affidavit. My Appellant
3 attorney, Lynette Grant (phonetic) from Columbia, also called
4 and spoke with Doug. She said that, that he told her he was
5 going to send her the affidavit ---

6 MS. WHITE: Your Honor, I would object. That's
7 hearsay.

8 THE COURT: Do you claimed exceptions?

9 MR. HYDE: No, Your Honor.

10 THE COURT: All right. Please continue, sir.

11 Q. (By Mr. Hyde) Anything else?

12 A. That's it.

13 MR. HYDE: Thank you.

14 THE COURT: Thank you, Mr. Huckabee. You can step
15 down, sir.

16 (The witness complied with the request.)

17 MR. HYDE: Your Honor, we'd call Abel Gray.

18 THE COURT: All right.

19 (The witness stepped forward to be sworn.)

20 (Whereupon,

21 ABEL GRAY, ESQUIRE

22 having been duly sworn, testified as follows:)

23 THE COURT: Please, have a seat.

24 (The witness complied with the request.)

25 THE COURT: Mr. Hyde?

1 DIRECT EXAMINATION by MR. HYDE:

2 Q. Mr. Gray, give your full name to the Court, please?

3 A. Abel Orlando Gray.

4 Q. And you're a prosecutor with the Seventh Circuit
5 Solicitor's Office?

6 A. Yes, sir.

7 Q. Were you the lead prosecutor in this case?

8 A. Yes, sir.

9 Q. You've been present in the courtroom today during
10 the hearing so far?

11 A. Yes, sir.

12 Q. So you've heard some of the allegations that Mr.
13 Huckabee has made?

14 A. Yes, sir.

15 Q. And you understand that he's alleged prosecutorial
16 misconduct this case?

17 A. Yes, sir.

18 Q. Now it's been indicated during the testimony today
19 that Mr. Huckabee made some verbal comments, a verbal
20 statement, but that he refused to give a written statement; is
21 that correct?

22 A. Yes, sir.

23 Q. Is it true that you brought to the jury's attention
24 in the trial that Mr. Huckabee refused to give a written
25 statement?

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1 A. I believe I did after -- let the jury know that he
2 gave a statement, a detail verbal statement after he'd been
3 Mirandized.

4 Q. But did you communicate during the trial in the
5 presence of the jury that Mr. Huckabee had refused to give a
6 written statement?

7 A. I don't know about refused. I may have said
8 something like he had given one, that he had given a verbal
9 statement to detectives after being Mirandized. He had signed
10 a waiver form acknowledging his *Miranda* rights.

11 Q. Is it fair to say that there was a dispute between
12 the two sides in the trial about what happened at the
13 incident?

14 A. Yes, sir.

15 Q. And -- and basically it came down to credibility of
16 verbal statements of Mr. Huckabee versus those who sided with
17 the prosecution; is that right?

18 A. No, sir.

19 Q. All right. Can you tell us why you don't believe
20 that to be true?

21 A. Because of the evidence at the crime scene, the
22 evidence in the truck. And Mr. Huckabee, once he got on the
23 stand and testified, showed how he shot at the vehicle to
24 confirm some of the dowel rods in -- in the truck.

25 There were no shell casings in the vehicle. There

1 were no bullet holes or shattered glass that would indicate
2 that Ms. Taberney or Ms. Nunson had fired at him or in his
3 direction whatsoever.

4 He even came down off the witness stand and showed
5 how his shots almost exactly matched the direction of the
6 dowel rods and the injury sustained by the victim in this
7 case.

8 Q. One issue that's been brought to the Court's
9 attention by Mr. Huckabee is his problem that, because he
10 refused to talk to Detective Taylor, he thinks that was a --
11 an issue that worked against him at the trial. Now did you
12 call Detective Taylor as a trial witness?

13 A. I don't remember. I don't think I did.

14 Q. Was there a reason you didn't call him?

15 A. He talked to Detective Boan -- I believe it was
16 Boan. And he -- he gave him the statement.

17 I wanted the statement from the defendant to that
18 detective. I don't believe the other detective collected any
19 evidence in this case. He wasn't a chain witness if I
20 remember correctly. So there was no need.

21 Q. Now it's Mr. Huckabee's contention that Ms. Tabenay
22 or Nunson fired -- first of all had a chrome revolver and
23 second, fired upon Mr. Huckabee first; is that correct?

24 A. Yes, sir.

25 Q. Okay. And I believe it's also Mr. Huckabee's

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1 contention that any firing of a gun by Ms. Tabernay was done
2 from the truck?

3 A. Yes, sir.

4 Q. And this was a -- a Chevy truck that -- that had the
5 suicide doors?

6 A. Yes, sir. It was a an extended cab. It was a
7 pretty big truck, yes, sir.

8 Q. I guess like an old Lincoln or something like that?

9 A. Correct. It was, like I said, an extended cab ---

10 Q. Okay.

11 A. --- not like full four (4) doors but an extended
12 cab.

13 Q. Right. And there was no GSR test done, though,
14 about the interior of the truck?

15 A. No.

16 Q. And why was that?

17 A. I wasn't the detective. I do not know.

18 Q. Okay. (Coughs) Excuse me. Was it part of your case
19 to attack Mr. Huckabee's credibility by pointing out to the
20 jury his -- Mr. Huckabee's post-arrest silence and his -- and
21 his failure to give a written statement?

22 A. No. I believe we had the hearing on prior criminal
23 record and other things, not just his silence. More so his
24 statement, what he actually said, not what he didn't say.

25 And what he actually did and the fact that it was

1 virtually impossible for Ms. Nunson to fire out of the truck
2 and not cause any damage to the truck or in my mind any damage
3 to the victim in this case.

4 The only injuries came from the firing of Mr.
5 Huckabee's weapon. The only damage to the truck was from Mr.
6 Huckabee's weapon.

7 Q. Well, let me give you one example perhaps. In your
8 closing argument -- and this is Page 398, Lines 14 through 20;
9 Mr. Huckabee has already read part of this.

10 According to the record you said, "I'm not putting
11 anything on paper" -- excuse me -- and this -- this is your
12 questioning of Investigator Bryant, "I'm not putting anything
13 on paper and you know why because wasn't his first run in. He
14 knows not to put anything on paper. In his mind, don't write
15 anything down it can't be used against you because since 1999
16 and 2007 he's been in and out of jail; he knows the system.
17 He knows how it works. He refused to talk to detective
18 Taylor."

19 A. Was that my question or Detective Bryant's
20 statement?

21 THE COURT: That was actually during the closing.

22 I've read the transcript.

23 MR. HYDE: Okay. Thank you. I think I first said
24 that.

25 THE COURT: Right. You were right the first time.

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1 That's during Mr. Gray's closing.

2 Q. (By Mr. Hyde) All right. So apparently you said in
3 your closing he refused -- Mr. Huckabee refused to talk to
4 Detective Taylor, right?

5 A. But he did talk to Detective Boan.

6 Q. What was his last name?

7 A. Detective ---

8 THE COURT: Bryant.

9 A. Bryant, I'm sorry. I -- I apologize. That's his
10 nickname, Boan. Detective Jason Bryant, yes:

11 (Off-the-Record Discussion)

12 Q. Mr. Huckabee when asked -- if he made verbal
13 statements but didn't make a written statement, why would you
14 feel it necessary to bring to the jury's attention that he
15 didn't give a written statement?

16 A. Because I wanted the jury to know exactly what type
17 of statement he gave; that it was verbal statement and not a
18 written statement for clarity sake, so, the jury wouldn't be
19 confused when they went to deliberations; where's the written
20 statement?

21 Q. Now was there any testimony that Mr. Huckabee wanted
22 to plead guilty?

23 A. I believe he told that to a detective and the
24 detective may have said that.

25 Q. To your knowledge was it true that he had -- that

1 Mr. Huckabee had said that at some point?

2 A. I took detective Bryant's word at face value that,
3 that's what the defendant said. I wasn't present during
4 questioning.

5 Q. In your opinion -- of course you were the prosecutor
6 and not the jury. In your opinion, what were the reasons for
7 the guilt? Or what -- what were the persuasive elements in
8 your case?

9 A. From my side, I don't know that general statement
10 was it. His statement about Ms. Taberney or Nunson having a
11 weapon there, not being any internal damage from her direction
12 in the vehicle whatsoever.

13 She never carried a purse as he stated. She almost
14 certainly would have had to injure the defendant by shooting
15 at the defendant ---

16 THE COURT: You mean the victim.

17 A. Oh, excuse me, injured the victim by shooting at the
18 defendant because based on what -- what he -- he showed the
19 jury, the angle -- the angle when he shot back at the -- shot
20 at the vehicle.

21 I don't know how she could have shot at him and not
22 shot the victim. Everything he said about the shooting, his
23 participation, matched up with the non-testimonial evidence.

24 Q. Mr. Gray, you've heard Mr. Huckabee talk about today
25 why he thinks a Doyle violation occurred; is that right?

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1 A. Yes, sir.

2 Q. In your opinion, was there a *Doyle* violation in this
3 case?

4 A. No, sir.

5 Q. And why do you have that opinion?

6 A. I -- I don't believe -- there hasn't been anything
7 suggested anything about -- I didn't suggest anything or say
8 anything or do anything that suggested a violation of any of
9 Mr. Huckabee's rights.

10 Q. The last line of question deals with what was in the
11 record and what was argued in closing. You heard Mr. Huckabee
12 state in his testimony today that he believed you argued at
13 closing some things that weren't in the record.

14 Specifically he talked about that you said he didn't
15 have a job in closing argument where there hadn't been any
16 testimony in evidence that has been examined here today.
17 What's your position on that issue?

18 A. If he I say that and that was used. I didn't know
19 if he had a job or not. That was my belief. There's a clear
20 instruction from the judge that nothing the attorneys say in
21 closing is evidence.

22 Q. And I believe you did say in closing that he had to
23 be apprehended by trickery?

24 A. Yes, sir.

25 Q. Do you believe there was a basis for that statement

1 in evidence on record?

2 A. I can't remember. I do not -- yes, that's how he
3 was apprehended. Mr. Hudani, Kareem Hudani, did talk to
4 officers, calls him, the defendant, and set up a meeting.
5 That's how he was apprehended.

6 Q. Lastly, on Page 403 of the trial transcript, Lines 4
7 through 6, apparently you -- you told the jury, according to
8 Mr. Brannon, he fell down and continued to fire once the truck
9 sped off. Once the threat -- if there was a threat, once the
10 threat was leaving, that he kept firing.

11 Do you believe that there's any place in the record
12 or the evidence in the trial where Mr. Brannon ever said such
13 a thing?

14 A. In closing.

15 Q. Well you said that in closing, right?

16 A. Yes.

17 Q. Okay.

18 A. I got last argument in this case.

19 Q. Right. Had Mr. Brannon ever said that?

20 A. I believe he did.

21 Q. Can you pinpoint ---

22 A. No, I cannot.

23 (Brief Pause)

24 Q. Would you agree that Mr. Huckabee had a right not to
25 write a statement?

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1 A. Yes.

2 Q. Would you agree that he has a right not to
3 incriminate himself?

4 A. Yes, but he did.

5 MR. HYDE: Please answer any questions from the
6 attorney general.

7 THE COURT: Ms. White?

8 MS. WHITE: Thank you.

9 CROSS EXAMINATION by MS. WHITE:

10 Q. Just briefly, Mr. Gray. Obviously, in your
11 understanding of the right to self incrimination, when -- does
12 someone incriminate themselves when they give either a verbal
13 or a written statement?

14 A. Yes.

15 Q. So, in this case, the victim -- Mr. Huckabee had
16 already given statements and incriminated himself by giving
17 the verbal statement; is that right?

18 A. Yes, ma'am.

19 Q. Okay. And whether or not he wrote it down, in your
20 mind, is that a vital part or anything that -- that affected
21 whether or not those statements were going to be used at trial
22 or whether that he had exercised his right to remain silent?

23 A. What was most vital to me is that he had -- he
24 signed a written waive -- waiver of his rights and, then, gave
25 a verbal statement.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 Q. So in your mind he was very aware that he was making
2 a statement outside after being Mirandized with no attorney
3 and not I guess utilizing his right to remain silent, but
4 giving a statement?

5 A. Yes, ma'am.

6 Q. Okay. In regards to the issue of closing and the
7 different statements that were made at closing, and in your
8 role of making a closing argument, generally from the State's
9 perspective, what is your role? What do you see your role in
10 -- in establishing in closing?

11 A. I try to establish all of the elements of the crime
12 that the defendant is indicted for, is on trial for, and what
13 he could potentially can be found guilty of.

14 Also in this case also I had the burden of
15 disproving self-defense.

16 Q. And do you think generally, just as kind of an
17 aside, do you prepare closing in advance or do you have to
18 wait and see what evidence is presented at trial and what's
19 said on the stand before you can really know what you're going
20 to be able to offer in closing?

21 A. A little bit of both. Mostly, if -- you -- you hope
22 for the best you're hundred percent (100%) full proof at your
23 closing in the beginning.

24 You listen to the evidence. You change it to the
25 evidence. I also -- I -- I listen to the closing, if I have

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1 last argument, of the defense in the case and I tailor my
2 argument to that also.

3 Plus I listen. We usually have a pre-closing
4 conference with the judge to find out what kind of charges
5 he's going to make and try to tailor my closing argument to
6 that also.

7 Q. Okay. And, in regards to the investigation of the
8 case, once you take over, in regards to the prosecution, in
9 general is most of the investigation completed already?

10 A. Yes, ma'am.

11 Q. So, any kind of testing you get the results, but
12 you're not in charge a lot of times of what testing has been
13 done; is that correct?

14 A. That's correct.

15 Q. Okay.

16 (Brief Pause)

17 MS. WHITE: And, Your Honor, I think that's all the
18 questions I have for this witness.

19 THE COURT: Mr. Hyde, anything on redirect?

20 REDIRECT EXAMINATION by MR. HYDE:

21 Q. Mr. Gray, can you cite in the record what the
22 evidence was for Mr. Huckabee's apparent refusal to talk to
23 Detective Taylor?

24 A. No, I cannot.

25 Q. Is it your memory that there was evidence to that

1 effect?

2 A. There may be. I -- I do know officer -- Detective
3 Bryant at length.

4 Q. You don't remember any specific testimony to that
5 effect?

6 A. No, sir.

7 MR. HYDE: All right. Thank you.

8 MS. WHITE: Nothing further, Your Honor.

9 THE COURT: Thank you, sir. You can step down.

10 MR. HYDE: That's our case, Your Honor.

11 THE COURT: All right. Very good.

12 (The witness complied with the request.)

13 THE COURT: Let's take a brief five (5) minute
14 break. We'll be right back. We're off the record.

15 (Whereupon, a brief recess was taken.)

16 THE COURT: Ms. White?

17 MS. WHITE: Your Honor, we'd call Doug Brannon.

18 THE COURT: Come forward, sir, and be sworn.

19 (The witness stepped forward to be sworn.)

20 (Whereupon,

21 DOUGLAS BRANNON

22 having been duly sworn, testified as follows:)

23 THE COURT: Ms. White?

24 MS. WHITE: Thank you, Your Honor.

25 DIRECT EXAMINATION by MS. WHITE:

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

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1 Q. Mr. Brannon, if you could, just give us an idea of
2 how you became involved with this case initially.

3 A. I got a phone call from one of Mr. Huckabee's family
4 members. I think it was his stepmother that called me
5 initially. And I was retained at some point thereafter.

6 Q. Okay. And do you recall how long you were retained
7 in advance, just kind of a ball park figure, before the trial?

8 A. It was -- it was quite a while for the trial. I
9 mean, it -- it -- I'm not sure if it was a full year, but it
10 was quite a while before the trial.

11 Q. Okay. Just an initial question: He's talked a
12 little bit about the fact that he never wanted to plead
13 guilty, that was never an issue. Was that ever something you
14 had discussed with him ---

15 A. No.

16 Q. --- in regards to resolving this?

17 A. Well, I'm -- I'm certain there was a conversation
18 about -- about the possibility of a plea but no, Kenneth, he
19 never wanted -- he never wanted to plead guilty and I'm pretty
20 sure that I told him, "Look, people don't hire me to plead
21 guilty. They hire me to try cases." So, I mean, it was never
22 -- our relationship was never about a guilty plea.

23 Q. So, as far as you knew, you were always going to
24 take this to trial and -- and try to -- try to win at trial,
25 obviously, not -- you were not hired to negotiate a guilty

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 plea?

2 A. No, but now we -- we knew about what that officer
3 was going to say because he had put it in an incident report.
4 So we knew that, that officer was going to say that Kenneth
5 allegedly said he wanted to plead guilty.

6 Q. Okay. And did he deny that in -- in your
7 conversations with him? Do you recall if he acknowledged if
8 he had said that at some point or...?

9 A. I'm assuming that in some conversation he denied
10 that because, again, there -- there may have been a general
11 conversation about a guilty plea, but he was never aiming
12 towards a plea.

13 So, I'm assuming that -- that he did deny that.

14 Q. Obviously, you had a *Jackson v. Denno* hearing. In
15 regards to the statements, were there ever any discussion
16 ahead of time that he did not feel that he had given a
17 voluntary statement? Or was this more of a -- a standard kind
18 of procedure because there were statements given?

19 A. It -- it was absolutely a standard procedure with
20 the exception of that statement made kind of randomly to the
21 detention officer. But, as far as his -- his verbal
22 statements made after *Miranda*, we liked those statements.

23 So, I mean, I did the *Jackson v. Denno* to protect
24 the record, but -- but in every one of his statements or -- or
25 his story and his statement matched up. It was a self-defense

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1 case. So, I didn't necessarily want to -- to have the -- the
2 statement, you know, set aside.

3 Q. Okay. Was there ever any discussion with him about
4 the fact that he didn't want to write it down and that was an
5 exercise of his right to remain silent as compared to the fact
6 that he had given a verbal statement?

7 A. There -- there -- there were some conversations
8 early on in my representation probably even before I had the
9 discovery about the fact there was a verbal statement but no
10 written statement because I -- I remember specifically.

11 And, in fact, in looking at my notes, I -- the first
12 time I met with Mr. Huckabee I asked him did he give a
13 statement. And he said, "I didn't write it down."

14 Q. And, in your experience, is that an issue in regards
15 to the right to remain silent or the right against self
16 incrimination the fact that the statement is not actually
17 memorialized in writing?

18 A. No. Once you sign a waiver and give a statement,
19 whether you write it or not the -- the police officer can,
20 then, take the witness stand and recant your statement.

21 Q. So, his allegations that you failed to object to all
22 the statements in which they discussed that he didn't write it
23 down or he didn't want to write it down, would you have
24 objected to those? Is that something that you normally would
25 have objected to?

1 A. I -- I -- apparently it's not something I would have
2 objected to because I didn't object to it.

3 Q. So, you're saying that ---

4 A. You know, again, the -- the trial strategy was that
5 this was a self-defense case and his statements bolstered
6 self-defense.

7 Now, should I have objected to -- to Abel's
8 questioning or statements along the line that he didn't write
9 it down? I have to go back, again, to pre-trial motions.

10 There was a hearing in front of Judge Cole about --
11 about Kenneth's criminal record and what -- what crimes were
12 going to be admissible and those kinds of things.

13 I mean, I -- I couldn't keep Abel from commenting on
14 certain convictions that Mr. Huckabee had. So, in my mind,
15 the fact that he didn't write a statement but gave a verbal
16 statement really didn't matter.

17 Q. Okay. Now the statement that he gave voluntarily to
18 Officer Green I think it was, when he was in the -- the
19 showers or the detention center, that was one that you also
20 raised in the *Jackson v. Denno* hearing?

21 A. Yes, absolutely.

22 Q. And was that one that you were concerned about
23 coming in, in front of the jury?

24 A. Well, I was -- I was more concerned about a
25 potentially violation of *Miranda*. But, again, it was still

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1 the same; I was shot at first.

2 So, again, it -- it bolstered the self-defense
3 defense, but I think going into the *Jackson v. Denno*, I had
4 maybe a little bit different idea of what happened.

5 I think going into *Jackson v. Denno* I thought that
6 Officer Green asked him a question about the incident, but
7 what came out in the *Jackson v. Denno* was that basically
8 Officer Green made a statement to which Kenneth responded.
9 Okay?

10 So -- but I -- I think -- I think that in the
11 discovery that I had led me to believe maybe that it was a
12 question not a statement on the part of Officer Green.

13 Q. Okay. Now tell me a little bit about the gunshot
14 residue. We've talked about the fact that they did find
15 gunshot residue on the other victim Kelly's hands or
16 Michelle's hands ---

17 A. Right.

18 Q. --- whichever name she was going by, but -- and
19 there was some I think lead particles but no true gunshot
20 residue.

21 And, then, you brought out in closing that, that
22 Sergeant Taylor never got a gunshot residue on the inside of
23 the truck.

24 The applicant has alleged that -- that he feels you
25 were ineffective for failing to have your investigator do a

1 gunshot residue on the truck. Is that anything you
2 considered?

3 A. No, for two (2) reasons: First off, Pete Heist is a
4 retired sheriff's deputy. He's not an expert in gunshot
5 residue.

6 And, secondly, the vehicle had been returned to the
7 victim's family before I had discovery and became aware of
8 GSR. And -- and, I mean, I'm not even sure that the vehicle
9 was still in county custody when I was retained.

10 So, I never had access to the truck after I became
11 aware of the gunshot residue situation.

12 Q. Okay. Now, in regards to -- I'm going to go back
13 and look at my notes, if you'll give me just a minute here.

14 (Brief Pause)

15 Q. Some questions -- I guess just in general, he's --
16 the Applicant has alleged that the prosecutor committed what
17 he considered to be a *Doyle* violation. There should have been
18 numerous objections to that.

19 In your experience practicing, do you -- did you
20 observe during the trial or in reviewing that anything that
21 you considered to be a *Doyle* violation?

22 A. No, because what *Doyle* says is that, if a defendant
23 gives no statement, that the -- the State is then barred from
24 bring up the fact that there was no statement. In this case,
25 Mr. Huckabee, he talked immediately.

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1 There was a statement. The only thing that there
2 wasn't in this case was a written statement. So, Doyle is not
3 on point.

4 Q: Okay. What about in objections would -- objections
5 to Mr. Gray's closing about the fact he said that the
6 defendant didn't have a job and -- and that he had refused to
7 talk to -- to Sergeant Taylor? Are those issues that you've
8 heard today that obviously you didn't object at the time, but
9 would you, in looking back, objected to those or...?

10 A. No. And I'm -- I'm certainly not contradicting or
11 attempting to contradict anything that Kenneth said, but my
12 recollection was Kenneth had -- had gotten out of prison, had
13 -- had -- he and his -- his girlfriend had, had a baby and he
14 had really tried to turn his life around.

15 He got a job working at Ryan's and some other fast
16 food places. And -- and my recollection was that his baby's
17 mother didn't want him to be involved in the sale of drugs,
18 wanted him to -- to go to school and -- and do -- you know,
19 get a job, but he just wasn't able to earn enough money to pay
20 the bills and do those things.

21 And, so, while out of the sale of drugs for a period
22 of time, he found himself supplementing his income with that.

23 I -- I -- he may have been working at Ryan's at that
24 time. I'm certainly not saying that he wasn't, but my
25 recollection of the trial -- at the trial, during the trial

1 was that he wasn't working at Ryan's.

2 And I might be completely wrong now. I'm not saying
3 that he's -- he's -- he's told a different story today. I'm
4 just saying my recollection was that he wasn't working at
5 Ryan's at that time.

6 Q. Okay. And what's your standard procedure for a way
7 of considering whether or not you object to statements made
8 during closing in particular?

9 A. Well, unless terribly egregious, I try not to object
10 during opening or closing statements. And that's mainly
11 because I don't want them to do that to me.

12 I -- I typically end up on a bit of roll in closing
13 arguments and -- and it's hard to get started again if there's
14 an objection.

15 Q. Okay. I'm just going to glance back through here
16 real quick.

17 (Brief Pause)

18 Q. Do you feel that there was anything that -- that you
19 had done? You mentioned you opening the door for the State to
20 -- to talk about evidence.

21 I don't know if that was defined, but was there
22 anything that -- that you can recall that you might have
23 opened the door on the prosecutor speak about in closing?

24 A. No. I mean, I -- I wrote that down, "opening the
25 door," but I don't -- there wasn't any specific incidence, at

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1 least that I'm aware of, so, I don't know.

2 Now, I -- I would talk about the -- I think in Mr.
3 Gray's closing he did say something along the lines of Mr.
4 Huckabee shot while the truck was driving away.

5 And now I can you that, in -- in the trial, we -- we
6 went to this incident site. I mean, we spent hours there.

7 And the way the vehicles were parked, the -- the
8 pick-up truck was very near the right hand side of that road.
9 In fact, I think the right side wheels were not on the
10 roadway.

11 And -- and within a couple of feet of the roadway
12 there was a ditch. And it was -- I mean, it was a deep ditch.
13 And that truck matched; described it accurately.

14 The back door on the passenger side opened the
15 opposite way of the front door. So, when those doors opened,
16 that -- the side of the truck was completely opened.

17 And Kenneth's testimony, and in my closing argument,
18 what we attempted to make the jury believe was that the driver
19 of the vehicle shot at Kenneth Huckabee with a silver
20 revolver. And that he dove out of the way of the shot.

21 And -- and he even came off of the witness stand and
22 -- and -- and showed the jury what he did. He dove out of the
23 way, which left him kind of on his left side shooting upwards
24 into -- into the vehicle.

25 And the fact that, that back door opened all the way

1 up made that shot possible. And Kenneth's testimony, and then
2 in my closing argument, was she shot and then hit the
3 accelerator. I -- I certainly didn't -- the intent was not to
4 open the door to -- to crash the fourth prong of -- of self-
5 defense.

6 And, quite frankly, that's not what happened because
7 the jury was not hung up on the fourth prong of self-defense;
8 they were hung up on the first prong of self-defense, which
9 was the drug deal.

10 So, I -- I understood. If that's what he's talking
11 about, as far as opening the door, that's what the testimony
12 was and that's what I spoke of in my closing argument. But,
13 again, the jury didn't have a problem with prong four (4),
14 they had a problem with prong one (1).

15 Q. And touching base on that, that is the issue of
16 whether or not the defendant brought on the fault ---

17 A. Correct.

18 Q. --- right?

19 A. Correct.

20 Q. And you argued to the judge that you wanted him to
21 instruct the jury that the sale of crack and the sale of drugs
22 and -- was not I guess relevant to bringing on fault?

23 A. Right.

24 Q. Is that accurate?

25 A. Yeah. The jury came back with that same question

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1 twice. And, in fact, I'm not sure if was me or Mr. Campbell,
2 but not only did we encourage vigorously Judge Cole to say a
3 drug deal is not in-of-itself fault. We wrote it down.

4 We wrote down what we wanted the judge to say. And
5 he smiled and quickly threw it away, you know. And he charged
6 them -- he said, "I'm only giving my standard charge."

7 But they were hung up on somebody being there to
8 sell drugs and them not having fault in bringing about the
9 situation. They couldn't break the chain from a business
10 trans -- transaction to a gunshot, okay?

11 Q. Okay. And, so, you did -- you did attempt to -- to
12 try to get that presented the jury ---

13 A. Absolutely.

14 Q. --- obviously, a couple of times. And those were
15 denied?

16 A. Yes.

17 Q. To your knowledge, do you know whether or not that
18 was raised and ruled on, on appeal?

19 A. It was.

20 Q. Okay. And that was denied by the ---

21 A. Yes.

22 Q. --- Appellant Court?

23 A. Yes, ma'am.

24 Q. And just briefly, since you mentioned that, the
25 Applicant mentioned that a juror contacted someone or you and

1 -- and said something about the fact that they thought that,
2 since he was giving a drug transaction, that he was somewhat
3 guilty, but they didn't want to find him guilty of murder?

4 A. Right.

5 Q. Can you explain a little bit about -- about that and
6 your interaction with them?

7 A. Yeah. The former solicitor here is Trey Gowdy, now
8 Congressman Trey Gowdy, goes to First Presbyterian here in
9 Spartanburg. The Sunday following the -- the trial, whatever
10 date the trial ended, that -- that next Sunday it turns out
11 that there was a juror in our case that attends First Pres.

12 And they -- that juror -- it was a woman --
13 approached Trey Gowdy. And -- and as Kenneth said, was
14 somewhat taken back by the number of -- the -- the length of
15 time that Kenneth was sentenced to.

16 Trey Gowdy called me on Monday, gave me the lady's
17 name and phone number. I did speak with that juror twice and
18 I forwarded the lady's name and phone number to appellant
19 counsel for Mr. Huckabee. And that's -- that's all -- that's
20 all I can tell you.

21 Q. All right. So you don't possess an affidavit from
22 her ---

23 A. No.

24 Q. --- that you have refused to turn it over ---

25 A. No.

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1 Q. --- or did not turn over?

2 A. No.

3 Q. Okay.

4 (Brief Pause)

5 MS. WHITE: All right.. I believe that is all that
6 I have at this time for this witness, Your Honor.

7 THE COURT: All right. Mr. Hyde?

8 CROSS EXAMINATION by MR. HYDE:

9 Q. Mr. Brannon, you've been present in the Courtroom
10 today during the hearing so far?

11 A. Yes, sir.

12 Q. Let's talk a little bit about the issue of whether
13 Mr. Huckabee refused to talk to Detective Taylor. What's your
14 understanding of that issue? Was there any evidence in the
15 trial about that?

16 A. I -- I -- Max, I don't know exactly, but I -- I know
17 that, you know, Kenneth was arrested. He was read *Miranda*
18 and, then, he told his -- his story, told what -- what his
19 recollection of the events were.

20 And, then, at some point -- and it was -- it was
21 quite a lengthy conversation as I recall. But, at some point,
22 he said, "I'm not going to write it down and I'm done
23 talking." And, then, somebody got angry.

24 Now I don't know if that person who got angry was
25 Taylor or not. I don't -- I don't remember if it was or not.

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1 But that's -- that's really all that -- that's all I know
2 about that.

3 Q. Would you agree that Mr. Gray in his closing did
4 comment that Mr. Huckabee refused to talk to Detective Taylor?

5 A. I don't -- I -- yeah, I don't doubt -- I don't
6 dispute that.

7 Q. And you've explained I think that your trial team
8 did not make any objection to that closing argument
9 particularly?

10 A. No. We didn't object to that in closing. Like I
11 said, I -- unless it's horribly egregious I -- I tend not to
12 object during a close.

13 But we were able to point out this was not a
14 situation where our client didn't cooperate with police. I
15 mean, he -- he talked to police. In fact, he talked a lot to
16 the police; he just didn't want to talk to that one.

17 (Brief Pause)

18 Q. Neither side of the case called Detective Taylor
19 apparently as a trial witness?

20 A. Right.

21 Q. Is there a reason why you chose not to call him as a
22 witness?

23 A. Yeah. If you read the transcript, you found that I
24 -- I threw him under bus and backed it up about four (4) times
25 and ran him over.

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1 I -- he was a much better witness to me without ever
2 taking the witness stand than he would have been had he got on
3 the witness stand. He would have, then, been able to explain
4 why he told somebody not to check GSR.

5 And -- and, I mean, he was -- he was better to me
6 sitting in a chair with me pointing at him and -- and -- and
7 telling the jury that -- that he didn't do his job than he
8 would have if he had been on the witness stand.

9 Q. There has been a lot of discussion today about Mr.
10 Huckabee's post-arrest silence and his refusal to give a
11 written statement.

12 A. Right.

13 Q. Do you feel like, if there had been no evidence
14 presented at trial as to his failure give a written statement
15 or his refusal to do so, there would have been a different
16 outcome at trial?

17 A. No.

18 Q. I believe you testified on direct that it's your
19 contention that a *Doyle* violation did not occur because of the
20 fact Mr. Huckabee gave verbal statements, just didn't give a
21 written statement?

22 A. Correct. Can we -- can we -- can we back up to the
23 question before that?

24 Q. Certainly.

25 A. No, I don't think that anything Abel said would --

1 or, if Abel had not said anything that he did say, the outcome
2 would have been different. I think the only way the outcome
3 is different in this case is if Judge Cole tells the jury that
4 the act of selling the drugs was not -- did not meet the first
5 prong of -- of self-defense.

6 That's the -- the jury believed that this was self-
7 defense, but they couldn't get pass there was a drug deal.
8 So, I don't think anything Abel said made the jury find him
9 guilty.

10 Q. Now there's also been some discussion today about
11 Mr. Huckabee's verbal statements to Officer Green. Mr.
12 Huckabee has said that he believes he was not Mirandized and
13 that perhaps there was a *Jackson v. Denno* following. What's
14 your position about the episode the way to his statements to
15 Officer Green?

16 A. Well, there's no question that he was not Mirandized
17 prior to that exchange -- that verbal exchange between he and
18 Officer Green. But, I mean, that was admitted in court by the
19 State.

20 But Officer Green did not ask Kenneth a question
21 that he -- to which he responded. Officer Green made a
22 statement which was, "Well, you shouldn't have shot somebody."
23 And -- and Kenneth, then, responded.

24 But, again, what he said bolstered the self-defense.
25 So why we fought that in -- in the *Jackson v. Denno*, it didn't

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1 specifically hurt our case.

2 Q. And there's also been some discussion about the
3 truck and why there was not a GSR test done on the truck.

4 A. Right.

5 Q. Can you clarify the decision by the trial team not
6 to hire a GSR tech? I know you said the truck may not have
7 even been in State custody when you were retained?

8 A. Right.

9 Q. Basically you're saying it was impractical
10 therefore?

11 A. It was impossible because what I can tell you
12 matches that when I got the GSR evidence that we did get, the
13 truck was not in the sheriff's department's custody.

14 Q. Now, did you ask for the truck to be presented at
15 the trial?

16 A. I did not.

17 (Brief Pause)

18 THE COURT: May I get clarification on that one
19 point real quick? How -- how much time had transpired
20 between the time that you received the discovery response
21 and became aware of the GSR issue and the actual incident
22 date? About how much time?

23 A. I -- I would have gotten the initial discovery two
24 (2) weeks to a month after sending notice of representation.
25 The GSR stuff didn't come until about three (3) months later.

1 THE COURT: So maybe about five (5) months after
2 the incident date?

3 A. That's right. And -- and now what I said, Your
4 Honor, was the truck was definitely not in the department's
5 custody when I got the GSR stuff. I'm not sure that it was in
6 the department's custody when I got retained, okay?

7 THE COURT: I understand. Okay. Thank you very
8 much. I apologize Mr. Hyde.

9 A. Max, I -- I -- you asked me if I asked about the
10 truck at the trial. I think there was a question about the
11 truck and the truck had been sold by the family.

12 I think that's what happened. It was no longer in
13 -- in -- the family didn't own it anymore.

14 Q. On the topic of testing, was there any test done on
15 the bullets to try to support Mr. Huckabee's theory of the
16 case? And -- and specifically, but not limited to this, was
17 there any testing of bullets in the ground, in the road?

18 A. No. And -- and we had a lengthy discussion about
19 that. Max, like I said, we went out there and we spent hours.

20 You can walk down in that area. It's that -- where
21 this shooting took place is -- is in a heavily gang invested
22 community, if you will.

23 In that period of time that we were there we found
24 -- and I'm not suggesting in any relation to this case -- but
25 we found probably ten (10) other casings. We found shotgun

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1 shells. We found all kinds of stuff.

2 And if -- and Kenneth's right; there was a
3 projectile found near where this took place. If we had -- and
4 the State did no testing on it. My recollection was it was
5 too badly damaged when it hit the concrete to test it.

6 But, if we had pushed that issue and let's say it
7 came back to be twenty two (.22), I mean, my conversations
8 with Mr. Campbell were, we were better off simply saying,
9 there's a projectile than saying what specifically that
10 projectile was.

11 Q. There's also been some discussion today about
12 comments Mr. Gray may have made in the closing other than the
13 one about Mr. Huckabee's potential refusal to talk to
14 Detective Taylor. Specifically there was a suggestion that
15 Mr. Huckabee had been apprehended through trickery; do you
16 remember if that was said in closing argument? Do you
17 remember that?

18 A. I -- I remember now that I've read the transcript.
19 And -- and I understand that Mr. Huckabee is saying that, that
20 was -- that was a statement made that -- that was not based on
21 evidence in the trial.

22 And, I -- you know, I disagree. The -- the police
23 officer didn't say, "We had to trick him to arrest him," but
24 they did set forth what they had to do to arrest him, which
25 was trick him.

1 So, I mean, they -- they said what they did. They
2 didn't use the word "trickery." What Mr. Gray did was use the
3 word "trickery" for what the testimony was.

4 So, I -- I think there was evidence in the record
5 that, you know, his buddy set him up.

6 Q. And do you recall the testimony specifically?

7 A. I'm sorry?

8 Q. Do -- do you recall the testimony specifically, just
9 for the basis of that position?

10 A. Yeah. I remember the -- I can't think of the guy's
11 name, the Iranian guy ---

12 MS. WHITE: Hudani.

13 A. Hudani testifying that police came to him. They
14 were talking to him. And they had him -- or I don't know if
15 the police asked them -- asked him to call Kenneth or if he
16 said, "Well, I can call him."

17 I don't remember if it was he offered or they asked,
18 but the -- the testimony was that -- that he arranged a drug
19 deal.

20 Q. And I think you've already hit this point, but for
21 clarification, the test -- the closing arguments comments by
22 Mr. Gray about Mr. Huckabee's lack of a job, do you think that
23 was prejudicial or should have been contested?

24 A. Well, again, I -- I don't remember specifically if
25 Kenneth was working at that time or not. And, if he was,

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1 then, it may have been prejudicial. But, again, the jury was
2 hung up -- they weren't hung up on whether he was employed or
3 unemployed; they were hung up on him selling dope and a
4 shooting taking place.

5 So, knowing what I know now, no, I don't think it
6 was prejudicial. But, if he was working and if what Mr. Gray
7 said was factually incorrect, then, maybe I should have
8 objected.

9 Q. Do you believe that Mr. Huckabee's guilt as decided
10 by the jury was overwhelming?

11 A. I don't -- I don't -- I don't understand "guilt
12 overwhelming." They found him guilty. So, apparently it was
13 -- it was overwhelming.

14 (Brief Pause)

15 Q. Did you ever make a statement, during the course of
16 the trial, that Mr. Huckabee continued to fire while the truck
17 sped off?

18 A. No. That -- I mean, there -- he only fired two
19 shots. That -- that evidence was in the record.

20 Q. And then lastly, do you happen to know the final
21 outcome of Mr. Hudani's criminal charges?

22 A. He pled and I'm certain was given some favor for his
23 testimony, but I don't know what his sentence was.

24 Q. His disposition would have occurred after the trial
25 was ---

1 A. I think entered the plea before the trial and, then,
2 was sentenced afterwards.

3 (Off-the-Record Discussion)

4 Q. Mr. Huckabee would like to know if, in fact, you
5 didn't say that he was firing at the truck while it sped away,
6 why did you not object to those representations made by the
7 prosecution?

8 A. Mr. Huckabee actually laid on the floor in the
9 courtroom and showed the jury what he did. In my closing
10 argument, I replayed as closely as I could verbally what he
11 showed them.

12 Mr. Hyde, closing arguments between a prosecutor and
13 a defense attorney are -- are vastly different in most cases.
14 Let's just say I thought my closing argument was more
15 compelling than Mr. Gray's closing argument.

16 (Brief Pause)

17 MR. HYDE: Thank you.

18 MS. WHITE: The State has no other questions of
19 this witness.

20 THE COURT: All right. One quick question just to
21 clarify another point. You had mentioned contact by a
22 juror with the now congressman -- now the congressman,
23 but the -- the -- the solicitor at the time.

24 Was there anything that the solicitor indicated to
25 you that the jur -- the juror indicated to him or is

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1 there anything the juror indicated to you that indicated
2 any sort of improper external influence on the jury
3 during their deliberations?

4 A. Nothing -- nothing at all.

5 THE COURT: All right.

6 A. And ---

7 THE COURT: So it was merely a matter of she was
8 surprised at the amount of time involved?

9 A. Yes.

10 THE COURT: Okay.

11 A. Yes. And -- and, in fact, Your Honor, I want to
12 make it real clear that Trey refused to talk to this woman.
13 She approached him, said she was on the jury, and -- and
14 started to say something.

15 He said, "I can't talk to you about this.
16 Here's..." Okay. He took her name and phone number and he
17 called me.

18 But he didn't -- he didn't go into any detail as far
19 as conversation with this woman. So, what I can tell you is
20 Trey didn't know what she wanted to tell me.

21 THE COURT: Okay.

22 A. Okay.

23 THE COURT: I understand that. I just wanted that
24 clarified for the record. Any follow-up based upon my
25 question, Mr. Hyde?

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

(Off-the-Record Discussion)

RECROSS EXAMINATION by MR. HYDE:

Q. I think this has already been stated, but Mr. Huckabee wants to ask what specifically did this lady say?

A. I'm -- I'm not suggesting to you that I'm quoting her, but it was basically what I've said, that he was there to sell drugs.

They believed that the driver of the vehicle shot at him, but they weren't going to let him go because he had a gun, he was selling drugs, and they couldn't let him go. And -- and I relayed exactly that to appellant counsel with the juror's name and phone number.

THE COURT: All right. Thank you. Nothing else?

MS. WHITE: Nothing, Your Honor.

THE COURT: Thank you very much. Any objection to excusing Mr. Brannon?

MR. HYDE: No, Your Honor.

THE COURT: You're free to stay. You're free to go. Good to see you. Thank you, sir.

MS. WHITE: And, Your Honor, the State has no other witnesses.

THE COURT: Anything in reply?

MR. HYDE: No, Your Honor.

THE COURT: Very good. All right. As you can tell, my clerk is not with me today that's because he

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1 left on Wednesday.

2 I know for a fact that he actually briefed this a
3 two (2) months ago when we initially were hoping to have
4 this hearing. I -- I want to get back to the office. I
5 don't have the brief with me. I'm sure he left it.

6 I'm hoping he left it. And, if he didn't, I'm sure
7 he can access it. I want to review that brief and read
8 the transcript again just to make sure I'm clear on all
9 points.

10 I will -- I've got a PCR term next week, so, I will
11 get something to you in terms of instructions on an order
12 to one of you sometime next week if that's acceptable.

13 MR. HYDE: Thank you, Your Honor.

14 MS. WHITE: Thank you.

15 THE COURT: Thank you all very much. It's a
16 pleasure to see all of you again.

17 MS. WHITE: Thank you, Your Honor.

18 (WHEREUPON, the proceeding concluded.)
19
20
21
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25

CERTIFICATION

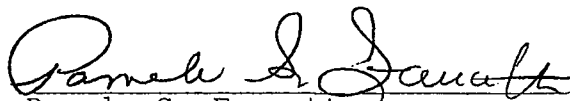
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REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the Court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 79, were transcribed at my direction and represent a complete and accurate transcription of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

September 21, 2012


Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Kenneth Lee Huckabee, #275354,	)	2010-CP-42-5548
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed on October 15, 2010, and the subsequent amendments filed March 8, 2011, December 15, 2011, and February 2, 2012. The Respondent made its Return on or about July 15, 2011. An evidentiary hearing into the matter was convened on March 9, 2012, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Max T. Hyde, Jr., Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. N. Douglas Brannon, Esquire, and Abel O. Gray, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court's office, Applicant's records from the South Carolina Department of Corrections, the Return, the trial transcript, and Applicant's appellate records.

PROCEDURAL HISTORY

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the October 2007 term of General Sessions for assault with intent to kill (2007-GS-42-5176) and murder (2007-GS-42-5177).

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 Douglas Brannon, Esquire, represented the Applicant. On March 6, 2008, the Applicant was convicted of ~~these charges~~ *voluntary manslaughter and AHAH* by a jury. The Honorable J. Derham Cole sentenced the Applicant to confinement for ten (10) years for the assault *of a high and aggravated nature* with the intent to kill charge and a concurrent thirty (30) years for the ~~murder~~ *voluntary manslaughter* charge.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Huckabee, Op. No. 2010-UP-4696 (filed June 9, 2010). A Petition for Rehearing was filed and subsequently denied on July 20, 2010. Applicant then filed a Petition for Writ of Certiorari, which was denied by the South Carolina Supreme Court on January 20, 2011. The Remittitur was returned on January 26, 2011.

ALLEGATIONS

In his initial application and subsequent amendment, the Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to object to Prosecutor's closing argument,
 - b. Counsel failed to object to impeachment of State's own witness Hudani,
 - c. Counsel failed to object to State's cross-examination of Applicant,
 - d. Counsel failed to object to Prosecutor's questioning of investigator regarding Applicant's refusal to write a statement,
 - e. Counsel failed to object to State's use of perjured testimony,
 - f. Counsel failed to call witnesses who were not called by the State, but had favorable information,
 - g. Counsel failed to object to jury charge regarding armed robbery,
 - h. Counsel failed to make motion to quash indictment for assault with intent to kill because of defects in the indictment,
 - i. Counsel failed to secure a preliminary hearing for Applicant,
2. Ineffective assistance of appellate counsel, in that;
 - a. Appellate counsel failed to raise the issue of the trial court's denial of Applicant's motions for directed verdict and judgment notwithstanding verdict,

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- b. Appellate counsel failed to raise issue of the trial court's denial of Applicant's motion for new trial,
- 3. Prosecutorial misconduct, in that;
 - a. Prosecutor commented on Applicant's post-arrest silence during closing arguments,
 - b. Prosecutor questioned investigator regarding Applicant's refusal to write a statement,
 - c. Prosecutor made various statements during closing arguments which misstated evidence and testimony,
 - d. Prosecutor attempted to appeal to personal bias of jurors by comments during closing arguments;
 - e. Prosecutor used perjured testimony,
- 4. Juror misconduct, in that;
 - a. Juror told counsel that because Applicant was a drug dealer, jury did not want Applicant to walk away, but they believed Applicant acted in self-defense and did not want him to receive thirty years,
- 5. Newly discovered evidence, in that;
 - a. Affidavit of juror regarding jury not wanting Applicant to receive thirty years because it was self-defense. Applicant believes that trial counsel had affidavit, but refused to turn information over.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71(c), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial

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process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that 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, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

The Applicant alleged that Counsel was ineffective for failing to object to the Solicitor's commentary regarding Applicant's refusal to write a written statement. The Applicant testified that he did talk with police about what happened and signed a form stating that he understood his rights, but refused to write his statement down. Applicant testified that because he refused to write the statement down, Counsel should have objected when Applicant was asked about his refusal to write the statement down. This Court finds that there is no merit to this ground of any assertion that Counsel was deficient in failing to object to this testimony due to Applicant's

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belief that this constituted post-arrest silence. The Applicant first gave an oral statement to police, therefore he was not silent and the Solicitor's commentary was not objectionable. Therefore, this Court finds that this claim should be denied and dismissed.

Additionally, the Applicant alleged that Counsel was ineffective for not moving to suppress the statement Applicant gave while in the jail to Officer Greene for a Miranda violation instead of on the basis Counsel argued. However, Applicant acknowledged that Counsel moved for a Jackson v. Denno hearing prior to his trial to address the voluntariness of each of the statements made by Applicant. Counsel testified that thought that there might be a violation of the Applicant's Miranda rights when he was preparing for the hearing; however, after reviewing the facts and hearing Officer Greene's testimony, Counsel realized that the facts of the Applicant giving his statement were different than originally thought. This Court finds that Counsel properly made a Motion to suppress and requested a Jackson v. Denno hearing prior to trial. Counsel argued against the introduction of the several statements made by Applicant, but was unsuccessful. Therefore, Counsel was not ineffective in this regard and this claim is denied and dismissed.

The Applicant also alleged that Counsel was ineffective for failing to object to the Solicitor's closing argument. Counsel testified that he did not find any comments made by the Solicitor during closing to be objectionable. Counsel testified that the evidence that the Applicant had at one time worked at Ryan's was in the record, but his past unemployment and concerns over money were also in the record. Additionally, Counsel testified that he prefers to not object during opposing counsel's closing arguments unless the alleged improper comments made are particularly egregious. This Court finds that the Solicitor's comments regarding whether or not the Applicant was working or why he needed money were a fair commentary on the evidence in the record.

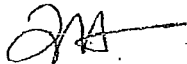
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evidence in the record. (See Transcript pp. 303-4, 349-50). Furthermore, the Solicitor's comments as to the Applicant's apprehension by trickery were also a fair commentary of the evidence in the record. (See transcript p. 339). The remaining statements by the Solicitor were fair commentary on the State's theory of the case from the facts presented. Accordingly, Counsel was not ineffective for failing to object to these comments or arguments. Therefore, this claim is denied and dismissed.

The Applicant also alleged that Counsel was ineffective for failing to obtain testing of the victim's truck for evidence of gunshot residue. The Applicant acknowledged that during trial, Counsel argued to the jury that no gunshot residue test was done on the truck and accused the investigating officer of not doing his job, but the Applicant argued that Counsel should have had the test completed to support Applicant's self-defense argument. This Court finds that because the truck had been returned to the owner, and possibly sold, by the time Counsel had been retained and due to the substantial passage of time, Counsel was not ineffective for failing to obtain a gunshot residue test of the truck. Furthermore, there has been no showing of prejudice and this claim should be denied and dismissed.

Finally, the Applicant alleged that Counsel was ineffective for opening the door for the State to speak about the Applicant's post-arrest silence and the evidence not in the record during closing arguments. This Court finds that this allegation lacks merit because again, there was no violation in discussing the Applicant's desire to not provide a written statement and all of the evidence discussed during closing was presented during the trial. Therefore, this claim is denied and dismissed.

This Court further finds Counsel met, and exceeded, the standards for competent representation for a defendant. To the extent Counsel may have missed a possible objection, this



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Court finds there is no prejudice because the jury, by their questions, was clearly hung up on the question of how the drug deal taking place affected the Applicant's self-defense claim.

Ineffective Assistance of Appellate Counsel

The Applicant alleged that Appellate Counsel was ineffective for failing to raise the issues of the trial court's denial of Counsel's motions for directed verdict, judgment notwithstanding the verdict, and motion for a new trial. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, 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 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

This Court finds that the Applicant failed to present any evidence or testimony to support his claims that Appellate Counsel was ineffective for failing to present the listed issues, rather than the ones presented to the Court. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim and it should be denied and dismissed.

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Prosecutorial Misconduct

The Applicant also alleged prosecutorial misconduct, based on the fact that the Solicitor commented on the Applicant's alleged post-arrest silence, Applicant's assertion that the Solicitor used perjured testimony, misstated facts and evidence during closing, and attempted to appeal to the jurors' personal biases. The Applicant testified that he believed the Solicitor committed a Doyle violation when he asked about the Applicant's refusal to write his statement down and when he mentioned that fact again during closing arguments. Applicant also testified that the Solicitor informed the jury that the Applicant had no job and no income, which was not in evidence. Additionally, the Applicant alleged that the Solicitor improperly referred to the Applicant as being "tricked" into being arrested, which was not in the record.

Mr. Grey, the Solicitor who handled the case at trial, testified that although the statement was never written down by the Applicant, the Applicant gave extensive oral statements. Grey testified that according to his knowledge, no Doyle violation was committed because of the Applicant's oral statements and testimony at trial. Grey also testified that he believed his role in making closing arguments was to try and establish the elements of the crime, which included disproving the Applicant's claim of self-defense.

Counsel also testified that the Applicant spoke extensively to police, but appeared to not want to talk to the one particular officer who tried to get him to write down the statement. Counsel testified that once you give a statement, he understands that you have waived your rights against self-incrimination as it relates to any Doyle or related violation.

This Court already found earlier no improper comments were made on the Applicant's alleged belief that his lack of a written statement constituted post-arrest silence. This allegation is denied and dismissed. This Court has reviewed the record and finds no time where the

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Solicitor crossed the line in his questioning of Applicant or otherwise "used perjured testimony." To the contrary, Counsel properly objected to any improper questioning throughout the trial. Therefore, this Court finds no merit in any of the Applicant's allegations of prosecutorial misconduct and they are therefore, denied and dismissed.

Juror Misconduct

The Applicant also alleged juror misconduct based upon his belief that a juror did not want to find him guilty other than the fact that he was a drug dealer. The Applicant testified that Counsel informed him that after the trial, Counsel spoke with a juror on the phone to explain that the jury found the Applicant guilty only because he was a drug dealer, but they did not want Applicant to receive a sentence of thirty years because they believed he acted in self-defense. Counsel testified that the Solicitor at the time of trial, Trey Gowdy, was apparently approached by a juror at church and Gowdy instructed the juror to contact Counsel. Counsel testified that he called the juror twice and forwarded her name and number to Appellate Counsel, but he never received an affidavit from the juror, nor was he aware of an existing affidavit. However, Counsel testified that during his conversations with the juror, she indicated that she was surprised by the sentence Applicant received because the jury had believed that Applicant had been shot at as well, but at no time did she indicate that there was any external influence that affected the jury deliberations.

The South Carolina Supreme Court established that a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial. Shumpert v. State, 378 S.C. 62, 67, 661 S.E.2d 369, 371 (2008). This Court finds that the Applicant has failed to meet his burden of proof as to this claim. The Applicant offered no evidence to establish that the comments made by the juror represented the beliefs of the entire jury or that the comments she

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made following the trial prejudiced the Applicant in any way. Therefore, this Court finds that this claim should be denied and dismissed.

Newly Discovered Evidence

The Applicant also alleged that newly discovered evidence exists in the form of an affidavit from a juror, who was allegedly concerned about the sentence the Applicant received because of the belief that the Applicant acted in self-defense during the drug deal.

A defendant requesting a new trial based on after discovered evidence must show that the evidence:

(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

As indicated by the testimony detailed in the previous allegation, Counsel testified that he spoke with a juror twice following the trial about her concern with the sentence that the Applicant received, but never had an affidavit from the juror and simply forwarded the juror's name and number to Appellate Counsel.

First, this Court finds that the Applicant failed to meet his burden of proof as to the existence of newly discovered evidence in the form of an affidavit. This Court finds Counsel's testimony to be credible that he never received any affidavit from a juror regarding deliberations. Second, this Court finds that the evidence offered in the form of testimony does not meet the requirements for newly discovered evidence. Clearly Counsel and the Applicant were aware of the juror's concerns immediately following the trial and Counsel took the opportunity to speak with the juror in an attempt to determine if there was anything to be concerned about in regards to the verdict. However, the information is not "material to the issue of guilt or innocence."

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Therefore, this Court finds that the Applicant failed to meet his burden of proof as to this claim and it should be denied and dismissed.

Summary

This Court finds that in regards to the allegations of ineffective assistance of counsel, Counsel's testimony and Mr. Grey's testimony were both far more credible than Applicant's testimony. This Court finds that Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in her representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

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

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the

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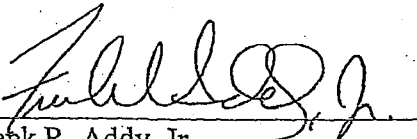
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appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 15th day of May, 2012.


Frank R. Addy, Jr.
Presiding Judge

Greenville, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT
2010-CP-42-5548

Kenneth Lee Huckabee #275354)
Applicant,

MOTION FOR RECONSIDERATION

V.

State of South Carolina,
Respondent.

Applicant, by and through the undersigned counsel, moves for reconsideration of the Court's order filed May 18, 2012 in the above-captioned matter pursuant to Rule 59(e), SCRCF.

In his initial application and subsequent amendments, Applicant alleged that counsel was ineffective for failing to object to the jury charge of malice regarding armed robbery. In the subject order, the Honorable Frank R. Addy, Jr. failed to rule on Applicant's allegation.

Applicant further alleged that in closing argument, Able Gay told the jury that Applicant refused to talk to Detective Taylor and that Applicant's silence was tied to his guilt. Judge Addy did not rule on the specific issue of the prosecutor telling the jury that Applicant refused to talk to Detective Taylor not being in evidence. The Court only ruled on the facts of the written statement refusal.

Also, the Court said counsel properly made a motion to suppress Officer Greene's testimony. A Jackson v. Denno hearing is not a motion to suppress but rather the voluntariness of what Applicant said. Applicant argued its being a Miranda violation that,

“According to Mr. Brannon, I fell down and continued firing once the truck sped off”

This is not in the record, and Doug Brannon even mentioned this.

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The Court said counsel testified that Applicant spoke extensively to police but the record/transcript of both Taylor and Bryant shows that Bryant and Taylor were the only investigators to whom Applicant ever spoke.

The Court ruled that counsel testified that once you give a statement, he understands that you have waived all of your rights against self-incrimination as it relates to Doyle violations. Miranda said the mere fact that the accused may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries.

The Court did not rule on the fact of how the prosecution molded its argument of Applicant's refusal to write a statement and refusal to talk to Detective Taylor around Miranda as Applicant stressed in the amended brief. So counsel's understanding of the Doyle issue which Applicant argued in his brief as a Miranda violation was wrong. Applicant did not argue issues about what Applicant supposedly said. Applicant argued error was committed in the showing of what Applicant did not say or write (as well as tied Applicant's silence to Applicant's guilt). Those were the stress points of the issues.

The Court did not rule on all of Applicant's issues. Accordingly, a new hearing should be allowed.

June 4, 2012

Spartanburg, South Carolina

Max T. Hyde, Jr. (SCB 17014)
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Spartanburg, SC 29304
T: (864) 804-6330
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max@maxhydelawfirm.com

~~ATTORNEY FOR APPLICANT~~

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG)

Kenneth Lee Huckabee, #275354,)

2010-CP-42-5548

Applicant,)

v.)

RETURN TO APPLICANT'S
MOTION FOR RECONSIDERATION

State of South Carolina,)

Respondent.)

This matter comes before the Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRCF, in which he asks the Court for relief from judgment of the Order filed May 18, 2012. The Respondent (the State) would submit the following:

I.

The Respondent submits that the Order signed by the Honorable Frank R. Addy, Jr. on May 15, 2012, contains the required findings of facts and conclusions of law as required by S.C. Code Ann. §17-27-80 (1976), and Rule 52(a) SCRCF. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

Specifically, the Applicant argues that the Court failed to address Counsel's alleged ineffectiveness for failing to object to the trial court's jury charge regarding malice and armed robbery because it was raised in his application and subsequent amendments. Respondent notes that the allegation was raised at the hearing, with the totality of the Applicant's testimony regarding the allegation being that Counsel should have objected to the jury charge regarding armed robbery because it was improper. Therefore, the Respondent submits that if the Court finds it appropriate, the Order could be amended to reflect that the Applicant failed to meet his

burden of proof when he failed to present any evidence to support his claim that Counsel was ineffective as to this issue and the claim should be denied and dismissed.

Applicant claims that the Court failed to properly address Applicant's claims regarding the State's closing argument. Respondent submits that the Motion should be denied. The Applicant argues that the Court did not specifically rule on the particular statement made by the State regarding the Applicant's not speaking to Detective Taylor. Respondent submits that the Order made a finding that all statements made by the Solicitor were fair commentary on the testimony and evidence presented at trial. The Order also found that Counsel was not ineffective for not objecting to any statements made by the Solicitor during closing arguments. Additionally, the Court ruled that there was no merit in any of the Applicant's allegations regarding prosecutorial misconduct. Therefore, Respondent submits that the Order properly addressed the Applicant's claims that Counsel should have objected to numerous statements made by the State during closing or that the Solicitor even made any objectionable statements.

Applicant argues that the Court improperly ruled as it related to Counsel's motion to suppress the statements made by Applicant to Officer Greene and the request for a Jackson v. Denno hearing. Respondent submits that the Applicant misunderstands the Order, as the Court did not find that the Jackson v. Denno hearing was a motion to suppress. Rather, the Court found that Counsel properly made a motion to suppress and requested a Jackson v. Denno hearing in attempts to keep out various statements made by the Applicant to police officers.

Applicant also raises two issues where he argues that testimony presented by Counsel at the hearing was incorrect. Specifically, Applicant appears to argue with the testimony of Counsel regarding which investigators Applicant spoke to regarding the case and Counsel's understanding of Doyle and Miranda violations. Respondent submits that the testimony was

presented to accurately reflect what was presented. A Motion for reconsideration or to alter or amend is not proper to argue that the testimony presented by Counsel was incorrect or misstated the law, as it was the testimony of Counsel, not findings of the Court.

Finally, Applicant raises the issue that the Court failed to properly address Applicant's claims that the State crafted its argument around Applicant's refusal to write a statement and speak to Detective Taylor. Respondent submits that the issues raised by Applicant were sufficiently covered in the Order's findings as it related to either Counsel's ineffectiveness or any prosecutorial misconduct, where the Court found no ineffectiveness and no merit in the Applicant's allegations.

II.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion should be denied and that said Motion be dismissed on all issues, unless the Court, in its discretion, finds that the Order should be amended regarding the one jury charge issue.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

BY:



ATTORNEYS FOR RESPONDENT

June 22, 2012.

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

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Kenneth Lee Huckabee, #275354.

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2010-CP-42-5548

ORDER

This matter comes before the Court by way of Applicant's Motion to Reconsider. The Respondent made its Return to this response on June 20, 2012.

The Order of Dismissal in this matter was signed by me on May 15, 2012. This Court finds that as it relates to all issues, other than the claim that Counsel was ineffective for failing to object to the jury charge regarding armed robbery and malice, this Order contains the required findings of facts and conclusions of law as required by S.C. Code Ann. §17-27-80 (1976), and Rule 52(a) SCRCP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

As to the Applicant's allegation that Counsel was ineffective for failing to object to the armed robbery and malice jury charge, this Court finds that the Order should be amended to reflect that the Applicant failed to provide any evidence in support of his claim the claim lacked merit, and it is therefore denied and dismissed.

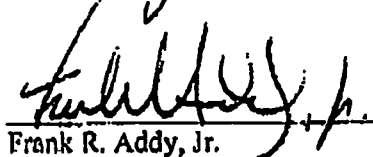
Based upon careful reconsideration of all the evidence in this case and upon full consideration of Applicant's Motion, this Court is not persuaded to alter or amend the judgment as it relates to any other allegation or issue raised in Applicant's Motion. This Court further finds that oral argument would not aid in the reconsideration of the original judgment. Therefore, this Court finds that the Order of Dismissal, which was served on May 18, 2012, shall

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only be amended by this Order to reflect the dismissal of Applicant's allegation regarding Counsel's Ineffectiveness for failing to object to the jury charge. This Order shall be incorporated as part of the Order of Dismissal in this matter.

AND IT IS SO ORDERED this 27th day of June, 2012.


Frank R. Addy, Jr.
Presiding Judge
Seventh Judicial Circuit

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WITNESSES

1. SENTENCE MADE ☐
Spartanburg County Sheriff's Office
2. CARD PULLED ☐
3. INDEXED ☐
4. CHECKED WARRANTS ☐
5. CHECKED SIGNATURE ☐
6. ASSESSMENT FINE CARD MADE ☐
7. TRAFFIC VIOLATIONS COPY ☐
[Signature]

ARREST WARRANT NUMBER

K262742

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date:

12-26-07

VERDICT

Guilty of Assault of a High and Aggravated Nature

MARC KITCHENS

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Foreperson of Petit Jury

Date:

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DOCKET NO. 07-GS-42-5176

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

OCT 29 2007

TERM

THE STATE

VS.

Kenneth Lee Huckabee

Indictment for

ASSAULT W/ INTENT TO KILL

SC Code: 17-25-0030

CDR Code: 768

Class MIS-UNC

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on OCT 26 2007, the
Grand Jurors of Spartanburg County present upon their oath:

ASSAULT WITH INTENT TO KILL

That Kenneth Lee Huckabee did, in Spartanburg County on or about July 18, 2007, unlawfully attempt to commit a violent injury to the person of Michelle M Knudson aka Kelly Ann Tavenier with malicious intent while accompanied by the present ability to complete the act, to wit: by shooting a gun into the vehicle the victim was driving, in violation of §17-25-30 (CL), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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

AFL C. Gentry
ASSISTANT SOLICITOR

WITNESSES

1. SENTENCE MADE ☒ **Computer**
2. REPORT ENDED ☒ **Computer**
- Spartanburg County Sheriff's Department
3. CHECKED ☒ **Computer**
4. INDEXED ☒
5. CHECKED WARRANTS ☒
6. CHECKED SIGNATURE ☒
7. ASSESSMENT ☒ **Computer**
- FINR CARD MADE ☒
8. TRAFFIC VIOLATIONS COPY ☒

[Signature]

ARREST WARRANT NUMBER

K263145

ACTION OF GRAND JURY

True Bill

[Signature]

Foreperson of Grand Jury

Date: 10-26-07

VERDICT

Guilty of Voluntary Manslaughter

MARC KITCHENS *John Doe*

3-1-08

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SPARTANBURG COUNTY

Foreperson of Grand Jury

Date: FILED

DOCKET NO. 07-GS-42-5177

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

OCT 29 2007

TERM

THE STATE

v

Kenneth Lee Huckabee

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

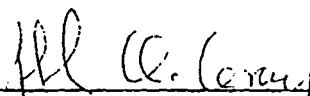
INDICTMENT

At a Court of General Sessions, convened on OCT 26 2007, the
Grand Jurors of Spartanburg County present upon their oath:

MURDER

That Kenneth Lee Huckabee did, in Spartanburg County on or about July 18, 2007, feloniously, willfully, and with malice aforethought, kill Jerry Bridwell, by shooting the victim with a gun, and that the victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, *The South Carolina Code of Laws*, (1976, as amended).

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



ASSISTANT SOLICITOR