

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

RECEIVED

MAY 14 2020

S.C. SUPREME COURT

Honorable Jocelyn Newman, Circuit Court Judge

App. Case No. 2020-000205

H. Dewain Herring,

Petitioner,

vs.

State of South Carolina

Respondent.

APPENDIX
VOLUME VI OF VII

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INDEX

Trial Transcript.....	1
Arrest Warrant, Indictments and Sentencing Sheets.....	2355
Brief of Appellant.....	2365
Brief of Respondent.....	2412
Reply Brief.....	2471
Opinion, South Carolina Supreme Court.....	2489
Petition for Rehearing.....	2504
Order Denying Petition.....	2526
Remittitur.....	2528
Petition for Habeas Corpus.....	2530
Amended Petition for Habeas Corpus.....	2539
Amended Memorandum.....	2548
Return and Memorandum.....	2592
Memorandum in Opposition.....	2670
Report and Recommendation.....	2687
Petitioner's Objections.....	2712
Opinion and Order.....	2724
Judgment.....	2744
Notice of Appeal.....	2745
Application for Post Conviction Relief.....	2746
Return.....	2753
Order for Substitution of Counsel.....	2764
Discovery Order.....	2767

Motion Regarding Jurisdiction.....	2771
Motion.....	2775
Discovery Order.....	2779
Amendment to Application for Post Conviction Relief.....	2780
PCR Evidentiary Hearing Transcript.....	2784
PCR Exhibits.....	3011
Order of Dismissal.....	3067
Rule 59, SCRCF, Motion.....	3091
Order Denying Motion.....	3126
Amended Order Denying Motion.....	3128

grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct.App.2007), *aff'd as modified* 2009 WL 1518780 (June 1, 2009); State v. Dawkins, 297 S.C. 386, 394, 377 S.E.2d 298, 302 (1989) curative instructions usually cure any prejudice caused by the admission of incompetent evidence).

Three witnesses testified as to their interpretations of a video, depicting the outside of Chastity's at 12:05:05-12:05:06 a.m. on the night in question (which is the precise time when John John was shot). Two witnesses, Donald Hawkins (a bouncer), and an Officer Gwyn, testified they saw a flash of light coming from the vehicle. The third witness, Officer Linfert testified he saw a shot fired from the vehicle, later clarifying that "obviously we saw the video where the shot was fired from inside the vehicle."

In response to Herring's objections to this testimony, the trial judge issued a curative instruction to the jury in each instance, to the effect that the witness could not give an opinion as to whether or not the flash was a gunshot, and that the jury should strike any such inference from its memory. The trial court instructed the jury that "you are the only ones who can draw from conclusions from what you saw on the tape and his testimony in this regard." He stated, further:

It's the same instruction I gave you with regard to another witness that looked at the same video and saw what he thought was- one said a light, one said a shot. That's an opinion. Just take it at that. Nobody saw the shot fired based on the testimony we've heard so far. It's all from the video. You are going to have the video. You can look at it. You can determine whatever you choose to determine from it.

As to Gwyn's testimony, the trial court re-instructed, "this witness has repeated something that another witness said regarding a light or a flash. You are not to interpret that as any evidence of a gunshot wound again or a

gunshot. It is your responsibility to see what you see on the video, if you see anything. This witness has merely told you what he thinks he saw."

We find the trial court's curative instructions sufficient to cure any prejudice, such that there was no error in denying Herring's motions for a mistrial. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (grant of a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way); Dawkins, *supra*.

Herring's convictions and sentences are affirmed.⁷

AFFIRMED.

TOAL, C.J. and BEATTY, J., concur. KITTREDGE, J., concurring in a separate opinion in which PLEICONES, J., concurs.

⁷ The remaining issues are affirmed pursuant to SCACR Rule 220(B)(1) and the following authorities: Issue 4 (failure to charge the law of accident)- State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999) (for homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon); State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002) (to warrant reversal, trial court's refusal to give requested charge must be both erroneous and prejudicial to defendant); Issue 5 (involuntary manslaughter instruction)- State v. McKnight, 378 S.C. 33, 661 S.E.2d 354 (2008) (failure to give requested jury instructions is not prejudicial error where instructions given adequately cover the law); Issue 6 (State v. Mouzon instruction) - State v. Reese, 370 S.C.31, 633 S.E.2d 898 (2006) (upholding Mouzon instruction); Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009) (in determining prejudiced from jury instructions, court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution); Issue 7 (directed verdict) - State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007) (if State presents any evidence from which the defendant's guilt can be fairly and logically deduced, case must go to the jury); Issue 8 (cumulative error) - State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008) (to qualify for reversal on ground of cumulative effect of trial errors, defendant must demonstrate errors adversely affected right to fair trial).

JUSTICE KITTREDGE: I concur in affirming the convictions and sentence of H. Dewain Herring. I join the majority in all respects save its determination concerning the initial search. I disagree that, from an objective standard, exigent circumstances existed upon the arrival of law enforcement at Herring's residence two hours after the shooting of John Johnson at Chastity's strip club.

What the majority characterizes as a "peek by police into [Herring's] garage" was, in my judgment, an unwarranted trespass and warrantless search. Upon the arrival of the police at Herring's residence approximately two hours after the crime, exigent circumstances for Fourth Amendment purposes did not exist. More to the point, nothing occurred at the residence to create an exigency to justify a warrantless search. There was neither hot pursuit, nor an imminent threat of danger to police or others, nor other conditions that reasonably fit exigent circumstances jurisprudence. *See State v. Abdullah*, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004) (discussing law of exigent circumstances).

The majority acknowledges that at the time of "Officer Linfert's peek into the garage ...[,] [i]t is undisputed that police had knowledge of Herring's identity, his residence, the make and model of his vehicle, and his license tag number." The police responded to this purported exigent circumstance by ringing the doorbell. When no one answered the doorbell, police "stationed men at the house and went to obtain a warrant." Even from a subjective point, it is clear that law enforcement did not harbor the view that exigent circumstances justified a warrantless search.

Although I believe the peek into the garage constituted an illegal search, I agree with the majority that the search yielded no evidence. The evidence at the residence linking Herring to the shooting was seized as a result of the subsequent valid SLED search warrant.

PLEICONES, J., concurs.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

JAN 20 2010

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

2006-GS-40-00881
2006-GS-40-00914

7-3261

State of South Carolina,

Respondent,

v.

H. Dewain Herring,

Appellant.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, appellant, H. Dewain Herring, respectfully petitions this court to rehear its decision in this case, filed December 21, 2009, opinion no. 26750.

Appellant raised eight separate issues on appeal, some of which had numerous arguments in support of appellant's claims of error in the rulings of the trial court. The Supreme Court addressed only two of the issues on appeal, summarily rejecting the other six claims of error without discussion. As to the two issues discussed by the Court, many of the arguments and supporting authorities were not addressed. Appellant asks the Court to

rehear his case and specifically address the merits of all his arguments with respect to his claims of error.

One of the issues on appeal involved a challenge to the validity of an order of the Chief Justice of the South Carolina Supreme Court, which authorized Richland County law enforcement officers to obtain search warrants through a telephone and facsimile procedure, without a personal appearance before the magistrate, a procedure employed in obtaining one of the search warrants in this case. Prior to oral argument in this appeal, appellant moved on June 16, 2009, for recusal of the Chief Justice on the basis that her participation in deciding the validity of her own order would violate appellant's right to due process. That motion was denied by the Chief Justice on June 18, 2009. The Chief Justice then participated in the decision of this appeal, and none of the challenges to the validity of the Chief Justice's order were addressed or decided by the Court. Appellant hereby renews his recusal motion and incorporates herein by reference all the authorities cited therein. Appellant urges the Court to rehear his appeal, without the participation of the Chief Justice, and address the merits of his challenges to the validity of the Chief Justice's order. To do otherwise will deprive appellant of his right to due process of law. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3.

In accordance with the requirement of Rule 221(a), appellant sets forth the following points the Court overlooked or misapprehended in the decision of this appeal:

Issue 1. Unlawful searches.

The defense moved to suppress three searches conducted by law enforcement officers at the home of appellant – a warrantless search, a search pursuant to a warrant obtained by

Richland County officers, and a search pursuant to a warrant obtained by the State Law Enforcement Division (SLED) – and the fruits of those searches.

A. Warrantless search.

The trial court found the warrantless entry by Richland County Sheriff's deputies into the curtilage of the home and their looking into the windows of the garage was unlawful. The state did not argue in this appeal that this finding was erroneous. However, three justices of the Court *sua sponte* held this warrantless search was lawful, under the exigent circumstances exception to the Fourth Amendment warrant requirement. Two justices disagreed, finding the search was an unwarranted trespass and unlawful search, not justified by any exigent circumstances. The majority misapprehended the exigent circumstances exception to the warrant requirement. The Court should rehear this issue and find the warrantless entry was not within the exigent circumstances exception. Under the exigent circumstances doctrine, an exception to the warrant requirement applies "only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." *See State v. Abdullah*, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004), *cert. denied*, November 19, 2004.

In this case, as the concurring justices correctly held, exigent circumstances did not exist. Two hours had passed since the shooting had occurred. There was no hot pursuit. There was no imminent threat to the officers or others. In fact, the officers went to the door and rang the doorbell, even after their warrantless entry and look into the garage revealed the presence of a vehicle similar to the one seen earlier at the scene of the shooting. Even believing the defendant might be in the house, the officers clearly did not perceive a risk to their safety or some other exigency requiring them to act without seeking a warrant. Just as

they stationed officers to secure the house while they obtained the warrant *after* their warrantless entry, they could have stationed officers to secure the premises *before* that warrantless entry while officers attempted to procure a search warrant. The Court should rehear this issue and find that the warrantless entry, without exigent circumstances, violated the Fourth Amendment and the South Carolina Constitution's counterpart. *See* U.S. Const. amend. IV; S.C. Const. art. I, § 10.

In analyzing the warrantless entry, the majority addressed only the exceptions to the Fourth Amendment warrant requirement of the United States Constitution. However, the majority overlooked the additional, separate protection of appellant's right to privacy guaranteed by the South Carolina Constitution. *See* S.C. Const. art. I, § 10. Searches which do not offend the United States Constitution may nonetheless offend the South Carolina Constitution's prohibition against unreasonable invasions of privacy. *See State v. Weaver*, 374 S.C. 313, 321-22, 649 S.E.2d 479, 483 (2007). Certainly, the greatest privacy interest a person can have is within the confines of his own personal residence, and the Court should rehear this appeal and find that the warrantless trespass into the curtilage of appellant's home and the look into the windows violated the South Carolina Constitution.

Both the majority opinion and the concurrence held that this warrantless search "yielded no evidence." This finding, however, overlooked the fact that this search resulted in the officers' learning of the presence in the garage of the vehicle alleged to have been at the scene of the shooting and of the likelihood that the defendant, and possibly evidence related to the shooting, would be found in the house. The warrant affidavit recited that officers "observed a black Toyota Forerunner parked in the garage." This fact served as part of the basis for the probable cause determination for issuance of the warrant sought by the Richland

County officers. Both that warrant and the ensuing warrant obtained by SLED were fruits of the poisonous tree – the illegal look into the windows of the defendant’s home – and the evidence obtained in those searches was inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *State v. Freiburger*, 366 S.C. 125, 131, 620 S.E.2d 737, 740 (2005), *cert. denied*, 547 U.S. 1147 (2006).

B. Warrant issued to Richland County officers.

The Court should rehear its analysis of the existence of probable cause for issuance of the first warrant, because the Court misapprehended that the information in the warrant affidavit provided a substantial basis upon which to conclude that probable cause existed to search the residence. The only recital in the affidavit providing probable cause to search this particular residence was the presence of a vehicle in the garage, information obtained in the unlawful warrantless entry. The remaining sentence in the affidavit that referred to the 460 Alexander Circle – “A search of Richland County records also provided an additional address of 460 Alexander Circle in Columbia, SC.” – was so conclusory that this statement, standing alone, provided no basis for a conclusion that evidence of the incident at Chastity’s might be found at this address. *Cf. State v. Baccus*, 367 S.C. 41, 51-52, 625 S.E.2d 216, 221-22 (2006); *State v. Smith*, 301 S.C. 371, 372-73, 392 S.E.2d 182, 182-83 (1990). Even if the affidavit had provided specific information connecting this address to the incident at Chastity’s, without knowledge of the presence of a vehicle at the address, there was no probable cause. *Cf. United States v. Dickerson*, 975 F.2d 1245, 1249-50 (7th Cir. 1992) (affidavit was not sufficient to support probable cause determination where only link was registration of car to address to be searched, without allegation that car was parked at that location), *cert. denied*, 507 U.S. 932 (1993).

The Court also held that the warrant was not rendered invalid because Officer Linfert talked to the magistrate and faxed the warrant to him, but Officer Davis appeared, was sworn, and signed the affidavit. In so holding, the Court overlooked the fact that Officer Davis, who had participated only in the part of the investigation at the site of the shooting, had no personal knowledge of anything that occurred in the investigation elsewhere. He could not make an oath based on his personal knowledge of any of the information concerning the person to whom the reported license number was registered, any address related to that person, or the presence of a vehicle in the garage. An affiant must have personal knowledge of the facts on which the probable cause determination is made. *State v. Dunbar*, 361 S.C. 240, 249-50, 603 S.E.2d 615, 620 (Ct. App. 2004), *cert. dismissed as improvidently granted*, 371 S.C. 594, 641 S.E.2d 435 (2007). Without the information purporting to link the crime to the location to be searched, there was no basis whatsoever for issuing this warrant. That information was within the knowledge of Linfert, not Davis. The magistrate knew the information was provided by Linfert, not Davis, but acted as a rubber stamp for the officers, abandoning his duty to act with neutrality and independence from law enforcement. The Court should grant rehearing and address this aspect of the analysis, which the Court overlooked.

C. Warrant issued to SLED agents.

Appellant raised multiple challenges to the validity of the warrant obtained by SLED agents following the shooting of the defendant by the Richland County officers. The Court misapprehended the meaning of the warrant statute, S.C. Code Ann. § 17-13-140, which provides: "A warrant issued hereunder shall be issued only upon affidavit *sworn to before the magistrate . . .*" (emphasis added). The Court misinterpreted this language in finding that

it does not require the affiant to appear *in person* before the magistrate, stating, "It only requires the affidavit be sworn." This construction of the statute ignores the statute's plain language requiring more than that the affidavit "be sworn" – it requires that the oath be taken "before" the magistrate. "Before" means "in the presence of." See Black's Law Dictionary, at 140 (5th ed. 1979); Webster's Third New International Dictionary, unabridged, at 197 (2002). It means "in sight or notice of," "face to face with," "confronting." See Webster's Third New International Dictionary, unabridged, at 197 (2002). A statute must be interpreted in a manner that gives meaning to all of its language, so that "no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." See *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). The plain meaning of Section 17-13-140 is that the affidavit must be sworn *in the presence of* the magistrate.

The fact that the Chief Justice issued an order authorizing issuance of warrants based on something other than a personal appearance and oath "before the magistrate" serves as tacit recognition that such a procedure was not previously authorized under the laws of this state – otherwise, no special order would have been necessary. The Court should grant rehearing, interpret Section 17-13-140 in the manner clearly intended by the legislature, and hold that the phrase "before the magistrate" requires the appearance of the affiant *in person*.

The Court upheld the validity of the SLED warrant without addressing many of the arguments of appellant with respect to the procedure established under the Chief Justice's order. The decision makes only passing mention of the Chief Justice's order and states that it was issued pursuant to Article V, Section 4 of the South Carolina Constitution, which establishes that the Chief Justice is the administrative head of the unified judicial system. However, the decision does not address appellant's argument that the order was *ultra vires* or

exceeded the scope of the authority conferred on the Chief Justice by Article V, Section 4. The grant of administrative authority over the judicial system is not the equivalent of a grant of authority to create new substantive law or procedural rules.

The Court also failed to address appellant's challenges to the Chief Justice's order on other state constitutional grounds, specifically, that the order (1) violates the doctrine of separation of powers, as between the judicial branch and both the legislative and executive branches, S.C. Const. art. I, § 8; S.C. Const. art. III, § 1; S.C. Const. art. IV, § 1; S.C. Const. art. V, § 1; (2) violates the constitutional provision against exempting an individual county from the general laws, S.C. Const. art. VIII, § 7; and (3) violates constitutional provisions which mandate statewide uniformity of criminal laws and uniformity of practice and procedure, S.C. Const. art. III, § 34; S.C. Const. art. VIII, § 14. The Court did not address appellant's additional arguments that the order violates the due process guarantees of both the state and federal constitutions and that the order, applicable only in Richland County and not the entire state, violates the equal protection guarantees of both the state and federal constitutions, U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3.

A criminal defendant has a right to appeal his conviction. *See* S.C. Code Ann. § 18-1-30 *et seq.*; Rule 201, SCACR. That right is eviscerated if the issues raised are not given any consideration and actually decided by the Court. The South Carolina Supreme Court is the final arbiter of challenges to the constitutionality of a statute or order under the South Carolina Constitution. For the Court not even to reach and decide the question of the validity of the order which authorized the facsimile procedure used in this case deprives the appellant of due process of law, as required by both the state and federal constitutions. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3. The Court overlooked the due process

implications of its affirming appellant's convictions without deciding all the issues raised, and it should grant rehearing in order to address the validity of the Chief Justice's order. Moreover, the Chief Justice should recuse herself, so that the validity of that order may be decided by a neutral, impartial, and disinterested tribunal, as required by due process. See U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; *Caperton v. A.T. Masset Coal Co., Inc.*, ___ U.S. ___, 129 S.Ct. 2252, 2259-67 (2009); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 59-62 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

Even if the validity of the Chief Justice's order withstands the constitutional and statutory challenges raised by appellant, the Court's decision should be reheard because the facsimile procedure used in this case did not comply with the requirements of the order. The order spells out that warrants are to be obtained *in person* unless specific criteria are met, and it is undisputed that those criteria were not met in this case. The magistrate was on duty, in bond court, during usual operating hours. It was both "possible" and "practical" for the officer to appear in person, thereby eliminating the authority to use the facsimile procedure.

However, had the circumstances been such that use of the facsimile procedure was authorized, the order further mandates compliance with specific procedural requirements. As is fully demonstrated in the final brief of appellant, p. 27, the procedure used in this case violated paragraphs 1, 4, 5, and 7 of the order's procedural requirements. The Court should rehear this case and address the non-compliance with the requisites of the Chief Justice's order.

The Court also overlooked the fact that the search conducted pursuant to the SLED warrant exceeded its scope, which authorized a search only for evidence "associated to a

shooting incident involving Richland County Sheriff's Department officers and the resident of the said address." The officers conducted their search in areas completely unrelated to that shooting, and the only evidence linking the defendant to the incident at Chastity's was found in such an area. The Court should rehear the case and address this argument.

The Court should also grant rehearing with respect to its application of a "good faith" exception to the statutory requirement of an appearance and oath *before the magistrate*. In applying a good faith exception, the Court overlooked its own case law that recognizes that the state warrant statute, Section 17-13-140, has requirements that are "more strict" than the requirements of the Fourth Amendment. Under these circumstances, the Court should not apply the good faith exception, a court-created doctrine applicable to the court-created exclusionary rule for violations of the Fourth Amendment. Here, the strict requirements of the warrant statute are the creation of the General Assembly, not the courts, and it is for the General Assembly to amend the legislation if it believes exceptions should be made. The Court's application of this exception, not a part of the state's warrant statutes, invaded the province of the legislative branch. The Court should grant rehearing and apply the statute as enacted by the legislature, rather than applying an exception to one of the statute's clear requirements. *See State v. Baucom*, 340 S.C. 339, 346, 531 S.E.2d 922, 925 (2000).

Finally, the Court should rehear its determination that any error in the admission of the evidence seized in the SLED search was harmless, because that conclusion overlooks the nature and significance of the evidence seized in that search. Contrary to the Court's summary of the evidence, the car that drove into the parking lot after the defendant had left was not established to be that of the defendant. No one observed the defendant in the vehicle, and no one observed the license plate of the car that drove up to the entrance

immediately prior to the shooting. The only evidence that linked the defendant to the shooting was the gun found in a closed closet during the search by SLED. Without that evidence, the true identity of the driver who entered the parking lot after the defendant left was a matter of speculation. Under these circumstances, the Court should rehear this case and find the error in admitting the evidence resulting from the SLED search could not be harmless.

Issues 2 and 3. Lay witness interpretations of the video.

The Court upheld the trial court's admission of lay witnesses' testimony concerning the "light" or "flash" they believed they saw on a video created by the club's security system. Those witnesses did not observe first-hand the events depicted on the video, but they were allowed to give narrative testimony concerning the events on the video, including their own opinion as to what the video depicted. The Court's decision misapprehended the error in the lower court's ruling and the curative charges that were given. The defense was objecting to the court's allowing the lay witnesses to testify they saw a flash or light, not only their interpretation that the flash or light was a gunshot. The curative charge went only to the issue of interpreting the flash or light to be a gunshot. It did not obviate the taint of allowing the jury to be influenced by the opinion of these lay witnesses that the video depicted a flash or light.

The Court overlooked Rules 602 and 701 of the South Carolina Evidence Rules, which limit the testimony of lay witnesses to opinions or interpretations that are rationally based on their perceptions, perceptions gleaned from their *personal knowledge*. Here, the witnesses did not observe the actual events. They had no personal knowledge, based on actually observing the vehicle at the time of the shooting, of whether there was a flash or

light. Interpreting what was depicted on the video was exclusively the function of the jury, and the court committed error in allowing testimony of the witnesses as to their own interpretations.

These witnesses were not qualified as experts to render opinion testimony concerning what was depicted on the video. Indeed, the prosecution attempted, unsuccessfully, to obtain such expert testimony, taking the video to NASA to have it enhanced by computer scientists there. Notwithstanding these attempts, the state did not produce a single expert who could testify that what appeared on the video was consistent with a gunshot aimed from the window of the vehicle. The only expert who actually testified stated that it was not. It was impermissible and prejudicial to allow lay witnesses, with no special expertise and no personal knowledge of the events depicted in the video, to render opinion testimony contrary to the findings of the experts who analyzed the video.

In finding the trial court's instructions cured any prejudice from admission of the lay witness opinion testimony, the Court misapprehended the effect of the so-called "curative" instructions. Curative instructions are not always adequate to eliminate the prejudice resulting from impermissible testimony: "[t]here are instances where the jury is exposed to inadmissible evidence which could make such a strong impression that instructions to disregard it may not remove its prejudicial effect." *United States v. Brevard*, 739 F.2d 180, 182 (4th Cir. 1984). Here, the court's instructions could not cure the taint from the improper interpretation for the jury of what was on the video. The repeated suggestion to the jurors that a light, a flash – even a gunshot – was depicted on the video could not be removed from their minds by an instruction of the court. The court's charge could not "unring the bell." Indeed, the trial court's attempt to "cure" the impermissible opinion testimony from these lay

witnesses concerning a flash, a light, and a shot actually compounded the prejudice, reiterating to the jury time and time again the impermissible interpretations given by these lay witnesses who were not qualified to render an expert opinion.

Moreover, the Court misapprehended the nature of the objection, the content of the curative instructions, and the prejudice resulting from the lay testimony. A review of the video (State's exhibit 54) shows there was no clear light or flash. The sole expert testified as to the substantial nature of the light or flash that would result if a gun were aimed out the window and fired. Such a light would be "a fire ball," a plume several feet in length in the shape of a cone, with a diameter of one to one-and-a-half feet. No such plume is depicted on the video. Indeed, the presence of any light or flash is genuinely in dispute. The prejudice that resulted from allowing lay witnesses to interpret the video as depicting a light or flash was the likelihood that the jurors would rely on such testimony and believe, based on the suggestion of these witnesses, that there was a flash, rather than reach their own conclusions based on their own review of the video. There was no probative value to the testimony, since the jurors were equally qualified as any lay witness to draw their own conclusions as to what was on the video. *See* Rule 403, SCRE. Under these circumstances, the error could not be harmless, and the Court should rehear the issue of both the admission of the evidence and the denial of the mistrial motion based on that evidence.

Issues 4, 5, 6. Jury charges.

Appellant appealed the refusal of the trial court to give three jury charges requested by the defense and further challenged the court's decision to give a charge requested by the state, to which the defense objected. The Court affirmed on these issues without discussion, citing Rule 220(B)(1), SCACR, and certain cases. As to each of these jury charges, the

Court misapprehended the applicability of the cited cases to the claim of error and overlooked its own controlling precedents.

A. Accident charge.

The court cited *State v. Burris*, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999), for the requisites of a defense of accident. While the state's version of the evidence may have negated a defense of accident, the defense presented evidence from which a jury could find all the requisites were met. Ballistic and trajectory evidence presented by the defense was consistent with a shot fired from beneath the level of the window, near the glove compartment, implying an unintentional shooting, and the state offered no contradictory evidence. The evidence showed that the defendant was lawfully in possession of the weapon, and the jury could infer that the gun discharged accidentally while he was handling the weapon near the glove compartment, below the window level, before departing. A trial court commits reversible error when it fails to give a requested charge on a defense that is supported by the evidence. *State v. Rye*, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007). The Court should rehear this issue, fully analyze the arguments contained in the briefs, and reverse.

B. Charge on negligent use of a deadly weapon.

The defense requested a charge that "one who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter." See *State v. Brown*, 205 S.C. 514, 518, 32 S.E.2d 825, 827 (1945). The defense also requested a second charge explaining the negligent use of a dangerous weapon, based on *State v. Gilliam*, 66 S.C. 419, 422, 45 S.E. 6, 7 (1903), and *State v. Quick*, 168 S.C. 76, 81, 167 S.E. 19, 21 (1932). Appellant contended that the court committed reversible

error in failing to give a charge on involuntary manslaughter from negligent use of a deadly weapon, in light of another part of the court's charge that allowed the jury to infer malice from the use of a deadly weapon. The Court summarily affirmed on this issue, citing *State v. McKnight*, 378 S.C. 33, 661 S.E.2d 354 (2008), for the proposition that failure to give a requested charge is not prejudicial error where the instructions given adequately cover the law. The Court misapprehended the nature of the instructions actually given, which did not adequately cover the law because they did not give the complete picture of what conclusions a jury could draw from the use of a deadly weapon.

After the briefing and argument in this case, the Court filed a decision in another case, *State v. Belcher*, __ S.C. __, 685 S.E.2d 802 (2009). On October 12, 2009, appellant immediately brought to the Court's attention that the *Belcher* decision supported his argument on this issue. See Rule 208(b)(7), SCACR (citation of supplemental authority). The Court, however, did not address nor even mention the *Belcher* decision, overlooking its applicability to the requested involuntary manslaughter charges.

In *Belcher*, the Court addressed a challenge to the traditional charge given in murder cases in this state instructing that malice may be inferred from the use of a deadly weapon. Overruling existing precedents, the Court held that the inference-of-malice charge is not appropriate in a murder prosecution where evidence is presented that would reduce, mitigate, excuse, or justify the killing. *Belcher*, __ S.C. at __, 685 S.E.2d at 804-10. Recognizing that malice includes the absence of justification, excuse, and mitigation, the Court reasoned:

When malice is viewed in light of these component parts, it becomes clear that inferring malice from the use of a deadly weapon is indeed only a "half-truth." The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts.

Belcher, __ S.C. at __, 685 S.E.2d at 808-09; *see also Glenn v. State*, 511 A.2d 1110, 1116 (Md. Ct. Spec. App. 1986).

At the time of trial, the inference-of-malice charge was an accepted jury instruction in all murder prosecutions, even those in which evidence was present to reduce, mitigate, excuse, or justify the killing. Against that backdrop, no objection was lodged by the defense in the trial court to the giving of this long-approved jury charge. However, in recognition of the "half-truth" nature of such a charge where the evidence tended to reduce or mitigate a killing, the defense urged the trial court to give the jury a more complete picture of the applicable law, requesting that the inference-of-malice charge be balanced by a charge on a competing principle of law applicable in this case – that the negligent use of a deadly weapon is involuntary manslaughter. Although the lower court instructed the jury that it could, upon the evidence presented in this case, find the defendant guilty of involuntary manslaughter, it refused to give either of the requested charges with respect to negligent use of a deadly weapon.

On appeal, appellant contended that the court committed reversible error in failing to give one of these charges, because of the prejudicial effect of the inference-of-malice instruction, *standing alone*. As the Court recognized in *Belcher*, the absence of justification, excuse, or mitigation could not be inferred from the use of a deadly weapon "standing alone." *See Belcher*, __ S.C. at __, 685 S.E.2d at 808-09. In this prosecution, the evidence presented by the defense supported instructing the jury that it could find the defendant guilty of the reduced offense of involuntary manslaughter. Because the inference-of-malice instruction was only a "half-truth" in the context of this prosecution, the charge given by the trial court was not a complete and accurate statement of the applicable law.

In summarily affirming this issue (footnote 7 in the opinion), the Court overlooked its recognition in *Belcher* that the court's charge, as given, presented only a "half-truth." Contrary to the Court's citation to *McKnight* and the parenthetical reference to the principle for which *McKnight* was cited, the lower court's failure to give one of the requested jury charges with respect to negligent use of a deadly weapon, in the context of this case in which the inference-of-malice charge was given, was prejudicial error because the instructions given did not adequately cover the law.

Appellant argued in his brief that the failure to give one of the requested charges concerning negligent use of a deadly weapon amounted to a constitutional violation of appellant's right to due process, in light of the court's giving the inference-of-malice charge. See U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3. The due process implications of this issue are now even greater, because this Court has now recognized the impropriety of an inference-of-malice instruction, standing alone, where the evidence supports a finding reducing the offense from murder to some other form of killing. If the Court fails to apply to this case the principles it embraced in *Belcher* just three months ago, appellant will be deprived of due process of law, in contravention of both federal and state constitutional due process protections. The Court should grant rehearing, reverse the lower court's refusal to give one of these requested charges, and remand for a new trial.

C. *Mouzon* charge.

The defense objected to the state's request to charge the jury on the principle of law espoused in *State v. Mouzon*, 231 S.C. 655, 99 S.E.2d 672 (1957), and appellant contended the giving of this charge was erroneous. The Court summarily affirmed this issue (footnote 7 of the opinion), citing *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006), and *Battle v. State*,

382 S.C. 197, 675 S.E.2d 736 (2009). The Court misapprehended the applicability of those cases, and it should rehear this issue.

In *Reese*, the Court held a solicitor's Golden Rule closing argument improper, and it cited the *Mouzon* principle in its determination that, because the evidence was not overwhelming, the improper argument deprived the defendant of due process. See *Reese*, 370 S.C. at 37-38, 633 S.E.2d at 901-02. The *Reese* Court was not presented with a challenge to the continued viability of the *Mouzon* principle in the wake of the legislature's adoption of a statutory definition of manslaughter. Nor was the *Reese* Court presented with a challenge to this principle on the constitutional grounds of vagueness and burden-shifting. The Court's reference to the *Reese* decision as "upholding Mouzon instruction" misapprehends the holding of *Reese*. In a wholly different context, *Reese* merely made reference to the *Mouzon* principle from prior case law. That principle was not at issue in *Reese*, and the *Reese* Court therefore did not "uphold" that principle in the face of a statutory or constitutional challenge. [*Reese* also cited the principle that malice may be inferred from the use of a deadly weapon, and *Belcher* expressly overruled *Reese* on that basis. See *Belcher*, __ S.C. at __ n. 10, 685 S.E.2d at 811 n.10.]

In *Battle*, the Court addressed a lower court's finding that counsel was ineffective for failing to object to language in the trial court's charge that allegedly diluted the state's burden of proving the defendant guilty beyond a reasonable doubt. While the Court cautioned against some of the language in the charge used by the trial court, it held there was not a reasonable likelihood the jury applied the court's instruction in a way that violated the Constitution, in light of the remainder of the court's charge that emphasized the state retained the burden to prove the defendant's guilt beyond a reasonable doubt. See *Battle*,

382 S.C. at 203-04, 675 S.E.2d at 739-40. The principle the Court cited from *Battle* – that in determining prejudice from jury instructions, the court must find there is a reasonable likelihood the jury applied the instruction in a way that violates the Constitution – is simply not applicable to appellant's arguments related to the *Mouzon* charge on non-constitutional grounds: (1) that the evidence did not warrant the giving of the charge and (2) that the principle stated in the charge is no longer the law of this State in light of the General Assembly's enactment of a statute which establishes a different mental state for involuntary manslaughter, S.C. Code Ann. § 16-3-60. The Court did not address either of these arguments, and it should rehear this issue and find the *Mouzon* charge was improper.

Appellant also challenged the *Mouzon* charge on due process grounds of vagueness and burden-shifting, and the Court's reliance on *Battle* with respect to those challenges was misplaced. This case is unlike *Battle*, where certain disfavored phrases were part of the court's instruction but the instruction as a whole appropriately informed the jury of the state's burden of proof. Here, the Court misapprehended the magnitude of the constitutional implications of the *Mouzon* charge. Its vagueness violated the procedural due process requirement of fair notice and proper standards for adjudication. See *Curtis v. State*, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001), *cert. denied*, 535 U.S. 926 (2002). It impermissibly left the jury to guess at the meaning of the *Mouzon* level of recklessness, in violation of due process. See *State v. Sullivan*, 362 S.C. 373, 375, 608 S.E.2d 422, 424 (2005); *Curtis*, 345 S.C. at 575, 549 S.E.2d at 598. Moreover, by allowing the jury to choose between murder and involuntary manslaughter if it found the defendant acted recklessly, the charge shifted the burden to the defense to disprove that the defendant's recklessness rose to an undefined standard that can be deemed malice, also in violation of due process. See

Lowry v. State, 376 S.C. 499, 505-07, 657 S.E.2d 760, 763-64 (2008); *Curtis*, 345 S.C. at 570, 549 S.E.2d at 597-98. The Court should grant rehearing and find that the *Mouzon* charge was improper in this case, factually, statutorily, and constitutionally.

Issue 7. Directed verdict on pointing and presenting.

If the Court determines the warrant issued to the Richland County officers was invalid, either as the fruit of the unlawful warrantless search or in its own right, the entry by the Richland County officers into the defendant's home was unlawful. In that event, the defendant was within his rights to arm himself in self-defense and defense of habitation. *See Rye*, 375 S.C. at 123, 651 S.E.2d at 323; *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

Issue 8. Cumulative error.

Upon rehearing, if this Court alters its findings as to the claims of error raised in this appeal, the Court should also rehear the cumulative effect of those errors and find that the defendant was denied his due process right to a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 342 S.C. 500, 512-513, 537 S.E.2d 291, 297-98 (Ct. App. 2000), *rev'd on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct. App. 1995).

CONCLUSION

The Court should rehear this case. In the interest of due process, the Chief Justice should recuse herself and allow the case to be reheard by an impartial tribunal. The Court should address each and every issue and argument, in order to assure the defendant receives due process in this appeal of right. With respect to the issues actually decided by the Court, the Court should rehear those issues and address the points set forth above that the Court

overlooked or misapprehended. The Court should reverse the defendant's conviction and remand his case for a new trial.

Respectfully submitted,

A handwritten signature in dark ink, appearing to be 'RH' followed by a large loop, positioned above a horizontal line.

Richard A. Harpootlian
Graham L. Newman
Richard A. Harpootlian, P.A.
1410 Laurel Street
Columbia, South Carolina 29201
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Katherine Carruth Goode
1079 Old Camden Road
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Telephone: 803-799-4440

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

2006-GS-40-00881
2006-GS-40-00914

State of South Carolina,

Respondent,

v.

H. Dewain Herring,

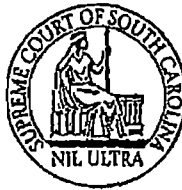
Appellant

PROOF OF SERVICE

I hereby certify that I served a copy of appellant's Petition for Rehearing upon respondent, by United States mail, postage prepaid, to respondent's attorney of record, Senior Assistant Attorney General S. Creighton Waters, P.O. Box 11549, Columbia, South Carolina 29211, on January 20, 2010.



Richard A. Harpootlian
Graham L. Newman
Richard A. Harpootlian, P.A.
1410 Laurel Street
Columbia, South Carolina 29201
Telephone: 803-252-4848



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

ATTORNEY GENERAL'S OFFICE
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COLUMBIA, SOUTH CAROLINA 29211
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(803) 734-1080
FAX (803) 734-1499

May 14, 2010

Richard A. Harpootlian, Esquire
Graham L. Newman, Esquire
Richard A. Harpootlian, P.A.
P.O. Box 1090
Columbia, SC 29202

Re: The State v. Herring, H. Dewain

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

"Petition for rehearing is denied.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ John W. Kittredge J.

Justice Donald W. Beatty and Acting
Justice John H. Waller, not participating.

May 14, 2010."

SCANNED
APR 25 2016

Richard A. Harpootlian, Esquire
Re: The State v. H. Dewain Herring
May 14, 2010
Page two

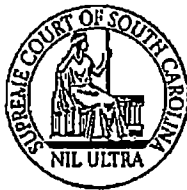
The remittitur is today being forwarded to the lower court.

Very truly yours,

Daniel E. Harpootlian
CLERK

DES/jjp

cc: Katherine Carruth Goode, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
Solicitor Warren Blair Giese



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

May 14, 2010

REMITTITUR

The Honorable Jeanette W. McBride
1701 Main Street, Room 205
PO Box 2766
Columbia, SC 29202

Re: The State v. Herring, H. Dewain – 2006-GS-40-00881
2006-GS-40-00914

Dear Mrs. McBride:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

Daniel E. Shearouse
ES

CLERK

DES/jjp

Enclosure

Attorney General's Office
RECEIVED 5-17-10

ADMINISTRATIVE INSTRUCTIONS

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SCANNED
APR 25 2016

cc: (without enclosure)
Katherine Carruth Goode, Esquire
Richard A. Harpootlian, Esquire
Graham L. Newman, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
Solicitor Warren Blair Giese

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

H. Dewain Herring

Petitioner,

vs.

William R. Byars, Jr., Director, S.C.
Department of Corrections, Robert M.
Stevenson III, Warden Broad River
Correctional Institute

Respondents.

PETITION FOR HABEAS CORPUS

Petitioner, H. Dewain Herring (Herring), by and through his undersigned counsel, alleges as follows:

I. PARTIES

1. Herring is confined at the Broad River Correctional Institute, Columbia, South Carolina serving a thirty (30) year sentence following his convictions for murder and pointing and presenting a firearm. Herring received a five (5) year sentence on the pointing and presenting conviction which is running concurrently with the sentence for murder.
2. Respondent, William R. Byars, Jr., is the Director of the South Carolina Department of Corrections.
3. Respondent Robert M. Stevenson III is the Warden at the Broad River Correctional Institute.

II. JURISDICTION

4. The United States District Court has jurisdiction over this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §§ 2254 and 1331. Petitioner is in custody

pursuant to judgment of a South Carolina State court and seeks relief on the ground that his conviction and sentence are in violation of his rights under the United States Constitution.

III. VENUE

5. Venue is proper in the United States District Court for the District of South Carolina because Petitioner's conviction was obtained in this District.

IV. PROCEDURAL HISTORY

6. Herring was indicted on February 16, 2006 in Richland County, South Carolina on charges of murder and pointing and presenting following the shooting death of nightclub employee on January 29, 2006.
6. Herring entered a plea of not guilty and was tried by a jury in Richland County Court of General Sessions beginning on May 7 and ending May 21, 2007.
7. Prior to trial on May 2, 2007 Herring filed a motion to suppress certain evidence seized during a warrantless search at his residence as well as the fruits of such search. Richland County Deputies went to Herring's home investigating the nightclub shooting and knocked on the door of his residence in the early morning hours of January 30, 2006. No one answered the door. The officers then left the sidewalk, crossed into Herring's yard and peered into his closed garage and saw what appeared to be the vehicle involved in the shooting under investigation. Thereafter, the Deputies used this information to obtain a search warrant of Herring's residence. During the execution of this warrant, the Deputies fired at Herring thinking that he was attempting to shoot at them. The South Carolina Law Enforcement Division (SLED) was contacted to investigate this second shooting

involving the Deputies. SLED obtained a second search warrant for Herring's residence.

8. The trial court conducted a suppression hearing on May 2, 2007 prior to jury selection.
9. During this suppression hearing, Herring also challenged the propriety of a search following the issuance of a warrant obtained by SLED that was obtained via facsimile in apparent violation of South Carolina criminal procedure. In the execution of this SLED warrant, Agents seized a firearm which was later link to the nightclub shooting through forensic testing.
10. Subsequent to this hearing, the State produced portions of an Administrative Order issued by the Chief Justice of the Supreme Court of the State of South Carolina authorizing the issuance of a search warrant via facsimile under certain limited circumstances. Herring then challenged the legality under the South Carolina and the United States Constitutions of a unique State law criminal procedure applicable to only one county in South Carolina as well as the authority of the Chief Judge to create such an exception by Administrative Order.
11. At the conclusion of the suppression hearing, the trial court ruled that the warrantless search "clearly violated the defendant's expectation of privacy within his home" and "could not support the seizure of evidence or be the basis for a later search warrant" under the Constitutions of the United States and South Carolina. Notwithstanding the trial court's finding that the warrantless entry was unlawful, the court denied the defense motions to suppress on the basis that the

two warrants were supported by probable cause and that the evidence found in the searches pursuant to those warrants would have been inevitable discovered.

12. Following a two week trial, the jury found Herring guilty and the trial court sentenced him to concurrent sentences of thirty (30) years for murder and five (5) years for pointing and presenting.
13. Herring timely filed a Notice of Appeal to the South Carolina Court of Appeals of his conviction and sentence on May 29, 2007.
14. The Supreme Court of South Carolina granted certiorari of the appeal prior to any ruling by the South Carolina Court of Appeals.
15. Because the appeal involved a challenge to the authority of the Chief Justice of the South Carolina Supreme Court to issue the Administrative Order altering the manner in which search warrants are obtained in Richland County as well as the validity of the Order, on June 16, 2009 Herring filed a motion for the Chief Justice to recuse herself from participating in the appeal of his conviction and sentence.
16. On June 18, 2009, the Chief Justice denied the motion to recuse in a one word order.
17. In the appeal before the South Carolina Supreme Court, Herring raised the following issues:
 - a. Did the trial court err in denying the defense motions to suppress the three searches of appellant's residence and the fruits of those searches?

- b. Did the trial court abuse its discretion in allowing lay witnesses to give their opinion of what could be seen on the video, when those witnesses did not personally observe the actual events depicted in that portion of the video?
 - c. Did the trial court abuse its discretion in denying the defense mistrial motion based on the admission of improper lay opinion testimony?
 - d. Did the trial court commit reversible error in denying the requested charge on accident?
 - e. Did the trial court commit reversible error in denying the requested charges on involuntary manslaughter based on negligent use of a deadly weapon?
 - f. Did the trial court commit reversible error in granting the state's request to charge based on *State v. Mouzon*?¹
 - g. Did the trial court err in denying the motion for directed verdict with respect to the charge of pointing and presenting a firearm?
 - h. Was the cumulative prejudice that resulted from all the erroneous rulings such that appellant is entitled to a new trial?
18. The Supreme Court held oral arguments in Herring's appeal on June 23, 2009.
19. Following oral arguments in Herring's appeal, the South Carolina Supreme Court issued a ruling in the case of *State v. Belcher*, ____ S.C. ____, 685 S.E.2d 802 (2009) which changed the law in South Carolina relating to whether a jury may infer malice from the use of a deadly weapon in a murder trial, overruling existing precedents.

¹ The requested charge allowed for the jury to convict Herring of murder based upon a finding of reckless conduct.

20. On October 12, 2009, Herring immediately brought to the Supreme Court's attention that the *Belcher* decision supported his argument relating to one issue raised on appeal regarding the propriety of the jury instructions given by the trial court on the question of malice and involuntary manslaughter pursuant to S.C. Supreme Court Rule 208(b)(7), SCACR (citation of supplemental authority).
21. On December 29, 2009 the South Carolina Supreme Court affirmed Herring's conviction and sentence. In its Opinion (No. 26750), the Supreme Court addressed only two of the issues raised on appeal, (a) above relating to the searches of Herring's residence and (b) above regarding the lay opinion testimony pertaining to the witnesses' belief that they saw a gun shot flash on a security video.
22. Herring filed a Petition to Reconsider on January 20, 2010 requesting the Court to rehear the case and to address the arguments and issues that were omitted from its Opinion. Furthermore, Herring also requested that the Supreme Court apply the *Belcher* decision to his case, which was pending on direct review when the Supreme Court issued its ruling. Herring also renewed his request that the Chief Justice recuse herself from the deliberations of the Petition for Rehearing.
23. On May 14, 2010 the South Carolina Supreme Court denied the Petition for Rehearing.
24. On June 4, 2010, Herring filed a Petition For Post Conviction Relief (PCR) in the South Carolina Court of Common Pleas. However the issues raised in the PCR are limited to those issues that were not presented to the State trial or appellate courts

and were not exhausted for purposes of habeas relief. Herring is only pursuing the federal constitutional claims that have been exhausted in this habeas petition.

V. GROUNDS FOR RELIEF

25. Petitioner contends that his conviction and sentence are contrary to the Constitution of the United States for the following reasons

- a. Petitioner Herring's Due Process Right To A Fair Trial Was Denied Because The Jury Instructions Equated The Mental State Required For A Conviction of Murder With the Same Mental State Necessary For The Lesser Included Offense of Involuntary Manslaughter, Thereby Allowing The Jury To Find Petitioner Guilty Of Murder Even If Petitioner Possessed The Mitigating State of Mind For Involuntary Manslaughter
- b. Petitioner's Due Process Rights To A Fair Trial Were Denied Because The Jury Was Not Instructed On The Defense of Accident Nor Provided Instructions Pertaining To The Negligent Use of A Firearm
- c. Petitioner was denied his right to Due Process as a result of the South Carolina Supreme Court's decision to refuse to apply its decision in *State v. Belcher*, ____ S.C. ____, 685 S.E.2d 802 (2009) to the Petitioner as required by *Griffith v. Kentucky* 479 U.S. 314 (1987);
- d. Petitioner was denied his right to Due Process as a result of the refusal of the Chief Justice of the South Carolina Supreme Court to recuse herself from participating in the appeal from Herring's conviction which necessarily involved a direct review of the legality of the Chief Justice's Administrative Order;
- e. Petitioner was denied his right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Petitioner was further deprived of his right to fully and fairly litigate this Fourth Amendment claim in the South Carolina state courts as a result of the refusal of the Chief Judge to recuse herself from participation and the Court's refusal to apply the correct and controlling legal standard applicable to Fourth Amendment claims;

VI. FACTUAL AND LEGAL ARGUMENTS

26. The factual claims and legal arguments that support the claims set forth in Section V are fully set forth in Petitioner's Memorandum in Support of Petition of Writ of

Habeas Corpus. These factual claims and legal arguments are hereby incorporated by reference.

VII. EXHAUSTION

27. Consistent with 28 U.S.C. § 2254(b), all grounds for relief raised in this Petition for Writ of Habeas Corpus have previously been raised before the South Carolina Supreme Court.

VIII. RELIEF REQUESTED

Wherefore, Petitioner Herring prays the Court:

1. Require Respondent to file and answer to this Petition prescribed by Rule 5 of the Rules governing Section 2254 cases in the United States District Court, identifying all State proceedings conducted in Petitioner's case, including any proceedings that have not been recorded or transcribed, and specifically admitting or denying the factual allegations set forth in this Petition.
2. Permit Petitioner to respond to any affirmative defenses raised by Respondent in his answer.
3. Permit Petitioner to utilize the procedures for discovery in *habeas corpus* Rule 5, Fed.R.Civ.P. 26-37, to the extent necessary to fully develop and identify the facts supporting this Petition and any defenses thereto raised by Respondent's answer.
4. Conduct an evidentiary hearing to resolve any factual disputes raised in relation to the claims in this Petition, by Respondent's answer to this Petition, or Petitioner's response to any of the affirmative defenses raised in Respondent's answer.
5. Issue a writ of habeas corpus to direct Respondents to release Petitioner from custody and to grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ James M. Griffin

James M. Griffin, Fed. I.D. No. 1053

P.O. Box 999

Columbia, SC 29202

(803) 744-0800

Attorneys for Petitioner

January 20, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

H. Dewain Herring

Petitioner,

vs.

William R. Byars, Jr., Director, S.C.
Department of Corrections, Robert M.
Stevenson III, Warden Broad River
Correctional Institute

Respondents.

**FIRST AMENDED
PETITION FOR HABEAS CORPUS**

Petitioner, H. Dewain Herring (Herring), by and through his undersigned counsel, alleges as follows:

I. PARTIES

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3. Respondent Robert M. Stevenson III is the Warden at the Broad River Correctional Institute.

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8. Prior to trial on May 2, 2007 Herring filed a motion to suppress certain evidence seized during a warrantless search at his residence as well as the fruits of such search. Richland County Deputies went to Herring's home investigating the nightclub shooting and knocked on the door of his residence in the early morning hours of January 29, 2006. No one answered the door. The officers then left the sidewalk, crossed into Herring's yard and peered into his closed garage and saw what appeared to be a vehicle of the same or similar description as was involved in the shooting under investigation. Thereafter, the Deputies used this information to obtain a search warrant of Herring's residence. During the execution of this warrant, the Deputies fired at Herring seventeen (17) times thinking that he was attempting to shoot at them. The South Carolina Law Enforcement Division

(SLED) was contacted to investigate this second shooting involving the Deputies.

SLED obtained a second search warrant for Herring's residence.

9. The trial court conducted a suppression hearing on May 2, 2007 prior to jury selection.
10. During this suppression hearing, Herring also challenged the propriety of a search following the issuance of a warrant obtained by SLED that was obtained via facsimile in apparent violation of South Carolina criminal procedure. In the execution of this SLED warrant, Agents seized a firearm which was later link to the nightclub shooting through forensic testing.
11. Subsequent to this hearing during trial on Wednesday May 9, 2006, the State produced portions of an Administrative Order issued by the Chief Justice of the Supreme Court of the State of South Carolina authorizing the issuance of a search warrant via facsimile under certain limited circumstances. Herring then challenged the legality under the South Carolina and the United States Constitutions of a unique State law of criminal procedure applicable to only one county in South Carolina as well as the authority of the Chief Judge to create such an exception by Administrative Order.
12. At the conclusion of the suppression hearing, the trial court ruled that the warrantless search "clearly violated the defendant's expectation of privacy within his home" and "could not support the seizure of evidence or be the basis for a later search warrant" under the Constitutions of the United States and South Carolina. Notwithstanding the trial court's finding that the warrantless entry was unlawful, the court denied the defense motions to suppress on the basis that the

two warrants were supported by probable cause and that the evidence found in the searches pursuant to those warrants would have been inevitably discovered.

13. Following a two week trial, the jury found Herring guilty and the trial court sentenced him to concurrent sentences of thirty (30) years for murder and five (5) years for pointing and presenting.
14. Herring timely filed a Notice of Appeal to the South Carolina Court of Appeals of his conviction and sentence on May 29, 2007.
15. The Supreme Court of South Carolina granted certiorari of the appeal prior to any ruling by the South Carolina Court of Appeals.
16. Because the appeal involved a challenge to the authority of the Chief Justice of the South Carolina Supreme Court to issue the Administrative Order altering the manner in which search warrants are obtained in Richland County as well as the validity of the Order, on June 16, 2009 Herring filed a motion for the Chief Justice to recuse herself from participating in the appeal of his conviction and sentence.
17. On June 18, 2009, the Chief Justice denied the motion to recuse in a one word order.
18. In the appeal before the South Carolina Supreme Court, Herring raised the following issues:
 - a. Did the trial court err in denying the defense motions to suppress the three searches of appellant's residence and the fruits of those searches?

- b. Did the trial court abuse its discretion in allowing lay witnesses to give their opinion of what could be seen on the video, when those witnesses did not personally observe the actual events depicted in that portion of the video?
 - c. Did the trial court abuse its discretion in denying the defense mistrial motion based on the admission of improper lay opinion testimony?
 - d. Did the trial court commit reversible error in denying the requested charge on accident?
 - e. Did the trial court commit reversible error in denying the requested charges on involuntary manslaughter based on negligent use of a deadly weapon?
 - f. Did the trial court commit reversible error in granting the state's request to charge based on *State v. Mouzon*?¹
 - g. Did the trial court err in denying the motion for directed verdict with respect to the charge of pointing and presenting a firearm?
 - h. Was the cumulative prejudice that resulted from all the erroneous rulings such that appellant is entitled to a new trial?
19. The Supreme Court held oral arguments in Herring's appeal on June 23, 2009.
20. Following oral arguments in Herring's appeal, the South Carolina Supreme Court issued a ruling in the case of *State v. Belcher*, ____ S.C. ____, 685 S.E.2d 802 (2009) issued a ruling on October 12, 2009 which changed the law in South Carolina relating to whether a jury may infer malice from the use of a deadly weapon in a murder trial, overruling existing precedents.

¹ The requested charge allowed for the jury to convict Herring of murder based upon a finding of reckless conduct.

21. On October 12, 2009, the same day as the *Belcher* decision, Herring immediately brought to the Supreme Court's attention that the *Belcher* decision supported his argument relating to one issue raised on appeal regarding the propriety of the jury instructions given by the trial court on the question of malice and involuntary manslaughter pursuant to S.C. Supreme Court Rule 208(b)(7), SCACR (citation of supplemental authority).
22. On December 29, 2009 the South Carolina Supreme Court affirmed Herring's conviction and sentence. In its Opinion (No. 26750), the Supreme Court addressed only two of the issues raised on appeal, (a) above relating to the searches of Herring's residence and (b) above regarding the lay opinion testimony pertaining to the witnesses' belief that they saw a gun shot flash on a security video.
23. Herring filed a Petition to Reconsider on January 20, 2010 requesting the Court to rehear the case and to address the arguments and issues that were omitted from its Opinion. Furthermore, Herring also requested once again that the Supreme Court apply the *Belcher* decision to his case, which was pending on direct review when the Supreme Court issued its ruling. Herring also renewed his request that the Chief Justice recuse herself from the deliberations of the Petition for Rehearing.
24. On May 14, 2010 the South Carolina Supreme Court denied the Petition for Rehearing.
25. On June 4, 2010, Herring filed a Petition For Post Conviction Relief (PCR) in the South Carolina Court of Common Pleas. However the issues raised in the PCR are limited to those issues that were not presented to the State trial or appellate courts

and were not exhausted for purposes of habeas relief. Herring is only pursuing the federal constitutional claims that have been exhausted in this habeas petition.

V. GROUNDS FOR RELIEF

26. Petitioner contends that his conviction and sentence are contrary to the

Constitution of the United States for the following reasons

- i. Petitioner Herring's Due Process Right To A Fair Trial Was Denied Because The Jury Instructions Equated The Mental State Required For A Conviction of Murder With the Same Mental State Necessary For The Lesser Included Offense of Involuntary Manslaughter, Thereby Allowing The Jury To Find Petitioner Guilty Of Murder Even If Petitioner Possessed The Mitigating State of Mind For Involuntary Manslaughter
- j. Petitioner's Due Process Rights To A Fair Trial Were Denied Because The Jury Was Not Instructed On The Defense of Accident Nor Provided Instructions Pertaining To The Negligent Use of A Firearm
- k. Petitioner was denied his right to Due Process as a result of the South Carolina Supreme Court's decision to refuse to apply its decision in *State v. Belcher*, ____ S.C. ____, 685 S.E.2d 802 (2009) to the Petitioner as required by *Griffith v. Kentucky* 479 U.S. 314 (1987);
- l. Petitioner was denied his right to Due Process as a result of the refusal of the Chief Justice of the South Carolina Supreme Court to recuse herself from participating in the appeal from Herring's conviction which necessarily involved a direct review of the legality of the Chief Justice's Administrative Order;
- m. Petitioner was denied his right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Petitioner was further deprived of his right to fully and fairly litigate this Fourth Amendment claim in the South Carolina state courts as a result of the refusal of the Chief Judge to recuse herself from participation and the Court's refusal to apply the correct and controlling legal standard applicable to Fourth Amendment claims;

VI. FACTUAL AND LEGAL ARGUMENTS

27. The factual claims and legal arguments that support the claims set forth in Section V are fully set forth in Petitioner's Memorandum in Support of Petition of Writ of

Habeas Corpus. These factual claims and legal arguments are hereby incorporated by reference.

VII. EXHAUSTION

28. Consistent with 28 U.S.C. § 2254(b), all grounds for relief raised in this Petition for Writ of Habeas Corpus have previously been raised before the South Carolina Supreme Court.

VIII. RELIEF REQUESTED

Wherefore, Petitioner Herring prays the Court:

1. Require Respondent to file an answer to this Petition prescribed by Rule 5 of the Rules governing Section 2254 cases in the United States District Court, identifying all State proceedings conducted in Petitioner's case, including any proceedings that have not been recorded or transcribed, and specifically admitting or denying the factual allegations set forth in this Petition.
2. Permit Petitioner to respond to any affirmative defenses raised by Respondent in his answer.
3. Permit Petitioner to utilize the procedures for discovery in *habeas corpus* Rule 5, Fed.R.Civ.P. 26-37, to the extent necessary to fully develop and identify the facts supporting this Petition and any defenses thereto raised by Respondent's answer.
4. Conduct an evidentiary hearing to resolve any factual disputes raised in relation to the claims in this Petition, by Respondent's answer to this Petition, or Petitioner's response to any of the affirmative defenses raised in Respondents' Answer.
5. Issue a writ of habeas corpus to direct Respondents to release Petitioner from custody and to grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ James M. Griffin

James M. Griffin, Fed. I.D. No. 1053

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(803) 744-0800

Attorneys for Petitioner

April 20, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

H. Dewain Herring

Petitioner,

vs.

William R. Byars, Jr., Director, S.C.
Department of Corrections, Robert M.
Stevenson III, Warden Broad River
Correctional Institute

Respondents.

**FIRST AMENDED
MEMORANDUM IN SUPPORT OF
PETITION FOR HABEAS CORPUS**

Petitioner, H. Dewain Herring (Herring), by and through his undersigned counsel, hereby submits this Memorandum in Support of his Petition for Writ of Habeas Corpus:

STATEMENT OF FACTS

A. Procedural History

Herring was indicted on February 16, 2006 in Richland County, South Carolina on charges of murder and pointing and presenting following the shooting death of nightclub employee on January 29, 2006. Herring entered a plea of not guilty and was tried by a jury in Richland County Court of General Sessions beginning on May 7 and ending May 21, 2007. Prior to trial on May 2, 2007 Herring filed a motion to suppress certain evidence seized during a warrantless search at his residence as well as the fruits of such search. Richland County Deputies went to Herring's home investigating the nightclub shooting and allegedly knocked on the door of his residence in the early morning hours of January 29, 2006. No one answered the door. The officers then left the sidewalk, crossed into Herring's yard and peered into his closed garage and saw what appeared to be a vehicle of the same or similar description as was involved in the shooting under investigation. Thereafter, the Deputies used this information to obtain a search warrant of

Herring's residence. During the execution of this warrant, the Deputies fired at Herring seventeen (17) times thinking that he was attempting to shoot at them. The South Carolina Law Enforcement Division (SLED) was contacted to investigate this second shooting involving the Deputies. SLED obtained a second search warrant for Herring's residence.

The trial court conducted a suppression hearing on May 2, 2007 prior to jury selection. During this suppression hearing, Herring also challenged the propriety of a search following the issuance of a warrant obtained by SLED that was obtained via facsimile in apparent violation of South Carolina criminal procedure. In the execution of this SLED warrant, Agents seized a firearm which was later linked to the nightclub shooting through forensic testing. Following this hearing during the course of trial, on Wednesday May 9, 2007 the State produced portions of an Administrative Order issued by the Chief Judge of the Supreme Court of South Carolina authorizing the issuance of a search warrant via facsimile under certain limited circumstances. Herring then challenged the legality under the South Carolina and the United States Constitutions of a unique State law of criminal procedure applicable to only one county in South Carolina as well as the authority of the Chief Judge to create such an exception by Administrative Order. At the conclusion of the suppression hearing, the trial court ruled that the warrantless search "clearly violated the defendant's expectation of privacy within his home" and "could not support the seizure of evidence or be the basis for a later search warrant" under the Constitutions of the United States and South Carolina. Notwithstanding the trial court's finding that the warrantless entry was unlawful, the court denied the defense motions to suppress on the basis that the two warrants were supported by probable cause and that the evidence found in the searches pursuant to those warrants would have been inevitably discovered.

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B. FACTS

Just after midnight on January 29, 2006, a shooting occurred at Chastity's Gold nightclub on River Drive in Columbia, South Carolina. A single shot was fired through the upper right side of the closed, opaque front door of the establishment and struck John Johnson, resulting in his death. The club had several security cameras in operation on that night, and a compact disk containing the video recordings from those cameras between 11:00 p.m. January 28 and 1:59:59 a.m. January 29 was introduced into evidence. State's Exhibit 54. The executive vice-president of Chastity's, who created the disk at the State's request, did not include the video from a camera positioned in the hallway. R. pp. 361, 376-79. The State failed to verify in a timely manner that the disk had all the camera views and failed to take custody of the computer's hard drive, and three months later the club's computer recorded over the January 28-29 video recording made from the hall camera. R. pp. 382-86, 409-11.

The videos depict Petitioner coming to the club at 11:00 p.m. and leaving just before midnight. They show him getting into a vehicle and driving away. After his car had left, the outside videos depict a car of the same color and style as his pulling to the front of the club.

The vehicle paused, then moved slightly forward, paused again, and then departed. At approximately the same time, Johnson fell to the floor inside the club. The State charged Petitioner with murder in connection with his death.

Between 4:00 and 4:30 a.m., Petitioner was awakened when at least six officers from the Richland County Sheriffs Department, ostensibly there to execute a search warrant, broke open the metal front door of his home with a battering ram, burst in with guns drawn, and opened fire. R. pp. 549, 552, 556-58. They shot 17 bullets into the walls and furnishings. R. pp. 558-59, 653-54. One bullet struck Petitioner in the back of his left arm and leaving his blood and tissue on the wall that it penetrated. R. pp. 563, 654-55, 669-71. Two of the officers claimed Petitioner pointed a gun at them. R. pp. 522, 612. The State charged Petitioner with pointing and presenting a firearm in connection with this incident.

A number of people who were working at Chastity's (collectively referred to in this brief as "the club witnesses") testified at trial. They revealed astounding information about the operations of the club and the activities that occur there.

Chastity's is a strip club at which dancers, also referred to as entertainers, perform totally in the nude. R. pp. 274, 327, 394. It is the only totally nude club in Columbia. R. pp. 274, 935. The dancers use stage names, not their real names. R. pp. 397, 444-45. The club charges the customers an entrance fee and makes additional money from sales of drinks, from fees dancers collect from the customers, and from costumes customers buy for the dancers. R. pp. 156-57, 166, 398, 403-05, 412, 460-61. The dancers are not employees of the club and are not paid by the club; instead, they pay the club a fee for the privilege of dancing there. R. pp. 274, 338, 396-

97,936. They earn money in the form of tips, but they also charge fees to provide personal dances for individual patrons, a portion of which they must pay to the club. R. pp. 166,221,274,936. The dancers also routinely tip the club's paid employees, whom they rely on to look out for them and provide "protection." R. pp. 211,220, 277,396, 451-53.

The individual dances occur in two formats. Some take place in a room called the VIP room, which contains a number of couches. R. p. 168. There, dancers provide individual five-minute dances, often involving "lap dances" by which the nude dancer sits on the clothed lap of the customer, grinding her nude genitalia on his clothed genitalia. R. pp. 214-15, 221, 332-33, 407, 1164, 1199-200. This room is not private, and more than one dancer can be servicing an individual customer simultaneously. R. pp. 168-69. The other kind of individual dance is a more private one, for which the customer pays a much higher fee to be entertained by the dancer, alone, for 30 minutes, in a room called the champagne room. R. pp. 215-17,1164. The doorway to this room is beaded, people can see into it, and the bouncers, also called floormen, check the room regularly. R. pp. 165, 169, 347, 416. Customers are not allowed to take their drinks from the bar into the VIP and champagne rooms, although they may purchase champagne and have it brought to the champagne room. R. pp. 278, 303-04, 344, 394. A dance in the VIP room costs \$30. R. p. 215. One in the champagne room costs from \$265 to \$300 (champagne extra). R. pp. 221, 307,413,453-54. The dancer must pay the club \$5 to \$10 of the fee paid for a dance in the VIP room and \$65 of what she collects for a private session in the champagne room. R. pp. 302,308,346, 399, 413. Under the club's rules, the dancers can touch and rub their breasts and genitalia on the customer, but the customer is not allowed to touch the dancer. R. pp. 225-26, 313, 327-28. Although the club's rules purport to require the men to remain clothed and purport to prohibit sexual activity between the entertainers and the customers, club witnesses

acknowledged that men lower their pants or otherwise expose themselves and that sex is provided to customers on occasion in the champagne room. R. pp. 218, 318, 947.

The club witnesses testified that Petitioner came to the club on January 28, ordered a drink at the bar, and purchased a drink for one of the dancers, "Mia." R. p. 299. She gave him a \$30 lap dance in the VIP room. R. pp. 301-03. Thereafter, they returned to the bar, where they had left their drinks. R. pp. 303-04. She offered him a \$300 dance in the champagne room, which he paid for, and she escorted him there. R. pp. 305-06, 309, 334, 414. She left him there, saying she wanted to freshen up, and she let the bouncer know she was doing so. R. pp. 311, 334, 415. She went to the dressing room and stayed there five to 15 minutes, "killing time" and smoking a cigarette. R. pp. 317, 335. Mia had consumed alcohol and drugs, and she admitted she was addicted to cocaine and was high on cocaine that night. R. pp. 315-16, 325. While she was away, a bouncer went to the champagne room, where he claimed he found Petitioner completely naked and engaging in sexual activity. R. pp. 318, 417-18. He ordered Petitioner to stop and get dressed. R. pp. 418-19.

None of this alleged activity is reflected on the videos from the club's security cameras. The hall camera was positioned facing the champagne room, and it was the video recording from this camera which was omitted from the disk offered into evidence by the State. R. pp. 243, 382-86. The State could have ensured that this recording was preserved but failed to do so. R. pp. 409-11.

Club witnesses testified Petitioner was upset. He wanted his money back, but it was not refunded, and he was required to leave. R. pp. 175-76. Mia acknowledged that it is "a great thing" when she is able to get the money from a customer without performing the services, and she was happy that happened with Petitioner, R. pp. 319, 324, 334. She had told him they would have complete privacy, even though she knew people would be looking in the room all the time.

R. pp. 165,306,354,457. The club regularly ejected patrons who violated the rules concerning touching or engaging in sexual activity, and it received complaints from customers who did not get what they paid for. R. pp. 220-21,406-08,449-50. Mia denied that she set Petitioner up by inviting him to take his clothes off and telling the bouncer to check on him in five minutes, but she and another dancer acknowledged that this practice occurs at Chastity's. R. pp. 336-37, 341, 359, 942-44.

The security camera videos which were preserved depict Petitioner, fully clothed, walking through the lobby to the front door and leaving, followed by Johnson and another employee of the club, Donnie Hawkins. The outdoor cameras depict him in the parking lot, initially talking with Johnson, then going toward his car, then returning to talk with Johnson and Hawkins. Ultimately, he got into his car and left.

The State contended that Petitioner returned in his car, obtained his gun from the glove compartment, aimed it through the passenger window to the door of the club, and intentionally fired. Neither Petitioner nor the gun can be seen on any of the security videos of the car that pulled up to the entryway. The defense offered expert forensic testimony concerning the substantial flash Petitioner's gun would have made - "a fire ball" - and the absence of any flash on the video. R. pp. 893-95. It was the expert's opinion based on his review of the video and the scene that a sizable flash - a plume several feet in length in the shape of a cone, with a diameter of one to one-and-a-half feet - would be visible if the State's theory of the case were correct. R. pp. 893-94,923-24. The absence of such a flash was indicative of the weapon's discharging from below the bottom of the window. R. p. 895. It was his opinion, based on the video and measurements he took at the scene, that the driver was not pointing the gun and aiming it at the door. R. pp. 886-92.

The defense established that the officers who conducted the processing of the crime scene for the Sheriffs Department did not take any measurements or conduct trajectory analysis with respect to the bullet entry and exit holes in the club's door. R. pp. 477,479-83, 878-79. They did not take the door into custody for further analysis of the bullet hole, and the door was replaced by Chastity's and thrown away over a month later. R. pp. 386-88, 491. Although they were capable of determining the angle of the bullet as it passed through the door, they did not make any effort to do so. R. pp. 483-86, 489-90, 494, 878-82. Nor did they look for any marks, dents, or other scars that would have been left by a bullet had it ricocheted from the brick pillars, metal poles, or metal frame of the overhang that protrudes over the walkway approaching the door, something normally done in processing a crime scene involving a gunshot. R. pp. 486-88, 494-96, 661-68, 882-85. Such evidence could have established that the gun discharged from below the window level, ricocheted off some part of the structure's exterior surroundings, and entered the front door at an angle, to support Petitioner's defense of accident or to support a conviction of a lesser offense involving recklessness. R. pp. 895-98, 928-29, 931-32.

The expert estimated the hole in the door was approximately five feet, eight inches above the floor line. R. p. 925. Because of the steps and the slope of the entryway, the bottom of the door was three-and-one-half feet above the level of the ground where the vehicle was. R. pp. 880-81, 925. The car window would have been approximately six inches above the bottom of the door. R. pp. 925-26, 929.

The expert believed the gun discharged from down near the glove box, and he testified that the gunshot residue found in the car was located in areas consistent with discharge of the firearm from the area of the glove compartment below the level of the window, R. pp. 899, 901-03. He noted the failure of the investigators to test for residue on the passenger seat, the glove box, or the floor of the passenger side, areas where the presence of residue would have provided

evidence of where the gun was when it was discharged. R. pp. 820, 903-04. This expert also testified that the forensic evidence established that Herring was shot in the back of his arm, with his back to the Deputies, when Herring was fleeing from what he believe to be intruders in his home.

Petitioner testified that he had no memory of the events that occurred from the time when he was at the bar after his arrival at Chastity's until he was awakened by the officers storming into his home. R. pp. 965-66. His only memory during that period was of a gunshot firing, but he did not remember any of the surrounding circumstances. R. pp. 999-1000, 1010-13. He had consumed a significant amount of alcohol throughout the day, drinking a number of beers during the day while playing golf in Aiken, drinking mixed drinks at an Aiken establishment after golf and later at his home, then drinking more scotch at Chastity's. R. pp. 957-59, 1218-20.

Dr. John Holbrook, an expert in pharmacology and the effects of certain drugs commonly known as date rape drugs, testified concerning the effects of such drugs, including Rohypnol and Gamahydroxyalbuterate. R. pp. 1051-67. These drugs are in powder form and are clear, odorless, and almost tasteless; they are especially tasteless when dissolved in an alcoholic drink. R. p. 1072. These drugs are central nervous system depressants and, among other effects, they cause both behavioral disinhibition and anterograde amnesia. R. pp. 1067-70. Anterograde amnesia is an inability of the brain to store memory or form memory during the time the drug is having its effect. R. p. 1068.

When these drugs are used in combination with alcohol, the amnesia effect can be increased. R. p. 1071. The drugs can also cause automatism, by which a person is not incapacitated but instead functions at an almost subconscious level without having any memory of it. R. p. 1082. In addition to lowering inhibitions, these drugs reduce the ability to think,

reason, and make rational decisions, and they affect a person's ability to distinguish right from wrong. R. p. 1085.

Had the State drawn blood from Petitioner that morning, a blood test could have revealed the presence of such a drug. R. p. 1090. The State's own expert so acknowledged. R. p. 1285. Numerous law enforcement officials involved with this case testified about the ability to obtain blood from a suspect and the fact that it is commonly done. However, there was no credible justification offered as to why the investigating officers failed to obtain blood from Herring following his arrest. R. pp. 721-22, 802-03, 823,841-42, 858-63, 866, 1280-86, 1293.

Two former Chastity's dancers, Ms. Cummings and Ms. McClendon, testified concerning an instance in which they both believed they had been drugged at the club, and Ms. Cummings testified concerning a second occasion when she believed she had been drugged there. R. pp. 1165-1213. Mia and another dancer acknowledged the practice in strip clubs of people putting something in other's drinks. R. pp. 344-46, 944-46. Mia testified that Petitioner drank from his drink at the bar, both before and after the lap dance she gave him. R. pp. 351-52. The club witnesses acknowledged that Petitioner's behavior was highly unusual, even bizarre. R. pp. 287,402,455. The club witnesses acknowledged they all were laughing about what Petitioner was alleged to have done in the champagne room. R. pp. 282,287, 318, 360, 402, 424.

Dr. Holbrook viewed the Chastity's videos both in and out of the courtroom, viewed a video of Petitioner driving into his gated subdivision, heard the 911 recording, read Petitioner's statements, heard Petitioner testify, spoke with Ms. Cummings and Ms. McClendon, and reviewed a number of the exhibits introduced into evidence. R. pp. 1074-77. In his expert opinion, Petitioner ingested a date rape drug or something similar on that night. R. pp. 1073-74, 1159-60. Petitioner's conduct and statements were consistent with having ingested such a drug. R. pp. 1080-88. His loss of all memory except an awareness of a gunshot was also consistent

with the amnesia that such drugs cause, because it is possible to form a very sharp memory while not forming a memory of other more common things. R. pp. 1083-84, 1131.

C. JURY INSTRUCTIONS

At Herring's trial, the State requested that the jury be instructed malice, an essential element of the crime of murder, exists where a defendant exhibits a "general malignant recklessness of the lives and safety of others." Herring's counsel objected to this charge arguing that it was too similar to the recklessness element of the lesser-included offense of involuntary manslaughter. The trial court nevertheless gave the challenged jury instruction. Specifically, the trial court instructed the jury that "malice does not necessarily impart ill will towards the individual injured but *signifies rather a general malignant recklessness of the lives and safety of others.*" As to involuntary manslaughter, the trial judge instructed, in part, that "Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in ... *a lawful act with reckless disregard for the safety of others.*"

In addition, the jury was charged that it may infer that Herring acted with malice from use of a deadly weapon. The defense requested two charges on involuntary manslaughter which made reference to the negligent use of a deadly weapon. R. pp. 1366-69. One of the proposed charges contained, in relevant part, the following language: "[O]ne who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter." R. p. 1366 (citations omitted). The other charge included another explanation of negligence in the use of a dangerous weapon or instrumentality, language also taken directly from prior decisions of the South Carolina Supreme Court,² *State v. Gilliam*, 66 S.C. 419, 422, 45

² The requested charge states "How do you, as jurors, think that a man of average sense in this position would handle a dangerous weapon or implement, under given circumstances generally? Then, under the testimony of the case you are trying, has that state shown beyond a reasonable doubt that the defendant was guilty of negligence-that is, he did act in that manner with the dangerous weapon or oimplement as a man of average sense and disposition, under the

S.E. 6, 7 (1903), and *State v. Quick*, 168 S.C. 76, 81, 167 S.E. 19, 21 (1932). The defense contended that, because the jurors were being told they could infer malice from use of a deadly weapon, they should also be charged that negligent use of a deadly weapon is involuntary manslaughter. R. pp. 1238-39. The State contended that the parties could argue the facts either way but that the court should not give the defense's requested charge. R. pp. 1239-40. The defense argued that, because the jury was being instructed on the inference of malice, the court had to also give its requested charge on the other conclusion that could be drawn where the jury merely found negligence, that there was not malice. R. pp. 1240-41. The court ultimately did not give either of the defense's requested charges. R. pp. 1308-09.

In addition, the trial court refused the defense request for a jury instruction regarding accident. The defense requested the following charge on accident: "If it [is] shown that the killing was unintentional; that it was done while the [defendant] was engaged in a lawful enterprise, and was not the result of negligence, the homicide will be excused [as] accident." The court refused the charge on the basis that the accident defense is available only when a defendant is involved and engaged in a lawful act. R. pp. 1244-45. The Supreme Court affirmed the trial court's refusal to give the requested charges.

STANDARD OF REVIEW

Under AEDPA, when the state courts have adjudicated a claim on the merits, federal courts may not grant a writ of habeas corpus unless the state court decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court

circumstances which the testimony shows to have existed in the case-he did act in that way, and, as a result of that, he did inflict mortal wound, as alleged in the Indictment, which caused the death of the defendant, as charged, if you find it so, then that will be a case of [involuntary] manslaughter." *State v. Gilliam*, 66 SC 419, 45 S.E. 6 (1903) and *State v. Quick*, 168 S.C. 76, 1767 S.E. 19 (1932). R. 1368-1369.

proceeding.” 28 U.S.C. § 2254(d). However, where a state court has not considered a properly preserved claim on its merits, a federal court must assess the claim de novo. *Monroe v. Angelone*, 323 F.3d 286 (4th Cir.2003). The general rule concerning exhaustion of state remedies is of course that after the issues have been ‘properly presented’ on direct appeal to the highest state court to which resort may be had, a federal habeas corpus petitioner will be deemed to have fully exhausted his available state remedies since further resort to the state court may fairly be considered futile once the state’s highest court has spoken to the issue. *Grundler v. North Carolina*, 283 F.2d 798 (4th Cir. 1960); *Edmondson v. Warden, Md. Penitentiary*, 335 F.2d 608 (4th Cir. 1964). Habeas relief is barred “unless it appears that the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b) (1966). The purpose underlying this doctrine is to give the “state courts the first opportunity to consider alleged constitutional errors occurring in a defendant’s state trial and sentencing.” *Matthews v. Evatt*, 105 F.3d 907, 910 (4th Cir.) *cert. denied*, 118 S.Ct. 102 (1997). Accordingly, federal habeas courts are authorized to consider only those issues which have been “ ‘fairly presented’ to the state courts.” *Id.* at 911 (quoting *Picard v. Connor*, 404 U.S. 270, 275-78 (1971) To present an issue to the state court fairly, the petitioner must present the state court with the “ ‘same factual grounds and legal theories’ ” that he seeks to assert in his federal petition. *Id.* (quoting *Joubert v. Hopkins*, 75 F.3d 1232, 1240 (8th Cir.), *cert. denied*, 116 S.Ct. 2574 (1996)

Moreover, a federal court will not grant habeas relief based on a Fourth Amendment violation if “the State has provided an opportunity for full and fair litigation” of the claim. *Stone v. Powell*, 428 U.S. 465, 482, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). The test for determining whether the defendant had a full and fair opportunity to litigate his Fourth Amendment claim has not been settled.³

³ Please see *infra.* at p. 40 for a full discussion regarding *Stone v. Powell* and related authority.

Although courts may reach the merits of a habeas petition to deny it, 28 U.S.C. § 2254(b)(2); they cannot issue the writ for unexhausted or procedurally defaulted claims. An exhausted claim has been “fairly presented” to the state courts. *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997). A procedurally defaulted claim is one that either has been, or would be, rejected by the state courts, not on the merits, but on the basis of an adequate and independent state procedural rule. *Burket v. Angelone*, 208 F.3d 172, 183 (4th Cir.2000). Courts may excuse a procedural default and reach the merits of a claim only if petitioner can show “cause for the default and prejudice resulting therefrom or that a failure to consider the claims will result in a fundamental miscarriage of justice.” *Polk*, 476 F.3d at 211

ARGUMENT

1. Petitioner Herring’s Due Process Right To A Fair Trial Was Denied Because The Jury Instructions Equated The Mental State Required For A Conviction of Murder With the Same Mental State Necessary For The Lesser Included Offense of Involuntary Manslaughter, Thereby Allowing The Jury To Find Petitioner Guilty Of Murder Even If Petitioner Possessed The Mitigating State of Mind For Involuntary Manslaughter

Where an error in a jury instruction is alleged, “it must be established not merely that the instruction is undesirable, erroneous, or even ‘universally condemned,’ but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.” *Cupp v. Naughten*, 414 U.S. 141, 146, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). The question is not whether the trial court gave a faulty instruction, but rather “whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.” *Id.* at 147, 94 S.Ct. 396; see also *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)(quoting and reaffirming *Cupp*).

Here the jury instructions, when read as a whole, provided the false impression that the jury could have convicted Petitioner of murder even if they found that he possessed the mitigating state of mind described in the instructions for involuntary manslaughter. As a result, the charges violated Petitioner's Due Process right to a fair trial. *Falconer v. Lane*, 905 F.2d 1129 (2d Cir. 1990). The trial court provided the following instruction regarding malice, the state of mind necessary to support a conviction for murder:

[T]he Defendant is charged with murder. The State must prove beyond a reasonable doubt that the Defendant killed another with malice aforethought....Malice is defined in the law of homicide as a term of art; that is, a technical term importing wickedness, excluding just cause or legal excuse. An old South Carolina case says that *malice does not necessarily impart ill will towards the individual injured but signifies rather a general malignant recklessness of the lives and safety of others..*" (emphasis added) R. p. 1305 ll 20-25; 1306 ll 1-3.

In addition, the trial court instructed the jury on the law of involuntary manslaughter, as a lesser included offense of murder. The court stated:

Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or, *a lawful act with reckless disregard for the safety of others...Reckless is a conscious failure to use ordinary care. A reckless disregard for the safety of others means that you [sic]not interested in the consequences of your acts or the rights and safety of others.* (emphasis added)

R. pp. 1308 ll 22-25; 1309 ll 1-2; 10-14.

Counsel for Petitioner objected to the trial court's use of recklessness in its charge on malice, asserting that having the jury distinguish between recklessness required for murder as opposed to reckless required for involuntary manslaughter was too confusing and an improper statement of the law, and alternatively even if the charge was "Constitutional" and an appropriate statement of the law, there was not a factual basis to support the charge. R. 1265-1266. The trial court responded "Well, I considered—I think I considered all that over the weekend and decided

as late as this morning to add the language of the *Mouzon* charge. I respectfully deny your motion." R. 1266 ll. 16-19.

On appeal, Petitioner through counsel argued that the State's sole theory of the case was that Petitioner pointed, aimed, and fired at the door, with actual malice. Recklessness was not in play whatsoever under the evidence offered by the State. The defense theory of the case was that, if the shot came from Petitioner's vehicle, the weapon discharged from beneath the window level, near the glove compartment, either through accident or recklessness. There was no evidence of some middle ground mental state of "super recklessness" that would warrant a charge of the *Mouzon* language.⁴

The Petitioner also argued that if, however, the *Mouzon* form of recklessness is still a viable concept in the law of the State the Court should find that use of this charge violates the federal and state due process clauses, for two reasons. First, the language of *Mouzon* is unconstitutionally vague. See U.S. Const, amends. V, XIV; S.C. Const, art. I, § 3. There is no articulable means by which to differentiate between the recklessness required for involuntary manslaughter and that which would elevate an offense to murder under *Mouzon*. The concept of vagueness or indefiniteness rests on the principle that procedural due process requires fair notice and proper standards for adjudication. See *Curtis v. State*, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001), cert, denied, 535 U.S. 926 (2002). Under the due process standard for vagueness, the recklessness standard established by *Mouzon* and its predecessor cases is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." See

⁴ In *Mouzon*, a pedestrian crossing a street in the Clarendon County village of Alcolu, where the speed limit was 35 miles per hour, was struck and killed by a car traveling 70 to 80 miles per hour. After hitting the woman, the car braked and slowed to about 20 miles per hour, and the driver looked back but never stopped. On those facts, the Court held that evidence of extraordinary recklessness warranted a murder conviction. See *Mouzon*, 231 S.C. at 658-62, 99 S.E.2d at 673-74.

State v. Sullivan, 362 S.C. 373, 375, 608 S.E.2d 422, 424 (2005); *Curtis*, 345 S.C. at 572, 549 S.E.2d at 598. Because of this vagueness, giving this charge deprived Petitioner of his federal due process rights. See U.S. Const, amends. V, XIV; S.C. Const, art. I, § 3; *Falconer v. Lane*, 720 F.Supp. 631, affirmed at 905 F.2d 1129 (7th Cir. 1990) In addition, if the jury accepted the defense evidence, that evidence established that Petitioner acted with recklessness, at most, giving the *Mouzon* charge - which allowed the jury to find either murder or involuntary manslaughter on the basis of a finding of recklessness - shifted the burden to the defense to prove that the recklessness involved in this case did not rise to the inarticulable, undefined standard of recklessness that could be deemed malice, in violation of due process, *Sandstrom v. Montana*, 442 U.S. 510 (1979) *In re: Winship*, 397 U.S. 358 (1970);

The South Carolina Supreme Court addressed Petitioner's claims of error arising from the reckless charge in a footnote:

"The remaining issues are affirmed pursuant to SCACR Rule 220(B)(1) and the following authorities:...Issue 6 (*State v. Mouzon* instruction)-*State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006)(upholding *Mouzon* instruction);*Battle v. State*, 382 S.C. 197, 675 S.E.2d 736 (2009)(in determining prejudice from jury instructions, court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution)"
Opinion at fn. 7.

The decision of the South Carolina Supreme Court "was contrary to, or involved an unreasonable application of, clearly established Federal law." In *Falconer v. Lane*, 720 F.Supp. 631, affirmed at 905 F.2d 1129 (7th Cir. 1990), the Seventh Circuit Court of Appeals, applying controlling United States Supreme Court precedent, affirmed the District Court's grant of habeas relief under substantially similar circumstances. There, the Illinois state statute defined murder as the intentional killing of another without lawful justification. Manslaughter was defined as the intentional killing of another resulting from either serious provocation or unreasonable belief that

the killing is justified. On their faces the two statutes were identical; since killing under serious provocation and killing under the unreasonable belief that it is justified amount to killing without lawful justification, a person was guilty of manslaughter was, by the literal terms of the statute, guilty of murder. 720 F. Supp at 642. In *Falconer*, the District Court explained:

“The trial court properly instructed the jury on the elements of murder. The court also properly instructed the jury on the elements of voluntary manslaughter. The court did not, however, instruct the jury that if it found serious provocation or unreasonable belief in justification it could *not* convict Ms. Falconer of murder. On the contrary, it stated that a person is justified in using deadly force “only if she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to herself.” Thus, the instructions did not merely shift the burden of proof on the affirmative defenses; rather they deprived Ms. Falconer of her affirmative defenses entirely: If the jury found that Ms. Falconer intentionally killed her husband without a reasonable belief that her use of force was necessary, then it had to convict her of murder regardless of whether she acted under serious provocation or under an unreasonable belief that she was justified in using the force she did.”

720 F.Supp. at 643.

Similarly, the charges given at Petitioner Herring’s trial did not instruct the jury that it could *not* convict Herring if it found that Herring engaged in “a lawful act with reckless disregard for the safety of others.” Like the charges in *Falconer*, the jury was instructed that it had to find malice, the essential element of murder, if he acted with a “general malignant recklessness of the lives and safety of others.” R. 1304, 1305. As a result, Herring was deprived of the recklessness defense entirely. Consequently, Herring was also deprived his Due Process rights to a fair trial.

2. Petitioner’ Due Process Rights To A Fair Trial Were Denied Because The Jury Was Not Instructed On The Defense of Accident Nor Provided Instructions Pertaining To The Negligent Use of A Firearm

The fact that “federal habeas corpus relief does not lie for errors of state law,” *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) does not mean, however,

that errors under state law cannot result in cognizable violations of a constitutional right to due process. What due process requires will often depend on what state law is. States are free to define the elements of, and defenses to, crimes. See *Apprendi v. New Jersey*, 530 U.S. 466, 484-87, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *McMillan v. Pennsylvania*, 477 U.S. 79, 84-86, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). Once states have promulgated laws to define criminal conduct, however, federal due process protects a defendant from conviction unless he is shown in a fair proceeding to have violated those laws. Thus, while habeas relief may not be granted for a "mere error of state law," a finding that the petitioner was erroneously deprived of a jury instruction to which he was entitled under state law is the first step in the determination whether that error violated the petitioner's federal due process rights. Accordingly, courts have granted habeas relief for a failure to charge a point of law where the evidence supported the charge under state law and where the erroneous failure to give such a charge was sufficiently harmful to make the conviction unfair. *Cupp*, 414 U.S. at 146, 94 S.Ct. 396. See *Jackson v. Edwards*, 404 F.3d 612, 624 (2d Cir.2005) (granting habeas relief for failure to charge justification in murder trial); *Means v. Solem*, 646 F.2d 322, 332 (8th Cir.1980) (granting habeas relief for error of state law on justification in jury instruction); *Barker v. Yukins*, 199 F.3d 867, 875-76 (6th Cir.1999) (same); *Zemina v. Solem*, 573 F.2d 1027, 1028 (8th Cir.1978) (adopting reasoning of *Zemina v. Solem*, 438 F.Supp. 455 (D.S.D.1977)) (same).

A. Herring Was Entitled To The Omitted Jury Instructions Under South Carolina Law

At Herring's trial, the jury was charged that it may infer that Herring acted with malice from use of a deadly weapon. The defense requested two charges on involuntary manslaughter which made reference to the negligent use of a deadly weapon. R. pp. 1366-69. One of the proposed charges contained, in relevant part, the following language: "[O]ne who causes the death

of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter."R. p. 1366 (citations omitted). The other charge included another explanation of negligence in the use of a dangerous weapon or instrumentality, language also taken directly from prior decisions of the South Carolina Supreme Court, *State v. Gilliam*, 66 S.C. 419,422, 45 S.E. 6, 7 (1903), and *State v. Quick*, 168 S.C. 76, 81, 167 S.E. 19, 21 (1932). The defense contended that, because the jurors were being told they could infer malice from use of a deadly weapon, they should also be charged that negligent use of a deadly weapon is involuntary manslaughter. R. pp. 1238-39. The State contended that the parties could argue the facts either way but that the court should not give the defense's requested charge. R. pp. 1239-40. The defense argued that, because the jury was being instructed on the inference of malice, the court had to also give its requested charge on the other conclusion that could be drawn where the jury merely found negligence, that there was not malice. R. pp. 1240-41. The court ultimately did not give either of the defense's requested charges. R. pp. 1308-09. In addition, the trial court refused the defense request for a jury instruction regarding accident. The defense requested the following charge on accident: "If it [is] shown that the killing was unintentional; that it was done while the [defendant] was engaged in a lawful enterprise, and was not the result of negligence, the homicide will be excused [as]accident." The court refused the charge on the basis that the accident defense is available only when a defendant is involved and engaged in a lawful act. R. pp. 1244-45. The Supreme Court affirmed the trial court's refusal to give the requested charges.

The requested charges were undeniably correct statements of South Carolina law. In addition, the requested charges were supported by the evidence introduced at trial.

A. Accident Charge

The evidence established that Petitioner had a valid concealed weapon permit. R. pp. 672,

998-99. He lawfully could carry his firearm in his glove compartment. He lawfully could have it on his person. He lawfully could transfer it from one to the other. See S.C. Code Ann. § 16-23-20 (9), (12). There was no allegation or evidence that he was in a location at which he was prohibited to have a concealed weapon. See S.C. Code Ann. § 23-31-215(M). Because of the evidence that Petitioner had a valid concealed weapon permit, the court charged the jury concerning such permits, including that a permittee may transfer the handgun between the permittee's person and an enclosed glove compartment or other closed areas. R.p. 1312. In conjunction with this charge, the court should have given the accident charge, which was supported by evidence in the record. The expert testified concerning the size and shape of the fire ball that would be visible on the video had the weapon been fired as the State alleged, and the absence of such a flash negated the State's theory that Petitioner was pointing the weapon and aiming at the door. R. pp. 893-95, 923-24. With this testimony in evidence, it was incumbent on the court to give the requested charge on the defense of accident.

B. Involuntary Manslaughter Charge

The defense requested, in addition to the court's own proposed charge on involuntary manslaughter, two charges on involuntary manslaughter which made reference to negligence in the use of a deadly weapon. R. pp. 1366-69. One of the proposed charges contained, in relevant part, the following language:

"[O]ne who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter."

R. p. 1366 (citations omitted). This language is a direct quote from *State v. Brown*, 205 S.C. at 18, 32 S.E.2d at 827, and it is a correct statement of the law. The other charge included another explanation of negligence in the use of a dangerous weapon or instrumentality, language also taken directly from prior decisions of the Supreme Court, *State v. Gilliam*, 66 S.C. 419, 422, 45

S.E. 6, 7 (1903), and *State v. Quick*, 168 S.C. 76, 81, 167 S.E. 19, 21 (1932). The State argued that the court's charge was adequate and anything more would be a charge on the facts. R. p. 1237. The defense contended that, because the jurors were being told they could infer malice from use of a deadly weapon, they should also be charged that negligent use of a deadly weapon is involuntary manslaughter. R. pp. 1238-39. The State contended that the parties could argue the facts either way but that the court should not give the defense's requested charge. R. pp. 1239-40. The defense argued that, because the jury was being instructed on the inference of malice, the court had to also give its requested charge on the other conclusion that could be drawn where the jury merely found negligence, that there was not malice. R. pp. 1240-41. The court ultimately did not give either of the defense's requested charges. R. pp. 1308-09.

The language in each proposed charge was a correct statement of the law and, like the accident defense, was supported by the testimony of the expert concerning the likely location of the gun when it was discharged and the unlikelihood, based on the absence of the expected flash on the video, that it was being pointed at the door, as the State alleged. R. pp. 893-95, 923-24. It was the court's duty to give the requested charges. They were not a charge on the facts any more than mentioning a deadly weapon in the malice charge is a charge on the facts.

The South Carolina Supreme Court addressed Petitioner's claim of error regarding the failure to provide the above requested instructions in footnote seven as follows:

"The remaining issues are affirmed pursuant to SCACR Rule 220(B)(1) and the following authorities: Issue 4 (failure to charge the law of accident)-*State v. Burris*, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999)(for homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in handling the weapon); *State v. Burkhardt*, 350 S.C. 252, 565 S.E.2d 298 (2002)(to warrant reversal, trial court's refusal to give requested charge must be both erroneous and prejudicial to defendant).

The Supreme Court misapplied its own controlling precedent. As set forth above, there

was sufficient evidence in the record establishing that the killing was unintentional, that the defendant was acting lawfully and due care was exercised in handling the weapon. Furthermore, the failure to give the requested charge was undeniably prejudicial to Petitioner Herring. Giving the jury an inference-of-malice charge which favored the State's theory of the case without balancing that charge with the alternate conclusion that favored the defense - that the jury could find involuntary manslaughter from the negligent use of a deadly weapon - was fundamentally unfair and a deprivation of Petitioner's right to due process.

3. Petitioner was denied his right to Due Process as a result of the South Carolina Supreme Court's decision to refuse to apply its decision in *State v. Belcher*, __ S.C. __, 685 S.E.2d 802 (2009) to the Petitioner as required by *Griffith v. Kentucky* 479 U.S. 314 (1987);

After the briefing and argument in the appeal before the South Carolina Supreme Court, the Court filed a decision in another case, *State v. Belcher*, __ S.C. __, 685 S.E.2d 802 (2009). On October 12, 2009, Petitioner immediately brought to the Court's attention that the *Belcher* decision supported his argument on this issue. See Letter dated October 12, 2009 pursuant to Rule 208(b)(7), SCACR (citation of supplemental authority). The South Carolina Supreme Court, however, did not address nor even mention the *Belcher* decision, overlooking its applicability to the requested involuntary manslaughter charges.

In *Belcher*, the Court addressed a challenge to the jury charge given in murder cases in this State instructing that malice may be inferred from the use of a deadly weapon. Overruling existing precedents, the Court held that the inference-of-malice charge is not appropriate in a murder prosecution where evidence is presented that would reduce, mitigate, excuse, or justify the killing. *Belcher*, __ S.C. at __, 685 S.E.2d at 804-10. Recognizing that malice includes the absence of justification, excuse, and mitigation, the Court reasoned:

When malice is viewed in light of these component parts, it becomes clear that inferring malice from the use of a deadly weapon is indeed only a "half-truth." The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts.

Belcher, __ S.C. at __, 685 S.E.2d at 808-09; *see also Glenn v. State*, 511 A.2d 1110, 1116 (Md. Ct. Spec. App. 1986).

In recognition of the "half-truth" nature of the inference-of-malice charge where the evidence tended to reduce or mitigate a killing, the defense urged the trial court to give the jury a more complete picture of the applicable law, requesting that the inference-of-malice charge be balanced by a charge on a competing principle of law applicable in this case – that the negligent use of a deadly weapon is involuntary manslaughter. Although the lower court instructed the jury that it could, upon the evidence presented in this case, find the defendant guilty of involuntary manslaughter, it refused to give either of the requested charges with respect to negligent use of a deadly weapon.

On appeal, Petitioner contended that the trial court committed reversible error in failing to give one of these charges, because of the prejudicial effect of the inference-of-malice instruction, *standing alone*. As the South Carolina Supreme Court recognized in *Belcher*, the absence of justification, excuse, or mitigation could not be inferred from the use of a deadly weapon "standing alone." *See Belcher*, __ S.C. at __, 685 S.E.2d at 808-09. In Herring's prosecution, the evidence presented by the defense supported instructing the jury that it could find the defendant guilty of the reduced offense of involuntary manslaughter. Because the inference-of-malice instruction was only a "half-truth" in the context of this prosecution, the charge given by the trial court was not a complete and accurate statement of the applicable law.

In summarily affirming this issue (footnote 7 in the opinion), the South Carolina Supreme Court failed to apply principle established in *Belcher* that the court's charge, as given, presented only a "half-truth." Contrary to the Court's citation to *McKnight* and the parenthetical reference to the principle for which *McKnight* was cited, the lower court's failure to give one of the requested jury charges with respect to negligent use of a deadly weapon, in the context of this case in which the inference-of-malice charge was given, was prejudicial error because the instructions given did not adequately cover the law.

Petitioner argued in his brief that the failure to give one of the requested charges concerning negligent use of a deadly weapon amounted to a constitutional violation of Petitioner's right to due process, in light of the court's giving the inference-of-malice charge. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3. In the Petition for Re-Hearing, Petitioner argued that the due process implications of this issue were even greater, because the South Carolina Supreme Court recognized the impropriety of an inference-of-malice instruction, standing alone, where the evidence supports a finding reducing the offense from murder to some other form of killing. Petitioner further argued that if the Court failed to apply to this case the principles it embraced in *Belcher* just three months earlier, Petitioner would be deprived of due process of law, in contravention of both federal and state constitutional due process protections. The South Carolina Supreme Court denied the Petition for Rehearing without discussion.

The South Carolina Supreme Court's refusal to apply its decision in *State v. Belcher* *State v. Belcher*, __ S.C. __, 685 S.E.2d 802 (2009) "was contrary to, or involved an unreasonable application of, clearly established Federal law." In *Griffith v. Kentucky*, the United States Supreme Court held that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases...pending on direct review or not yet final." 479 U.S. 314, 328. Even

the South Carolina Supreme Court recognized the application of *Griffith v. Kentucky* to its decision in *Belcher*. The Court stated "Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved."

Despite its recognition of *Griffith v. Kentucky* and the requirement that *Belcher* be applied retroactively to all cases pending on direct review, the South Carolina Supreme Court refused, without discussion, to apply *Belcher* to Petitioner Herring's appeal. The fact that *Belcher* does apply to Herring's case is clearly established by the Court's explanation that *Belcher* overruled "all cases involving a homicide...where two factors co-exist: (1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; and (2) evidence was presented that, if believed, would have reduced, mitigated, excused or justified the homicide." *Id.* at footnote 10. It cannot be contested that Herring presented evidence if believed by the jury would have reduced and/or mitigated the charge of murder. Furthermore, it cannot be contested that the jury was given the inference of malice instruction. Nor can it be contested that Herring's case was pending on direct appeal at the time *Belcher* was issued and Herring squarely presented the question of whether *Belcher* should apply to his case to the South Carolina Supreme Court. As a result, Herring's conviction and sentence must be vacated because the South Carolina Supreme Court directly violated the governing principles of *Griffith v. Kentucky*.

4. Petitioner was denied his right to Due Process as a result of the refusal of the Chief Justice of the South Carolina Supreme Court to recuse herself from participating in the appeal from Herring's conviction which necessarily involved a direct review of the legality of the Chief Justice's Administrative Order;

The trial court conducted a suppression hearing on May 2, 2007 prior to jury selection. During this suppression hearing, Herring challenged the propriety of a search following the issuance of a warrant obtained by SLED that was obtained via facsimile in apparent violation of

South Carolina criminal procedure. In the execution of this SLED warrant, Agents seized a firearm which was later linked to the nightclub shooting through forensic testing. Subsequent to this hearing, the State produced portions of an Administrative Order issued by the Chief Judge of the State of South Carolina authorizing the issuance of a search warrant via facsimile under certain limited circumstances. Herring then challenged the legality under the South Carolina and the United States Constitutions of a unique State law of criminal procedure applicable to only one county in South Carolina as well as the authority of the Chief Judge to create such an exception by Administrative Order. At the conclusion of the suppression hearing, the trial court ruled that the warrantless search "clearly violated the defendant's expectation of privacy within his home" and "could not support the seizure of evidence or be the basis for a later search warrant" under the Constitutions of the United States and South Carolina. Notwithstanding the trial court's finding that the warrantless entry was unlawful, the court denied the defense motions to suppress on the basis that the two warrants were supported by probable cause and that the evidence found in the searches pursuant to those warrants would have been inevitably discovered.

At trial and on appeal, Herring challenged the administrative order of the Chief Justice dated July 26, 2001 which purports to authorize a procedure for obtaining a search warrant in Richland County, South Carolina by facsimile transmissions which is different than and not authorized by the State's statutory law governing the issuance of search warrants. Herring also moved before the South Carolina Supreme Court requesting the Chief Justice who issued the challenged order to be recused from hearing the appeal.

In his challenge to the lawfulness of the SLED search warrant, Herring relied upon the South Carolina statutory requirement that a warrant "shall be issued only upon affidavit sworn to

before the magistrate" and the strict construction given this statute by the South Carolina Supreme Court. See S.C. Code Ann. § 17-13-140; *State v. McKnight*, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987); see also *State v. Covert*, __ S.C. __ 675 S.E.2d 740, 742 (2009) (reiterating that this statute is "more strict" than the Fourth Amendment). Petitioner argued the order of the Chief Justice cannot override the plain mandate of the General Assembly and South Carolina Supreme Court precedents.

In issuing the Order, the Chief Justice invoked her authority under Article V, Section 4 of the South Carolina Constitution, which grants certain powers to the Chief Justice as the administrative head of the judicial system. However, the stated premise for issuance of the order creating an alternative procedure for obtaining search warrants was to "enhance the ability of law enforcement in Richland County to obtain evidence of criminal activities."

Petitioner argued that the order of the Chief Justice violates the South Carolina Constitution, in a number of respects: (1) it violates the doctrine of separation of powers, as between the judicial branch and both the legislative and executive branches, S.C. Const, art. I, § 8; S.C. Const, art. III, § 1; S.C. Const, art. IV, § 1; S.C. Const, art. V, § 1; (2) it exceeds the authority conferred on the Chief Justice by the provision of the Constitution invoked in the order, S.C. Const, art. V, § 4; (3) it violates the constitutional provision against exempting an individual county from the general laws, S.C. Const, art. VIII, § 7; (4) it violates constitutional provisions which mandate statewide uniformity of criminal laws, S.C. Const, art. III, § 34; S.C. Const, art. VIII, § 14. Petitioner further argued the order violates provisions requiring statewide uniformity of practice and procedure, as well as the due process and equal protection guarantees of both the state and federal constitutions, U.S. Const, amends. V, XIV; S.C. Const, art. I, § 3.

Despite these direct challenges to the Chief Justice's Order authorizing the issuance of search warrants based upon a facsimile transmission, the Chief Justice summarily denied Herring's motion for recusal. The Supreme Court thereafter affirmed Herring's conviction without addressing the authority of the Chief Justice to issue the challenged order. The Court determined that the SLED agents could rely upon the warrant in good faith and further that any error was harmless.

The recusal of the Chief Justice was necessary under federal due process guarantees to ensure a fair and impartial hearing and disposition of Petitioner's challenge to the authority of the Chief Justice to issue the order allowing the telephone and facsimile warrant procedure used to procure the search warrant in this case. The United States Constitution guarantees the right of every criminal defendant to due process of law. *See* U.S. Const. amends. V, XIV; The due process protection mandates that trials and appeals be heard by disinterested and impartial judicial officers. *See Caperton v. A.T. Massey Coal Co., Inc.*, __ U.S. __ (2009) (2009 WL 1576573); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 59-62 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The United States Supreme Court has held,

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'

Murchison, 349 U.S. at 136 (citations omitted).

Supreme Court precedents establish “objective standards that require recusal when ‘the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’” *Caperton*, __ U.S. __, 2009 WL 1576573, at 3, *citing Withrow v. Larkin*, 421 U.S. 35, 47 (1975). One situation in which due process implications arise is when a conflict exists from the judge’s participation in earlier proceedings in the case. *Caperton*, 2009 WL 1576573, at 8, *citing Murchison*, 349 U.S. at 136.

In this case, one of the issues on appeal was the constitutional and statutory authority of the Chief Justice to issue the order authorizing the procurement of search warrants in Richland County by a telephone and facsimile procedure, without the statutorily mandated appearance and oath before a magistrate. With all due respect to the South Carolina Supreme Court and the Chief Justice, Petitioner’s due process rights mandated that the Chief Justice not participate in appellate review of the propriety of her own order. No person can be truly disinterested and impartial in reviewing his or her own actions. Due process demands that the determination of the validity or invalidity of the Chief Justice’s order authorizing the telephone/facsimile procedure used in this case be made by a panel of justices that does not include the Chief Justice. *Cf. Murchison*, 349 U.S. at 136 (“Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.”) The Chief Justice’s refusal to recuse herself from consideration of Petitioner’s appeal is a violation of Herring’s due process rights to which no harmless error analysis can be applied. See, *Caperton*, __ U.S. __, 2009 WL 1576573, at 3, *citing Withrow v. Larkin*, 421 U.S. 35, 47 (1975)

5. Petitioner was denied his right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Petitioner was further deprived of his right to fully and fairly litigate this Fourth Amendment claim in the South Carolina state courts as a result of the refusal of the Chief Judge to recuse herself from participation and the Court's refusal to apply the correct and controlling legal standard applicable to Fourth Amendment claims;

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by governmental actors. U.S. Const. amend. IV; *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). In analyzing whether challenged conduct violated the protections afforded by the Fourth Amendment, the threshold question is whether that conduct amounted to a search or seizure, recognizing that not every observation made by a law enforcement officer-even if consciously intended to disclose evidence of criminal activity-constitutes a search within the meaning of the Fourth Amendment. See *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983); *Tarantino v. Baker*, 825 F.2d 772, 775 (4th Cir.1987). Rather, "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Jacobsen*, 466 U.S. at 113, 104 S.Ct. at 165; *Andreas*, 463 U.S. at 771, 103 S.Ct. at 3324 ("If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search'...."). Accordingly, the inquiry must focus on whether the individual "manifested a subjective expectation of privacy in the object of the challenged search" and whether "society [is] willing to recognize that expectation as reasonable." *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986)

Furthermore, "because individuals ordinarily possess the highest expectation of privacy within the curtilage of their home, that area typically is "afforded the most stringent Fourth Amendment protection." *U.S. v. Taylor*, 90 F.3d 903 (4th Cir. 1996), citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976) However, "

‘[w]hat a person knowingly exposes to the public, even in his own home ..., is not a subject of Fourth Amendment protection.’ ” *Ciraolo*, 476 U.S. at 213, 106 S.Ct. at 1813 (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)). Thus, a law enforcement “officer’s observations from a public vantage point where he has a right to be” and from which the activities or objects he observes are “clearly visible” do not constitute a search within the meaning of the Fourth Amendment. *Id.*; *United States v. Bellina*, 665 F.2d 1335, 1341-42 (4th Cir.1981).

In *McDonald v. U.S.* 335 U.S. 451, 69 S.Ct. 191 (1948) the Court explained that the warrant requirement is not a mere formality to be ignored when convenient:

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest *456 of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

335 U.S. at 455, 456.

a. The Warrantless Search Of Herring’s Garage and Subsequent Evidence Obtained And Used Against Him In Violation Of the Fourth Amendment

Richland County deputies went to Herring’s residence following the Chastity’s shooting. Deputies walked to Herring’s front door using the sidewalk leading up to the front of the house. They allegedly knocked and no one answered. A Deputy then left the sidewalk and peered through windows at the side of the home and saw a black Toyota 4Runner meeting the description of the vehicle believed to be involved in the Chastity’s shooting. The Deputy could

not have seen the vehicle from his vantage point along the sidewalk but had to leave the sidewalk and/or driveway, enter a graveled landscaped area of the yard and get within six feet of the windows in order to see the vehicle. Thses windows were located more than fifteen (15) feet from the sidewalk.

At trial, Herring argued that the warrantless entry of the police into the curtilage was illegal because the police left the public space where they had the right to be without a warrant- the sidewalk and driveway. The trial court agreed that the officers "clearly violated the defendant's expectation of privacy within his home" without a warrant and therefore the fruits of this unlawful search "could not support the seizure of evidence or be the basis for a later search warrant." R. 150. Notwithstanding the trial court's correct finding that the warrantless entry was unlawful, the court denied Herring's motion to suppress the two subsequent searches conducted following the issuance of two warrants concluding that both warrants were supported by probable cause and that the evidence found in the searches would have been inevitably discovered.

The South Carolina Supreme Court apparently rejected the trial court's conclusion that the search was unlawful. Rather, three justices of the Court *sua sponte* held this warrantless search was lawful, under the exigent circumstances exception to the Fourth Amendment warrant requirement. Two justices disagreed, finding the search was an unwarranted trespass and unlawful search, not justified by any exigent circumstances. The majority also concluded that the search of Herring's garage did not yield any further evidence against him because there was sufficient probable cause to support the issuance of the two subsequent warrants independent from the knowledge gained through the warrantless search that a black 4Runner was parked in the garage.

i. The Exigent Circumstances Doctrine Clearly Does Not Apply

The South Carolina Supreme Court erroneously applied the exigent circumstances exception to the warrant requirement. Under the exigent circumstances doctrine, an exception to the warrant requirement applies “only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist.” See *State v. Abdullah*, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004), *cert. denied*, November 19, 2004.

In this case, as the concurring justices correctly held, exigent circumstances did not exist. Two hours had passed since the shooting had occurred. There was no hot pursuit. There was no imminent threat to the officers or others. In fact, the officers allegedly went to the door and rang the doorbell, even after their warrantless entry and look into the garage revealed the presence of a vehicle similar to the one seen earlier at the scene of the shooting. Even believing the defendant might be in the house, the officers clearly did not perceive a risk to their safety or some other exigency requiring them to act without seeking a warrant. Just as they stationed officers to secure the house while they obtained the warrant *after* their warrantless entry, they could have stationed officers to secure the premises *before* that warrantless entry while officers attempted to procure a search warrant.

In *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006), the United States Supreme Court gave examples of exigent circumstances that would justify a warrantless search of a person’s dwelling:

We have held, for example, that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) to prevent the imminent destruction of evidence, *Ker v. California*, 374 U.S. 23, 40, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (plurality opinion), or to engage in “ ‘hot pursuit’ ” of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42, 43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976). “[W]arrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement

so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” *Mincey v. Arizona*, 437 U.S. 385, 393-394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)

In *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) the United States Supreme Court recognized the right of police, who had probable cause to believe that an armed robber had entered a house minutes before, to make a warrantless entry to arrest the robber and search for weapons. In that case, an eyewitness saw the fleeing armed robber enter a house. The Court held that the “exigencies of the situation” were such that the police acted reasonably in entering the house without a warrant. *Id.* at 298-99. The Court stated, “The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.” *Id.*

In *Wallace v. King*, 626 F.2d 1157 (4th Cir.1980) police officers searched two homes without search warrants while seeking a person wanted on a valid arrest warrant. The court noted that the circuit courts had not been uniform in their “approach to the problem presented by the instant case.” *Id.* at 1161. The court went on to state:

Common to all those opinions, however, is the requirement that, for the search to be constitutionally valid, not only must the officers have probable cause to believe the person named in the arrest warrant is on the premises of the third person, but there must also exist an appropriate exception to the warrant requirement, e. g., consent of the owner or occupier of a dwelling unit or exigent circumstances, which did not exist in this case. It is not practical, in this opinion, to list all the circumstances which may justify such entry. Exigent circumstances may properly include hot pursuit or justifiable fear of injury to persons or property if the arrest is delayed. Whether the entry sought to be made is in an area where a magistrate is or is not readily available, and whether another officer is available to keep watch on the premises while an officer seeks a search warrant, are among the factors which may be considered in appropriate cases. The nature of the premises sought to be entered and whether the officers have reasonable cause to believe that the subject of the arrest warrant owns or resides therein

are other factors. Reasonable or probable cause to believe that a person for whom an arrest warrant has been issued is on the premises, standing alone, is not sufficient.

Id. at 1161.

In *U.S. v. Jones*, 204 F.3d 541, 542 (4th Cir.2000), the court held that exigent circumstances were present when police officers entered a house after they saw a suspected drug deal, ordered the defendant to stop, and the defendant ran into the house. The court found:

[The defendant] correctly points out that, even assuming the existence of probable cause, exigent circumstances are required to justify an officer's warrantless entry into a residence. We have no difficulty concluding that such circumstances existed here. First, the officers reasonably believed that evidence could be destroyed if they waited to obtain a warrant before entering [the defendant's] home.... Second, they were in "hot pursuit" of Jones when he entered the house.... Third, they had no idea whether the house belonged to [the defendant], and thus were reasonably concerned for the safety of innocent inhabitants of the house.

Id. at 543. Similarly, in *U.S. v. Oaxaca*, 569 F.2d 518,521 (9th Cir.1978), the court held that "[t]he exigencies of hot pursuit justified the warrantless entry into the garage" where police knew a bank had been robbed just a few minutes before, the robbers left in a car registered to the address of the house at issue, they saw one of the suspects run into house, and moments later they heard a loud noise that they thought came from the garage.

Unlike the above cases, there had been a considerable amount of time between the shooting at Chastity's and the warrantless search of Herring's residence. Courts within the Fourth Circuit have held that where at least 40 minutes have lapsed there is not sufficient basis to justify a warrantless search of a suspect's home in an attempt to apprehend him. In *U.S. v. Diaz-Segovia*, 457 F.Supp. 260, 271-72 (D.Md.1978), the court considered whether a search of a house, after the arrest of two suspects and after other suspects had fled, came within the "hot pursuit" exception to the search warrant requirement. The court noted that "[t]he question seems to boil down to whether (1) the police have a reasonable belief that a suspect is present in the

house; and (2) whether the police reasonably fear that the suspect is armed and dangerous.” *Id.* The court noted that there was no evidence the police saw the suspects run into the house, and the police waited approximately 30-40 minutes after the initial arrests before entering the house, which “mitigate[d] against a finding that the entry of the house was in fact an emergency.” *Id.* at 272. Here, more than two hours had passed since the Chastity’s shooting. Counsel has not located a single reported decision in this land upholding a warrantless search for a suspect in his residence more than two hours after the commission of an alleged offense, especially where there were no eye witnesses who saw the suspect enter the residence. The cases cited in the Supreme Court’s decision affirming Herring’s conviction certainly do not support such a holding.

iii. The Search Warrants Were Not Supported By Untainted Evidence Which Provided A Basis For A Determination That Probable Cause Existed to Search Herring’s Residence

Residential searches are upheld “only where some information links criminal activity to the Defendant’s residence.” *United States v. Lator*, 996 F.2d 1578, 1583 (4th Cir.), cert. denied, 510 U.S. 983 (1993). The affidavit’s basis for seeking a warrant does not have any link to Herring’s residence, other than the fact that a 4Runner was seen in the garage. The only sentence in the affidavit pertaining to the _____ address states, “ A search of Richland County records also provided an additional address of _____ Columbia, S.C.” This was insufficient as a matter of law to support probable cause. Cf. *United States v. Dickerson*, 975 F.2d 1245, 1249-50 (7th Cir. 1992)(affidavit not sufficient to support probable cause determination where only link was registration of car to address to be searched, without allegation that car was parked at that location.), cert. denied, 507 U.S. 932 (1993). The second warrant was issued at the request of SLED to investigate the shooting inside Herring’s home, which never would have occurred but for the issuance of the first. Both the first warrant and the

ensuing warrant obtained by SLED were fruits of the poisonous tree – the illegal look into the windows of the defendant's home – and the evidence obtained in those searches was inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

D. Herring Was deprived of his right to fully and fairly litigate this Fourth Amendment claim in the South Carolina state courts as a result of the refusal of the Chief Judge to recuse herself from participation and the Court's refusal to apply the correct and controlling legal standard applicable to Fourth Amendment claims

When a claim on a Fourth Amendment issue has been raised, considered, and rejected on its merits in the state courts, the issue in the wake of *Stone v. Powell* is whether the opportunity for its adjudication has been full and fair. The only guideline given by the Supreme Court in *Stone v. Powell*, for determining whether a state court has given a petitioner for federal habeas corpus relief the requisite "opportunity for full and fair litigation" was to make a footnote citation to its previous decision in *Townsend v. Sain*. Significantly, not only was *Townsend* merely a footnote reference, it was introduced with a "cf." signal.

The petitioner in *Townsend v. Sain* grounded his habeas petition on a Fifth Amendment claim that his confession had been involuntarily given. The Supreme Court held that where a petitioner has shown that he did not receive a full and fair evidentiary hearing from the state court relative to his claim, a federal court on habeas review must conduct such an evidentiary hearing. *Townsend v. Sain* recited various circumstances in which a full and fair evidentiary hearing would not be considered to have been provided by the state courts:

- (1) The merits of the factual dispute were not resolved in the state hearing;
- (2) The state factual determination was not fairly supported by the record as a whole;
- (3) The fact-finding procedure employed by the state was not adequate to afford a full and fair hearing;
- (4) There is a substantial allegation of newly discovered evidence;

- (5) The material facts were not adequately developed at the state court hearing; or
- (6) For any reason, it appears that the state trier did not afford the habeas applicant a full and fair fact hearing.

Technically, *Townsend* applies only in determining whether a state court has granted the petitioner a full and fair evidentiary hearing. Thus, when findings of fact are in dispute after an adjudication of a Fourth Amendment claim on its merits, the usefulness of the reference to *Townsend* is apparent. When, however, a procedural default has precluded an adjudication on the merits of the claim, only legal issues would be involved and the utility of the *Townsend* criteria is unclear and would be limited at best.

In *O'Berry v. Wainwright*, 546 F.2d 1204 (5th Cir. 1977), the court decided that the *Townsend v. Sain* criteria were not applicable in a situation in which the defendant had not raised his Fourth Amendment claim at trial and therefore had no hearing. The court stated that *Townsend v. Sain* involved the accuracy of the factual hearing provided the petitioner in the state court; in contrast, *Stone v. Powell* was concerned with the basic availability of an opportunity to litigate a Fourth Amendment claim. Similarly, the Second Circuit in *Gates v. Henderson*, 568 F.2d 830 (2d Cir. 1977), stated that since the petitioner did not seek a hearing on his Fourth Amendment claim in the state courts, *Townsend* was "irrelevant."

Whatever the *Stone* Court had in mind as a definition of "full and fair" consideration of a Fourth Amendment claim, it is not coextensive with the criteria in *Townsend*. In *Pulver v. Cunningham*, 419 F. Supp. 1221 (S.D. N.Y. 1976), judgment aff'd, 562 F.2d 198 (2d Cir. 1977), the court stated that, "*Stone v. Powell* cannot be read merely as a reiteration of *Townsend v. Sain*... . [I]t is apparent that the opportunity to litigate encompasses more than an evidentiary hearing in the trial court." Similarly, the Fourth Circuit in *Doleman v. Muncy*, 579 F.2d 1258 (4th

Cir. 1978), noting the fact that the reference to *Townsend* was preceded by "cf.," stated, "Had the Court intended to engraft the *Townsend v. Sain* criteria into the *Stone* situation, it could have done so expressly instead of by a passing footnote reference."

As a result, most federal courts have concluded that while the criteria established in *Townsend* can be an aid in determining whether an opportunity for full and fair consideration of his Fourth Amendment claim was given a petitioner, the criteria cannot be considered the sole measure for making the determination. In *Gamble v. State of Okl.*, 583 F.2d 1161 (10th Cir. 1978) the Tenth Circuit granted habeas relief when inculpatory statements made after the defendant had been given his *Miranda* warnings were admitted into evidence in clear violation of *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975) In *Gamble*, on hearing the defendant's application for habeas relief, the state trial court expressly denied the applicability of *Brown*, erroneously stating that, since *Miranda* warnings had been read, defendant's statements were automatically admissible. The Oklahoma court hearing the case on direct appeal made no reference to *Brown* and did not apply the factors listed in *Brown* in making its decision. The court held that the "opportunity for full and fair litigation" was not limited to the evidentiary hearing required by *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) (overruled by, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)), but "contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards. Thus, a federal court is not precluded from considering Fourth Amendment claims in habeas proceedings when the state court willfully refuses to apply the correct and controlling constitutional standard." *Gamble* recognizes that a state court, while equally competent as its federal counterpart to pass on constitutional issues, cannot be allowed to bar habeas relief under *Stone v. Powell* when a defendant seeks to vindicate

important federal rights. *See Henry v. State of Miss.*, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965)

i. The State Courts Willfully Refused To Apply The Correct and Controlling Constitutional Standard

At Herring's trial, the trial judge correctly concluded that the warrantless search of Herring's garage was unconstitutional. Yet, the trial judge then clearly and willfully ignored controlling constitutional standards by concluding that the search warrant affidavits for the two subsequent searches contained sufficient facts, separate and distinct from the information that a 4Runner was parked in the garage, to support a finding of probable cause by the magistrate. This finding was in total and complete disregard to the constitutional requirement that there be some link between the alleged criminal activity and the residence being searched. Federal case law explicitly holds that the mere fact that a vehicle is registered to a resident of a particular residence is not sufficient basis to support probable cause absent evidence.

The majority of the South Carolina Supreme Court then rejected the trial judge's correct conclusion that the warrantless search and further concluded that the search did not disclose any incriminating evidence that was used against Herring. Once again, the South Carolina Supreme Court dispensed with the constitutional requirement that there be some link to the residence being searched and the crime being investigated or the suspect being sought. The only link though was the fact that a 4Runner vehicle was parked in the garage. The majority of the Supreme Court concluded that the "peek" which led to the evidence was not unreasonable because of exigent circumstances, i.e. an apparent murder had been committed some two hours earlier and the Deputies went to the address on the suspect driver's license. However, as stated above, federal courts have rejected the exigent circumstances to support a warrantless search where the search was conducted more than 40 minutes after the suspect was seen entering the

residence and no case has been located that would justify a warrantless search of more than two hours after the shooting and the officers had not been provided any eyewitness accounts of the suspect entering the residence.

ii. Herring Was Denied A Full and Fair Opportunity To Litigate His Fourth Amendment Search Claims Because Of the Chief Justice's Refusal To Recuse Herself From Participating In The Case When Her Order Was Being Challenged

For the reasons argued in Section Four, *infra.* at pages 28-33, the Chief Justice refusal to recuse herself from participating in the appeal of Herring's conviction and to rule upon the lawfulness of the challenged search violated the due process clause of the United States Constitution and deprived Herring a full and fair opportunity to litigate his Fourth Amendment search claims.

CONCLUSION

Based upon the foregoing, Petitioner requests that the Court issue a writ of habeas corpus to direct Respondents to release Petitioner from custody and to grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

GRIFFIN LLC

/s/ James M. Griffin

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Attorneys for Petitioner

April 20, 2011

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA**

H. Dewain Herring, #321951,	)	C/A No. 0:11-160-RMG-PJG
	)	
Petitioner,	)	RETURN AND MEMORANDUM OF
vs.	)	LAW IN SUPPORT OF
	)	MOTION FOR SUMMARY
	)	JUDGMENT
Robert M. Stevenson, III, Warden	)	
Broad River Correctional Institution,	)	
	)	
Respondents.	)	
	)	

The Respondent, above-named, hereby makes a Return to the Rule to Show Cause entered by the Honorable Paige Gossett, United States Magistrate Judge to the pro se Petition for a Writ of Habeas Corpus filed on February 3, 2011 and dated January 20, 2011 and amended on April 20, 2011. The Respondent would show this Court the following:

I.

The Petitioner, H. Dewain Herring, #321951, is presently confined at the Broad River Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Richland County. At the February 2006 term, the Richland County Grand Jury indicted Petitioner, H. Dewain Herring, for murder and pointing and presenting a firearm (06-GS-40-0914 & -0881). Specifically, the murder indictment alleged that, on or about January 29th, 2006, Petitioner killed John Johnson with malice aforethought by use of a firearm.

The Honorable G. Thomas Cooper, Jr., conducted a jury trial of Petitioner from May 7th through 21st, 2007. At trial, Petitioner was represented by Richard A. Harpootlian, Esquire,

Graham Newman, Esquire, and Jamie Lindler, Esquire; Solicitor Barney Giese and Deputy Solicitor John Meadors prosecuted the case for the State. On May 21st, 2007, the jury found Petitioner guilty as charged, and Judge McKellar sentenced him to thirty (30) years in prison for murder and a five year concurrent sentence for pointing and presenting.

A timely notice of appeal was filed and served on May 29th, 2007. The Petitioner was represented on appeal by Richard A. Harpootlian, Graham L. Newman, and Katherine Carruth Goode of the South Carolina Bar. In the Final Brief of Appellant, counsel for the Petitioner raised the following statement of issues on appeal:

1. Did the trial court err in denying the defense motions to suppress the three searches of appellant's residence and the fruits of those searches?
2. Did the trial court abuse its discretion in allowing lay witnesses to give their opinion of what could be seen on the video, when those witnesses did not personally observe the actual events depicted in that portion of the video?
3. Did the trial court abuse its discretion in denying the defense mistrial motion based on the admission of improper lay opinion testimony?
4. Did the trial court commit reversible error in denying the requested charge on accident?
5. Did the trial court commit reversible error in denying the requested charges on involuntary manslaughter based on negligent use of a deadly weapon?
6. Did the trial court commit reversible error in granting the State's request to charge based on *State v. Mouzon*?
7. Did the trial court err in denying the motion for directed verdict with respect to the charge of pointing and presenting a firearm?
8. Was the cumulative prejudice that resulted from all the erroneous rulings such that appellant is entitled to a new trial?

Final Brief of Appellant, p. 1. The Respondent was primarily represented in the appeal by

Assistant Attorney General S. Creighton Waters. In his Final Brief of Respondent, he restated the issues on appeal as follows:

- I. THE SEARCH WARRANTS WERE VALID UNDER BOTH CONSTITUTIONAL AND STATUTORY LAW, BUT REGARDLESS, NO EVIDENCE SHOULD HAVE BEEN SUPPRESSED.
- II AND III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR COMMIT REVERSIBLE ERROR IN ALLOWING TESTIMONY FROM A BOUNCER AND TWO OFFICERS AS TO WHAT THEY SAW ON THE VIDEO OF THE SHOOTING, WHERE THE TESTIMONY WAS NOT EXCLUABLE OPINION TESTIMONY, AND WHERE ANY ERROR WAS HARMLESS OR CURED BY INSTRUCTION.
- IV. THERE WAS NO REVERSIBLE ERROR IN THE TRIAL COURT'S REFUSAL TO CHARGE ACCIDENT, WHERE THE CHARGE AS REQUESTED WAS AN INCORRECT STATEMENT OF LAW, AND WHERE ACCIDENT WAS NOT VIABLE ANYWAY SINCE AS A MATTER OF LAW APPELLANT WAS NEITHER ACTING WITH DUE CARE NOR IN A LAWFUL MANNER.
- V. THERE WAS NO REVERSIBLE ERROR FROM THE JUDGE'S REFUSAL TO GIVE CERTAIN SUPPLEMENTAL CHARGES RELATING TO INVOLUNTARY MANSLAUGHTER, WHERE THE CHARGES WERE INCOMPLETE OR INCORRECT STATEMENTS OF LAW AND THE JUDGE'S CHARGE CORRECTLY SET FORTH THE CONCEPTS IN ISSUE, AND WHERE APPELLANT WAS NOT ENTITLED TO AN INVOLUNTARY MANSLAUGHTER CHARGE IN ANY EVENT.
- VI. THE TRIAL COURT DID NOT ERR IN GIVING A CHARGE ON THE DEFINITION OF *MOUZON* OR "DEPRAVED HEART" MURDER, WHERE: (1) THAT LONGSTANDING CONCEPT WAS NOT ABROGATED BY PASSAGE OF THE STATUTE DEFINING CRIMINAL NEGLIGENCE FOR PURPOSES OF INVOLUNTARY MANSLAUGHTER; (2) THIS CASE WAS A CLASSIC EXAMPLE FOR APPLICATION OF THE DOCTRINE; AND (3) "DEPRAVED HEART" MURDER AND INVOLUNTARY MANSLAUGHTER ARE SUFFICIENTLY DISTINCT THAT THE CHARGE COULD NEITHER BE UNCONSTITUTIONALLY VAGUE NOR BURDEN SHIFTING.
- VII. SINCE THE RCSD WARRANT WAS VALID, APPELLANT HAD NO

RIGHT TO ARM HIMSELF IN RESISTANCE; THUS, A MOTION FOR DIRECTED VERDICT WAS PROPERLY DENIED AS TO THE POINTING AND PRESENTING CHARGE.

VIII. THERE IS NO CALL FOR APPLICATION OF THE CUMULATIVE ERROR DOCTRINE IN THIS CASE.

Final Brief of Respondent, p. 1.

On June 16, 2009, counsel for Petitioner made a motion to recuse Chief Justice Jean Toal. The motion was based upon the assertion that the magistrate , in issuing the warrants had instructed the SLED agent to follow the procedures established on an the July 26, 2001 order of the Chief Justice for the issuance of Richland County warrants by telephone and facsimile transmissions. The Petitioner claimed that this procedure in accord with Chief Justice's order violated the state constitution and due process. *State v. Herring*, Motion to Recuse, p. 3-5. On June 18, 2009, the Chief Justice entered a summary letter order that the motion to recuse was denied.

On June 23, 2009, oral argument before the South Carolina Supreme Court was held. On October 12, 2009, counsel Harpootlian for Herring pursuant to SCACR Rule 208(b)(7) issued a letter asserting that the Court as a supplemental citation State v. Belcher, Op.No. 26729 (S.C.Sup.Ct. October 12, 2009) relating to his assertion in his briefs that the trial court erred in refusing to instruct on his requested charges of accident and involuntary manslaughter.

On December 21, 2009, the South Carolina Supreme Court entered its opinion affirming the conviction and sentence. Rehearing was timely sought and denied on May 14, 2010. The remittitur was issued the same day. Certiorari was not sought in the United States Supreme Court.

Pending State PCR Proceedings

On June 4, 2010, the Petitioner, pro se, filed an application for post-conviction relief in Richland County. Herring v. State, 2010-CP-40-3783. The Respondent, through Assistant Attorney Brian Petrano made a Return to the Petition on July 23, 2010. The Petitioner was initially represented by Robert L. Brown of the Richland County Bar. On March 30, 2011, an order substituting Cam Littlejohn as counsel was entered. The matters is still pending in the Court of Common Pleas for Richland County.

ATTACHMENTS

The Petitioner has attached the following materials to his Petition on February 3, 2011.

1. Final Brief of Appellant
2. Final Reply Brief of Appellant.
3. Final Brief of Respondent.
4. Motion to Recuse.
5. Order Denying Motion to Recuse.
6. State v. Herring, Supreme Court Opinion.
7. Petition for Rehearing.
8. Letter Order Denying Petition for Rehearing.
9. Remittitur Letter dated May 14, 2010.
10. Record on Appeal - Four Volumes - (1382 pages).

Respondent has no additional attachments.

STATEMENT OF STATE'S VERSION OF THE CASE

This case concerns the conviction of a Columbia attorney for shooting an employee of

Chastity's strip club after the attorney was removed from the club. Petitioner did not seriously contend he was not the shooter at trial, but raised the defense of involuntary intoxication.

A. The incident in the "champagne room" and the shooting

At about 11:00 p.m. on Saturday, January 28th, 2008, a well-dressed man arrived at Chastity's all-nude strip club on River Drive in Columbia. Renisha Grainger, or "Mia", was a dancer working that night, and the man signaled her he wanted a private "lap dance" in the Champagne Room. Mia paid a bouncer, Carl Weeks, his cut of the fee and Carl escorted the man back to the Champagne Room. {R. 179; 299-305; 414-16}.

Mia left the room after a couple of minutes to freshen up and planned to return to her customer; however, when Carl checked on the man waiting in the Champagne Room, he found the man completely naked and sitting on the couch masturbating. The man told Carl he was "waiting on a girl", and Carl told the man he could not do that here and needed to leave. The man did not respond and kept masturbating. {R. 305-15; 417-19; 454-55}.

Carl went and got the victim, John Johnson or "John John", who went in the room to talk to the man. Eventually, the man and John John emerged, and Carl told the man he could either leave or they would call the police and report him for solicitation of prostitution. The man responded, "No, I will fucking shoot you", and which point Carl replied, "you're not going to shoot anybody". Another bouncer, Donald Hawkins, over heard the man threaten to kill Carl and John John. At this point, John John pushed Carl back to de-escalate the situation. {R. 166-69; 231; 419-22}.

Carl went off to attend to other duties and Donald came up to assist John John with the unruly man. They escorted the man outside, but did not have to use force or put their hands on

him. However, the man was upset, wanting his money back. He told the two strip club employees that they did not want him to come back because someone is going to get "fucked up". A security video played at trial shows the man exiting the club at 11:56 p.m. {R. 169-79; 263-70; 364-70; 423-25}.

The man got in his SUV, leaned over towards the glove compartment, and then very slowly left the parking lot at 12:03 a.m. John John called out the vehicle's license tag over his radio and Carl wrote it down on his hand. Carl told Donald they should step inside in case the man started shooting. They watched as the man drove away until he was totally gone, and Carl went inside to his duties. Donald and John John saw then saw the SUV coming back down River Drive, so they went back in the club. {R. 179-205; 426-27; 431-33; 441}.

John John was at the door of the club peeking out and Donald was watching the monitors. Suddenly, John John said, "oh shit". He then fell to the floor, having been struck in almost directly in the left ear by a bullet that passed through the front door. The security video shows the SUV returning to the parking lot, pausing directly in front of the club before the shot was fired, and then departing. {R. 178-208; 428-31}.

The man who was in the room naked, who was ordered to leave, and who threatened the strip club employees was identified at trial by Renisha, Carl, Donald, bartender Nicole Beran, and club Vice President Jewel Koon as Petitioner, Dewain Herring. {R. 200; 271; 305; 375; 435}.

B. Police arrive and Petitioner is identified

Of course, police were summoned, and given the license tag Carl had written down from the assailant's SUV. It came back registered to Petitioner at his office address. Officers also

compared a picture of the man on the club's security video with Petitioner's driver's license photograph and his picture on his office website, and it was a match. Of course, officers found no one present at the business address during early morning hours on a Sunday, but they did find in their records Petitioner's home address in a gated community. {R. 499-504; 507; 603-05; 608-09; 766-69}.

C. Gunfire at Petitioner's home

Officers thus went to Petitioner's home in the early morning hours of that Sunday. They knocked on the door, but no one responded. One officer looked in the windows of the garage and saw inside an SUV like the one on the video. {R. 504-07; 765-66}.

Officers then obtained a search warrant. After again knocking on the door, they made a forcible entry. Two officers came down the hall to see Petitioner, who retreated into a bedroom. As an officer looked into the bedroom, he saw Petitioner pulling a gun from a nightstand. The officers yelled "gun, gun, drop the gun," but Petitioner continued to turn and point the gun towards them. An officer dropped to one knee and fired, and other officers in the house also opened fire. The officer felt debris kicking up around him and retreated. {R. 505; 512-25; 554-59; 609-17; 622; 629; 642-43; 770-78}.

What followed was a standoff between Petitioner and the officers that lasted for some time. The officer continued to yell that they were law enforcement and for Petitioner to come out, but received no response until he said he had been shot. The officers told him to come out and he would get help. Petitioner refused, asking why the officers were there, and when told it was relating to an incident earlier that night, Petitioner yelled he had been in bed all night. {R. 526; 617-21}.

The officer heard a gun cock from the bedroom, so they retreated further and call superiors. They were informed that Petitioner had called 911 and was on the phone reporting a home invasion. Petitioner told 911 he did not believe the people were police officers, and a number of questions were coordinated between 911 and Petitioner to satisfy him as to the identity of the officers. Petitioner came out and was arrested, and had a gunshot wound to his arm. {R. 527-31}.

D. Petitioner's custodial statements to police

Because officers had been involved in a shooting, SLED was called out to investigate pursuant to routine policy. {R. 652; 676-78}. SLED agents interviewed Petitioner after advising him of his rights. Petitioner gave a statement in which he claimed he went to bed at 11:00 p.m., and was awakened by a loud banging on his door. He asserted he did not recognize the people entering his house as officers, and asked them to speak up because he could not hear them. The men then started shooting at him, so he retreated to his bedroom and got a .357 magnum revolver from his nightstand. Petitioner admitted cocking and uncocking the weapon. Petitioner called 911 and told them some men were in the house claiming to be from the sheriff's department, but he was unsure. A supervisor got on the phone with him and told him the men were there to speak to him with regard to an incident on River Drive, but Petitioner told the supervisor he did not know anything about an incident on River Drive. Petitioner stated he surrendered to the officers and was placed into custody. He claimed he was worried because there had been a number of burglaries in the area and the officers entered with great force. {R. 682-703; 723-38}.

The SLED agent then spoke with Richland County officers and determined a number of inconsistencies between Petitioner's version and the facts. He thus spoke to Petitioner again,

asking him to go back further in the day. Petitioner admitted he went to Aiken to play golf with his friend, Chris Isgett, and drank about nine beers. They then went to a bar and grill, where he drank four scotch and sodas. The two men returned to Petitioner's house, where they had more drinks, and Isgett left around 8:30 p.m. Petitioner then claimed he took a shower and laid down and did not remember going anywhere. He claimed he thought about going to the Tombo Grill, but decided to stay home. {R. 708-10}.

When asked if he went to Chastity's strip club, Petitioner stated he knew where it was but did not recall ever going there. The SLED agent then pointed out that the strip club's security cameras had a picture of him entering, at which point Petitioner admitted he remembered "the white woman with the big tits". Appellant said he had a scotch there, and while his recollection was "hazy", he did now recall being there. {R. 710-12}.

When asked if he had a problem with anyone at the club, Petitioner admitted he went into the back room for a lap dance done by a light-skinned black woman. He admitted driving his black 4Runner SUV, but stated he "typically [did not] go to places like [Chastity's] because the people who go there have bad attitudes". Petitioner admitted owning four handguns and one shotgun, and stated he usually has one in the SUV with him. However, he claimed he did not remember which gun he had in the SUV that night. {R. 712-14}.

When asked if he fired his weapon at Chastity's while leaving, Petitioner said he did not recall doing so. When asked if he fired a gun at all, Petitioner replied:

If I did, I was not shooting at anyone. I'm not saying that I did not do it. If the gun went off while in my hand, it was harmless error. It was probably the Ruger .357, and if it went off, it was an accident.

Petitioner claimed he was not shooting at anyone because "there was nobody to shoot at".

Petitioner then specifically wrote at the end of the statement that he reserved the right to “edit, add, or delete” from the statement. {R. 714-16; 739-53}.

After the SLED agent took the second statement, a Richland County investigator spoke with Petitioner. Petitioner told the investigator he remembered having a dispute with the strip club employees, and remembered shooting the gun – although he stated he was not shooting at anyone. Petitioner again stated the weapon fired was likely his Ruger handgun, as that was the one he usually kept in his car. Petitioner then asked if he was under arrest, and was told he was under arrest for murder. Petitioner looked surprised, and the investigator told him the bullet had killed someone. Petitioner then put his head into his hands and said, “no, no, no”. Petitioner said he had not intended to hurt anyone, and requested a lawyer. {R. 794-99}.

E. Evidence recovered from Petitioner and his home

SLED agents investigating the shooting of course found evidence of the shootout and standoff between Petitioner and the officers executing the warrant. Sixteen casings and fifteen projectiles were recovered, and it was determined a total of seventeen shots had been fired by the group of officers who entered the home. {R. 653-55; 661-69; 822}.

A Smith and Wesson .357 revolver was found on Petitioner’s bed. In a closet under some clothes, officers found a Ruger .357 pistol. The Ruger had one fired casing in its revolver and four unfired cartridges. {R. 656-59; 718; 720; 753-54}.

No gunshot residue was found on Petitioner’s hands, although that could be explained by the time lapse. No gunshot residue was found on the driver’s side of Petitioner’s 4Runner, but all three swabs from the passenger side showed gunshot residue. {R. 818; 825-36}. In Petitioner’s 4Runner SUV, officers found six boxes of shotgun shells, one Ruger catalog, one

Buckmaster magazine, one Gunhunter magazine, and an Indigo Club clay shooting coupon. {R. 810-13}. The security tape from Petitioner's gated community showed someone matching his description and wearing the red sweater similar to the one on the Chastity's tape entering the subdivision at 1:12 a.m. on Sunday morning. {R. 857}.

F. Evidence recovered from Chastity's

Officers at Chastity's did not find any projectiles at the scene but did find a bullet hole in the right top area of the front door to the club. A trajectory analysis was not conducted because officers had the security video of the shooting. {R. 470-74; 477; 543; 586-87}.

An autopsy revealed the bullet struck John John almost directly in his left ear canal, and the bullet fragmented upon hitting bone. The pathologist was able to remove five fragments, but left in others too small for removal. {R. 586-87; 855}.

Bullet fragments were recovered from the victim's head, which were taken to SLED for processing. A SLED expert conclusively matched one of the fragments to the Ruger .357 Petitioner owned which was found under clothes in his closet; analysis on the others was inconclusive or impossible. The expert noted that the weapon could not be fired in its holster without use of some sort of tool, and even then it would need to be manually cocked first. Finally, the SLED expert found no evidence the weapon had been fired while within its holster. {R. 843-54; 856}.

G. The defense case

The defense first began by calling Lawton Yates, who was qualified over State objection in forensics and ballistics. He opined that the forensic evidence was inconsistent with officers' claims that they only fired once when Petitioner grabbed the gun from the nightstand and turned

toward them. Yates asserted the club video evidence was inconsistent with Petitioner aiming at the door and firing through it without some ricochet. Yates stated he would have expected to see a fireball when the weapon was fired, and the alleged absence of that on the video indicates the weapon was fired below the plane of the passenger side window. However, Yates conceded that the SLED expert was correct in concluding Petitioner's .Ruger .357 fired the shot that killed John John. {R. 877-904}. On cross, Yates conceded the shot was fired from the car. {R. 910-17}.

Next, the defense called a dancer a Chastity's, who stated some dancers take a fee, tell a customer they would perform oral sex, and then arrange for a bouncer to check on them. She also claimed she had heard of people putting things in other people's drinks at the club. {R. 933-46}. Two other dancers testified later, of which one stated she believed she had once been drugged at Chastity's, and the other said she was with the first dancer and also believed the first dancer had been drugged. {R. 1161-1214}.

Petitioner testified at his trial. He stated he played golf with Mr. Isgett in Aiken, and then went to the bar and grill where he had a few drinks. Upon getting back home at about 7:30, he took a shower and laid down, but then got up intending to go to the Tombo Grill. However, supposedly the kitchen had closed early, so he went to Platinum Plus. Something there made him nervous, so he decided to go home. On the way, though, he stopped at Chastity's, and he admitted on the stand the person in the security video was him. {R. 957-63}. However, Petitioner claimed that he does not have a coherent memory of anything that happened after he ordered a drink at Chastity's, which he attributed to being drugged there. {R. 979-82}.

Petitioner noted that he wears glasses and is hard of hearing, and also sleeps with a medical device that makes an audible hum. He asserted that while he could hear the officers

making noise and yelling, he could not tell they were officers. He denied ever pointing his gun at them. {R. 968-72}. Despite the fact that Petitioner remembered the previous point, he claimed he had no memory of being advised of his rights or signing the waiver form. Consequently, he did not believe his first statement was accurate, but said as the officers continued to question him, his memory began to come back "hazily". Petitioner claimed that although he said that if the gun went off, it was an accident or "harmless error", he did not actually remember anything happening. {R. 982-1002}.

Petitioner was cross-examined on his claim that he did not fire the gun intentionally, his assertion that except for the gun going off he supposedly did not remember anything after he got his drink at Chastity's, the fact that he does not appear to be physically impaired on the video even though he claims he was drugged, the fact that he remembers what happened when police invaded his home but does not remember signing a Miranda waiver some five (5) hours later, and his claim that SLED is setting him up and he does not believe he told the SLED agent he had a dispute with the employees at Chastity's strip club. {R. 1007-49}.

Petitioner next called Dr. John Holbrook, who was qualified as an expert in pharmacology. He asserted that date rape drugs can cause amnesia and loosen inhibitions, and claimed that in his opinion Petitioner did ingest a date rape drug that night. Dr. Holbrook arrived at this conclusion because Petitioner's behavior was supposedly out of character, he showed behavioral disinhibition when he took his clothes off, and he had no memory after a certain time. The doctor asserted that had Petitioner been given a drug test, it would have revealed the presence of such a drug. {R. 1066-90}. The doctor was crossed on the fact that everyone who observed Petitioner did not find him obviously intoxicated, and that the effects of any drug

should have worn off by the time he signed his advice of rights form at 9:42 a.m. The doctor was also cross-examined on the fact that Petitioner never claimed he was drugged on the day of the incident, and on the fact that Petitioner stated in his first statement that he had not been out all night and had gone to bed at 11:00 p.m. {R. 1091-1139}.

Petitioner's golf partner Chris Isgett testified for the defense that Petitioner only had about five beers during the round of golf, and only two scotches at the bar and grill in Aiken. Back in his house here in Columbia, Petitioner was just on his second scotch when Isgett left to go home. {R. 1215-20}.

Finally, Petitioner called his wife to testify. She also stated that Petitioner wears hearing aids and sleeps with a device on that makes a humming sound, and that on many occasions he has slept through the door bell or phone ringing. {R. 1225-28}.

H. State's reply case

In reply, the State first called Dr. Demi Garvin, an expert in forensic toxicology who had analyzed hundreds of cases of drug facilitated sexual assault. She reviewed, among other things, all the incident reports, witness statements, medical records, 911 calls, and Petitioner and Dr. Holbrook's trial testimony. She opined to a reasonable degree of scientific and medical certainty that Petitioner was not involuntarily intoxicated by any such substance. {R. 1267-70}. She stated that given the alcohol he had voluntarily consumed, any surreptitiously provided drug would render him relatively incapacitated or significantly impaired. She noted that while anterograde amnesia can result from a date rape drug, that would not occur in isolation from significant physical impairment. Further, Petitioner's purposeful and goal-directed behavior, and ability to fend for himself, was inconsistent with such a level of intoxication. {R. 1270-74}. Dr.

Garvin also concluded based on her review of the evidence that Petitioner knew right from wrong at the time of the shooting. {R. 1274-79}.

Indeed, throughout the State's case in chief, many of the witnesses who interacted with Petitioner, from the strip club employees to the officers at his house to the officers who interviewed him, testified Petitioner was coherent, not overly intoxicated, and responsive to questions. {R. 172; 238; 278; 351; 531-32; 620-21; 716; 757}.

II. ALLEGATIONS IN PETITION

In his amended petition filed April 20, 2011, Herring, through counsel makes the following allegations as to why he is being held in custody unlawfully:

- I. Petitioner Herring's Due Process Right To A Fair Trial Was Denied Because The Jury Instructions Equated The Mental State Required For A Conviction of Murder With the Same Mental State Necessary For The Lesser Included Offense of Involuntary Manslaughter, Thereby Allowing The Jury To Find Petitioner Guilty Of Murder Even If Petitioner Possessed The Mitigating State of Mind For Involuntary Manslaughter.
- II. Petitioner's Due Process Rights To A Fair Trial Were Denied Because The Jury Was Not Instructed On The Defense of Accident Nor Provided Instructions Pertaining To The Negligent Use of A Firearm.
- III. Petitioner was denied his right to Due Process as a result of the South Carolina Supreme Court's decision to refuse to apply its decision in State v. Belcher, __S.C. __, 685 S.E.2d 802 (2009) to the Petitioner as required by Griffith v. Kentucky, 479 U.S. 314 (1987).
- IV. Petitioner was denied his right to Due Process as a result of the refusal of the Chief Justice of the South Carolina Supreme Court to recuse herself from participating in the appeal from Herring's conviction which necessarily involved a direct review of the legality of the Chief Justice's Administrative Order.
- V. Petitioner was denied his right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Petitioner was further deprived of his right to fully and fairly litigate this Fourth Amendment claim in the South Carolina state courts as a result of the refusal of

the Chief Judge to recuse herself from participation and the Court's refusal to apply the correct and controlling legal standard.

Amended Petition.

III.

STANDARD OF REVIEW.

The AEDPA provides for restrictive review of claims presented in a federal habeas action.¹ A claim adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of" clearly established federal law as decided by the United States Supreme Court, or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d). *See also Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

The above standard is only applied to claims that have been properly presented to, and decided by, the state courts. In other words, to be entitled to such review, a petitioner must have properly exhausted his state remedies by fairly presenting the claim to the highest state court. *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997). Procedural default occurs when "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546 (1991). A petitioner must show cause and prejudice or demonstrate that a miscarriage of justice would occur if the claims were not heard, i.e. a showing of actual innocence,

¹ The AEDPA also provides for a one-year statute of limitations. 28 U.S.C. §2244(d)(1). Petitioner filed well within the one-year period as his federal time limits did not begin to run until ninety-days after May 10, 2010, the conclusion of his direct appeal.

to overcome the bar. *Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S.Ct. 2639 (1986). Petitioner's claims will be analyzed individually in light of these standards and requirements.

IV.

The petitioner makes five allegations in his Petition for Writ of Habeas Corpus.

Respondent submits that each of the allegations are without merit for federal habeas relief.

A. State v. Mouzon and Jury Instructions for Murder and Involuntary Manslaughter.

In his first allegation for relief, Herring contends that the jury instructions for murder and involuntary manslaughter violated due process of law. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a federal court may grant habeas relief on a claim "adjudicated on the merits" in state court only if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Where, as here, it is the state court's application of governing federal law that is challenged, the decision " 'must be shown to be not only erroneous, but objectively unreasonable.' " *Middleton v. McNeil*, 541 U.S. 433, 436, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004) (per curiam) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam)); see also *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable-a substantially higher threshold").

Our habeas precedent places an "especially heavy" burden on a defendant who, like Herring, seeks to show constitutional error from a jury instruction that quotes a state statute or

substantive state law. Henderson v. Kibbe, 431 U.S. 145, 155, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). Even if there is some "ambiguity, inconsistency, or deficiency" in the instruction, such an error does not necessarily constitute a due process violation. Middleton, *supra*, at 437, 124 S.Ct. 1830. Rather, the defendant must show both that the instruction was ambiguous and that there was " 'a reasonable likelihood' " that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt. Estelle v. McGuire, 502 U.S. 62, 72, 112 S.Ct. 475, 482, 116 L.Ed.2d 385 (1991) (quoting Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)). In making this determination, the jury instruction " 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle, *supra*, at 72, 112 S.Ct. 475 (quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). Because it is not enough that there is some "slight possibility" that the jury misapplied the instruction, Weeks v. Angelone, 528 U.S. 225, 236, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000), the pertinent question "is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' " Estelle, *supra*, at 72, 112 S.Ct. 475 (quoting Cupp, *supra*, at 147, 94 S.Ct. 396). See also, Waddington v. Sarausad, 129 S.Ct. 823, 831 -832 (U.S. 2009).²

A claim that a jury instruction is contrary to state law presents no federal question.

²Generally, an improper instruction would have to relieve the jury of finding an element of the offense or alter the burden of proof. The standard from Estelle is whether there is a reasonable likelihood that the jury applied the instruction in a way that violated the Constitution. 502 U.S. at 72, 112 S.Ct. at 482. See also Allen v. Woodford, 366 F.3d 823, 840 (9th Cir. 2004), amended 395 F.3d 979, 996 (9th Cir. 2005); Beardslee v. Woodford, 327 F.3d 799, 811 (9th Cir. 2003), amended 358 F.3d 560, 574, supplemented 393 F.3d 1032 (9th Cir. 2004).

Mitchell v. Goldsmith, 878 F.2d 319, 324 (9th Cir. 1989). And it is not enough to show that the instruction was undesirable, erroneous or condemned; it must violate some due process right protected by the Fourteenth Amendment. Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). See also Middleton v. McNeil, 541 U.S. 433, 437, 124 S.Ct. 1830, 1832, 158 L.Ed.2d 701 (2004). "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Waddington v. Sarausad, 129 S.Ct. 823, 832 (U.S., 2009). "[W]e are bound to presume that state courts know and follow the law, and we have been instructed that state-court decisions be given the benefit of the doubt." *Id.* at 838 n. 6 This direction applies with even greater force when a state court is analyzing a jury instruction developed under state law. See Waddington v. Sarausad, --- U.S. ---, 129 S.Ct. 823, 833-35, 172 L.Ed.2d 532 (2009) (emphasizing that this Court must review a state court's resolution of an error in a state-law jury instruction "through the deferential lens of AEDPA").

Mouzon Issue.

Within his memorandum in support of the Petition, Herring argues that the trial judge erroneously charged malice under State v. Mouzon, *supra*. Memorandum, p. 18-20. As stated above, this Mouzon issue was summarily denied within the opinion in the following manner:

The remaining issues are affirmed pursuant to SCACR Rule 220(B)(1) and the following authorities: . . . Issue 6 (State v. Mouzon instruction)- State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (upholding Mouzon instruction); Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009) (in determining prejudiced from jury instructions, court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution) . . .

Herring, *supra*.

Herring contends that when reading the instructions as a whole, the jury could have convicted the Petitioner of murder, even if they found that he possessed the mitigating state of mind described in the instructions for involuntary manslaughter. Implicit in the argument, the Petitioner contends the trial court erred in granting the State's request to charge the version of common law malice found in State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957). The charge was properly given, as the General Assembly's statutory definition of "criminal negligence" did not abrogate the longstanding concept of depraved heart murder, and this case is indeed a classic example for application of the Mouzon doctrine. Because "depraved heart" or Mouzon murder is obviously distinct from the mere conscious negligence for involuntary manslaughter, the charge was neither unconstitutionally vague nor burden-shifting.

A. Events at trial

The court held an informal charge conference with counsel for both parties in chambers at the close of the defense case. The following day, Friday, May 18, the court allowed counsel to place on the record the various charge requests and objections. R. pp. 1232-64. After a charge conference prior to the weekend, the trial court received a request from the State to charge the commonly known and used language of "malignant heart" malice based in Mouzon. The defense objected, first contending the language was burden-shifting. The defense next argued that Mouzon was an old case that had been subsumed by the General Assembly's definition of the criminal negligence necessary for involuntary manslaughter as "reckless disregard of the safety of others". While asserting that having the jury distinguish between the recklessness required for murder as opposed to the recklessness required for involuntary manslaughter would be confusing, the defense also contended that there was no evidence from which the jury could infer

Petitioner pointed the gun at anyone. The court noted it had considered the issue all weekend and felt the charge was appropriate. {R. 1265-66}. The defense renewed the objection after the charge. {R. 1317}.

On Monday, the defense noted an objection to this charge, which the court had added to the charge it intended to give to the jury, on multiple grounds. R. pp. 1265-66. The court overruled the objection and added the requested language to its charge. R. p. 1266. When the court charged the jury, it included the Mouzon language, stating,

... Malice is defined in the law of homicide as a term of art; that is a technical term importing wickedness, excluding just cause or legal excuse. **An old South Carolina case says that malice does not necessarily impart ill will towards the individual injured but signifies rather a general malignant recklessness of the lives and safety of others or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief**

R. pp. 1305-06.³ The jury was also instructed on the law of involuntary manslaughter:

Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or a lawful act with reckless disregard for the safety of others.

Unintentional means the defendant did not intend for anyone to be killed or seriously injured. Reckless disregard for the safety of others is more than mere negligence or carelessness. Mere negligence or carelessness is the failure to use care that a person of ordinary reason would use under the same circumstances.

Recklessness is a conscious failure to use ordinary care. A reckless disregard for the safety of others means that you [sic] not interested in the consequences of your acts or the rights and safety of others. If a person who knows or should know that ordinary care requires certain precautions be taken for the safety of others when using a dangerous instrumentality such as a gun or car but that person fails to use those precautions without concern, the person's actions are considered reckless.

R. Pp. 1308, l. 22 p. 1309, ll. 10-20.

³On Saturday, the State submitted, with copy to the defense by fax, an additional proposed charge based on State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957). R. p. 1320.

B. The General Assembly did not abrogate *Mouzon* malice by its passage of the involuntary manslaughter statute defining criminal negligence, and the doctrine is clearly applicable to the facts of this case.

As Petitioner notes, Mouzon was a case in which a conviction for murder was found appropriate in a case of vehicular homicide, in which the defendant had been driving recklessly despite his passenger's protests and struck a pedestrian at an extremely high rate of speed with no effort to avoid her. The Court affirmed the murder conviction, finding that malice could be found even without a specific intent to kill the victim, where there "is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life." Mouzon cited an earlier case which noted that malice does not "necessarily import ill-will toward the individual injured, 'but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief'. State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672, 675-76 (1957) (quoting State v. Heyward, 197 S.C. 371, 15 S.E.2d 669 (1941)). It was this language that the trial judge charged. {R. 1305-06}.

Petitioner contended that the Mouzon form of malignant or depraved heart murder was superseded by the General Assembly when in 1968 it passed S.C. Code Ann. § 16-3-60 (Rev. 2003), defining the "criminal negligence" necessary for involuntary manslaughter as "reckless disregard for the safety of others". This is incorrect. As explained in the section V, *supra*, by passage of § 16-3-60 the General Assembly was simply overruling years of preexisting caselaw sustaining involuntary manslaughter convictions upon a finding of simple negligence, by setting the bar higher for the general policy rationale that simple negligence is typically not enough for criminal liability. See McAninch, Fairey, and Coggiola, The Criminal Law of South Carolina p.

12, 195-96 (5th ed. 2007).

However, setting the bar higher than simple tort-style negligence for involuntary manslaughter had nothing to do with overruling the longstanding Mouzon inference of malice for murder in situations where a particularly egregious actor had no specific intent to kill the victim. First, of course, is the obvious point that neither § 16-3-60 nor any other statute expressly disavows the Mouzon inference of malice.

Second, while both § 16-3-60's definition of criminal negligence and Mouzon might share the word "recklessness", it is clear, as McAninch notes, that "the degree of recklessness must involve more egregious conduct than that 'reckless disregard for the safety of others' which is the statutory definition of the criminal negligence predicate to an involuntary manslaughter prosecution." McAninch, *supra*, at 94-95. Indeed, this is obvious from the language itself, as while § 16-3-60 merely refers to "reckless disregard for the safety of others", which is, as the trial judge correctly pointed out, a *conscious* failure to use ordinary care, Mouzon's definition of malice focuses on the fact that a specific intent to kill the victim is not required, and malice may exist where there is a "general malignant recklessness", or a "heart regardless of social duty and fatally bent on mischief". 231 S.C. at ___, 99 S.E.2d at 675.

However expressed, the difference between the two is not hard to understand. The lesser standard simply refers to one who consciously fails to exercise due care; the Mouzon standard is met when the conduct is so egregious that it crossed the line and "is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life". 231 S.C. at 675, 99 S.E.2d at 675. Consciously engaging in mere negligence is not the same as conduct so egregious and dangerous that it is the functional equivalent of an intent to kill. They

are two degrees of recklessness, but simply because they share that same word does not mean either that the Legislature intended with § 16-3-60 to redefine Mouzon murder as mere involuntary manslaughter (punishable by only five years),

Petitioner's argument that there could never be a conviction of involuntary manslaughter if Mouzon murder is applied to firearms is simply without merit. The spate of cases involving those who arm themselves in self defense but have the gun go off unintentionally provide just such an example. See, e.g., State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008); State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008). Moreover, Petitioner is also incorrect that the facts of this case do not warrant application of the doctrine. Assuming the jury believed he did not have a specific intent to kill John John, the jury could still find that what Petitioner did in this case is the perfect analogy with use of firearms for the vehicular homicide in Mouzon – like the defendant there, who blazed through a small community at nearly four times the speed limit and predictably struck a pedestrian with no effort to avoid her, Petitioner here fired a bullet into a structure he knew was full of people, and predictably struck an occupant who had no chance to avoid the bullet. Both the defendant in Mouzon and Petitioner then fled the scene. That certainly displays an extreme heedlessness of the deadly consequences of actions so obviously dangerous to others that malice could be inferred; even if the jury believed he was not specifically aiming for John John, he did not specifically care one way or the other whether it was John John, Carl, Donald, or any other employee or customer that was hit. See Brown, 975 S.W.2d at 924 (citing treatise pointing out that *shooting into a crowd or occupied building*, or driving into a crowd, are classic examples of depraved heart or “wanton murder”).

Indeed, if Petitioner is correct that § 16-3-60 made the mental state in Mouzon the

standard for involuntary manslaughter, then to the contrary there could never be a conviction for murder unless the individual had a specific intent to kill or do bodily harm. Mouzon is in fact the manner, aside from the felony murder rule, in which malice can be found without a specific intent to kill or injure the actual victim killed; otherwise, a person could open fire into an occupied building, or close his eyes and swerve while driving at a high rate of speed on a street crowded with pedestrians, and at worst be guilty only of a five year sentence for involuntary manslaughter. Cf. Brown, 975 S.W.2d at 924 (citing those as classic examples of depraved heart murder). To the contrary, Foust specifically rejected that malice required a specific intent to kill the victim, and cited Mouzon as a prime example. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996) (citing a treatise for the proposition that a specific intent to take life is not necessary for murder, and citing cases including Mouzon showing that principle).⁴

Said another way, if Petitioner intentionally fired his weapon but it unintentionally went into a building and killed someone, possibly involuntary manslaughter could result. But if Petitioner intentionally fires his weapon and intentionally aims it at an occupied building, he can be guilty of murder even if he did not specifically intend to kill the person behind the door that was ultimately struck.

C. The two concepts are distinct, and the fact that the two share the word “recklessness” does not make the *Mouzon* standard unconstitutionally vague, confusing, or burden shifting.

Since, as expressed above, the difference between the two concepts is obvious, it cannot

⁴ See also State v. Kinard, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007) (noting that malice can be established four ways, by “intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule)”).

be said the two mental states are so inseparable as to be confusing and unconstitutionally vague.⁵ Indeed, a number of courts have so held. See, e.g. People v. Cole, 85 N.Y.S.2d 990 (1995) (noting that the concept of depraved indifference to human life is one “rather well understood at common law”, and rejecting vagueness arguments because the conduct fit within the “accepted understanding of the kind of recklessness” rising to such depraved indifference); State v. Robinson, 934 P.2d 38 (Kan. 1997) (wanton murder statute not unconstitutionally vague as compared to manslaughter, where the question is one of degree, and less extreme recklessness is punished as manslaughter); Brown v. Commonwealth, 975 S.W.2d 922 (Ky. 1998) (“wanton murder” in circumstances manifesting extreme indifference to human life not unconstitutionally vague in distinction from second degree manslaughter; the question between the two is one for the trier of fact); State v. Dow, 489 A.2d 650 (Del. 1985) (extreme indifference to human life is “easily understood” and is equivalent to “depraved heart murder”, which has long been part of the law).

Moreover, for the same reasons, it cannot be said that the instruction was burden shifting simply because defense counsel might attempt to persuade the jury that his client only had the lesser mental state. And, of course, in addition to the general discussion on the State’s burden of proof, the judge charged the jury that it was up to the State to prove malice, and the jury should only consider involuntary manslaughter if it had determined the State failed to establish a case

⁵ In the appeal, the State argued that any contention that the Mouzon standard violates the due process clause because of vagueness was not preserved. Final Brief of Appellant, p. 46. While defense counsel did argue that charge would create confusion between the standard for involuntary manslaughter and Mouzon malice, and did at one point ask whether the charge was constitutional, he never once asserted it was unconstitutionally vague in violation of the due process clause. See, e.g. State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996) (Eighth Amendment challenge to parole eligibility not preserved because no constitutional basis was raised at trial).

for murder. {R. 1305; 1307-08}.

Because “federal habeas corpus relief does not lie for errors of state law,” we may grant the writ based on errors in state jury instructions only in extraordinary cases. Lewis v. Jeffers, 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). “The question in [] a collateral proceeding is ‘whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,’ Cupp v. Naughten, 414 U.S. at 147, 94 S.Ct. 396, not merely whether ‘the instruction is undesirable, erroneous, or even universally condemned,’ *id.* at 146, 94 S.Ct. 396.” Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). Herring cannot clear this high bar to relief. In denying relief, the South Carolina Supreme Court cited “ Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009) (in determining prejudiced from jury instructions, court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution).” Respondent submits that this was not an unreasonable application of United States Supreme Court precedent. The allegation must be denied.

B. Jury Instruction Requests: Involuntary Manslaughter and Accident.

In his second allegation, he contends that the trial court erred in failing to five requested instructions on defense of accident and negligent use of a firearm. Memorandum p. 20-25. Respondent submits that he has failed in his burden of proof required to entitle him to habeas corpus relief. This issues were raised at trial and in the direct appeal as Issue 4 and Issue 5. Final Brief Of Petitioner, p. 35-41, Final Brief of Respondent, p. 35-40. The South Carolina Supreme Court denied relief on the claim in summary fashion in its opinion, in pertinent part:

FN7. The remaining issues are affirmed pursuant to SCACR Rule 220(B)(1) and the following authorities: . . . Issue 4 (failure to charge the law of accident)- State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999) (for homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon); State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002) (to warrant reversal, trial court's refusal to give requested charge must be both erroneous and prejudicial to defendant); Issue 5 (involuntary manslaughter instruction)- McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (failure to give requested jury instructions is not prejudicial error where instructions given adequately cover the law); Issue 6 (State v. Mouzon instruction)- State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (upholding Mouzon instruction); Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009) (in determining prejudiced from jury instructions, court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution) . . .

Herring, 387 S.C. 201, 692 S.E.2d 490.

On appeal, Herring contended that, although the trial court did charge involuntary manslaughter, it erred in failing to charge some specific language on the doctrine found in some defense requests. Respondent questioned whether the issue was preserved; in any event, the issue to the second request is clearly not preserved. Regardless, the charges were properly denied because as requested they were incorrect and incomplete statements of the law of South Carolina, and the judge's charge correctly set forth the concepts in issue. And, Petitioner could not have been prejudiced, as he was not entitled to an involuntary manslaughter or accident instruction anyway.

Involuntary Manslaughter Issues

A. Events at trial

Herring proposed two jury charges at trial on the issue of involuntary manslaughter. His first instruction set forth the commonly accepted modern two part definition of involuntary

manslaughter in the first sentence, but then added the following:

One who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter.

His second request was a verbatim instruction given by a trial judge in a 1903 case, as follows:

“How do you, gentlemen, as jurors, think that a man of average sense in this position would handle a dangerous weapon or implement, under given circumstances generally? Then, under the testimony of the case you are trying, has the state shown beyond a reasonable doubt that the defendant was guilty of negligence—that is, he did act in that manner with the dangerous weapon or implement as a man of average sense and disposition, under the circumstances which the testimony shows to have existed in the case—he did act in that way, and, as a result of that, he did inflict the mortal wound, as alleged in the indictment, which caused the death of the defendant, as charged, if you find it so, then that will be a case of manslaughter.” State v. Gilliam, 66 S.C. 419, 45 S.E. 6 (1903).

{R. 1366}.

During the charge conference, the defense first asked for the second sentence of its first request, which it asserted was a modern rephrase of that within the Gilliam case. When the judge asked if the defense wanted both, the defense initially stated yes, but then conceded that given its position that the second sentence of the first request was a “modern summary of what they say in Gilliam, the 1903 case”, a charge of just the second sentence would be satisfactory. {R. 1236-37}.

The State asserted the judge’s proposed charge was a direct and concise statement of the law and anything else should be left to the parties for argument. At this point, the defense contended that the second sentence of the first request was necessary to “balance” the fact that the judge was going to give the normal charge on the permissive inference of malice from use of a deadly weapon. {R. 1237-38}. The court responded that criminal negligence for involuntary manslaughter had been statutorily defined as reckless disregard, and “it just doesn’t have that

following sentence that you [the defense] had". {R. 1239}. The defense responded that it wanted clarification that while the jury may infer malice from use of a deadly weapon, malice does not necessarily result from negligent use of such a weapon. {R. 1240}. Importantly, the defense again stated that the only reason it included the quote from Gilliam in the second request was to show a "continuum of cases", and the defense responded "absolutely" when the trial court specifically asked if all the defense wanted was the second sentence of the first request. The court indicated it would take the matter under consideration. {R. 1241}. Ultimately, it faxed both parties a copy of its final charge once it had considered a number of charging issues raised. {R. 1263-65}.

The trial court ultimately gave the following instruction, relevant to the issues:

Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either an unlawful act not amounting to a felony and not naturally intending to cause death or great bodily harm, or, a lawful act with reckless disregard for the safety of others.

Unintentional means the defendant did not intend for anyone to be killed or seriously injured. Reckless disregard for the safety of others is more than mere negligence or carelessness. Mere negligence or carelessness is the failure to use care that a person of ordinary reason would use under the circumstances.

Recklessness is a conscious failure to use ordinary care. A reckless disregard for the safety of others means that you are not interested in the consequences of your acts or the rights and safety of others. If a person knows or should know that ordinary care requires certain precautions be taken for the safety of others when using a dangerous instrumentality such as a gun or a car but that person fails to use those precautions without concern, the person's actions are considered reckless.

{R. 1308-09}. The defense did not renew its objection on this particular issue after the charge.

{R. 1316-17}.⁶

In denying relief on the claim, the South Carolina Supreme Court concluded: "Issue 5 (involuntary manslaughter instruction)- McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (failure to give requested jury instructions is not prejudicial error where instructions given adequately cover the law)." Implicitly, this is a conclusion that the instructions, as given, adequately and correctly covered the law of involuntary manslaughter - a purely state law issue. Since the South Carolina Supreme Court is the final arbiter of substantive state law, his claim does not provide a basis for federal habeas corpus relief. See Smith v. Moore, 137 F.3d 808, 822 (4th Cir.1998) (refusing to entertain claim that jury instruction misstated South Carolina law). Habeas corpus relief is only available to a state inmate "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "[F]ederal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67 (1991). Accordingly, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Id., 502 U.S. at 67-68. Since the Petitioner has not alleged or shown that his conviction violates federal law, this Court should summarily dismiss the petition for habeas corpus relief on this ground.

B. The requests were properly denied as incorrect or incomplete statements of law.

⁶ It is arguable that the issue is preserved as to either charge. Certainly, however, the issue is not preserved as to the second request. Although the defense at one point stated it wanted both requests {R. 1236-37}, he then stated under specific questioning by the judge that all it really wanted was the second sentence of the first request, which it considered was the modern expression of the old language in the second request. {R. 1241}. Any issue as to the second request was not preserved.

In any event, the requests were properly denied as they were incorrect or incomplete statements of law by the trial judge. The real debate centers around the second sentence of the first request: "One who causes the death of another *by the negligent use of a deadly weapon* or instrumentality may be convicted of involuntary manslaughter." (Emphasis added). {R. 1366}. Professor McAninch's Fifth Edition has an excellent explanation of the development of the law in this area. He notes that for years in South Carolina an involuntary manslaughter conviction could be sustained by a finding of simple negligence. See McAninch, Fairey, and Coggiola, The Criminal Law of South Carolina p. 12, 195-96 (5th ed. 2007) (citing State v. Caldwell, 231 S.C. 184, 98 S.E.2d 259 (1957)). However, in 1968, the General Assembly passed S.C. Code Ann. § 16-3-60 (Rev. 2003), which made the criminal negligence necessary for involuntary manslaughter a more culpable state of mind than the mere tort version of negligence, by defining *criminal* negligence as the "reckless disregard for the safety of others". McAninch, et. al., *supra*. As the trial judge noted, the primary distinction between the two is that the reckless person is conscious of the manner in which he is acting negligently, but disregards this risk. Id. See also State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997). Finally, McAninch notes that while there are some crimes remaining where simple tort negligence is sufficient, for policy reasons the common law is reluctant to impose criminal liability on one who merely fails to use due care. Id. at 13.

Indeed, the South Carolina Supreme Court has reiterated the same concepts:

We clarify today that in a criminal case, the State cannot rely on civil concepts of negligence and recklessness, that is, statutory violations, to meet its burden of proving the defendant's state of mind. The import of the terms negligence and recklessness as used in the civil law and in the criminal law are neither equivalent nor interchangeable.

State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997) (citing McAninch).

Thus, the second sentence of the first request is incorrect and incomplete. It only refers to “negligence”, and is based in old caselaw that has been superseded by statute. While “criminal negligence” is a viable term, the requested charge does not use that term, nor does it explain the difference between negligence and criminal negligence as defined in S.C. Code Ann. § 16-3-60 (Rev. 2003).

On the other hand, the trial court’s charge clearly did correctly and expressly define the appropriate mental state, and explain the difference between it and simple negligence. {R. 1309}. The judge specifically noted that “[i]f a person knows or should know that ordinary care requires certain precautions be taken for the safety of others when using a dangerous instrumentality such as a gun or a car, but that person fails to use those precautions without concern, the person’s actions are considered reckless” – which is essentially the legally correct version of the second sentence of Petitioner’s first request. See generally State v. Weaver, 265 S.C. 10, 217 S.E.2d 31 (1975) (no reversible error where charge given by judge was essentially the same as requested by appellant). See, e.g. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (viewing charge as a whole, judge’s charge was sufficient to convey the applicable law).

As to Petitioner’s concern that the second sentence was necessary to “balance” the standard permissive inference of malice from use of a deadly weapon, there is no caselaw of which the State is aware that requires such linkage between two distinct concepts under the two different crimes, where the jury was otherwise correctly charged on the law. The judge carefully explained that the inference was permissive only and did not lessen the burden of the State to

prove malice {R. 1307}, and there is no indication of an undue emphasis on the permissive inference where the judge later carefully and accurately explained the mental state necessary for involuntary manslaughter. Weaver, Kelsey, supra. Indeed, the judge specifically told the jury to only consider involuntary manslaughter if it found that State failed to prove murder {R. 1308}, which necessarily means it would have rejected application of the far more culpable mental state the judge earlier described in defining malice {R. 1305-06}.

As to the second request, it is incorrect and incomplete for the same reasons as expressed in Professor McAninch's book. See Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985) (where charge, if given in exact language of request, would be incorrect, it is not error to refuse it).

C. There is no error because, although given, involuntary manslaughter was not warranted under these facts.

In any event, any alleged error was harmless because , although involuntary manslaughter was charged, it was not warranted under these facts. "[M]ost constitutional errors can be harmless." Arizona v. Fulminante, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); see, e.g., Fullwood v. Lee, 290 F.3d 663, 678-83 (4th Cir.2002) (third-party influence on juror and jurors' consideration of extraneous evidence subject to harmless error review). Because of the threat collateral attacks pose to "finality, comity, and federalism," Fry v. Pliler, 551 U.S. 112, 116, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007), habeas petitioners may secure the writ only if the error "actual[ly] prejudice[d]" them, Brecht v. Abrahamson, 507 U.S. at 637, 113 S.Ct. 1710. In making this determination, courts ask whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting Kotteakos, 328 U.S. at 776, 66 S.Ct.

1239) (internal quotation marks omitted). In the "unusual" situation where "the matter is so evenly balanced that [the habeas judge] feels himself in virtual equipoise as to the harmlessness of the error [under Brecht]"-that is, where the judge is in "grave doubt"-the court must grant the writ. O'Neal v. McAninch, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

Again, involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996).

If, as Petitioner contended in his statement to Chief Wilson, he intentionally fired the gun at the building but not at anyone in particular, he clearly committed an unlawful act that not only amounted to a felony but would naturally tend to cause harm, given the building was occupied. See, e.g. S.C. Code Ann. § 16-23-440 (Rev. 2003) (felony to discharge firearm into a building regularly occupied by persons).

If, as argued at trial, relating to accident, one looks at the rest of Petitioner's statements, there is no actual evidence that pursuant to his concealed weapons permit he was merely transferring his firearm from his person to the glove box or vice versa and it unintentionally went off.

Petitioner cannot satisfy either version of the definition of involuntary manslaughter; as such, he cannot suffer any prejudice from the denial of his specific charges on the issue.

B. Defense of Accident and Negligent Use of Fireman.

Petitioner also asserts that he was entitled to additional omitted instructions and the trial court erred in denying his jury charge request for a charge on accident. However, the charge was

properly denied as it was an incomplete and thus incorrect statement of law. In any event, as a matter of law Petitioner was acting neither with due care nor in a lawful manner when the gun went off; as such, accident was not a viable defense. In denying relief upon the claim against the failure to instruct on accident, the Court held:

FN7. The remaining issues are affirmed pursuant to SCACR Rule 220(B)(1) and the following authorities: Issue 4 (failure to charge the law of accident)- *State v. Burriss*, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999) (for homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon); *State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298 (2002) (to warrant reversal, trial court's refusal to give requested charge must be both erroneous and prejudicial to defendant).

Herring, supra.

A. Events at trial

At trial, the defense submitted a written proposed instruction on accident. {R. 1370}.

The State submitted a responsive memorandum, in which it argued that Petitioner's unlawful arming of himself precluded a charge on accident. {R. 1372}. The judge ruled that accident is only viable as a defense when the defendant is engaged in a lawful act, and the judge did not believe the defense was appropriate in Petitioner's case. The defense argued that because he had a concealed weapons permit, he had the right to have the weapon out in the car. The court was unpersuaded this made a difference. {R. 1244-46}.

B. The charge was properly denied because it contained an incomplete and thus incorrect statement of law.

As an initial matter, the charge was properly denied as it was an incorrect statement of the law. It is true that for a homicide to be excusable on the ground of accident, it must be shown (1) that the killing was unintentional, (2) that the defendant was acting lawfully, and (3) that due care

was exercised in the handling of the weapon. State v. Goodson, 312 S.C. 278, 280 440 S.E.2d 370, 372 (1994). However, the charge goes on to add the passage: "The defendant does not bear the burden of proving accident; rather, the State must prove beyond a reasonable doubt that the defendant acted with the intent to kill the deceased." {R. 1370}. This is incomplete and thus incorrect. While it is true that accident is not an affirmative defense and the state must establish the appropriate mental state for the crime, the second clause of the sentence, requiring the State to prove "the defendant acted with the intent to kill the deceased", is simply not the law. Our state supreme court has held that murder is not a specific intent crime; all that must be shown is the element of malice. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996) (in ruling that a specific intent to kill was not necessary for the crime of assault and battery with intent to kill, noting that "we hold that it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State", and citing a treatise for the proposition that a specific intent to take life is not necessary for murder). See also State v. Kinard, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007) (noting that malice can be established four ways, by "intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule)").

Petitioner contended on appeal this erroneous second clause is a "paraphrase of additional language" in the decision of State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945), which "has not been overruled". {Brief of Appellant p. 36}. There are two problems here. First, of course, is Foust and its progeny are recent and clear on the issue, regardless of what Brown says. But more importantly, the requested second clause is not, in fact, a paraphrase of language in Brown. Instead of noting, as in Petitioner's request, that "the State must prove beyond a reasonable doubt

that the defendant acted with the intent to kill the deceased”, the opinion states “the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide”. That is a far cry from Petitioner’s direct expression of a specific intent to kill, which is but only one way in which the State may establish the necessary intent for murder.⁷

Since Petitioner’s request to charge contained an incomplete and thus incorrect statement of the law, it was not error to refuse to charge the whole thing. See Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985) (where charge, if given in exact language of request, would be incorrect, it is not error to refuse it).

C. In any event, as a matter of law Petitioner was acting neither with due care nor in a lawful manner when the gun went off; as such, accident was not a viable defense.

In any event, the trial court was correct that a charge on accident was not warranted by the evidence presented. One claiming accident must act not only with due care but also lawfully, and as a matter of law it cannot be said Petitioner was so acting either with due care or lawfully when the bullet from his gun was fired into the club.

It is true that in one statement to police Petitioner claimed “if the gun went off while in my hand, it was harmless error. It was probably the Ruger .357, and if it went off, it was an accident.” {R. 714-15}. However, it is undisputed – by way of the video – that after leaving the club once, Petitioner returned, drove up before the door, and lowered the windows – before a

⁷ Petitioner recognized this problem by stating in passing that the State “did not object to this charge on the basis that it was an incorrect statement of law”. {Brief of Appellant p. 36}. This is of no consequence, as the Supreme Court could affirm for any ground apparent in the record, see Rule 220(c), SCACR, and it would certainly be bad policy to endure the extreme social cost of reversal for failure to charge something that is not the law anyway.

gunshot left his car killing the victim. Even assuming a lack of intention, as a matter of law one cannot be said to be acting with due care in handling a weapon if, after drinking all day, he returns to the scene of an altercation, pulls in the parking lot right in front of the door, rolls down the window, and starts playing around with his loaded .357 magnum revolver. If in fact he was involuntarily intoxicated and the weapon went off because the involuntary intoxication rendered him incapable of criminal responsibility from such acts, that would be a complete defense, but of course the jury was charged on that and rejected it. That has nothing to do with accident.

Similarly, as a matter of law Petitioner cannot be said to have been acting lawfully. Of course, as Petitioner points out, statutory law permits one to possess a handgun in a "closed glove compartment, closed console, closed trunk, or in a closed container" in the trunk, and also permits one with a valid concealed weapons permit to have a handgun "concealed on or about his person" in a vehicle. S.C. Code Ann. § 16-23-20(9) (Rev. 2003). Moreover, the statute also allows one to transfer "a handgun directly from or to a vehicle and a location specified where one may legally possess a handgun". S.C. Code Ann. § 16-23-20(15) (Rev. 2003). Petitioner had a concealed weapons permit, and thus as a general matter he would have been allowed to transfer a handgun from his glove box to a place of concealment about his person. It should be noted, though, that only the act of transferring the weapon from the glove box to a concealed location on the person, and vice versa, is lawful conduct.

While at first blush this might seem to aid Petitioner, upon closer inspection it clearly does not. While Petitioner attempted to claim accident in the statement to SLED, the statement was clear he did not actually remember anything. {R. 714}. And Petitioner repeatedly claimed in his trial testimony that he has no coherent memory after he had a drink at Chastity's {R. 966}.,

that he has no recollection of leaving Chastity's on the night of the incident, which he attributed to being involuntarily drugged {R. 979}., that while he remembered the gun going off, he was not sure if it was in his hand or even if he was in his car {R. 1010-12}., and – most importantly – that when he claimed accident or “harmless error” in his statement to police he did not actually remember anything like that happening {R. 999}.

The only differing evidence from Petitioner was his statement to Deputy Chief Wilson, in which he admitted he remembered having a dispute with the employees, and said that “when he fired the gun he wasn’t shooting at anyone”. Wilson was clear Petitioner stated he fired the gun. {R. 769-98}. This expression of an intentional act in firing the weapon would not suffice for accident, as obviously it could be neither due care nor acting lawfully. See, e.g. S.C. Code Ann. § 16-23-440 (Rev. 2003) (unlawful to discharge firearm into a building regularly occupied by persons); S.C. Code Ann. § 23-31-400 (Rev. 2003) (unlawful for person under influence of alcohol or controlled substances to discharge a firearm); City of Columbia Code § 14-101 (unlawful to discharge firearm in city limits).

Thus, there was never any testimony from Petitioner that he was transferring the weapon from his person to the glove box or vice versa pursuant to his rights under the pistol possession statute or the concealed weapons statute, when the gun accidentally discharged. In his statements to SLED and trial testimony, Petitioner never remembered doing anything. His self-serving theory as to what *may* have happened is by admission without any basis in actual known facts, and thus cannot be evidence justifying a jury charge on a legal doctrine where there was no other actual evidence establishing that Petitioner was exercising due care while merely transferring the gun in accordance with his rights under the statute. See State v. Pittman, 373 S.C. 527, 647

S.E.2d 144 (2007) (although appellant there argues the shootings were unintentional and reckless due to Zolof ingestion, there was no evidence submitted to support that finding). Nothing in those statutes provides that just because you have a concealed weapon permit you can pull out the gun and play with it at your leisure in your car while intoxicated in a public place. And, of course, Petitioner's alternate version of an intentional shooting at no one clearly would not justify the charge, as by no means could that be lawful or in the exercise of due care. Indeed, because of these conclusions, it simply does not matter what Petitioner's paid expert thought about whether the video evidence supported a conclusion Petitioner deliberately aimed at the door and fired, as even if the weapon did go off accidentally or ricochet under any view of the evidence it was still being handled under circumstances that were unlawful and negligent.

Finally is the question of proximate cause. It seems to go without saying that if Petitioner had been drinking all day, gets into an altercation at a strip club, is ordered to leave, does so, but then returns to the front door, where he rolls down his SUV's windows and starts playing with his firearm, such conduct clearly is the proximate cause of the shooting. State v. Goodson, 321 S.C. 278, 440 S.E.2d 370 (1994) (Toal, J., concurring) (where defendant unlawfully possesses a firearm, has been drinking all day, and kills a bartender with an unlawful firearm when it goes off accidentally, the unlawful possession of the gun is the proximate cause of the injury – thus, accident was not warranted) (reasoning adopted in State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999)).

Again, the jury was charged that if it believed Petitioner's judgment had been so compromised by alleged involuntary intoxication that he was not criminally responsible, then it should acquit. However, since there was no actual evidence in the record from which it could be

concluded Petitioner was behaving with due care and lawfully when he returned to the scene of an altercation, rolled down his windows, and began to handle his firearm, the judge properly denied the charge on accident.

In denying relief, the South Carolina Supreme Court cited State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999) and paraphrasing that "for homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." Implicitly, this summary conclusion of the law of accident suggested that the it found as a matter of state law that Petitioner did not qualify for an accident instruction. Further, the Court cited State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002) and paraphrased it that "to warrant reversal, trial court's refusal to give requested charge must be both erroneous and prejudicial to defendant." Again, the state court conclusion must be read that the failure to give the requested charge - under the facts of this case - was not prejudicial to the Petitioner. He has failed in his burden of proof. Habeas relief is not warranted.

C. State v. Belcher Issue

In his allegation third allegation, he asserts that the state court's failure to cite State v. Belcher, 685 S.E.2d 802 (2009) in its order suggested that it violated the retroactivity principles of Griffith v. Kentucky, 479 U.S. 314 (1987). As stated above, on October 12, 2009, after briefing and oral argument, counsel Harpootlian made a supplemental citation of authority by letter to the South Carolina Supreme Court pursuant to SCACR Rule 208(7). Within the letter, counsel Harpootlian argued the recent Belcher opinion was relevant in the following manner:

This ruling alters previous South Carolina authority and is pertinent to

arguments presented by Appellant Herring in both his final brief (pages 35-38, 43-44) and his final reply brief (pages 10-14, 17).

The reason for this supplemental citation is as follows: Appellant Herring's case presents what the Belcher opinion refers to as "co-existing factors" for its application: "(1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; and (2) evidence was presented that, if believed, would have reduced, mitigated, excused or justified the homicide or the charged ABWIK." Id, at 29, n. 10. The Belcher opinion's recognition that a charge on the inference of malice from the use of a deadly weapon is only a "half-truth" is pertinent to the appellant's arguments (at pages referenced above) that, where an inference of malice was given, the court committed reversible error in refusing to also charge other principles of law related to the evidence that would have reduced, mitigated, excused or justified the homicide."

Letter, Harpootlian to Shearouse, October 12, 2009.

A review of the Final Brief of Appellant pages 35-38 and 43-44 reveal that these issues involved the failure to charge the requested charge on accident⁸ and the failure to include in the involuntary manslaughter instruction the language: "one who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter, citing *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006); *State v. Brown*, 205 S.C. 514, 32 S.E.2d 825, 827(1945)." ROA p. 1366.

The issues briefed before the state court and the Statement of the Issues on Appeal did not involve the same issue the state court addressed in *Belcher* - whether a jury charge that "malice may be inferred from the use of a deadly weapon." At no point did the Petitioner raise an objection to the giving of the inferred malice instruction and did not raise it within any brief. No exception was made to the particular instruction. In fact during the charge conference when asked

⁸The requested accident instruction was:

"If it is shown that the killing was unintentional; that it was done while defendant was engaged in a lawful enterprise, and was not the result of negligence, the homicide will be excused as accident." The defendant does not bear the burden of proving accident; rather, the State must prove beyond a reasonable doubt that the defendant acted with the intent to kill the deceased." R. 1370-71.

about the charge on "murder" which included the malice instructions, counsel stated : "we're fine with that." ROA 1234, ll. 10-12.

In Belcher, the South Carolina Supreme Court stated in pertinent part concerning retroactivity of its holding:

Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final **where the issue is preserved**. N. 10 Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final"); Harris v. State, 273 Ga. 608, 543 S.E.2d 716, 717-18 (2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline'-i.e., cases which are pending on direct review or not yet final"). Our ruling, however, will not apply to convictions challenged on post-conviction relief. See generally Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). . . .

State v. Belcher, *supra*. (emphasis added).

The Petitioner ignores two salient factors - the issue concerning the giving of the inferred malice through use of a deadly weapon charge was not preserved by any objection and was not raised in the briefing in the appeal. Simply put, the issue about the propriety of giving an inferred malice charge in Herring was never raised. It was not preserved - a requirement of Belcher. The Belcher decision applied, by analogy the holding in Griffin to establish the timeline for application of the Belcher revision of precedent concerning the inferred malice instruction, yet it still required the issue to be preserved. This holding in Belcher does not set forth a freestanding claim for federal habeas relief concerning a pure state law determination. Second, his apparent suggestion in his argument is that the state court - in not citing Belcher, did not consider his supplemental citation of authority is without merit. The holding in Belcher - the new rule is that

trial court in South Carolina should not charge the jury in a murder case an instruction on implied malice through the use of a deadly weapon. This was not an issue in Herring's case. In summarily rejecting his claims on the merits - albeit not citing Belcher - or the multitude of cases cited by the Petitioner or Respondent - the Court was not required to distinguish Belcher in writing to comply with Belcher's mandate.

Further, reliance on Griffith v. Kentucky⁹ does not create an exception to the rules of preservation of federal constitutional claims in a retroactivity analysis for new rules.¹⁰ To the contrary, the retrospective application of a new criminal rule does not relieve a defendant of the responsibility of preserving an issue for appeal by filing an appropriate objection or motion in

⁹Griffith only applies when a new federal constitutional rule is adopted, not when a state court reinterprets a state statute or a matter of state law. See Henry v. Ricks, 578 F.3d 134, 141 (2d Cir.2009).

¹⁰It is well-settled that in order for a new law to apply retroactively to a case pending on direct appeal, the issue had to be preserved in the trial court and at all subsequent stages of the adjudication up to and including the direct appeal Commonwealth v. Marshall, 596 Pa. 587, 947 A.2d 714 (Pa.2008) (Batson issue); State v. Clements, 46 N.M. 745, 215 P.3d 54 (N.M.App.,2009) (Supreme Court's decision in State v. Frawley, that sentence alteration based on a judge's finding is unconstitutional, would not apply to defendant's appeal of sentence, even though defendant's case was still on direct review when Frawley was decided, where rule in Frawley was to apply prospectively only, and **defendant did not preserve the issue by timely objection in the trial court**); State v. Reed, 218 W.Va. 586, 625 S.E.2d 348 (W.Va.,2005) (in the absence of any substantial countervailing factors, where a new rule of criminal law is made of a nonconstitutional nature, it will be applied retroactively only to those cases in litigation or on appeal **where the same legal point has been preserved**). See Coleman v. Thompson, 501 U.S. 722, 732 (1991), it has long been settled that, "[w]hen a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court." Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991). See also Barnes v. Thompson, 58 F.3d 971, 974 n. 2 (4th Cir.1995) ("A basic tenet of federal habeas review is that a federal court does not have license to question a state court's finding of procedural default, if based upon an adequate and independent state ground.") (citing Harris v. Reed, 489 U.S. 255, 262 (1989)).

the trial court. In Powell v. Nevada, 511 U.S. 79, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994), the Supreme Court recognized that a state procedural default could preclude application of the Griffith rule. In that case, the Nevada Supreme Court erroneously declined to apply a Fourth Amendment decision of the Supreme Court to a case pending on direct review at the time the decision was rendered. The U.S. Supreme Court held that this error did not necessarily require that the petitioner “ ‘be set free.’ ” Id., 511 U.S. at 84. Instead, the Court stated that “several questions remain open for decision on remand ... [i]n particular ... the consequences of Powell's failure to raise the federal question....” Id. Contrary to Petitioner's claim, therefore, the fact that his case remained pending at the time the Belcher decision issued is not, in itself, grounds for excusing waiver of the failure to instruct claim, nor does it otherwise provide grounds for habeas relief to the extent the Belcher issue was even presented to the Court. Accord, State v. Louthan, 158 Wash.App. 732, 744-745, 242 P.3d 954, 961 (Wash.App. Div. 2,2010) (Arizona v. Gant issue not preserved under Griffith analysis). ¹¹ In

¹¹By way of contrast, in Smith v. State, 598 So.2d 1063 (Fla.1992), the Florida Supreme Court appeared not to distinguish between constitutional and non-constitutional rules in determining that Griffith v. Kentucky required retroactive application of any new rules of criminal procedure to cases not yet final on direct review. At issue was whether to give retroactive effect to the Florida Supreme Court's Pope v. State, 561 So.2d 554 (Fla.1990), decision, in which that court held that when an appellate court reverses a departure sentence because of the absence of written reasons for the departure, the court must remand the case for resentencing with no possibility of departure from the guidelines. The Florida Supreme Court decided to apply Pope to the defendant's case, explaining:

Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review of not yet final.

Smith, 598 So.2d at 1066. In so holding, the Florida Supreme Court qualified that the claim at issue had to have been preserved for appellate review.

In Murtishaw v. Woodford, 255 F.3d 926 (9th Cir.2001), the petitioner argued that he was

entitled to habeas corpus relief based on the failure of the California Supreme Court to apply to his case on direct appeal its People v. Flannel, 25 Cal.3d 668, 160 Cal.Rptr. 84, 603 P.2d 1 (1979), decision. In Flannel, the California Supreme Court held that an honest though unreasonable belief of the need for self-defense is sufficient to negate the existence of malice and that the trial court must instruct the jury as much when the evidence warrants it. The California Supreme Court had declined to apply Flannel to Murtishaw's case, holding that Griffith applied only to rules based on the federal Constitution or upon the federal supervisory power, and that "[w]e need not extend this analysis to rules of criminal procedure derived solely from state law." People v. Murtishaw, 48 Cal.3d 1001, 1013, 258 Cal.Rptr. 821, 773 P.2d 172 (1989). The Court of Appeals for the Ninth Circuit agreed with the California Supreme Court's analysis, explaining:

Griffith requires retroactive application only of "new constitutional rules of criminal procedure," Griffith, 479 U.S. at 322, 107 S.Ct. 708, 93 L.Ed.2d 649. It does not require retroactive application of every new state-declared common law. Murtishaw argues that Flannel was implicitly based on constitutional principles because it contained overtones of due process. The Flannel court, however did not cite to the federal or state Constitution in reaching its decision that trial courts must give sua sponte instructions of the unreasonable self-defense theory. (Citation omitted). Furthermore, in Murtishaw II, the California Supreme Court expressly held that the Flannel rule was based on state common law, not on the Federal Constitution. (Citation omitted). Murtishaw cannot cite to any authority indicating that the federal constitution requires a sua sponte instruction on the imperfect self-defense theory.

Murtishaw v. Woodford, 255 F.3d at 956.

United States ex rel. Franklin v. Gilmore, 993 F.Supp. 1162 (N.D.Ill.1998), involved a habeas corpus action challenging the failure of the Illinois Supreme Court to apply retroactively to petitioner's case on direct appeal a new Illinois Supreme Court decision, People v. Gacho, 122 Ill.2d 221, 119 Ill.Dec. 287, 522 N.E.2d 1146 (1988), requiring the trial court to instruct the jury in any case where the defendant was convicted of two or more murders that a natural life sentence was mandatory if the jury did not impose the death penalty. Citing Griffith v. Kentucky, the petitioner argued that the state courts had erred in not applying its Gacho decision to his case in violation of his rights under the Fourteenth Amendment. The District Court for the Northern District of Illinois rejected the petitioner's argument because Griffith was limited in its scope "to new rules of federal constitutional magnitude." United States ex rel. Franklin, 993 F.Supp. at 1178 (citation omitted). Noting that another Illinois Supreme Court decision had construed the right to a natural life instruction as a statutory right rather than a constitutional right, the district court explained that, "[s]tate courts are entitled to refuse to apply new state court decisions retroactively, and the Supreme Court has 'reemphasize[d] that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.'" Id. (quoting Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)).

Mason v. Duckworth, 74 F.3d 815 (7th Cir.1996), involved a habeas corpus action in which the petitioner had challenged his conviction based on the failure of Indiana's highest court to apply to his case on direct appeal its Modesitt v. State, 578 N.E.2d 649 (Ind.1991), decision. Modesitt

overruled a previous decision and adopted Fed.R.Evid. 801(d)(1)(A), which added a requirement for admissibility of certain out-of-court statements. Modesitt expressly stated that it was to be applied only prospectively. The Court of Appeals for the Seventh Circuit rejected the petitioner's argument, based on *Griffith v. Kentucky*, that Modesitt should have been applied retroactively to his case on direct appeal, explaining, "[a]s Judge McKinney in the district court noted, however, there is an 'explicit caveat' to the holding: Griffith only applies to new rules of federal constitutional magnitude." *Mason*, 74 F.3d at 818. Determining that Modesitt's overruling of the previous controlling decision had nothing to do with the constitutionality of that decision and everything about curbing abuse and harmonizing Indiana's evidentiary rules with those of other jurisdictions, the Seventh Circuit concluded that, "[t]his change in the rules of evidence is simply not one of constitutional proportions, and for that reason Griffith does not apply." *Id.* at 819.

In *Lackey v. Scott*, 28 F.3d 486 (5th Cir.1994), the habeas corpus petitioner argued that the state's highest court had violated his constitutional rights by failing to apply retroactively to his case on direct appeal a new state decision, *Geesa v. State*, 820 S.W.2d 154 (Tex.Crim.App.1991), requiring a definition of the term "reasonable doubt" in jury instructions in criminal trials. The Texas Court of Criminal Appeals also ruled in *Geesa* that the decision would apply only prospectively. The petitioner argued that *Geesa* was based on federal constitutional law and that, accordingly, *Griffith v. Kentucky* required that it be given retroactive application to cases not yet final on direct appeal. The Fifth Circuit rejected the petitioner's argument, holding that, "[c]ontrary to Lackey's assertions, the rule announced in *Geesa* was not required by the federal constitution or law. (Citations omitted). Thus, the federal retroactive principles discussed in *Griffith* have no bearing on the state's application of its new rule. (Citation omitted)." *Lackey*, 28 F.3d at 491. The Fifth Circuit also rejected the petitioner's argument that the failure to give *Geesa* retroactive application under *Griffith* principles violated his Equal Protection rights, reasoning that the petitioner had failed to attempt to demonstrate that the state had no rational basis for giving *Geesa* only prospective effect.

In *Diggs v. Owens*, 833 F.2d 439 (3rd Cir.1987), the petitioner argued that he was entitled to habeas corpus relief because he had been tried for first degree murder and kidnapping in Pennsylvania in violation of several articles of the Interstate Agreement on Detainers Act (IADA). The petitioner's claim was largely based on *United States v. Mauro*, 436 U.S. 340, 349, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978), wherein the Supreme Court held, with qualifications, that a writ of habeas corpus ad prosequendum was not a detainer for purposes of the IADA. However, the Third Circuit had held in *United States v. Williams*, 615 F.2d 585, 592-93 (3rd Cir.1980), that *Mauro* was not to be applied retroactively. The petitioner argued that *Griffith v. Kentucky* required that *Mauro* be applied retroactively to his case. The Third Circuit rejected his argument, explaining:

Griffith, however, was concerned with the retroactive application of the constraints on a prosecutor in jury selection established in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and thus dealt with constitutionally mandated procedures. * * * Accordingly, we hold that *Griffith* should be confined to constitutional rules of criminal procedure and thus does not require retroactive application of new procedural decisions not constitutionally grounded.

There is no reason to apply the *Griffith* constitutional retroactivity holding

Hankerson v. North Carolina, 432 U.S. 233, 243, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977), the Court held that Mullaney v. Wilbur was to be given full retroactive effect, in accord with Griffith v. Kentucky, supra. However, in Hankerson, the Supreme Court also held that the States could elect to carve an exception to full retroactivity. "The States, if they wish, may be able to insulate past convictions [from full retroactive review] by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." Hankerson, supra at 244 n. 8, 97 S.Ct. 2339. Accord, Abu-Jamal v. Horn, 520 F.3d 272, 284 (3d Cir.2008) (objection needed for Batson claim applying Griffith); see also, Allen v. Lee, 366 F.3d 319, 327-28 (4th Cir.2004) (en banc) (same); Thomas v. Moore, 866 F.2d 803, 804 (5th Cir.1989)(same). In the Belcher decision on this state law issue, the South Carolina Supreme Court established the preservation requirement in this setting. See also State v. Zivcic, 229 Wis.2d 119, 598 N.W.2d 565 (App.1999) (applying Griffith court concludes that objection and preservation in trial court is required); State v. Foster-DeBerry 347 Mont. 164, 166, 197 P.3d 1004, 1006 (Mont.,2008) (same). Compare United States v. Levy, 416 F.3d 1273, 1277-1278 (11th Cir.2005) (finding defendant not entitled to relief in light of Supreme Court's announcement of new rule in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), where defendant raised issue for first time in a petition for rehearing; Griffith's retroactivity rule applies only to defendants who have preserved their objections either at trial or on appeal and, therefore, are

here as the IADA is "nothing more than a set of procedural rules" and remains distinct from the rights it was fashioned to serve.

Diggs, 833 F.2d at 442 (quoting United States v. Palmer, 574 F.2d 164, 167 (3rd Cir.1978)). See, Cowans v. Bagley, 624 F.Supp.2d 709, 738 -740 (S.D.Ohio,2008).

similarly situated to the defendant to whom the new rule is first applied).

Indeed, courts are not required to apply new federal constitutional rules retroactively unless the issue has been preserved and the case is "pending on direct review or not yet final." See Griffith, 479 U.S. at 328, 107 S.Ct. 708; United States v. Booker, 543 U.S. 220, 268, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (holding that reviewing courts must still "apply ordinary prudential doctrines, determining, for example, whether the issue was raised below," before applying a rule retroactively). "So, under Griffith, even if they barely miss the magic date, those unfortunate enough to have appealed and lost or failed to appeal or failed to preserve the issue all get no benefit of a new rule, even one deemed necessary for a fair trial." Membres v. State, 889 N.E.2d 265, 274 -275 (Ind.,2008).

Therefore, the Petitioner has failed to show that the Supreme Court's preservation requirement in Belcher was an unreasonable application of Griffith. His claim otherwise is without merit.

To the extent he claims that the court's failure to cite Belcher concerning his argument asserting that the reasoning - not the holding - applied similarly to his case, he has failed to state a cognizable claim. His suggestion is that the state court ignored his supplemental citation of authority because it did not cite to his claims in its summary rejection concerning his request for instructions. This speculative assertion is without merit for relief. Further, this concerns purely a state law issue. As set forth herein, the state supreme court is the final arbiters of state law and habeas does not lies to correct perceived errors of substantive state law. Estelle v. McGuire, supra. He has failed to show entitlement to relief.

D. Refusal of the Chief Justice to Recuse Herself.

In his fourth argument, Herring complains that he was denied due process in the appeal because the Chief Justice of the Supreme Court refused to recuse herself in the appeal because Herring was challenging in the appeal the lawfulness of the search warrant based upon a state law requirement. His complaint focused upon an Administrative Order issued by the Chief Justice dated July 26, 2001 which set out a procedure for obtaining a search warrant in Richland County by facsimile transmissions when S.C. Code §§ 17-23-140 set out that a warrant shall be issued only upon affidavit sworn to before a magistrate." On June 16, 2009 prior to the oral argument, counsel asserted that the Chief Justice should be recused because he was challenging the search warrants of 2006 based upon the statutory requirement that the warrant affidavits be an "affidavit sworn before a magistrate" and that the use of fax was outside of the statutory requirement. Particularly, he was asserting that the 2001 Administrative Order relied upon was in violation of the South Carolina Constitution, Article V, Section 4 which granted certain limited powers to the Chief Justice as head of the judicial system as well as other provisions of the South Carolina Constitution. On June 18, 2009, by letter order, the Chief Justice entered a letter order that the motion to recuse was "denied."

"It is enough for present purposes to say the following. First, judicial rulings alone almost never constitute valid basis for a bias or partiality motion. See U.S. v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). According to federal law,

For a motion to recuse to be granted, the [petitioner] must allege bias or prejudice from a source other than the Court proceedings in this case.... The facts ... must show the bias is personal, as opposed to judicial, in nature.... An allegation of "judicial" bias is not grounds for a motion to recuse.

United States v. Falcone, 505 F.2d 478, 485 (3d Cir.1974), cert. denied sub. nom. Berger v. United States, 420 U.S. 955 (1975). See also United States v. Rosenberg, 806 F.2d 1169, 1171 (3d Cir.1986), cert. denied, 481 U.S. 1070 (1987).¹² Here, the entire complaint is state court concerned her actions in the administrative order. ROA 1338-1340. This was a judicial function arising from the state constitutional duties of the Chief Justice. It was unrelated to the particular Herring case in 2006 and was done in 2001.

The Chief Justice's order of July 26, 2001, invokes the constitutional authority of Article V, Section 4, of the South Carolina Constitution:

The Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system. He shall appoint an administrator of the courts and such assistants as he deems necessary to aid in the administration of the courts of the State. The Chief Justice shall set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system. Provided, each county shall be entitled to four weeks of court each year and such terms therefore shall be provided for by the General Assembly. Provided, further, that the Chief Justice shall set a term of at least one week in any court of original jurisdiction in any county within sixty days after receipt by him of a resolution of the county bar requesting it. The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the

¹²United States v. Couch, 896 F.2d 78, 81 (5th Cir.1990) (federal statute on judicial disqualification establishes statutory disqualifications standard more demanding than that required by due process clause, and, accordingly, conduct violative of statute may not be due process deficiency); see also Hardy v. United States, 878 F.2d 94 (2d Cir.1989) (refusing to extend prisoner habeas corpus relief for alleged statutory, judicial bias claim); Bradshaw v. McCotter, 796 F.2d 100 (11th Cir.1986) (holding that no constitutional violation was shown even though state appellate judge heard appeal when he should have disqualified himself as a former state prosecutor who signed state briefs); U.S. v. Slay, 714 F.2d 1093, 1094-1095 (11th Cir.1983) (no grounds for recusal when magistrate judge's decision to deny the defendant's motion to suppress was based on an impartial consideration of the testimony and the physical evidence presented at the hearing and where there was no suggestion that the magistrate judge considered any extrajudicial source of knowledge or had any personal bias or prejudice); U.S. v. Lawson, 780 F.2d 535 (6th Cir.1985) (it was not improper for same judge who originally authorized wiretap to make suppression decision with regard to intercepted material); U.S. v. Jones, 801 F.2d 304 (8th Cir.1986) (party seeking recusal of issuing magistrate judge must show personal bias or prejudice stemming from extrajudicial source).

Supreme Court shall make rules governing the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

See S.C. Const. art. V, § 4.

Since it was a judicial function, the rule did not require the particular recusal of the Chief Justice. Whether it is necessary for a judicial officer to disqualify himself in a given case is left to the sound discretion of the judicial officer himself. A statement of former U.S. Supreme Court Chief Justice William Rehnquist is instructive as to how an appellate judge might make a recusal decision. See Microsoft Corp. v. United States, 530 U.S. 1301, 121 S.Ct. 25, 147 L.Ed.2d 1048 (2000). There, the Chief Justice was considering whether he should recuse himself in an appeal where his son was a partner in a firm representing a party in the appeal. Chief Justice Rehnquist considered 28 U.S.C. § 455, a federal statute that sets forth the legal criteria for the disqualification of federal judicial officers. Although the federal statute and its interpretation are not binding on this Court, Chief Justice Rehnquist's statement is instructive because of the similar purpose and language in Canon 3 of the Idaho Code of Judicial Conduct and 28 U.S.C. § 455. Chief Justice Rehnquist stated:

Section 455(a) contains the more general declaration that a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As this Court has stated, what matters under § 455(a) "is not the reality of bias or prejudice but its appearance." Liteky v. United States, 510 U.S. 540, 548, 114 S.Ct. 1147 [1154] 127 L.Ed.2d 474 [486] (1994). This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.

Id. at 1302, 121 S.Ct. at 26, 147 L.Ed.2d at 1049. According to the Chief Justice, the decision whether a judge's impartiality can "reasonably be questioned" is to be made in light of the facts

as they existed, and not as they were surmised or reported. *Id.* Applying this standard to his situation, the Chief Justice declined to recuse himself, concluding that his participation in the case did not give rise to an appearance of partiality. *Id.*

Petitioner, relying principally on Caperton v. A.T. Massey Coal Co., Inc., — U.S. —, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). In Caperton, the United States Supreme Court explained that while “most matters relating to judicial disqualification do not rise to a constitutional level,” there are certain rare situations where “the probability of actual bias on the part of the judge or decisionmaker” violates the Due Process Clause. *Id.* at 2259. The Court identified two instances where it had found due process violations. One instance concerned the ability of a judge to remain impartial in a criminal contempt proceeding where the judge previously had been the object of the defendant's contempt. *Id.* at 2261. The other instance concerned recusal where the decisionmaker had a financial interest in the case. *Id.* at 2260–62 (discussing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) (violation of due process for an Alabama Supreme Court justice to participate in an action seeking punitive damages from an insurance company when the justice was a plaintiff in a very similar case pending below); Gibson v. Berryhill, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973) (an administrative board composed of private optometrists had a pecuniary interest of such “sufficient substance” that due process precluded it from presiding over a hearing against competing corporate optometrists); Ward v. Vill. of Monroeville, Ohio, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (mayor's position of traffic court judge violated due process where mayor was responsible for producing revenue for the city, and the fines imposed by his court amounted to a “substantial portion of the municipality's funds.”); Tumey v. State of Ohio, 273 U.S. 510, 47

S.Ct. 437, 71 L.Ed. 749 (1927) (Due Process Clause required recusal where mayor who sat as judge in certain cases was only paid for his judicial services if he convicted the defendant). The Supreme Court in Caperton noted that in every case where it found that the Constitution required judicial recusal, the Court “dealt with extreme facts that created an unconstitutional probability of bias that ‘cannot be defined with precision.’” “Caperton, 129 S.Ct. at 2265–66 (quoting Lavoie, 475 U.S. at 822 (1986)); see also United States v. Rodriguez, No. 08–16696, 2010 WL 5175110, at *9 (11th Cir. Dec.22, 2010) (noting that the holding in Caperton was narrow and limited to the “extraordinary situation where the probability of actual bias rises to an unconstitutional level.”) (internal quotations and citation omitted). Under Caperton, the determination of whether the facts in a particular case are extreme enough to create an unconstitutional probability of bias involves an objective inquiry, based on whether, “under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” Caperton, 129 S.Ct. at 2263.

The facts of this case do not present one of the “rare instances” where the Constitution requires judicial recusal. See *id.* at 2267 (“Application of the constitutional standard in this case will ... be confined to rare instances.”); see also Bracy v. Gramely, 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (“[M]ost questions concerning a judge’s qualifications to hear a case are not constitutional ones, because the Due Process Clause ... establishes a constitutional floor, not a uniform standard.”) (citations omitted).

Here, in passing upon the propriety of the searches raised in the direct appeal, the Chief Justice prior judicial action in the administrative order did not mandate her removal. Indeed, to

follow Petitioner's logic, any Justice or appellate judge in the majority on a decision would have to recuse herself if a motion to argue against precedent had been granted as to that decision, and any Justice or appellate judge who ruled a certain way on an issue as a trial judge would have to recuse herself if that issue were under review on appeal. The Chief Justice's refusal to recuse herself based upon a judicial act arising from her duties as Chief Justice did not create a personal bias or showing of impartiality. Further, this action does not require the granting of a writ of habeas corpus where there is no showing mandating a new appeal in the state court. See Lavoie, 475 U.S. 813, 824, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) ("At some point, 'the biasing influence ... will be too remote and insubstantial to violate the constitutional constraints.'") (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 243, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980)); see also Commonwealth of Northern Mariana Islands v. Kaipat, 94 F.3d 574, 581-82 (9th Cir. 1996) (not a violation of due process for judge to impose fine on defendant even though legislature had earmarked such fines for a judicial building fund because the judge had no "direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case.") (quoting Tumey, 273 U.S. at 523).

E. Denial of 4th Amendment Right to Be Free of Unreasonable Searches and Seizures and Denied A Full and Fair Opportunity to Litigate His 4th Amendment Claim.

In his final claim, he asserts that he was denied a full and fair opportunity to litigate his Fourth Amendment claim in state court. Memo, p. 33-44. Particularly, he contends it is based upon the failure of the Chief Justice to recuse herself and the failure of the Supreme Court to apply the correct and controlling legal standards. As stated above in issue 4, the Chief Justice's refusal to recuse herself based upon her July 2001 Administrative Order was not a constitutional

error under state law. His claim that the state court did not properly apply applicable standards related to 4th Amendment claims provides an inadequate basis for allowing federal habeas review. His allegation must be dismissed.

This ground is barred under *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). In *Stone*, *Powell*, like the petitioner in this case, argued that evidence used in his trial was the product of an illegal search. The Supreme Court held that federal courts could not, on a state prisoner's petition for a writ of habeas corpus, consider a claim that evidence obtained in violation of the Fourth Amendment should have been excluded at his trial, when the prisoner has had an opportunity for full and fair litigation of that claim in the state courts. *Id.* at 494-95. *See also Cardwell v. Taylor*, 461 U.S. 571, 572-73, 103 S.Ct. 2015, 76 L.Ed.2d 333 (1983) (finding the *Stone v. Powell* doctrine applicable where the defendant "argued that evidence used in his trial was the product of an illegal arrest"); *Dortch v. O'Leary*, 863 F.2d 1337, 1342 (7th Cir.1988) (refusing to reverse state court's Fourth Amendment rulings concerning evidence that was derived from an allegedly illegal arrest because "it is precisely this type of consideration [that] *Stone v. Powell* precludes.") (citation and quotation marks omitted); *Jones v. Superintendent of Rahway State Prison*, 725 F.2d 40, 42 (3rd Cir.1984) (holding that "consideration of a claim that evidence admitted at trial was the fruit of an illegal arrest could not be considered on a habeas corpus petition so long as the state courts had afforded a full and fair opportunity to litigate that claim"). Here, the petitioner was given a full and fair chance to litigate the present issue in state court, and therefore federal habeas review is not available.

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), creates a special rule for 4th Amendment search and seizure claims. Where the petitioner has not been denied a fair

opportunity to raise Fourth Amendment claims in the state court, federal habeas is unavailable. The opportunity for a full and fair hearing in the state court does not mean that the state court must correctly apply federal constitutional law. Bridgers v. Dretke, 431 F.3d 853, 861 (5th Cir. 2005).

In state court, the issue Petitioner was concerned with concerning the preparation of the search warrant was purely a state law issue concerning the applicability of an administrative order. As Petitioner acknowledged in his brief, the power of the Chief Justice to issue the 2001 administrative order and the applicability of S.C. Code §§ 17-23-140 was purely a state law matter and did not go to a 4th Amendment claim. This pure state law issue did not affect the 4th Amendment litigation in state court. See Estelle v. McGuire, 502 U.S. 62, 67 (1991). “It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” Id., 502 U.S. at 67-68.

He further claims that the state court misapplied federal precedent on the 4th Amendment. The Stone v. Powell doctrine is only concerned with whether Petitioner had a “full and fair opportunity to litigate the Fourth Amendment claim. As evidence by the hearings at trial and the appellate litigation, Petitioner was not denied the “full and fair opportunity to litigate his Fourth Amendment claims. Stone v. Powell, 428 U.S. 465, 494-495 (1976) [“we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial”]; Boggs v. Blair, 892 F.2d 1193, 1199-1200 (4th Cir.1989), cert. denied, 495 U.S. 940 (1990). Doleman v. Muncy, 579 F.2d 1258, 1265 (4th Cir.1978) (applying Stone and holding that where a state court provides a

mechanism under state practice to litigate Fourth Amendment claims, then the court "need not inquire further into the merits of the petitioner's case ... unless the prisoner alleges something to indicate that his opportunity for a full and fair litigation of his Fourth Amendment claim or claims was in some way impaired."). See also Mueller v. Angelone, 181 F.3d 557, 570 n. 8 (4th Cir.1999).

Petitioner first challenges the search warrants obtained by the Richland County Sheriff's Department ("RCSD") and SLED for Petitioner's home. As will be seen, no exclusion of evidence was required.

A. The RCSD warrant

The South Carolina Supreme Court rejected the claims concerning the RCSD warrant after providing a full and fair opportunity to litigate the claim. Particularly, the Court concluded:

1. SEARCH WARRANTS/SUPPRESSION OF EVIDENCE

Herring contends the trial court erred in denying his motion to suppress evidence seized by police during the searches of his home and automobile. We disagree.

a. Initial Search

Herring contends the initial peek by police into his garage (when his black SUV was seen), was an illegal search, which thereby led to the issuance of a search warrant. Accordingly, Herring asserts the subsequent search of his home was the impermissible fruit of the illegal garage search, and that police otherwise had no basis upon which to search the residence. Herring also contends the subsequent SLED search of his home was illegal inasmuch as it a) resulted from the two prior illegal searches, and b) the SLED warrant was invalid as it was not issued in compliance with S.C.Code Ann. § 17-13-140. For numerous reasons, we find the evidence seized by police was properly admitted.

Regarding the initial search, Herring contends that when police crossed the curtilage of his yard and peered into his garage windows, it constituted an illegal search. The trial court agreed with Herring and held Officer Linfert's peek into Herring's garage violated Herring's expectation of privacy. However, the trial court found that since no evidence was seized as a result of that search, there was nothing to suppress; it therefore went on to address the validity of the other searches, which it found permissible.

Initially, as discussed below, we disagree with the trial court's conclusion

that Officer Linfert's initial peek into the garage window constituted an illegal search. Regardless, however, we find the peek into the window did not lead to discovery of any further evidence, such that it was not "fruit of the poisonous tree" and therefore did not taint the subsequent searches.

As noted previously, prior to going to Herring's residence, police responded to a shooting at Chastity's nightclub at which the manager of the club was shot and killed. While at Chastity's, police were given a description of Herring's black SUV, as well as the corresponding South Carolina license plate number which was written down by witnesses. Police watched the video which showed the suspect as he entered and departed from the nightclub, and police were given a color photograph of the suspect from the video.

Police obtained Herring's identifying information from the license tag number. When they went to the registered address for the vehicle, a business office, there was no black SUV in the parking lot. Officer Linfert checked the Department of Motor Vehicle website for other addresses listed for Herring, which revealed his home address. Based upon this information, police went to the address at approximately 2:00 a.m. Officer, seeing a light on in the garage, peeked in the garage window to see if the suspect was there. Although the suspect was not there, Linfert saw the black SUV, and recognized it as the suspect's vehicle. Police knocked on the door and rang the doorbell several times; receiving no answer, they returned to the police station and obtained a search warrant for the home.

Private residences are places in which an individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is one society recognizes as justifiable. Accordingly, searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). The Fourth Amendment extends that same protection to outbuildings in the curtilage of the home. *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987); *Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir.2001).FN4

FN4. It is equally well settled that searches and seizures of property in plain view are presumptively reasonable. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. California v. Ciraolo, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

However, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The United States Supreme Court has recognized that one exigency obviating the requirement for a warrant is the need to protect or preserve life or avoid serious injury. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). An action is "reasonable" under the Fourth Amendment, regardless of

the individual officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action." *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement. *Schmerber v. California*, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The likelihood a suspect will imminently flee is also an exigency warranting such an intrusion. *Johnson v. United States*, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436 (1948). Protecting the safety of police officers has also been held an exigent circumstance. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). A warrantless search is justified under the exigent circumstances doctrine to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside a dwelling. *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). In such circumstances, a protective sweep of the premises may be permitted. See *Maryland v. Buie*, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990); cf. *State v. Abdullah*, 357 S.C. 344, 592 S.E.2d 344 (Ct.App.2004).

Under the circumstances presented, we find the exigencies of the situation justified Officer Linfert's look into Herring's garage at 2:00 a.m. It is undisputed that police had knowledge of Herring's identity, his residence, the make and model of his vehicle, and his license tag number. Officer Linfert testified that upon arriving at the home, he saw a light on in the garage and therefore looked through the window to see if the suspect was inside. Police officers were looking for a suspected murderer whom they knew was likely to be armed with a deadly weapon.

We find it was objectively reasonable for Officer Linfert to take precautions to protect his own safety, and the safety of the officers around him, by looking into the garage to see if the suspect was there. When nobody was in the garage, police followed proper procedure by knocking on the door and ringing the doorbell. Receiving no answer, they stationed men at the house and went to obtain a warrant. Given the exigent circumstances then and there presenting, we find Officer Linfert's minimal intrusion was objectively reasonable and did not constitute a Fourth Amendment violation. Cf. *Chimel v. California*.

Moreover, Officer Linfert's peek into the garage yielded no evidence against Herring. Police already had knowledge of the make, model and license plate number of the vehicle the suspect drove; they knew the automobile was registered to Herring, and they knew his residential address was 406 Alexander Circle. Officer Linfert's observation of the vehicle in the garage yielded no evidence which further inculpated Herring. We find the trial court erred in holding this initial "search" violated Herring's Fourth Amendment rights; the de minimis intrusion to secure the officers' safety did not necessitate suppression.

b. Search of residence

Herring next asserts the subsequently issued warrant was defective such that the search conducted by the Richland County Sheriff's Department (RCSD)

was illegal. He contends the affidavit supporting the warrant failed to connect his residence to the crime at Chastity's; he also contends the information in the affidavit was false because the officer who prepared the affidavit did not actually appear before the magistrate but, instead, sent another officer. We find the warrant was supported by probable cause and was properly issued.

The affidavit states that deputies responded to Chastity's to find the Victim, John Johnson, who had been shot in the head and who subsequently died upon arrival at the hospital. Witnesses*212 at Chastity's described the suspect, the clothing he was wearing, the car he was driving as a black Toyota Forerunner, and gave the license tag number of SC 1891. Department of Motor Vehicle records indicated the car was registered to Dewain Herring, of 1361 Landmark Drive, which was a closed business. A search of Richland County records provided an additional address for Herring at 460 Alexander Circle. Based upon this information, the affidavit lists the property sought as " firearms, ammunition, burgundy sweater, white turtleneck shirt, khaki pants, eyeglasses, black 1996 Toyota Forerunner, SC/EU1891, and any and all other evidence associated to a shooting incident."

A search warrant may issue only upon a finding of probable cause. *State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006), cert. denied --- U.S. ---, 129 S.Ct. 733, 172 L.Ed.2d 735 (2008). The duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed. *Id.*; *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987). A "totality-of-the-circumstances" test is utilized in probable cause determinations:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

We find the affidavit sufficient to establish probable cause for police to look for Herring, a murder weapon, and the Toyota Forerunner at his known residence.

Herring asserts the RCSD warrant was defective because, notwithstanding the affidavit contained the name of Officer Linfert at the top, it was actually Officer Davis who appeared before the Magistrate. However, Officer Linfert clarified that the reason his name was listed is that Officer Davis did not have a search warrant form on his computer, and the form was typed by Linfert on his computer and his name was automatically inserted at the top; Linfert simply *213 forgot to change the name to Davis. Officer Davis personally appeared before the magistrate and swore to the information; he was familiar with the information and background of the case, having been to Chastity's and having interviewed the witnesses. We find the fact that Linfert's name was at the top of the affidavit did

- not vitiate the validity of the warrant. *State v. Shupper*, 263 S.C. 53, 207 S.E.2d 799 (1974) (typographical error did not affect validity of search warrant). Accordingly, we find the evidence seized during the RCSD's search of the residence was properly admitted by the trial court.

Herring, *supra*.

Clearly, there was a full and fair opportunity to litigate these 4th Amendment claims. A suppression hearing was held before trial. As noted in the Statement of Facts, but also testified to at the suppression hearing, employees at the Chastity's strip club had written down the license plate on the black SUV driven by the assailant and it matched a black Toyota 4Runner SUV registered to Petitioner at his business address. Petitioner's driver's license picture matched the individual seen on the security video, and the video reflected the vehicle was parked directly in front of the club when the shot happened, after it had returned to the club minutes after Petitioner got into it and left following the altercation with employees in the parking lot. Officers went to the business address, but no one was there during the early morning hours of a Sunday morning. Officers then found Petitioner's home address. {R. 18-19; 29-31; 101-06; 111-13}.

Evidence in the record supports the findings and conclusions within the opinion of the Court. Sgt. Linfert went to Petitioner's house and knocked on the door, but no one answered. They looked in the garage and saw the 4Runner. Another officer, Morris Davis, had not gone to Petitioner's residence but instead was at the club taking statements from witnesses, and was "aware of the whole incident". Sgt. Linfert met with Officer Davis and they prepared a search warrant affidavit. In preparing the statement, the officers used Sgt. Linfert's computer, which automatically puts his name at the top of the affidavit, and it was not changed by mistake. Sgt. Linfert sent Officer Davis over to the Magistrate's residence since Davis already knew where it

was. Officer Davis signed the affidavit and swore to it before the magistrate, explaining to the magistrate that although Linfert's name had been placed at the top he was the one who had been asked to come down. {R. 19-26; 31-39; 224-25; 94-99; 101; 106-10}.

Further, the State had contended that the search warrant was valid even if the deputies' entry into the curtilage to look for the 4Runner was improper, and the judge did in fact find that search unjustified. {R. 149-50}. However, the trial judge ruled that even if the portion of the search warrant referring to the 4Runner being in the garage was excluded, "there are sufficient facts sworn to in the affidavit which would lead a disinterested magistrate to conclude that a search warrant should be issued of the defendant's premises". The judge noted that witnesses had described the defendant, the 4Runner, and the license number, and police had identified Petitioner's residence. Finally, the trial court concluded that the firearms, ammunition, vehicle, and clothing sought by the warrant would in fact be things found in a residence. {R. 151-52}.

On appeal, Petitioner makes two contentions with regard to the RCSD warrant which he fully litigated in state court. First, he contended that the warrant was false, and unsworn, inasmuch as Sgt. Linfert's name was at the top of the affidavit but Officer Davis actually signed it and swore to it before the magistrate. As explained in the testimony, this was clearly a scrivener's or ministerial error brought on by the fact that the officers – who prepared the affidavit jointly – used Linfert's computer which automatically placed his name at the top. Davis was clear the magistrate knew who he was. Such a minor error does not affect the validity of the warrant. See, e.g. State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974) (obvious typographical error in the date of a search warrant did not affect the validity).

Moreover, there was no false information, and this case is distinguishable from State v.

Dunbar, 361 S.C. 240, 603 S.E.2d 615, 620 (Ct. App. 2004). In Dunbar, the officer who was sworn for the affidavit had no knowledge of the facts of the case, and he could not make the oath required for the search warrant. Thus, he could not relay any information required to support probable cause. Here, Davis, who was sworn by the magistrate and signed the affidavit, testified that he was well aware of the facts of the case. He was involved in the investigation at Chasity's. He also worked with Sergeant Linfert in putting together the affidavit. Davis knew the defendant's address, that he drove a 4Runner, and that the individual on the driver's license was the same as on the surveillance video at Chastity's before anyone ever went to the defendant's residence. {R. 109}. Further, Davis conveyed that information to the magistrate judge. {R. 110}. There was no defect. The South Carolina Supreme Court's conclusion was supported by the evidence.

Second, Petitioner litigated that the affidavit was insufficient if one excludes the reference to observation of the 4Runner in the garage of Petitioner's residence, which was found improper by the judge. This also is meritless. Of course, in Illinois v. Gates, 462 U.S. 213, 238, (1983), the United States Supreme Court adopted a "totality-of-the-circumstances" test for probable cause determinations, noting that the magistrate must make a practical, common-sense decision whether there is a "fair probability that contraband or evidence of a crime will be found in a particular place". Removing any reference to the observation of the 4Runner in the garage, the affidavit notes that a victim had been killed by a firearm, that witnesses had described the defendant and the license plate of his vehicle, that the tag was registered to Petitioner's business, that the business was closed, and that a search of the residence and vehicle was necessary for the investigation. {R. 1322}.

Petitioner's primary contention seems to be that since the SUV was registered to the business, there was nothing to link the residence to the crime absent the suppressed observation of the SUV in the garage. However, "the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence." U.S. v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988).

Especially given that the officers had determined no one was at the business, it was certainly a reasonable and normal inference that the owner was likely home during the early hours of darkness on a Sunday morning. The inference is even more valid given that they had video evidence of him being at a nearby club in the city a few hours earlier. See United States v. Anderson, 851 F.2d 727, 729 (4th Cir.1988) (even if a search warrant affidavit contains no facts that the item to be searched for is in the place to be searched, a magistrate may draw reasonable inferences that the place to be searched is a likely place for the item to be located). Thus, the warrant had ample probable cause even if the observation of the 4Runner in the garage is excluded. See, e.g. State v. Davis, 371 S.C. 412, 639 S.E.2d 457 (Ct. App. 2006) (remaining information in affidavit after false statement was excluded was sufficient).

Further, given the lack of any bad faith on the part of the officers and the overwhelming evidence already gathered of Herring's guilt – including a video – suppression would not be warranted under the good faith exception in United States v. Leon, 468 U.S. 897 (1984), which precludes application of the exclusionary rule where officers acted in reasonable reliance on a search warrant issued by a detached and neutral magistrate ultimately found to be invalid.

Finally, even if the warrant was invalid and evidence should have been suppressed, any error was harmless. In New York v. Harris, 495 U.S. 14 (1990), the United States Supreme

Court held that the exclusionary rule would not bar introduction of statements made outside of the defendant's home after Miranda warnings, where the arrest was supported by probable cause but had been effected after a warrantless entry into the person's home. The only thing of consequence resulting from the RCSD warrant was Petitioner's arrest, and his subsequent custodial statements were all made outside of his home. And, even if evidence of the discussions during the standoff were excluded, and even if also the discovery of the murder weapon by the SLED warrant was excluded, the evidence was more than overwhelming given the video, the witness, testimony, the license tag and registration, and Petitioner's custodial admissions. See State v. Woods, 376 S.C. 125, 654 S.E.2d 867 (Ct. App. 2007) (denial of motion to suppress harmless given overwhelming evidence).

B. The SLED Warrant

Petitioner also challenges the SLED warrant, obtained after SLED was called to investigate the shootout in Petitioner's home. Again there was a full and fair opportunity to litigate the 4th Amendment claim in the state court. In denying relief on this claim, the South Carolina Supreme Court addressing the validity of the search under state law and resolved the claims as follows:

Finally, Herring challenges the search performed by SLED. He contends the SLED warrant, which was obtained by facsimile, was invalid; he also asserts the methodology employed, which was authorized by an order of the Chief Justice, FN5 violates the search warrant statute, S.C.Code Ann. § 17-13-140. We find the trial court properly upheld SLED's search of the residence.

FN5. See <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2001-07-26-01>. The order was issued pursuant to Art. V, § 4 of the S.C. CONST. (Chief Justice of the Supreme Court shall be the administrative head of the unified judicial system). The order allows for issuance of search warrants by facsimile under controlled conditions, and sets forth the requirements

therefore.

SLED was called in to investigate after the sheriff's deputies wounded Herring during their attempt to arrest him at the home. SLED obtained a warrant utilizing the telephone procedure set forth in the Chief Justice's order of July 2001. Agent Lawrence testified that he had prepared the search warrant, and faxed it to Magistrate McDuffie, who was in bond court. The Magistrate swore him over the phone. Although SLED was not directly investigating the murder, they were investigating the shooting by police officers, and were looking for firearms, cartridges, blood, projectiles, blood, and any evidence relating to a shooting incident at that address. As a result of the search, they found the khaki pants, white turtle neck, burgundy sweater Herring was wearing at the time of the shooting, and two weapons, a Smith and *214 Wesson .357 revolver and a Ruger .357 pistol. The Ruger was in the bedroom closet under some clothes.

S.C.Code Ann. § 17-13-140 states, in pertinent part:

A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer abovementioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

(Emphasis supplied). Herring asserts the statute requires the affiant appear before the magistrate in person. We disagree.

Contrary to Herring's contention, the language does not state an affidavit must be sworn in person. It only requires the affidavit be sworn. Officer Lawrence, who prepared the affidavit, was sworn over the telephone by the Magistrate. We find this complies with the literal terms of the statute such that there was no defect in the warrant. Cf. *Gay v. Ariail*, 381 S.C. 341, 673 S.E.2d 418 (2009) (literal terms of statute prevail); *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002) (where terms of a statute are clear, there is no room for construction).

Herring cites *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987) as supporting his contention that issuance of a warrant via facsimile was invalid. In *McKnight*, police officers appeared before a magistrate to obtain a warrant, but did not complete an affidavit in support thereof. Notwithstanding the officers were sworn and gave oral testimony to the magistrate, we held a "search warrant affidavit which itself is insufficient to establish probable cause may be supplemented before the magistrate by sworn oral testimony.... However, sworn oral testimony, standing alone, does not satisfy the statute." 291 S.C. at 113, 352 S.E.2d at 473 (internal citations omitted). In *McKnight*, we found the mandatory requirement of an affidavit lacking, thereby requiring suppression. The Court noted § 17-13-140 imposes stricter requirements than does the Fourth

Amendment, and that “[a] search warrant *215 that would survive constitutional scrutiny may still be defective under the statute.” *Id.*

Recently, however, we recognized that there is a “‘good faith’ exception to the statute’s [S.C.Code Ann. 17-13-140] requirements where the officers make a good faith attempt to comply with the statute’s affidavit procedures.” *State v. Covert*, 382 S.C. 205, 675 S.E.2d 740 (2009), citing *McKnight*. FN6 FN6. In *Covert*, we left open the question of whether a good faith exception applies when “the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid.” *Id.* at 209, 675 S.E.2d at 743. Given our recognition of an exception for officers’ good faith attempt to comply with the affidavit requirement, we find no reason not to extend such a good faith exception to a warrant reasonably believed to be valid, but later determined invalid. Accordingly, even if we were to determine the affidavit was improper, we would find the SLED agents acted in good faith and reasonably believed the warrant valid, such that the search should be upheld.

We find the present circumstances give rise to such a good faith exception. It was 4:00 in the morning, and SLED agents were attempting to obtain a warrant to investigate a shooting by Richland County Sheriff’s deputies of a prominent Columbia attorney. We hold the officers made a good faith attempt to comply with the affidavit procedures, and accordingly, we affirm the trial court’s ruling.

Moreover, even if we were to hold the SLED search illegal, we would hold any error was harmless. A videotape from Chastity’s shows Herring entering and leaving the club. Several witnesses identified Herring from the videotape, and his vehicle and license tag number were identified. Two witnesses saw him drive away from the club, and then testified they saw his vehicle returning down River Drive. Donald Hawkins saw Herring’s car come back into the parking lot, saw a flash come from the side of the vehicle, heard John John say “oh shit,” and then saw that John John had been hit by a bullet. Further, although Herring denied intentionally shooting anyone, he admitted he owns several guns, including a .357 Ruger, which he usually carries with him in his Toyota Forerunner, and he admitted he had some memory of a gun going off. Finally, gunshot residue was found on the passenger side of the vehicle, which was ultimately connected to Herring’s Ruger. Accordingly, admission of the evidence seized in the *216 SLED search, even if erroneous, was harmless. *State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872 (2007); *State v. Garner*, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (holding improperly admitted evidence harmless error given overwhelming evidence of guilt). We affirm the trial court’s ruling concerning the SLED search.

State v. Herring, *supra*.

Evidence in the record supports that he was not deprived of full and fair litigation of his claims concerning the SLED warrant which was raised within his brief as a pure state law claim.

Final Brief of Appellant, p. 17-28. As raised in the state court as a state law claim, it is not cognizable under Estelle v. McGuire, as well as Stone v. Powell.

The state court correctly decided the state law issues. At the hearing, Agent Lawrence testified he contacted the magistrate on call at bond court, and was instructed to follow the telephonic procedure authorized in Richland County by Chief Justice Toal in her Administrative Order of July 26th, 2001. Agent Lawrence typed out the warrant, faxed it to the magistrate, and was sworn over the phone. During the course of this search, officers found the murder weapon in a closet; however, the warrant's language covered any firearms on the premises. {R. 69-89}.

The trial court found the warrant supported by probable cause, and added that the inevitable discovery doctrine would support admission of evidence seized from the automobile, which would have eventually been discovered in the course of the investigation into the homicide. {R. 152}.

1. Alleged failure to comply with section 17-13-140

Petitioner asserted in the appeal that the SLED warrant failed to comply with S.C. Code Ann. § 17-13-140 (Rev. 2003), which requires that a warrant "issued hereunder shall be issued only upon affidavit sworn to before the magistrate". He further contended that the telephonic procedure in this case violated the statute, regardless of the Chief Justice's Order.

First, he pointed to State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), which found a search warrant supported only by an officer's sworn oral testimony defective under the statute. Petitioner contends that McKnight's interpretation of the statutory requirement of an affidavit "reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath", means that the attesting officer had to appear in person before the magistrate rather

than telephonically. He then makes a number of constitutional and statutory arguments as to the inability of the Chief Justice alone to amend a statute to allow a telephonic procedure.

He overlooks the fact that nothing in the § 17-13-140 or McKnight mandates swearing “before” the magistrate has to be done in person, as opposed to by telephone, webcam, or any other of the wonders of modern communication. The Chief Justice, in her power as the administrative head of the courts, has simply interpreted “before” as allowing an officer to be sworn over the phone and the affidavit to be transmitted by fax. There is nothing to indicate that this conclusion is judicially incorrect as a matter of law. See, e.g. United States v. Beasley, No. 00-20151 MI/BRE, 2000 W.L. 33725116 (W.D. Tenn. December 19, 2000) (in applying state rule also requiring swearing “before” the magistrate, noting that while the rule “does not expressly permit the procurement of a search warrant by electronic means, it does not prohibit it,” and no law was cited to the contrary). Here, albeit over the telephone, the officer was sworn, and he did submit a signed affidavit. There was no violation of the state statute.

Petitioner also made an argument that the administrative order violates the state constitutional requirements of the statewide uniformity of criminal laws. As an initial matter, this claim is not preserved as it was not raised to (nor ruled upon) by the judge. Dunbar, infra. Regardless, the constitutional provisions cited only speak to the ability of the General Assembly to enact special or local laws, and say nothing about judicial development of procedural mechanisms with regard to search warrants and consistent with the statute – as opposed to enactment of different substantive criminal laws. See S.C. CONST Art. III, § 34. The cases cited by Petitioner support the Chief Justice’s prerogative to make procedural orders, in that they reversed local rules of procedure enacted by circuit court judges that were not approved in

advance by the Chief Justice. See Spartanburg County of Social Services v. Padgett, 296 S.C. 79, 370 S.E.2d 872 (1988) (chief administrative judge exceeded scope of authority by enacting contempt rule without prior approval by Chief Justice); State v. Duncan, 274 S.C. 379, 264 S.E.2d 421 (1980) (circuit court rule promulgated by individual circuit void). Indeed, a search of the South Carolina Judicial Department website reveals a number of orders approving local rules for the processing of criminal cases in various counties. See, e.g. 2008-03-31-01 "Local Rules for the Processing of Criminal Cases in Calhoun County".

2. Failure to comply with the order allowing use of the telephone

Next, Petitioner asserted that even if the Chief Justice's Order allowing telephonic warrants is valid, the search warrant in this case was defective because there was not perfect compliance with the order. Apparently, the magistrate was on duty, all pages were not initialed by the officer when faxed, all pages were not initialed by the magistrate when faxed back, and the magistrate did not note on the warrant one of three ways in which he confirmed the officer's identity.

All of these are insufficient to invalidate the warrant. First, even though a magistrate was on duty, the order allows use of the procedure in extraordinary circumstances. {R. 1338}. Here, such circumstances existed, as the magistrate was in bond court, there had been a standoff in which a local attorney had been shot by police, and it was major case involving a homicide in which evidence needed to be preserved and collected as soon as possible. With regard to initialing each page, the warrant reflects that both the judge and the officer signed the affidavit, and the judge signed the warrant, and obviously these are the significant portions of the warrant. There is no contention that forgeries or other irregularities occurred with the cover sheet, and

accordingly any such defect is a scrivener's error or ministerial. See, e.g. State v. Shupper, 263 S.C. 53, 207 S.E.2d 799 (1974) (obvious typographical error in the date of a search warrant did not affect the validity); State v. Mollison, 319 S.C. 41, 459 S.E.2d 88 (Ct.App.1995) (failure to comply with inconsequential ministerial requirements of the statute does not require suppression in the absence of prejudice to the defendant). With regard to failure to notate the manner in which identity was confirmed, again, there is no contention of foul play and the officer and magistrate signed the important and necessary parts of the affidavit. Shupper, supra.

3. Probable cause and scope

Petitioner did assert in the appeal that the SLED warrant was improper as it was not supported by probable cause, and the officers seized the murder weapon which was not displayed in the shootout. As to probable cause, the SLED officers were undoubtedly there to investigate the shootout at Petitioner's house, but as Agent Lawrence said, as a technical matter he was to treat Petitioner as the victim and the officers as the suspects, since Petitioner had been shot. {R. 79}. The affidavit clearly reflected that there had been a shooting by officers during execution of a search warrant which wounded the suspect, and SLED had been summoned by the Sheriff to conduct this investigation. Probable cause was clearly present that evidence related to this shooting was in the house.

As to a contention that officers exceeded the scope by retrieving the murder weapon found in the closet, the SLED warrant authorized obtainment of any firearms associated with the shootout, and as Agent Lawrence noted, both weapons recovered were .357s. It was not unreasonable for SLED to seize both in determining which had been used or displayed in the event.

5. Good faith and inevitable discovery

Finally, Petitioner asserts that the doctrines of good faith and inevitable discovery should not apply to this state law situation. The Supreme Court rejected this claim concluding alternately that there was a good faith exception to compliance §17-13-140 where the officers made a good faith attempt to comply with the state statute. Of course, in United States v. Leon, 468 U.S. 897 (1984), the U.S. Supreme Court precluded application of the exclusionary rule where officers acted in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. There can be no doubt that as a federal constitutional matter, the good faith doctrine should apply. The SLED agent was relying on what the magistrate told him to do, and on an Administrative Order of the Chief Justice. There is no evidence of foul play or that the magistrate was not neutral and detached.

The state supreme court relied upon existing precedent in State v. Covert, 382 S.C. 205, 675 S.E.2d 759 (2009). At the time of the briefing, the Respondent had relied upon the pre-crime January 17, 2006 Court of Appeals decision in State v. Covert, 368 S.C. 188, 628 S.E.2d 482 (Ct. App. 2006). [The Herring warrant occurred on January 29, 2006]. In Covert, the court of appeals noted that defects under the state statute will not be overlooked unless officers make a good faith effort to comply with it. Subsequently, the Supreme Court in 2009 left open the question on certiorari in Covert. The Supreme Court in Herring found no reason not to extend this logic to his situation where there was a good faith exemption to a warrant reasonably believed to be valid under state statutory law. In State v. Sachs, 264 S.C. 541, 559, 216 S.E.2d 501, 510 (1975), the court found such an effort where the misstatements were the result of a joint federal/state investigation. In State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987), the court

found no such effort where the officer only offered sworn *oral* testimony, and no written affidavit. The court of appeals in Covert had found no good faith effort where the date the magistrate signed the affidavit was two days after the search – and there was no evidence offered the error was typographical. The supreme court in Covert, did not address the existence of good faith, though Chief Justice Toal would have found the exception exists, but was not shown in Covert's case.

Supportive of the decision in Herring on this state law issue, unlike Covert, the officers did testify, and there is no evidence of anything but that the officer was sworn, signed the affidavit, and the magistrate signed the warrant after review, before the search was conducted. There was a good faith effort. Indeed, even if there is a higher standard of privacy under the state constitution, no valid policy reason would be served by suppression in this case where there was no bad faith and officers were acting in accordance with judicial orders. Suppression would do nothing to deter improper police conduct. The same goes for application of the doctrine of inevitable discovery. See Nix v. Williams, 467 U.S. 431 (1984).

Finally, there is also record support for the Supreme Court's conclusion that any error in failing to suppress the SLED warrant was harmless. Even if the murder weapon had not been discovered, the evidence was overwhelming, given the video, the witness identifications, the automobile tag and registration, and Petitioner's custodial statements. Indeed, nothing about the weapon would affect Petitioner's defenses at trial. See State v. Woods, 376 S.C. 125, 654 S.E.2d 867 (Ct. App. 2007).

For the foregoing reasons, the Petitioner was afforded a full and fair opportunity to litigate his Fourth Amendment claims. Under Stone v. Powell, the allegations concerning

claimed Fourth Amendment violations must be denied.

CONCLUSION

V.

Each and every allegation contained within the Petition not hereinbefore either expressly admitted, qualified or explained is hereby denied.

WHEREFORE, having made Return, the Respondents request that the Petition, as amended, be dismissed for the reasons set forth above.

Respectfully submitted,

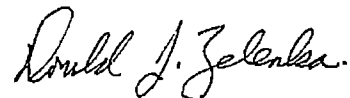
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S/Donald J. Zelenka

By: _____

April 29, 2011

DONALD J. ZELENKA

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

H. Dewain Herring, #321951,	)	C/A No. 0:11-160-RMG-PJG
	)	
	)	
Petitioner,	)	
vs.	)	
	)	MOTION FOR SUMMARY JUDGMENT
Robert M. Stevenson, III, Warden	)	
Broad River Correctional Institution,	)	
	)	
Respondents.	)	
_____	)	

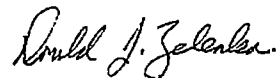
The Respondent, above-named, by and through the undersigned attorneys, respectfully move this Court, pursuant to Rule 56(b) F.R.C.P., for summary judgment based upon the pleadings pursuant to 28 U.S.C.A. §2254(d)(1),(2) .

Respectfully submitted,

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April 29, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

H. Dewain Herring, #321951,

Petitioner,

v.

Robert M. Stevenson, III, Warden
Broad River Correctional Institution,

Respondents.

Case No. 0:11-160-RMG-PJG

**PETITIONER HERRING'S MEMORANDUM IN OPPOSITION
TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
AND REPLY TO RESPONDENT'S RETURN**

I. INTRODUCTION

Petitioner Dewain Herring hereby incorporates his Memorandum in Support of Petition For Habeas Corpus in response to Respondent's Motion for Summary Judgment. Petitioner further submits this Memorandum in Opposition to Respondent's Motion For Summary Judgment and in Reply to Respondent's Return to respond to factual and legal arguments contained in Respondent's Memorandum.

II. FACTUAL STATMENT

Respondent Relies Upon Discredited and Disputed Facts In An Attempt To Convince This Court That the Serious Constitutional Errors Upon Which Herring's Conviction is Based Should Be Ignored

In his "Statement of State's *Version* of the Case," Respondent relies exclusively upon testimony of the State's witnesses, as if the witnesses' credibility went unchallenged during the trial. Respondent also relies upon statements allegedly made by Herring to an investigator, statements that Herring denied making. Respondent further omits critical evidence presented at

trial that contradicted the State's claim that Herring intentionally, with malice aforethought, shot and killed John Johnson. After presenting the evidence in the Record in the light most favorable to the State and ignoring contrary evidence presented at trial, the Respondent argues that Herring could not have been prejudiced from the significant Constitutional errors upon which Herring's 30 year sentence is based.

Specifically, Respondent cites the testimony from Chastity's bouncer Carl Weeks who testified that Herring threatened to shoot him and then states that "[a]nother bouncer, Donald Hawkins, over heard the man threaten to kill Carl and John John." Return at p. 6. Respondent also cites to Hawkins testimony where he claims Herring stated that the strip club employees did not want him to come back because someone is going to get "fucked up." Hawkins trial testimony however was contradicted by statements that he had previously made to investigators from the Richland County Sheriff's Department and by a recorded statement he gave to Herring's counsel. Furthermore, Hawkins even contradicted his own testimony at trial.

Hawkins never told the Richland County Sheriff's investigators that he overheard Herring threaten to kill Carl Weeks or anyone else. (R. p. 231) Moreover, Hawkins provided a recorded statement to counsel for Herring where he was asked to recite everything that Hawkins overheard Herring state. Again, Hawkins did not mention that he overheard Herring threaten to kill anyone. (R. p. 232) Rather, Hawkins on cross examination admitted that it was only after he and Carl Weeks met with the prosecutors where he was informed that Carl claimed Herring threatened to kill Carl that he recalled overhearing this statement. (R. pp. 233, 234, 235) In addition, during direct testimony Hawkins claimed that he heard Herring state that "I will kill you," however on cross examination Hawkins recanted somewhat and claimed that he only heard "kill you." (R. p. 231)

In addition, Respondent claims that the trial testimony established that the victim John Johnson was peeking out the front door just before he was shot. Return p. 7. Again, the source of this evidence is the testimony of Hawkins. However, even Hawkins admitted that he last observed John Johnson looking out the door some 15 seconds before the shooting and he could not say whether John Johnson was peeking out the door at the time of the shooting. (R. pp. 246, 247)

In summary, Carl Weeks is the only witness who consistently maintained that Herring threatened to kill anyone. Weeks and Hawkins clearly were biased witnesses whose credibility were suspect and vigorously challenged at trial. Furthermore, Weeks claims that the threat was against him, and not anyone else. Because Weeks was upset with Herring, John Johnson directed Weeks to leave the area in order to diffuse the situation.

Respondent also relies upon the testimony of Richland County's lead detective who claimed that Herring told him during a custodial interview that Herring remembered shooting the gun, but that he was not shooting at anyone. Return p. 11. This testimony however was contradicted by Herring who testified that he never made this statement. Furthermore, the alleged statement by Herring that he recalled shooting a gun is not within any of the written statements Herring gave the investigators following the shooting.

Rather, Herring had consistently stated that he vaguely recalled a gun going off, but he does not recall anything more. Herring's statements given to SLED and Richland County Sheriff investigators after he had been arrested were obviously inaccurate. For example, he stated that he had consumed some nine beers playing golf and four scotch drinks at a bar and grill afterwards. Yet, Herring's golfing partner testified that Herring had at most five beers playing golf and perhaps two scotch drinks afterwards before returning home. (R. pp. 1217-1220) Herring also

vaguely recalled receiving a dance from a light skinned black woman at Chastity's, yet the stripper Mia was clearly not light skinned. (R. pp. 964-965) The reason Herring's memory was hazy and vague is because he was drugged. (R. p. 979) Herring's belief that he was drugged was supported by expert testimony and other witnesses who have been drugged or were aware that such activity takes place at this particular club. Even the State's witnesses described Herring's behavior as bizarre. (R. pp. 933-946; 1066-1090; 1161-1214)

Herring also testified that the shooting had to be an accident because he would not intentionally fire a gun toward anyone. Herring's ballistic expert also corroborated Herring's belief that the shooting was accidental. Significantly, if Herring had been shooting toward the door, the expert concluded that a bright "fire ball" coming from the barrel pointing out of the car window would have been visible in the video. There was no such flash of light. (R. pp. 877-904) Richland County investigators even flew the video to the NASA space center in Florida and had the video enhanced and examined, but to no avail. (R. pp. 784-788) There is simply no discernible flash, much less a "fireball," that would indicate that Herring aimed the firearm outside the passenger's window and shot toward the Club. The absence of such a flash was indicative of the weapon's discharging from below the bottom of the window. (R. p. 895)

Based on the video and measurements he took at the scene, Herring's expert testified that the driver was not pointing the gun and aiming it at the door. (R. pp. 886-92) The expert believed the gun discharged from down near the glove box, and he testified that the gunshot residue found in the car was located in areas consistent with discharge of the firearm from the area of the glove compartment below the level of the window, (R. pp. 899, 901-03.) He noted the failure of the investigators to test for residue on the passenger seat, the glove box, or the floor of the passenger side, areas where the presence of residue would have provided evidence of where the gun was when it was discharged. (R. pp. 820, 903-04). This expert also testified that the forensic evidence established that Herring was shot in the back of

his arm, with his back to the Deputies, when Herring was fleeing from what he believes to be intruders in his home. In short, there was very credible evidence presented that not only was Herring drugged by someone at Chastity's but the shooting of John Johnson was unintentional and an accident.

III. ARGUMENT

1. Petitioner Herring's Due Process Right To A Fair Trial Was Denied Because The Jury Instructions Equated The Mental State Required For A Conviction of Murder With the Same Mental State Necessary For The Lesser Included Offense of Involuntary Manslaughter, Thereby Allowing The Jury To Find Petitioner Guilty Of Murder Even If Petitioner Possessed The Mitigating State of Mind For Involuntary Manslaughter

Respondent misconstrues Herring's first ground for relief that the jury instructions did not differentiate between the degrees of recklessness required to prove malice for the murder charge from the degree of recklessness that would support a finding of the lesser offense of involuntary manslaughter. Instead, Respondent argues that common law "depraved heart" murder survived the passage of the State statute defining criminal recklessness for involuntary manslaughter. Respondent further argues that South Carolina law, as well as the law of other States, recognizes a distinction between criminal recklessness and recklessness that demonstrates a depraved indifference to the lives and safety of others. Petitioner does not quarrel with this distinction.

In fact, as the Fourth Circuit recently explained in a habeas action arising out of North Carolina, the distinction between the two concepts is a matter of degree:

Under North Carolina law the "distinction between 'recklessness' indicative of murder and 'recklessness' associated with manslaughter 'is one of degree rather than kind.' " *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299, 303 (2000) (quoting *United States v. Fleming*, 739 F.2d 945, 948 (4th Cir.1984)). North Carolina courts have indicated, however, that the difference in degree is large. See, e.g., *id.*; *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905, 918 (1978).

Bauberger v. Haynes, 632 F.3d 100 (4th Cir. 2011)

The cases relied upon by Respondent from other jurisdictions generally require that the amount of recklessness required to support a murder conviction be of such a degree so as to demonstrate an extreme indifference to human life. *State v. Robinson* 261 Kan. 865, 934 P.2d 38 (Kan. 1997)(conviction for depraved heart second degree murder requires proof that the defendant acted recklessly under circumstances manifesting extreme indifference to value of human life, which requires culpability that differs in degree but not in kind from ordinary recklessness required for manslaughter); *People v. Cole*, 629 N.Y.S.2d 166, 652 N.E.2d 912 (1995)(recklessly cause death while acting under circumstances evincing a depraved indifference to human life); *Brown v. Commonwealth of Kentucky*, 975 S.W.2d 922 (Kentucky 1998)(“wanton murder is distinguished from second degree (involuntary manslaughter) which also punishes “wantonly causing the death of another” by the additional element described in the phrase “under circumstances manifesting extreme indifference to human life.”); *People v. Marcy*, 628 P.2d 69 (Colo. 1981)(The elements of extreme indifference murder are (1) under circumstances manifesting extreme indifference to the value of human life; (2) knowingly engaging in conduct that creates a grave risk of death to another; and (3) thereby causing the death of another); Even the South Carolina Supreme Court in *Mouzon* recognizes this added element.

Here, the instructions given to Herring’s jury did not differentiate between the degree of reckless required to support a depraved indifference murder conviction and the lesser degree of involuntary manslaughter recklessness. The Court charged malice, stating “malice does not necessarily impart ill will towards the individual injured but signifies rather a general malignant recklessness of the lives and safety of others or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.” (R. pp. 1305-06) (emphasis added). By

using the disjunctive “or” between the phrase “malignant recklessness of the lives and safety of others” and “condition of mind which shows a heart regardless of social duty and fatally bent on mischief” the Court instructed that there were two separate and alternative means of proving malice. In addition there is no material difference between the phrase “malignant recklessness of the lives and safety of others” used in the murder jury instruction and the recklessness portion of the manslaughter charge, where the Court instructed “A reckless disregard for the safety of others means that you [sic] not interested in the consequences of your acts or the rights and safety of others.” (R.pp. 1308, 1309)

Interestingly, Respondent does not attempt to distinguish the *Falconer* line of cases relied upon by Herring. See, *Falconer v. Lane*, 720 F.Supp. 631, affirmed at 905 F.2d 1129 (7th Cir. 1990), *Herring's Memorandum In Support of Writ Habeas*, at p. 19. Like in *Falconer*, the jury could have found Herring guilty of murder even if it concluded that he acted lawfully (by being licensed to carry a concealed weapon) but with a reckless disregard for the safety of others, that is he was not interested in the consequences of his acts or the rights and safety of others. Under these circumstances Herring was denied his due process rights. *Id.*

2. Petitioner' Due Process Rights To A Fair Trial Were Denied Because The Jury Was Not Instructed On The Defense of Accident Nor Provided Instructions Pertaining To The Negligent Use of A Firearm

Respondent argues that Herring was not entitled to a charge of accident or negligent use of a firearm because “as a matter of law Petitioner was acting neither with due care nor in a lawful manner when the gun went off; as such, accident was not a viable defense.” Return p. 37. Respondent concedes that Herring had a license to carry a concealed weapon under South Carolina law and it was lawful for him to transfer a firearm from his glove box to his person and vice versa. In addition, Respondent ignores Herring's statements made after the shooting and his

testimony that the shooting was an accident, as well as the testimony of Herring's expert witness, who testified that the gun discharged from down near the glove box, (R. pp. 899, 901-03).

Under South Carolina law, if there is any evidence to warrant a jury instruction, a trial court must, upon request, give the instruction. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001); *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented. *Lee*, 298 S.C. at 364, 380 S.E.2d at 835. In *State v. Crosby*, 355 S.C. 475, 84 S.E.2d 110 (2003) the South Carolina Supreme Court held that it was reversible error for the trial court to reject a defense request for a jury instruction on accident. The Court found "ample evidence" from which the jury could infer that the Defendant did not intend to discharge his weapon, even though in his statement to the police after the shooting the Defendant stated "I closed my eyes and pulled the trigger." The Defendant told three witnesses after the shooting it had been an accident and that he "hadn't meant to do it." The Defendant had told one of the witnesses that the "gun had slipped." 355 S.C. 47, 52-53, 584 S.E.2d 110, 112 (2003).

Here, when asked if he fired his weapon at Chastity's Herring stated "If I did, I was not shooting at anyone. I'm not saying that I did not do it. If the gun went off while in my hand, it was harmless error. It was probably the Ruger .357 and if it went off, *it was an accident.*" This statement, combined with Herring's trial testimony and his forensic expert's analysis is sufficient evidence to warrant an accident charge under South Carolina law.

Respondent also contends that the requested accident charge contained a misstatement of law related to whether the State had to prove specific intent to kill the victim and therefore the jury was properly rejected. First, the trial court did not reject the charge because it contained one phrase unrelated to the concept of accident which possible could be misconstrued as an incorrect

statement of law. Moreover, it was incumbent upon the trial court to instruct the jury on the law of accident, which it did not do, by either deleting the objectionable phrase from Herring's request or using the court's own instruction. *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001); *State v. Lee*, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989).

This Court's role is not to interpret South Carolina law with regard to accident, but to determine whether the evidence was sufficient to warrant an accident charge under that law. *See, Jackson v. Edwards*, 404 F.3d 612, 621, 622 (2d Cir.2005). As the above establishes, Herring was clearly entitled to such an instruction. The question then becomes whether the failure to give an accident instruction was sufficiently harmful to render the trial unfair. *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). The answer is obviously yes. To deny a defendant the opportunity to raise a "highly credible defense" to a charge of homicide is nothing short of a "catastrophic" error. *Jackson v. Edwards*, 404 F.3d 612, 625 (2d Cir. 2005); see also, *Davis v. Strack*, 270 F.3d 111, 131-132 (2d Cir.2001); *Means v. Solem*, 646 F.2d 322, 332 (8th Cir.1980) (granting habeas relief for error of state law on justification in jury instruction); *Barker v. Yukins*, 199 F.3d 867, 875-76 (6th Cir.1999) (same); *Zemina v. Solem*, 573 F.2d 1027, 1028 (8th Cir.1978) (adopting reasoning of *Zemina v. Solem*, 438 F.Supp. 455 (D.S.D.1977)) (same).

3. Petitioner was Denied his Right to Due Process as a Result of the South Carolina Supreme Court's Decision to Refuse to Apply Its Decision in *State v. Belcher*, S.C. _____, 685 S.E.2d 802 (2009) to the Petitioner as Required by *Griffith v. Kentucky* 479 U.S. 314 (1987)

Respondent contends that the *Belcher* issue was not preserved by Herring at trial or on appeal and therefore the South Carolina Supreme Court rejected the application of *Belcher* to Herring's appeal. However, the South Carolina Supreme Court did not rule that Herring failed to preserve the *Belcher* decision. In fact, as the record establishes, Herring through counsel

submitted the *Belcher* decision as supplemental authority in support of his appeal at the earliest possible opportunity.

In addition, the ruling in *Belcher* was related to Petitioner's argument made at the trial court and on appeal that the failure to give one of the requested charges concerning negligent use of a deadly weapon amounted to a constitutional violation of Petitioner's right to due process, in light of the court's giving the inference-of-malice charge. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3. In the Petition for Re-Hearing, Petitioner argued that the due process implications of this issue were even greater, because the South Carolina Supreme Court recognized the impropriety of an inference-of-malice instruction, standing alone, where the evidence supports a finding reducing the offense from murder to some other form of killing. Petitioner further argued that if the Court failed to apply to this case the principles it embraced in *Belcher* just three months earlier, Petitioner would be deprived of due process of law, in contravention of both federal and state constitutional due process protections.

Respondent further argues that the holding in *Griffith v. Kentucky*, 479 U.S.314 (1987), that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases...pending on direct review or not yet final" only applies when a new federal constitutional rule is adopted. Respondent does not cite any Fourth Circuit authority for this proposition. In addition, the case relied upon by Respondent, *Henry v. Ricks*, 578 F.3d 134, 141 (2d Cir. 2009), addressed the situation where the highest state court ruled that its holding would only have prospective application. Here, the South Carolina Supreme Court clearly ruled that *Belcher* would be applied retroactively pursuant to *Griffith v. Kentucky*. Petitioner therefore was entitled to have the benefit of the *Belcher* decision for the issues that were preserved at trial and raised on appeal. As explained above, Petitioner was denied this right. Moreover, the principals announced

in *Belcher*, if applied to Herring's appeal, dictate that Herring's conviction be reversed because the trial court failed to properly balance the inference of malice charge with the charged requested by Herring concerning the negligent use of a deadly weapon.

4. Petitioner was Denied his Right to Due Process as a Result of the Refusal of the Chief Justice of the South Carolina Supreme Court to Recuse Herself from Participating in the Appeal from Herring's Conviction which Necessarily Involved a Direct Review of the Legality of the Chief Justice's Administrative Order

Respondent contends that judicial rulings alone are insufficient grounds to justify recusal. Respondent ignores *In re Murchison*, 349 U.S. 133, 136 (1955) which involved the recusal of a judge in a contempt proceeding after issuing a rule to show cause why the defendant should not be held in contempt. The Court explained, "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. *To this end no man can be a judge in his own case...* Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" In addition, South Carolina law provides that a justice of the Supreme Court is disqualified from participating from an appeal of an order of the justice. *Dominick v. Jones*, 96 SC 224, 80 S.E. 193 (1913); *Mills v. Atlantic Coast Line R. Co.* 87 S.C. 158, 69 S.E. 91 (1910); S.C. Code §14-3-50 ("no justice shall preside in any case or at the hearing thereof ...in which he... has presided in any inferior court.").

5. Petitioner was Denied his Right to be Free From Unreasonable Searches and Seizures Guaranteed by the Fourth Amendment to the United States Constitution and Petitioner was Further Deprived of His Right to Fully and Fairly Litigate this Fourth Amendment Claim in the South Carolina State Courts as a Result of the Refusal of the Chief Judge to Recuse Herself from Participation and the Court's Refusal to Apply the Correct and Controlling Legal Standard Applicable to Fourth Amendment Claims

Respondent argues that Herring's Fourth Amendment search claims are barred by *Stone v. Powell* 428 U.S. 465 (1976) contending that Herring had a full and fair chance to litigate this claim in State court. Return, p. 58. Alternatively, Respondent contends that there was no Fourth Amendment violation and even if there was, such a violation was harmless.

Herring previously addressed *Stone v. Powell* in his Memorandum in Support of Petition, explaining that the "opportunity for full and fair litigation" is not limited to the evidentiary hearing required by *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) (overruled by, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)), but "contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards. Thus, a federal court is not precluded from considering Fourth Amendment claims in habeas proceedings when the state court willfully refuses to apply the correct and controlling constitutional standard." *Gamble v. State of Okl.*, 583 F.2d 1161 (10th Cir. 1978); See also, *Pulver v. Cunningham*, 419 F. Supp. 1221 (S.D. N.Y. 1976), judgment aff'd, 562 F.2d 198 (2d Cir. 1977), ("*Stone v. Powell* cannot be read merely as a reiteration of *Townsend v. Sain*... . [I]t is apparent that the opportunity to litigate encompasses more than an evidentiary hearing in the trial court."); *Doleman v. Muncy*, 579 F.2d 1258 (4th Cir. 1978), (noting the fact that the reference to *Townsend* was preceded by "cf.," stated, "Had the Court intended to engraft the *Townsend v. Sain* criteria into the *Stone* situation, it could have done so expressly instead of by a passing footnote reference.")

Herring was denied a full and fair opportunity to litigate the search issue by the State courts' willful refusal to apply the correct and controlling legal standard. At Herring's trial, the trial judge correctly concluded that the warrantless search of Herring's garage was unconstitutional. Yet, the trial judge then clearly and willfully ignored controlling constitutional standards by concluding that the search warrant affidavits for the two subsequent searches contained sufficient facts, separate and distinct from the information that a 4Runner was parked in the garage, to support a finding of probable cause by the magistrate.

The majority of the South Carolina Supreme Court then rejected the trial judge's correct conclusion that the warrantless search and further concluded that the search did not disclose any incriminating evidence that was used against Herring. The majority of the Supreme Court concluded that the "peek" which led to the discovery of the 4Runner in the garage was not unreasonable because of exigent circumstances, i.e. an apparent murder had been committed some two hours earlier and the Deputies went to the address on the suspect driver's license. However, federal courts have rejected the exigent circumstances to support a warrantless search where the search was conducted more than 40 minutes after the suspect was seen entering the residence. See, *U.S. v. Diaz-Segovia*, 457 F.Supp. 260, 271-72 (D.Md.1978). Respondent has not cited a single case that supports the Supreme Court's ruling that there were exigent circumstances justifying the warrantless search of Herring's residence.

Respondent however argues before this Court that the warrant issued to the Richland County Sheriff's Department would be nevertheless valid because there were sufficient facts contained in the affidavit, other than reference to the 4Runner located in the garage, which would lead disinterested magistrate to conclude that a search should be issued of the defendant's premises. Return p. 65. This was the basis of the trial judge's ruling to deny the motion to

suppress. This rationale was rejected by the South Carolina Supreme Court and is contrary to well established Fourth Circuit jurisprudence that there must be some evidence linking criminal activity to the residence to be searched. See, *United States v. Lalor*, 996 F.2d 1578 1583, cert.denied 510 U.S. 983 (1993).

The first six sentences of the affidavit's basis for seeking a warrant does not have any link to the residence. The next two sentences actually link the vehicle to a different address, 3612 Landmark Drive, a business location. The only sentence in the affidavit pertaining to the address states, "A search of Richland County records also provided an additional address of _____." This statement is so lacking in specificity that it does not provide any basis for linking this address to the events at Chastity's. *U.S. v. Dickerson*, 975 F.2d 1245, 1249-50 (7th Cir. 1992) (affidavit was not sufficient to support probable cause determination where only link was registration of car to address to be searched, without allegation that car was parked at the location.)

Respondent also argues that the good faith exception in *United States v. Leon* 468 U.S. 897 (1984) precludes application of the exclusionary rule. However, under *Leon*, suppression is appropriate if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. *Id.* at 926. Here, the officers who obtained the warrant did so only after conducting an illegal warrantless search of Herring's residence, and included the fruits of this illegal search in the affidavit presented to the magistrate. There is not a good faith exception for such illegal conduct. See, *United States v. Villard*, 678 F. Supp. 483, 490 (D.N.J. 1988) (This court finds that the good faith exception established in *United States v. Leon* does not apply here. *Leon* did not address the admissibility of evidence seized under a warrant that was based on information obtained in a

prior illegal search. Further, it would be inappropriate and inconsistent with the reasoning of *Leon* to extend the good faith exception to such a situation); *State v. Hicks*, 146 Ariz. 533, 535, 707 P.2d 331, 333 (Ariz. Ct. App. 1985) aff'd, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987)(The state argues that because the officer subsequently obtained a search warrant that his actions ought to be validated under the "good-faith" exception to the exclusionary rule... [W]hile *Leon* does hold that officers may reasonably rely on a magistrate's assessment of probable cause in issuing a warrant and that exclusion need not be ordered if the magistrate is wrong in that assessment, it does not hold that a subsequent warrant validates an earlier illegal search. *Police officers cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate.*) *United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987)(The *Leon* analysis and good faith exception are not applicable to this case. The fact that Officer Jensen conducted a warrantless search of the vehicle which violated Vasey's Fourth Amendment rights precludes any reliance on the good faith exception)

Lastly, Respondent argues that even if the warrant was invalid and evidence should have been suppressed, any error was harmless, relying upon *New York v. Harris*, 495 U.S. 14 (1990) (where the Court held that the exclusionary rule would not bar introduction of statements made outside Defendant's home after *Miranda* warnings were given) However, Herring did not admit to any criminal conduct during his custodial interrogation. Respondent also ignores the fact that the gun used in the Chastity's shooting was found in the search of Herring's residence. Moreover, Herring was convicted of pointing and presenting a firearm. This charge and conviction arose out of the Richland County Sheriff's Deputies execution of the illegal search warrant.

CONCLUSION

Based upon the foregoing, Petitioner requests that the Court issue a writ of habeas corpus to direct Respondent to order a new trial and/or release Petitioner from custody and to grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

GRIFFIN LLC

/s/ James M. Griffin

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Attorneys for Petitioner

June 15, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the following document upon counsel for Respondent via electronic service this 15th day of June, 2011:

**PETITIONER HERRING'S MEMORANDUM IN OPPOSITION
TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
AND REPLY TO RESPONDENT'S RETURN**

/s/ James M. Griffin

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Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

H. Dewain Herring,	)	C/A No. 0:11-160-MBS-PJG
	)	
Petitioner,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
Robert M. Stevenson, III, <i>Warden Broad River</i>	)	
<i>Correctional Institute,</i>	)	
	)	
Respondent.	)	
_____	)	

The plaintiff, H. Dewain Herring ("Herring"), a state prisoner who is represented by counsel, filed this habeas corpus action pursuant to 28 U.S.C. § 2254. This matter comes before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) DSC for a Report and Recommendation on the respondent's motion for summary judgment. (ECF No. 17.) Herring filed a response in opposition. (ECF No. 26.) Having carefully considered the parties' submissions and the record in this case, the court concludes that the respondent's motion for summary judgment should be granted.

BACKGROUND

Herring was indicted in February 2006 in Richland County for murder (06-GS-40-914) and pointing and presenting a firearm (06-GS-40-881). (App. at 2-7; ECF No. 4-1 at 16-21.) Herring was represented by Richard A. Harpootlian, Esquire, Graham Newman, Esquire, and Jamie Lindler, Esquire. The trial court conducted a suppression hearing on May 2, 2007 during which Herring, through counsel, challenged the propriety of a search warrant. On May 7 through May 21, 2007, Herring was tried by a jury and found guilty as charged. (App. at 1318; ECF No. 5-15 at 8.) Herring was sentenced by the circuit court to thirty years' imprisonment for murder and five years'

imprisonment for pointing and presenting a firearm, both sentences to be served concurrently. (App. at 2352; ECF No. 5-15 at 9.)

Herring timely appealed and was represented by Richard A. Harpootlian, Esquire, Graham L. Newman, Esquire, and Katherine Carruth Goode, Esquire, who filed a brief on Herring's behalf that raised the following issues:

1. Did the trial court err in denying the defense motions to suppress the three searches of appellant's residence and the fruits of those searches?
2. Did the trial court abuse its discretion in allowing lay witnesses to give their opinion of what could be seen on the video, when those witnesses did not personally observe the actual events depicted in that portion of the video?
3. Did the trial court abuse its discretion in denying the defense mistrial motion based on the admission of improper lay opinion testimony?
4. Did the trial court commit reversible error in denying the requested charge on accident?
5. Did the trial court commit reversible error in denying the requested charges on involuntary manslaughter based on negligent use of a deadly weapon?
6. Did the trial court commit reversible error in granting the State's request to charge based on State v. Mouzon?
7. Did the trial court err in denying the motion for directed verdict with respect to the charge of pointing and presenting a firearm?
8. Was the cumulative prejudice that resulted from all the erroneous rulings such that appellant is entitled to a new trial?

(ECF No. 1-4 at 7.) Because one of Herring's issues on appeal involved a challenge to the authority of the Chief Justice of the South Carolina Supreme Court regarding the issuance of an administrative order that altered the manner in which search warrants are obtained in Richland County as well as the validity of the administrative order itself, on June 16, 2009 Herring filed a motion for the Chief

Justice to recuse herself from participating in the appeal of his conviction and sentence. (ECF No. 1-8.) Herring's motion was denied on June 18, 2009. (ECF No. 1-9.)

The Supreme Court heard oral argument on June 23, 2009. By order issued December 21, 2009, the Court affirmed Herring's conviction and sentence. State v. Herring, 692 S.E.2d 490 (S.C. 2009); (ECF No. 1-10). Herring filed a petition for rehearing on January 20, 2010, in which he requested that (1) the Court rehear his case and address the remainder of his issues on appeal; and (2) the Court apply the recent decision in State v. Belcher, 385 S.C. 597 (2009), to his case, which had been pending on direct review when the Court's opinion in Belcher was issued. (ECF No. 1-11.) Herring's petition also renewed his request that the Chief Justice recuse herself from considering his petition for rehearing. The South Carolina Supreme Court denied by letter order Herring's petition for rehearing on May 14, 2010. (ECF No. 1-12.) The remittitur was issued May 14, 2010. (ECF No. 1-13.)

On June 4, 2010, Herring filed a *pro se* application for post-conviction relief ("PCR"), which is currently pending in the Richland County Court of Common Pleas.¹

SUMMARY OF TRIAL EVIDENCE

In considering Herring's appeal, the South Carolina Supreme Court summarized Herring's criminal proceedings as follows:

Herring was charged with the January 29, 2006 shooting of an employee of Chastity's Gold Nightclub (Chastity's), a strip club in Columbia. The facts giving rise to the shooting are as follows.

After golfing in Aiken with friends on the day of January 28, 2006, at which he had consumed numerous beers, Herring stopped by a bar for a few drinks on the

¹ All of the issues raised in the instant Petition address direct review, not collateral, issues. It appears that Herring has chosen to seek habeas review of those issues before exhausting his collateral issues. See 28 U.S.C. § 2244(b)(2) (discussing requirements for authorization to file second or successive habeas corpus applications).

way home, and then returned home around 7:30 p.m. Herring had a couple more drinks at his home with a golfing buddy before the friend left. Herring laid down intending to go to sleep, but got up and decided to go a Forest Acres restaurant. When the restaurant was closed, Herring changed his mind and went to Platinum Plus, a Columbia strip club. He had a drink and paid a dancer for a lap dance and left Platinum Plus. On his way home, he decided to stop by Chastity's on River Drive; he arrived shortly after 11:00 p.m. According to Herring, he ordered a drink at the bar, but he has very little recall of any events for several hours thereafter.

According to witnesses and employees of Chastity's, Herring purchased a drink and paid for a \$30.00, three minute lap dance from a dancer named Mia. After the lap dance, Herring paid Mia for a \$300 dance in what was known as the Champagne room.

Mia took Herring to the Champagne room and told him to wait while she went to freshen up. A bouncer, Carl Weeks, went to check on Herring a few minutes later and found him naked and masturbating on the sofa. The bouncer told Herring he could not do that and told him he would have to leave. When Herring did not move, the bouncer got the manager, John Johnson (John John). When they returned, Herring was dressed. Weeks told Herring he would either have to leave, or they would call police and have him arrested for solicitation of prostitution. According to Weeks, Herring responded, "No. I will fucking shoot you." John John and a bouncer named Donnie Hawkins escorted Herring to the front door at 11:57 p.m. John John walked outside with Herring and used a two-way radio to call Herring's license plate number out to Weeks, who was standing in the doorway, as Herring drove away. Weeks and Hawkins watched as Herring backed up his black SUV, and fumbled with his glove compartment with his right hand. Herring slowly pulled away, putting down the passenger side windows as he went. Hawkins, Weeks and John John had just gone inside when they saw Herring's vehicle coming back down River Drive toward Chastity's. According to Hawkins, John John was right inside the door. Hawkins saw a flash of light come from the side of the vehicle, and heard John John say, "Oh shit!" John John fell to the floor, having been hit in the left ear by a bullet which came through the front door. He died a short while later at the hospital.

Upon arriving at the scene of Chastity's, police were given Herring's license tag number, which was registered to his office address in Columbia. Police patrolled the office parking lot, but did not find the vehicle. They then determined Herring's home address and went there at 2:10 a.m. on January 29, 2006. A police officer, seeing a light on in the garage, peeked in the garage window to see if the suspect was there. Although the suspect was not there, the officer did see the vehicle, which they realized was Herring's. They knocked on the door and rang the doorbell several times and, receiving no answer, they returned to the police station and obtained a search warrant for the home.²

² Several officers remained outside the premises while the warrant was obtained.

Police went back to Herring's residence at approximately 4:00 a.m. to execute the search warrant. They rang the doorbell several times but received no answer. They entered forcibly, announcing they were police with a search warrant. Officer Linfert testified that he saw Herring in the hallway and recognized him from the photo on his driver's license. Linfert told Herring to get down on the ground, but Herring ran back down the hall toward a bedroom. He followed Herring to the bedroom, and saw Herring pull a gun from a nightstand and point it in his direction. Officer Linfert yelled at him to drop the gun and then fired one shot at him. Other officers also opened fire, and Herring was hit in the arm. Herring called 9-1-1 and told them he believed there were intruders in his home. After talking with the 9-1-1 operator, Herring surrendered upon realizing the "intruders" were indeed police officers.

Herring initially told police he had not left the house after returning home from Aiken; he did not recall going to Chastity's. When police told him of the video tape which showed him entering and leaving Chastity's, he remembered only being at the bar, having a drink, and a gunshot firing; the next memory he had was of police bursting into his home. He subsequently began remembering more details, such as paying for a lap dance from a light skinned black woman.

Bullet fragments removed from John John's head conclusively matched a .357 Magnum Ruger owned by Herring; the Ruger was found under some clothing in his bedroom closet during a SLED search of the home.³ Gunshot residue was found on the passenger side of Herring's vehicle. A jury convicted Herring of murder and pointing and presenting a firearm.

(ECF No. 1-10 at 2-4); see also Herring, 692 S.E.2d at 491-92.

FEDERAL HABEAS ISSUES

In Herring's federal petition for a writ of habeas corpus, he raises the following issues:

- [a]. Petitioner Herring's Due Process Right To A Fair Trial Was Denied Because The Jury Instructions Equated The Mental State Required For A Conviction of Murder With the Same Mental State Necessary For The Lesser Included Offense of Involuntary Manslaughter, Thereby Allowing The Jury To Find Petitioner Guilty Of Murder Even If Petitioner Possessed The Mitigating State of Mind For Involuntary Manslaughter[;]
- [b]. Petitioner'[s] Due Process Rights To A Fair Trial Were Denied Because The Jury Was Not Instructed On The Defense of Accident Nor Provided Instructions Pertaining To The Negligent Use of A Firearm[;]

³ [The South Carolina Law Enforcement Division ("SLED")] searched the residence relative to the shooting which occurred between police and Herring at the time of Herring's arrest.

- [c]. Petitioner was denied his right to Due Process as a result of the South Carolina Supreme Court's decision to refuse to apply its decision in State v. Belcher, [385] S.C. [597], 685 S.E.2d 802 (2009)[.] to the Petitioner as required by Griffith v. Kentucky[.] 479 U.S. 314 (1987);
- [d]. Petitioner was denied his right to Due Process as a result of the refusal of the Chief Justice of the South Carolina Supreme Court to recuse herself from participating in the appeal from Herring's conviction which necessarily involved a direct review of the legality of the Chief Justice's Administrative Order;
- [e]. Petitioner was denied his right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Petitioner was further deprived of his right to fully and fairly litigate this Fourth Amendment claim in the South Carolina state courts as a result of the refusal of the Chief Judge to recuse herself from participation and the Court's refusal to apply the correct and controlling legal standard applicable to Fourth Amendment claims[.]

(Am. Pet., ECF No. 13 at 7.)

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party.

See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” Id. at 248. The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c), (e); Celotex Corp., 477 U.S. at 322.

B. Habeas Corpus Standard of Review

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as decided by the Supreme Court of the United States,” or the decision “was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d)(1), (2). When reviewing a state court’s application of federal law, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Williams v. Taylor, 529 U.S. 362, 410 (2000); see also Harrington v. Richter, 131 S. Ct. 770, 785 (2011); Humphries v. Ozmint, 397 F.3d 206 (4th Cir. 2005); McHone v. Polk, 392 F.3d 691 (4th Cir. 2004). Moreover, state court factual determinations are presumed to be correct and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

“A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” Harrington, 131 S. Ct. at 786 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). Under the AEDPA, a state court’s decision “must be granted a deference and latitude that are not in operation” when the case is being considered on direct review. Harrington, 131 S. Ct. at 785. Moreover, review of a state court decision under the AEDPA standard does not require an opinion from the state court explaining its reasoning. See id. at 784 (finding that “[t]here is no text in [§ 2254] requiring a statement of reasons” by the state court). If no explanation accompanies the state court’s decision, a federal habeas petitioner must show that there was no reasonable basis for the state court to deny relief. Id. Pursuant to § 2254(d), a federal habeas court must (1) determine what arguments or theories supported or could have supported the state court’s decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. Id. at 786. “If this standard is difficult to meet, that is because it was meant to be.” Id. Section 2254(d) codifies the view that habeas corpus is a “‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” Id. (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

C. Respondent’s Motion for Summary Judgment

1. Jury Instructions for Murder and Involuntary Manslaughter

Herring first alleges that the trial court’s jury instructions on murder and involuntary manslaughter violated his right to due process of law. Herring argues that the jury instructions described the same mental state for murder and involuntary manslaughter, which allowed the jury

to convict Herring of murder even if he “possessed the mitigating state of mind described in the instructions for involuntary manslaughter.” (Am. Mem. Supp. Pet., ECF No. 13-1 at 17.) Herring summarizes this ground as asserting that “the jury instructions did not differentiate between the degrees of recklessness required to prove malice for the murder charge from the degree of recklessness that would support a finding of the lesser offense of involuntary manslaughter.” (Petr.’s Resp. Opp’n Summ. J. at 5, ECF No. 26 at 5.)

When a petitioner argues that he is entitled to federal habeas relief based on an improper jury instruction, the court must be mindful that “not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation.” Middleton v. McNeil, 541 U.S. 433, 437 (2004). Further, “[a] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” Id. (quoting Boyde v. California, 494 U.S. 370, 378 (1990)). The defendant must demonstrate “that there was a ‘reasonable likelihood’ that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt.” Waddington v. Sarausad, 555 U.S. 179, 191 (2009) (quoting Estelle v. McGuire, 502 U.S. 62, 72 (1991)). There must be more than “some ‘slight possibility’ that the jury misapplied the instruction” and the relevant question is “‘whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.’” Waddington, 555 U.S. at 191 (quoting Estelle, 502 U.S. at 72). Finally, as stated above, when a petitioner challenges a state court’s application of federal law, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Williams, 529 U.S. at 410.

In this case, the trial judge instructed the jury on both murder and involuntary manslaughter. After explaining to the jury the requirements of criminal intent, the trial judge provided a lengthy charge on murder followed by an instruction on involuntary manslaughter. Herring's trial counsel objected to the court's inclusion of a Mouzon⁴ charge as part of the murder charge, arguing that the Mouzon case is from 1957;⁵ that the charge is burden shifting; that the recklessness provision has been subsumed by the involuntary manslaughter statute; and that if the charge is constitutional, there was no factual basis for the charge. Trial counsel asserted that including recklessness in the manslaughter and murder charge would confuse the jury. (ECF No. 5-13 at 29-30.) The trial judge rejected trial counsel's argument.

The pertinent portion of the trial court's jury charge as to murder, with an emphasis on the Mouzon language, stated as follows:

Malice is defined in the law of homicide as a term of art; that is, a technical term importing wickedness, excluding just cause or legal excuse. *An old South Carolina case says that malice does not necessarily impart ill will towards the individual injured but signifies rather a general malignant recklessness of the lives and safety of others or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.*

(ECF No. 5-14 at 35-36) (emphasis added).⁶ By contrast, the relevant portion of the involuntary manslaughter charge at issue stated:

Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either an unlawful act not amounting to a felony and not naturally

⁴ State v. Mouzon, 99 S.E.2d 672 (S.C. 1957).

⁵ The court notes that the Mouzon instruction was upheld by the South Carolina Supreme Court in a 2006 case. See Herring, 692 S.E.2d at 497 n.7 (citing State v. Reese, 633 S.E.2d 898, 902 (S.C. 2006), overruled on other grounds by State v. Belcher, 685 S.E.2d 802 (S.C. 2009)).

⁶ This paragraph is only a portion of the malice instructions provided to the jury as part of the murder charge. (See ECF No. 5-14 at 36-37.)

tending to cause death or great bodily harm; or, a lawful act with reckless disregard for the safety of others.

Unintentional means the defendant did not intend for anyone to be killed or seriously injured.

Reckless disregard for the safety of others is more than mere negligence or carelessness. Mere negligence or carelessness is the failure to use care that a person of ordinary reason would use under the same circumstances.

Recklessness is a conscious failure to use ordinary care. A reckless disregard for the safety of others means that you not interested in the consequences of your acts or the rights and safety of others. If a person who knows or should know that ordinary care requires certain precautions be taken for the safety of others when using a dangerous instrumentality such as a gun or a car but that person fails to use those precautions without concern, the person's actions are considered reckless.

(ECF No. 5-14 at 38-39.)

On appeal, Herring raised several challenges to the Mouzon charge. His due process argument first alleged that the language is unconstitutionally vague because there is no means to differentiate between recklessness as it was used in the involuntary manslaughter charge and the recklessness required to elevate the offense to murder. Herring also argued that the Mouzon charge unconstitutionally shifted the burden of proof for the defendant's mental state to the defendant. (ECF No. 1-4 at 46-47.) The South Carolina Supreme Court summarily rejected Herring's challenge to the Mouzon charge, stating the following:

The remaining issues are affirmed pursuant to SCACR Rule 220(B)(1) and the following authorities: . . . Issue 6 (State v. Mouzon instruction) – State v. Reese, 370 S.C.[]31, 633 S.E.2d 898 (2006) (upholding Mouzon instruction); Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009) (in determining prejudice[] from jury instructions, court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution).

(ECF No. 1-10 at 14); see also Herring, 692 S.E.2d at 497 n.7.

In his Amended Petition, Herring argues that the South Carolina Supreme Court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as decided by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Relying on a case from the United States Court of Appeals for the Seventh Circuit, Herring alleges that he was deprived of his recklessness defense because the jury was not instructed "that it could *not* convict Herring if it found that Herring engaged in 'a lawful act with reckless disregard for the safety of others' " and because the jury was instructed that "it had to find malice, the essential element of murder, if he acted with a 'general malignant recklessness of the lives and safety of others.' " ⁷ (ECF No. 13-1 at 19-20.)

As an initial matter the court notes that "it is Supreme Court precedent, and not [] [c]ircuit precedent, to which we look in applying the AEDPA standard of review." Bustos v. White, 521 F.3d 321, 325 (4th Cir. 2008) (citing Williams, 529 U.S. at 381-82, 390 n.15). Herring has identified no United States Supreme Court case unreasonably misapplied by the South Carolina Supreme Court on this issue. Moreover, in any event, the Seventh Circuit case does not support Herring's Petition. The Seventh Circuit in Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), found that a trial court's jury instructions on voluntary manslaughter and murder resulted in explicit misdirection to a level

⁷ In Herring's response in opposition to the respondent's motion for summary judgment, he also appears to argue for the first time that the trial court erred in including the word "or" between the phrases "a general malignant recklessness of the lives and safety of others" and "a condition of mind which shows a heart regardless of social duty and fatally bent on mischief." (See ECF No. 25 at 6-7.) The court finds that this argument is not properly before the court. See, e.g., Bridgeport Music, Inc. v. WM Music Corp., 508 F.3d 394, 400 (6th Cir. 2007) (holding that a party may not expand its claims to assert new theories in response to summary judgment); White v. Roche Biomedical Labs., Inc., 807 F. Supp. 1212, 1216 (D.S.C. 1992) (noting that "a party is generally not permitted to raise a new claim in response to a motion for summary judgment").

that violated the constitutional guarantee of due process. In summarizing those instructions, the court stated that

[t]he jury was told that to sustain a charge of voluntary manslaughter the State had to prove either that the defendant “acted under a sudden and intense passion resulting from serious provocation by another” or that the defendant held an unreasonable belief that circumstances existed which would have justified the killing. The jury was also given the elements necessary to sustain a charge of murder, which did not specifically include the “manslaughter defenses” of provocation or unreasonable belief of justification. Finally, to avoid a murder conviction, a defendant must have “reasonably” believed that the use of force against the decedent was necessary to defend herself against “the imminent use of unlawful force.”

In order to return the murder verdict, then, the jury was required to find that the petitioner was not completely justified in using the deadly force that she used. Yet the jury was not told that if it found that she had acted with some lesser level of justification it could not convict her of murder.

Falconer, 905 F.2d at 1133. The court further noted that “the Illinois Supreme Court held in a separate, consolidated case that it was ‘grave error’ to give instructions identical to those given at petitioner’s trial.” Id. at 1131.

The court finds that unlike those found to be deficient in Falconer, the jury charges at Herring’s trial did not result in explicit misdirection. Rather, contrary to Herring’s assertions, the instructions at issue here distinguish between the “*malignant*” recklessness required to sustain a murder charge, more specifically described as “a condition of mind which shows a heart regardless of social duty and fatally bent on mischief,” and the “reckless disregard for the safety of others” associated with involuntary manslaughter, described as being “not interested in the consequences of your acts or the rights and safety of others.” (ECF No. 5-14 at 35-36, 38-39.) Moreover, reading the charges as a whole (see ECF No. 5-14 at 26 through ECF No. 5-15 at 6), the court finds that the South Carolina Supreme Court did not err in finding no reasonable likelihood that the jury applied the instruction in a way that violates the Constitution. See Herring, 692 S.E.2d at 497 n.7; see also

Waddington, 555 U.S. at 191. Thus, Herring has failed to demonstrate that the South Carolina Supreme Court unreasonably misapplied clearly established federal law in rejecting Herring's argument that the Mouzon charge violated his right to due process. Accordingly, Herring is not entitled to federal habeas corpus relief on this ground.

2. Jury Instructions for the Defense of Accident and for the Negligent Use of a Firearm

Herring next argues that the trial court's failure to charge the jury on the defense of accident or to include charges referencing the negligent use of a firearm charge in the trial court's involuntary manslaughter charge violated his right to due process.

Trial counsel requested that the court charge the jury on the defense of accident, arguing that since the defendant possessed a concealed weapons permit, he had a lawful right to have the weapon out in his car. Contrarily, the solicitor argued that the defendant did not have a right to have it out in the parking lot, waiting; that the defendant failed to exercise due care with it; and that the defendant had allegedly been drinking all day. (See ECF No. 5-13 at 8-9.) The trial court denied the requested charge, stating that such a defense "is only allowable when the defendant is involved and engaged in a lawful act." (ECF No. 5-13 at 7-8.)

Trial counsel also requested that the trial court include in its involuntary manslaughter charge that "[o]ne who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter." (ECF No. 5-16 at 25) (quoting State v. Brown, 32 S.E.2d 825, 827 (S.C. 1945)). Trial counsel further requested that the voluntary manslaughter instructions include the following:

How do you, gentlemen, as jurors, think that a man of average sense in this position would handle a dangerous weapon or implement, under given circumstances generally? Then, under the testimony of the case you are trying, has the state shown

beyond a reasonable doubt that the defendant was guilty of negligence—that is, he did act in that manner with the dangerous weapon or implement as a man of average sense and disposition, under the circumstances which the testimony shows to have existed in the case—he did act in that way, and, as a result of that, he did inflict the mortal wound, as alleged in the indictment, which caused the death of the defendant, as charged, if you find it so, then that will be a case of manslaughter.

(ECF No. 5-16 at 27) (quoting State v. Gilliam, 45 S.E. 6, 7 (S.C. 1903) and State v. Quick, 167 S.E. 19, 21 (S.C. 1932)). However, during discussions with the trial judge, trial counsel stated that the shorter charge from Brown is essentially a modern summary of the longer charge from Gilliam and Quick and that the defendant would be satisfied if just the shorter charge were included. (ECF No. 5-12 at 37-38; see also ECF No. 5-13 at 4.) Trial counsel argued that such a charge was warranted because the murder charge stated that one can infer malice from the use of a deadly weapon and, therefore, the jury should also be told that negligent use of a deadly weapon is involuntary manslaughter. (ECF No. 5-13 at 2, 3.) The solicitor argued that the trial court's charges accurately stated the law and appeared to argue that the additional charge would be a charge on the facts, which the parties could argue to the jury. (See ECF No. 5-13 at 2-3.) The trial court noted that involuntary manslaughter requires a finding of criminal negligence, which is a reckless disregard for the safety of others, and which was included in the proposed charges. (Id.) Ultimately, the court did not include a charge on negligent use of a firearm in its instructions.

The South Carolina Supreme Court summarily rejected Herring's arguments stating the following:

The remaining issues are affirmed pursuant to SCACR Rule 220(B)(1) and the following authorities: . . . Issue 4 (failure to charge the law of accident) – State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999) (for homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon); State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298 (2002) (to warrant reversal, trial court's refusal to give requested charge must be both erroneous

and prejudicial to defendant): Issue 5 (involuntary manslaughter instruction) – McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) (failure to give requested jury instructions is not prejudicial error where instructions given adequately cover the law).

(ECF No. 1-10 at 14); see also Herring, 692 S.E.2d at 497 n.7.

In presenting their respective positions to this court, the parties argue extensively over the requirements of South Carolina state law with regard to these charges. However, the court notes that “[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). The relevant question before the court is whether the trial court’s failure to provide these instructions rose to such a level that it violated Herring’s right to due process and that the South Carolina Supreme Court unreasonably misapplied federal law as determined by the United States Supreme Court in finding that it did not.⁸ Herring appears to argue that the trial court’s failure to provide these charges was sufficiently harmful to make Herring’s conviction unfair.

Having reviewed the parties’ arguments, the trial testimony, and the charges given by the trial court, the court finds that Herring has not demonstrated that the trial court’s failure to issue these jury charges under the circumstances in this case amounts to a due process violation. Cf. Cool v. United States, 409 U.S. 100, 103-04 (1972) (*per curiam*) (holding that an instruction which “allow[ed] the jury to convict despite its failure to find guilt beyond a reasonable doubt” mandates reversal of the conviction). “Failure to give an appropriate theory-of-defense instruction, without more, is not a violation of the Due Process Clause. Some other circumstances, demonstrating a serious miscarriage

⁸ To the extent that Herring argued in his direct appeal that his due process rights were violated by failing to include these charges and the South Carolina Supreme Court did not specifically address these arguments, Herring must show that there was no reasonable basis for the state court to deny relief. See Harrington, 131 S. Ct. at 784.

of justice, must be present.” Nickerson v. Lee, 971 F.2d 1125, 1138 (4th Cir. 1992), overruled on other grounds by Gray v. Netherland, 518 U.S. 152, 165-66 (1996) (internal quotation marks and citation omitted). Although Herring argues that his defense of accident was a “highly credible defense,” reading the charges as a whole, he has failed to demonstrate that a serious miscarriage of justice occurred and that the South Carolina Supreme Court denied Herring due process in its apparent finding that under state law the trial court did not err in failing to charge accident. (See Petr.’s Resp. Opp’n Summ. J. at 9, ECF No. 26 at 9.) Similarly, reviewing the trial court’s charges as a whole, Herring has failed to demonstrate a denial of due process in the South Carolina Supreme Court’s determination that the trial court’s failure to include an instruction in the manslaughter charge concerning negligent use of a firearm did not amount to prejudicial error as it adequately covered the law. Herring cannot demonstrate that the absence of such language from the manslaughter charge “so infected the entire trial that the resulting conviction violates due process.” Waddington, 555 U.S. at 191 (internal quotations marks and citation omitted). Finally, it does not appear that Herring’s trial counsel was precluded from arguing to the jury his position with respect to the gun, specifically that he may have been negligent. Accordingly, Herring cannot demonstrate that the South Carolina Supreme Court unreasonably misapplied clearly established federal law as decided by the Supreme Court of the United States in rejecting these allegations of error. See Bustos, 521 F.3d at 325 (stating that “it is Supreme Court precedent, and not Fourth Circuit precedent, to which we look in applying the AEDPA standard of review”) (citing Williams, 529 U.S. at 381-82, 390 n.15).

3. **Application of State v. Belcher**

Herring next argues that the South Carolina Supreme Court denied him due process in refusing to apply its holding in State v. Belcher, 685 S.E.2d 802 (2009), to Herring's case. The parties agree that the Belcher case was decided by the state Supreme Court after briefing and argument before the Supreme Court in Herring's case, but before the Supreme Court issued its decision in Herring's case, and that appellate counsel submitted a letter to the South Carolina Supreme Court prior to the issuance of its decision in this case arguing for the application of Belcher.

The Belcher case held that "the 'use of a deadly weapon' implied malice instruction has no place in a murder . . . prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing" Id. at 809. However, the South Carolina Supreme Court specifically stated that "[b]ecause our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final *where the issue is preserved*." Id. at 810 (emphasis added) (citing Griffith v. Kentucky, 479 U.S. 314 (1987) and Harris v. State, 543 S.E.2d 716, 717-18 (Ga. 2001)).

In issuing its decision in Herring's case, the South Carolina Supreme Court did not directly address this argument; however, as stated above, when no explanation accompanies the state court's decision, a federal habeas petitioner must show that there was no reasonable basis for the state court to deny relief. See Harrington, 131 S. Ct. at 784. Further, pursuant to § 2254(d), a federal habeas court must (1) determine what arguments or theories supported or could have supported the state court's decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. Id. at 786.

In this case, as argued by the respondent, the South Carolina Supreme Court could reasonably have found that the Belcher issue was not properly preserved for appellate review. Although Herring argues that his objection to the trial court's decision not to charge the jury that "[o]ne who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter" properly preserved this issue for review, this objection did not pertain to the propriety of the trial court's charge regarding murder. Herring did not challenge the trial court's murder charge, which included the implied malice instruction. In fact, with regard to the murder charge, trial counsel stated, "[w]e're fine with that." (ECF No. 5-12 at 35.) The Belcher issue is a distinct one from the involuntary manslaughter instruction the trial court declined to charge. The South Carolina Supreme Court could reasonably have determined that counsel's objection to the *exclusion* of a requested charge on involuntary manslaughter was not adequate under state issue preservation rules to encompass the *inclusion* of an instruction with regard to implied malice in the murder charge. See State v. Adams, 504 S.E.2d 124, 126-27 (S.C. Ct. App. 1998) (holding that the issue of whether the State presented sufficient evidence of intent to accomplish a sexual battery was not preserved for review, in part because the precise argument was not raised to and ruled upon by the trial court as the defendant merely argued generally that evidence did not rise to the level of reasonable doubt). Accordingly, Herring has failed to show that there was no reasonable basis for the state court to deny relief. Further, he cannot show that there is no possibility that fairminded jurists could disagree that a failure to apply the Belcher decision retroactively under the circumstances in this case violates a holding of a prior decision of the United States Supreme

Court.⁹ See Harrington, 131 S. Ct. at 784, 786; see also American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 177-78 (1990) (plurality opinion, O'Connor, J.) (observing that "[t]he determination whether a constitutional decision of this Court is retroactive . . . is a matter of federal law. When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.").

4. Recusal

Herring next argues that he was also denied his right to due process when the Honorable Jean Hoefler Toal, Chief Justice of the South Carolina Supreme Court, denied Herring's motion to recuse herself from considering Herring's direct appeal. The basis of Herring's motion was that one of the issues Herring was presenting on direct appeal challenged the authority of the Chief Justice to issue an administrative order authorizing law enforcement officers to obtain warrants in Richland County by telephone and facsimile transmissions without personally appearing before the magistrate. (ECF No. 1-8.) The Chief Justice denied Herring's motion. (ECF No. 1-9.)

The United States Supreme Court has stated that "[u]nder our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 129 S. Ct. 2252, 2257 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). Further, "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.' As the Court has recognized, however, 'most matters relating to judicial disqualification

⁹ As pointed out by the respondent, the Belcher case constituted a "clear break" from *prior state law*; it did not announce a new federal constitutional rule of criminal procedure. Consequently, even if the Belcher issue were properly preserved, the United States Supreme Court's decision in Griffith would not necessarily govern the retroactivity analysis. (See Respt.'s Mem. Supp. Summ. J. at 47-50 n.11, ECF No. 16 at 47-50) (examining case law discussing the limitations on the application of Griffith's requirement of retroactivity to new rules of state law).

[do] not rise to a constitutional level.’ ” Id. at 2259 (internal citations omitted). Moreover, constitutionally required recusal has been found in cases that “dealt with extreme facts that created an unconstitutional probability of bias that ‘cannot be defined with precision.’ ” Id. at 2265-66 (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986)).

In this case, Herring relies on the following statement by the United States Supreme Court:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that ‘Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.’ Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’

In re Murchison, 349 U.S. 133, 136 (1955) (internal citations omitted and alterations in original).

The Murchison case involved the denial of a motion to recuse a judge presiding over a show-cause hearing in a criminal contempt proceeding. The judge had been the so-called “one-man judge-grand jury” under Michigan law in the secret proceedings out of which the contempt charges arose. Id. at 134-35. The Supreme Court held that “it was a violation of due process for the ‘judge-grand jury’ to try these petitioners.” Id. at 139.

Upon review of the facts and circumstances in this matter, the court finds that Herring has failed to demonstrate that the state court unreasonably misapplied clearly established federal law in denying Herring’s motion for recusal. The situation in this case is unlike that in Murchison. Here, Herring alleges partiality because the Chief Justice issued, approximately eight years before Herring’s appeal, the administrative order that Herring was attacking. This alleged bias stemming

from a justice's ostensible interest in defending a position or rule she previously adopted is not the type of "interest in the outcome" proscribed by Murchison in the context of criminal contempt proceedings. Rather, as the respondent points out, Herring's ground is more akin to a party requesting an appellate judge to recuse in an appeal arguing against precedential authority which that judge had previously authored. Herring has failed to show that the purported interest by the Chief Justice in this issue posed an objective risk of actual bias or prejudgment that would implicate the Due Process Clause. See Caperton, 129 S. Ct. at 2263.¹⁰ Accordingly, the court finds that Herring has failed to demonstrate this case was one of those "rare instances" or consisted of "extreme facts" that would constitutionally mandate recusal. See id. at 2265, 2267 ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.") (internal quotation marks and citation omitted); see also id. at 2268 (observing that "[w]e have thus identified only two situations in which the Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is presiding over certain types of criminal contempt proceedings") (dissenting opinion, Roberts, C.J.).

5. Fourth Amendment Claims

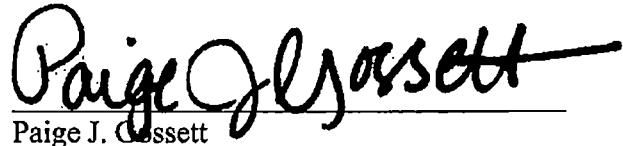
Finally, Herring argues that he was denied his right under the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures. Herring argues

¹⁰ Moreover, the court observes that although there was a concurring opinion in Herring's direct appeal, all five of the Justices appear to have agreed that the SLED search warrant, which was the warrant obtained via the procedures permitted by the administrative order, was proper. (See ECF No. 1-10 at 10-12, 15.) Thus, it appears that recusal of Chief Justice Toal would not have altered the result of Herring's appeal in any event.

extensively in his Amended Petition and his response in opposition to summary judgment the reasons that the search warrants violated his rights under the Fourth Amendment. However, a petitioner's allegations of a violation of the Fourth Amendment as a freestanding claim cannot constitute grounds for habeas relief, unless he demonstrates that he did not have a full and fair opportunity to litigate this claim in state court. See Stone v. Powell, 428 U.S. 465, 494 (1976) (concluding that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial"); Doleman v. Muncy, 579 F.2d 1258, 1265 (4th Cir. 1978) (applying Stone and holding that where a state court provides a mechanism under state practice to litigate Fourth Amendment claims, then the court "need not inquire further into the merits of the petitioner's case . . . unless the prisoner alleges something to indicate his opportunity for a full and fair litigation of his Fourth Amendment claim or claims was in some way impaired"). In this case, Herring was provided with an opportunity to present his Fourth Amendment claims by a motion to suppress at the trial court and thereafter on appeal to the South Carolina Supreme Court. Although Herring argues that the Chief Justice's denial of his motion to recuse denied him the opportunity to fully and fairly litigate his claim, for the reasons discussed above, the court finds this argument to be without merit. Therefore, having determined that Herring was provided an opportunity for full and fair litigation of his Fourth Amendment claims in accordance with Stone and Doleman, the court "need not inquire further into the merits of [Herring's] case." Doleman, 579 F.2d at 1265. Accordingly, Herring is not entitled to federal habeas corpus relief on this ground.

RECOMMENDATION

For the reasons stated above, the court recommends that the respondent's motion (ECF No. 17) be granted and Herring's Petition be denied.

A handwritten signature in black ink, reading "Paige J. Cassett", with a horizontal line underneath.

Paige J. Cassett
UNITED STATES MAGISTRATE JUDGE

January 25, 2012
Columbia, South Carolina

The parties' attention is directed to the important notice on the next page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

H. Dewain Herring, #321951,

Petitioner,

v.

Robert M. Stevenson, III, Warden
Broad River Correctional Institution,

Respondents.

Case No. 0:11-160-RMG-PJG

**PETITIONER HERRING'S OBJECTIONS TO THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION**

Petitioner Dewain Herring hereby objects to Magistrate Judge's Report and Recommendation (RR) granting summary judgment to the Respondent. Petitioner Herring hereby incorporates all arguments previously made in his Amended Petition, Memorandum in Support and Memorandum in Opposition to Respondent's Motion for Summary Judgment. [Dkt. 13, 13-1 and 26]. In addition, Petitioner submits the following specific objections to the factual findings and conclusions of law set forth in the RR:

A. Standard of Review/Factual Findings

The RR fails to apply the appropriate summary judgment standard under Rule 56, Fed. Rules Civ. P. Specifically, the Magistrate Judge in her summary of evidence simply adopts the factual recitation from the South Carolina Supreme Court's opinion and fails to consider material exculpatory evidence. Many of the statements in the S.C. Supreme Court's opinion cited in the RR do not have any basis in the record. For example, page 4 of the RR states that,

"Herring slowly pulled away, putting down the passenger side windows as he went. Hawkins, Weeks and John John had just gone inside when they saw Herring's vehicle coming back down River Drive toward Chastity's. According to Hawkins, John John was right inside the door. *Hawkins saw a flash of light come from the side of the vehicle and heard John John say, "Oh shit."* John John fell to the floor, having been hit in the left ear by a bullet which came through the front door."

The highlighted portion of this summary was contradicted by Hawkins own trial testimony. Hawkins admitted that he last observed John John looking out the door some 15 seconds before the shooting and he could not say whether John John was peeking out the door at the time of the shooting. (R.pp. 246-247). Hawkins therefore could not have seen a flash of light coming from the side of the vehicle.

The issue regarding the flash of light is very significant because Herring's forensic expert, whose testimony the RR simply ignores, concluded that the gun was discharged inside the shooters vehicle from near the glove box and that the driver of the vehicle was not pointing the gun and aiming it at the door. (R. pp. 886-92). If Herring had been shooting toward the door, the expert concluded that a bright fireball coming from the barrel pointing out of the window would be visible on the parking lot surveillance video. There was no such flash of light. (R. pp. 877-904). Richland County investigators even flew the video to the NASA space center in Florida and had the video enhanced and examined, but to no avail. (R. pp. 784-788). Also, the evidence established that the bullet entered at the top right hand corner of the door. Herring's expert testified that the location of the bullet entering the door would have been different if Herring had been leaning out and pointing the weapon outside the passenger door window toward the front door of the club. (R. pp. 896-900) The RR also ignores Herring's testimony that the shooting had to be an accident and fails to address or consider the testimony that Herring was likely drugged with the date rape drug GHB.

This exculpatory testimony should have been considered by the lower court in the discussion of Herring's due process claims relating to the improper charge on involuntary manslaughter and the failure to give a jury instruction on accident and negligent use of a fire arm. Moreover, in the discussion of the due process claim relating to the failure to charge the defense of accident, the RR states that the "the Solicitor argued that the defendant did not have a right to have it out in the parking lot, waiting." There is no evidence in the record that Herring was waiting in the parking lot with a gun out. Nor can such an inference be drawn from the evidence.

Lastly, the RR's discussion of the shooting within Herring's residence fails to consider the forensic evidence establishing that Herring was shot in the back of the arm, rather than the front, which supported Herring's claim that he was fleeing from the officers who he thought were intruders in his house.

B. Jury Instructions For Murder and Involuntary Manslaughter

Petitioner Herring objects to the Magistrate's rejection of the claim that the *Mouzon* charge delivered to the jury violated Herring's right to due process because the charge did not distinguish between the degree of recklessness required to prove malice for the murder charge from the degree of recklessness that would support a finding of the lesser offense of involuntary manslaughter. The Magistrate erroneously concluded that Herring's claim is premised solely upon the Seventh Circuit decision in *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990). Rather Herring's claim is grounded upon the due process right to have a lesser included offense charged to the jury if the evidence supports the charge. See, *Hopper v. Evans*, 456 605 (1962); *Leary v. Garraghty*, 155 F. Supp. 2d 568, 573-74 (E.D. Va. 2001); *Simpson v. Garrison*, 551 F.Supp. 618, 621 (W.D.N.C.1982), *aff'd*, 705 F.2d 445 (4th Cir.1983).

Furthermore, the Magistrate's attempt to distinguish *Falconer* is incorrect. Like *Falconer*, the jury could have found Herring guilty of murder even if it concluded that he acted lawfully (by being licensed to carry a concealed weapon) but with a reckless disregard for the safety of others. Under these circumstances Herring was denied his due process rights. *Id.*

The Magistrate also erroneously concludes that Herring improperly expanded the scope of this claim by arguing in his response in opposition to the Respondent's motion for summary judgment that the trial court erred by including the word "or" between the phrases "a general malignant recklessness of the lives and safety of others" and "a condition of mind which shows a heart regardless of social duty and fatally bent on mischief." See RR, fn 7.

In the Amended Petition and Memorandum In Support, Herring argues that the malignant recklessness language allowed the jury to convict Herring of murder based upon the same recklessness that would support a conviction for involuntary manslaughter. [Dkt 13-1 p. 17] The Respondent cites the phrase "a condition of mind which shows a heart regardless of social duty and fatally bent on mischief" used in the *Mouzon* charge and then argues that this phrase merely describes the amount of recklessness or conduct that crosses the line and indicates a depravity of mind and disregard for human life" [Dkt. 16, pp. 22-24].

Responding to this argument, Herring asserts that the charge given to the jury did not instruct the jury that it could only find Herring guilty of murder if the degree of recklessness crosses the line and establishes a condition of mind that is fatally bent on mischief. Herring has not improperly expanded his claim and it was error for the Magistrate to refuse to consider this defective charge as a whole.

Herring further objects to the Magistrate's finding that the South Carolina Supreme Court correctly found that there was no reasonable likelihood that the jury applied the instruction in a

way that violates the Constitution. To reach this conclusion, the Magistrate must necessarily have ignored the use of the disjunctive "or" and concluded that it was reasonable to assume the jury disregarded the instructions given. In addition, the Magistrate must have also failed to consider the exculpatory and conflicting evidence relied upon by Herring in his Petition.

C. Jury Instructions for the Defense of Accident and for the Negligent Use of a Firearm

Herring objects to the Magistrate's conclusion that Herring has not demonstrated that the trial court's failure to charge the jury on the defense of accident and negligent use of a firearm did not amount to a due process violation; that the circumstances do not arise to a miscarriage of justice and that the Supreme Court's determination that the trial court's failure to include an instruction in the manslaughter charge concerning negligent use of a firearm did not amount to prejudicial error as it adequately covered the law. As noted previously, the Magistrate failed to consider the un-contradicted exculpatory forensic evidence presented at trial from which a jury should have only found that the shooting was an accident. This evidence established that if the shooting was intentional there would have been a noticeable fireball from the passenger window captured on the video tape and the angle of entry of the bullet would have been different. The Magistrate also ignored Herring's testimony that the shooting must have been an accident as well as the undisputed evidence that Herring had a concealed weapons permit and he could lawfully possess the firearm in the passenger compartment of his vehicle.

D. Application of *State v. Belcher*

Herring objects to the finding that the *Belcher* issue was not preserved by Herring at trial or on appeal and therefore the South Carolina Supreme Court could have reasonably found that the *Belcher* issue was not preserved for appellate review.

Additionally, Herring objects to the Magistrate's conclusion that *Belcher* is not required to be applied retroactively under *Griffith v. Kentucky*, 479 U.S.314 (1987). Specifically, the South Carolina Supreme Court recognized in *Belcher* that it should be applied to cases which are pending on direct review or not yet final where the issue is preserved. Obviously, the South Carolina Supreme Court could not rule that the *Belcher* decision applies to all cases which are pending on direct review or not yet final where the issue is preserved, except for Herring's appeal. Yet, this would be the result of the Magistrate's ruling.

E. Recusal

Herring objects to the Magistrate's conclusion that he was denied his right to due process by the refusal of the Chief Justice to recuse herself from consideration of his appeal. The United States Supreme Court explained, "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. *To this end no man can be a judge in his own case...* Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955).

Here, the Chief Justice served as a judge of her own conduct that was being challenged on appeal. This conduct is nothing akin to a judge sitting upon an appeal where the court is being asked to overturn a prior decision issued by the judge in another case. Here, the Chief Justice order is administrative, rather than judicial. Furthermore, the appeal is from a direct application of the administrative order which if successful could have led to the suppression of evidence seized pursuant to that order. Rather, this situation is analogous to a judge hearing an appeal

from an order denying a motion to suppress evidence seized pursuant to a search warrant issued by the same judge.

Herring also objects to the Magistrate's conclusion that he could not show prejudice from the Chief Justice's participation in the appeal. See fn. 10. The United States Supreme Court has explicitly ruled that prejudice is presumed when a judge who should be disqualified from sitting on a case nevertheless participates in the ruling. *In re Murchison*, 349 U.S. 133, 136 (1955); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S. Ct. 2252, 2263, 173 L. Ed. 2d 1208 (2009).

F. Fourth Amendment Claims

Herring objects to the Magistrate's conclusion that he had a full and fair opportunity to litigate his Fourth Amendment claims and therefore the Court need not address these claims. The Magistrate is incorrect in two respects. First, the Magistrate's decision regarding the recusal of the Chief Justice is wrong. Second, there must more than just a suppression hearing to satisfy *Stone v. Powell*.

The "opportunity for full and fair litigation" is not limited to the evidentiary hearing required by *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) (overruled by, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)), but "contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards. Thus, a federal court is not precluded from considering Fourth Amendment claims in habeas proceedings when the state court willfully refuses to apply the correct and controlling constitutional standard." *Gamble v. State of Okl.*, 583 F.2d 1161 (10th Cir. 1978); See also, *Pulver v. Cunningham*, 419 F. Supp. 1221 (S.D. N.Y. 1976), judgment aff'd, 562 F.2d 198 (2d Cir. 1977), ("*Stone v. Powell* cannot be read merely as a reiteration of *Townsend v. Sain*... . [I]t

is apparent that the opportunity to litigate encompasses more than an evidentiary hearing in the trial court."); *Doleman v. Muncy*, 579 F.2d 1258 (4th Cir. 1978), (noting the fact that the reference to *Townsend* was preceded by "cf.," stated, "Had the Court intended to engraft the *Townsend v. Sain* criteria into the *Stone* situation, it could have done so expressly instead of by a passing footnote reference.")

Here, Herring was denied a full and fair opportunity to litigate the search issue by the State courts' willful refusal to apply the correct and controlling legal standard. At Herring's trial, the trial judge correctly concluded that the warrantless search of Herring's garage was unconstitutional. Yet, the trial judge then clearly and willfully ignored controlling constitutional standards by concluding that the search warrant affidavits for the two subsequent searches contained sufficient facts, separate and distinct from the information that a 4Runner was parked in the garage, to support a finding of probable cause by the magistrate.

The majority of the South Carolina Supreme Court then rejected the trial judge's correct conclusion that the warrantless search and further concluded that the search did not disclose any incriminating evidence that was used against Herring. The majority of the Supreme Court concluded that the "peek" which led to the discovery of the 4Runner in the garage was not unreasonable because of exigent circumstances, i.e. an apparent murder had been committed some two hours earlier and the Deputies went to the address on the suspect driver's license. However, federal courts have rejected the exigent circumstances to support a warrantless search where the search was conducted more than 40 minutes after the suspect was seen entering the residence. See, *U.S. v. Diaz-Segovia*, 457 F.Supp. 260, 271-72 (D.Md.1978). Respondent has not cited a single case that supports the Supreme Court's ruling that there were exigent circumstances justifying the warrantless search of Herring's residence.

Respondent however argued that the warrant issued to the Richland County Sheriff's Department would nevertheless be valid because there were sufficient facts contained in the affidavit, other than reference to the 4Runner located in the garage, which would lead disinterested magistrate to conclude that a search should be issued of the defendant's premises. Return p. 65. This was the basis of the trial judge's ruling to deny the motion to suppress. This rationale was rejected by the South Carolina Supreme Court and is contrary to well established Fourth Circuit jurisprudence that there must be some evidence linking criminal activity to the residence to be searched. See, *United States v. Lalor*, 996 F.2d 1578 1583, cert.denied 510 U.S. 983 (1993).

The first six sentences of the affidavit's basis for seeking a warrant does not have any link to the residence. The next two sentences actually link the vehicle to a different address, 3612 Landmark Drive, a business location. The only sentence in the affidavit pertaining to the 460 Alexander Circle address states, "A search of Richland County records also provided an additional address of 460 Alexander Circle." This statement is so lacking in specificity that it does not provide any basis for linking this address to the events at Chastity's. *U.S. v. Dickerson*, 975 F.2d 1245, 1249-50 (7th Cir. 1992) (affidavit was not sufficient to support probable cause determination where only link was registration of car to address to be searched, without allegation that car was parked at the location.)

Respondent also argued that the good faith exception in *United States v. Leon* 468 U.S. 897 (1984) precludes application of the exclusionary rule. However, under *Leon*, suppression is appropriate if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. *Id.* at 926. Here, the officers who obtained the warrant did so only after conducting an illegal warrantless

search of Herring's residence, and included the fruits of this illegal search in the affidavit presented to the magistrate. There is not a good faith exception for such illegal conduct. See, *United States v. Villard*, 678 F. Supp. 483, 490 (D.N.J. 1988) (This court finds that the good faith exception established in *United States v. Leon* does not apply here. *Leon* did not address the admissibility of evidence seized under a warrant that was based on information obtained in a prior illegal search. Further, it would be inappropriate and inconsistent with the reasoning of *Leon* to extend the good faith exception to such a situation); *State v. Hicks*, 146 Ariz. 533, 535, 707 P.2d 331, 333 (Ariz. Ct. App. 1985) aff'd, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987)(The state argues that because the officer subsequently obtained a search warrant that his actions ought to be validated under the "good-faith" exception to the exclusionary rule... [W]hile *Leon* does hold that officers may reasonably rely on a magistrate's assessment of probable cause in issuing a warrant and that exclusion need not be ordered if the magistrate is wrong in that assessment, it does not hold that a subsequent warrant validates an earlier illegal search. *Police officers cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate.*) *United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987)(The *Leon* analysis and good faith exception are not applicable to this case. The fact that Officer Jensen conducted a warrantless search of the vehicle which violated Vasey's Fourth Amendment rights precludes any reliance on the good faith exception)

Lastly, Respondent argued that even if the warrant was invalid and evidence should have been suppressed, any error was harmless, relying upon *New York v. Harris*, 495 U.S. 14 (1990) (where the Court held that the exclusionary rule would not bar introduction of statements made outside Defendant's home after *Miranda* warnings were given) However, Herring did not admit to any criminal conduct during his custodial interrogation. Respondent also ignores the fact that

the gun used in the Chastity's shooting was found in the search of Herring's residence. Moreover, Herring was convicted of pointing and presenting a firearm. This charge and conviction arose out of the Richland County Sheriff's Deputies execution of the illegal search warrant.

CONCLUSION

Based upon the foregoing, Petitioner requests that the Court review the Report and Recommendation of the Magistrate Judge de novo and issue a writ of habeas corpus to direct Respondent to order a new trial and/or release Petitioner from custody and to grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/James M. Griffin

James M. Griffin, Fed. I.D. No. 1053

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(803) 771-8000

Attorneys for Petitioner

February 13, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the following document upon counsel for Respondent via electronic service this 13th day of February 2012:

**PETITIONER HERRING'S OBJECTIONS TO THE
MAGISTRATE'S REPORT AND RECOMMENDATIONS**

/s/ James M. Griffin

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Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

H. Dewain Herring,

Petitioner,

VS.

Robert M. Stevenson, III, Warden of
Broad River Correctional Institution,

Respondent.

C/A No. 0:11-160-MBS-PJG

OPINION AND ORDER

Petitioner H. Dewain Herring is a prisoner in the custody of the South Carolina Department of Corrections who currently is housed at the Broad River Correctional Institution. Petitioner, represented by counsel, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that he is being held in custody unlawfully. Petitioner seeks relief in the form of vacatur of his conviction.

This matter is before the court on Respondent's¹ motion for summary judgment filed April 29, 2011. ECF No. 17. Petitioner filed a response in opposition on June 15, 2011. ECF No. 26. In accordance with 28 U.S.C. § 636(b)(1) and Local Rule 73.02, D.S.C., this matter was referred to United States Magistrate Judge Paige J. Gossett for pretrial handling. The Magistrate Judge issued a Report and Recommendation on January 25, 2012, in which she recommended that summary judgment be granted. ECF No. 28. On February 13, 2012, Petitioner filed objections to the Report and Recommendation. ECF No. 29.

¹ Petitioner initially named William R. Byars, Jr., director of the South Carolina Department of Corrections, as an additional respondent. Byars was previously terminated as a party because he is not Petitioner's immediate custodian. ECF No. 8. Although Petitioner subsequently named Byars in his amended petition, the court construes the previous order as terminating Byars once again.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility for making a final determination remains with this court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The court is charged with making a *de novo* determination of any portions of the Report and Recommendation to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or may recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

I. BACKGROUND

On February 15, 2006, Petitioner was indicted in Richland County, South Carolina, for murder and pointing and/or presenting a firearm. ECF No. 4-1 at 19 & 21. Prior to trial, Petitioner moved to exclude various evidence seized during three searches of his home. ECF No. 5-15 at 31; *see* ECF No. 5-16 at 1-24. On May 21, 2007, Petitioner was convicted by a jury of both offenses. *Id.* at 16-17. Petitioner was sentenced to thirty years imprisonment for murder and five years imprisonment for pointing and/or presenting a firearm, to be served concurrently. *Id.* Petitioner filed a notice of appeal on May 29, 2007. ECF No. 1-2 at 1. On Petitioner's motion, the South Carolina Supreme Court certified the case for review on February 5, 2009, transferring jurisdiction from the appellate court. *See* ECF No. 1-3 at 1; S.C. App. Ct. R. 204(b).

Petitioner raised the following issues in his appeal to the South Carolina Supreme Court:

1. Did the trial court err in denying the defense motions to suppress the three searches of appellant's residence and the fruits of those searches?
2. Did the trial court abuse its discretion in allowing lay witnesses to give their opinion of what could be seen on the video, when those witnesses did not personally observe the actual events depicted in that portion of the video?
3. Did the trial court abuse its discretion in denying the defense mistrial motion

based on the admission of improper lay opinion testimony?

4. Did the trial court commit reversible error in denying the requested charge on accident?
5. Did the trial court commit reversible error in denying the requested charges on involuntary manslaughter based on negligent use of a deadly weapon?
6. Did the trial court commit reversible error in granting the State's request to charge based on *State v. Mouzon*?
7. Did the trial court err in denying the motion for directed verdict with respect to the charge of pointing and presenting a firearm?
8. Was the cumulative prejudice that resulted from all the erroneous rulings such that appellant is entitled to a new trial?

ECF No. 1-4 at 7. On June 16, 2009, Petitioner filed a motion to recuse Chief Justice Jean Toal.

ECF No. 1-8. Petitioner explained that he was challenging the validity of a search warrant that was obtained by telephone and fax pursuant to an administrative order issued by Chief Justice Toal, as well as the validity of the order itself. ECF No. 1-8 at 3-4. Petitioner's motion was denied on June 18, 2009. ECF No. 1-9.

The South Carolina Supreme Court heard oral arguments on June 23, 2009. ECF No. 1-10 at 1. On December 21, 2009, the supreme court affirmed Petitioner's conviction and sentence by published opinion. ECF No. 1-10; *State v. Herring*, 692 S.E.2d 490 (S.C. 2009). On January 20, 2010, Petitioner filed a petition for rehearing, requesting that the supreme court reconsider its ruling and apply the holding of *State v. Belcher*, 685 S.E.2d 802 (S.C. 2009), which was issued on October 12, 2009, between the date of the oral argument and the ruling in Petitioner's case. ECF No. 1-11. The petition for rehearing also restated Petitioner's request that Chief Justice Toal recuse herself from participation in the case. *Id.* The supreme court denied the petition for rehearing on May 14, 2010, and remitted the case to the lower court. ECF No. 1-12; ECF No. 1-

13.

The South Carolina Supreme Court summarized the facts of Petitioner's case as follows:

Herring was charged with the January 29, 2006 shooting of an employee of Chastity's Gold Nightclub (Chastity's), a strip club in Columbia. The facts giving rise to the shooting are as follows.

After golfing in Aiken with friends on the day of January 28, 2006, at which he had consumed numerous beers, Herring stopped by a bar for a few drinks on the way home, and then returned home around 7:30 p.m. Herring had a couple more drinks at his home with a golfing buddy before the friend left. Herring laid down intending to go to sleep, but got up and decided to go a Forest Acres restaurant. When the restaurant was closed, Herring changed his mind and went to Platinum Plus, a Columbia strip club. He had a drink and paid a dancer for a lap dance and left Platinum Plus. On his way home, he decided to stop by Chastity's on River Drive; he arrived shortly after 11:00 p.m. According to Herring, he ordered a drink at the bar, but he has very little recall of any events for several hours thereafter.

According to witnesses and employees of Chastity's, Herring purchased a drink and paid for a \$30.00, three minute lap dance from a dancer named Mia. After the lap dance, Herring paid Mia for a \$300 dance in what was known as the Champagne room.

Mia took Herring to the Champagne room and told him to wait while she went to freshen up. A bouncer, Carl Weeks, went to check on Herring a few minutes later and found him naked and masturbating on the sofa. The bouncer told Herring he could not do that and told him he would have to leave. When Herring did not move, the bouncer got the manager, John Johnson (John John). When they returned, Herring was dressed. Weeks told Herring he would either have to leave, or they would call police and have him arrested for solicitation of prostitution. According to Weeks, Herring responded, "No. I will fucking shoot you." John John and a bouncer named Donnie Hawkins escorted Herring to the front door at 11:57 p.m. John John walked outside with Herring and used a two-way radio to call Herring's license plate number out to Weeks, who was standing in the doorway, as Herring drove away. Weeks and Hawkins watched as Herring backed up his black SUV, and fumbled with his glove compartment with his right hand. Herring slowly pulled away, putting down the passenger side windows as he went. Hawkins, Weeks and John John had just gone inside when they saw Herring's vehicle coming back down River Drive toward Chastity's. According to Hawkins, John John was right inside the door. Hawkins saw a flash of light come from the side of the vehicle, and heard John John say, "Oh shit!" John John fell to the floor, having been hit in the left ear by a bullet which came

through the front door. He died a short while later at the hospital.

Upon arriving at the scene of Chastity's, police were given Herring's license tag number, which was registered to his office address in Columbia. Police patrolled the office parking lot, but did not find the vehicle. They then determined Herring's home address and went there at 2:10 a.m. on January 29, 2006. A police officer, seeing a light on in the garage, peeked in the garage window to see if the suspect was there. Although the suspect was not there, the officer did see the vehicle, which they realized was Herring's. They knocked on the door and rang the doorbell several times and, receiving no answer, they returned to the police station and obtained a search warrant for the home.

Police went back to Herring's residence at approximately 4:00 a.m. to execute the search warrant. They rang the doorbell several times but received no answer. They entered forcibly, announcing they were police with a search warrant. Officer Linfert testified that he saw Herring in the hallway and recognized him from the photo on his driver's license. Linfert told Herring to get down on the ground, but Herring ran back down the hall toward a bedroom. He followed Herring to the bedroom, and saw Herring pull a gun from a nightstand and point it in his direction. Officer Linfert yelled at him to drop the gun and then fired one shot at him. Other officers also opened fire, and Herring was hit in the arm. Herring called 9-1-1 and told them he believed there were intruders in his home. After talking with the 9-1-1 operator, Herring surrendered upon realizing the "intruders" were indeed police officers.

Herring initially told police he had not left the house after returning home from Aiken; he did not recall going to Chastity's. When police told him of the video tape which showed him entering and leaving Chastity's, he remembered only being at the bar, having a drink, and a gunshot firing; the next memory he had was of police bursting into his home. He subsequently began remembering more details, such as paying for a lap dance from a light skinned black woman.

Bullet fragments removed from John John's head conclusively matched a .357 Magnum Ruger owned by Herring; the Ruger was found under some clothing in his bedroom closet during a SLED search of the home. Gunshot residue was found on the passenger side of Herring's vehicle. A jury convicted Herring of murder and pointing and presenting a firearm.

State v. Herring, 692 S.E.2d 490, 492-93 (S.C. 2009) (footnotes omitted).

Petitioner filed the within § 2254 petition on October 21, 2010. ECF No. 1. Petitioner asserts the following ground for relief:

1. Petitioner's Due Process right to a fair trial was denied because the jury instructions equated the mental state required for a conviction of murder with the same mental state necessary for the lesser included offense of involuntary manslaughter, thereby allowing the jury to find Petitioner guilty of murder even if Petitioner possessed the mitigating state of mind for involuntary manslaughter.
2. Petitioner's Due Process rights to a fair trial were denied because the jury was not instructed on the defense of accident nor provided instructions pertaining to the negligent use of a firearm.
3. Petitioner was denied his right to Due Process as a result of the South Carolina Supreme Court's decision to refuse to apply its decision in *State v. Belcher*, . . . 685 S.E.2d 802 (2009) to the Petitioner as required by *Griffith v. Kentucky*[,] 479 U.S. 314 (1987).
4. Petitioner was denied his right to Due Process as a result of the refusal of the Chief Justice of the South Carolina Supreme Court to recuse herself from participating in the appeal from [Petitioner's] conviction which necessarily involved a direct review of the legality of the Chief Justice's Administrative Order.
5. Petitioner was denied his right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Petitioner was further deprived of his right to fully and fairly litigate this Fourth Amendment claim in the South Carolina state courts as a result of the refusal of the Chief Judge to recuse herself from participation and the Court's refusal to apply the correct and controlling legal standard applicable to Fourth Amendment claims.

ECF No. 13 at 7. The petition is governed by the terms of 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996.

II. STANDARD OF REVIEW

To prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) he is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The facts and any inferences drawn from the facts should be viewed in a light most favorable to

the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather he must demonstrate that specific, material facts exist which give rise to a genuine issue. *Id.* at 324.

An application for a writ of habeas corpus with respect to a claim that was adjudicated on the merits in state court proceedings cannot be granted unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A determination of a factual issue made by a state court is presumed to be correct. Petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). “Where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.” *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011).

A decision is “contrary to” clearly established federal law if it either applies a legal rule that contradicts prior Supreme Court holdings or reaches a conclusion different from that of the Supreme Court “on a set of materially indistinguishable facts.” *Buckner v. Polk*, 453 F.3d 195, 198 (4th Cir. 2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). A decision is an “unreasonable application” of clearly established federal law if it “unreasonably applies” a

Supreme Court precedent to the facts of the petitioner's claim. *Id.* (quoting *Williams*, 529 U.S. at 413). The court's "review is . . . deferential because [the court] cannot grant relief unless the state court's result is legally or factually unreasonable." *Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000) (quoting *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999)).

III. DISCUSSION²

A. Jury Instructions for Murder and Involuntary Manslaughter

The trial judge instructed the jury that because Petitioner was charged with murder, the prosecution must prove that he "killed another with malice aforethought." ECF No. 5-14 at 35.

The trial judge instructed the jury that:

Malice is defined in the law as a term of art; that is, a technical term importing wickedness, excluding just cause or legal excuse. An old South Carolina case says that malice does not necessarily impart ill will towards the individual injured but signifies rather a general malignant recklessness of the lives and safety of others or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.

Id. at 35-36.³ The trial judge also instructed the jury on the lesser included offense of involuntary manslaughter, stating that:

Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or, a lawful act with reckless disregard for the safety of others. . . . Recklessness is a conscious failure to use ordinary care. A reckless disregard for the safety of others means that you [are] not interested in the consequences of your acts or the rights and safety of

² Petitioner filed objections to the Magistrate Judge's findings on all of his claims. Although the court will conduct a *de novo* review of all of Petitioner's objections, the court shall address all but one of Petitioner's claims without reference to the Report and Recommendation.

³ The "old South Carolina case" is *State v. Mouzon*, 99 S.E.2d 672 (S.C. 1957). See ECF No. 16 at 21.

others.

Id. at 38-39.

Before the South Carolina Supreme Court, Petitioner argued that the *Mouzon* language concerning “general malignant recklessness” constituted reversible error for several reasons. Petitioner argued that the prosecution’s sole theory of the case was that he aimed the gun and fired at the door with actual malice, while the defense theory of the case was that he accidentally or recklessly discharged the gun without aiming at the door. ECF No. 1-4 at 45. Accordingly, Petitioner argued, there was no evidence of “some middle ground mental state of ‘super recklessness’ that would warrant a charge of the *Mouzon* language.” *Id.* Petitioner further argued that South Carolina Code § 16-3-60, which defines the mental state for involuntary manslaughter as “reckless disregard for the safety of others,” had supplanted or overruled the common law principle stated in *Mouzon* that “recklessness with regard to the lives and safety of others could rise to the level of malice to support a conviction of murder.” *Id.* at 46.

Petitioner also argued that the crime of murder based on the *Mouzon* recklessness standard was unconstitutionally vague because “[t]here is no articulable means by which to differentiate between the recklessness required for involuntary manslaughter and that which would elevate an offense to murder.” ECF No. 1-4 at 47. Finally, Petitioner argued that the *Mouzon* charge unconstitutionally shifted the burden of proof with respect to his mental state because “if the jury accepted the defense evidence [which] established that [he] acted with recklessness, at most,” the burden would be shifted onto him “to prove that the recklessness involved in this case did not rise to the inarticulable, undefined standard of recklessness that could be deemed malice.” *Id.* The South Carolina Supreme Court summarily rejected

Petitioner's arguments, citing to an earlier case upholding the *Mouzon* instruction and an earlier case holding that "in determining prejudice[] from jury instructions, [a] court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution." ECF No. 1-10 at 14 n.7.

A petitioner alleging that his right to due process was violated by an improper jury instruction "must show both that the instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009) (quotations omitted). "In making this determination, the jury instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Id.* at 191 (quotation omitted). "[T]he pertinent question is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* (quotation omitted).

Contrary to Petitioner's assertion, the jury instructions did not equate the mental state required for murder with that required for involuntary manslaughter. The trial court instructed the jury that one who unintentionally kills another while engaged in "a lawful act with reckless disregard for the safety of others" is guilty of involuntary manslaughter. ECF No. 5-14 at 38-39. On the other hand, the trial court instructed the jury that malice "signifies . . . a general malignant recklessness of the lives and safety of others or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief." *Id.* at 35-36. A "malignant" recklessness suggests a state of mind significantly more culpable and destructive than "mere" recklessness. This is especially true when the instructions imply that a "malignant recklessness"

is synonymous with “a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.”

Petitioner, focusing on the disjunctive “or,” contends that the instruction defines “two separate and alternative means of proving malice.” ECF No. 26 at 6-7. It is immaterial whether the two descriptions are considered to be “two separate and alternative means of proving malice” or simply two phrases attempting to express the same indefinite concept. The question is whether there is a reasonable likelihood that the jurors, hearing the “malignant recklessness” language in the context in which it was presented, understood it to mean that Petitioner could be convicted of murder based on the “simple” recklessness associated with involuntary manslaughter.

The adjective “malignant,” as well as the description of malice as involving “a heart regardless of social duty and fatally bent on mischief,” distinguished this more culpable recklessness from ordinary recklessness. Petitioner’s defense at trial was that he accidentally fired his gun while taking it from his glove compartment. The court finds that it is not reasonably likely that, if the jurors believed Petitioner’s theory, they could have considered such an accident to be “malignant recklessness.” Accordingly, the South Carolina Supreme Court’s holding that these jury instructions did not violate Petitioner’s right to due process was not an unreasonable application of clearly established federal law.

B. Jury Instructions on Accident and Negligent Use of a Firearm

Petitioner’s trial counsel requested that the trial court instruct the jury on accident, as follows:

“If it [is] shown that the killing was unintentional; that it was done while the [defendant] was engaged in a lawful enterprise, and was not the result of

negligence, the homicide will be excused [as] accident.” The defendant does not bear the burden of proving accident; rather, the State must prove beyond a reasonable doubt that the defendant acted with the intent to kill the deceased.

ECF No. 5-16 at 29. The trial judge denied this charge as inapplicable to the facts of the case because “the defense of accident is only allowable when the defendant is involved and engaged in a lawful act.” ECF No. 5-13 at 7-8. Trial counsel also requested that the involuntary manslaughter charge include a statement that “[o]ne who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter.” ECF No. 5-16 at 25. Additionally, trial counsel requested that the involuntary manslaughter charge include the following:

How do you, as jurors, think that a man of average sense in this position would handle a dangerous weapon or implement, under given circumstances generally? Then, under the testimony of the case you are trying, has the state shown beyond a reasonable doubt that the defendant was guilty of negligence—that is, he did act in that manner with the dangerous weapon or implement as a man of average sense and disposition, under the circumstances which the testimony shows to have existed in the case—he did act in that way, and, as a result of that, he did inflict the mortal wound, as alleged in the indictment, which caused the death of the defendant, as charged, if you find it so, then that will be a case of [involuntary] manslaughter.

ECF No. 5-16 at 27. The trial judge did not give either instruction to the jury.

Before the South Carolina Supreme Court, Petitioner argued that the trial court erred in refusing to give the accident charge because evidence introduced at trial showed that Petitioner was engaged in a lawful activity at the time of the shooting. ECF No. 1-4 at 42. Specifically, Petitioner noted that he had a valid concealed weapon permit and that his theory at trial was that the gun accidentally discharged while being transferred from the glove compartment of his car. *Id.* at 42-43. Petitioner also argued that the trial court erred in refusing to instruct the jury that negligent use of a deadly weapon constitutes involuntary manslaughter because this was a

correct statement of the law, and because it was necessary to counterbalance the jury instruction stating that "[i]f a person using a deadly weapon deliberately and intentionally without just cause or legal excuse takes the life of another, malice may be inferred." *Id.* at 43-44; ECF No. 5-14 at 37.

The South Carolina Supreme Court summarily rejected Petitioner's argument as to the accident instruction, citing to an earlier case holding that "for homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." ECF No 1-10 at 14 n.7. The supreme court also cited an earlier case holding that "to warrant reversal, [the] trial court's refusal to give [a] requested charge must be both erroneous and prejudicial to [the] defendant." *Id.* The supreme court similarly rejected Petitioner's argument as to involuntary manslaughter with a deadly weapon, citing an earlier case holding that "failure to give requested jury instructions is not prejudicial error where instructions given adequately cover the law." *Id.*

Regardless of whether any evidence introduced at trial supported Petitioner's theory that the shooting constituted an excusable accident, there is no constitutional error resulting from the trial court's refusal to give the requested instruction on accident. As stated above, an erroneous or omitted jury instruction violates due process only if there is a reasonable likelihood that the jury convicted a defendant without finding every necessary element to be proven beyond a reasonable doubt. Petitioner's requested instruction stated that a killing is excusable if it is unintentional, occurring during the course of a lawful activity, and not the result of negligence. However, the trial judge instructed the jury that malice, an essential element of murder, requires conduct that is willful, deliberate, intentional, or at least done in "a general malignant

recklessness of the lives and safety of others or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.” ECF No. 5-14 at 35-36. If the jurors believed that the shooting occurred unintentionally while Petitioner was engaged in a lawful activity and not behaving negligently, they could not have convicted Petitioner of murder under the instructions given.

Similarly, the trial court did not commit constitutional error in refusing to give an instruction stating that a defendant who causes the death of another by the negligent use of a deadly weapon may be convicted of involuntary manslaughter. The trial court correctly and adequately instructed the jury on involuntary manslaughter, and these instructions would apply to the use of a deadly weapon in “reckless disregard for the safety of others.” ECF No. 5-14 at 38-39. Furthermore, there was no need to “balance” the instruction stating that “[i]f a person using a deadly weapon deliberately and intentionally without just cause or legal excuse takes the life of another, malice may be inferred” with an instruction stating that the use of a deadly weapon does not necessarily imply malice. *Id.* at 37. The instruction does not suggest that the use of a deadly weapon necessarily implies malice, but rather states that malice may be inferred if this use was “deliberate[] and intentional[] without just cause or legal excuse.” The South Carolina Supreme Court’s holding that the trial court’s omission of Petitioner’s requested jury instructions did not violate his right to due process was not an unreasonable interpretation of clearly established federal law.

C. Application of *State v. Belcher*

In *State v. Belcher*, the South Carolina Supreme Court considered the long-accepted jury instruction stating that “malice may be inferred from the use of a deadly weapon.” *Belcher*, 685

S.E.2d at 804. The supreme court held that this instruction “is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide.” *Id.* at 804. The supreme court, noting that malice necessarily includes the absence of justification, excuse, or mitigation, described this instruction as “only a half-truth.” *Id.* at 808. For example, if a defendant intentionally uses a deadly weapon in self-defense, “[t]he absence of justification, excuse, or mitigation cannot be inferred from the use of a deadly weapon standing alone.” *Id.* The supreme court held that its ruling would be “effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved.” *Id.* at 810.

In his petition for rehearing, Petitioner argued that the South Carolina Supreme Court erred in failing to apply the holding of *Belcher*, which was decided after oral arguments but before the ruling in his case. ECF No. 1-11 at 15-17. However, the jury instruction given at Petitioner’s trial differs significantly from the instruction at issue in *Belcher*. The trial judge instructed the jury that “[i]f a person using a deadly weapon deliberately and intentionally without just cause or legal excuse takes the life of another, malice may be inferred.” ECF No. 5-14 at 37. Rather than simply stating that malice may be inferred from “the use of a deadly weapon,” the instruction also informed the jurors that Petitioner must have “deliberately and intentionally . . . take[n] the life of another” and that this must have been “without just cause or legal excuse.” This language adequately answers the criticism put forth in *Belcher* by forbidding the jury to infer malice from the use of a deadly weapon if there was just cause or a legal excuse. More importantly, there is no reasonable chance that the instruction given permitted the jury to draw an improper inference of malice or shifted any burden onto Petitioner. Petitioner’s theory

at trial was that he had accidentally or recklessly discharged the gun, and the “deliberate[] and intentional[]” language would not permit an inference of malice if the jury believed this theory. Because the holding of *Belcher* is not relevant to Petitioner’s case, there can be no constitutional error.

D. Recusal of Chief Justice Toal

At trial and on appeal, Petitioner argued that a search of his home conducted pursuant to a warrant was illegal because the warrant had been obtained by a State Law Enforcement Division (“SLED”) officer over the telephone and by fax, without the officer’s personal appearance before a magistrate and without his affidavit being sworn before the magistrate. ECF No. 1-8 at 3. Petitioner contended that the magistrate instructed the officer to follow this procedure, which was approved in a July 26, 2001 order by Chief Justice Toal. *Id.* Petitioner argued that Chief Justice Toal’s order was contrary to the South Carolina Constitution, to various South Carolina statutes, and to holdings of the South Carolina Supreme Court. *Id.* at 3-4. Petitioner maintained that Chief Justice Toal’s recusal was required by due process in order “to ensure a fair and impartial hearing and disposition of [his] challenge to the authority of the Chief Justice to issue the order allowing the telephone and facsimile warrant procedure.” *Id.* at 4. Petitioner’s request for recusal was denied without comment. ECF No. 1-9.

The Magistrate Judge found that the South Carolina Supreme Court had not unreasonably misapplied clearly established federal law in denying Petitioner’s motion for recusal. ECF No. 28 at 21. The Magistrate Judge distinguished *In re Murchison*, 349 U.S. 133 (1955), the primary case cited by Petitioner, in which the Supreme Court held that a judge allowed under state law to conduct secret, one-person grand jury proceedings could not act as the judge in a criminal

contempt action arising from these proceedings. The Supreme Court found that because the judge played a significant role in the “accusatory process,” he could not “be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.” *Id.* at 137. The Magistrate Judge found that “alleged bias stemming from a justice’s ostensible interest in defending a position or rule she previously adopted is not the type of ‘interest in the outcome’ proscribed by *Murichson*.” ECF No. 28 at 21-22. Rather, the Magistrate Judge found that the situation is more akin to a litigant requesting recusal by an appellate judge in an appeal arguing against precedential authority previously authored by that judge. *Id.* at 22. The Magistrate Judge found that Petitioner had not demonstrated that “this case was one of those ‘rare instances’ or consisted of ‘extreme facts’ that would constitutionally mandate recusal.” *Id.* (citing *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265, 2267 (2009)). The Magistrate Judge further noted that the South Carolina Supreme Court unanimously agreed that the administrative order was proper, and that Chief Justice Toal’s recusal apparently would not have affected the result of Petitioner’s appeal. *Id.*

This court agrees with the Magistrate Judge and finds that Chief Justice Toal’s participation in Petitioner’s case did not “pose[] such a risk of actual bias or prejudgment that [it] must be forbidden if the guarantee of due process is to be adequately implemented.” *Caperton*, 129 S. Ct. at 2263 (quotation omitted). Although Petitioner argues that the Chief Justice acted as “a judge in [her] own case” and “as a judge of her own conduct,” such a characterization is not accurate. Rather, the Chief Justice was being asked to reconsider her earlier position regarding matters of legal interpretation. Although Chief Justice Toal was required to construe the authority of the chief justice under the South Carolina Constitution, this is not the sort of

“personal interest” in the outcome that the Supreme Court has found to be unconstitutional.

Furthermore, even assuming that Chief Justice Toal’s participation in Petitioner’s case was improper, habeas relief would not be available in this situation. Contrary to Petitioner’s assertion, the Supreme Court has never “explicitly ruled that prejudice is presumed when a judge who should be disqualified from sitting on a case nevertheless participates in the ruling.” ECF No. 29 at 7. The first case cited by Petitioner, *Murichson*, involved a trial judge who presided over a contempt hearing when he should have recused himself. *See Murichson*, 349 U.S. at 134-136. The other case cited by Petitioner, *Caperton*, involved a 3-2 decision by a state supreme court where the interested justice was in the majority. *See Caperton*, 129 S. Ct. at 2256. However, the Supreme Court has never considered whether participation in a ruling by a judge who should be disqualified necessarily taints the ruling if that judge’s vote is not outcome-determinative.⁴ In the absence of clearly established federal law, as stated by the Supreme Court, habeas relief may not be granted.

E. Fourth Amendment Claims

Petitioner argues that the South Carolina Supreme Court unreasonably found that his Fourth Amendment right to be free from unreasonable searches and seizures was not violated by various police actions. Petitioner recognizes that “where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or

⁴ *See, e.g., Caperton*, 129 S. Ct. at 2269-70 (Roberts, C.J., dissenting) (noting that, among the unanswered questions to be answered by later courts, was the question: “Must the judge’s vote be outcome determinative in order for his non-recusal to constitute a due process violation?”).

seizure was introduced at his trial.” *Stone v. Powell*, 428 U.S. 465, 494 (1976). Accordingly, Plaintiff argues that the participation of Chief Justice Toal denied him a full and fair opportunity to litigate his Fourth Amendment claims. For the reasons explained above, the court rejects this argument. Plaintiff further argues that the state court’s “willful refusal to apply the correct and controlling legal standard” deprived him of a full and fair opportunity to litigate his Fourth Amendment claims. ECF No. 29 at 8. If a habeas court finds that a petitioner had a procedural mechanism available to raise Fourth Amendment claims in state court and that this opportunity was not impaired, it need not inquire further into the merits of these claims. *Doleman v. Muncy*, 579 F.2d 1258, 1265 (4th Cir. 1978). In this case, Petitioner, represented by skilled counsel, raised his Fourth Amendment claims by motion in the trial court, had a suppression hearing, and ultimately had these claims resolved by published opinion of the South Carolina Supreme Court. This court is satisfied that Petitioner had a full and fair opportunity to present his claims, and will not consider the merits of these claims further.

F. Factual Findings

Petitioner objects that “the Magistrate Judge in her summary of evidence simply adopt[ed] the factual recitation from the South Carolina Supreme Court’s opinion and fail[ed] to consider material exculpatory evidence.”⁵ ECF No. 29 at 1. Petitioner lists various facts in this recitation that he asserts are contradicted by the trial record and various allegedly exculpatory facts presented at trial that are not mentioned. *Id.* at 1-3. However, none of these discrepancies is relevant to this court’s resolution of Petitioner’s claims. Furthermore, Petitioner has not alleged that the jury’s verdict or the South Carolina Supreme Court’s opinion were “based on an

⁵ This court has cited the same factual recitation as background.

unreasonable determination of the facts in light of the evidence presented.” 28 U.S.C. § 2254(d)(2). Accordingly, this objection is without merit.

IV. CONCLUSION

The court has carefully reviewed the record and concurs in the recommendation of the Magistrate Judge. Defendant’s motion for summary judgment is granted and the case dismissed.

V. CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2254 Cases, as effective December 1, 2009, provides that the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability will not issue absent “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001). The court concludes that Petitioner has not made the requisite showing. Accordingly, the court denies a certificate of appealability.

IT IS SO ORDERED.

s/ Margaret B. Seymour
Chief United States District Judge

Columbia, South Carolina

March 19, 2012

UNITED STATES DISTRICT COURT

for the

District of South Carolina

H. Dewain Herring,

Petitioner

v.

Robert M Stevenson, III, Warden Broad River

Correctional Institute,

Respondent

Civil Action No. 0:11-cv-00160-MBS

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the petitioner *(name)* _____ recover from the respondent *(name)* _____ the amount of _____ dollars (\$___), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the petitioner recover nothing, the action be dismissed on the merits, and the respondent *(name)* _____ recover costs from the petitioner *(name)* _____.

☒ other: Summary judgment is hereby entered for the respondent, Robert M Stevenson, III. The petitioner, H. Dewain Herring, shall take nothing of the respondent as to the petition filed pursuant to 28 U.S.C. §2254 and this case is dismissed with prejudice.

This action was *(check one)*:

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

☒ decided by the Honorable Margaret B Seymour, Chief United States District Judge, presiding, adopting the Report and Recommendations set forth by the Honorable Paige J. Gossett, United States Magistrate Judge, which granted the respondent's motion for summary judgment.

Date: March 20, 2012

CLERK OF COURT

s/J. Peterson

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

H. Dewain Herring, #321951,

Petitioner,

v.

Robert M. Stevenson, III, Warden
Broad River Correctional Institution,

Respondents.

Case No. 0:11-160-RMG-PJG

NOTICE OF APPEAL

Notice is hereby given that Petitioner H. Dewain Herring in the above named case hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Order granting Respondents' Motion for Summary Judgment entered in this action on the 19th day of March 2012. Petitioner Herring further requests a Certificate of Appealability from the Fourth Circuit Court of Appeals and relies upon the arguments to be presented in the Petition and Memorandum in Support of the Petition for Certificate of Appealability to be filed in the Court of Appeals.

/s/ James M. Griffin
James M. Griffin, Fed. I.D. 1053
P.O. Box 11208
Columbia, SC 29211
(803) 771-8000

Attorneys for the Petitioner

April 18, 2012

57th BP
ORIGINAL

FORM 5

STATE OF SOUTH CAROLINA

County of Richland

Herman Herring
Full name and prison number (if any) of Applicant
#321951

State of South Carolina

IN THE COURT OF COMMON PLEAS

2010CP4003783

APPLICATION FOR

POST-CONVICTION RELIEF

2010 JUN -4 PM 3:23
JEANNETTE W. MCBRIDE
Clerk & G.S.

RICHLAND COUNTY
FILED

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Broad River Correctional Institution
4460 Broad River Rd. Columbia SC 29210
2. Name and location of Court which imposed sentence Richland County
Court of General Sessions, Columbia SC 29201
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Murder; Indict. # 06-GS-40-0914
 - (b) Pointing & Presenting a Firearm; Indict. #
06-GS-40-0881

SCANNED
APR 25 2016

- (c) N/A
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) May 21, 2007, Murder; 30 years
- (b) May 21, 2007, Pointing & Presenting; 5 years (Concurrent)
- (c) N/A
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty N/A
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The S.C. Supreme Court heard this case
- ii. on Direct Appeal, June 23, 2009, pursuant
- iii. to Motion for Certification, Rule 204(b) SCACR
- (b) the result in each such Court to which you appealed:
- i. Guilty Verdict Affirmed
- ii. Guilty Verdict Affirmed
- iii. N/A
- (c) the date of each such result:
- i. December 21, 2009
- ii. December 21, 2009
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. SC Supreme Court Opinion # 26750
- ii. SC Supreme Court Opinion # 26750
- iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A

- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel, Pre Trial
- (b) Ineffective Assistance of Counsel, Trial
- (c) Ineffective Assistance of Counsel, Appeal
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See 10. (a)
- (b) See 10. (b)
- (c) See 10. (c)
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? Yes
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. See 8 (a) i, ii, iii
- ii. (See 12 (d) Petition for Rehearing
- iii. filed January 20, 2010 S.C. Supreme
- iv. Court; Said Petition Denied May 14, 2010
- (b) the name and location of the Court in which each was filed:
- i. See 8 (a) i, ii, iii
- ii. See 13 (a) ii
- iii. N/A
- iv. N/A

(c) the disposition thereof:

- i. The Judgment of Lower Court Affirmed
- ii. See 13 (a) ii
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. December 21, 2009
- ii. May 14, 2010
- iii. N/A
- iv. N/A

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

- i. SC Supreme Court Opinion # 26750
- ii. SC Supreme Court Denial of Petition for Rehearing
- iii. N/A
- iv. N/A

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

NO

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

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

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

- i. N/A
- ii. N/A
- iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective Assistance of Counsel Claims
(b) are not Cognizable on Direct Appeal.
(c) therefore PCR is appropriate to bring such
allegations.

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

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

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

(a) the name and address of each attorney who represented you:
i. Richard A. Harpothian, esq.
1410 Laurel St. Columbia SC 29201
ii. Katherine Cornuth Gooda, esq.
1079 Old Camden Rd, Winnsboro SC 29180.
iii. N/A
(b) the proceedings at which each such attorney represented you:
i. Harpothian - Waived Preliminary
Hearing, Pre-Trial Discovery, Trial Sentencing
ii. Harpothian and Gooda - Direct Appeal
and Petition for Rehearing
iii. N/A

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

Reversal. Remand for a New Trial.
Reconsideration of Sentence with the Effective
Assistance of Counsel - any other Relief this
Court deems appropriate.

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

NO

STATE OF SOUTH CAROLINA)

County of Richland)

VERIFICATION

I, H. DEWAIN HERRING (#321951), being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

H. Dewain Herring

SWORN to and subscribed before me this 26th
day of MAY, 2010

Susan J. Johnson (L.S.)
Notary Public

My Commission Expires: _____ My Commission Expires
March 5, 2018

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

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

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

N/A (720) #321951
Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____,

N/A
Notary Public

My Commission Expires: _____

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

HERRING H Dewain ,
#321951)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2010-CP-400-3783

RETURN

The Respondent, making its Return to the Application for Post-Conviction Relief filed June 4 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was represented by Richard A Harpootlian, Esquire. The Applicant was convicted following a jury trial on May 21 2007, with the Honorable G. Thomas Cooper, Jr.. The Applicant was indicted for and/or convicted of: Murder and Pointing and Presenting a Firearm - 2006-GS-40-00881;00914. According to the South Carolina Department of Corrections (SCDC), the Applicant is serving a 30 year sentence for "Murder."

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the

Applicant's records from the Department of Corrections, the Applicant's trial transcript, and the Applicant's appellate records.

The Applicant's conviction was affirmed by our Supreme Court on December 21, 2009, rehearing was denied on May 14, 2010. The Remittitur was issued on May 14, 2010:

Background: Defendant was convicted by jury in the Circuit Court, Richland County, G. Thomas Cooper, Jr., J., of murder and pointing and presenting a firearm. Defendant appealed.

Holdings: The Supreme Court, Waller, J., held that:

- (1) officer's look into defendant's garage window at 2:00 a.m. was justified by exigent circumstances;
- (2) supporting affidavit provided probable cause justifying a search warrant; and
- (3) South Carolina Law Enforcement Division (SLED) search warrant, obtained by facsimile, was valid.

Affirmed.

The facts from the appellate decision are as follows:

FACTS

Herring was charged with the January 29, 2006 shooting of an employee of Chastity's Gold Nightclub (Chastity's), a strip club in Columbia. The facts giving rise to the shooting are as follows.

After golfing in Aiken with friends on the day of January 28, 2006, at which he had consumed numerous beers, Herring stopped by a bar for a few drinks on the way home, and then returned home around 7:30 p.m. Herring had a couple more drinks at his home with a golfing buddy before the friend left. Herring laid down intending to go to sleep, but got up and decided to go a Forest Acres restaurant. When the restaurant was closed, Herring changed his mind and went to Platinum

Plus, a Columbia strip club. He had a drink and paid a dancer for a lap dance and left Platinum Plus. On his way home, he decided to stop by Chastity's on River Drive; he arrived shortly after 11:00 p.m. According to Herring, he ordered a drink at the bar, but he has very little recall of any events for several hours thereafter.

According to witnesses and employees of Chastity's, Herring purchased a drink and paid for a \$30.00, three minute lap dance from a dancer named Mia. After the lap dance, Herring paid Mia for a \$300 dance in what was known as the Champagne room.

Mia took Herring to the Champagne room and told him to wait while she went to freshen up. A bouncer, Carl Weeks, went to check on Herring a few minutes later and found him naked and masturbating on the sofa. The bouncer told Herring he could not do that and told him he would have to leave. When Herring did not move, the bouncer got the manager, John Johnson (John John). When they returned, Herring was dressed. Weeks told Herring he would either have to leave, or they would call police and have him arrested for solicitation of prostitution. According to Weeks, Herring responded, "No. I will fucking shoot you." John John and a bouncer named Donnie Hawkins escorted Herring to the front door at 11:57 p.m. John John walked outside with Herring and used a two-way radio to call Herring's license plate number out to Weeks, who was standing in the doorway, as Herring drove away. Weeks and Hawkins watched as Herring backed up his black SUV, and fumbled with his glove compartment with his right hand. Herring slowly pulled away, putting down the passenger side windows as he went. Hawkins, Weeks and John John had just gone inside when they saw Herring's vehicle coming back down River Drive toward Chastity's. According to Hawkins, John John was right inside the door. Hawkins saw a flash of light come from the side of the vehicle, and heard John John say, "Oh shit!" John John fell to the floor, having been hit in the left ear by a bullet which came through the front door. He died a short while later at the hospital.

Upon arriving at the scene of Chastity's, police were given Herring's license tag number, which was registered to his office address in Columbia. Police patrolled the office parking lot, but did not find the vehicle. They then determined Herring's home address and went there at 2:10 a.m. on January 29, 2006. A police officer, seeing a light on in the garage, peeked in the garage window to see if the suspect was there. Although the suspect was not there, the officer did see the vehicle, which they realized was Herring's. They knocked on the door and rang the doorbell several times and, receiving no answer, they returned to the police station and obtained a search warrant for the home.^{FN2}

FN2. Several officers remained outside the premises while the warrant was obtained.

Police went back to Herring's residence at approximately 4:00 a.m. to execute the search warrant. They rang the doorbell several times but received no answer. They entered forcibly, announcing they were police with a search warrant. Officer Linfert testified that he saw Herring in the hallway and recognized him from the photo on his driver's license. Linfert told Herring to get down on the ground, but Herring ran back down the hall toward a bedroom. He followed Herring to the bedroom, and saw Herring pull a gun from a nightstand and point it in his direction. Officer Linfert yelled at him to drop the gun and then fired one shot at him. Other officers also opened fire, and Herring was hit in the arm. Herring called 9-1-1 and told them he believed there were intruders in his home. After talking with the 9-1-1 operator, Herring surrendered upon realizing the "intruders" were indeed police officers.

Herring initially told police he had not left the house after returning home from Aiken; he did not recall going to Chastity's. When police told him of the video tape which showed him entering and leaving Chastity's, he remembered only being at the bar, having a drink, and a gunshot firing; the next memory he had was of police bursting into his home. He subsequently began remembering more details, such as paying for a lap dance from a light skinned black woman.

Bullet fragments removed from John John's head conclusively matched a .357 Magnum Ruger owned by Herring; the Ruger was found under some clothing in his bedroom closet during a SLED search of the home.^{FN3} Gunshot residue was found on the passenger side of Herring's vehicle. A jury convicted Herring of murder and pointing and presenting a firearm.

FN3. SLED searched the residence relative to the shooting which occurred between police and Herring at the time of Herring's arrest.

State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009).

II.

The Applicant interprets each of the Applicant's allegations as a claim of ineffective assistance of counsel, his claims are as follows:

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

- (a) Ineffective Assistance of Counsel: Pre Trial
- (b) Ineffective Assistance of Counsel: Trial
- (c) Ineffective Assistance of Counsel: Appeal

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Ineffective Assistance of Counsel Claims
- (b) are not Cognizable on Direct Appeal.
- (c) therefore PCR is appropriate to bring such allegations.

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

Reversal, Remand for a New Trial.
Reconsideration of Sentence with the Effective
Assistance of Counsel - any other Relief the
Court deems Appropriate.

III.

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. 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 process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. 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, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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

IV.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

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

VI.

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

The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Robert L. Brown, Esquire, Esquire regarding when the hearing should be set.¹

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737
bpetrano@scag.gov

July 19, 2010

¹ See: <http://www.scattorneygeneral.com/inside/pcr.html> for current and archived PCR rosters.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS

2010-CP-400-3783

Dewain H. Herring, 321951

Applicant,

vs

State of South Carolina,

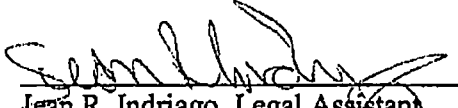
Respondent.

)
)
)
) AFFIDAVIT OF SERVICE BY MAIL
)
)
)
)
)

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

Robert L. Brown, Esquire
Post Office Box 100261
Columbia, South Carolina 29202

DATED this 21st day of July, 2010.



Jean R. Indriago, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

H. Dewain Herring, #321951,)
Applicant,)

2010-CP-40-3783

v.)

State of South Carolina,)
Respondent.)

**ORDER FOR SUBSTITUTION
OF COUNSEL AND CONTINUANCE**

RICHLAND COUNTY
FILED
2014 MAR 21 AM 11:18
CLERK
C.C. & J.S.
BLANCHETTE M. HARRIGAN

This matter comes before the Court pursuant to an Application for Post-Conviction Relief filed on June 4, 2010. On March 30, 2011, Cameron B. Littlejohn, Jr. Esquire, was substituted as Applicant's counsel.

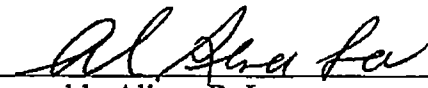
On March 18, 2014, an evidentiary hearing was scheduled in front of the Honorable Alison R. Lee at the Richland County Courthouse. Applicant was present at the hearing, along with Tricia A. Blanchette, Esquire. The State was represented by Megan E. Harrigan, Assistant Attorney General.

After introducing the case, Ms. Harrigan informed the Court that Applicant had a motion. Thereafter, Ms. Blanchette informed the Court that she had been recently retained and was moving for substitution of counsel and continuance of the evidentiary hearing. She further informed the Court that she had spoken with Mr. Littlejohn, but she was unable to obtain his signature and submit a written motion prior to the hearing date due to Mr. Littlejohn being out of the State. When asked by the Court, Ms. Blanchette responded that she did not even have a copy of the PCR Application, and she was not prepared to go forward.

Therefore, based upon good cause shown at the hearing, this Court finds that Tricia A. Blanchette shall be substituted in as counsel in place of Cameron B. Littlejohn, Jr. This Court further finds that the evidentiary hearing is continued to give Ms.

Blanchette adequate time to obtain Applicant's file and properly prepare his case for an evidentiary hearing.

AND, IT IS SO ORDERED this 19th day of March, 2014.



Honorable Alison R. Lee
Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

H. Dewain Herring,

☒ Plaintiff

v.

State Of South Carolina

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2010-CP-40-3783

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

Tricia A. Blanchette, Bar No. 74904

Address:

PO Box 12725

Columbia, SC 29211

phone: 803-988-0008 fax:

e-mail: blanchettelaw@gmail.com other:

Defendant's Attorney:

Clay Mitchell, Bar No.

Address:

PO Box 11549

Columbia, SC 29211

phone: 803-734-3737 fax: 803-734-4113

e-mail: other:

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

September 19, 2014

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act

☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by:

Date Filed:

☐ MOTION FEE COLLECTED:

☐ CONTESTED - AMOUNT DUE:

RICHLAND COUNTY
FILED
2014 SEP 26 PM 3:21
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

SCANNED

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

H. Dewain Herring, 321951,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2010-CP-40-3783

**ORDER AUTHORIZING DISCOVERY
IN POST CONVICTION RELIEF
APPLICATION**

2014 SEP 26 PM 3:21
JEANETTE W. MCBRIDE
CLERK, S.C. & G.S.

RICHLAND COUNTY
FILED

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 4, 2010. The State submitted a Return on July 21, 2010. On March 30, 2011, Cameron B. Littlejohn, Jr., Esquire, was substituted as Applicant's counsel. On March 21, 2014, Tricia A. Blanchette, Esquire, was substituted as Applicant's counsel. On August 6, 2014, Applicant, through counsel, filed a Motion for Discovery in Post Conviction Relief.

On September 5, 2014, a motion hearing was held in front of the Honorable Robert E. Hood at the Richland County Courthouse. Applicant was present and was represented by Tricia A. Blanchette, Esquire. The State was represented by J. Rutledge Johnson, Assistant Attorney General.

As was set forth in the Motion, Tricia A. Blanchette, Esquire, explained that she had reviewed Applicant's file at Attorney Richard Harpootlian's office. Thereafter, she received and reviewed over 7,000 copies from said file and numerous compact discs.¹ Based upon her review of the copied materials and transcript, she requested the opportunity to review the files of the requested agencies to obtain a complete copy of the discovery materials that are necessary to properly prepare Applicant's case for an

¹ As directed by Attorney Richard Harpootlian's office, Applicant paid for the paper and compact disc copies.

evidentiary hearing. She clarified that unless specified, she was not requesting a complete copy of the agencies file, but was asking for the opportunity to review the file to determine if said file is contained in the copies received from Richard Harpootlian, Esquire. She also requested that the parties review the files jointly to ensure the integrity and efficiency of the process.

In response, the State objected to Applicant's motion and requested that the right of the non-party entities be reserved to allow those entities the opportunity to assert privilege or protection from production of the requested discovery materials.

After hearing from both parties, this Court acknowledged the length and complexity of the underlying trial and reasoned that Applicant's counsel's requests for discovery were necessary to properly prepare Applicant's case for an evidentiary hearing.

Pursuant to S.C. Code Ann. §17-27-150(a) (2008), this Court finds that Applicant's request shall be granted to ensure that Applicant, through counsel, can properly prepare his Application for Post Conviction Relief for an evidentiary hearing. As was requested by the State, any parties in receipt of a subpoena pursuant to this Order may file a timely objection, which will be addressed by this Court.

Therefore, Applicant shall be allowed to issue subpoenas to the appropriate offices or agencies for the review and/or production of any and all files related to Case No. 2006-GS-40-0881, 0914 pursuant to S.C. Code Ann. §17-27-150(a) (2008), specifically, as follows:

1. A complete copy of the State Law Enforcement Agency (SLED) file, to include all files related to the Richland County Sheriff's Department "officer involved shooting" investigation.
2. A complete copy of the Richland County Sheriff Department's file, to include internal affairs files regarding the "officer involved shooting" investigation.

3. A complete copy of any records related to Applicant maintained by the Richland County Detention Center.
4. The opportunity to review a complete copy of the Richland County Solicitor's file and receive any needed copies.
5. The opportunity to review a complete copy of the Richland County Coroner's file and receive any needed copies.
6. The opportunity to review a complete copy of the trial exhibits and receive any needed copies.

IT IS THEREFORE ORDERED:

1. That Counsel for Applicant is permitted to serve a subpoena and/or submit a written request, along with a copy of this Order, upon the above listed agencies or entities for the opportunity to review and/or production of any and all files related to Case No. 2006-GS-40-0881, 0914.
2. That any parties in receipt of a subpoena pursuant to this Order may file a timely objection, which will be addressed by this Court.

AND, IT IS SO ORDERED this 22 day of SEPT, 2014.



Honorable Robert E. Hood
Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

H. Dewain Herring, #321951,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2010-CP-40-3783

CERTIFICATE OF SERVICE

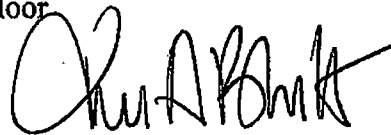
JEANNETTE M. MCBRIDE
C.C.P. & G.S.

2014 SEP 26 PM 3:21

RICHLAND COUNTY
FILED

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I hand delivered this 19th day of September 2014, a copy of an Order Authorizing Discovery in Post Conviction Relief Application to Clay Mitchell of the Attorney General's Office, at:

Office of the Attorney General
ATT: Clay Mitchell, Ast. AG
100 Assembly Street, 5th Floor
Columbia, SC 29201



Tricia A. Blanchette
Attorney for Applicant
PO Box 12725
Columbia, SC 29211
(803) 988-0008

September 19, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
)
H. Dewain Herring, 321951,)
Applicant,)
v.)
)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2010-CP-40-3783

**MOTION FOR ASSIGNMENT
OF JURISDICTION**

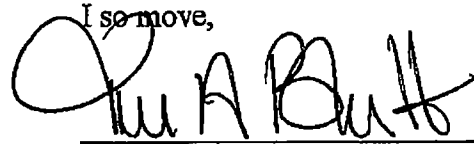
This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 4, 2010. On March 30, 2011, Cameron B. Littlejohn, Jr., Esquire, was substituted as Applicant's counsel. On March 21, 2014, Tricia A. Blanchette, Esquire, was substituted as Applicant's counsel.

On September 5, 2014, a motion hearing was held in front of the Honorable Robert E. Hood at the Richland County Courthouse. Applicant was present and was represented by Tricia A. Blanchette, Esquire. The State was represented by J. Rutledge Johnson, Assistant Attorney General. Following the hearing, the Honorable Robert E. Good issued an Order Authorizing Discovery in Post Conviction Relief.

At the motion hearing, the Honorable Robert E. Hood acknowledged the complex nature of the case and the number of circuit court judges that were conflicted out from presiding over it. The Honorable Robert E. Hood explained that it would benefit all parties and expedite the case to request that one circuit court judge be assigned to oversee the discovery and status of the case, as well as preside over the evidentiary hearing on a date certain. The Honorable Robert E. Hood made it clear that he would not be opposed to accepting such an assignment.

Thereafter, the parties discussed the Judge's recommendation and determined that they were in agreement with it. As a result, Applicant, through counsel, is respectfully

moving for the assignment of sole jurisdiction over his pending PCR Application (Docket No.: 2010-CP-40-3783) to the Honorable Robert E. Hood to streamline the complexity that his Application presents. The State is in agreement with this request.

I so move,


Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
Attorney for Applicant

December 15, 2014
Columbia, SC

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

H. Dewain Herring, #321951,)
Applicant,)

2010-CP-40-3783

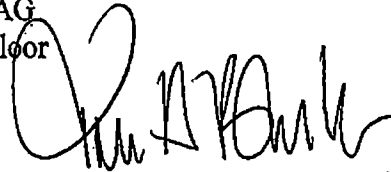
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I hand delivered this 15th day of December 2014, a copy of an Motion for Assignment of Jurisdiction to Clay Mitchell of the Attorney General's Office, at:

Office of the Attorney General
ATT: Clay Mitchell, Ast. AG
100 Assembly Street, 5th Floor
Columbia, SC 29201



Tricia A. Blanchette
Attorney for Applicant
PO Box 12725
Columbia, SC 29211
(803) 988-0008

JEANNETTE W. MCBRIDE
C.C.P. & G.S.

2014 DEC 15 PM 1:56

RICHLAND COUNTY
FILED

December 15, 2014

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

H. Dewain Herring,

☒ Plaintiff

v.

State Of South Carolina

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2010-CP-40-3783

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Tricia A. Blanchette, Bar No. 74904

Address:

PO Box 12725

Columbia, SC 29211

phone: 803-988-0008 fax:

e-mail: blanchettelaw@gmail.com other:

Defendant's Attorney:

Clay Mitchell, Bar No.

Address:

PO Box 11549

Columbia, SC 29211

phone: 803-734-3737 fax: 803-734-4113

e-mail: other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Status

Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

August 11, 2015

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

SCANNED

APR 29 2016

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
H. Dewain Herring, 321951,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2010-CP-40-3783

MOTION

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 4, 2010. On March 30, 2011, Cameron B. Littlejohn, Jr., Esquire, was substituted as Applicant's counsel. On March 21, 2014, Tricia A. Blanchette, Esquire, was substituted as Applicant's counsel.

On August 6, 2014, Applicant, through counsel, filed a Motion for Discovery in Post Conviction Relief. On September 5, 2014, a motion hearing was held in front of the Honorable Robert E. Hood at the Richland County Courthouse. Applicant was present and was represented by Tricia A. Blanchette, Esquire. The State was represented by J. Rutledge Johnson, Assistant Attorney General.

On September 22, 2014, the Honorable Robert E. Hood issued an Order Authorizing Discovery in Post Conviction Relief Application, which was filed on September 26, 2014. The Order provided that Applicant shall be allowed to issue subpoenas to the appropriate offices or agencies for the review and/or production of any and all files related to Case No. 2006-GS-40-0881, 0914 pursuant to S.C. Code Ann. §17-27-150(a) (2008), specifically, as follows:

1. A complete copy of the State Law Enforcement Agency (SLED) file, to include all files related to the Richland County Sheriff's Department "officer involved shooting" investigation.

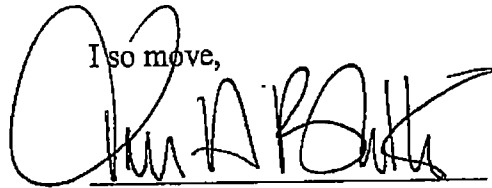
2. A complete copy of the Richland County Sheriff Department's file, to include internal affairs files regarding the "officer involved shooting" investigation.
3. A complete copy of any records related to Applicant maintained by the Richland County Detention Center.
4. The opportunity to review a complete copy of the Richland County Solicitor's file and receive any needed copies.
5. The opportunity to review a complete copy of the Richland County Coroner's file and receive any needed copies.
6. The opportunity to review a complete copy of the trial exhibits and receive any needed copies.

By October 31, 2014, Applicant's counsel had issued subpoenas to the Richland County Detention Center, Sheriff's Department, Coroner's Office and SLED. As of the date of this filing, Applicant's counsel has diligently pursued but not received a complete response from the Richland County Detention Center nor any files from the Richland County Sheriff's Department.

To complicate matters, Applicant's case has been unable to be set for a motion and/or status hearing since the issuance of the Order for Discovery and resulting failure of agencies to comply due to judicial conflicts. At the hearing held on September 5, 2014, the Honorable Robert E. Hood acknowledged the complexity of Applicant's case and the complication of judicial conflicts. He recommended that the parties move to have a circuit court judge assigned to oversee pre-hearing matters and preside over the evidentiary hearing. After addressing his suggestion with the Attorney General's Office, Applicant, through counsel, filed a Motion for Assignment of Jurisdiction, with the consent of the Attorney General's Office, in September 2014. By way of this Motion, Applicant, along with the Attorney General's Office, were asking that Judge Hood be assigned

jurisdiction. Thereafter, the Honorable Casey L. Manning issued an Order granting assignment of jurisdiction, but the Order was rescinded prior to filing.

Based upon the following, Applicant is moving for a status hearing to address the outstanding discovery matters and to find a way in which the hearing of his case, for both pre-hearing matters and an evidentiary hearing, can move forward in a timely manner.

I so move,


Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
Attorney for Applicant

August 11, 2015
Columbia, SC

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

H. Dewain Herring, #321951,)
Applicant,)

2010-CP-40-3783

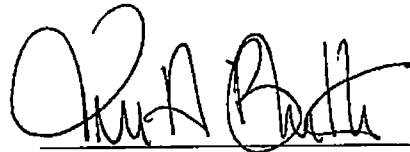
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed a Motion in the mail on this 11th day of August 2015 to Clay Mitchell of the Attorney General's Office, at:

Office of the Attorney General
ATT: Clay Mitchell, Ast. AG
Post Office Box 11549
Columbia, SC 29211



Tricia A. Blanchette
Attorney for Applicant
PO Box 12725
Columbia, SC 29211
(803) 988-0008

August 11, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS
H. Dewain Herring

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2010-CP-40-3783
State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other Dismissed without prejudice
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : Richland County Detention Center and the Richland County Sheriff's Department are ordered to respond to the Applicant's subpoenas in this matter within 30 days.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge Janya L. Yu Judge Code 2756 Date 8/27/2015

For Clerk of Court Office Use Only

This judgment was entered on the 1 day of Sept, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 1 day of Sept, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

H. Dewain Herring,
☒ Plaintiff

v.

State Of South Carolina
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2010-CP-40-3783

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

JANETTE M. MCBRIDE
C.C.P. & G.S.

2016 SEP 12 PM 2:27

RICHLAND COUNTY
FILED

Plaintiff's Attorney:
Tricia A. Blanchette, Bar No. 74904
Address:
PO Box 12725
Columbia, SC 29211
phone: 803-988-0008 fax:
e-mail: blanchettelaw@gmail.com other:

Defendant's Attorney:
Jessica Kinard, Bar No.
Address:
PO Box 11549
Columbia, SC 29211
phone: 803-734-3737 fax: 803-734-4113
e-mail: other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Amendment to Application for PCR

Estimated Time Needed: 2 days Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

September 12, 2016

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

- ☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
H. Dewain Herring, 321951,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2010-CP-40-3783

AMENDMENT TO APPLICATION
FOR POST CONVICTION RELIEF

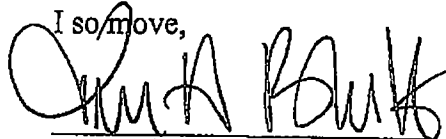
RICHLAND COUNTY
FILED
2016 SEP 12 PM 2:27
JEANNETTE W. MCBRIDE
C.C.P. & S.S.

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 4, 2010. Applicant, through counsel, abandons any claim(s) of ineffective assistance of appellate counsel and moves to specifically allege ineffective assistance of trial counsel as follows:

1. Trial counsel rendered ineffective assistance of counsel by failing to engage in meaningful plea negotiations.
2. Trial counsel rendered ineffective assistance of counsel by failing to argue for a change of venue.
3. Trial counsel rendered ineffective assistance of counsel by failing to present a reasonable defense through the calling of available witnesses, utilization and objection to evidence, utilization of expert witnesses, request for instructions on lesser included offenses and meaningful closing argument.
4. Trial counsel rendered ineffective assistance of counsel by failing to properly address Applicant's mental health through the utilization of experts prior to and during trial to assist in plea negotiations, preparation of a defense, pre-trial motions, presenting a defense at trial, preparing and presenting Applicant's trial testimony, making closing arguments and in overall mitigation.
5. Trial counsel rendered ineffective assistance of counsel by failing to properly prepare and fully utilize a crime scene investigation expert prior to and during trial.
6. Trial counsel rendered ineffective assistance of counsel by failing to object to the testimony and exhibit offered regarding a NASA enhancement when no person from NASA was present or called at trial.
7. Trial counsel rendered ineffective assistance of counsel by failing to be cognizant of the order utilized by the State to support the search warrant and object when the Order was incomplete as introduced at trial.

8. Trial counsel rendered ineffective assistance of counsel in the handling of Applicant's testimony and portrayal at trial.
9. Trial counsel rendered ineffective assistance of counsel by failing to properly prepare and utilize Dr. Holbrook at trial, especially when his testimony opened the door to the reply testimony of Demi Garvin. Trial counsel further rendered ineffective assistance of counsel by failing to object to the utilization of Demi Garvin in reply in a capacity that exceeded her expert qualification and/or object to the testimony she offered.
10. Trial counsel rendered ineffective assistance of counsel by failing to offer any evidence to support an accident charge to support the arguments made in opening to the jury and object to the Solicitor's closing argument regarding an accident charge.
11. Trial counsel rendered ineffective assistance of counsel when he failed to object to the Solicitor's closing argument due to bolstering, burden shifting, injecting personal testimony, and errantly stating what the court's instructions would be.
12. Pursuant to Rule 15(b), SCRPC, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

I so move,



Tricia A. Blanchette, Bar #74904
PO Box 12725
Columbia, SC 29211

Attorney for Applicant

September 12, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

H. Dewain Herring, #321951,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

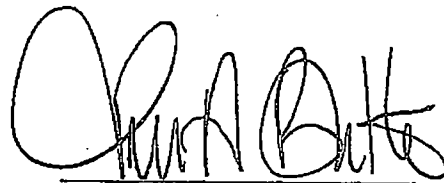
2010-CP-40-3783

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2016 SEP 12 PM 2:27
JEANNETTE W. McBRIDE
C.C.B. & G.S.

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed an
Amendment to Application for Post Conviction Relief in the mail on this 12th day of
September 2016 to Jessica Kinard of the Attorney General's Office, at:

Office of the Attorney General
ATT: Jessica Kinard, Ast. AG
Post Office Box 11549
Columbia, SC 29211



Tricia A. Blanchette
Attorney for Applicant
PO Box 12725
Columbia, SC 29211
(803) 988-0008

September 12 2016

1 STATE OF SOUTH CAROLINA)

2 COUNTY OF RICHLAND)

COURT OF COMMON PLEAS
2016-CP-40-3783

3
4 Dewain Herring,)

5 Plaintiff,)

6 vs.)

7 State of South Carolina,)

8 Defendant.)

TRANSCRIPT OF RECORD

9 January 4, 2017
10 Columbia, South Carolina

11
12
13 B E F O R E:

14 THE HONORABLE JOCELYN NEWMAN, JUDGE.

15
16
17 A P P E A R A N C E S:

18 TRICIA A. BLANCHETTE, ESQ.
19 Attorney for the Plaintiff

20 JESSICA E. KINARD, ASSISTANT ATTORNEY GENERAL
21 Attorney for the Defendant

22
23
24
25 DEBORAH M. McCURDY, RPR
Official Court Reporter

INDEX OF WITNESSES

TORA BRAWLEY

Direct By Ms. Blanchette 34

Cross By Ms. Kinard 51

DONNA SCHWARTZ MADDUX

Direct The Court 55

Cross By Ms. Kinard 92

Redirect By Ms. Blanchette 97

RICHARD A. HARPOOTLIAN

Direct By Ms. Blanchette 99

Cross By Ms. Kinard 152

Redirect By Ms. Blanchette 167

RALPH ROBERT TRESSEL

Direct By Ms. Blanchette 174

Cross By Ms. Kinard 208

PETER SKIDMORE

Direct By Ms. Blanchette 213

Cross By Ms. Kinard 219

PLAINTIFF EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	Curriculum Vitae of Dr. Brawley	37	37
2	Dr. Brawley's Report	40	40
3	Curriculum Vitae of Dr. Maddox	57	57
4	Dr. Maddox's Report	59	59
5	Order	74	74
6	Letter	133	133
7	Curriculum Vitae of Mr. Tressel	175	175
8	Mr. Tressel's Report	181	181
9	Dr. Haxton's Report	223	223

JANUARY 4, 2017

THE COURT: We are ready to begin Civil Action Number 2010-CP-40-3783, Dewain Herring v. The State of South Carolina, application for post-conviction relief.

Ms. Kinard, yes?

MS. KINARD: Yes, Your Honor. May it please the Court?

As you stated, this is the matter of Dewain Herring v. State of South Carolina. We are before the Court on an application for post-conviction relief that was filed June 4, 2010. A return was filed July 21, 2010.

In this application Mr. Herring alleged the following facts:

That he is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Richland County Clerk of Court. He was indicted at the February 2006 term of the Richland County Grand Jury. He was represented by Richard A. Harpootlian, Esquire.

He was convicted following a jury trial on May 21, 2007. That trial was conducted before the Honorable G. Thomas Cooper, Jr. The applicant was found guilty as indicted for murder and pointing

1 and presenting a firearm.

2 He is serving a 30-year sentence for murder
3 and a 5-year sentence for pointing and presenting.

4 The State is present, and ready to proceed.
5 The applicant is present, and represented by Tricia
6 Blanchette.

7 THE COURT: All right, Ms. Blanchette?

8 MS. BLANCHETTE: Good morning, Your Honor.
9 Tricia Blanchette, on behalf of Dewain Herring.

10 Just a couple of matters before I start
11 calling witnesses.

12 First, I would ask if the Court would consider
13 allowing Mr. Herring's shackles to be loosened a
14 little bit so that he could write. It is my
15 understanding that all the officers in the
16 courtroom are okay with it as long as Your Honor
17 is. So I will leave that in your discretion.

18 THE COURT: Let me verify with the officers.
19 I don't try to do your job for you, so, you know --

20 THE DEPUTY: It will be fine with us. We can
21 take the shackles off, loosen them, or take them
22 off, your discretion.

23 THE COURT: Okay, that's fine. I'm fine with
24 it, as long as security is fine with it.

25 (Complies.)

1 THE COURT: And let me ask, just for my
2 information, we don't have any members of the media
3 here, do we? I assume it is family and friends and
4 other interested parties.

5 Okay. I just wanted to make sure.

6 MS. BLANCHETTE: I appreciate that, Your
7 Honor.

8 And, Your Honor, as we had discussed already
9 off the record, at this time I do not intend to
10 call Mr. Herring today, but because he is currently
11 serving a minimum sentence for murder, I would ask
12 that Your Honor just question him to assure that he
13 does want to go forward today.

14 THE COURT: All right. Mr. Herring, if you
15 would stand up, raise your right hand, and be
16 placed under oath.

17 (Defendant stands.)

18 THE CLERK: Do you solemnly swear or affirm
19 that the testimony you are about to give in this
20 case will be the truth, the whole truth, and
21 nothing but the truth, so help you God?

22 MR. HERRING: Yes, ma'am.

23 THE COURT: All right, Mr. Herring, you
24 understand that we are here for -- on your
25 application for post-conviction relief; correct?

1 MR. HERRING: Yes, ma'am.

2 THE COURT: And your attorney tells me that
3 she does not intend to call you to testify in this
4 case. Is that your understanding?

5 MR. HERRING: It is my understanding.

6 THE COURT: Okay. You understand that the
7 only outcome, the only potential outcome of this
8 proceeding would be for you to get a new trial in
9 this case.

10 MR. HERRING: I was hoping for a little more,
11 but, yes, ma'am.

12 THE COURT: Okay. Well, the only thing that I
13 can award you is a new trial.

14 MR. HERRING: I understand.

15 THE COURT: Do you understand that?

16 MR. HERRING: I understand.

17 THE COURT: Okay. And it is my understanding
18 that you are serving the minimum sentence for
19 murder, that is 30 years. Do you understand that?

20 MR. HERRING: Yes, ma'am, that's correct.

21 THE COURT: And that if you were to be granted
22 a new trial and were subsequently convicted again,
23 that you would be exposed to 30 years to life. Do
24 you understand that?

25 MR. HERRING: That's what I have now, so that

1 is fine.

2 THE COURT: Okay. But you could get a life
3 sentence rather than 30.

4 MR. HERRING: I understand.

5 THE COURT: Okay. I just want to make sure
6 that you understand what is going on and that you
7 wish to proceed with your application.

8 MR. HERRING: I do.

9 THE COURT: Okay. Thank you, sir.

10 MR. HERRING: Thank you.

11 (Defendant seated.)

12 MS. BLANCHETTE: Thank you, Your Honor.

13 As Your Honor is probably aware, this is a
14 case that involves a very voluminous transcript.
15 What I have done is prepared an introduction where
16 I will address each of the issues, and then I have
17 specific transcript cites to coordinate with each
18 issue.

19 Yesterday Ms. Kinard brought to my attention
20 that it would be helpful if she had those
21 citations, so what I did today is I actually
22 prepared just a shortened version. It is
23 essentially my introduction notes. I gave her a
24 copy. If Your Honor would like a copy as well, I
25 have that.

1 THE COURT: Yes, ma'am.

2 MS. BLANCHETTE: And it is not a formal memo,
3 it is just essentially my notes.

4 THE COURT: Do you happen to have an extra
5 copy for my court reporter?

6 MS. BLANCHETTE: I do. I have an extra in
7 case the court reporter would like one.

8 (Complies.)

9 MS. BLANCHETTE: Your Honor, I also will be
10 referencing a couple of cases just in this brief
11 introduction. One is State v. Santiago. In that
12 case it cites to Gill v. State and State v.
13 Callahan. And then I also will be referencing
14 State v. Pittman. And I have a copy of those if
15 you would like those as well.

16 THE COURT: Yes, ma'am.

17 (Complies.)

18 MS. BLANCHETTE: All right, Your Honor, the
19 first issue that we have raised by way of the
20 amendment in this case is that trial counsel
21 rendered ineffective assistance of counsel by
22 failing to engage in meaningful plea negotiations.
23 That issue will be addressed through testimony.
24 There are no transcript citations for that.

25 The second issue deals with a failure to argue

1 for a change of venue. There will just be a brief
2 couple of references to the transcript, but that
3 will be addressed in the testimony of
4 Mr. Harpootlian.

5 The third issue is trial counsel rendered
6 ineffective assistance of counsel by failing to
7 present a reasonable defense through the calling of
8 available witnesses; utilization and objection to
9 evidence; utilization of expert witnesses; request
10 for instructions on lesser included offenses; and a
11 meaningful closing argument.

12 For lack of better words, that is a catchall
13 issue and will be covered by a number of the issues
14 we will go into in more detail.

15 The fourth issue is that trial counsel
16 rendered ineffective assistance of counsel by
17 failing to properly address applicant's mental
18 health through the utilization of experts prior to
19 and during trial to assist in plea negotiations;
20 preparation of a defense; pretrial motions;
21 presenting a defense at trial; preparing and
22 presenting applicant's trial testimony; and making
23 closing arguments and overall mitigation.

24 Here, based upon the findings of Dr. Tora
25 Brawley and Dr. Donna Schwartz Maddox, both experts

1 should have been utilized, we are alleging, in plea
2 negotiations, trial strategy and preparation, such
3 as whether or not Mr. Herring should take the
4 stand, the defense of involuntary intoxication. We
5 will be going further into detail regarding the
6 testimony of Demi Garvin and at trial.

7 As is addressed in State v. Santiago that I
8 have already handed up, both experts could have
9 been used at the Jackson v. Denno hearing and in
10 addressing the voluntariness of Mr. Herring's
11 statement with the jury.

12 It also appears from Santiago and Pittman that
13 their testimony could have been proffered and/or
14 utilized to support the defense of accident,
15 argument against the Mouzon charge, and for the
16 lesser included charges of voluntary manslaughter
17 and/or involuntary manslaughter.

18 It is understood that South Carolina does not
19 recognize a diminished capacity defense, but it
20 could have been argued that the expert's testimony
21 was admissible for the above-stated reason. And if
22 not allowed, such issue could have been raised on
23 appeal.

24 I specifically would like to go to the trial
25 record, and I am going to go through a number of

1 citations dealing with the mental health issue.

2 In the trial record, the first place that the
3 issue of mental health comes up is on Pages 20
4 through 22. There Defense counsel asked that there
5 be questions asked of the jury regarding bipolar
6 and manic depressive. And the State questioned the
7 jury being asked about that since it is not being
8 raised as a defense.

9 Essentially, argument is made that it will be
10 an evidentiary issue in the case, and Judge Cooper
11 agrees to allow the questions to be asked.

12 Then if you turn to Page 26 of the transcript,
13 beginning at Line 5, the attorney explains there
14 that he had spoken to a psychiatrist and that he is
15 not alleging that Mr. Herring is incompetent and
16 that he is competent to stand trial.

17 The next place that this issue comes up is
18 Pages 377 through 378. And this is the State's
19 opening argument. And in their opening, the State
20 argues that, Malice is the equivalent of an evil
21 heart and a brain, but you can't open one's brain
22 or heart to determine if there is malice.

23 On Page 398, if you look at Line 4, that is
24 Defense counsel's opening argument. And Defense
25 counsel submits to the jury that they will prove

1 why the Defendant didn't remember and that he is
2 not lying in his statements that he gave to law
3 enforcement.

4 If you flip all the way to the end of trial on
5 Page 2271, which is the Defendant's closing
6 argument, there the Defense gives an argument about
7 a hazy memory.

8 And, Your Honor, I apologize, but there are a
9 lot of volumes, so I may go a little slow.

10 THE COURT: Yes, ma'am.

11 MS. BLANCHETTE: And then if you look at the
12 State's closing argument on Page 2227, Line 13,
13 they argue once again to the jury that, Murder is
14 an intentional act, but you can't open his brain
15 and see if he had that intent.

16 They also mock and kind of disregard the
17 defense and say that what it is is a selective
18 memory argument. And that is Page 2306.

19 I am going to turn to Page 2326, and I will
20 bring your attention to Judge Cooper's instruction
21 to the jury.

22 In his instruction to the jury he specifically
23 says on 2326, Lines 11 through 14, Malice
24 aforethought presupposes a competent mind capable
25 of thinking, entertaining, and remaining an evil

1 disposition which would encompass the death of
2 another human being.

3 Now, that is the trial record where we would
4 submit that this issue of mental health comes up
5 and just references that I would like for you to
6 have before I call the experts that we will call
7 today on mental health.

8 Now I would like to look at the Jackson v.
9 Denno hearing, because we are also alleging that
10 the experts should have been utilized in preparing
11 and being called at the Jackson v. Denno hearing.
12 It begins on Page 131 of the transcript.

13 And the first person that is called is Agent
14 Dave Lawrence. And I'm just going to summarize
15 some of his direct and then cross-examination. I
16 have provided the cites on the handout that I gave
17 to you.

18 He explains on Pages 136 through 137 that he
19 had to wait to speak with Mr. Herring because
20 emergency services were called to work on his
21 bandage.

22 After a line of questioning on Page 140 he
23 explains that Mr. Herring appeared to understand
24 his rights.

25 On Pages 142 through 143 he is asked about

1 alcohol, and he does indicate that he believes he
2 wasn't under the influence of drugs or alcohol, but
3 he could smell an alcoholic odor coming from him.

4 Also, on Page 143, Line 20, he is asked if he
5 formally knew Mr. Herring, and he did say he knew
6 him as a lawyer.

7 And then 154, Line 13, he is specifically
8 asked questions about whether or not Mr. Herring
9 understood. And he says, He certainly appeared to
10 be very aware of what was taking place.

11 On cross-examination on Page 157, he is shown
12 a record where Mr. Herring had been given Ativan,
13 and he says he was not aware of that.

14 And then he is asked by Defense counsel about
15 the effects of Ativan and the bleeding from being
16 shot. That is 157 through 158.

17 He is further questioned on Page 159, Line 20,
18 about smelling alcohol. And he confirms again that
19 he did smell alcohol.

20 And then if you turn to 161, Line 6, counsel
21 asked him the following questions.

22 Question: Now, so he had been shot, he had
23 been given Ativan, you smelled alcohol on his
24 breath, and you continued to interrogate him?

25 And he says: I did.

1 Agent Paul LaRosa also took the stand. On
2 Page 171, Lines 14 through 19, he said that the
3 Defendant appeared to understand.

4 Chief Wilson was also called as a witness. On
5 Page 174, Lines 20 through 24, he says that the
6 Defendant appeared to understand.

7 Then on Page 175, beginning with Line 14, he
8 recounts the statement that Mr. Herring gave to
9 him.

10 And then on Page 184, Line 7, when asked by
11 Defense counsel he admits that he wasn't aware that
12 he had been given Ativan.

13 Page 186 starts the Defense's argument on the
14 Jackson vs. Denno hearing, and essentially I am
15 just summarizing, the transcript will speak for
16 itself.

17 Defense counsel argues that Mr. Herring was
18 shot, he was bleeding, he was on Ativan. And he
19 makes an argument regarding the subsequent or
20 second interview with Chief Wilson.

21 On Page 189 he addresses what is the fifth
22 factor in the totality of circumstances test, and
23 that is the appearance, intellectual and emotional
24 state of the suspect.

25 And to support that argument and suppression

1 on that ground, he merely says on Line 2, he had
2 been shot, and on Line 4, they gave him Ativan. So
3 essentially his argument regarding his emotional
4 and intellectual state was, he had been shot and he
5 was on Ativan.

6 Thereafter the judge ruled it was admissible,
7 the statements were both admissible. And that is
8 on Page 193.

9 We have in the courtroom with us today the
10 exhibits from the trial. Your Honor, is it okay if
11 I approach?

12 THE COURT: Yes, ma'am.

13 MS. BLANCHETTE: And those have previously
14 been marked as State's Exhibit 1, State's Exhibit
15 2, and State's Exhibit 3.

16 State's Exhibit 1 is the waiver of rights.
17 State's Exhibit 2 is the first statement given by
18 Mr. Herring. And State's Exhibit 3 is the second
19 statement given by Mr. Herring.

20 At trial, Agent Lawrence was again called. He
21 addressed the statement on Pages 1106 through 1141.

22 He is then asked in front of the jury about
23 whether or not Mr. Herring appeared coherent when
24 giving the statement.

25 Defense counsel does object, but he

1 essentially does testify, yes, he did appear
2 coherent. And that is Pages 1119 through 20.

3 On cross-examination he is asked, in light of
4 Mr. Herring relying upon hearing aids, whether it
5 appeared that he understood him. And he testifies
6 at 1186, Lines 13 through 15, that he had no
7 difficulty in understanding him at all.

8 He then further asked about giving him
9 additional time because he had been shot to give a
10 statement. And that is on 1177, Line 20. And he
11 says that he would have given him additional time,
12 but he didn't want it.

13 And then he further discloses on Pages 1202
14 through 1203 that EMS was called after the
15 interview and the Defendant was taken back to the
16 hospital.

17 Your Honor, those are all the references that
18 I give you at this time regarding the Jackson v.
19 Denno.

20 The next issue as far as the mental health
21 would be the accident charge. Your Honor, if I
22 could beg the Court's indulgence just one second.

23 THE COURT: Yes, ma'am.

24 (Pause.)

25 THE COURT: Yes, ma'am?

1 MS. BLANCHETTE: The accident charge, the
2 transcript citations for that as it came up in the
3 Defense's opening argument, if you look at
4 Page 391, beginning on Line 11, Mr. Harpootlian
5 explains accident to the jury and goes into how
6 that is unintentional.

7 Then on Pages 2073 through 2074, it is put on
8 the record that the Court has declined to give an
9 accident charge.

10 Then on Page 2298, which is the State's
11 closing argument -- it actually begins on 2297,
12 Line 25, but going into 2298. He says there that,
13 His Honor is not going to tell you -- he will not
14 tell you that you can use accident as a defense.
15 Accident is not a defense in this case. You cannot
16 find the Defendant not guilty because of accident,
17 ricochet, or whatever. His Honor will instruct you
18 you cannot consider accident -- which, as I have
19 already pointed out, the Court declined to charge
20 accident, but he did not charge that you could not
21 consider accident, as the State was saying here.

22 We also submit that the mental health
23 testimony we are going to present today would have
24 assisted in an argument -- or as far as the
25 argument to the jury for the involuntary, because

1 the Court did instruct on involuntary.

2 In his opening, Defense counsel said on
3 Page 391, beginning on Line 7, that involuntary
4 equals a reckless killing.

5 And then I will refer you to the appellate
6 brief. And does Your Honor have a copy of that, or
7 would you like me to provide a copy of that?

8 THE COURT: I have it.

9 MS. BLANCHETTE: Looking at the appellate
10 brief on Page 37, I think it best addresses,
11 instead of going through the transcript, the issue
12 of the Court refusing to give additional language
13 to the jury regarding the negligent use of a
14 weapon. And that is found in the appellate brief
15 beginning on Page 37.

16 And then finally on this issue, we submit that
17 the utilization of the mental health experts could
18 have assisted in the State's argument against the
19 Mouzon charge.

20 Once again, I think this is best addressed by
21 looking at the brief instead of giving a number of
22 case citations. This issue shows up Page 39 of the
23 appellate brief.

24 Going to the next issue, Issue Number 5, we
25 have alleged that trial counsel rendered

1 ineffective assistance by failing to properly
2 prepare and fully utilize the crime scene
3 investigation expert prior to and during trial.

4 We intend to call such an expert today. And
5 then I just have some brief transcript citations
6 regarding testimony elicited from the Defense
7 expert at trial.

8 On Page 825 of the transcript it is noted that
9 there was no trajectory done at the club or at the
10 scene where this murder took place.

11 As far as Mr. Yates, who was the Defense
12 expert, he testifies on Pages 1693 through 1695
13 about a theory that traffic could have caused a
14 reflection regarding this flashing light that they
15 are trying to allege was the gunshot. And he
16 submits that there is no evidence of a gunshot from
17 the car on the video.

18 He then, on Page 1625, which I'm sorry is
19 going backwards, he explains that typically a
20 normal procedure to look for a ricochet -- and he
21 explains what a ricochet is.

22 Then on Page 626, beginning on Line 25, he
23 begins by identifying objects that could have
24 caused a ricochet in this case.

25 On 1636, Line 14, he explains that you would

1 expect to see a flash or a fireball when a gun is
2 shot.

3 And then on Page 1643, beginning on Line 1, he
4 addresses the trigger pull, and the trigger pull if
5 a gun is already cocked. And those would be
6 matters pertinent to the expert we intend to call
7 today.

8 Your Honor, the next issue is trial counsel
9 rendered ineffective assistance of counsel by
10 failing to object to the testimony and exhibit
11 offered regarding a NASA enhancement when no person
12 from NASA was present or called at trial.

13 Here, despite making extensive objections and
14 moving for a mistrial as to the testimony regarding
15 a light or flash on the video, the Defense did not
16 argue against the admission of State's Exhibit
17 87, which was marked in the record as a NASA tape,
18 and it says NASA video on it. And we have that
19 exhibit here in the courtroom today. That would be
20 State's Exhibit 87. And I would just like to note
21 for the record it does say NASA, and then it looks
22 like the letters W-O-R-K.

23 THE COURT: Okay.

24 MS. BLANCHETTE: After appearing to have an
25 issue with the State's witness, Mr. Earles,

1 regarding State's Exhibit 54 and 60, Defense
2 counsel abandons his objections and said he had no
3 objection to him -- his qualification of giving
4 expert testimony. That is on Page 1257, Line 22.
5 Thereafter he testified to what was done by Brad
6 Lawrence, who worked at NASA. And a video made at
7 NASA appears to be introduced as State's Exhibit
8 87. And that would be transcript Page 1360 and
9 1363.

10 It is our position that the testimony was
11 clearly used to bolster the State's case and became
12 part of the facts and utilized and even referenced
13 in the appellate court decision.

14 Your Honor, if you can bear with me, I have a
15 number of cites from where this flash issue does
16 come up in the transcript.

17 The first -- and this NASA issue. In the
18 Defense opening on Page 387, Line 13, and 392 on
19 16, he submits to the jury that the video was taken
20 to NASA, so the Defense brought it up in their
21 opening, not the State.

22 Then as far as the flash, Donald Hawkins, who
23 was a lay witness, takes the stand. And there is a
24 series of objections, but he essentially testifies
25 that he saw a flashing light on the video from

1 inside the car. And that begins on Page 452, Line
2 6.

3 Counsel further objects when he is asked a
4 question on Page 457, Line 1, about identifying
5 Mr. Herring. And there the State incorporates a
6 question about the flash he saw. And
7 Mr. Harpootlian objects to that.

8 Then on Page 461 through 462, Mr. Harpootlian
9 further objects when Mr. Hawkins is asked,
10 essentially he says opinion testimony about the
11 flash because the video was shipped to Cape
12 Canaveral, which would be NASA, and they weren't
13 able to enhance it, and he doesn't have an expert
14 report from the State on that.

15 Further argument goes back and forth, 463
16 through 469, essentially about what the witness
17 said, and if it is a flash, what you can see on the
18 video, and whether or not that testimony should be
19 struck.

20 At the beginning of the next day of trial, the
21 Defense renews their objection. The Court grants
22 it and gave a curative instruction, which in my
23 opinion seems to be rather confusing.. That is on
24 Pages 576 through 578, and 581 through 583.

25 When Officer Linfert takes the stand for the

1 State, he says that he saw the shot fired from the
2 video on Page 851, Lines 1 through 2. Again the
3 Defense counsel objects, and a curative is given
4 again on Page 851.

5 When Officer Gwyn takes the stand, he is
6 asked, In your opinion, what did you see on the
7 video? And he says, A flash from the side door.
8 On Page 943, Line 5.

9 At that point Defense counsel moves for a
10 mistrial. He says on Pages 944 through 945 in
11 support of his argument for a mistrial that the
12 videos were sent to NASA and the expert could not
13 render an opinion.

14 After hearing argument on Page 949, Judge
15 Cooper finds that he will give the same instruction
16 but warns the State that it is getting close to a
17 403 violation. And then on 950, Line 18, he gives
18 another curative.

19 As I already referenced, Mr. Earles is called
20 to testify. Following just a few brief questions
21 about NASA on Page 1350, the jury is sent out and
22 they do a proffer beginning on 1351.

23 And there he explains that he went to NASA, he
24 brought the videos to Brad Lawrence. And he
25 explains on Page 1356 what was done in that.

1 After he gets finished explaining that, on
2 Page 1357, Line 22, Defense counsel says he does
3 not have an objection to his qualification of
4 giving opinion testimony.

5 He then explains on 1360, Line 16, that he
6 took State's Exhibit 54 and 60 down to NASA to Brad
7 Lawrence. And in his opinion there was no more
8 detail than the original CD he brought down there.
9 And they looked at it on the big screen where you
10 do shuttle launches. And that goes through Page
11 1362.

12 He explains on 1363, Line 19, that he brought
13 a video back from NASA, which was marked as State's
14 Exhibit 87, which I have already referenced, and it
15 says NASA on the outside of the video. And that
16 was entered without objection.

17 Turning to closing arguments, in closing, even
18 though they didn't talk about it in opening, on
19 Page 2219, Line 20, the State submits to the jury
20 that the video was sent to Cape Canaveral. On
21 Page 2220, Line 23, they submit to the jury that
22 that video showed the shot.

23 On Page 2222, Line 9, they submit to the jury
24 that Ray Livingston saw the flash.

25 And then in their second closing argument on

1 Page 2288, beginning on Line 4, the closing
2 argument starts with, The tape, those 39 seconds of
3 why we are here today.

4 In closing argument, the Defense on Page 2283,
5 says, The reason NASA is not here is there was no
6 gun, there was no flash, is the argument the
7 Defense submitted.

8 Referencing the brief that I have earlier, the
9 appellate brief on Page 33 goes into this issue
10 regarding the flash testimony. And in the brief
11 the Defense even relies upon what this NASA guy,
12 Brad Lawrence, found and did in the case.

13 Your Honor, moving on to Number 7, trial
14 counsel rendered ineffective assistance of counsel
15 by failing to be cognizant of the order utilized by
16 the State to support the search warrant and
17 objected when the order was incomplete and
18 introduced at trial. I might have some of my
19 personal notes there.

20 THE COURT: Yes, ma'am. I will disregard
21 those.

22 MS. BLANCHETTE: Okay. From the record it
23 appears that no one had a copy of Chief Justice
24 Toal's order when Agent Lawrence addressed it on
25 the stand. And that comes up in transcript Pages

1 261 through 264.

2 Here in the courtroom today we have Court's
3 Exhibit 4. Based upon the record I thought it
4 would be Court's Exhibit 3, but Court's Exhibit 4
5 appears to be Chief Justice Toal's order, along
6 with the memorandum and the case law that was
7 submitted regarding this issue.

8 Later it is argued that the order is not
9 evidence, merely the testimony regarding it. That
10 shows up on Pages 345 through 346.

11 It is further stated by Defense counsel that
12 they took the evening to research the issue. So it
13 appears from the record that the Defense was not
14 aware of the order prior to trial. I'm relying
15 upon Page 344 for that.

16 From the clerk's exhibits, which we have in
17 the courtroom today, the order is missing a page as
18 introduced at trial and is incomplete. The order
19 was the primary focus in the appellate argument.
20 In our opinion it appears to have impacted the
21 outcome of the trial and appeal. And for that
22 position I would reference the brief, Pages 17
23 through 27.

24 Our eighth issue is that counsel was
25 ineffective in the handling of Mr. Herring's

1 testimony and portrayal at trial. There, Your
2 Honor, I began to give cites, and what I just ask
3 is that the Court review his entire testimony. I
4 think it would just be redundant to try to give all
5 the cites that I would like for you to look at.

6 But I will note that on Page 25, Line 15,
7 Mr. Harpootlian indicates that it is undecided at
8 that point if Mr. Herring will take the stand.

9 Our last lengthy issue, Your Honor, is Issue
10 Number 9, trial counsel rendered ineffective
11 assistance of counsel by failing to properly
12 prepare and utilize Dr. Holbrook at trial,
13 especially when his testimony opened the door to
14 the reply testimony of Demi Garvin.

15 Trial counsel further rendered ineffective
16 assistance of counsel by failing to object to the
17 utilization of Demi Garvin in reply in a capacity
18 that exceeded her expert qualification and/or
19 object to the testimony she offered.

20 Simply put, this ties back in to the mental
21 health issue. The State asked for Holbrook's
22 testimony to be struck because it goes into the
23 issues of criminal capacity and insanity, which
24 then goes into a lengthy argument regarding
25 Pittman. And that would be on Pages 1871 through

1 1883.

2 The State distinguished Pittman. And
3 Mr. Giese had just recently handled the Pittman
4 case. Since there they say that GBMI had actually
5 been raised as an affirmative defense, and so they
6 had notice of the involuntary intoxication, whereas
7 in this case no notice was given of the involuntary
8 intoxication defense.

9 The Court found that Holbrook's testimony
10 would be allowed, but he had also allowed the State
11 time to put together rebuttal testimony. And that
12 is on Pages 1184 through 1186.

13 In the transcript, Mr. Holbrook is confronted
14 with a statement he did not review, but opines his
15 opinion wouldn't change.

16 In closing, the State argues that Mr. Holbrook
17 was just contacted since the Defense just came up
18 with the theory of involuntary intoxication, and if
19 he had reviewed the entire file, his opinion would
20 have changed. That is Pages 2301 and 2245.

21 Then it is our position that Holbrook's
22 testimony and lack of notice of this defense of
23 involuntary intoxication opened the door for
24 rebuttal testimony of Demi Garvin.

25 Dr. Garvin testified that Mr. Herring's

1 actions were purposeful, provides reasons for his
2 behavior, distinguishes his actions from amnesia,
3 and primarily distinguishes Herring from case
4 studies because case studies involve underlying
5 psychiatric disorders.

6 If I can beg the Court's indulgence one
7 moment?

8 THE COURT: Yes, ma'am.

9 (Pause.)

10 MS. BLANCHETTE: Despite medications that
11 Herring was prescribed treating anxiety and
12 depression, her testimony was given to the jury
13 without the jury having any knowledge of Herring's
14 underlying psychiatric disorders that we will go
15 into today, and they were briefly referenced, some
16 of them, in the jury selection. And she provided
17 opinion testimony, we would submit, outside of her
18 area of expertise.

19 Without going into them specifically, some
20 additional transcript cites are Pages 2105 through
21 2106, 2111 through 2112, 2146, 2162, 2164 through
22 2166, 2168, 2183, 2186 to 7; and then further
23 Page 1853, Line 13, Page 2118, 2131, and 2133.

24 Issue Number 10, Your Honor, is that trial
25 counsel rendered ineffective assistance by failing

1 to offer any evidence to support an accident
2 charge, to support the arguments made in opening to
3 the jury, and object to the Solicitor's closing
4 argument regarding an accident charge.

5 I have already touched on this accident issue,
6 but again I would just direct your attention to the
7 Solicitor's closing arguments. The Court
8 instructed them that it is not an accident and they
9 can't consider accident, on Page 2298.

10 And then the final issue is counsel failed to
11 object to the Solicitor's closing argument due to
12 bolstering, burden shifting, injecting personal
13 testimony, and inherently stating what the Court's
14 instruction will be.

15 You obviously know we have an issue with
16 Page 2298 where he talks about the accident charge.
17 The other references are Page 2299 where the
18 Solicitor states that he had just found out about
19 the involuntary intoxication.

20 Page 2243 we submit he is bolstering the
21 State's witnesses.

22 And 2315 to 2316 -- I have a copy of State v.
23 Daniels that I'll hand up at the end of the case
24 where the State is asking what we submit is burden
25 shifting, because he is asking to be fair to both

1 sides.

2 Your Honor, I appreciate your patience in
3 going through that. I just thought it would be
4 helpful to give you that background information
5 before I call witnesses.

6 Do you have any questions or anything I can
7 offer at this time?

8 THE COURT: No, ma'am.

9 MS. BLANCHETTE: Then, Your Honor, I am
10 prepared to call my first witness.

11 I would call Tora Brawley.

12 (Witness approaches.)

13 THE BAILIFF: Place your left hand on the
14 Bible, and raise your right hand, please.

15 (Witness complies.)

16 THE CLERK: Do you solemnly swear or affirm
17 that the testimony that you are about to give in
18 this case will be the truth, the whole truth, and
19 nothing but the truth, so help you God?

20 THE WITNESS: I do.

21 THE CLERK: Have a seat, and state your name
22 for the record.

23 (Witness seated.)

24 THE WITNESS: Tora Brawley.

25 TORA BRAWLEY,

1 after being duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MS. BLANCHETTE:

4 Q. All right. And, Ms. Brawley, what is your proper
5 title? What should I call you?

6 A. Dr. Brawley.

7 Q. Dr. Brawley. Okay, Dr. Brawley, can you please
8 describe your educational background for us?

9 A. I have a bachelor's degree from the University of
10 Texas at Austin.

11 I have a master's degree and a PhD in clinical
12 psychology from California School of Professional
13 Psychology with a proficiency in neuropsychology.

14 I did a predoctoral internship at Baylor
15 College of Medicine in Houston, Texas.

16 And I did a postdoctoral fellowship at Duke
17 University Medical Center in Durham, North
18 Carolina.

19 Q. And, Dr. Brawley, would it assist you if I handed
20 you a copy of your curriculum vitae?

21 A. Sure.

22 MS. BLANCHETTE: Your Honor, may I approach
23 the witness?

24 THE COURT: Yes, ma'am.

25 (Complies.)

1 BY MS. BLANCHETTE:

2 Q. And, Dr. Brawley, do you hold any licenses that are
3 relevant to psychology?

4 A. I do. I am licensed in the State of South
5 Carolina. And I also hold temporary licenses
6 currently in the State of Texas and Mississippi.

7 Q. How long have you practiced in the area of
8 neuropsychology?

9 A. I started administering tests almost over 30 years
10 ago and was first licensed in 1993 in the State of
11 Texas.

12 MS. BLANCHETTE: Your Honor, beg the Court's
13 indulgence a moment.

14 (Pause.)

15 BY MS. BLANCHETTE:

16 Q. What is the current nature of your practice?

17 A. I am in private practice. I work part-time.

18 Q. And how long has that been the nature of your
19 practice?

20 A. I started part-time private practice after the
21 birth of my son in 2002.

22 Q. Approximately how many patients have you conducted
23 neuropsychological evaluations on since you became
24 licensed?

25 A. Over a thousand.

1 Q. Have you previously testified as an expert in
2 neuropsychology?

3 A. I have.

4 Q. Clearly I haven't; I apologize if I butcher that
5 word. How many times were you permitted to give
6 expert testimony?

7 A. Over 40 times.

8 Q. And in what courts was that testimony given?

9 A. I testified in several state courts, both criminal
10 and civil courts, and also in federal court.

11 Q. Do you typically testify for the Defense, the
12 State, or both?

13 A. I have done both.

14 Q. All right.

15 MS. BLANCHETTE: And, Your Honor, at this time
16 I would move Dr. Brawley's curriculum vitae in as
17 Applicant's Number 1.

18 THE COURT: Any objection?

19 MS. KINARD: No objection.

20 MS. BLANCHETTE: And, Your Honor, would you
21 like a copy?

22 THE COURT: Yes.

23 (WHEREUPON, Plaintiff Exhibit No. 1 was
24 marked for identification and received
25 into evidence.)

1 MS. BLANCHETTE: And, Your Honor, at this time
2 I would move Dr. Brawley be permitted to testify as
3 an expert in the area of neuropsychology.

4 THE COURT: Any voir dire?

5 MS. KINARD: No, ma'am.

6 THE COURT: No objection.

7 BY MS. BLANCHETTE:

8 Q. Dr. Brawley, please explain for me, and for all of
9 us, what is neuropsychology?

10 A. Neuropsychology is the study of brain behavior
11 relationships. We conduct specific testing that
12 looks at how different areas of the brain are
13 actually working. Where an MRI gives you a picture
14 of the brain, these tests tell us how the areas are
15 functioning, how they are -- at what capacity they
16 are functioning.

17 Q. How does neuropsychology differ from other areas of
18 psychology; for example, such as clinical
19 psychology?

20 A. Again, it is a specific test that we are trained to
21 administer. A clinical psychologist will do some
22 personality testing, but these tests you have to
23 have additional training in neurobiology and
24 neuroanatomy and general brain functions.

25 Q. Were you asked to conduct a neuropsychological

1 evaluation of Mr. Herring in this case?

2 A. I was.

3 Q. Okay. And when did you evaluate him?

4 A. I conducted the evaluation on March 15th of 2016.

5 Q. And did you prepare a report from that evaluation?

6 A. I did.

7 MS. BLANCHETTE: Your Honor, should I ask to
8 approach?

9 THE COURT: You don't need to ask.

10 BY MS. BLANCHETTE:

11 Q. Dr. Brawley, can you review that and identify what
12 it appears to be for the record?

13 A. That is a copy of -- well, you have got parts of
14 two here, because I did an additional report after
15 I interviewed the family, so you have got the first
16 two pages of my neuropsychological report and then
17 the two pages from the family event. It is missing
18 the last two pages of my original report.

19 MS. BLANCHETTE: Your Honor, if I could beg
20 the Court's indulgence one moment.

21 THE COURT: Ms. Blanchette, I think if you
22 will turn around, I think Dr. Schwartz Watts Maddox
23 is trying to help you.

24 (Pause.)

25

1 BY MS. BLANCHETTE:

2 Q. Let me hand you this.

3 A. That's the same thing. I have a copy, if that will
4 help you.

5 Q. That would help. That doesn't have all the pages
6 either? So you have a complete copy of your
7 report?

8 A. I do.

9 MS. BLANCHETTE: And, Your Honor, I apologize,
10 I will have to make additional copies of this, but
11 I can show it to the State as well. I believe I
12 provided this to the State prior to the hearing.

13 MS. KINARD: Your Honor, I have the -- the
14 original report is four pages; is that correct?

15 THE WITNESS: Correct.

16 MS. KINARD: Your Honor, I have a copy of the
17 complete report.

18 MS. BLANCHETTE: And, Your Honor, I move this
19 report in as Applicant's Number 2.

20 THE COURT: Any objection?

21 MS. KINARD: No, Your Honor. Is that all six
22 pages together?

23 MS. BLANCHETTE: Yes, I was going to do all
24 six pages together.

25

1 (WHEREUPON, Plaintiff Exhibit No. 2 was
2 marked for identification and received
3 into evidence.)

4 MS. BLANCHETTE: And just to be clear for the
5 record, the report has been introduced; is that
6 correct?

7 THE COURT: Yes.

8 MS. BLANCHETTE: Okay.

9 BY MS. BLANCHETTE:

10 Q. Prior to -- have you had the opportunity to review
11 prior testing records of Mr. Herring as part of
12 your work in this case?

13 A. After I had evaluated him I was provided with
14 additional testing records, yes.

15 Q. Okay. And do you know what those included?

16 A. He was previously given some cognitive testing in
17 2006 by William Haxton, PhD. And that is a
18 testing -- another report that I reviewed.

19 Q. And that was something that you considered in your
20 report or was that subsequent to?

21 A. I had already prepared my report, I believe, when I
22 saw that, but I did go back and compare the test
23 scores to look and see -- since the testing was
24 done so close to the time of trial, I wanted to see
25 how he was then compared with how he is now, so I

1 did go back and compare the two scores.

2 Q. Okay. Well, let's go through what you found now,
3 and then we will get back into that.

4 A. Okay.

5 Q. As part of your evaluation of Mr. Herring, did you
6 conduct a clinical interview?

7 A. I did.

8 Q. Okay. And what did that entail?

9 A. That is basically question, answers, gathering
10 history from him, asking him about current
11 symptoms, past symptoms, his educational
12 background, work history, et cetera.

13 Q. And did you also administer a neuropsychological
14 test?

15 A. I did administer a battery of tests to Mr. Herring.

16 Q. What did those tests measure?

17 A. A variety of cognitive domains. I give an IQ test,
18 not necessarily because I want an IQ, but because
19 it has 11 different subtests that test different
20 areas of the brain.

21 I also did memory testing, testing on
22 attention and concentration, verbal skills, his
23 motor skills, perceptual organizational skills, so
24 a variety of cognitive functions were assessed.

25 Q. Did you -- were you looking at valid results on

1 those tests?

2 A. I was.

3 Q. How do you know that?

4 A. There are several factors that you look at for
5 validity, a consistency of scores, but also any
6 time that -- involved in a case where there is
7 potentially secondary gain, I administer what we
8 call malingering tests to look at effort. I need
9 to know that he is giving me his best effort, he is
10 not trying to overexaggerate, or anything like
11 that. So I did administer the test of memory
12 malingering, and he passed that with flying colors.

13 There were also no other red flags. You look
14 to see if they are missing easy questions and
15 getting hard ones, those types of things. He was
16 consistent throughout the testing.

17 Q. And, Dr. Brawley, could you please explain or
18 summarize your findings as far as Mr. Herring's
19 neuropsychological functioning?

20 A. Mr. Herring had several areas of deficit. He had
21 deficits of verbal learning, verbal memory, verbal
22 fluency, abstract reasoning, motor functioning.

23 He was very low, for instance, at the fourth
24 percentile, for his memory for a story. He was at
25 the second percentile for his ability to copy a

1 figure. So overall I felt that these results were
2 consistent with the presence of a mild dementia.

3 He was also reporting some depression, but I
4 didn't feel like that could account for what I was
5 seeing here.

6 The fact that he had such high level premorbid
7 or what we consider beforehand abilities, and he is
8 conversationally, what I call conversationally
9 intact, he can mask some of those deficits to
10 people if they are just having a general
11 conversation with him. It is not until you get to
12 the actual testing that you find the extent of the
13 organicity that we have got here.

14 Q. In your report you mention that Mr. Herring was
15 tangential. Am I saying that correctly? What does
16 that mean?

17 A. He had a hard time staying on task and on
18 questions. I would ask a question and he would
19 start to answer it, and then would go off and I had
20 to kind of reel him back in. It was hard to keep
21 him on task.

22 Q. You also wrote in your report that his current IQ
23 is believed to be a decline in functioning. How
24 did you determine that?

25 A. There are a variety of ways to look at that. You

1 want to look at general knowledge scores, but also
2 we give what is called the Wechsler Test of Adult
3 Reading. And that type of test, it holds, it holds
4 with dementia, your ability to sound out words and
5 to read words. So you give them the test and it
6 comes up with an estimated premorbid level of
7 functioning. And that was 125.

8 And I believe Dr. Haxton had estimated that he
9 was premorbidly at 120, so that is consistent with
10 what he found also.

11 Q. And that doctor's findings were in 2006; is that
12 correct?

13 A. Correct.

14 Q. In your report you said that his current results
15 are consistent with dementia. How is that
16 determined?

17 A. In order to qualify for a diagnosis of dementia,
18 you have to have impairments in memory and at least
19 two other areas of functioning. And he definitely
20 met those criteria.

21 Q. And what were your recommendations based on the
22 test results you obtained?

23 A. I felt like this underlying dementia had been
24 missed because of the other factors, because of the
25 alcohol and psychiatric issues, and that he should

1 have a full neurological work-up to see the
2 potential causes of this dementia: Is it something
3 that is reversible? Is it something that can be
4 treated? So that was one of my recommendations.

5 And I also wanted to make sure that his meds
6 were at full effective level. I just wanted to
7 make sure that the medicines were working for his
8 depression. And I recommended that he have some
9 counseling.

10 Q. And you have been working in conjunction with
11 Dr. Schwartz Maddox on this case involving
12 Mr. Herring; is that correct?

13 A. That's correct. She is the one who requested the
14 testing.

15 Q. Okay. After you did the evaluation, did you have
16 the opportunity to meet with Mr. Herring's family
17 members?

18 A. I did. After I had discussed the results with
19 Dr. Maddox, she asked me to go back to the family
20 and do a dementia interview, because I saw him at
21 the Detention Center and he was just there by
22 himself.

23 Oftentimes we like to have family just to get
24 collateral information. And I hadn't seen the
25 report from 2006 yet, so I wanted to see if they

1 had noticed any issues beforehand around the time,
2 just kind of get an idea how long had this been
3 going on. So I did have an interview with his wife
4 and his son Chandler.

5 Q. And you have explained what the purpose of that
6 meeting was, but what information did you obtain
7 during that meeting?

8 A. It was very helpful and very enlightening. They
9 both had noticed changes in his cognition many
10 years in the past before 2006, but they both
11 independently attributed it to different things.
12 There was never the thought that there might be an
13 underlying brain organicity problem going there.

14 Ms. Herring attributed it to his psychiatric
15 symptoms, and his son attributed it to the alcohol
16 and his psychiatric medications.

17 So they both, because there were other things
18 going on, that is kind of what they latched onto to
19 try to explain his behaviors and the lapses in
20 cognition and the changes that they had noticed
21 over the years.

22 Q. And you did a supplemental report regarding that
23 meeting; is that correct?

24 A. I did.

25 Q. Okay. And that has been admitted as an exhibit

1 here today?

2 A. Yes, ma'am.

3 Q. In summary, were your current findings consistent
4 with the findings of the previous testing
5 administered to Mr. Herring in 2006?

6 A. They were. He was referred to Dr. Haxton by a
7 psychiatrist who was treating him at the time in
8 2006. His psychiatrist had suspected that there
9 was a decrease in cognitive functioning and he
10 wanted to rule out organicity at that time in 2006.
11 He was concerned, you know, that this would affect
12 his ability to go back to the practice of law or to
13 be able to practice law.

14 And Dr. Haxton also did a battery of testing.
15 A lot of the similar tests that I give, some were a
16 little bit different, but they were comparable. I
17 was able to compare scores. He had declined in a
18 couple of areas since that testing. But at that
19 time Dr. Haxton noted that he had mild to moderate
20 loss of cognitive functioning, marked --

21 MS. KINARD: Objection, Your Honor. I'm
22 sorry, I don't have a copy of his report. And I
23 realize that experts can testify regarding outside
24 sources, but I believe that at this point it is a
25 recitation of the report.

1 MS. BLANCHETTE: Your Honor, if I could beg
2 the Court's indulgence. I do have five boxes in
3 this case. I only brought one over today. Since
4 the State had her report prior to today, I didn't
5 understand that was something they also wanted to
6 be provided. I will be happy to provide it, I just
7 don't have it sitting here in front of me.

8 MS. KINARD: I'll do my best to find it. And
9 I did not realize that was an issue. My apologies.

10 THE COURT: This is something that Dr. Brawley
11 relied on in forming her opinion?

12 MS. BLANCHETTE: I was able to get the
13 psychiatrist Dr. Steude's file, as well as Dick
14 Harpootlian's file; and I provided the experts
15 Dr. Steude's file. And that is what she will be
16 referring to at this time.

17 And I can provide that complete file to the
18 State again if they don't have it. I know this has
19 been a long case.

20 MS. KINARD: It has been a long case. I will
21 do my best to locate it in my file.

22 THE COURT: Okay.

23 MS. KINARD: My apologies. Thank you.

24 MS. BLANCHETTE: Your Honor, if I can beg the
25 Court's indulgence?

1 THE COURT: Yes, ma'am.

2 (Pause.)

3 BY MS. BLANCHETTE:

4 Q. Dr. Brawley, continue.

5 A. Certainly. Again, my results are consistent with
6 those of Dr. Haxton. He also noted some
7 perseveration or repeating, some of the same
8 behavioral things that I noted in my report. And
9 he felt that also his premorbid skills masked his
10 loss of ability to process new information. And at
11 that time he felt like his deficits impaired his
12 ability to successfully maintain his legal practice
13 at this time, which was the question that
14 Dr. Steude had posed to him. So he did note
15 significant impairments in cognition at that time.

16 Q. Dr. Brawley, were your findings consistent with the
17 findings of Dr. Donna Schwartz Maddox?

18 A. Yes.

19 Q. The psychiatrist who also evaluated Mr. Herring?

20 A. Yes.

21 Q. And the opinions you have espoused here today, do
22 you uphold them to a reasonable degree of
23 psychological scientific certainty?

24 A. I do.

25 Q. Now, if Mr. Harpootlian had approached you prior to

1 the trial and provided you Dr. Steude's records and
2 what was in his case file, would you have been
3 willing to undertake the same things that you did
4 in preparation for this PCR?

5 A. Yes.

6 Q. And would you have shared with him your findings?

7 A. Yes.

8 Q. Okay. And would have worked in conjunction with
9 Dr. Schwartz Maddox or a psychiatrist to help him
10 prepare for trial and determine how your findings
11 should be used at trial?

12 A. I would.

13 Q. Were you ever contacted by Dick Harpootlian
14 regarding this case?

15 A. No, I was not.

16 Q. Dr. Brawley, you have done extensive work on this
17 case and provided two reports. Is there anything
18 that I failed to ask you that you think would be
19 instructive to the Court at this time?

20 A. Not that I can think of.

21 MS. BLANCHETTE: Your Honor, I have no further
22 questions of this witness.

23 THE COURT: Okay. Cross-examination?

24 MS. KINARD: Thank you, Your Honor. Beg the
25 Court's indulgence.

1 (Pause.)

2 CROSS-EXAMINATION

3 BY MS. KINARD:

4 Q. Dr. Brawley, just to make sure that I understand,
5 Dr. Haxton's findings you believe show a precursor
6 to the conditions that you found?

7 A. I think that Dr. Haxton's findings show that there
8 was also dementia present at the time that he
9 evaluated him in 2006.

10 Q. As part of your preparation for today, did you have
11 any opportunity to review the testimony presented
12 at court by Dr. Holbrook?

13 A. No, ma'am.

14 Q. Okay. Are you aware of the theories presented at
15 trial regarding involuntary intoxication?

16 A. I -- that is out of my area. Dr. Schwartz-Watts
17 ordered these tests just like she would order an
18 MRI or a blood test. It is part of the testing
19 that she uses to formulate the more legal
20 questions. I don't review the legal aspect.

21 Q. Regardless of that, in addition to dementia, there
22 are certainly other conditions that could have
23 affected him on that night?

24 A. Yes.

25 Q. But overall you -- and were you able to form an

1 opinion regarding how his dementia, as you saw it
2 earlier in 2016, could have affected his mental
3 capacity?

4 A. I don't evaluate competency or mental capacity.
5 What I can say about the dementia, if you have
6 organicity already there and you put other things
7 on top of it, like alcohol or stress or sleep
8 deprivation, it is going to make things much worse.

9 The results that I got and that Dr. Haxton got
10 I think are the optimal that we could get because
11 he wasn't using alcohol, we were in a quiet room,
12 we weren't having to multi-task. So, you know, I
13 can tell you that those things will make dementia
14 worse.

15 Q. And I didn't quite understand your answer earlier
16 regarding depression and how that affects dementia.
17 I believe you indicated -- and please correct me if
18 I'm wrong -- that you found what you considered to
19 be mild dementia and mild depression; is that
20 correct?

21 A. He was reporting some vegetative symptoms of
22 depression, many in reaction to his current
23 stressors or situation. And it is always important
24 to take that into account, because depression can
25 cause some changes in cognition. So it is

1 important to evaluate that.

2 Q. So overall the mild dementia is the thing that
3 concerned you the most; is that fair to say?

4 A. Yes.

5 MS. KINARD: I have no further questions.
6 Thank you.

7 THE COURT: Any redirect?

8 MS. BLANCHETTE: Your Honor, I have no further
9 questions of this witness. Thank you.

10 THE COURT: Okay. Dr. Brawley, you may step
11 down.

12 THE WITNESS: Thank you. May I be excused,
13 Your Honor?

14 THE COURT: Any objection?

15 MS. KINARD: No objection.

16 THE COURT: You may be excused.

17 (Witness steps down and is excused.)

18 MS. BLANCHETTE: Your Honor, may I approach
19 briefly?

20 THE COURT: Yes.

21 (WHEREUPON, a bench conference was
22 held.)

23 THE COURT: We will take about a 15-minute
24 recess.

25 (WHEREUPON, a break was taken at 10:44

1 a.m.)

2 (WHEREUPON, the hearing resumed at 11:04

3 a.m.)

4 THE COURT: Are you ready?

5 MS. BLANCHETTE: Thank you for the break. The
6 case file was actually here in the courtroom, and I
7 gave the State a copy of Dr. Haxton's report.

8 THE COURT: Perfect.

9 MS. KINARD: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MS. BLANCHETTE: Your Honor, my next witness
12 would be Dr. Donna Schwartz Maddox.

13 (Witness approaches.)

14 THE BAILIFF: Place your left hand on the
15 Bible, and raise your right hand, please.

16 (Witness complies.)

17 THE CLERK: Do you solemnly swear or affirm
18 the testimony that you are about to give in this
19 case will be the truth, the whole truth, and
20 nothing but the truth, so help you God?

21 THE WITNESS: I do.

22 THE CLERK: Please have a seat, and state your
23 name for the record.

24 (Witness seated.)

25 DONNA SCHWARTZ MADDOX,

1 after being duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 THE COURT: Good morning.

4 BY MS. BLANCHETTE:

5 Q. Would you please state your name for the record?

6 A. Sure. Donna, middle name is Schwartz, last name
7 Maddox, M-A-D-D-O-X.

8 THE COURT: So it is not hyphenated?

9 THE WITNESS: No, ma'am.

10 THE COURT: Okay.

11 THE WITNESS: I just kept the Schwartz as the
12 middle name for now so people would recognize the
13 name.

14 THE COURT: Okay. Good enough.

15 BY MS. BLANCHETTE:

16 Q. And I apologize, I may have already called you by a
17 few names.

18 And I hand you a document. Can you identify
19 that for the record, please?

20 A. Yes. This is my most current CV.

21 Q. Okay. And, Dr. Maddox, can you explain for us your
22 education that you have?

23 A. Sure. I graduated from Furman University in 1985
24 with a bachelor of arts degree in psychology.

25 I graduated from medical school in 1989 from

1 the University of South Carolina School of
2 Medicine.

3 I completed a residency in general psychiatry
4 here in Columbia, and I finished that in 1993.

5 I completed a year of forensic fellowship in
6 psychiatry in Columbia here in 1994.

7 I am licensed to practice medicine in South
8 Carolina and Georgia.

9 And I presently work as a forensic and general
10 psychiatrist.

11 Q. Okay. And do you actually hold a number of
12 positions?

13 A. Yes.

14 Q. Okay. And what are those?

15 A. Well, I actually retired from the state in August,
16 so I'm officially retired, but --

17 THE COURT: Congratulations.

18 THE WITNESS: Thank you.

19 A. I continue to work -- well, I work at Patrick
20 Harris Psychiatric Hospital right now. That is in
21 Anderson. And I have a case load of inpatients
22 there, so I still treat patients every day.

23 And then I am also presently engaged in the
24 private practice of forensic psychiatry, but I also
25 still teach, so I teach -- I have got a position at

1 the Greenville Medical School, University of South
2 Carolina, and I teach medical students every day.
3 I teach the residents in Greenville.

4 And I am also still a professor at the Medical
5 University of South Carolina in forensic
6 psychiatry.

7 Q. All right. And, Dr. Maddox, I have provided you a
8 copy of your CV there.

9 MS. BLANCHETTE: And I move it in as
10 Applicant's Number 3, I believe, at this time?

11 THE COURT: Any objection?

12 MS. KINARD: No objection.

13 (WHEREUPON, Plaintiff Exhibit No. 3 was
14 marked for identification and received
15 into evidence.)

16 BY MS. BLANCHETTE:

17 Q. Dr. Maddox, it also lists on here a number of
18 publications that you have; is that correct?

19 A. Yes, ma'am.

20 Q. Okay. And that is rather lengthy so I won't go
21 through those. As well as a number of
22 presentations that you have made?

23 A. Yes.

24 Q. And you have been qualified in the state courts of
25 South Carolina previously; is that correct?

1 A. I have.

2 Q. Do you know approximately how many times?

3 A. 700.

4 Q. And what is the area that you are qualified --
5 specifically qualified in?

6 A. Forensic psychiatry.

7 Q. And when you are qualified in that area, have you
8 testified for the State, the Defense, or both?

9 A. Both.

10 MS. BLANCHETTE: Your Honor, at this time I
11 would move Dr. Schwartz-Watts as an expert in the
12 area of forensic psychology.

13 THE COURT: Any voir dire or objection?

14 MS. KINARD: Neither, Your Honor.

15 THE COURT: Okay.

16 BY MS. BLANCHETTE:

17 Q. All right, Dr. Schwartz-Watts, let's -- I'm sorry,
18 I keep calling you Schwartz-Watts. Dr. Maddox, I
19 am going to hand you up a document. If you can
20 identify it for the record, please.

21 A. This is a copy of the report I submitted to you,
22 and it is dated August 20th, 2015.

23 Q. Okay. And it is complete?

24 A. Yes.

25 Q. Okay.

1 MS. BLANCHETTE: Your Honor, at this time I
2 would move her report in as Applicant's Number 4.

3 THE COURT: Any objection?

4 MS. KINARD: No, Your Honor.

5 THE COURT: Without objection.

6 Do you have a copy?

7 MS. BLANCHETTE: I do.

8 (Complies.)

9 THE COURT: Thank you.

10 (WHEREUPON, Plaintiff Exhibit No. 4 was
11 marked for identification and received
12 into evidence.)

13 BY MS. BLANCHETTE:

14 Q. To begin, Dr. Maddox, just explain how you became
15 involved in this case of Dewain Herring.

16 A. Yes. You contacted me and asked me to do an
17 evaluation of him.

18 I went to Kirkland Institution and I examined
19 him in September of 2015.

20 I also reviewed various documents you provided
21 to me.

22 After my evaluation, I also asked for a
23 neuropsychological consultation, and I relied upon
24 that as well.

25 Q. Okay. And who did you recommend for that

1 neuropsychological evaluation?

2 A. Dr. Brawley. She worked with me at the Medical
3 School at the University of South Carolina, and I
4 was familiar with her work and knew that she was
5 local. There are a few other neuropsychologists in
6 the state, but my understanding they are in
7 Charleston.

8 Q. Okay. And after she conducted the task that you
9 had requested, did do you consult with her?

10 A. I did. We spoke by telephone, and had a phone
11 conference.

12 And in that telephone conversation, I asked
13 her to please meet with Mr. Herring's family since
14 she was here in Columbia. I live in Anderson now,
15 and so it would have been undue expense for that to
16 happen, and so she did that as well.

17 Q. And did you consult with her after she met with his
18 family?

19 A. I did.

20 Q. Okay. And you have listed in your report a number
21 of sources of information, but was Dr. Tora Brawley
22 also a source of information that you relied upon?

23 A. Yes.

24 Q. Okay. And you heard her refer to Dr. Steude's
25 records. Who is your understanding Dr. Steude was

1 in this case? How is he related to the case?

2 A. He actually was the treating psychiatrist for
3 Mr. Herring. Mr. Herring had been in treatment
4 with him for a number of years.

5 Q. Okay. And you reviewed the records that he
6 supplied?

7 A. I did.

8 Q. Okay. As well as an evaluation, the
9 neuropsychological evaluation, done by Bill Haxton
10 dated back to 6/17 of 2006; is that correct?

11 A. Yes.

12 Q. And did you ask Dr. Brawley to review these
13 findings from 2006 in conjunction with her findings
14 from her evaluation of Mr. Herring at the present
15 time?

16 A. Yes.

17 Q. Okay. And what was -- what did you all consult
18 with regarding the prior testing that had been
19 done?

20 A. The focus of our consultation mainly was her
21 present results. I had Dr. Haxton's testing. And
22 also what was important to me was the family
23 history she got from his wife and his son that
24 showed that he certainly had these deficits.

25 The problem is we knew that he had dementia

1 now, but the issue was would he have had dementia
2 back at the time of his crime, and so those things
3 were very helpful.

4 Q. Okay. And how were they helpful?

5 A. To know that he had symptoms.

6 What had happened during the record review is
7 that -- Dr. Steude's notes were kind of -- there
8 was only a very few lines actually talking about
9 Mr. Herring having been tested. And so we had
10 to -- I contacted you, and I believe you had to do
11 further review and pull those records to get them
12 for us. And so we knew that there had been a
13 history of some cognitive deficits. But what was
14 helpful is that certainly some of the things the
15 family said, that he had been irritable, that they
16 noticed he could be very temperamental. There were
17 periods of times before this event where he
18 couldn't find words, that he would be -- looked
19 like he was having trouble trying to get his
20 thoughts together, and those sorts of things. So
21 those are the kinds of symptoms that you see with
22 dementia.

23 Q. And we have spoken a little bit about the dementia,
24 but would you like to discuss that further as far
25 as this finding of dementia for Mr. Herring?

1 A. Sure. What I did, Your Honor -- of course, you
2 know, you always have to get a complete medical
3 history. There is a lot of causes of dementia that
4 are reversible, so that is really important.

5 And Mr. Herring, he is no spring chicken
6 anymore, he is 73 years old now. And so for him
7 that is especially important, especially since he
8 had had a period of functioning well. He was --
9 he had run a solo practice. His highest level of
10 functioning probably would have been running his
11 solo practice for a number of years, and had been
12 quite successful.

13 He had a number of medical conditions that
14 were very important to me. He has a history of
15 hypertension. And, of course, hypertension can be
16 a cause of dementia. As one gets older, if your
17 blood pressure raises your brain gets little mini
18 strokes, and that can cause -- that is one form --
19 it is called a vascular dementia.

20 He also, of course, has mental illness. And
21 sometimes mental illness can look like dementia.
22 And I think you had talked about that earlier.
23 Sometimes people with depression or manic
24 depression, when they are in a period of highs or
25 lows it can affect their ability to remember things

1 and to focus and pay attention. So those records
2 needed to be reviewed.

3 He also has hearing loss. And when you get
4 older and you can't hear, sometimes that can
5 present -- someone may think that is dementia when
6 it is in fact just hearing loss.

7 He also had cataracts removed. He couldn't
8 see for a period of time. So a lot of his senses
9 were dulled as well.

10 But the other record that was really important
11 to me is he has a history of sleep apnea, and at
12 night his oxygen level -- he had the testing, and
13 it would go to 78 percent at night when he was not
14 on his mask. So his brain was also having periods
15 of time where it was not getting oxygen.

16 And then finally, of course, he drank. He had
17 a very long history of alcohol abuse. And alcohol
18 alone can also contribute, and it can cause a
19 dementia over years.

20 So as you see in looking at his medical
21 history, he has a number of causes that could be
22 contributing to his present dementia, in addition
23 to the alcohol abuse.

24 Q. And let's talk a little bit about the bipolar
25 disorder or the mental health kind of aspect of

1 this beyond dementia.

2 When I originally contacted you, that is what
3 I was asking you to look into; is that correct?

4 A. That's correct.

5 Q. Okay.

6 A. And what happened, I interviewed him. And when I
7 interviewed him, Your Honor, it was very clear to
8 me that he was having cognitive difficulty.

9 What I noticed in the exam, he would often --
10 as Dr. Brawley mentioned, he was very
11 circumstantial. It was very hard to just get -- he
12 had a lot of information he wanted to share, but he
13 would get so distracted, and he would kind of go
14 from one topic to the other, that it was very
15 difficult to get him to cooperate, even though he
16 was trying. So I had much more luck when I
17 administered -- part of my exam is I do a
18 neurological evaluation, and I also do a
19 neuropsychological screening. So I had him do some
20 tests. And those tests showed symptoms that are
21 very consistent with dementia.

22 The main test, Your Honor, one of the things I
23 do is called a verbal fluency test. And I give you
24 a minute and I ask you to name every word you can
25 think of that begins with a certain letter.

1 And in Mr. Herring's case he did what is
2 called perseveration. He would give the same word.
3 His brain would go through and he would stop for a
4 minute and try to think of new words, and his brain
5 would go back to the same word.

6 And it is kind of like driving -- as Dr.
7 Brawley taught me, it is kind of like driving in
8 the same pothole every time you do down the road.
9 Your brain kind of uses the same strategies to
10 generate new ideas.

11 And he also had significant problems on his
12 memory test. The memory test, I give you three
13 words to remember, and then I ask you in five
14 minutes to remember them and distract you with
15 other tests.

16 And what happened is after the five minutes he
17 could recall one word correctly. The other one he
18 couldn't recall at all, even with clues and even
19 with a forced choice test. And what a forced
20 choice test is, you actually give them the word.
21 You mix it up with other words.

22 And then the third one, he was able to recall
23 with a cue.

24 So on the clinical exam, it was difficult to
25 get that history, but when I actually gave him the

1 testing, that is where his deficits were apparent.

2 So, in my opinion, he did not look like he was
3 bipolar, even though he certainly had some
4 symptoms. He was anxious and certainly talkative.

5 Q. Okay. Now, is there anything further you did when
6 you evaluated him that you would like to share with
7 the Court today?

8 A. Yes. I did give him a neurological examination,
9 looking for things like closed head injury.
10 Sometimes we will get certain neurological
11 findings. And he did not have those.

12 Q. And in your report you referenced these findings of
13 Dr. Bill Haxton from 2006. Again, how did that
14 factor into your overall analysis in this case?

15 A. But, as with Dr. Brawley, I had already -- I had
16 the opinion -- I was concerned that he had
17 dementia, and so the normal methodology is when
18 someone has dementia you refer them for
19 neuropsychological testing so you can get an idea.

20 Persons with dementia, they can have different
21 levels of functioning. Mr. Herring appears a lot
22 more intact than what he is because he has very
23 good vocal skills and he can answer questions. The
24 problem is there is a lot of other things that your
25 brain does that is important in dementia.

1 So I did not have Dr. Haxton's results until
2 after the testing as well. So they confirmed. It
3 was very helpful for this case in particular
4 because they were present -- they would have been
5 available around the time of his offense, and they
6 were certainly very similar with Dr. Brawley's
7 findings.

8 Q. And that was March of 2016, and this incident
9 occurred in January -- I'm sorry, 2006 -- and this
10 incident occurred in January of 2006; is that
11 correct?

12 A. That's correct.

13 Q. And, as you mentioned, you didn't have that report
14 going into your meeting with him, so you weren't
15 looking specifically for the things that Dr. Haxton
16 had reported; is that correct?

17 A. That's correct. This was just a general forensic
18 and psychiatric exam where you are looking for any
19 illnesses, any medical illness -- as a
20 psychiatrist, I also look for medical illnesses
21 that can be contributing and causing psychiatric
22 symptoms.

23 Q. And, Dr. Maddox, please stop me if I'm going too
24 quickly. But I was going to ask next what
25 diagnosis you reached in this case? If there is

1 more you need to further explain before you get to
2 that, please do.

3 A. No, no, I am very comfortable with that.

4 Your Honor, the DSM-5 is new, so now we don't
5 have dementia anymore, it is now called a whole new
6 term. And it is long, and I apologize. But his
7 technical diagnosis would be a major neurocognitive
8 impairment due to multiple ideologies. And then it
9 has a qualifier called: With behavioral
10 disturbances.

11 In layman's terms, it is dementia. And it
12 means that he has behavioral disturbances with his
13 dementia. There are some persons with dementia
14 that are quiet, they don't have disinhibited
15 behavior, they may not use rash, impulsive
16 judgment. And then there is other persons that
17 have dementia that will have behavioral
18 disturbances.

19 And, in my opinion, just based on what the
20 family observed, and certainly this crime, I
21 thought he met that qualifier.

22 Q. Okay. Did you have other diagnoses that you
23 reached in this case?

24 A. I did. I diagnosed his alcohol abuse disorder. I
25 think it has been significant. And the new

1 qualifier in the DSM-5 is called: In a controlled
2 environment. He doesn't drink anymore. He is in a
3 place where he is monitored and he doesn't have
4 access to alcohol.

5 I also diagnosed his obstructive sleep apnea
6 because it is significant and it does contribute to
7 his mental state.

8 The day I saw him, his CPAP machine, he had
9 not been using. I think there had been some
10 difficulties. It was old. And I know that you
11 have to replace the mask ever so often. And I felt
12 that was contributing.

13 I also diagnosed him with hypertension because
14 he is on medication.

15 The other thing I do need to add, Your Honor,
16 in 2011 in the Department of Corrections -- I also
17 had those records, and they were very important --
18 he kept having episodes of syncope where they would
19 find him unconscious. And they did an MRI at that
20 time. So this was some years later, but it still
21 was consistent with the findings. He had an
22 abnormal MRI. So when they actually took a picture
23 of his brain he had some structural deficits there,
24 probably from old strokes or from having high blood
25 pressure.

1 The other thing that is significant in his
2 case is he has had some cancers of his face and he
3 has had some significant facial surgeries, and I
4 thought all of those things were contributing.

5 He also has high cholesterol, high lipids, and
6 those also can contribute to dementia.

7 Q. And next you reached a number of opinions in this
8 case, as reported in your -- as stated in your
9 report; is that correct?

10 A. Yes.

11 Q. Do you want to take us through those opinions?

12 A. Sure. It is my opinion, Your Honor, to a
13 reasonable degree of medical certainty that he was
14 suffering from a neurocognitive disorder at the
15 time of this offense.

16 And I base that on Dr. Haxton's -- we have --
17 we know what his functioning was around that period
18 of time. Very lucky. Normally that would not
19 happen. You would not have access to that kind of
20 data in retrospect. But based on his
21 neuropsychological test results at that time -- and
22 this is a chronic condition, this is not something
23 that happens overnight. Sometimes you can have a
24 patient that, say they have a stroke and they may
25 have very acute mental status changes that develop

1 into dementia, but most dementias are insidious.
2 They kind of go over time. They can get worse over
3 time. Some stay the same. It depends on what the
4 cause is.

5 So it is my opinion, based on Dr. Haxton's
6 data, and also the interviews Dr. Brawley did with
7 Mr. Herring's family, that he was having these
8 impairments that are consistent with dementia at
9 the time of his offense in 2006.

10 The other opinion I had is that he was
11 suffering from bipolar disorder at the time of his
12 offense.

13 Your Honor, he had been treated by Dr. Steude
14 from 1996 until 2006. And in my report he was
15 noted -- I looked in 2006 to see how his mental
16 state was with Dr. Steude's notes.

17 And, for example, in June 2006 he was
18 having -- he was talking loud, having disorganized
19 thoughts.

20 After he was shot, at the time of this
21 offense, he was transferred to the Baptist
22 Hospital. And then once he went to the Richland
23 County Detention Center, Dr. Ellen Berg, who was a
24 psychiatrist there that works, she sent him to Just
25 Care to the hospital. So he was even having active

1 symptoms of his mental illness, which had been
2 pre-existing, in my opinion, at the time of the
3 offense.

4 And then certainly, I think as the Attorney
5 General had noted, there had been a history of
6 alcohol abuse. And it appeared from reading the
7 trial transcript and some of the testimony that he
8 was intoxicated with alcohol at the time of this
9 offense.

10 Q. Dr. Maddox, I am going to approach you with this
11 document. And please let me know if it is
12 something that you reviewed in preparation to
13 testify today.

14 A. Yes.

15 Q. And what does it appear to be, for the record? Can
16 you identify it?

17 A. Yes. This is a probate order signed by Judge
18 Jacqueline Belton. And it was an order requiring
19 that once he made bond he had to be released into a
20 residential facility for treatment under the care
21 of Dr. Steude.

22 MS. BLANCHETTE: Your Honor, at this time I
23 would move this order, dated February 1, 2006, in
24 as Applicant's Number 5.

25 THE COURT: Any objection?

1 MS. KINARD: No, Your Honor.

2 (WHEREUPON, Plaintiff Exhibit No. 5 was
3 marked for identification and received
4 into evidence.)

5 BY MS. BLANCHETTE:

6 Q. And how did that order factor into the information
7 that you were just discussing, that he was being
8 treated by Dr. Steude at that time?

9 A. Yes. My understanding was he was at Richland
10 County in the Detention Center. Dr. Berg is the
11 psychiatrist there who had -- was the contract
12 psychiatrist there at the time. She thought he was
13 ill enough to petition for emergency admission to
14 Just Care. And my understanding is that he applied
15 for bond, but the condition of the bond was that he
16 go into inpatient treatment, which he did at
17 Baptist Hospital. And Dr. Steude assumed the
18 inpatient care of him, and had also provided his
19 outpatient care for ten years prior to that.

20 Q. I'll take that back from you.

21 (Complies.)

22 Q. Is there anything further regarding your diagnosis
23 of bipolar disorder that you would like to share
24 with the Court?

25 A. No. Other than, Your Honor, as you get older you

1 tend to get more manic. It kind of has -- it has a
2 really interesting force. When you are young in
3 your 20s you get manic. And then usually typically
4 in your 30s, 40s, and 50s you will have more
5 depression. And then there is another peak in
6 mania usually in your 60s and 70s.

7 So to kind of have pressured speech, lots of
8 thoughts, agitated behavior, that would be
9 consistent with his age and his history of
10 diagnosis.

11 Q. And you mentioned briefly the alcohol intoxication.
12 What was your diagnosis or finding regarding the
13 alcohol intoxication at the time of his offense?

14 A. It was my opinion that he was intoxicated, just
15 based, again, as I mentioned, on the transcripts
16 and some of the testimony.

17 Q. Okay. And did you have an opinion regarding the
18 medicines that were administered to him at the
19 hospital?

20 A. I do.

21 Q. And what is that?

22 A. Your Honor, I did not know that was going to be an
23 issue in this case, but I was very concerned upon
24 reading the records, knowing now that he had a
25 dementia, if you give intramuscular medications

1 like Ativan, which is what he received, that can
2 cause disinhibition. It worsens dementia. As
3 Dr. Brawley mentioned, there are certain conditions
4 when you already have a dementia that can make it
5 worse. And giving medicines that are that
6 sedating, they can do a number of things.. They can
7 cause confusion. Just during the time that they
8 are -- you are under the effect of them. They can
9 cause confusion, they can make you extremely
10 sedated. They can worsen your cognitive
11 functioning.

12 So the other thing it does is it can
13 disinhibit you. It can make you say things that
14 you may not normally say if you were not under the
15 influence of it.

16 Q. It is your understanding from the reading of the
17 record that he was under the influence of that drug
18 at the time of his interview with law enforcement?

19 A. That is correct.

20 Q. Is that correct? And what is your finding
21 regarding that as far as how that could have
22 affected the statement and interview with law
23 enforcement?

24 A. A number of things. It can account for his -- it
25 accounts to me for a number of things. It can

1 account for later why he may not have remembered
2 what he said during the time that he gave the
3 statement, because when you have those medications
4 you are -- you get a blackout, so he may not recall
5 later on what he said.

6 But the other thing is, it kind of has an
7 intoxicating effect, that he may have volunteered
8 more information than he would have had he not been
9 under the influence of that medication.

10 Q. Now, you said you reviewed the transcript in this
11 case; is that correct?

12 A. Yes.

13 Q. And I have already referenced today, at the very
14 beginning the issue of his bipolar disorder, mental
15 health is brought up as far as questions that could
16 be asked of the jury, but did you have concern or
17 have a finding regarding a failure to bring that up
18 in the remainder of the legal proceedings?

19 A. Yes. It certainly would have been helpful. But,
20 again, I'm not a lawyer, but I would have
21 testified, I would have been glad to talk about
22 those things.

23 Q. And let me get kind of specifically into how you
24 could have assisted Defense counsel in this case,
25 because we have gone through what you have done in

1 preparation for the PCR.

2 And before I do that, is there anything
3 further regarding your work in preparation for this
4 PCR today that you would like to add? Any other
5 findings?

6 A. No.

7 Q. Okay. Are you familiar with attorney Dick
8 Harpootlian?

9 A. Very well.

10 Q. And have you worked with him on cases before?

11 A. I have.

12 Q. And do you recall working with him on a case where
13 the Defendant's name was Santiago that was just a
14 couple of years prior to Mr. Herring's case?

15 A. I do.

16 Q. Okay. And you were his expert in that? You worked
17 with him as an expert in that case; is that
18 correct?

19 A. Yes.

20 Q. Okay. So if Mr. Harpootlian had reached out to you
21 and asked for your assistance in this case, would
22 you have been willing to assist him in this case?

23 A. Absolutely. And still would any day.

24 Q. And would you have reviewed the material that you
25 have reviewed in preparation for today, minus

1 obviously the transcript, because the trial hadn't
2 taken place?

3 A. Yes.

4 Q. Okay. And would you have shared with him your
5 findings?

6 A. Yes. And I would have done the same methodology.
7 If I had any indication that Mr. Herring had
8 dementia, I would have asked him to get a
9 neuropsychological consult, ordered the MRI, which
10 he ultimately had in 2011, and order some of the
11 blood tests that the Department of Corrections has
12 done. They have actually done the test. I was
13 concerned that he had a reversible dementia, and I
14 looked in the records and they actually have done
15 all the tests over the years that I would have
16 needed. But I would have recommended laboratory
17 tests, an MRI, some scanning of his brain, and the
18 neuropsychological testing.

19 Q. Okay. And you would have reviewed Dr. Steude's
20 records as you have done in preparation for today?

21 A. Absolutely.

22 Q. And worked in conjunction with him at that time?

23 A. Yes.

24 Q. And upon doing that, would you have had the same
25 findings that you shared with us today?

1 A. Again, you know, this is a different data point ten
2 years later, but based on Dr. Haxton's test
3 results, I don't know if he would have exactly
4 presented clinically, but I have confidence that I
5 would have been able to diagnose him.

6 Q. Okay. And I know that you said you worked with
7 Mr. Harpootlian before. In every case that you
8 have worked with him, do you also end up testifying
9 at a trial, or sometimes do you help him in the
10 stages leading up to a trial?

11 A. There have been times, probably more often than
12 not, that I am retained on a case and I don't
13 testify.

14 Q. Okay. And when you are retained on a case and you
15 don't testify, do you assist the attorney and
16 provide information when he is potentially trying
17 to work out plea negotiations?

18 A. If called upon. Certainly, I will do -- if I can
19 help -- once I am not an evaluator and will not be
20 testifying as a psychiatrist for evaluation
21 results, I'm glad to consult.

22 Q. Okay. And would you have been willing to assist --
23 if a plea was entered in this case, would you have
24 been willing to offer mitigation information at
25 that plea?

1 A. Sure.

2 Q. Okay. Now, we have touched briefly on the fact
3 that Mr. Herring gave a statement in this case.
4 What information or findings would you have shared
5 with Mr. Harpootlian regarding the statement in
6 this case?

7 A. Well, it would have been -- I guess it is more a
8 legal issue, but I would have -- I will
9 certainly -- I think there are periods of time
10 where he said he didn't remember doing things. But
11 the main concern I had, that I recall -- of course,
12 the records are voluminous -- but I recall later
13 that I think, and certainly in his trial, that
14 there was one time where it seemed the witnesses
15 were pitting, I think there was an objection
16 raised, where Mr. Herring said he didn't remember
17 something, he didn't recall saying something to the
18 law enforcement, and they each were saying that the
19 other was not being truthful. Those sorts of
20 things would have been issues where that would have
21 been helpful.

22 In looking at his testimony, I counted at
23 least I think 30 something times -- I can't even
24 keep track of the number of times when Mr. Herring
25 was testifying that he would say, I don't remember.

1 And I would have certainly advised Mr. Harpootlian
2 not to put him up on the stand.

3 Q. And that was going to be my next question. What
4 would have been your advice regarding putting him
5 on the stand and having him testify at his trial?
6 You would have advised him not to do that?

7 A. Absolutely, because, just as you -- in looking at
8 his testimony, he would have difficulty
9 remembering. He could easily become confused.

10 The problem with dementia is when you are
11 conversationally attacked, like Mr. Herring is, you
12 can't tell -- there is a condition in dementia
13 called confabulation. And what that means is, your
14 brain, when it can't remember something, it fills
15 in the gaps. And it is not lying, it is not on
16 purpose. Your brain fills in the gaps. And so you
17 can't tell -- no one is a human lie detector, so
18 you can't tell when somebody with dementia is
19 confabulating or they are actually relying upon
20 their memory to recall something. So his memory
21 also would not have been reliable in this case.

22 Q. And you evidenced that by reviewing his testimony?

23 A. Yes.

24 Q. You saw incidents of that in testimony?

25 A. Yes.

1 Q. And have you been involved in cases where you
2 provided that advice to the attorney as far as
3 whether or not their client should take the stand
4 or was capable of taking the stand?

5 A. Yes. Again, when asked.

6 Q. I referenced the Santiago case. One of the primary
7 issues in that case was the voluntariness of the
8 Defendant Santiago's statement. And an issue that
9 came up on appeal was whether or not your testimony
10 should have been utilized in the Jackson v. Denno
11 hearing addressing the suppression of the
12 statement.

13 One question. But in this case would you have
14 been willing to testify in the Jackson v. Denno
15 hearing regarding the circumstances surrounding
16 Mr. Herring giving his statement in this case?

17 A. Yes.

18 Q. And would you have been willing to testify at trial
19 regarding the statement and, for lack of a better
20 word, the voluntariness of that statement?

21 A. Yes.

22 Q. Is there anything else regarding his statement or
23 him taking the stand, anything else you would like
24 to add to that?

25 A. No, ma'am.

1 Q. Okay. As far as defenses, in this case the defense
2 of involuntary intoxication was raised. And as a
3 result of Dr. Garvin's testimony, the State
4 actually moved to have it struck because they said
5 that he was getting into issues involving sanity.

6 In response, Judge Cooper allowed Demi Garvin,
7 who was a forensic toxicologist, to testify. And
8 throughout the course of her testimony, which I
9 have asked you to review, she testified that Mr.
10 Herring's actions were purposeful. Is that
11 something based upon your expertise that a forensic
12 toxicologist is qualified to testify to?

13 A. In my opinion, no.

14 Q. Who would be the appropriate person to testify to
15 the purposefulness of his actions or comment about
16 his actions in regards to this case?

17 A. In my opinion, that would be a realm -- that is a
18 forensic psychiatrist's or a forensic
19 psychologist's job.

20 When somebody has behaviors -- you just can't
21 look at motor movements to decide whether
22 somebody -- if you don't know someone's thought
23 process, it is not helpful to give those kinds of
24 opinions unless you have evaluated the person and
25 you have done formal testing or you have done a

1 complete history, and those sorts of things.

2 Judging someone's intent or purposes just based on
3 movements is not a good methodology.

4 Q. And she refers to the video that she had reviewed.
5 And she says that, on Page 2106, beginning on Line
6 121, that it is her opinion within a reasonable
7 degree of medical certainty that he was not given a
8 substance involuntary that caused his intoxication.

9 She goes on to explain that her reason for
10 that opinion, on Page 2111, was because his actions
11 were purposeful.

12 Again, are you familiar with a forensic
13 toxicologist being able to offer an opinion in that
14 regard?

15 A. No. And my answer also, in finishing that, would
16 be persons with dementia, especially -- you can
17 still -- even if you are mildly intoxicated, you
18 may not be intoxicated to the point that you are
19 stumbling or that you can't perform certain motor
20 tests or neurological tests, but you still can be
21 significantly cognitively impaired because of the
22 underlying mental condition.

23 Q. And when Dr. Garvin is on the stand,
24 Mr. Harpootlian on cross-examination shows her a
25 number of case studies that deal with voluntary

1 intoxication. This begins on about Page 2146 of
2 the transcript and goes for a couple of pages.

3 She distinguishes those case studies on
4 Page 2164 and 2165, because the people in those
5 case studies had underlying psychiatric disorders.
6 And she distinguishes those and essentially
7 dismisses those during cross-examination.

8 Would you have been willing to testify that
9 Mr. Herring also had an underlying psychiatric
10 disorder?

11 A. Absolutely.

12 Q. And in response to that, Defense counsel has her
13 review the medications, on Page 2166 for reference,
14 of the medications that Mr. Herring had on his
15 second admission to the hospital. And he tries to
16 ask if those medications treat psychiatric
17 disorders.

18 Would you have been able to answer that
19 question and give the diagnosis of Mr. Herring?

20 A. Yes.

21 Q. And she also, when she is on the stand, they go
22 into the issue of the fact that no blood sample was
23 collected in this case so they couldn't examine the
24 blood for level of intoxication. Is that something
25 that caught your attention in this case, the

1 failure to take a blood sample?

2 A. Yes.

3 Q. And how would that have been helpful in this case?

4 A. Well, of course it is a piece of evidence, and to
5 know the blood alcohol level, you would be able to
6 extrapolate. So, for example, had his blood
7 alcohol level been less than .1, and we know that
8 he has a dementia, that would be significant
9 compared to was his blood alcohol level .2 and
10 looking at his behavior. Again, it is a piece of
11 data.

12 Q. Your final finding in your order talks about how
13 your findings would have been helpful in mitigation
14 as Mr. Herring's capacity to conform his conduct to
15 the requirements of the law was diminished. Can
16 you further explain that for me?

17 A. Yes. Again, this is a very difficult case. If he
18 had not been intoxicated, there certainly would
19 have been incapacity to conform issues, Your Honor.
20 You know, we knew that he had mental illness, he
21 had dementia, he was angry. Some events had
22 happened in the club and he was very upset and he
23 was not acting rationally. But the alcohol
24 intoxication would preclude me from giving that
25 opinion, but I certainly think all of those things

1 were a factor.

2 Again, if you take these illnesses alone, they
3 would be enough to impair one's capacity, but then
4 when you add the alcohol intoxication on top of
5 having the dementia, again, it is cumulative.

6 So because of that I would have split a hair
7 and not rendered that opinion because of the
8 alcohol intoxication, but it certainly -- in my
9 opinion, his capacity was diminished.

10 Q. And that is information, that finding, you would
11 have shared with Mr. Harpootlian as he was
12 preparing his case if he asked you to do what you
13 have done in preparation for today?

14 A. Yes.

15 Q. And you also mentioned in your report that his
16 behavior was impulsive and reckless. Can you
17 further explain that?

18 A. Yes. Again, here is -- this is a man that had been
19 working, had been functioning in society. He began
20 in 2006. He certainly was having some decline in
21 his functioning. And his psychiatrist, if you look
22 Dr. Steude's records, Dr. Steude is the one that
23 recommended earlier while he was treating him that
24 he have this neuropsychological evaluation.

25 And what had happened in his practice, he was

1 beginning to decline in his practice before this
2 ever happened. And the record noted that he wasn't
3 taking on new cases, he wasn't able to keep up with
4 his work. And, in fact, he was spending his day
5 going back to old clients and spending time with
6 them and he was not being productive. So you have
7 this history that he already was having a decline
8 in his functioning prior to this.

9 And, then again, he begins -- he gets -- there
10 were symptoms that his mental illness is getting
11 worse. And then his drinking -- probably
12 self-medicating, but also he is a long-term
13 alcoholic -- that is increasing. And so all of
14 those things are steadily decreasing his
15 functioning and, in my opinion, led him to this
16 point. And that is not typical behavior for him.

17 And on that evening, you know he was angry.
18 He was able to give me some of the history of what
19 had happened that night. And to return to the
20 scene and to have a gun and fire it, those are all
21 very reckless things, in my opinion. That had not
22 been consistent with his behaviors.

23 Q. And just so I'm clear and the record is clear, you
24 found in this case that his dementia is a permanent
25 condition or there is permanent brain damage in

1 this case?

2 A. Yes.

3 Q. Okay. So it is not something that would have
4 fluctuated from the time of Dr. Haxton's report to
5 now as far as getting better, it is something that
6 only gets worse?

7 A. Not necessarily. Actually, I was surprised that he
8 is still as impaired as he was in 2006. It has
9 been ten years later. He is not drinking anymore.
10 So, again, he has got numerous causes for his
11 dementia. So the fact that he is abstinent from
12 alcohol I would have expected some improvement, but
13 the fact that his dementia is also contributed to
14 by his hypertension, and also his sleep apnea, I
15 could see it deteriorating.

16 So I think -- right now he has been stable
17 over the past ten years, but that is because his
18 blood pressure is being managed, he is on his
19 medications, and he is not drinking. So,
20 hopefully, unless he has another little stroke or
21 some kind of cardiac event, it should be stable for
22 a period of time.

23 MS. BLANCHETTE: Your Honor, if I can beg the
24 Court's indulgence one moment?

25 THE COURT: Yes, ma'am.

(Pause.)

BY MS. BLANCHETTE:

Q. Dr. Maddox, I understand you are not an attorney, but if Mr. Harpootlian would have contacted you and said he needed you to evaluate Mr. Herring and potentially testify on his involuntary intoxication defense, is that something you could have assisted him with?

A. I would have referred him out. That is just my -- I can testify in those areas, but that is not one that I have expertise in, so I probably would have referred him out.

Q. Okay. And if he needed your testimony to assist in arguing, even though diminished capacity isn't recognized as a defense, but to argue or to submit information to the jury regarding the voluntariness of the statement and/or to try to get a lesser included offense, would you have been willing to testify in those regards?

A. Absolutely.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence a moment.

(Pause.)

BY MS. BLANCHETTE:

Q. Dr. Maddox, you provided great assistance in this

1 case, and Mr. Herring has appreciated all that you
2 have done, and I know that you have reviewed a lot.
3 Is there anything further that you would like to
4 share with the Court today regarding your work in
5 this case, your findings, and what you could have
6 done leading up to his trial in this case?

7 A. Not that I can think of.

8 MS. BLANCHETTE: Your Honor, I have no further
9 questions of this witness.

10 THE COURT: Cross-examination?

11 MS. KINARD: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MS. KINARD:

14 Q. Good afternoon, Dr. Maddox. In assessing
15 Mr. Herring, did you review at all the possibility
16 of criminal responsibility? I mean, you discussed
17 diminished capacity, even though it is more a
18 medical term, not a legal term, and how dementia
19 may have affected him, but did you evaluate how his
20 dementia affected his criminal responsibility?

21 A. Yes.

22 Q. Please describe that a little bit.

23 A. I would have opined that he was criminally
24 responsible. It would have been my opinion, even
25 though he had a dementia, that for the specific

1 charge he would -- he knew right from wrong,
2 absolutely. Even though he is demented he would,
3 in his right mind, would not shoot anyone.

4 Q. And this behavioral impairment, I believe that
5 is -- is that the term that you use as a, I believe
6 you said indicator on the DSM-5?

7 A. Yes, with behavioral disturbances.

8 Q. Disturbances.

9 A. Yes.

10 Q. Thank you. Was that indicated in his behavior that
11 night?

12 A. Yes. In my opinion, yes. Persons with dementia,
13 when they get upset, they get extremely irritable.
14 They can hold on. They remain irritable. They
15 probably don't have the same cooling off. It
16 depends on the individual, but they don't have the
17 same cooling off period of time that other people
18 may. Or they can get extremely irritable over
19 numerous little things. And so their judgment is
20 very affected. They get very impulsive. They have
21 changes in their mood very quickly and suddenly.

22 Q. Now, you just testified that you would not be
23 comfortable helping prepare a defense of
24 involuntary intoxication?

25 A. That's correct.

1 Q. However, in your opinion, if you feel comfortable
2 answering, is that a possibility in this situation?
3 Did you see any evidence saying absolutely not,
4 there was no chance he was involuntarily
5 intoxicated?

6 A. Oh, no. I think it was certainly a reasonable
7 area.

8 Q. So you don't think that was an irrational defense
9 or explorational avenue in his defense of this
10 case?

11 A. Not at all.

12 Q. Okay. You also spoke about some of the drugs that
13 he was administered, particularly Ativan?

14 A. Yes, ma'am.

15 Q. Would that account for any lapses in truth-telling?
16 You said -- and I will elaborate -- you said he
17 might suffer a blackout or lack of memory. Could
18 it affect his ability to tell the truth?

19 A. It could. In a demented person, again, the
20 confabulation, but it is so hard to know because
21 non-truth-telling has so many meanings. In a
22 demented person it can be confabulation, that their
23 brain is just filling in gaps, and it may not be
24 the truth, but there is no intent to it. It could
25 be lying. You are correct. But Ativan, if you

1 have an underlying dementia, it can confuse you and
2 your brain could be more likely to confabulate and
3 do things like that.

4 Q. So just to make sure I understand. It may or may
5 not be an intentional untruth?

6 A. That's correct.

7 Q. It could be confabulation?

8 A. Yes.

9 Q. And you really can't know the difference?

10 A. That's correct. I have no way. We -- no one in
11 science yet -- they are getting close, they are
12 doing some scans out in California right now that
13 maybe one day, but right now we sure can't tell.

14 Q. All right. You testified briefly about
15 Mr. Herring's testimony during the trial. Do you
16 believe that it was possible to prepare him to
17 testify?

18 A. I didn't ask Mr. Harpootlian. I don't know. I
19 had -- I'm trained to give interviews, and I had a
20 very difficult time getting an accurate history
21 from him. He wanted to help, but, again, he was
22 very hypervocal, he would often get distracted, he
23 would go off on tangents, even with me being
24 skilled in that sort of thing, directing him. So
25 it would have been difficult.

1 Q. And, again, just to clarify, you received Dr.
2 Haxton's records after your initial evaluation of
3 Mr. Herring?

4 A. That's correct.

5 Q. And I believe you described them as confirming your
6 thoughts?

7 A. Yes. They were certainly consistent with my
8 findings and Dr. Brawley's findings. And to me
9 they were helpful because they were ten years
10 earlier. So that -- it helped me render more
11 opinions about what his mental state was at the
12 time, it was more helpful information, because it
13 was a data point much closer to the time of the
14 crime.

15 Q. And just to clarify, some of the last statements
16 that you made on direct, you talked about
17 Mr. Herring's actions being inconsistent with his
18 habit or his typical behavior. How are you able to
19 render that opinion?

20 A. Just based on his legal history. I saw no other
21 records of him having murder charges or discharging
22 firearms in public, in businesses, and those sorts
23 of things.

24 Q. So you are referring to the extremity and nature of
25 these charges?

1 A. Yes, ma'am, the magnitude of his behavior, that's
2 correct.

3 MS. KINARD: I don't believe I have any
4 further questions. Thank you very much.

5 THE WITNESS: You're welcome.

6 THE COURT: Any redirect?

7 MS. BLANCHETTE: Very briefly, Your Honor.

8 REDIRECT EXAMINATION

9 BY MS. BLANCHETTE:

10 Q. The State had asked you a number of questions about
11 your findings now. And at trial the State argued
12 that you couldn't open up Mr. Herring's brain and
13 look to see what was going on at the time.

14 If you would have been contacted by
15 Mr. Harpootlian, would you have been able to help
16 him look into Mr. Herring's brain?

17 A. Absolutely.

18 MS. KINARD: Objection, Your Honor.

19 THE COURT: Sustained.

20 MS. KINARD: Thank you, Your Honor.

21 MS. BLANCHETTE: Your Honor, I have no further
22 questions of this witness.

23 THE COURT: All right.

24 THE WITNESS: Thank you.

25 THE COURT: Thank you. You may step down.

1 Any objection to Dr. Maddox being excused?

2 MS. KINARD: No, Your Honor.

3 MS. BLANCHETTE: No, Your Honor.

4 THE COURT: Thank you for coming.

5 (Witness steps down and is excused.)

6 MS. BLANCHETTE: Your Honor, I may need a
7 brief break. The witness I was going to call next
8 I do not see in the courtroom right now.

9 THE COURT: All right, we will take ten
10 minutes.

11 MS. BLANCHETTE: Thank you, Your Honor.

12 (WHEREUPON, a break was taken at 11:48
13 a.m.)

14 (WHEREUPON, the hearing resumed at 11:59
15 a.m.)

16 MS. BLANCHETTE: We would call Dick
17 Harpootlian.

18 (Witness approaches.)

19 THE BAILIFF: Place your left hand on the
20 Bible, and raise your right hand, please.

21 (Witness complies.)

22 THE CLERK: Do you solemnly swear or affirm
23 the testimony that you give in this case will be
24 the truth, the whole truth, and nothing but the
25 truth, so help you God?

1 THE WITNESS: I do.

2 THE CLERK: Have a seat.

3 (Witness complies.)

4 THE CLERK: And state your full name for the
5 record.

6 THE WITNESS: My name is Richard A.
7 Harpootlian.

8 RICHARD A. HARPOOTLIAN,
9 after being duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MS. BLANCHETTE:

12 Q. Mr. Harpootlian, what is your current profession?

13 A. I'm an attorney.

14 Q. And how long have you been an attorney?

15 A. Since 1974. That would be 42 years.

16 Q. And during those 42 years, have you had different
17 positions in the legal profession?

18 A. I'm sorry, say that again, please?

19 Q. Have you had different positions in the legal
20 profession? Held different positions?

21 A. Yes. I have been -- I was an Assistant Solicitor
22 from 1975 to 1983.

23 From 1983 to 1990, I was in practice with Jack
24 Swerling doing primarily criminal defense work.

25 From January of 1991 to January of 1995, I was

1 the Solicitor for the Fifth Circuit.

2 And then I went into private practice, where I
3 have been since January of 1995.

4 Q. And during that time, it would be my understanding
5 you handled a number of criminal cases?

6 A. Hundreds.

7 Q. Do you recall your representation of Dewain Herring
8 in this case?

9 A. I did.

10 Q. Okay. And have you had a chance to review the
11 transcript or your file from this case?

12 A. I mean, I have not had a chance to read the
13 transcript. I read it when the appeal was being
14 done, but I have not taken steps to review the
15 transcript in detail, nor the file in detail. We
16 produced it to you, and you and I have talked about
17 some pieces of it.

18 Q. And that would be my next question. You did give
19 me the opportunity to come over to your office and
20 review your file; is that correct?

21 A. I did.

22 Q. Okay. And subsequently then your office produced
23 portions of that file?

24 A. Whatever you wanted.

25 Q. I'm just going to jump right in and go through the

1 issues as they are in the amendment and go through
2 each of the allegations, and then we will see if
3 there is anything further we need to add.

4 The first allegation deals with a change of
5 venue as far as media attention to this case. Do
6 you recall, was there a lot of media attention on
7 this case?

8 A. There was a lot of media attention.

9 Q. And do you recall why you didn't move for a change
10 of venue out of Richland County?

11 A. Well, I felt Richland County would be -- I mean, if
12 you got moved to Lexington, that's not good. I
13 don't think that the judge would move it as far
14 away as Charleston. And we felt that we could get
15 a good jury venire and a good jury if the
16 appropriate voir dire questions were asked.

17 Q. Okay. And in your closing argument you told a
18 Scottish story. I don't know if you remember.

19 A. I tell it every time. As a matter of fact, I can
20 actually do it verbatim right now -- I use it in
21 every case -- as if that was the first time I told
22 it. Yes.

23 Q. And then you urged the jury to do the unpopular
24 thing. Did that factor into the media and the
25 attention that had been given to this case?

1 A. No. I mean, it is -- I just tried a murder case
2 four or five weeks ago, and I said the same thing.
3 And the argument is simply, in Scotland they have
4 three verdicts: Guilty, not guilty, not proven.
5 And juries come into courtrooms assuming they have
6 to figure out and determine what happened, and that
7 they either have to decide the Defendant did the
8 crime or didn't do the crime. And so there is that
9 third option of not proven. The State has to prove
10 the case beyond a reasonable doubt. And in
11 Scotland they recognize that not proven, which
12 doesn't exonerate the Defendant, but at the same
13 time doesn't convict him. And it is not the
14 popular view to do that. You have got to -- the
15 jury believes they have got to find somebody
16 culpable or not culpable.

17 Q. Thank you for that explanation. I am going to move
18 forward to plea negotiations in this case. Were
19 there any?

20 A. Tried.

21 Q. Do you want to explain, please?

22 A. Barney Giese was the Solicitor. He indicated he
23 could plead straight up to murder.

24 Q. And was there anything that factored into that?
25 Was there -- because -- let me ask you this. Did

1 you look into insurance policies that Mr. Herring
2 was carrying at the time?

3 A. Yes. One of the arguments I made to the Solicitor
4 was that if he could plead to involuntary
5 manslaughter that there would be coverage under
6 both his household -- argument that there would be
7 coverage under his household policy and his motor
8 vehicle policy, and I think it added up to about
9 \$3 million, which would go to -- I think he had two
10 minor children living with, I believe, their mother
11 in Philadelphia or Pennsylvania somewhere. And I
12 believe the family was represented by -- actually,
13 the mother and father were here, and the mother of
14 the children was in Philadelphia. And, I mean, you
15 know, you can't mix the civil and the criminal. I
16 made them aware of that, that if he was allowed to
17 plead to involuntary, that coverage could perhaps
18 be made. I mean, I think he would probably have to
19 litigate it, but I do a lot of insurance coverage
20 litigation, I felt pretty good about the fact he
21 could get coverage.

22 Q. So that was a proposal that you provided in trying
23 to reach a plea agreement in this case?

24 A. Yes.

25 Q. And what happened with that?

1 A. There was no interest expressed by the person that
2 makes that decision, which is Barney Giese. And he
3 related that the family was not interested or it
4 was too contingent, or something. I can't
5 remember. You know, it has been the better part of
6 a decade.

7 Q. Okay. And I introduced previously an order that
8 was obtained for an emergency hospitalization --

9 A. Right.

10 Q. -- of Mr. Herring. And I can show you that.

11 A. I have seen it.

12 Q. You have seen it? Okay. You are familiar with it?

13 A. Yes.

14 Q. And that would be for mental illness?

15 A. Correct.

16 Q. You were aware that he was suffering from mental
17 illness at the time of your representation?

18 A. Yes. He had been under the treatment prior to the
19 incident by Dr. Phil Steude, who is a psychiatrist
20 here in town. And Dr. Steude, we contacted Dr.
21 Steude about, you know, trying to figure out if
22 there was some mental defense.

23 Steude indicated that Dewain had been
24 diagnosed bipolar and was on medication at the time
25 of the incident, or had been prescribed medication.

1 And that alcohol and that medication did not mix
2 very well, that it made the person -- affected
3 their conduct, mental thoughts.

4 And, of course, the testimony was clear that
5 he had been playing golf that day with Chris Isgett
6 and they had been drinking and then he --
7 apparently he had some drinks at the different
8 establishments he had gone to. So it was clear
9 that he was drinking alcohol with that medication,
10 and that that could provide some explanation for
11 his conduct, which would be voluntary intoxication,
12 which is not a defense.

13 So we actually attempted to show that his
14 conduct was more consistent with him being given a,
15 in the vernacular, Mickey, somebody had put
16 something in his drink. We had an expert testify
17 about that. Apparently that didn't go very far.

18 Q. And I'll get to that in more detail, but I want to
19 go with the mental health issue just a little bit
20 more here.

21 A. Sure.

22 Q. You also assisted Mr. Herring in obtaining
23 disability coverage?

24 A. We did.

25 Q. Is that correct?

1 A. We did.

2 Q. Okay. And was that also you consulting with Dr.
3 Steude?

4 A. You know, I know we had a discussion about some of
5 the issues involved. Disability, I have no
6 independent recollection of a specific
7 conversation. I know we had conversations.

8 Q. Did Dr. Steude ever bring to your attention a
9 neuropsychological evaluation report done by Bill
10 Haxton in June of 2006?

11 A. I don't think so. I mean, I probably had the
12 report, but I don't think -- I think I was counting
13 on Dr. Steude to review it and give me an opinion
14 as to whether or not it would have affected -- his
15 mental state was such that it would provide a
16 defense, mitigation, or something. Bipolar was
17 all he ever talked about.

18 Q. Okay. And you pretty much answered that question.
19 Did he ever bring up the issue of dementia?

20 A. Absolutely not.

21 Q. Now, typically when you are preparing a case, do
22 you reach out to experts in the area of mental
23 health?

24 A. If it is relevant to that case, sure.

25 Q. Okay. And is Dr. Schwartz-Watts, or Dr. Maddox as

1 she goes by now, is she an expert that you used
2 previously in cases?

3 A. I have.

4 Q. Okay. And is she somebody that you could have
5 potentially reached out to on this case?

6 A. Absolutely.

7 Q. And is there any reason why you didn't reach out to
8 her on this case?

9 A. Because unlike 99 percent of the cases I'm involved
10 in, this Defendant had a mental health -- a
11 psychiatrist treating him prior to the incident,
12 had a history of his mental issues. I mean, you
13 know, typically what happens is somebody gets
14 arrested, there are mental -- questions about their
15 mental competence of what happened, you hire
16 Dr. Schwartz-Watts, she does a post hoc
17 investigation so that it is -- they have to reflect
18 back on what their mental status was at the time of
19 the incident. In this case we had Dr. Steude, who
20 treated him before and after the incident, so, I
21 mean, I guess I deferred to Dr. Steude.

22 Q. Would you have utilized him as an expert witness in
23 this case?

24 A. If he had given me something that would have been a
25 defense or mitigation, yes.

1 Q. Would it have been a concern that in
2 cross-examination the State could have gotten into
3 his lengthy treatment of the Defendant, of
4 Mr. Herring?

5 A. I don't think so. I think that that helped -- I
6 mean, it would give him credibility in terms of
7 whatever conclusion he came to, but the only
8 conclusion he came to was bipolar.

9 Q. Now, was that conclusion or the issue of mental
10 health used at all in the plea negotiation stage of
11 this case?

12 A. No.

13 Q. If you knew that he -- if it had been reported in
14 the 2006 test that he was suffering from dementia,
15 is that something you could have utilized in your
16 plea negotiations in this case?

17 A. If somebody had -- I apologize for interrupting --
18 if somebody had explained to me the relevance of
19 that -- you say dementia. I mean, I have talked to
20 him. I know that Mr. Herring has been diagnosed
21 with dementia right now. I talked to him this
22 morning. He was conversant with me. I talked to
23 Donna outside.

24 I said, What is going on here? Because my
25 concept of dementia is different than apparently

1 what it really is.

2 And she indicated, He is conversant. That
3 doesn't mean he doesn't have dementia.

4 So if somebody had explained to me prior to
5 this trial -- and Dr. Steude would have been the
6 one to do that -- explained to me that dementia
7 affects him in this way, which would have perhaps
8 explained -- I mean, that may have been relevant on
9 a GBMI or if you could get that in to a jury it
10 might have allowed them to conclude it was not
11 murder, it was not Mouzon murder, it might have
12 been voluntary or perhaps even involuntary.

13 So I think, yes, that is important, but at
14 this point, you know, all I can tell you is no
15 one -- the only mental health professional we
16 utilized is the guy that was treating Dewain, had
17 treated Dewain, and was treating Dewain. And we
18 felt -- and Dr. Steude had a great reputation. I
19 have actually used him in cases years ago.

20 Q. If you would --

21 MS. KINARD: Excuse me. Just for
22 clarification of the record -- and please tell me
23 if I am misunderstanding this -- but I believe in
24 Dr. Haxton's report there is no diagnosis of
25 dementia. The word is not used.

1 MS. BLANCHETTE: I may have misspoke. I was
2 just going from the expert testimony.

3 MS. KINARD: I am not even referring to that,
4 but as far as what Mr. Harpootlian was aware of, I
5 don't believe he could have accurately been
6 described as knowing there was a diagnosis of
7 dementia. I just wanted to clarify that for the
8 record.

9 THE COURT: Okay. And I have not seen
10 Dr. Haxton's report, so I don't know.

11 THE WITNESS: Maybe -- I mean, whatever is in
12 the report would have been interpreted by Dr.
13 Steude for me. In other words, I wouldn't have --
14 if I had seen the word dementia, I wouldn't have
15 known without further investigation how that would
16 have affected.

17 I will say that having talked to
18 Dr. Schwartz-Watts this morning -- I didn't listen
19 to her testimony -- that my understanding of
20 dementia now is different than it would have been
21 before seeing the report obviously when preparing
22 his defense.

23 Q. And that is what I was going to ask. If you had
24 engaged the services of Dr. Schwartz-Watts, had her
25 done the evaluation and do what she explained in

1 the courtroom today and in her report, which I
2 provided to you previously, she had then advised
3 you to obtain the services of Dr. Tora Brawley, and
4 had all the information compiled by the two of
5 those experts, you would have utilized that in plea
6 negotiations; is that correct?

7 A. Yes, with this caveat. The admissibility of all
8 that -- as you know, I am representing a guy named
9 Santiago and we have been slogging through the
10 appellate process on his conviction for murder.
11 There is huge questions as to whether that would
12 have been admissible, so in terms of using it for
13 plea negotiations, I guess I could have said to
14 Barney, Look, the guy is suffering from dementia.
15 He has got a -- it is not a mental defense perhaps,
16 but certainly it is mitigation, and could we sit
17 down and maybe talk to the family about the
18 insurance money, the dementia, can we do all that?
19 But we had no defense in the sense of mental
20 illness because, again, I was relying on Dr.
21 Steude.

22 Q. And you referred to Santiago, and I have several
23 times as well. And please correct me if I am
24 summarizing any of the facts from that case wrong.
25 But in that case you were attempting to use

1 Dr. Schwartz-Watts' testimony in your case in
2 chief.

3 A. Well, I didn't try the case. I did the PCR.

4 Q. Okay.

5 A. So he attempted -- the defense attorney attempted
6 to use Dr. Schwartz-Watts' testimony to explain
7 that this kid that had Aspergers would have
8 perceived a threat differently because of his
9 Aspergers than a person without Aspergers, and that
10 that would affect -- and if you read Ralph King
11 Anderson's dissent from the Court of Appeals, it
12 describes the process of why that would be
13 relevant. The South Carolina Supreme Court denied
14 cert, and we currently have a petition for habeas
15 in federal court on that issue.

16 Q. In the Court of Appeals decision -- I have already
17 provided a copy of that to the Court today -- in
18 both majority the opinion and in the dissent that
19 you referenced, they discuss the fact that the
20 attorney failed to: One, proffer any testimony of
21 Dr. Schwartz-Watts; two, utilize her testimony in
22 the Jackson v. Denno hearing.

23 A. Correct.

24 Q. And then, three, attempt to introduce her testimony
25 to the jury to address the voluntariness of the

1 statement.

2 A. Correct.

3 Q. So I am going to take you through each one of
4 those.

5 One, would you have utilized her testimony
6 based upon her findings in the Jackson v. Denno
7 proceeding in this case?

8 A. Sure. I would have used all three things if I was
9 aware, unlike in Santiago where they were aware and
10 had the testimony and he didn't proffer it -- that
11 was the problem there, was we didn't proffer it --
12 for any of those purposes.

13 And in the PCR, Judge -- I'm trying to
14 remember who the PCR judge was, it was -- he was
15 from Beaufort -- anyway, he ruled that the lawyer
16 was ineffective for not presenting that evidence,
17 but it was harmless error. And that is why we are
18 on federal habeas now.

19 But the problem here is that we again relied
20 on Dr. Steude, and once Steude indicated there was,
21 you know, nothing -- nowhere to go in terms of
22 mental defense, we didn't think to talk to
23 Dr. Schwartz-Watts, or anybody else.

24 Q. On Page 186, just for everyone's reference of the
25 transcript, is your argument at the end of the

1 Jackson v. Denno hearing?

2 A. Right.

3 Q. And there you argue that he is on Ativan and he was
4 bleeding as far as the fifth factor of his
5 intellectual emotional state?

6 A. Right.

7 Q. Dr. Schwartz-Watts has testified today and put in
8 her report her findings regarding the facts of that
9 Ativan on the voluntariness of his statement or his
10 capacity to give that statement. Is that something
11 you considered looking into in getting an expert to
12 testify about in this case?

13 A. I did not.

14 Q. And what was your reasoning for not having anyone
15 decide this argument that you made on that factor?

16 A. Well, I mean, I think that -- I can't really
17 remember, to be frank with you, but I think the
18 analysis was, again, as to any aspect of the drugs
19 that -- and that Ativan was prescribed by Dr.
20 Steude; correct? So, I mean -- I mean, that is my
21 memory is that he prescribed it, so we would defer
22 to him as to what effect, if any, it might have
23 had.

24 Q. And if it was -- you then in your cross-examination
25 ask -- when the issue goes in front of the jury,

1 you asked Chief Wilson and the other officers about
2 him being given Ativan when he was hospitalized for
3 the shooting?

4 A. Correct.

5 Q. But that would be your same answer as to why you
6 didn't use an expert --

7 A. Yes.

8 Q. -- to address that?

9 A. Correct.

10 Q. Let's talk a little bit about the testimony of
11 Mr. Herring.

12 A. Mr. Who?

13 Q. Mr. Herring.

14 A. Oh, okay.

15 Q. The Defendant. What did you do to prepare him to
16 take the stand?

17 A. Over a period of weeks, Dewain would come to my
18 office, we would rehearse his testimony. Jim
19 Griffin, who is a friend of mine, participated,
20 played prosecutor. We battered him about. And I
21 must say, he did extraordinarily well. I mean, he
22 really, really knocked it out of the park over the
23 last couple of sessions. We probably had five or
24 six sessions. I can't remember how many.

25 But, look, Dewain is above average

1 intelligence significantly. He is an attorney.
2 And made a great presentation in all the practices,
3 the rehearsals. I mean, we beat him up. Went
4 after him. And he performed well.

5 The idea was that the shot that killed this
6 guy was from 140 feet, I think is my memory,
7 uphill, at night, through a door, into the guy's
8 ear. So the idea that this was an intentional act
9 to kill somebody was not credible. That it was
10 reckless. Now, was it Mouzon reckless? We didn't
11 think so.

12 But, you know, what was important was for
13 Dewain to appear to be contrite and upset about the
14 fact that he had taken that life of another human
15 being. And he, I think, almost came to tears
16 several times in my office. He did great. So we
17 felt he was well prepared.

18 I talked to Jim Griffin this morning to make
19 sure my recollection was correct, and he agreed.

20 Q. Now, you talked about your preparation. How was
21 Dewain's actual testimony at trial?

22 A. Horrible. Awful.

23 Q. Please explain.

24 A. Wooden. He indicated that -- he almost -- at one
25 point he blamed the police. It was bizarre that

1 somebody who could have, who had done so well with
2 Griffin and I, could be so bad on the stand. And
3 Barney went after him, and he reacted horribly.

4 Now, there was no contrition, no sorrow, no --
5 none of the things that he displayed when we -- and
6 that was rehearsal. That wasn't the real thing. I
7 mean, you would think somebody would be more
8 emotional when they are testifying about it, but he
9 got -- he just became very stoic, very unemotional.
10 And it was horrible. Train wreck.

11 Q. And you have seen a lot of testimony over the
12 years; is that correct?

13 A. Yes. Worst I have ever seen.

14 Q. That was going to be my question. How would you
15 rank this, one of the worst?

16 A. The worst. Let me say this. Having seen what I
17 saw him do in my office, and then that, I mean, it
18 was just -- it was un -- I think Jenny was sitting
19 right behind me and leaned up after his testimony
20 and said, We screwed up. That wasn't very good. I
21 said, You're right. I mean, we were all shocked.

22 Now, do I have an explanation for that? Not
23 really. But -- back then I didn't. Maybe it is
24 dementia. Maybe that is what -- the inability to
25 emote. I don't know. And I could only guess

1 today.

2 Q. If you would have utilized an expert such as Drs.
3 Maddox and Dr. Brawley, and as Dr. Maddox testified
4 today, she would have advised you or any other
5 defense attorney to not put him on the stand, would
6 you have heeded her advice?

7 A. Well, knowing how badly he would do on the stand
8 now, I would have heeded her advice. I think back
9 then -- I mean, this is a case that -- I mean, I
10 think it would be tough not to put him on the
11 stand, knowing what I knew then, because, again, he
12 had done so well. If he had testified the way he
13 had -- in my conference room had testified, or
14 50 percent of that, we wouldn't be sitting here
15 today, I don't think.

16 Q. If you had received advice from an expert with
17 concerns about him taking the stand and his mental
18 capability in doing so, would you have had to
19 approach this case differently?

20 A. Sure. Absolutely.

21 Q. Okay. And any idea how that approach would have
22 differed?

23 A. Not really. I mean, you know, it is 20/20
24 hindsight. I know now what would have happened,
25 what did happen when he took the stand, so it is

1 really hard for me to guess what I would have done.

2 Q. And Dr. Maddox testified about how the dementia --
3 and I know it has a longer proper name, but I will
4 just refer to it as dementia -- can affect his
5 behavior. Do you think that could have factored at
6 all into your argument for an accident charge in
7 this case?

8 A. Well, I mean, it is not -- we don't have a
9 diminished capacity defense, so no. I mean, the
10 way I think you get it in is through the back door,
11 which is he has got this, you know, this issue. It
12 is the Santiago argument, which hasn't worked so
13 far in state court. You would want the jury to
14 know that he did suffer from dementia, bipolar,
15 those sorts of things, not as a defense, but as a
16 mitigation.

17 I mean, Mouzon is a recklessness, a heart
18 devoid of any social consciousness. So, you know,
19 he's got issues here. That doesn't excuse what he
20 did, but it mitigates what he did.

21 Q. And speaking of Santiago, in that case it refers
22 to -- and this is the appellant decision, Court of
23 Appeals decision -- it cites to Gill v. State,
24 which is a Supreme Court decision from 2001, and
25 State v. Callahan, which is a Supreme Court

1 decision from 1974. And in both of those
2 instances, which you just explained happened, they
3 somewhat back-doored the testimony?

4 A. Right.

5 Q. In both of those instances the psychiatrists had
6 been allowed to testify?

7 A. Right.

8 Q. So that is something that could have been feasible
9 in this case?

10 A. If I had known about it.

11 Q. In looking -- in the opening and in the closing,
12 the Solicitor argues that you can't open his brain
13 to determine intent, you can't open his brain to
14 explain his actions.

15 You argue at times that his memory is hazy,
16 that there are issues, and you are going to explain
17 why he lied.

18 So I know you said you relied on Dr. Steude,
19 but why didn't you go further to have his brain
20 examined or have neurocognitive tests done in this
21 case?

22 A. Because Dr. Steude had been treating him -- and,
23 again, I had used Dr. Steude. He is one of the
24 go-to -- or used to be one of the go-to people in
25 criminal cases to do all the sort of analysis you

1 are talking about. So you would think that he, if
2 he had any questions about dementia or any other
3 issue, that he would have said that to me. I mean,
4 he is basically bipolar, on meds; if he takes his
5 meds, doesn't drink, he is not going to have a
6 problem.

7 Q. But you were aware or assisted him in getting
8 disability due to cognitive impairment?

9 A. Correct. But, remember, that cognitive impairment
10 is after the incident; correct? I mean, that is --
11 we are applying for it after he has hired me, after
12 he has been no longer practicing law, after we had
13 gotten him out of jail.

14 Q. But that information was available to you prior to
15 the trial, even though it is after --

16 A. Absolutely.

17 Q. Okay. It was prior to trial.

18 Now, we have talked about the Mouzon charge
19 and how the mental health issue could have affected
20 that.

21 As far as involuntary, the information or the
22 findings of Dr. Maddox and Dr. Brawley, do you see
23 how that could have assisted in your argument for
24 involuntary to be able to back-door her testimony,
25 or their testimony?

1 A. Well, I mean, basically -- I mean, if you look at
2 the analysis on it, voluntary was never an issue
3 because it was sudden heat or passion based on
4 legal provocation. There was no legal provocation.
5 So it is not a voluntary. So it is either a murder
6 or an involuntary. It is a reckless disregard for
7 the life of others. If it is not the Mouzon
8 malice, then it is involuntary, and so it would
9 have been relevant to deal with the blackness of
10 the heart, the Mouzon definition of malice.

11 Q. I want to ask you a little bit about Dr. Holbrook,
12 who was your expert in the area of involuntary
13 intoxication.

14 A. Right.

15 Q. And then the rebuttal testimony of Dr. Garvin.

16 Dr. Holbrook was put up, and he testified that
17 in his opinion it was more likely than not that Mr.
18 Herring did ingest a drug at the time of this
19 incident.

20 A. Right.

21 Q. Following that -- and it is Page 1871 of the
22 transcript is where it begins -- there is lengthy
23 argument back and forth between yourself and the
24 Solicitor regarding the Pittman case. The
25 Solicitor actually asks for Dr. Holbrook's

1 testimony be struck because it is going into issues
2 of sanity and mental health.

3 A. Right.

4 Q. It also raises an issue of lack of notice of the
5 involuntary intoxication.

6 The Solicitor argues that in Pittman --
7 because you do a lengthy argument on Pittman -- and
8 I'm sorry, this is a long question -- the Solicitor
9 then argues that in Pittman it was an issue of
10 prescription drugs and they received notice because
11 they had affirmatively pled the GBMI defense?

12 A. Right.

13 Q. And on Page 1877, specifically on Line 15, the
14 State argues that you are trying to back-door
15 psychiatric testimony through Dr. Holbrook.

16 A. Right.

17 Q. Was that your intention at that time? Were you
18 trying to bring up his mental health?

19 A. I mean, I'm sure I was trying to -- I mean, so the
20 involuntary intoxication would be somebody put
21 something in one of his drinks. That layered on
22 top of the bipolar, the bipolar drugs. In a way,
23 sure. But, I mean, what we really wanted was,
24 somebody in the club gave him a Mickey, and that
25 affected his -- if he had -- if he was

1 involuntarily intoxicated, that would I think
2 negate a Mouzon charge, or the jury considering
3 Mouzon murder, and get us back to involuntary,
4 which is where we wanted to go.

5 Q. Now, in jury selection you asked for the questions
6 regarding bipolar disorder.

7 A. Right.

8 Q. And the State is concerned that you are hinting at
9 it here with Dr. Holbrook. But is there any reason
10 why you never specifically addressed even that
11 portion of his mental health?

12 A. Because I think if we opened the door on bipolar,
13 it would get into the medication he was on and what
14 happens when you drink alcohol on top of that
15 medication. I mean, in a much more specific way.
16 That voluntary intoxication issue.

17 Q. And Judge Cooper ultimately rules on Page 1884 that
18 he is going to allow Dr. Holbrook to continue with
19 his testimony, he does have concern about the
20 notice issue, but he is somewhat in agreement with
21 your arguments, but he allowed the State to provide
22 rebuttal testimony?

23 A. Sure.

24 Q. And do you recall that they called Dr. Demi Garvin
25 in rebuttal?

1 A. I do.

2 Q. And was that positive in the sense that you got to
3 ask her about failing to take a blood sample in
4 this case?

5 A. Apparently not positive enough, but, yes, it was a
6 plus, yes.

7 Q. And on the flip side, she explained that she has
8 been involved in a number of involuntary
9 intoxication cases, and she opines that this is not
10 an involuntary intoxication case. And she gives a
11 reason for her opinion was that his actions were
12 purposeful?

13 A. Right.

14 Q. She is a forensic toxicologist?

15 A. Right.

16 Q. Is there a reason you did not object to her
17 testimony about interpreting his actions?

18 A. I can't think of one.

19 Q. She then -- she goes on and continues to --

20 A. Here is what I'll say about that. In the heat of
21 trial, sometimes you overlook an objection. And if
22 you are correct in what you said and I overlooked
23 what I should have objected and the jury should
24 have been instructed to disregard what she said.

25 Q. And on cross-examination you actually provided

1 her -- I don't know if you remember -- a number of
2 case studies with individuals who had been found to
3 have involuntary intoxication.

4 A. Vaguely, I remember that.

5 Q. She distinguished all of those case studies, or a
6 majority of those case studies, saying that those
7 people had underlying psychiatric disorders.

8 Even though you said Dr. Steude didn't give
9 you the full picture, you were aware that
10 Mr. Herring had an underlying psychiatric disorder?

11 A. Correct.

12 Q. And her testimony, she distinguished and said your
13 studies weren't applicable for that reason. Would
14 that be correct?

15 A. You know, I don't know, but if you remember, again,
16 she was called. We didn't get a -- unlike a civil
17 case, we don't get a report. We don't know what
18 she is going to say until she testifies. So
19 everything is sort of on the fly there. I mean,
20 you don't really know what the expert is going to
21 say until she testifies. So I don't remember.

22 Q. Now, you mentioned something about not wanting to
23 get into the medications because that could
24 potentially divert away from the involuntary
25 intoxication defense, am I correct?

1 A. That's part of it, yes.

2 Q. But during Demi Garvin's cross-examination, you
3 actually have her go through a long list of
4 medications and ask her if those are used to treat
5 anxiety and depression?

6 A. Right.

7 Q. So weren't you essentially opening the door to that
8 form of testimony?

9 A. A little bit. And I don't think the Solicitor went
10 after it as hard as he might have.

11 Again, in a criminal case, you don't have --
12 this isn't something you game out ahead of time.
13 She is testifying. You are hearing her opinion for
14 the first time from the stand. And so you are
15 trying to weasel as much as you can out of the
16 witness without getting the door open totally and
17 getting new testimony in that you don't want in.
18 It is all feel and compromise.

19 Q. And would you agree that she was allowed to testify
20 in rebuttal because of you calling Dr. Holbrook?

21 A. Absolutely.

22 Q. And the State arguing that they didn't get adequate
23 notice?

24 A. I believe that we -- I think the judge was wrong
25 about that, but, yes.

1 Q. During Dr. Holbrook's testimony, the State shows
2 him a number of statements he hadn't reviewed. And
3 then their closing argument essentially is:
4 Dr. Holbrook didn't even review the case. He got
5 called here last minute. The State is coming up
6 with this defense on the fly.

7 Was the involuntary intoxication defense a
8 last minute defense?

9 A. It was -- when you say a last minute defense, it
10 was something that we had been looking at. And I
11 can't remember, there was -- I thought there was
12 somebody that we had -- one of the women that
13 worked there testified that that happened from time
14 to time, or somebody testified. Again, it has been
15 eight years since I read the transcript. So that
16 opened that door. I don't know how long we had
17 known about it.

18 Q. Now, turning to another issue. I don't know if you
19 recall, but it was extensively argued in the brief.
20 This issue of everyone interpreting the video, from
21 what they saw, whether it was a flashing light.

22 A. Right.

23 Q. Or a light flashing or a flash.

24 A. Right.

25 Q. And you made a number of motions and objections

1 regarding that; is that correct?

2 A. To non-expert testimony by police officers and what
3 they saw, yes.

4 Q. As well as individuals that were at the club, lay
5 witnesses?

6 A. Correct, yes, because they were looking at a video
7 screen.

8 Q. Now, Mr. Earles testified about he began being
9 asked questions about taking the video to NASA?

10 A. I'm sorry, say that again?

11 Q. Mr. Earles testified about taking the videos --

12 A. Right.

13 Q. -- which is State's Exhibit 54 and 60 -- to NASA?

14 A. Right.

15 Q. And at that point you objected, and the jury was
16 sent out. Essentially your argument was -- well,
17 in the proffer -- he then goes through his proffer
18 and he explains that he took the video to NASA,
19 worked with an individual named Brad Lawrence, and
20 explains what they did at NASA and everything they
21 determined.

22 After that, on Page 1357, you say you no
23 longer have any objection?

24 A. Right.

25 Q. He gets up in front of the jury and explains all of

1 that. And it appears from the testimony and the
2 record of the court, Exhibit Number 87 is
3 introduced during his testimony. And the outside
4 of it, I'll show you, it indicates -- I believe
5 that may say NASA work?

6 A. I don't know where my glasses are, but if that is
7 what you say it says, I'll agree, sure.

8 Q. I have two questions, I believe, on this. One, do
9 you recall why you did not further object and you
10 essentially waived your objection to his testimony
11 about what a non-present witness, Brad Lawrence,
12 did with this video at NASA?

13 A. Because I thought that actually the video was
14 helpful based on Ron Yates' testimony.

15 Q. Can you explain that?

16 A. Well, I mean, our -- we had to have some reason --
17 I mean, if he shot at -- was aiming at the door
18 with the intent of shooting into the door, there is
19 some reasonable expectation that somebody was
20 behind that door or would be behind that door, and
21 that would be murder.

22 We attempted to show that either he was
23 fumbling with the gun or the gun was below the
24 window of the car when it went off, as if he had
25 taken it out of the glove compartment and it went

1 off, either accidentally or he was not competent to
2 handle it.

3 So it wasn't a -- what we didn't want was the
4 jury to believe he did this. And the flash
5 indicated, we thought, and Yates' testimony was
6 that the video was consistent with our theory.

7 Q. So you wanted the video admitted?

8 A. Yes.

9 Q. But is there any reason you didn't object to a
10 subsequent -- a NASA -- one that is marked as NASA
11 being admitted? Because they already had 54 and 60
12 in the record.

13 A. I didn't think it was harmful in any way.

14 Q. And in the State's closing argument, or second
15 closing argument, they start out by saying: The
16 tape -- those 39 seconds are why we are here today.
17 So they also believed that tape was helpful; is
18 that correct?

19 A. Absolutely. It happens all the time.

20 Q. Did you ever try to track down Brad Lawrence and
21 find out if what the State was reporting was
22 correct?

23 A. No. There wasn't anything about the tape that -- I
24 mean, the NASA tape and other tapes, the NASA tape
25 may have been little clearer, but, I mean, there

1 wasn't anything pejorative about it.

2 MS. BLANCHETTE: Your Honor, may I approach
3 the witness?

4 THE COURT: Yes.

5 (Complies.)

6 BY MS. BLANCHETTE:

7 Q. I'm going to hand you this document. If you can
8 identify it for the record, please?

9 A. This is a letter I wrote on May 4th, 2007, to
10 Deputy Solicitor Meadors.

11 Q. Okay. And you would agree that the record properly
12 reflects that this case was tried on May 7th of
13 2007?

14 A. Correct.

15 Q. So this is just a couple of days before trial?

16 A. Correct.

17 Q. Okay. And what is it that you are addressing in
18 this letter?

19 A. That they had sent the video from Chastity's to
20 NASA to enhance and said that basically I wanted to
21 know what the results were.

22 Q. So if closing time is May 4th, you didn't know what
23 had happened with the video at NASA; is that
24 correct?

25 A. Correct.

1 MS. BLANCHETTE: Your Honor, at this time I
2 would move this as Applicant's Number 6.

3 THE COURT: Any objection?

4 MS. KINARD: No objection.

5 (WHEREUPON, Plaintiff Exhibit No. 6 was
6 marked for identification and received
7 into evidence.)

8 BY MS. BLANCHETTE:

9 Q. When did you find out about what had happened with
10 the video at NASA?

11 A. I really don't remember. Sometime obviously before
12 it was introduced.

13 Q. So you didn't have an opportunity then to look into
14 this Brad Lawrence, the one who had worked on the
15 video at NASA, that is referenced in the
16 transcript?

17 A. I mean, I think when I looked at the video I saw
18 that it looked like an enhanced video of what I had
19 already seen. There was nothing in that video I
20 thought was particularly pejorative or harmful. I
21 mean, it was the video.

22 The most harmful video was the one showing
23 Dewain getting in his car, driving off, and then,
24 you know, and then coming back. The flash piece of
25 it was subject to argument, but the fact that he

1 left and came back was I think the most harmful
2 piece of the video. And that didn't need
3 enhancement.

4 Q. And speaking of the video in the club, it is
5 apparent throughout the transcript and something
6 that you argued heavily about was law enforcement
7 didn't do any trajectory at the scene; is that
8 correct?

9 A. Correct.

10 Q. And you retained the services of an expert by the
11 last name of Yates in this case?

12 A. Ron Yates, correct.

13 Q. Okay. And did he work a long time on the case, or
14 kind of what was his involvement in the case? Do
15 you recall?

16 A. Well, I mean, I think we sent him all the
17 information we had, the measurements, and asked him
18 to see if he could produce a trajectory.

19 And, again, you know, he had an extensive
20 background in law enforcement and ballistics work.
21 And, I mean, I can't remember the exact -- at this
22 point, exactly what his testimony was, but it was a
23 trajectory, the distance.

24 Again, the idea that somebody could sit in
25 that car and intend to kill somebody on the inside

1 at that distance with a snub nose .357, I believe
2 it was, defies logic. And that was the whole idea.
3 This is a shot -- a one in a million shot. You
4 couldn't repeat it if you tried a million times.

5 Q. And he goes through, beginning on Page 1625, a
6 theory of it could have been a ricochet and
7 different objects it could have ricocheted?

8 A. Absolutely.

9 Q. In closing argument the State kind of scoffs at
10 that theory?

11 A. Yes.

12 Q. Was that something that he shared with you and you
13 all discussed prior to trial?

14 A. Yes. Yes.

15 Q. And that was a strategy -- did you share that with
16 Mr. Herring as well?

17 A. Do I remember a distinct conversation with him?
18 No. But I'm sure we discussed -- I mean, Dewain is
19 a lawyer. I mean, we discussed the case in detail,
20 all the -- I mean, we felt very good going into
21 trial. Very good.

22 Q. And I know we all know he was a lawyer in the
23 courtroom, but just for the record, what type of
24 lawyer was he?

25 A. He did trust and estates.

1 Q. So he wasn't a criminal lawyer?

2 A. No, but Dewain came up in the same era as -- he is
3 a little bit older than me -- where everybody did a
4 little bit of everything to begin with. He had
5 been around -- I used to see him at the courthouse
6 back when the courthouse was on Sumter Street, back
7 when I first started practicing. Everybody did a
8 little bit of everything. So, I mean, he had --
9 was he an expert in criminal law? No. Did he
10 understand how a trial worked? Yes.

11 Q. I'm going to turn to the search warrant issue. And
12 we had brought in the courtroom today, and I have
13 already referenced I believe it is Court's Exhibit
14 4, which is very lengthy, from the trial. I don't
15 know if you want to reference that. And the top of
16 it is an order signed by Chief Justice Toal?

17 A. Yes.

18 Q. It appears from your response you remember it?

19 A. Oh, I remember this, because they didn't comply
20 with it.

21 Q. And the issue comes up during Agent Lawrence's
22 testimony that they had obtained a search warrant
23 via fax and phone. Were you aware of that prior to
24 trial?

25 A. I believe I was, yes.

1 Q. Okay. And then he explains that it is an
2 acceptable procedure pursuant to what was admitted
3 as Court's Exhibit 3 there -- I mean, 4.

4 A. Well, let me say this. What we were not -- we
5 did -- we were aware of the fact that he obtained a
6 search warrant by fax. What we were not aware of
7 was the Chief Justice's order.

8 Q. And so when was the first time you saw that?

9 A. Just -- either just prior to trial, or during the
10 trial.

11 Q. And would you mind flipping through that exhibit
12 and seeing if based on the page numbers and content
13 it appears to be complete?

14 A. It is not -- are you talking about the Chief
15 Justice's order?

16 Q. Yes.

17 A. Yes, it is not -- oh, no, it is not complete. I
18 know it is not complete.

19 Q. And if that is not brought up in the transcript
20 that it is not complete, is there any reason that
21 wasn't addressed?

22 A. I don't think we knew it wasn't complete.

23 Q. Even though it was admitted as an exhibit?

24 A. I mean, it is -- if you look at it -- I now know
25 Page Number 3 is missing, okay? But at the time,

1 we had never seen this before. This was brought to
2 us by the State when we moved to suppress.

3 Q. And that became a primary issue on the appeal,
4 would you agree?

5 A. Absolutely.

6 Q. And you had actually moved for Chief Justice Toal
7 for recusal for that reason?

8 A. Yes.

9 Q. And did she recuse herself?

10 A. I can't -- I don't -- I can't remember.

11 Q. It is explained at trial that you had spent the
12 night researching it, you know, so essentially this
13 was a surprise to you?

14 A. Absolutely.

15 Q. How did it impact the argument that you were making
16 for suppression in this case?

17 A. Well, I mean, I think once we read it, we
18 determined they didn't even meet -- they didn't do
19 what this order said they should do. So, I mean,
20 we factored all that in. We argued it. And the
21 Supreme Court decided I was wrong.

22 Q. But what you had prepared pretrial didn't factor in
23 to Chief Justice Toal's order; is that correct?

24 A. Correct. Because, with all due deference to Chief
25 Justice Toal, this order wasn't available anywhere

1 publicly. It wasn't on the website, it wasn't in
2 the orders, it wasn't anywhere. I mean, that was
3 unfair and wrong.

4 Q. And was that the issue on appeal, or was the issue
5 more so that -- I guess was notice the issue, which
6 seems to be --

7 A. No.

8 Q. -- what we are talking about -- or did the issue
9 being whether the order was proper and properly
10 filed?

11 A. Whether the order was proper and was properly
12 filed.

13 Q. So why didn't the notice issue get brought up in
14 the circuit court?

15 A. Well, I mean, I think in the typical criminal case
16 with the sort of loosey-goosey discovery rules we
17 have -- you know, again, I just finished a murder
18 case here, the first one I have tried in ten
19 years -- you know, in federal court, where I have
20 tried a good bit of cases, you don't get discovery
21 material that is not Bates stamped. Apparently the
22 rule in state court is nobody Bates stamps
23 anything. So there is an argument about whether
24 you ever got it or didn't get it because nobody
25 can -- I mean, the State can say, This is what we

1 gave them, it is a stack of stuff. You don't know
2 whether Page 357 in there -- they are not numbered.
3 You don't even know what Page 357 is. So it is a
4 much -- and even back then it was even looser than
5 it is now.

6 So notice -- once we had the order, we saw
7 they didn't comply with it, so I guess we just
8 figured that was our best argument. And what would
9 we get? A delay? The judge would stop the trial
10 for a day? For me to do what? We had already done
11 the research.

12 Q. And as far as you can see from the record, though,
13 they didn't have the complete order?

14 A. Correct. But that was enough for the trial judge.

15 Q. Let me just ask you about the trial in general a
16 little bit.

17 On Page 1829, Line 9, you informed the Court
18 that you had pared back your witnesses
19 significantly, you should be done by lunch, because
20 the jury has heard enough.

21 I know you said you haven't reviewed the
22 transcript recently, but do you remember why that
23 strategy was decided upon, to pare back your
24 witnesses and that the jury had heard enough?

25 A. I don't. I don't remember.

1 Q. Was there concern at that point, if you remember,
2 that Mr. Herring's testimony had essentially sunk
3 the ship so there was no need to call further
4 witnesses?

5 A. I don't remember that, but that would have been a
6 very logical conclusion.

7 Q. Now, in this case the jury didn't return until the
8 21st. And the transcript says 7:23 p.m. Do you
9 recall that you had a Fourth Circuit argument on
10 the 23rd, on May 23rd?

11 A. I don't.

12 Q. Did that factor in -- did you need to get to that
13 Fourth Circuit argument? Was that a factor at all
14 on the time that was spent on this trial?

15 A. No. I have had Fourth Circuit arguments continued
16 before. It is not a big deal to get one continued.

17 Q. Now, I think it is fair to say that in expert
18 Yates' testimony there was a lot of focus on the
19 officer-involved shooting in the home?

20 A. Right.

21 Q. Was there any reason there wasn't more focus given
22 to the ballistics or the evidence at the club
23 itself?

24 A. Well, I mean, my recollection is there were 14 or
25 15 shots fired from several different angles at the

1 house. And we thought the ballistics would show --
2 I mean, their allegation was that he was pointing a
3 pistol at him. And we thought that the angles of
4 the bullets disproved that -- I mean, disproved the
5 fact that he was armed with a weapon at the time.
6 They shot 14 times. I think one bullet hit him in
7 the fatty part of his arm. The rest of them missed
8 him. One bullet fired at the scene. I mean, it is
9 not that complicated. The distance, it is on a
10 video tape, the whole shooting. The one at the
11 house was not.

12 Q. But you would agree that -- and he did receive a
13 5-year sentence for the shooting at the home?

14 A. Yes.

15 Q. Which is much less than the murder charge carries?

16 A. Yes.

17 Q. I want to ask you a little bit about both closing
18 arguments.

19 You have already indicated that Mr. Herring's
20 testimony was less than what you had hoped for?

21 A. That would be a kind way to analyze it, yes.

22 Q. And how do you think he came off to the jury?

23 A. Horrible.

24 Q. Now, was closing argument essentially your chance
25 to try to save the ship and portray him in a light

1 more favorable to the jury?

2 A. You know, the jury had seen him. They had heard
3 him. I mean, I don't know how you undo that.

4 Q. On Page 2279, Line 18, you explain that, He is
5 James Brown's attorney, and that is who is on
6 trial.

7 Do you remember your reasoning in trying to
8 explain to the jury that he was James Brown's
9 attorney?

10 A. Well, that he is somebody of substance, somebody
11 with intelligence, somebody who matters. You know,
12 he is somebody whose life shouldn't be taken away
13 from him because he has made a contribution and
14 continues to make a contribution to the community.
15 He is somebody of substance. I'm not talking about
16 financial substance, I'm talking about character.

17 Q. Okay. And saying he was James Brown's attorney you
18 thought accomplished that?

19 A. I think it is -- I mean, it is one of the few
20 things I could point to that they could relate to.
21 I mean, again, trust, wills, estates is not the
22 sexiest -- how do you make that into something that
23 people understand? He is James Brown's lawyer. He
24 does his trust, estates, wills.

25 Q. And you are aware that he had served on a number of

1 non-profit boards?

2 A. Yes.

3 Q. Involved with the hospital? Different things of
4 that nature?

5 A. Yes.

6 Q. You also say on Page 2266 -- let me turn to that,
7 because I don't want to misspeak. Beginning on
8 Line 22 you say: This is the end of his life. The
9 end of his life because of a stupid decision
10 brought on by drinking that took him to Platinum
11 Plus and took him to Chastity's that night.

12 So would you agree that there you are
13 admitting essentially fault on his part, that he
14 was the one that chose to drink, this was his --

15 A. Absolutely.

16 Q. -- absolute decision?

17 A. Absolutely. It is a mea culpa. We screwed up, but
18 it ain't murder. I mean, that is the only way to
19 defend that case. He is on videotape, his car,
20 shot fired. I mean, all the forensic evidence
21 consistent with him firing the shot. So all you
22 can say is he killed him, he is sorry, but it ain't
23 murder.

24 Q. And doesn't that make his mental state at that time
25 even more important then? The most important, I

1 would say?

2 A. Well, again, knowing what I know now, yes.

3 Q. And like I said before, the State argues in opening
4 and closing you can't open his brain, but you could
5 have asked to have experts to do tests on his
6 brain; is that correct?

7 A. I had an expert, Phil Steude, who had been treating
8 him, and convinced me that he had bipolar disorder,
9 and that was it.

10 Q. And did you retain his services separately as an
11 expert?

12 A. No.

13 Q. Or you were just consulting with him?

14 A. He is the treating -- I mean, he is the treating
15 physician expert. He is the person that treats him
16 for the illness.

17 Q. Now, in the State's closing argument, the Solicitor
18 states that the first time he heard of the
19 involuntary intoxication was when Mr. Herring took
20 the stand and he essentially mocks the entire
21 defense?

22 A. Right. Right.

23 Q. You stated earlier you don't recall exactly when
24 that defense was formalized; is that correct?

25 A. Correct.

1 Q. And the reason for that is, I think we were looking
2 for a stripper or a former stripper from the club
3 that we heard rumors about roofies, and those sorts
4 of things. And I think we found -- and, again, I
5 can't remember, it has been almost a decade -- that
6 we put up to explain how that happened from time to
7 time. Am I right about that? I mean, that is my
8 memory. It may be wrong.

9 MS. BLANCHETTE: Your Honor, I can answer if
10 you instruct me to.

11 THE COURT: Sure.

12 Q. There were witnesses called from the club.

13 A. Right. So that is my memory. And that is how -- I
14 think when we felt comfortable with that, we
15 decided to go ahead and put it in. Or we may have
16 just been trying to ambush the Solicitor, which is
17 fair game.

18 Q. The Solicitor also said in his closing argument on
19 Page 2294, beginning on Line 15, he talks about all
20 the different defenses that have been thrown out.
21 And he said that, This is a case where you call it
22 the shotgun effect, where you shoot everything up
23 against the wall essentially to see what would
24 stick.

25 A. Right.

1 Q. Was that your strategy in this case?

2 A. Well, I wouldn't describe it that way. I would
3 describe it as there were a variety of different
4 considerations that the jury should go through.
5 Again, this is a reasonable doubt defense, not that
6 he didn't do it. There are defenses where he
7 didn't do it, he wasn't the guy that pulled the
8 trigger, he wasn't the guy that drove by in the
9 car, he wasn't the guy that broke into the house.
10 That is not this case.

11 This case is, he is the guy that shot, but he
12 didn't intend to kill anybody. It was reckless,
13 not malice under Mouzon, but simply reckless under
14 involuntary manslaughter.

15 And so there are number of ways to get to
16 that. And so we tried to develop each one of them,
17 whether it was involuntary intoxication, you know,
18 fumbling with the gun, shooting at the building,
19 whatever.

20 Q. And essentially in the appellate brief at one point
21 it does say that your argument was essentially the
22 defense theory was accident or recklessness, and
23 you would agree with that?

24 A. Sure.

25 Q. Now, during the State's closing argument -- and I

1 am just going to ask you about some statements that
2 were made and why you didn't object.

3 A. Okay.

4 Q. The Solicitor says, as I have already mentioned,
5 that the first time hearing involuntary
6 intoxication was today. He is not allowed to
7 testify. Did you see any reason why we should
8 object to that?

9 A. I mean, you have to look at the context of it.
10 When was it? And, of course, you don't object to
11 everything that is objectionable because then you
12 are popping up every two seconds, and when you
13 really want to make an objection and make it really
14 count, I don't know if that caused any major harm.

15 Q. And on Page 2243, he is talking about the different
16 officers from the Richland County Sheriff's
17 Department's Office that testified. And he says,
18 That's a good Sheriff's Department in the heat of
19 battle down there. And then he goes into all of
20 them and how he knows them.

21 A. Right.

22 Q. Did you have any reason why you didn't objected for
23 potential bolstering there?

24 A. No. Well, I mean, I don't know if that is
25 bolstering, but it is pretty normal that the

1 Solicitor praises the Sheriff's Department and the
2 people there.

3 Q. On Page 2315 to 2316, he essentially asked the jury
4 to be fair to both the State and to Mr. Herring.
5 There was a case, State v. Daniels, that came out
6 that cautioned judges to no longer give that type
7 of statement in their charges. Is there any reason
8 you didn't object to that as burden shifting?

9 A. I can't think of one. I can't remember one.

10 Q. And then we talked about your attempt to get an
11 accident charge and that the Court refused to
12 instruct on accident in this case; is that correct?

13 A. Correct.

14 Q. On Page 2297, during the Solicitor's closing he
15 says, His Honor is not going to tell you -- he will
16 not tell you that you can use accident as a
17 defense. Accident is not a defense in this case.
18 You cannot find the Defendant not guilty because of
19 accident, ricochet, or whatever. His Honor will
20 instruct you you cannot consider accident.

21 Would you agree that is different than the
22 Court just not instructing on accident?

23 A. That is different, yes.

24 Q. Is there a reason you didn't object to that
25 statement from the Solicitor?

1 A. I have no memory.

2 Q. And in your opening you told the jury that you
3 would show them that this was an accident?

4 A. Correct.

5 Q. That was one of your primary defenses?

6 A. Correct.

7 Q. And here the Solicitor is essentially closing that
8 door and telling the jury the Court is going to
9 instruct them that they can't consider accident?

10 A. Well, they can't consider accident because the
11 judge isn't going to give them that option. He
12 ruled against me on accident.

13 Q. He ruled against you in the specific instruction;
14 is that correct?

15 A. Right. But I can't -- I couldn't argue accident
16 because he wasn't going to instruct them on
17 accident.

18 Q. But you had argued it throughout the course of the
19 whole trial?

20 A. Right.

21 Q. So that would have factored into the reasonable
22 doubt analysis?

23 A. Correct.

24 Q. Is that correct?

25 A. Yes.

1 Q. Okay. So this was a misstatement by the Solicitor?

2 A. Sure.

3 MS. BLANCHETTE: Your Honor, if I could beg
4 the Court's indulgence for couple of moments?

5 THE COURT: Yes, ma'am.

6 (Pause.)

7 MS. BLANCHETTE: Your Honor, if possible,
8 could I potentially get about five minutes? I
9 don't want to keep you on the bench; I may need
10 just a couple of moments.

11 THE COURT: Sure. How long do you anticipate
12 your cross-examination will be, Ms. Kinard?

13 MS. KINARD: Not very long, Your Honor. Maybe
14 20 minutes at the most, if that long.

15 THE COURT: Let's just take a five minute
16 break, and we will try to finish Mr. Harpootlian
17 before the lunch break.

18 MR. HARPOOTLIAN: Thank you, Your Honor.

19 MS. BLANCHETTE: Thank you, Your Honor.

20 (WHEREUPON, a break was taken at 12:59
21 p.m.)

22 (WHEREUPON, the hearing resumed at 1:09
23 p.m.)

24 THE COURT: Are you ready to proceed?

25 MS. BLANCHETTE: Yes, Your Honor, we are.

DIRECT EXAMINATION CONTINUES

BY MS. BLANCHETTE:

Q. Mr. Harpootlian, I have gone through each of the issues raised in the amended application in this case.

A. Yes, ma'am.

Q. Is there anything further regarding your representation of Mr. Herring that you think is pertinent in response to the issues raised in this case?

A. No.

MS. BLANCHETTE: Your Honor, I have no further questions of this witness.

THE COURT: All right. Cross-examination.

MS. KINARD: Yes, Your Honor. Thank you.

CROSS-EXAMINATION

BY MS. KINARD:

Q. Thank you for being here, Mr. Harpootlian.

A. Yes, ma'am.

Q. Ms. Blanchette has examined you what I would normally most of the time ask PCR witness attorneys, but I am going to back and go through some fundamental questions regarding the basics of your process and how you represented Mr. Herring.

We discussed how long you have been practicing

1 law. And you became involved in this case by
2 retainer; is that correct?

3 A. Correct.

4 Q. Do you recall how these charges arose and how you
5 became involved from the outset?

6 A. I really can't, to be frank with you. I remember I
7 got a call maybe from Virginia, his wife. I'm not
8 sure who called me to begin with. Dewain lived out
9 in Kings Grant, where I knew a number of the people
10 in the neighborhood. So I don't know whether a
11 neighbor called me or if she -- somebody -- it has
12 been -- again, I can't remember.

13 Q. Did you have numerous meetings with Mr. Herring --

14 A. Yes.

15 Q. -- after that?

16 A. Yes.

17 Q. Did you discuss the indictments and the elements of
18 the offenses?

19 A. You mean do I have an independent recollection of
20 that? No. But I'm sure -- normally, that is what
21 would do.

22 Q. Okay. And if you don't have an independent
23 recollection, you can answer if it was your
24 practice?

25 A. That is my practice, correct.

1 Q. Thank you. Did you review the possible punishments
2 for each charge in the case?

3 A. That would be my practice, yes.

4 Q. And you discussed any collateral consequences, such
5 as probation or classifications, or anything like
6 that?

7 A. That would be my practice. I don't have an
8 independent recollection of doing that.

9 Q. Is it also your practice to discuss and inform him
10 of any constitutional rights that he is entitled
11 to, such as a jury trial, right to remain silent,
12 so on and so forth?

13 MS. BLANCHETTE: Your Honor, I don't have an
14 objection, but my client is indicating he is having
15 trouble hearing Ms. Kinard.

16 MS. KINARD: I will speak up and maybe slow
17 down.

18 MS. BLANCHETTE: Thank you.

19 A. I'm sorry, what was the last question?

20 Q. I'll rephrase that. Did you speak with Mr. Herring
21 about his constitutional rights he was entitled to,
22 such as that of a jury trial, right to remain
23 silent, right to confront witnesses, et cetera?

24 A. Maybe not in those terms, but that would be my
25 practice. I mean, in terms of jury trial, you have

1 got a right to a jury trial or we could try to work
2 out a plea. And they made no offer. We really had
3 no -- we could either plead to murder straight up
4 or go to trial.

5 Q. Is it fair to say that you might have not
6 necessarily skipped a few of these steps, but due
7 to Mr. Herring's legal expertise, he knew what was
8 going on, is that fair to say?

9 A. No, it is not fair to say. What would be fair to
10 say is that I would have explained these rights in
11 a much more summary fashion with him than I would
12 have to a, you know, a pulpwood truck driver with
13 an eighth grade education.

14 Q. Certainly. Thank you. So you also further
15 discussed the State's burden of proving guilt
16 beyond a reasonable doubt?

17 A. Sure.

18 Q. And you discussed that with Ms. Blanchette as far
19 as your strategy, which we will get to in just a
20 minute. Did you discuss with Mr. Herring his
21 versions of the facts of the case?

22 A. Yes.

23 Q. Did you base that discussion on what had been
24 revealed in the statements, or did you start that
25 from a fresh slate to tell you what happened? Can

1 you describe that conversation?

2 A. I mean, I -- and I have no difficulty remembering
3 that conversation, but I think initially he had not
4 a great memory of what happened. And over a period
5 of time it got more focused.

6 Q. Did he ever indicate that he did not understand
7 your discussions at any point in time?

8 A. You know, Dewain asked questions. Very insightful
9 on some issues, I remember. As we prepped him, he
10 was very insightful, and pushed back from time to
11 time on how we went about prepping him. In a
12 sense, we got aggressive from time to time. So,
13 no, there was no question in my mind he understood
14 what we were talking about and what the
15 consequences were.

16 Q. Okay. As to procedural questions, did you file a
17 discovery motion?

18 A. Yes.

19 Q. When receiving matters regarding that motion, did
20 you feel that you were receiving items that you
21 expected to receive? I realize that can be a
22 strange question, but were you missing a statement,
23 for example, or some kind of report?

24 A. Not that I remember, but typically the Government
25 or the State's effort at responding to discovery is

1 disjointed because they don't get everything they
2 ask for from the Sheriff's Department on a timely
3 basis, so it dribbles in. You don't get everything
4 in one fell swoop, so you have got to follow up.
5 That is typical. That happens in every case.

6 Q. Certainly. And you complied with your normal
7 practice to follow up and seek out discovery?

8 A. Absolutely.

9 Q. Thank you. In preparing the case, did you research
10 and look for fact witnesses?

11 A. Yes.

12 Q. Did you find any?

13 A. Yes, we did. We found -- I think one of the issues
14 we talked about earlier was the involuntary
15 intoxication. We found a couple of women that
16 worked there that were helpful in indicating that
17 from time to time people did get something put in
18 their drink. We went out to the club I want to say
19 three times, maybe four times, to actually examine
20 the scene, talk to the young lady that Mr. Herring
21 had a discussion with.

22 Q. And she was called as a State's witness?

23 A. She was.

24 Q. Now, in your preparation, of course, you began
25 developing a theory and possible defenses. We

1 discussed these throughout your direct
2 examination -- or, excuse me, you and
3 Ms. Blanchette have. If you could sum it up into
4 the shortest version of the strategy, what would
5 that be?

6 A. Well, that, you know, that he shot the guy, but
7 that it wasn't malicious. It wasn't Mouzon malice,
8 darkness of heart, absence of social conscious
9 shooting. It was an involuntary manslaughter. A
10 reckless disregard for the lives of others. And
11 that would be involuntary manslaughter, which is a
12 much lesser sentence, parolable, all those sorts of
13 things.

14 Q. I believe you described that also as the jury
15 should not be able -- or should be able to find
16 reasonable doubt to prevent them from finding
17 murder?

18 A. Correct.

19 Q. Is it fair to say -- and please correct me if I'm
20 wrong -- that this case was not as much of proving
21 whether he shot someone or not, but about
22 mitigation of how that was dealt with legally?

23 A. When you say mitigation, it is more of do they
24 have -- have they proved that malicious intent. It
25 is not -- if they haven't proved that malicious

1 intent, then you've got two options: Not guilty or
2 involuntary manslaughter. And so it would defer --
3 it would take them to the involuntary manslaughter.
4 Because, again, I don't -- there were no elements
5 of voluntary manslaughter here.

6 Q. Thank you.

7 A. Or not all the elements of voluntary manslaughter.

8 Q. Was Mr. Herring understanding of that strategy and
9 did he agree with it as you proceeded?

10 A. Yes.

11 Q. He realized that that is the basis of your defense
12 as he went into trial?

13 A. Well, okay, the first -- the best result would be
14 accident. That is not guilty. Accident. The
15 judge took that off the table. So the best we
16 could hope for at that point was involuntary.

17 Q. And to just step back for one brief second about
18 the judge taking accident off the table, you
19 discussed that with Ms. Blanchette right at the end
20 of your direct examination. And the judge refused
21 to give a charge about this being accident;
22 correct?

23 A. That's correct.

24 Q. And so therefore you did not pursue that, you did
25 not want the jury to be confused? Is that a fair

1 statement?

2 A. Well, I wanted to focus on involuntary.

3 Q. So for that reason your statement earlier that the
4 State's closing being accident is not a defense was
5 not necessarily something that was objectionable
6 based on your strategy of the case?

7 A. Well, the judge had ruled that accident was not
8 going to be a defense. I mean, I guess I didn't
9 view that as objectionable in the context.

10 Q. Okay. Certainly fair. And you stated briefly
11 regarding plea negotiations, that the only offer
12 was a straight up plea to murder?

13 A. Correct.

14 Q. And even though you spoke with the Solicitor about
15 the possibility of insurance policies or an
16 involuntary manslaughter conviction, he was not
17 open to that?

18 A. Correct. And let's understand the context of what
19 was going on here. We've got a wealthy -- not
20 wealthy, but substantial member of the bar, white,
21 affluent guy who shoots and kills an
22 African-American not of means and not of education.

23 Most of the cases that walk into this
24 courtroom on murder cases are the flip. It is some
25 non-affluent African-American accused of killing a

1 white affluent person. So the race issue. And as
2 we picked a jury, we were cognizant of that. We
3 were trying to make sure that we didn't get in a
4 situation where people felt like, you know, that he
5 was -- the burden was on him to prove he didn't do
6 it.

7 And the Solicitor, who is an elected
8 official -- I had the job for four years -- is
9 cognizant of how the community is going to view the
10 crime. Just like the police officer being tried
11 down in Charleston. There is a thought in many
12 members of the community that police officers are
13 out of control.

14 So that is a factor that the Solicitor has to
15 consider. I take that back -- does consider --
16 they don't have to consider it, but they do. And
17 something we had to bake into how we picked a jury.

18 Q. Now, speaking of how you picked a jury, was there a
19 Batson challenge in this trial?

20 A. I can't remember.

21 Q. Okay.

22 A. I don't think so, but I can't remember. If you
23 tell me there was, I will be happy to try to
24 remember it.

25 Q. There was.

1 A. Okay.

2 Q. If I can just point to the transcript, Page 107.

3 There is basically a mutual Batson challenge. And
4 nothing was done as a result of those because --
5 testifying that there was a finding that they were
6 all racially mutual motivating factors for choosing
7 those jurors. Do you remember that they were all
8 race neutral?

9 A. Now that you have reminded me of that, I have a
10 vague recollection of it.

11 Q. It was on the record but in chambers, if that helps
12 jog your memory.

13 So, as you said, you stick to your story that
14 basically you were just cognizant of how you
15 handled the case based on the factors and the
16 players involved?

17 A. Yes.

18 Q. Okay. Getting into some of the meat of this, let's
19 go first to the NASA enhancement and that issue
20 that you discussed with Ms. Blanchette.

21 My understanding -- and I'm curious if this is
22 yours -- is that the NASA enhancement was not only
23 not harmful, as you testified, but it wasn't new;
24 is that correct?

25 A. It wasn't what?

1 Q. It wasn't new? It wasn't -- it didn't show
2 anything that you couldn't already see on the first
3 version?

4 A. That was my memory of it and my understanding of
5 it. It wasn't some detail revealed that we hadn't
6 seen before. It may have been clearer, but it
7 wasn't any new matter there, that I thought.

8 Q. And so did that factor into your decision not to
9 seek another expert or any other counterpoint view
10 regarding that enhancement?

11 A. The thought never crossed my mind.

12 Q. Speaking of seeking experts, let's talk about Dr.
13 Steude and the experts that you have seen testify
14 here.

15 I believe you stated that this was an unusual
16 situation because you are dealing with a client who
17 was already under psychiatric care?

18 A. Correct.

19 Q. So, in a sense, you kind of had a built-in expert
20 for evaluation pretrial purposes?

21 A. Yes.

22 Q. And you have the benefit of his history with
23 Mr. Herring?

24 A. Yes.

25 Q. And so therefore you had not only what he had to

1 say at the time of the commission of the crime --
2 him being Dr. Steude -- you had the benefit of ten
3 years -- I believe it was ten years -- of
4 psychiatric treatment with Mr. Herring?

5 A. That was the thought at the time, yes.

6 Q. And so you felt very comfortable relying on his
7 assessment -- analysis?

8 A. At that time I did, yes.

9 Q. Now, I realize a lot has been said today about
10 Dr. Brawley and Dr. Maddox and what they have found
11 as a result of this testing?

12 A. Correct.

13 Q. And you have also testified as to what you may have
14 changed?

15 A. Yes.

16 Q. However, looking back, do you feel like you
17 utilized all the knowledge and resources that you
18 had at your disposal when you tried this case?

19 A. Looking back on it, I think that -- I mean, it is
20 difficult for me to answer that question because I
21 now know that the information I received from Dr.
22 Steude was not complete or accurate, so it is hard
23 for me -- I'll give you an example. I represented
24 a guy named Robert South. Robert South was a death
25 penalty case in Lexington County from 1985. Robert

1 South was a guy with no criminal record, a plumber,
2 had a plumbing company. Pulls up next to a police
3 officer who is writing a ticket. Been a police
4 officer for three hours. Placed an assault rifle
5 out the window, blows his brains out. No reason.
6 No motive. Takes off. Pulled over. Came up with
7 some crazy story about how a hitchhiker made him do
8 it.

9 We had him examined, CAT scan, MRI, nothing
10 wrong with him mentally at all. Nothing. He got
11 tried, convicted, and sentenced to death.

12 David Bruck, an old friend of mine,
13 represented him on his habeas, sent all the medical
14 records to Duke, and at Duke they found a --
15 looking -- using the technology available then,
16 they found a walnut-sized tumor in his brain that
17 we had never seen or known about.

18 As a result, the Supreme Court reversed his
19 sentence and gave him a new trial on sentencing
20 only. Robert South decided that if the best he
21 could do is life to go ahead and execute him. And
22 he asked to be executed, and they did.

23 Now, knowing what I know now, if we had
24 been -- if we had that information, Robert South
25 might not have been convicted, let alone sentenced

1 to death.

2 So I have a hard time knowing what I know now
3 saying it wouldn't have made a difference. Maybe
4 we should have gone and gotten Dr. Schwartz-Watts
5 or somebody like her, knowing what I know now.

6 Q. Certainly. And perhaps I phrased that inartfully.
7 At the time did you feel as if you were doing
8 everything possible?

9 A. Oh, absolutely.

10 Q. And you felt that you were using all the necessary
11 experts and resources available to you then?

12 A. Based on what I now believe was incorrect
13 information from Dr. Steude, yes.

14 Q. That is certainly a fair distinction. Thank you
15 for that.

16 And just very briefly I'd like to discuss
17 Yates and his testimony. Just to clarify, it was
18 my understanding that a lot of Mr. Yates's
19 testimony dealt with the shooting in the home
20 because that was the incident that involved more
21 room for error or more moving parts.

22 A. Well, you know, the idea was that -- yes, that is
23 partially true, but the idea was that if a jury
24 believed that Dewain had pulled a pistol on the
25 police, then that gave rise to the inference that

1 he knew he had shot somebody. I mean, the police
2 kick in your front door. If you haven't done
3 anything wrong, you just put your hands up.

4 So it was more important than just the five
5 years or just the crime. And so we focused on
6 that. And the mechanics of the shooting at the
7 strip club weren't that complicated. We wind up
8 with the idea it could have been an accident or
9 ricochet, which would -- I mean, even if it wasn't
10 an accident, that again gives rise to this idea it
11 wasn't a malicious intent to hurt somebody.

12 Q. Thank you for that.

13 MS. KINARD: And beg the Court's indulgence.

14 (Pause.)

15 BY MS. KINARD:

16 Q. I believe Ms. Blanchette covered almost all of my
17 questions. So unless you have anything else to
18 provide to the Court based on the questions I have
19 asked you, I do not have any further questions.

20 A. I don't have anything further.

21 THE COURT: Any redirect?

22 MS. BLANCHETTE: Very briefly, Your Honor.

23 REDIRECT EXAMINATION

24 BY MS. BLANCHETTE:

25 Q. Mr. Harpootlian, you were talking about your

1 preparation in this case on cross-examination. Did
2 you anticipate or prepare Mr. Herring for a
3 possible murder conviction or did you think the
4 outcome would be different in this case?

5 A. What do you mean prepare him for a murder
6 conviction?

7 Q. When you were discussing with him the strategy and
8 the likely outcome of the trial, did you indicate
9 to him, based upon your vast experience, that you
10 thought a murder conviction was likely or not?

11 A. I said it was possible. I mean, I can tell you
12 that based on his performance in my conference
13 room, I was feeling pretty good going into the
14 trial. But nobody -- I can't -- I have never told
15 anybody what I thought the likely outcome of a case
16 was, ever, in any case. Because you don't know.

17 Q. So the issues regarding racial factors were
18 discussed on cross-examination.

19 A. Uh-huh.

20 Q. Since I take from your testimony that race was an
21 issue in this case, did that -- and we have already
22 talked about your decision not to change venue --
23 would that have factored in with it being Richland
24 County and to a change of venue?

25 A. Well, I mean, a change of venue would be a county

1 of similar racial proportions. I mean, you are not
2 going to go to -- I mean, I have had change of
3 venues in cases and they typically pick a county
4 that looks a lot like your county, just in a
5 different part of the state outside of the media
6 market, so it really wasn't -- that race piece
7 wasn't a factor on change of venue, no.

8 Q. But in direct you gave an example of Lexington
9 County and so that wouldn't have been a possible
10 county; is that correct? So it is going to be same
11 racial make-up?

12 A. Yes.

13 Q. Now, as far as you know -- you have made it clear
14 you relied upon Dr. Steude?

15 A. Yes.

16 Q. And we have discussed this report that was turned
17 over, his file, and relied upon by both experts
18 utilized today?

19 A. Right.

20 Q. And those experts were experts in the area of
21 forensic psychiatry and neuropsychology. As far as
22 you know, was Dr. Steude qualified in either of
23 those areas of expertise?

24 A. I know he has been qualified to testify in court
25 because I used him back a long time ago, prior to

1 this case. I don't know what he is qualified in.

2 Q. In State v. Santiago, the decision came down
3 June 19th of 2006, so a year before this case went
4 to trial?

5 A. Right.

6 Q. And you are listed as the appellate counsel; is
7 that correct?

8 A. Yes.

9 Q. Okay. And in that case it is discussed at length
10 the utilization of Donna Schwartz-Watts as to the
11 voluntariness of the statement?

12 A. Correct.

13 Q. You had just handled Santiago. I guess my question
14 is pretty simple. Why didn't it cross your mind to
15 use Dr. Schwartz-Watts, or Maddox now, in the
16 capacity that you attempted to use her in Santiago?

17 A. Because Santiago was Aspergers. Aspergers is -- I
18 mean, the only allegation -- the only mental issue
19 involved with Dewain, that we knew of, was bipolar,
20 and as long as he was on his medication, not a
21 problem. So, I mean, Aspergers is something that
22 affects his perception. People's -- someone with
23 Aspergers perceives the world differently and
24 people's facial expressions and gestures are
25 perceived differently. There was never any

1 suggestion that that came into play at all in
2 Dewain's case. Anything like that.

3 Q. But you would agree that you were aware and on
4 notice of cognitive impairment as a result of your
5 involvement in his obtaining disability --

6 A. Yes.

7 Q. -- because he was no longer to perform in his law
8 practice at the capacity he was previously?

9 A. Correct. Yes.

10 Q. And you had notice of that leading into trial?

11 A. Again, in the context of -- I mean, if Dr. Steude
12 called me and said, you know, Dewain is going to
13 have problems understanding what is going on, or
14 had problems understanding what was going on the
15 night of the shooting because of this cognitive
16 issue, we would have taken it a step further,
17 obviously. But no one ever said that. His
18 treating physician, his treating psychiatrist never
19 raised that issue. And he had access to the
20 documents. You know, you rely on an expert to
21 interpret for you. And he was an expert.

22 Q. I guess I'm just confused by how you were able to
23 successfully obtain disability due to cognitive
24 impairment, but that didn't seem to be an issue
25 leading up to trial.

1 A. Well, you would have to ask the disability
2 insurance folks. I mean, Dewain came to us,
3 indicated he had disability insurance, he couldn't
4 work anymore. And we wanted to get him some
5 income. We submitted the paperwork, and they gave
6 him the coverage. It wasn't litigated. I mean, if
7 it had been litigated, then we probably would have
8 been on notice of all of these issues. It was
9 just -- you know, we submitted the paperwork and
10 they gave him disability.

11 Q. And you have stated how he was a lawyer and he was
12 able to assist you essentially --

13 A. Right.

14 Q. -- in the preparation of his defense. But at the
15 same time you were aware the finding had been made
16 that he was not cognitively available to -- sorry,
17 able to practice law at the same capacity anymore?

18 A. At the same capacity, sure.

19 MS. BLANCHETTE: Your Honor, I have no further
20 questions on redirect.

21 THE COURT: All right.

22 Thank you, Mr. Harpootlian.

23 MR. HARPOOTLIAN: Free at last?

24 THE COURT: Free at last.

25 Any objection to him being excused?

1 MS. KINARD: No, Your Honor.

2 MS. BLANCHETTE: What was that, Your Honor,
3 I'm sorry?

4 THE COURT: Any objection to Mr. Harpootlian
5 being excused?

6 MS. BLANCHETTE: No.

7 THE COURT: All right. Thank you for coming.

8 MR. HARPOOTLIAN: Thank you, Your Honor.

9 (Witness steps down and is excused.)

10 THE COURT: All right, folks, we have got to
11 break for lunch. We are pretty hungry up here. So
12 what do we have remaining? Do you have additional
13 witnesses?

14 MS. BLANCHETTE: Yes, Your Honor, I have the
15 expert, Bob Tressel, and then the private
16 investigator, Pete Skidmore, and Pete will be a
17 very brief witness.

18 THE COURT: Okay. Let's take a break until
19 2:30.

20 MS. BLANCHETTE: Okay, thank you.

21 (WHEREUPON, a lunch break was taken at
22 1:35 p.m.)

23 (WHEREUPON, the hearing resumed at 2:32
24 p.m.)

25 THE COURT: Call your next witness.

1 MS. BLANCHETTE: We would call Robert Tressel
2 to the stand.

3 (Witness approaches.)

4 THE BAILIFF: Place your left hand on the
5 Bible, and raise your right hand, please.

6 (Witness complies.)

7 THE CLERK: Do you swear or affirm the
8 testimony you shall give in this case will be the
9 truth, the whole truth, and nothing but the truth,
10 so help you God?

11 THE WITNESS: I do.

12 THE CLERK: Thank you. Have a seat in the
13 witness stand, please.

14 (Witness complies.)

15 THE CLERK: State your full name for the
16 record.

17 THE WITNESS: My name is Ralph Robert Tressel,
18 T-R-E-S-S-E-L. I go by Robert or Bob.

19 THE COURT: Your witness.

20 MS. BLANCHETTE: Thank you, Your Honor.

21 RALPH ROBERT TRESSEL,
22 after being duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MS. BLANCHETTE:

25 Q. Mr. Tressel, I am going to hand you a document.

1 Can you identify it for the record?

2 A. Yes, this is a copy of my CV.

3 MS. BLANCHETTE: Your Honor, at this time I
4 move the curriculum vitae of Mr. Tressel in as
5 Applicant's Number 7.

6 THE COURT: Any objection?

7 MS. KINARD: No objection.

8 THE COURT: So admitted.

9 (WHEREUPON, Plaintiff Exhibit No. 7 was
10 marked for identification and received
11 into evidence.)

12 BY MS. BLANCHETTE:

13 Q. Mr. Tressel, I just want to go over some of the
14 information contained in your curriculum vitae.
15 What is your current occupation?

16 A. I am the chief criminal investigator, Cobb
17 County -- Cobb is C-O-B-B -- District Attorney's
18 Office, Marietta, Georgia.

19 Q. Okay. And so you are joining us today from near
20 Atlanta, Georgia; is that correct?

21 A. That's correct. Marietta is north of Atlanta. I
22 live west of Atlanta.

23 Q. Okay. And how long have you been with the District
24 Attorney's Office there?

25 A. I have been there a little over -- well, almost six

1 years now, five and three-quarters.

2 Q. And what does your role as the chief criminal
3 investigator with that office entail?

4 A. I manage the criminal investigations division. We
5 have 16 investigators. Preparing cases for trial,
6 obtaining police reports, obtaining evidence that
7 is used at the time of trial, interviewing
8 witnesses, going over crime scene reports, and
9 preparing cases to be presented in court.

10 My main function as the chief investigator is
11 also to handle all death penalty cases, and also
12 all officer-involved shooting cases.

13 Q. All right. And that would include homicide cases?

14 A. Yes.

15 Q. Do you know approximately how many homicide cases
16 you have been involved in since you have been
17 there?

18 A. I know that I have put on some documents in excess
19 of six -- oh, since I have been with the D.A.'s
20 Office?

21 Q. Uh-huh?

22 A. Probably close to 40.

23 Q. Okay. And prior to the District Attorney's Office,
24 if you want to start from oldest to newest, what
25 were your positions of employment?

1 A. I was a Cobb County police officer from 1971 to --
2 excuse me, 1973 to 1985.

3 I spent a year and a half as a uniform
4 officer. Was transferred to the Crimes Against
5 Persons Unit in 1975, commonly referred to as the
6 Robbery/Homicide Division.

7 And I believe it was 1988 -- excuse me, 1978,
8 I made the rank of sergeant. And was an evening
9 watch supervisor in the Crimes Against Persons
10 Unit.

11 I resigned my position as a police officer.
12 In 1985 I took the position as the medicolegal
13 death investigator with the Cobb County Medical
14 Examiner's Office.

15 I stayed with the Medical Examiner's Office
16 until I left county government in December of 1999.

17 While at the Medical Examiner's Office I was
18 made the operations manager, chief investigator,
19 and served in that function for the last six years
20 or so that I was there.

21 Q. Okay. And have you -- what was your educational
22 experience before starting off in your profession?

23 A. I attended some college, but never completed a
24 degree. Most of my training comes from law
25 enforcement and medical examiner's terms. I have

1 received advanced training in homicide
2 investigation, crime scene analysis, crime scene
3 processing, blood spatter analysis, firearms. I've
4 been trained at the University of Miami School of
5 Medicine, University of St. Louis School of
6 Medicine. I have been trained in homicide
7 investigations through the FBI at Quantico,
8 Virginia. Numerous training classes. In all I
9 have over 700 hours of just homicide investigation
10 training.

11 Q. And all that is listed on your curriculum vitae; is
12 that correct?

13 A. It is.

14 Q. Over several pages? Okay. And do you also work as
15 a consultant?

16 A. I do. Since the mid 80s I have been doing outside
17 consulting outside of Cobb County.

18 When I left in 1999, that is what I did
19 solely, as a consultant in homicide investigations
20 and helping defense attorneys and prosecutors
21 prepare cases for trial.

22 Q. And that was going to be my next question. Have
23 you consulted with both the Defense and the State
24 in cases?

25 A. Yes, I have.

1 Q. Okay. And have you been qualified as expert in the
2 state courts?

3 A. I have been qualified in 12 states, including South
4 Carolina, and in several federal courts.

5 Q. And what is the area of expertise that you have
6 been qualified in?

7 A. It ranges from the basic homicide investigation to
8 how a homicide investigation should progress from
9 crime scene to interviews to suspects. Blood
10 spatter interpretation I have been qualified.
11 Crime scene reconstruction. Some basic ballistics
12 in homicide cases involved with firearms, its
13 trajectory analysis, and correlate that with
14 injuries that have been received.

15 Q. Okay. And have you been qualified as an expert in
16 the State of South Carolina?

17 A. I have.

18 Q. Do you know approximately how many times?

19 A. Three times prior to today. One is here in this
20 court.

21 Q. Okay. Here in Richland County you have been
22 qualified?

23 A. Yes, ma'am.

24 Q. Okay. And have you also been qualified in a PCR
25 case in Berkeley County?

1 A. If that is Moncks Corners, yes.

2 Q. All right.

3 MS. BLANCHETTE: Your Honor, at this time I
4 would offer Mr. Tressel as an expert in the area of
5 crime scene investigation and homicide
6 investigation.

7 THE COURT: Any objection or voir dire?

8 MS. KINARD: Neither, Your Honor.

9 THE COURT: All right.

10 BY MS. BLANCHETTE:

11 Q. All right, Mr. Tressel, can you explain for us how
12 you became involved in the PCR case of Dewain
13 Herring?

14 A. Yes. Your office -- you contacted me to take a
15 look at this case back in early 2016 to provide
16 some analysis of the crime scene work-up that was
17 done on this case and what could or could not be
18 determined based on that work-up and how
19 essentially the investigation progressed.

20 Q. Okay. And did you also come here to Richland
21 County to review evidence?

22 A. Yes. I got it in my report. I never remember
23 dates. I came here on 5/20 of '16 to look at the
24 evidence.

25 Q. And I was going to hand you a document. Can you

1 identify that for the record, please?

2 A. Yes. This is the report I issued on this case.

3 Q. Okay.

4 MS. BLANCHETTE: Your Honor, at this time I
5 would move Mr. Tressel's report in as Applicant's
6 Number 8.

7 THE COURT: Any objection?

8 MS. KINARD: No objection.

9 (WHEREUPON, Plaintiff Exhibit No. 8 was
10 marked for identification and received
11 into evidence.)

12 BY MS. BLANCHETTE:

13 Q. Mr. Tressel, the first part of your report is your
14 credentials in the field for crime scene
15 investigation?

16 A. Yes, ma'am.

17 Q. I believe we have gone over that. Is there
18 anything further you would like to add to that?

19 A. No. The only thing I would like to point out is I
20 have been associated with law enforcement and crime
21 scene work for 43 years now, so it is a lot of
22 hands-on experience, training, and practical work
23 done in the field.

24 Q. And in your report you go through a section
25 regarding crime scene investigation. Can you just

1 explain to us the importance in the role that crime
2 scene investigation plays in a homicide
3 investigation?

4 A. Certainly. Crime scene investigation is a part of
5 the puzzle. Not only who the victims are, who
6 possibly the perpetrators are, but how the events
7 played out. Can we put people in certain
8 positions. Can we indicate -- we know what can be
9 seen or can't be seen from eyewitnesses based on
10 the crime scene and what their recollection is. So
11 we correlate the crime scene as a piece of the
12 puzzle to use when interviewing witnesses and then
13 to establish how a chain of event takes place.
14 Again, it is part of the puzzle. We look at the
15 autopsy report, we look at the laboratory reports,
16 we look at the statements. We pull all that
17 together to create a puzzle.

18 Crime scene is one of the -- is the vital part
19 in documenting and processing the scene
20 appropriately.

21 Q. Okay. And you have already mentioned some of the
22 things that you review, but on your report you list
23 those out specifically; is that correct?

24 A. Yes, I do.

25 Q. Okay. And what would be those items that you

1 reviewed in preparation for today?

2 A. I've got the Richland County Sheriff's Department
3 incident report from River Drive, coroner's report
4 on Mr. Johnson, Richland County's use of force
5 report on the incident that happened in Columbia on
6 SLED investigative reports on the
7 use of force on , crime scene
8 photographs from and the trial
9 transcripts. And also the physical evidence that I
10 looked at here in Richland County.

11 Q. Okay. And, Mr. Tressel, you identified a couple of
12 those items that were part of the clerk's file from
13 the underlying trial in this case that would be
14 helpful to your testimony here today?

15 A. Yes, I did.

16 Q. So in the courtroom we have State's Exhibit 51,
17 which is a diagram on a large piece of poster
18 board.

19 A. Uh-huh.

20 Q. We also have State's Exhibit 52, which is another
21 diagram on a large piece of poster board?

22 A. Yes.

23 Q. We also have pictures that were marked at trial as
24 State's Exhibit 8, 9, 11, 12, 13, 15, 16, and 17.

25 MS. BLANCHETTE: Your Honor, at this time may

1 I hand him some of these exhibits?

2 THE COURT: Yes.

3 MS. BLANCHETTE: And, Your Honor, may he have
4 permission when needed to come down to refer to
5 these exhibits as well?

6 THE COURT: Absolutely.

7 MS. BLANCHETTE: All right.

8 BY MS. BLANCHETTE:

9 Q. Mr. Tressel, you have reviewed everything that you
10 told us, all the materials, you came here and
11 reviewed the physical evidence?

12 A. Yes.

13 Q. You gave a summary of the incident from the
14 documents that you obtained. What I would like to
15 do is go through the opinions that you reached in
16 this case.

17 A. Okay.

18 Q. Will you take us through the first opinion that you
19 reached in this case regarding the crime scene
20 documentation and what was done in relation to the
21 incident location.

22 A. My first opinion deals with the trajectory analysis
23 of the projectile that went through the front door
24 of the business.

25 In my opinion, it was insufficient. You

1 can't -- when we work a crime scene we have to
2 anticipate somebody going back and trying to either
3 recreate or re-evaluate that evidence. And in this
4 case there was no trajectory analysis done.

5 In the trial testimony, the crime scene
6 investigator said he could tell what angle it
7 struck the door and went through the door at by
8 looking at it, but that doesn't tell us where the
9 door -- the exact position of the door, and it
10 doesn't tell us the exact position of where the
11 weapon had to be fired to create the damage to the
12 door.

13 So the trajectory analysis is the vital,
14 important step in processing this crime scene.

15 There are several ways of doing trajectory
16 analysis. You can do it with just simply
17 measurements by measuring how far the defect is on
18 the front of the door from the bottom to where it
19 strikes and how far from one of the two sides it
20 strikes. You can do it with a dowel rod, because
21 this projectile went all the way through the door.
22 You can do it with laser equipment that is now
23 available.

24 We can take the trajectory based -- we call
25 the door in this case would be an intermediate

1 target. In other words, the bullet first strikes
2 the door, goes through the front facing of it, goes
3 through the back facing of it, and then strikes the
4 Decedent.

5 So we can determine the exact angle that the
6 bullet came through the door at. The question is,
7 where -- what is the position of the door, because
8 it is on hinges. And where could the shooter be at
9 the time that bullet was fired.

10 And in this case I can't do that. They took
11 no measurements, they did no trajectory analysis,
12 there is no dowel rods in it, there is no laser
13 equipment used to determine exactly what angle this
14 bullet came through the door.

15 Q. And is that conflicting with what they did at the
16 scene of Mr. Herring's home where there was an
17 officer-involved shooting?

18 A. Very much so in conflict. At the Herring residence
19 there is multiple dowel rods through bullet defects
20 that are at that crime scene. That is to determine
21 which officers fired based on their position that
22 they indicated at the time of the officer-involved
23 shooting, where those projectiles went, can we
24 follow the track, can we identify it based on
25 intermediate targets or additional targets that

1 struck -- one struck the bed and went through a
2 wall. Can we align that -- those projectiles up
3 with a particular officer, even if we can't collect
4 all the bullets, because some of them -- I always
5 call it going out to the wild blue yonder. They
6 pass through and you can't always recover every
7 projectile. Can we analyze the crime scene based
8 on the trajectory analysis and determine who fired
9 which bullets. And that was done at the residence.

10 Q. And, furthermore, at the -- as was discussed at
11 trial, did they keep the door where the bullet went
12 through at the club? Was that retained for
13 evidentiary purposes?

14 A. Not that I'm aware of, no.

15 Q. Okay. So you weren't able to examine that?

16 A. I couldn't look -- if I had the door I could make
17 measurements of it and then make some
18 determinations, but the door was not kept.

19 Q. What were you able to determine from what you were
20 able to review in this case?

21 A. Well, in this case the bullet travels -- if you are
22 looking at the front of door, the bullet is
23 traveling from the left side of the door to the
24 right -- in other words, left to right. It is
25 traveling from the front to the back of the door.

1 And it is traveling at an upward angle. And it is
2 at a -- based on the photographs, it is an acute
3 angle, it is not straight through. In other words,
4 it doesn't hit the front of the door, it goes
5 straight, hits the back of the door. It is running
6 at an acute angle to the door.

7 Q. So were you able to obtain, though, from the
8 materials you reviewed the proper measurements so
9 you could determine the precise location?

10 A. No. There is no measuring devices in any of the
11 photographs that tell me anything about distances.
12 There is measuring devices that are placed above
13 the actual bullet hole, but it doesn't tell me how
14 far it is from door frames or hinges, or anything
15 of that nature.

16 Q. Can you take us through the trial exhibits that you
17 have there in your hand and explain the importance
18 of those to you in your investigation?

19 A. Sure. I'm not sure how these got entered the way
20 they did, but we will start with Trial Exhibit
21 Number 8. This is the photograph that has the
22 Number 2 on the back. This is the back side of the
23 door. And the bullet exited the door here. And
24 you can see the splintering of the door veneer in
25 the photograph. You can see that this is fairly

1 close to the door jamb. I don't know how high -- I
2 mean, I can estimate how high it is based on some
3 other photographs, but there is nothing to tell me
4 how high up this is or how far into the door that
5 is.

6 Exhibit Number 9 is a distant shot taken of
7 the front of the door to the location showing the
8 steps that you have to step up to get to the door.
9 And there is a Number 1 in the far right-hand side
10 of that.

11 When we get to State's 11, that is a close-up
12 of the door. Again, there is no measuring device
13 in it to tell me how high up or how far over from
14 the door jamb this is. And it has got the Number 1
15 just above the defect in the door.

16 State's 12 is another photograph of the inside
17 of the door. It is taken at a little bit different
18 angle, and you can see the splintering better in
19 this photograph than you can in the other one.
20 Splintering occurs because the bullet is losing its
21 energy. It went through the two veneers, started
22 to lose energy. Instead of punching a clean hole
23 through, it started to shear that veneer off.

24 State's 13. I pulled this photograph simply
25 because this is the -- I guess they call it the

1 lobby area inside. It took me a while to figure it
2 out, but the entry door is behind this wall to the
3 left. They spent a lot of time moving the ATM
4 machine around and looking for the projectile in
5 this area.

6 Of course, the projectile did not exit
7 Mr. Johnson, so there was no projectile to be found
8 at the crime scene. Just -- they were using their
9 angle -- the investigator said he could visualize
10 thinking -- if the bullet had continued through,
11 that would be the area that it would be found in.

12 State's 15 is a close-up photograph of the
13 front of the door showing the defect. This is a
14 perfectly round defect. It tells me that the
15 bullet is still spiraling. It is still on its
16 trajectory. It is not wobbling. It hasn't come in
17 contact with any other surface prior to striking
18 the door.

19 State's 16 is just another photograph again of
20 the back of the door with Tab Number 2 on it. It
21 is taken from a little bit further back. Again, it
22 doesn't show us anything about how high up it is or
23 how far left or right it is.

24 State's 17 is another photograph of the front
25 of the door taking it at an even further back

1 distance, again showing the front steps, showing
2 that the drive area is significantly lower than the
3 door area. So this bullet is traveling at an
4 upward direction to reach to the door. And it is
5 almost to right-hand side on that photograph.

6 Can you tell me what that one is, because I
7 can't read it?

8 Q. You can come down if you would like.

9 (Witness steps down.)

10 Q. State's Exhibit 51, is that the one you want?

11 A. 51, yes. 51 is just the crime scene diagram that
12 the investigators did, again showing the entryway,
13 the front door, and the various rooms inside this
14 business establishment. It gives us a clearer idea
15 of this lobby area. The ATM machine was sitting
16 over in this corner right here. And the bullet
17 passed through coming in this direction. And that
18 is with the door closed. So it comes in this way.
19 And that is why they were spending so much time in
20 this lobby area looking for a particular
21 projectile. It just gives us a real good layout of
22 how this crime scene building is set up and the
23 area they were working in was simply in this area
24 right here. And if you want to give me, is that
25 52?

1 Q. 52.

2 A. Exhibit 52. This one is important because it shows
3 actually the front door area. It doesn't tell me
4 how far set back it is, that alcove is. But from
5 where they measured right here -- and I'm assuming
6 this is the driveway -- they measured that from
7 here to the bullet strike was 33 feet.

8 But what is interesting to me is, I don't know
9 if that is straight from the parking lot to the
10 bullet hole, or is that from the parking lot to the
11 base of the door? Because if I do it from the
12 parking lot, holding it on the parking lot, I am
13 going to create a greater distance because of the
14 height.

15 Q. Uh-huh.

16 A. So I don't know exactly how they got the 33 feet,
17 but it shows there is about 11 yards difference
18 from the front of the awning area to the door
19 itself.

20 Q. Now, did the surveillance video or the stills
21 recovered from the video reveal anything to you
22 regarding the location of Mr. Herring's vehicle at
23 the time the shot was fired?

24 A. Well, the video shows the vehicle traveling from
25 the left of the camera, which would be to the right

1 on the diagram, because we are looking at it from
2 the business side.

3 Q. Okay.

4 A. Okay? So it is coming from the left of the front
5 entryway. It comes across the front entryway, and
6 then leaves. The camera is set up to catch
7 individuals coming up the steps or leaving the
8 steps. When the door is open you can see in the
9 video the very top edge of the door when it opens
10 and closes. And you can make out patrons coming in
11 and leaving on the video.

12 The video is important because the door
13 swings -- if I'm on the inside of the business
14 looking out, the door swings outward to the left,
15 which is the direction that Mr. Herring's vehicle
16 is coming from in the video.

17 Then as the door begins to swing closed, he
18 comes by. The video, it is not a realtime video,
19 it is a camera system that I believe, if I remember
20 correctly, it takes two frames per second, so you
21 just get glimpses all the way down the line. You
22 can see the door out of view when Mr. Herring's
23 vehicle is directly in front. Then you see on the
24 video the door slightly come ajar, open up
25 slightly. Then it opens up a little bit further.

1 Then it closes. No one comes in or out during that
2 sequence, just the door opening and closing. There
3 is several scenarios that could be. I don't know.

4 The main issue with that is that Mr. Herring
5 is coming down driving his vehicle. He can't see
6 if anybody is behind that door or not.

7 Q. And as far as knowing the precise location of his
8 vehicle, do the video or the stills give you any
9 indication there?

10 A. They sent the video to NASA for -- to have it
11 enhanced.

12 Q. Uh-huh.

13 A. They were unable to do any enhancement of it. In
14 looking at the photographs -- there was trial
15 testimony pertaining to, quote, a flash.

16 In my review of those stills that were
17 captured from the video, I do not see a flash. I
18 see a reflection of lights that are coming off of
19 the entryway of the establishment reflecting off
20 the vehicles and off Mr. Herring's vehicle as he
21 follows through. There is no distinctive marking
22 of a flash of a gun going off.

23 Q. In looking at the still photographs here when you
24 are at the courthouse, did that assist you in
25 making that determination and opinion?

1 A. Yes. Once I had looked at the stills that they had
2 taken. You can't determine anything because, like
3 I say, it is taking two frames per second. And we
4 have to think of a gun flash, it takes just
5 milliseconds. It may be gone before we ever see
6 it. We may never see it because it is fired from
7 inside the vehicle.

8 Q. And at trial there was extensive testimony and
9 debate about this issue of a flash.

10 A. Yes.

11 Q. You read through the transcript; correct?

12 A. Yes.

13 Q. And Mr. Yates, who was the Defense expert that was
14 called to trial, he does briefly mention a
15 reflection?

16 A. Uh-huh.

17 Q. But in your opinion, is there more that could have
18 been gone into as far as more testimony that was
19 available regarding the reflection by referencing
20 the stills?

21 A. Yes. And if you look at the reflections, if you
22 begin before the vehicle even appears,
23 Mr. Herring's vehicle appears, if you look how the
24 reflections are coming off of the vehicles that are
25 parked out front, they have a rectangular shape to

1 them. And that is all reflective light coming off
2 chrome or coming off the sides of the vehicle.

3 When you see Mr. Herring's vehicle come into
4 view, you also get the rectangular reflections.
5 You see them on different spots on the car.

6 All the way through I see nothing but these
7 rectangular reflections. So I don't see a gun
8 flash.

9 Q. And that would have been an opinion you would have
10 been available to give at this trial; is that
11 correct?

12 A. Yes.

13 Q. Okay. I want to go back, and I'll reference you to
14 the top of Page 6 of your report and ask you about
15 what you were able to ascertain from the autopsy
16 report in this case.

17 A. Well, the autopsy report indicates that Mr. Johnson
18 had a single gunshot wound that went into the left
19 ear canal. There was no exit wound. The medical
20 examiner reported it as a small caliber. X-rays
21 revealed that there were five bullet fragments
22 contained in the cranial vault.

23 The fragments are indicative of this
24 projectile being a semi-jacketed or jacketed hollow
25 point. And what happens with that bullet is it has

1 a lead center that is encased in copper. As the
2 bullet strikes, the copper begins to peel and
3 allows the lead to essentially separate.

4 Now, the copper is very, very thin. It breaks
5 into very small minute pieces. Some of them are
6 large, some are not. And the lead then begins to
7 deform in association with that copper jacket. So
8 the fragments that are seen are just a bullet that
9 is fragmenting once it entered into Mr. Johnson.

10 The wound is not described as being irregular,
11 having an odd shape, or having any what we call
12 tears around its edges, typical of a bullet that
13 has been through a surface and begun to separate.
14 So the bullet stayed intact through the door. It
15 is a veneer door. By that I mean it has got a
16 veneer facing on both sides. It is hollow in the
17 center. The bullet stayed intact until it struck
18 Mr. Johnson.

19 Q. And directing you to the bottom of Page 6, there
20 you address the ricochet theory proposed at trial.
21 Can you take us through that and your opinion on
22 that matter?

23 A. I have done a lot of ricochet cases. When a bullet
24 ricochets, it deforms the nose of the bullet. It
25 strikes a surface and it deforms. It flattens it.

1 And then the bullet goes off in another direction.
2 If the bullet is flattened, it will make an
3 irregular entry into either the person that is
4 struck with it, makes -- not only does it flatten
5 it, but it begins to make the bullet wobble,
6 because it is -- as it hits, it no longer can
7 spiral. So as it hits and begins to wobble, it
8 makes an irregular entry. Sometimes it will enter
9 sideways. You'll see a perfect imprint of a bullet
10 being sideways.

11 And you can see in State's Exhibit 15, it is a
12 perfectly round hole in the door on the outside.
13 So that bullet did not strike anything prior to
14 striking the door.

15 Q. And so just to be clear for my benefit and for the
16 record, do you agree or disagree with the ricochet
17 theory proposed at trial?

18 A. I totally disagree with it.

19 Q. And so in closing essentially the State was arguing
20 it was implausible and you are in agreement with
21 the State's position in closing at trial?

22 A. It is not a ricochet. It can't be.

23 Q. Well, let me -- go ahead. Were you finished?

24 A. I was done.

25 Q. Okay. Is there anything else regarding the

1 ricochet theory you would like to add?

2 A. No. I don't know at what length they looked
3 through this entryway. There was no documentation
4 of any potential strike marks where a bullet struck
5 a pillar or anything on the way in.

6 If I had worked this crime scene and I had
7 seen -- been able to visualize State's 15 that they
8 took a picture of, I would have told the
9 investigators, Don't look for a strike because this
10 bullet did not ricochet off anything.

11 Q. And let's talk about how this crime scene was
12 analyzed. Is it consistent with the best practices
13 approach that is utilized?

14 A. No, it is not.

15 Q. And how is that?

16 A. Well, the trajectory analysis was not done. There
17 was no -- they were looking for a bullet in the
18 lobby area, but no one knew whether there was an
19 exit wound or not. They knew Mr. Johnson had been
20 shot.

21 EMTs could have easily told them, There is not
22 an exit. We know there is an entrance, but there
23 is nothing on the opposite -- anywhere else on
24 Mr. Johnson's head to indicate that there is an
25 exit wound.

1 So they spent a lot of time measuring the
2 inside and getting measurements of where things
3 were, but they didn't do any trajectory analysis to
4 try to determine -- as I said earlier, it is a
5 piece of the puzzle. You take your crime scene
6 work, your photographs, you take your trajectory
7 analysis, and then you take that video that you
8 captured, and let's see where the door has to be in
9 order for a shot to be fired at the entryway.

10 And you can get a range. It can be from Point
11 A to Point B to create that angle, depending on the
12 position of the door. And that is thing we do not
13 know is what the position of the door was exactly,
14 other than it appears to be either all the way
15 closed or virtually closed at the time the shooting
16 takes place.

17 Q. And the position of the door, is that key to
18 determining the location from where the shot was
19 fired?

20 A. It is part of it, yes. If you had a -- if we had
21 this video and we had that range we had created of
22 Point A being here and Point B being over here, at
23 what time is Mr. Herring's vehicle within that
24 range. And you maybe could have isolated different
25 frames of it to look at when and where could it

1 have happened. I know the door wasn't all the way
2 open at the time of the shooting. I know it may be
3 ajar, but it is not fully open. So we would narrow
4 that down. And you create an angle of -- I call it
5 an angle of opportunity to create the defect that
6 we see.

7 Q. And you are familiar with having reviewed the file
8 and the transcript. Would you agree that one of
9 the major contentious issues was the location that
10 Mr. Herring's hand would have been in when the shot
11 was fired?

12 A. Yes. And the trajectory analysis would tell us at
13 what height, how far out, you know, run a string
14 or -- not everybody, I started to say everybody --
15 a lot of places use lasers now and you can
16 videotape the laser as you open the door to get a
17 line to where it is at. And it would have told us
18 how high that weapon had to be held, at what angle,
19 from a vehicle moving in the parking lot to be
20 fired from.

21 Q. And would that have helped in the determination as
22 to an opinion regarding whether or not that weapon
23 was accidentally fired?

24 A. It could have, yes.

25 Q. I want to jump back to one thing you mentioned

1 briefly is that that video went to NASA.

2 A. Yes.

3 Q. And you have reviewed the transcript. And when you
4 were here in Richland County you also -- we
5 attempted to watch, but were unable to see the
6 outside here of State's Exhibit 7?

7 A. Yes.

8 Q. It has a reference to NASA on it?

9 A. Right.

10 Q. As well as the transcript indicates it is a NASA
11 tape?

12 A. Uh-huh.

13 Q. And this was admitted at trial without objection?

14 A. (Nods affirmatively.)

15 Q. In your experience, what is the typical practice
16 when you send evidence like that to an outside
17 agency? As far as getting back reports, having to
18 call the witness at trial, those type of things?

19 A. When you have outside work done on a piece of your
20 evidence -- and I use our most recent case where we
21 had some elaborate testing done about temperatures
22 inside a car -- we rely on the expert to testify as
23 to what his findings were, how he set up the tests,
24 how he processed it, how he got the data. You have
25 to bring in the person that does the work to

1 explain what they did, whether they got anything or
2 not. If I am going to introduce it as evidence, I
3 am going to get them to testify to it.

4 MS. KINARD: Objection, Your Honor. I believe
5 that calls for a legal conclusion.

6 THE COURT: I believe it does too. Sustained.

7 BY MS. BLANCHETTE:

8 Q. In your experience -- specifically in your position
9 in Cobb County -- do you send evidence to outside
10 agencies?

11 A. We do on occasion, yes.

12 Q. Okay. And when you do that, is there a certain
13 protocol that you have to follow if you are going
14 to utilize evidence at a trial?

15 A. Certainly. Chain of custody, how the evidence was
16 transmitted, what is requested of the outside
17 expert. Written reports are I want to say
18 99 percent of the time obtained. There are
19 occasions where we are in a rush and we don't have
20 time to get a report, but get their reports. Just
21 make sure that any scientific procedures that need
22 to be followed were followed.

23 Q. And as part of your consultation and work in
24 conjunction with myself on this case, did you raise
25 a concern regarding this NASA video or this piece

1 of evidence that was introduced?

2 A. I did, yes.

3 Q. And what was that that you conveyed?

4 A. Well, we had testimony about NASA looking at it and
5 trying to enhance it. All of us have had trouble
6 opening that particular disk, so we don't know what
7 they did with it. And the only thing is in the
8 report it is written that they made a determination
9 without the hard drive from the recorder, they
10 couldn't do any enhancement of what was already
11 present.

12 Q. And you mentioned the hard drive. Why would that
13 be instrumental in trying to enhance the video?

14 A. Sometimes the way the hard drive records data can
15 be manipulated if you have the hard drive,
16 especially on these camera systems that are not
17 true video where there is stop action.

18 Q. I want to talk with you a little bit about the
19 discharge of the weapon in this case -- and
20 Mr. Yates goes into it -- as far as -- and I
21 apologize, I'm not a ballistics expert -- the
22 poundage that would be required to discharge the
23 weapon.

24 A. Single action versus double action.

25 Q. Thank you. Let me ask you this. And he briefly

1 touches on this at the trial. If the gun had been
2 cocked already, is there a higher likelihood of an
3 accidental discharge?

4 A. Yes. Okay, cocked means that the weapon is in what
5 we call single action mode. All right. So maybe I
6 better explain single versus double action.

7 Q. I would appreciate it.

8 A. All right, double action in a revolver is when I
9 pull it up, I have got a cylinder with five or six
10 bullets in it, depending on how it is made. And
11 when I pull the trigger, the hammer starts to come
12 back, the cylinder rotates to bring the next round
13 into place, and then when I reach a certain level,
14 the hammer falls striking the cartridge case. It
15 is spent, expelling the bullet.

16 In single action, usually most people use
17 their thumb, pull the hammer back. It is already
18 in a cocked, ready to fire position. And then
19 you -- when you are ready to fire, you put a much
20 lighter pull on the trigger.

21 If I remember right -- and I can't remember
22 exactly, but the trigger pull is somewhere in the
23 neighborhood of three to five pounds single action
24 and eight to ten pounds in double action, which is
25 not uncommon. Double action requires more effort

1 because you are functioning the gun in two
2 different fashions. You are rotating the cylinder
3 and you are forcing the hammer back. If I pull the
4 hammer back, it is already -- the motion of pulling
5 the hammer back rotates the cylinder. The only
6 thing you have to do is just reach on the trigger
7 and pull it.

8 Q. One of the theories that was alluded to in this
9 trial was that cocking the gun may have caused an
10 accidental discharge. Would uncocking the gun also
11 cause an accidental discharge?

12 A. It can, yes.

13 Q. So if an individual had cocked a gun and then chose
14 to uncock it, that could cause it to potentially go
15 off accidentally?

16 A. Yes. In order to uncock the weapon, you have to
17 somehow hold the hammer while you pull the trigger
18 and let it down slowly. Some people do it with
19 both hands, some do it with one hand. It can
20 accidentally -- you may not have enough pressure on
21 the hammer and you can accidentally discharge the
22 weapon in single action mode.

23 MS. BLANCHETTE: Your Honor, could I beg the
24 Court's indulgence one moment?

25 THE COURT: Yes, ma'am.

1 (Pause.)

2 BY MS. BLANCHETTE:

3 Q. Mr. Tressel, you have done extensive work on this
4 case at my request.

5 A. Yes.

6 Q. It is much appreciated. Is there anything further
7 regarding your findings and your review of this
8 case that you would like to offer?

9 A. I think I have already said the basics. We don't
10 know the trajectory analysis so we don't know
11 positioning at the time the weapon was fired. And
12 definitely Mr. Herring could not see if anybody was
13 standing behind the door or not when he fired the
14 weapon.

15 Q. And if Mr. Harpootlian would have contacted you and
16 asked for your assistance in this case, would you
17 have been willing to do the work that you have done
18 in preparation for this PCR?

19 A. Yes, I would have.

20 Q. Okay. And just to be clear for the record, you are
21 not in agreement with a number of the findings by
22 the expert that he utilized?

23 A. No, I'm not in agreement at all.

24 Q. Okay. And today, as you have testified to, there
25 is further information that you could have offered

1 in the record at this trial?

2 A. Yes. I would have definitely advised trial counsel
3 that this was not a ricochet in any way. And
4 rightfully so argued, that the trajectory is
5 vitally important to determining when and how the
6 weapon was discharged.

7 Q. And you could have gone into the issue we were
8 discussing about cocking and uncocking the weapon
9 as well?

10 A. Definitely, yes.

11 Q. Okay. And using the still photos to address the
12 reflection as you opined it to be?

13 A. Yes.

14 MS. BLANCHETTE: Your Honor, I have no further
15 questions of this witness.

16 THE COURT: Cross-examination.

17 MS. KINARD: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MS. KINARD:

20 Q. Mr. Tressel, is there any question about the fact
21 that a bullet was fired towards this building?

22 A. No.

23 Q. Is there any question that only one shot was fired
24 towards this building?

25 A. Not that I'm aware of, no.

1 Q. So the fact that there was nothing that you could
2 identify as a gun flash -- forgive me if that is
3 not the right term -- on the video, that doesn't
4 mean it didn't happen; is that correct?

5 A. Oh, I'm not saying it didn't happen, I'm just
6 saying that I don't think the video clearly shows
7 that.

8 Q. And so the fact that people saw what they call a
9 light around the time of the firing of the gun, as
10 best as we can tell, from the video, that doesn't
11 necessarily mean that a gun was not fired?

12 A. Oh, no.

13 Q. Okay. Now, you talked about the fact that there
14 was a hollow point bullet used or found. Is that
15 delineated in the coroner's report that it was a
16 hollow point?

17 A. No, it is not.

18 Q. Is it possible to know that post-mortem?

19 A. By examination -- by the description he gave, it is
20 either a hollow point or what we call a fully
21 jacketed bullet.

22 Q. And you know that because of the way it broke down
23 into pieces?

24 A. Into the pieces, yes.

25 Q. As you said on direct?

1 A. Yes.

2 Q. And so you said that it broke down into pieces and
3 that would be unlikely if it had come in contact
4 with another surface; is that correct? Between the
5 firing of the gun and entering Mr. Johnson?

6 A. Well, what I said was if it had struck something in
7 a ricochet fashion.

8 Q. I'm thinking of the door.

9 A. The door? It is traveling too fast when it goes
10 through that thin veneer. The veneer doesn't have
11 enough grip to it or solidness to it to begin
12 shearing the -- I call it the petals of the jacket.

13 Q. Okay. Thank you. I misunderstood that. So the
14 fact that it entered and then exited the two sides
15 of the veneer door would not affect the jacketing
16 of the bullet?

17 A. It might start it to shear off, and that is why we
18 have five fragments once it penetrates into
19 Mr. Johnson, but it didn't shear any of it off
20 before it hit Mr. Johnson.

21 Q. So that finding of the fragmentation within him is
22 in line to what you would have expected?

23 A. Yes.

24 Q. In your opinion, if the investigation of the club's
25 crime scene had been conducted as the investigation

1 of Mr. Herring's house crime scene, if this were
2 done to the level of the second, would that have
3 provided more information for you?

4 A. Oh, definitely.

5 Q. And let's talk about the reflections just a little
6 bit more. Since you did review the transcript,
7 would you agree that sometimes it was testified to
8 that people saw a light coming from the car and not
9 just a flash?

10 A. Well, they called it -- they do say light coming
11 from the car. I'm unable to determine --
12 everything that I saw I saw in multiple frames. So
13 light coming from the car, based on what I saw on
14 the video and on the stills, is consistent with
15 reflections.

16 Q. Do you recall which gun was alleged to have been
17 used?

18 A. If I'm not mistaken, it was a Ruger .357.

19 Q. And is that single action or a double action?

20 A. It is a double action revolver. In other words, it
21 can be fired in both single action or double
22 action.

23 Q. Thank you. Thank you for clarifying that.

24 Now, based upon the totality of the
25 information and your opinions, your final opinion

1 was that the bullet penetrated the door intact and
2 separated upon entry through Mr. Johnson's skull;
3 is that correct?

4 A. That's correct, yes.

5 Q. Okay. And so the end result is what was alleged in
6 the indictment and what Mr. Herring was convicted
7 of; is that correct? That a bullet fired from his
8 gun ultimately killing Mr. Johnson?

9 A. Yes, ma'am.

10 Q. I have no further questions. Thank you.

11 THE COURT: Any redirect?

12 MS. BLANCHETTE: No, Your Honor.

13 THE COURT: All right. Thank you. You may
14 step down.

15 THE WITNESS: Thank you.

16 THE COURT: Any objection to him being
17 excused?

18 MS. KINARD: None, Your Honor.

19 MS. BLANCHETTE: No, Your Honor.

20 THE COURT: Sir, you may be excused.

21 THE WITNESS: Thank you, ma'am.

22 THE COURT: Thank you.

23 (Witness steps down and is excused.)

24 THE COURT: Call your next witness.

25 MS. BLANCHETTE: Your Honor, I would call

1 Peter Skidmore to the stand.

2 (Witness approaches.)

3 THE BAILIFF: Place your left hand on the
4 Bible, and raise your right hand, please.

5 (Witness complies.)

6 THE CLERK: Do you swear or affirm the
7 testimony you are about to give in this case will
8 be the truth, the whole truth, and nothing but the
9 truth, so help you God?

10 THE WITNESS: Yes.

11 THE CLERK: Have a seat in the witness stand,
12 please.

13 (Witness complies.)

14 THE CLERK: State your name for the record.

15 THE WITNESS: Peter Skidmore.

16 PETER SKIDMORE,
17 after being duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MS. BLANCHETTE:

20 Q. Mr. Skidmore, what is your current occupation?

21 A. I'm a licensed private investigator in North and
22 South Carolina.

23 Q. Okay. And how is it that you became involved in
24 the PCR case of Dewain Herring?

25 A. You contacted me, and I was retained by

1 Mr. Herring.

2 Q. Okay. I just want to ask you about two matters
3 that you looked into in this case. One would be
4 the media attention revolving around the trial.
5 Were you able to search on the internet and other
6 sources and look at a number of the articles and
7 blog posts, and different things like that, that
8 were out there?

9 A. Yes. There were several articles.

10 Q. Okay. And what did you review?

11 A. Newspaper articles that had been posted on the
12 internet.

13 Q. Okay. And in reviewing those, if you had been
14 working on the case at the time of the trial, would
15 you have raised concerns regarding the media
16 attention leading into this trial?

17 A. Absolutely.

18 Q. Okay. And what would those concerns have been?

19 A. That people could have already formed their opinion
20 before they were seated on the jury.

21 Q. Okay. And I probably should have asked you this
22 first. Mr. Skidmore, are you regularly retained in
23 cases leading up to trials?

24 A. I am.

25 Q. Okay. And do you know approximately how many

1 criminal cases you have been retained as a private
2 investigator in?

3 A. It would be hard to say. I have investigated well
4 over 100 murder investigations, I have worked on
5 federal death penalty cases, murder investigations
6 in South Carolina, Mississippi, several other
7 states.

8 Q. So you are familiar with working with Defense
9 attorneys leading up to a trial and helping them
10 prepare for trial; is that correct?

11 A. That is correct.

12 Q. All right. So going back to where I was, if you
13 had reviewed all of the media attention circulating
14 around this case prior to trial, what would you
15 have discussed with Defense counsel?

16 A. I would have discussed possibly changing the venue.

17 Q. And why is that a recommendation you would have
18 made?

19 A. Well, on the media, but also Mr. Herring being so
20 involved in the community as well.

21 Q. Okay. And I don't know if you were present for
22 Mr. Harpootlian's testimony, but he said that was a
23 factor that he chose not to pursue in this case.
24 Would you have been in disagreement with that
25 decision?

1 A. I would have suggested, you know, changing or
2 trying to change it. It is ultimately his
3 decision, though.

4 Q. Okay. I also want to talk with you -- you came and
5 you reviewed all the evidence as well when
6 Mr. Tressel was here; is that correct?

7 A. That is correct.

8 Q. Okay. And do you recall when we all looked at and
9 attempted to watch State's Exhibit 87?

10 A. Yes, I do.

11 Q. Okay. And you reviewed the transcript and a number
12 of case materials leading up to this PCR; is that
13 correct?

14 A. Yes.

15 Q. And you have also met with myself and
16 Mr. Harpootlian when he originally turned over the
17 file?

18 A. Yes.

19 Q. And that was several years ago?

20 A. Yes.

21 Q. In reading the transcript, reviewing his file, and
22 seeing that exhibit, was there an individual
23 discovered or a name that came to be regarding
24 someone that had supposedly worked on this video at
25 NASA?

1 A. Yes. I had the same concerns as Mr. Tréssel had as
2 far as the chain goes. And that was one of your
3 concerns as well. So we backtracked and located
4 Mr. Lawrence, who was supposed to have reviewed the
5 tape.

6 Q. And his name is actually given in the transcript
7 and several other court documents; is that correct?
8 Brad Lawrence?

9 A. That is correct.

10 Q. And based upon you contacting Mr. Lawrence, what
11 information were you able to give me regarding his
12 involvement in the case?

13 A. Nothing whatsoever. He went back and tried to pull
14 a file, and he couldn't find the file. Didn't
15 remember the case at all.

16 Q. Okay. And was the matter discussed as to whether
17 or not he needed to be subpoenaed to be here today?

18 A. Yes, we discussed that.

19 Q. Okay. Where is he currently located?

20 A. Florida.

21 Q. Okay. And was he -- did he confirm with you that
22 he was working for NASA at the time of
23 Mr. Herring's trial?

24 A. He was.

25 Q. Okay. And did you receive any information as to