

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Jocelyn Newman, Circuit Court Judge

App. Case No. 2020-000205

H. Dewain Herring,

Petitioner,

vs.

State of South Carolina

Respondent.

APPENDIX
VOLUME VII OF VII

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1 whether or not it would have been easier for him to
2 obtain his file back at that time versus now in
3 what is 2017?

4 A. Yes.

5 Q. Okay. And what information did you obtain
6 regarding his access to the file, you know, now ten
7 years later?

8 A. He said that he was unable to locate a file.

9 Q. Okay. Mr. Skidmore, if I could beg the Court's
10 indulgence one moment.

11 (Pause.)

12 BY MS. BLANCHETTE:

13 Q. Mr. Skidmore, if you were working on this case
14 before the trial and doing the work that you have
15 done now for the PCR, would you have been able to
16 locate Mr. Lawrence if Mr. Harpootlian had asked
17 you before trial, Brad Lawrence, the guy from NASA?

18 A. I think it would have been --

19 MS. KINARD: Objection. Calls for
20 speculation.

21 THE COURT: Sustained.

22 MS. BLANCHETTE: Sorry, Your Honor, that was a
23 very bad question.

24 BY MS. BLANCHETTE:

25 Q. Mr. Skidmore, was it easy for you to locate Brad

1 Lawrence in preparation for this PCR?

2 A. Fairly easy, yes.

3 Q. Okay. Can you explain?

4 A. Yes. We did searches through the programs that we
5 have at our office and were able to get a phone
6 number and locate him that way.

7 Q. And in the criminal cases that you have been
8 involved in, do you typically receive information
9 regarding any of the State's witnesses or experts
10 that you need to speak with prior to trial if you
11 are investigating the case for the Defense?

12 A. Absolutely, yes.

13 Q. Okay.

14 MS. BLANCHETTE: Your Honor, I have no further
15 questions.

16 THE COURT: Cross-examination.

17 MS. KINARD: Thank you, Your Honor. Very
18 briefly.

19 CROSS-EXAMINATION

20 BY MS. KINARD:

21 Q. Mr. Skidmore, when you are working with Defense
22 counsel and considering a change of venue, what
23 kind of factors do you consider?

24 A. As I said earlier, I take into consideration the
25 media that has been involved, how involved the

1 person is in the community, and what ties to the
2 community that that person has, good or bad. That
3 is, I guess, an overview of what I do.

4 Q. Were you here when Mr. Harpootlian was testifying?

5 A. I was here for part of it.

6 Q. Were you here when he was asked about whether he
7 considered a change of venue?

8 A. I believe so, yes.

9 Q. Do you recall his testimony regarding the
10 potentialities of that and why he chose not to?

11 A. I think -- yes, I do remember. He said he would
12 get possibly the same type of jury pool, I believe.

13 Q. Do you disagree with that?

14 A. I don't believe that I can say. In past, I thought
15 it was kind of the luck of the draw. I didn't
16 think the State could pick like another county that
17 was very similar to it. I know it can't be from
18 one extreme to the other.

19 Q. So you would disagree with his assessment that if,
20 for instance, it was moved to Lexington County he
21 would receive a very similar situation?

22 A. Well, I think, there again, that is his call and
23 all I could do is focus on, you know, what was
24 going on in this county at the time.

25 Q. So your focus -- nevermind, I won't ask that. Is

1 it fair to say that your focus in researching this
2 case was the media involvement and what you saw as
3 to regard to that?

4 A. The media, as well as talking to Mr. Herring about
5 his different ties within the community -- where he
6 went to church, who was affiliated at his church,
7 and those type of things. So it was not just the
8 media, it was also talking and discussing
9 Mr. Herring's involvement in the community.

10 Q. Did you conduct any interviews in furtherance of
11 that investigation?

12 A. As far as the?

13 Q. Like with people in his church or with the
14 non-profits he worked with that you mentioned?

15 A. No, ma'am.

16 MS. KINARD: I have no further questions.

17 THE COURT: Any redirect?

18 MS. BLANCHETTE: Beg the Court's indulgence
19 one moment.

20 THE COURT: Yes, ma'am.

21 (Pause.)

22 MS. BLANCHETTE: Your Honor, I have no further
23 questions of this witness.

24 THE WITNESS: Thank you.

25 THE COURT: All right, you may step down.

1 (Witness steps down.)

2 THE COURT: Any additional witnesses,
3 Ms. Blanchette?

4 MS. BLANCHETTE: I do not have any additional
5 witnesses. I do have a number of cases just to
6 hand up for the Court to review, you know, at your
7 leisure, Your Honor. I didn't intend to go through
8 all those today.

9 THE COURT: Okay. Ms. Kinard, do you have any
10 witnesses?

11 MS. KINARD: No, Your Honor, no witnesses.
12 But I would be prepared for a short closing if you
13 would like one, or whatever Your Honor would
14 prefer.

15 THE COURT: Absolutely. I'm happy to hear
16 from either one of you or both of you.

17 MS. BLANCHETTE: And, Your Honor, I think we
18 were both going to remember addressing --

19 MS. KINARD: Your Honor, as you may recall,
20 the Haxton report that has been referred to by
21 pretty much everybody, we have stipulated to enter
22 it as an exhibit.

23 THE COURT: Yes, ma'am.

24 MS. KINARD: How would you prefer it marked?

25 MS. BLANCHETTE: It can be an Applicant,

1 that's fine. Make all the stickers the same.

2 (WHEREUPON, Plaintiff Exhibit No. 9 was
3 marked for identification and received
4 into evidence.)

5 THE COURT: And, as I said, I will be happy to
6 hear sort of closing arguments or a summary from
7 each of you. I am going to ask -- I am going to
8 take this one under advisement. I am going to ask
9 both of you for proposed orders. So I just say
10 that because I know that a considerable bit of your
11 argument will be incorporated into proposed orders,
12 but I am happy to hear from you now if you would
13 like for me to as well.

14 MS. BLANCHETTE: And, Your Honor, I can
15 respond at this point. I believe I made quite a
16 lengthy argument and transcript cites at the
17 beginning, so I would rely upon that. I will hand
18 up some cases. But I would ask, just because of
19 the nature of some of the testimony that was
20 offered today with the experts, if I would be
21 allowed to order the transcript and receive that
22 before proposing an order just to ensure accuracy
23 in proposing that order to you.

24 MS. KINARD: I would ask the same.

25 THE COURT: Okay. Well, that is perfect.

1 Okay.

2 MS. KINARD: If we are going to do proposed
3 orders, then I'll save my argument.

4 THE COURT: Okay.

5 MS. KINARD: Thank you, Your Honor.

6 THE COURT: And I am happy to take whatever
7 cases you have.

8 MS. BLANCHETTE: Okay, Your Honor, I do have
9 those. And I will just state the name for the
10 record and happy to give a list to the State.

11 I already handed up State v. Santiago, Gill v.
12 State, Callahan v. State, and State versus Pittman
13 I believe at the beginning. I will run through the
14 case names and the reason and then hand up a copy
15 at the end.

16 I will also be providing a copy of Ramirez v.
17 State, which is a recent Court of Appeals opinion.
18 It goes into the issue of mental health experts.
19 It is currently pending certiorari in the Supreme
20 Court.

21 I also hand up Reeves v. State. This also
22 goes into the issue of expert witnesses, but it is
23 also currently pending certiorari in the Supreme
24 Court. And those are both 2015 decisions.

25 McKnight v. State, also on the issue of the

1 mental health experts.

2 State v. Harris, also on the issue of the
3 mental health experts.

4 Then specifically as to the issues we
5 addressed regarding Demi Garvin, State v. Ellis.

6 And then I have a copy of the memorandum
7 opinion and order in Ronald McIver v. the United
8 States of America, and that deals directly with
9 testimony on an expert opinion offered by Dr. Demi
10 Garvin.

11 As to the admissibility of a statement and
12 possible ineffective assistance on that, I will be
13 handing up Dupree v. State.

14 As to the Solicitor's closing argument, I will
15 be handing up Davis v. Cartlidge.

16 And I have referenced this case several times
17 today. I will be handing up State v. Daniels on
18 the issue of the burden shifting.

19 THE COURT: All right.

20 MS. BLANCHETTE: And I apologize, but I may
21 take a minute.

22 THE COURT: That's fine.

23 Anything further from the Applicant, aside
24 from handing up those cases?

25 MS. BLANCHETTE: Your Honor, if I could beg

1 the Court's indulgence while I pull these?

2 (Pause.)

3 MS. BLANCHETTE: Nothing further from me at
4 this time. But we do greatly appreciate your time
5 and patience.

6 THE COURT: Absolutely.

7 Anything from the State?

8 MS. KINARD: No, Your Honor, just to let you
9 know we appreciate your time and patience and
10 flexibility in scheduling.

11 Should we notify you once we receive the
12 transcript and then we can set up a timeline for
13 proposed orders?

14 THE COURT: That sounds good to me.

15 MS. KINARD: Thank you, Your Honor.

16 THE COURT: All right. So y'all can
17 coordinate the ordering of the transcript with Ms.
18 McCurdy, and we will be in touch.

19 MS. BLANCHETTE: Thank you.

20 MS. KINARD: Thank you.

21 THE COURT: Thank you.

22 (WHEREUPON, the proceedings were
23 concluded at 3:34 p.m.)

24

25

(END OF TRANSCRIPT)

CURRICULUM VITAE

TORA L. BRAWLEY

Columbia, SC 29223

EDUCATION:

- 1986 BA The University of Texas, Austin, Texas
Major: Pre Med/Psychology Minor: Sociology
- 1988 MA California School of Professional Psychology
Major: Clinical Psychology Proficiency: Neuropsychology
(Full APA Accreditation)
- 1992 PhD California School of Professional Psychology
Major: Clinical Psychology Proficiency: Neuropsychology
(Full APA Accreditation)

INTERNSHIP Baylor College of Medicine, Department of Psychiatry
Houston, Texas (Full APA Accreditation)

POSTDOCTORAL FELLOWSHIP Duke University Medical Center, Department of
Psychiatry/Medical Psychology
Durham, North Carolina

ACADEMIC HONORS:

- 1985-1986 Dean's List, University of Texas at Austin
1986-1990 Dean's List, California School of Professional Psychology

LICENSES:

- 1999-Current Licensed Clinical Psychologist
State of South Carolina (License Number 752)
- 2012-Current Temporary Practice Certificate, Board of Psychology
State of Mississippi
- 1997-2000 Licensed Clinical Psychologist and Certified Health Services Provider
State of North Carolina (License Number PP2327)
- 1993-2012 Certified and Licensed Clinical Psychologist
State of Texas (License Number 24914)



PROFESSIONAL EXPERIENCE:

- CURRENT Private Practitioner
Forensic Neuropsychology, Columbia, South Carolina
- 1999-2013 Assistant Professor
South Carolina School of Medicine, Department of Neuropsychiatry and Behavioral Science, Columbia, South Carolina
- 1999-2002 Clinical Psychologist - Forensic Neuropsychology
William S. Hall Psychiatric Institute - Forensic Unit, South Carolina Department of Mental Health, Columbia, South Carolina
- 1999-2002 Faculty for Technical Trial Advocacy Course
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National Hockey League, Carolina Hurricanes, Raleigh, North Carolina
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Baylor College of Medicine, Department of Neurology, Houston, Texas.
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- 1990-1992 Research Associate
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- 1989-1990 Psychology Intern
Ben Taub General Hospital Emergency Room, Psychiatric Unit and Consultation and Liaison Service, Houston, Texas.
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- 1989-1990 Psychology Intern

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Baylor College of Medicine, Sex Offender Treatment Program, Department of
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- 1987-1989 Neuropsychological Assistant
Baylor College of Medicine, Dept. of Neurology, Houston, Texas.
- 1987-1988 Psychological Trainee
United States Air Force Mental Health Clinic, Castle Air Force Base, Atwater,
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- 1987 Psychological Trainee
Bullard High School, Scandinavian Jr. High and Jackson Elementary Schools,
Fresno, California.
- 1986 Psychological Technician
Medical Personnel Pool, Houston, Texas.
Placement: Harris County Psychiatric Hospital
- 1985 Mental Health Worker
Deer Park Psychiatric Hospital, Deer Park, Texas.
- 1985 Mental Health Worker
Austin State Hospital, Travis Unit, Austin, Texas.
- 1984 Volunteer Services
Texas Children's Hospital, Houston, Texas.
- 1984 Mental Health Worker
Extend-A-Care Program, Autistic Unit, Austin, Texas.

RESEARCH EXPERIENCE:

- 1987 Research Assistant
California School of Professional Psychology, Fresno, California.
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- 1990-1997 Counselor, Muscular Dystrophy Association ALS Clinic, Houston, Texas.
- 1989-1990 Psychological Service Provider, Women's Christian Halfway House,
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- 1989-1990 Psychology Intern, placed in Mid City Community Mental Health Center,
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- 1988 Alzheimer's Disease Association family support group, Fresno, California.

PUBLICATIONS AND INVITED LECTURES:

- Brawley, T.L. (2009, April). Forensic Neuropsychology. Presented at USC School of Medicine, Columbia, South Carolina.
- Brawley, T.L. (2005, June). Introduction to Forensic Neuropsychology. Presented to Center for Capital Litigation, Columbia, South Carolina.
- Brawley, T.L. (2004, March). Forensic Neuropsychology. Presented at William S. Hall Institute as Part of the Forensic Psychiatry Special Topics Seminar, Columbia, South Carolina.
- Brawley, T.L. (2003, February). Forensic Neuropsychological Assessment. Presented to Forensic Fellowship Program, William S. Hall Psychiatric Institute, Columbia, South Carolina.
- Brawley, T.L. (2003, January). Neuropsychological Assessment: Basic Overview for Psychiatrists. Presented to General Psychiatry Residency Program, University of South Carolina School of Medicine, Columbia, South Carolina.
- Buchman, A. L., Sohei, M., Brown, M., Jenden, D., Ahn, C., Roch, M., & Brawley, T. L. (2001). Visual Memory Improves Following Choline Supplementation in Long-Term Total Parenteral Nutrition. JPEN 25: 30-35.
- Brawley, T.L. (2000, May). Neuropsychological Evaluation of Traumatic Brain Injury: Forensic Implications. Presented to Forensic Grand Rounds, William S. Hall Psychiatric Institute, Columbia, South Carolina.
- Lande, R.G, Crawford, P., Shea S., Tezza, C, Brawley, T. (2000, January). How To Meet Your Duty to Provide Competent Legal Representation to Your Mentally Ill Client. Presented to Midyear Meeting of the South Carolina Bar, Charleston, South Carolina.
- Brawley, T.L. & Fowles, G. (1999, April). Functional Neuroanatomy and Brain Injury. Presented to WakeMed Rehab Brain Injury System Training Program, Raleigh, North Carolina.

Brawley, T. L. & Harrison, K. W. (1996, November). Mild Traumatic Brain Injury In the Managed Care Environment. A paper presented to the Brain Injury Association National Symposium, Dallas, Texas.

PUBLICATIONS AND INVITED LECTURES (CONT.):

Brawley, T. L., Cooke, N & Roll, P. (1996, September). The Neuropsychological Evaluation: Utility in a Neurology Setting. Presented to the Neuroscience Conference, Baylor College of Medicine, Department of Neurology, Houston, Texas.

Brawley, T. L. & Harrison, K. W. (1995, November). The Problem of Mild Traumatic Brain Injury. A paper presented to the Texas Psychological Association Annual Conference, San Antonio, Texas.

Brawley, T. L. & Harrison, K. W. (1995, October). The Post-Concussive Patient. Invited lecture To the Family Practice Residency Program, St. Joseph's Hospital, Houston, Texas.

Brawley, T. L. (1995, February). A Basic Overview of Neuropsychology. Invited lecture, Our Lady of the Lake University, Houston, Texas.

Brawley, T. L. & Lai, E. (1993, November). Perspectives of the Patient Evaluation. Paper presented at Alzheimer's Disease: Insights, Research and Decisions Conference, Houston, Texas.

Brawley, T. L. & Cooke, N. (1993, May). Mood Disorders and Memory Loss: Strategies to Remember. Presented to the Depressives and Manic Depressives Association (DMDA) support group, Houston, Texas.

Brawley, T. L. (1992). Alzheimer's disease and multi-infarct dementia: Neuropsychological and magnetic resonance correlates. Dissertation Abstract International, 53/11B, 6029.

Brawley, T. L. (1992, November). Handling Selective Behaviors in Dementia Patients. Paper presented at Harris County Hospital District Community Health Workshop.

Brawley, T. L. (1991, November). Ethical Issues in Alzheimer's Disease. Paper presented at Alzheimer's Disease: Pathways to Discovery Conference, Houston, Texas.

Brawley, T. L. (1991, June). Neuropsychological Testing: Basic Concepts, Ideas and Applications. Presented to Baylor College of Medicine medical students, Alzheimer's Disease Research Center, Department of Neurology.

Pirozzolo, F. J., Bonnefil, V., Brawley, T. (1991). Development of the embryonic, fetal and neonatal nervous system. In J. W. Gray & R. S. Dean (Eds.), Neuropsychology of Perinatal Complications (pp. 22-58). New York: Springer Press.

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REFERENCES: Available Upon Request

TORA L. BRAWLEY, PH.D.
CLINICAL PSYCHOLOGY – NEUROPSYCHOLOGY

Patient Name: Dewain Herring

Date of Birth: 12/19/43

Date of Evaluation: 03/15/16



Per the request of Dr. Donna Schwartz-Watts , a clinical interview and neuropsychological test battery were administered to Mr. Herring at Kirkland Correctional Institution on March 15, 2016 to assess his current level of cognition. Effort testing was also conducted to ensure the validity of these results. The following is a summary of evaluation results.

Mr. Herring is a 72 year-old, right handed, white male who is currently reporting difficulties with cognition. On clinical interview, he reports to be very frustrated with his short term memory and concentration. He said that recently it took him three days to write nineteen thank you notes because he “couldn’t put the words together.” He states that he has poor recall of recent conversations, word finding problems, has to re-read things because he has forgotten and will frequently lose track of what he is doing midtask. He went on to say, “Something’s not right with me.” He states that looking back in hindsight, sometime before 2006 he became “less reasoned with people.” He says he now realizes because of this he alienated several referral sources. He rates the current severity of his cognitive symptoms as “mild,” but states he believes they are getting worse.

Mr. Herring is married to his wife of 47 years. He has two grown children and three grandchildren. He graduated from USC Law School in 1969, reporting to have been an above average student. He was a practicing attorney until his incarceration and was in private practice for the last 38 years.

Psychiatric history is reportedly positive only for marital counseling off and on since the 1970s. He states that he also attended alcohol rehabilitation after his charges while on house arrest. Mr. Herring reveals that he was a heavy drinker of alcohol since the 1970s. He states that he would consume approximately 1.5 gallons of alcohol per week. He states that he experienced some blackouts related to his drinking in the 1980s.

Family history reveals Mr. Herring was born in Kingstree, SC. He grew up with his parents and a younger brother and described his childhood as “not good.” He reports to have been subjected to both emotional and physical abuse. He reveals that his mother was diagnosed with Bipolar disorder and committed suicide at age 60. He reports his father had diabetes, heart issues and was also a heavy user of alcohol.

Significant medical history includes arthritis, GERD, sleep apnea, and bladder issues. He also reports to have cataracts and wears bilateral hearing aids.

Currently, he reports vegetative symptoms which include difficulties sleeping, not feeling rested in the morning, "poor" energy level, increased irritability and feelings of depression and anxiety. He does reveal that his depression and anxiety have lessened with a change in facilities and medication.

Current life stressors include concerns about his marriage ("the closeness is gone") and family ("I have let them down," "I'm not there for my grandchildren") as well as the stressors associated with a prison environment.

The following tests were administered to Mr. Herring:

Wechsler Adult Intelligence Scale- IV (WAIS-IV)

Wechsler Test of Adult Reading (WTAR)

Repeatable Battery for the Assessment of Neuropsychological Status (RBANS)

List Learning

List Recall

List Recognition

Story Memory

Story Recall

Figure Copy

Figure Recall

Line Orientation

Picture Naming

Semantic Fluency

Verbal Series Attention Test

Controlled Verbal Fluency Test

Short Categories Test – Booklet Format

Finger Oscillation

Grooved Pegboard

Trail Making Part A

Trail Making Part B

Test of Memory Malingering

During this evaluation Mr. Herring was well groomed, alert, and fully ambulatory. His mood was mainly pleasant and friendly but he did become visibly upset on a few occasions during the interview. He exhibited good eye contact, and hearing and vision appeared to be adequate for the purposes of this evaluation. His speech was fluent and he had a very good vocabulary. He was very talkative and occasionally became tangential and then would lose track of that he was talking about. He was very cooperative to testing and persisted with little encouragement. Testing conditions were optimal and these test results are considered to be a valid representation of Mr. Herring's current level of cognitive functioning.

The Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV) revealed Mr. Herring to have the following index scores:

Verbal Comprehension	116	(86 th percentile)	High Average
Perceptual Reasoning	96	(39 th percentile)	Average
Working Memory	114	(82 nd percentile)	High Average
Processing Speed	97	(42 nd percentile)	Average
General Ability	106	(66 th percentile)	Average
Full Scale IQ	107	(68 th percentile)	Average

These scores place him overall at the Average range of intellectual functioning. Review of individual subtest revealed that nonverbal abstract reasoning was an area of weakness for him. On a test of oral reading ability (WTAR) he obtained an estimated premorbid Full Scale IQ of 125. This is consistent with a decline in intellectual abilities when compared to his current IQ scores.

Additional testing revealed Mr. Herring to have deficits in the areas of immediate verbal learning (18th percentile), immediate memory for a prose passage (4th percentile), delayed recall for a prose passage (9th percentile), ability to copy a complex figure (2nd percentile), controlled verbal fluency for letter cues (15th percentile), and abstract reasoning and cognitive flexibility (10th percentile).

Motor testing revealed severely impaired manual speed bilaterally (2nd percentile). Manual dexterity was borderline on the right hand (7th percentile) and below average on the left (16th percentile). Trail Making ability when set shifts were required was significantly slowed (12th percentile).

Formal effort testing was conducted with the Test of Memory Malingering. Performance was completely within normal limits, indicating no evidence of an attempt to exaggerate or malingering cognitive symptoms.

In summary, Mr. Herring is a 72 year-old, right handed, white male who is currently reporting difficulties with cognition. He is also reporting depression and multiple vegetative symptoms.

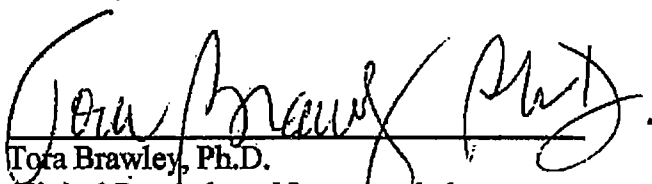
Testing results from this evaluation reveal that Mr. Herring is currently performing in the Average range of intellectual functioning based on his Full Scale IQ of 107. This is believed to be a decline in functioning from premorbid estimates.

Additional deficits were noted in the areas of verbal learning, verbal memory, verbal fluency, abstract reasoning and motor functioning. He put forth good effort and these results are considered to be an accurate representation of his current functioning.

The current results are consistent with the presence of a mild dementia. While he is reporting some depression it is not believed this can account for the entirety of his deficits. He should undergo a full dementia evaluation to assess for possible reversible causes or potential treatment

options. The current efficacy of his psychotropic medication should also be fully assessed. Ideally, Mr. Herring would also undergo counseling to help him cope more effectively with his current stressors.

Thank you for asking me to participate in the evaluation of this patient. Please do not hesitate to contact me should you have further questions.



Tota Brawley, Ph.D.
Clinical Psychology-Neuropsychology

TORA L. BRAWLEY, PH.D.
CLINICAL PSYCHOLOGY – NEUROPSYCHOLOGY

Report Addendum – Family Interviews

Patient Name: Dewain Herring

Date of Birth: 12/19/43

Date of Interviews: 06/03/16

Per the request of Dr. Donna Schwartz-Watts, additional interviews were conducted with the wife and son of Mr. Dewain Herring. Mr. Herring had undergone a clinical interview and neuropsychological test battery at Kirkland Correctional Institution on March 15, 2016 to assess his current level of cognition. Testing results from this evaluation revealed that Mr. Herring was exhibiting a decline in estimated premorbid intellectual functioning as well as deficits in the areas of verbal learning, verbal memory, verbal fluency, abstract reasoning and motor functioning. These results are consistent with the presence of a mild dementia. While he was reporting some depression it was not believed this accounted for the entirety of his deficits. It was recommended he undergo a full dementia evaluation to assess for possible reversible causes or potential treatment options. As part of this evaluation, additional interviews were conducted with his family in an attempt to gather information on the potential onset and etiology of his cognitive difficulties.

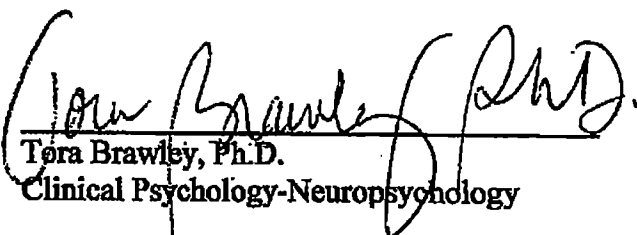
Mrs. Virginia Herring has been married to her husband for 47 years. She reports that her husband had always had his “ups and downs” because of his Bipolar disorder but they had become more noticeable in the last 15-18 years. She states that in the couple of years prior to his incarceration he had become much more irritable and was not as easy to get along with. She states that he was very “restless”, “overly sexual”, and “more obsessed” with sexual materials. She also reports that they were not communicating well and that alcohol was an issue as they would both drink in the evenings. She reveals that in the 6-12 months prior to his incarceration his restlessness grew worse and he “couldn’t sit and relax”. She states he was never “at ease”, and she wondered if he had stopped taking his medications. She reports that he had told her he did not feel he was doing a good job at work anymore and that he had lost some clients. Mrs. Herring states that she attributed these changes in her husband to his Bipolar disorder and his use of alcohol.

Mr. Herring’s adult son, Chandler, was also interviewed. Chandler reports that he had noticed memory problems in his father in the years prior to his incarceration but he attributed them to his psychiatric medications. He states that between the medications and alcohol there would be times where his father was “incoherent”. He states that frequently there were times when his father could not recall conversations from the night before. He reports they would have a fully intelligent and coherent conversation which his father had no recall of hours later. He reveals there were other times when his father’s speech was “gibberish pig Latin”, and there were also

times that he could not speak at all, "like the cat had his tongue". Chandler described in detail an incident several years prior to incarceration when he, his girlfriend and his father were at their lake house. He left his father to start the grill (which had had done many times before) while he went in to shower. A few minutes later his girlfriend came to get him and told him his father could not figure out how to work the grill. When he went outside he found his father sitting on the steps with a glass of wine. When he asked his father what the problem was, he states that his father "could not respond". "He just looked right through me like he couldn't speak, he saw me but it was like I was an apparition". Chandler also reports that he would have to repeat stories and details several times to his father in order for him to "get it". Additionally he states that in the last 10-15 years he has noticed that his father has become much more rigid and "less likely to see other's point of view". Chandler states that he attributed these behaviors and changes in cognition to his father's combined use of medications and alcohol.

In summary, both Mrs. Herring and Chandler noticed unusual behaviors, changes in cognition and changes in personality in the years and months leading up to his charges. In their attempt to understand and explain the changes, Mrs. Herring attributed them to his psychiatric disorder and alcohol, while Chandler attributed them to the combination of psychiatric medications and alcohol. Given this information, it is entirely possible that Mr. Herring was also experiencing neurological events whose onset and symptoms were being masked by the above mentioned factors. Both Herrings state that they were not asked about this information in the original trial.

Thank you for asking me to further participate in the evaluation of Mr. Herring. Please do not hesitate to contact me should you have further questions.


Tora Brawley, Ph.D.
Clinical Psychology-Neuropsychology

Curriculum Vitae
DONNA SCHWARTZ MADDOX

POSITIONS:

Contract Forensic Psychiatrist
Department of Mental Health

Contract General Psychiatrist
Harris Psychiatric Hospital

Psychiatric Service Director (certified)
Harris Psychiatric Hospital
Retired August 5, 2016

Clinical Professor of Psychiatry
Medical University of South Carolina
Department of Psychiatry and Behavioral Sciences

Associate Professor of Psychiatry
Greenville Hospital System
Department of Psychiatry

Professor of Psychiatry
Edward Via College of Osteopathic Medicine
Carolinas Campus

PROFESSIONAL LICENSURE:

South Carolina Medical License # 16574
Georgia Medical License #74584

EDUCATION:

1981 - 1985 B.A. Psychology
Furman University
Greenville, South Carolina

1985 - 1989 Doctor of Medicine
University of South Carolina School of Medicine
Columbia, South Carolina

BOARD CERTIFICATIONS:



Donna Schwartz-Watts, MD
Curriculum Vitae

Diplomate, Psychiatry, (Board Certification #40726), January 1995,
recertified 7/05- 12/2015

Added Qualifications in Forensic Psychiatry, July 1996 #471, recertified
7/06-12/16

POSTGRADUATE FELLOWSHIPS AND RESIDENCY POSITIONS:

- 1989 - 1993 Resident in General Psychiatry
William S. Hall Psychiatric Institute
Columbia, South Carolina
- 1993 - 1994 Fellowship in Forensic Psychiatry
William S. Hall Psychiatric Institute
Columbia, South Carolina

ACADEMIC POSITIONS/EMPLOYMENT/UNIVERSITY APPOINTMENTS:

- 7/2010-8/2013 Senior Psychiatrist
Bryan Psychiatric Hospital
- 4/24/13 to present Clinical Professor of Forensic Psychiatry
Medical University of South Carolina
Department of Psychiatry and Behavioral Sciences
- 7/2010 to 2015 DMH Professor of Psychiatry
University of South Carolina School of Medicine
Department of Neuropsychiatry
- 7/2006-7/2010 Professor of Clinical Psychiatry
Director, Forensic Psychiatry Services
University of South Carolina School of Medicine
Department of Neuropsychiatry and Behavioral Science
3555 Harden Street Extension, Suite 102
Columbia, South Carolina 29203
(803) 434-4698 (803) 434-2367 (fax)
- Consulting and Treating Forensic Psychiatrist
South Carolina Department of Juvenile Justice
- Consulting and Treating Forensic Psychiatrist
South Carolina Department of Corrections
- 11/98-6/2009 Consulting and Treating Forensic Psychiatrist
Behavioral Disorders Treatment Program
(Sexually Violent Predator Program: SC 44-48-110)
South Carolina Department of Mental Health

- 6/1997- 7/2006 Associate Professor
Director, Forensic Services
Department of Neuropsychiatry
University of South Carolina School of Medicine
- 1/2004-7/2004 Acting Assistant Director, Psychiatry Residency Program
University of South Carolina School of Medicine
Department of Neuropsychiatry and Behavioral Science
- 9/1995-5/1997 Forensic Residency Training Director
University of South Carolina School of Medicine
- 7/1996 – 6/1997 Psychiatrist C William S. Hall Psychiatric Institute
Residential Treatment Director of NGRI Unit
- 1/1995 – 6/1996 Teaching Psychiatrist II William S. Hall Psychiatric Institute
Out-patient Forensic Psychiatrist
- 1/1995 – 12/1997 Assistant Professor University of South Carolina School of Medicine
Department of Neuropsychiatry
- 7/1994 –6/1995 Instructor University of South Carolina School of Medicine
Department of Neuropsychiatry
- 7/1994 – 12/1994 Teaching Psychiatrist I William S. Hall Psychiatric Institute
In-patient and Out-patient Forensic Psychiatrist

MEDICAL STAFF APPOINTMENTS

Patrick B. Harris Psychiatric Hospital
Bryan Psychiatric Hospital (current)
South Carolina Department of Corrections (courtesy)
South Carolina Department of Juvenile Justice (inactive 7/2010)
William S. Hall Psychiatric Institute
Palmetto Health Richland Memorial Hospital (courtesy)
Palmetto Health Baptist Medical Center (courtesy)
Providence Hospital (pending)

UNIVERSITY/ MEDICAL STAFF COMMITTEES:

2015-Present Vice-President, medical Staff Harris Psychiatric Hospital
2007-2010 Member, Appointments and Promotions Committee, USC
2002- 2009 Member, Alumni Committee, USC School of Medicine
1996- 2010 Member, Residency Selection Committee
1995- 2010 Member, Residency Training Committee

- 2002- 2003 Member, Search Committee, Chairman of Neuropsychiatry
- 2000-2001 Member, Committee on Women USC
- 1997 Member, Traditions Committee USCSM
- 1997 Member, Search Committee, Director Rehabilitation Counseling
- 1997 Physician Advisor, Environment of Care
- 1996 Member, Search Committee Chair of Department of Neuropsychiatry and Director of Hall Institute
- 1996 Member, Finance Committee, University Specialty Clinics
- 1994-1996 Member, Infection Control Committee
- 1993-1994 Member, Research Committee

HONORS AND AWARDS:

- 2016 Clinical Mentor Award, University of South Carolina School of Medicine, Greenville, South Carolina
- 2007 Outstanding Female Physician Mentor Award
- 2004-2005 Outstanding Forensic Teaching Award
Presented by the USC SOM Forensic Fellowship Training Program
- 1992 Rapoport Scholarship in Forensic Psychiatry
Presented by the American Academy of Psychiatry and the Law
- 1989 Neurology Award, School of Medicine
- 1985 Cum Laude Graduate, Furman University
Phi Beta Kappa, Furman University
Alpha Epsilon Delta, Furman University

MEMBERSHIPS AND OFFICES IN PROFESSIONAL ORGANIZATIONS:

- 2002-2009 American Board of Psychiatry and Neurology.
Forensic Certification Committee
- 1999-2009 American Board of Psychiatry and Neurology
1999-Present Board Examiner
- 1997-2003 Group for the Advancement of Psychiatry (GAP), General Member
1999 Chair
- 1992- Present American Academy of Psychiatry and the Law (AAPL)
1995-2000 Rapoport Committee (President appointed)
1995-2000 Education Committee (President appointed)
1998-2000 Program Committee (President appointed)
1999 Program Chair
1995-97 Mentor to Rapoport Fellow
- 1989-1998 American Psychiatric Association, General Member

- 1989-1998 South Carolina Psychiatric Association
1995-1998 Federal Legislative Representative (President appointed)
1995-1999 Executive Council
1996-1998 Secretary-Treasurer
- 1997 NAMI Advisory Board Physician Representative

PUBLICATIONS:

Dehart, D., Dwyer, G., Seto, M., Letourneau E., Schwartz-Watts, D. Internet solicitation of children. A proposed typology of offenders based on their chats, E-mails and social network posts. *Journal of Sexual Aggression*, 2016

Schwartz-Watts DM: "Commentary: Stalking Risk Profile." *The Journal of the American Academy of Psychiatry and the Law*, 34:455-457, 2006.

Schwartz-Watts DM, Frierson RL: "20: Crisis Stabilization in Correctional Settings." in *Clinical Practice in Correctional Medicine*, Second Edition, edited by Michael Puisis, D.O., S.C. Mosby, Inc affiliate of Elsevier, Inc 2005.

Schwartz-Watts DM. "Asperger's Disorder and Murder." Analysis & Commentary *The Journal of the American Academy of Psychiatry and the Law* 33:390-3, 2005.

Schwartz-Watts DM, Rowell CN. "Commentary: Update on Assessing Risk for Violence Among Stalkers." *The Journal of the American Academy of Psychiatry and the Law* 31:440-3, 2003.

Giorgi-Guarnieri D, Zonana HV, Schwartz-Watts DM. "Practice Guideline: Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense." Supplement to *The Journal of the American Academy of Psychiatry and the Law* 30:2, 2002.

Frierson R, Schwartz-Watts D, Malone T, Morgan D. "Capital Versus Noncapital Murderers" in revision *The Journal of the American Academy of Psychiatry and the Law*, 1998.

Schwartz-Watts D, Morgan D. "Violent Versus Nonviolent Stalkers," accepted, *The Journal of the American Academy of Psychiatry and the Law*, 1998.

Schwartz-Watts D, Morgan D, Barnes C. "Stalkers: The South Carolina Experience," *The Journal of the American Academy of Psychiatry and the Law*, 1997, 24:541-545.

Schwartz-Watts D, Montgomery L, Morgan D. "Seroprevalence of Human Immunodeficiency Virus Among Pre-Trial Detainees," *The Bulletin of the American Academy of Psychiatry and the Law*, 1995, 23:285-289.

POSTERS:

Internet Chat Rooms: Who Solicits Children? R. Gregg Dwyer, MD, EdD, Donna Schwartz-Watts MD, William Burke, PhD, American Academy of Psychiatry and the Law 39th Annual Meeting, Seattle, WA October, 2008

PRESENTATIONS:

“Expert Testimony” Lecture to Medical University of South Carolina Forensic Residents, Charleston, SC 1/13/16

“Death Penalty and South Carolina” Lecture to Medical University of South Carolina Forensic Residents, Charleston, South Carolina, February 6, 2013

“Autistic Spectrum Disorders; What Capital Lawyers Should Know.” Death Penalty 2013, Sheraton Four Seasons, Greensboro January 25, 2013

“Predators Among Us” University of South Carolina 2012 Mini Med School, October 2, 2012, Columbia, South Carolina

“How Death is Different-Using ABA Guidelines to Meet the Standard of Care in Death Penalty Cases and Social History Investigations: The team Approach” with Joe VonKallist, Capital Case Workshop, September 19, 2012, Wilmington, North Carolina

“Protecting Mental Health” South Carolina Attorney General’s Continuing Legal Education Ethics Seminar, Blatt Building, Columbia, SC 12/2/11

“Autistic Spectrum Disorders and the Legal System”, DMH Annual CME, William S Hall Psychiatric Institute 9/11

“Issues of Mental Competency” South Carolina Circuit Court Judges Conference, Spartanburg, South Carolina, May 4-6, 2011

“Stalking in the New Millennium”: Department of Mental Health Day Long CME, Columbia SC, October 2009

“Internet Predators”: South Carolina Psychiatric Association Annual Meeting, Myrtle Beach, South Carolina, 1/2009

“Internet Predators”: Panel Speaker, South Carolina Bar Association Annual Meeting, Myrtle Beach South Carolina, 1/2009

Internet Predators: ICAC Quarterly Meeting, Columbia, South Carolina 11/21/2008

Project Safe Childhood, Advanced Online Child Exploitation Seminar, National Advocacy Center Columbia, SC, July 29, 2008

“Violent Crimes and the Commitment of Sexually Violent Predators, MUSC Judges and Attorneys Substance Abuse and Ethics Seminar, Charleston, South Carolina, December 7, 2007

“Autistic Spectrum Disorders and Corrections” South Carolina Department of Corrections Mental Health Seminar, Columbia, South Carolina, December, 2007

“Pitfalls in Sex offender Commitment Hearings” Panel Speaker, American Academy of Psychiatry and the Law 38th Annual meeting, Miami, Florida, October 22, 2007

“Treating the Untreatable” Panel Speaker, American Academy of Psychiatry and the Law 38th Annual Meeting, Miami, Florida, October 19, 2007

“Risk Assessment in General Psychiatry: Department of Mental Health Annual Day Long CME, Columbia, SC September 21, 2007

“Mitigation in Noncapital Cases” SC Public Defender’s Conference, Myrtle Beach, SC October 2007.

“Nuts and Bolts of Sexually Violent Predator Proceedings” SC Bar CLE, Columbia, South Carolina July 27, 2007

University of South Carolina School of Medicine Founder’s Day Speaker for Woman in Medicine, Columbia, South Carolina, April 2007.

“Autistic Spectrum Disorders and Mitigation,” Washington DC March 2007

“Sex Crimes and their Aftermath II” Panel Discussion and Presentation, Jack Swerling Moderator, South Carolina Bar Association Conference, Charleston, SC, January 25, 2007

“Psychiatry for the Brilliant Fact Finders” Invited Speaker, South Carolina Judges Conference, Greenville, SC, May 12, 2006.

“Sex Crimes and their Aftermath” Panel Discussion and Presentation, Jack Swerling Moderator, South Carolina Bar Association Conference, Charleston, SC January 27, 2006.

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice National Institute of Trial Advocacy, Atlanta Georgia , June 4-5, 2005

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice National Institute of Trial Advocacy, Atlanta Georgia , June 5-6, 2004

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice National Institute of Trial Advocacy, New York, New York, June 20-21, 2003

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice, New York, New York. June 20-22, 2002.

South Carolina Probation, Paroles and Pardons Annual Conference. "A State of Mind". Myrtle Beach, SC. November 11, 2002.

American Academy of Psychiatry and the Law, "Difficult Case? Consult your Colleagues." Newport Beach, California. October 26, 2002

South Carolina Public Defender's Conference, "Issues and Concerns Regarding the Sexually Violent Predator Statute" Litchfield Beach, South Carolina, September 30, 2002

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice, New York, New York, June 28-30-2002.

American Academy of Psychiatry and the Law, "Death Penalty" Boston, MA, October 28, 2001

American Academy of Psychiatry and the Law, "Ask the Expert" and "The Difficult Case" Panel Discussions. Boston, MA, October 28, 2001

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice, New York, New York, June 14-17-2001.

Annual Capital Defense Training Seminar, "The Importance of Timing in the Presentation of Your Client's Story: Frontloading Mitigation" with John Blume, Attorney, Jekyll Island, Georgia, February 9, 2001

University of Texas, Department of Psychiatry Grand Rounds "Profile of a Stalker" San Antonio, Texas, December 19, 2000

Willford Hall Medical Center, Lackland Air Force Base, Texas, "Death Penalty Evaluations," December 18, 2000.

Willford Hall Medical Center, Lackland Air Force Base, Texas, "Texas Sexually Violent Predator Statute," December 18, 2000

American Academy of Psychiatry and the Law, " Juveniles Who Carry Weapons on School Grounds" Baltimore, Maryland, October 15, 1999

American Academy of Forensic Science, Workshop Presenter, San Francisco, 1998 "Classification and Typology of Stalkers."

Kansas City, Western Missouri Forensic Department, 1997 "Evaluation of Stalking."

University of South Carolina School of Medicine Women's Month Featured Presenter, 1997

"Stalkers: The South Carolina Experience."

American Academy of Psychiatry and the Law, Denver, CO, 1997 "Psychotic versus Nonpsychotic Stalkers."

American Academy of Psychiatry and the Law, Denver, CO, 1997 "Harassing Telephone Callers."

American Academy of Psychiatry and the Law, Denver, CO, 1997 Panel on Maintaining Competence sponsored by Education Committee

American Academy of Psychiatry and the Law, Puerto Rico, 1996 "Violent Versus Nonviolent Stalkers",

American Academy of Psychiatry and the Law, Puerto Rico, 1996 "Capital Versus Noncapital Murderers"

American Academy of Psychiatry and the Law, Puerto Rico, 1996 "Treatment of Insanity Acquittes Across the United States."

William S. Hall Psychiatric Institute Forensic Forum, 1996 "Evaluation and Treatment of Sexual Offenders."

Georgia Regional Forensic Forum, 1996 "Evaluation and Treatment of Sexual Offenders."

American Academy of Psychiatry and the Law, Seattle, Washington, 1995 "Stalkers: The South Carolina Experience"

South Carolina Psychiatric Association, Hilton Head Symposium, 1995 "What General Psychiatrists Need to Know About Forensic Psychiatry."

American Academy of Psychiatry and the Law Annual Conference, San Antonio, Texas 1993 "Seroprevalence of HIV Among Inpatient Pre-trial Detainees"

American Medical Association, North Carolina 1990 "Tertiary Metastases Presenting As Panhypopituitarism"

Present Grants:

Internet Crimes Against Children: Development of a Typology of Offenders for Use in Prevention, Investigations and Treatment; U.S. Department of Justice Office of Justice Programs Grant; 2010-MC-CX-003; Principle Investigator: RG Dwyer; Co-Principal Investigator: D DeHart; Co-Investigators/Consultants: R Moran, DM Schwartz-Watts, W Burke, DL Laufersweiler-Dwyer; 2010 - 2013

Internet Chat Room Solicitation of Children: A Study of Psychosocial and Criminal Justice Factors as

Donna Schwartz-Watts, MD
Curriculum Vitae

They Relate to Public Safety Risk; American Academy of Psychiatry and the Law Institute for Education and Research (AIER) Grant; Principal Investigator: RG Dwyer; Co-investigators: D DeHart, DM Schwartz-Watts, W Burke & R Moran; 2009 - 2010

(Revised 1/3/17)

Psychiatric Evaluation
Dewain Herring
DOB:
Date of Evaluation: 9/12/15
Place of Evaluation: Kirkland Correctional Institution
Date of Report: 8/20/16

Identifying Information: Dewain Herring is a 72 year old married male and former attorney referred for psychiatric evaluation by his attorney Tricia Blanchette. Mr. Herring was convicted of Murder and sentenced to 30 years in Richland County. This evaluation was conducted as part of his Post Conviction Relief.

Statement of Nonconfidentiality: Mr. Herring understood this examiner is an agent of his attorney and that a report would be provided to Ms. Blanchette and possibly used in his upcoming legal proceedings. He had a history of outpatient psychiatric treatment prior to his offenses.

Sources of Information:

Neuropsychological Evaluation 3/15/16
Neuropsychological Report Addendum 6/3/16
Telephone Consultation Dr. Tora Brawley 6/9/16
Interview Notes Virginia Herring, Chandler Herring by Tora Brawley, Ph.D. 6/3/16
Psychiatric records Dr. Stuede 1995-2007
Letter to Dr. Stuede from David Tollin, Ph.D. 2006
Confirmation of interview statement
Hearing Healthcare Records of SC
Baptist Hospital records 2006
Neuropsychological Evaluation report Bill Haxton, Ph.D. 6/17/06
Alvin S. Glenn Detention Center records
Trial transcript May 2007
SCDC records
Attempted telephone conference Shep Jordan 8/20/16



Pertinent Statements:

Educational History:

Mr. Herring graduated from University of South Carolina in 1966 with a degree in Business Administration. He completed law school in 1969. He worked as an attorney for what is now Bank of America for ten years and then opened a solo practice for a year. He worked as a partner in a very successful practice including estate planning until 1995 when he again entered a solo practice. Records indicate he had a decline in his practice prior to his criminal charges.

Medical History:

He has a history of sleep apnea and his family reports he was on CPAP (Continuous Positive Airway Pressure). He reports his machine is old, and he does not use CPAP presently. Mr. Herring was evaluated by an SCDC physician soon after his sentence. A CT scan of his head was ordered and showed

He was admitted to Baptist Hospital in 2006 with a Deep Venous Thrombosis (DVT). He also had a gunshot wound to his arm. He had a long history of hypertension. He was noted to have decreased strength in his left upper extremity. He developed anemia after his gunshot wound. He was also evaluated in the ICU in 2/2006 for atypical chest pain.

He also has a history of being treated for glaucoma.

He has a history of basal cell carcinomas of the face and required rhinoplasty grafting.

He reports he receives Prilosec for GERD and Simvastatin for his lipids. He reports he has received Flomax in the past for his prostate. He reports he receives Lasix. He also reports "bad osteoarthritis" and is prescribed Meloxicam.

Psychiatric History:

Mr. Herring had a prior history of outpatient psychiatric treatment. He received inpatient treatment at Baptist Hospital in Columbia, SC in 1996 and 2006 and Just Care in 2006.

Records from Dr. Steude indicate he was diagnosed with Bipolar Affective Disorder and had been in treatment with him since 1999, although Mr. Herring reports Dr. Steude treated him as an inpatient in 1996. He had been prescribed various medications including: Wellbutrin (antidepressant), Celexa (antidepressant), Depakote (mood stabilizer). His condition had been stable for a long period of time. A note from 2001 indicates that he was having problems with feeling irritated, not sleeping well and being confrontational, which are symptoms consistent with his diagnosis (4/18/01). A note from 2007 indicates he had difficulty concentrating (4/20/07). A note from 2007 reported that he was praying for a heart attack.

On 6/16/06 he was noted to talk loud and have disorganized thoughts.

After he was shot, he was transferred to the psychiatric ward at Baptist Hospital. He was placed in alcohol rehab as well. When he entered Alvin S Glenn, he was committed to Just Care by Dr. Elin Berg. The commitment papers indicated he was confused and required constant observation. He was prescribed Valproic Acid, and two antidepressants (citalopram and Bupropion) while confined.

He reports his present medications include: Venflaxine 300mg daily, Lamotrigine 150mg in the morning and 200mg at night and Escitalopram 40mg in the morning. He reported a depressed mood at the time of his evaluation. A note from 4/28/06 cited he had a profound difficulty taking on new cases. A note from 5/23/06 noted that Mr. Herring was processing Dr. Steude's request for psychological testing for his IQ and memory functions.

A letter to EMSI in May 2007, noted that Mr. Herring had been abstinent from alcohol over a year and still had cognitive difficulties.

Mr. Herring had a psychological consultation from his insurance company in 2006. The issue was mild cognitive impairment. The psychologist noted that Dr. Steude had interviewed Mr. Herring's son and wife, who also noticed cognitive slowing, despite his abstaining from alcohol. Dr. Steude noted he was not taking on new work but instead checking on old clients. In a letter to his insurance company, he reported he had difficulty concentrating and focusing. He also noted problems with math, spelling and having to reread information.

Family History:

Mr. Herring's mother allegedly was diagnosed and treated for Bipolar Affective Disorder. He reports she also had Rheumatoid Arthritis. His mother allegedly committed suicide at age 60. His father abused alcohol.

Substance Use History:

Mr. Herring has a long history of alcohol abuse. Notes from Dr. Stuede indicate he had a long pattern of drinking and minimizing his alcoholism. While under bond, Dr. Steude recommended he receive inpatient treatment in Columbus North Carolina. He completed inpatient treatment from 2/23/06-4/13/06.

Mental Status Examination:

Mr. Herring was talkative and often had to be redirected. He was easily distractible. He was circumstantial when providing history. His mood was euthymic. His affect was constricted. He was not psychotic. He was not suicidal or homicidal.

On cognitive screening, he exhibited some perseveration on a test of verbal fluency. He was able to register three items but could only recall one with prompting after five minutes. He was able to reproduce a visual design.

Neurological Screening Examination:

He was able to perform rapid motor movements without perseveration. He did not have any frontal release signs. His Rhomberg was negative. His tandem gait was normal.

Results of Testing:

He was evaluated by Bill Haxton, Ph.D in 2006. He was found to have perseveration on frontal lobe tasks. He was also found to have deficits in processing speed.

He was examined by Dr. Tora Brawley in March 2016. He was found to have a decline in his functioning. He had deficits in verbal learning, verbal memory, verbal fluency, abstract reasoning and motor functioning.

Diagnoses:

Major Neurocognitive Impairment Due to Multiple Etiologies, with behavioral disturbances
Alcohol Use Disorder, In a Controlled Environment

Obstructive Sleep Apnea

Hypertension

Basal cell carcinomas of the face with elephant trunk repair

Hyperlipidemia
Benign Prostatic Hypertrophy

Opinions:

1. Mr. Herring was suffering from a neurocognitive disorder at the time of his offense.
2. Mr. Herring was suffering from Bipolar Disorder at the time of his offense.
3. Mr. Herring was suffering from alcohol intoxication at the time of his offense.
4. Mr. Herring was administered an intramuscular benzodiazepine before he provided a statement to the police.
5. Administration of the benzodiazepine exacerbated his underlying neurocognitive disorder and affected his ability to provide a statement to law enforcement. The effect of administering a benzodiazepine to an individual with underlying cognitive impairment causes disinhibition.
6. While Mr. Herring's bipolar disorder was introduced during his legal proceedings, there is no evidence that his cognitive impairment/ dementia was presented during his proceedings. He had significant frontal lobe dysfunction tested by Dr. Bill Haxton.
7. Such evidence would have been helpful in mitigation as his capacity to conform his conduct to the requirements of the law was diminished. His behavior was impulsive and reckless.

Donna Schwartz Maddox, MD

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 IN THE MATTER OF:)
)
DEWAIN HERRING)
 (Alleged Mentally Ill Individual))

IN THE PROBATE COURT
 Case No: 2006-MI-40-158

06 FEB -1 PM 4:22
 AMY W. JESCHKE
 PROBATE JUDGE
 RICHLAND COUNTY, S.C.

FILED

ORDER

This court has received the Application for Involuntary Emergency Hospitalization for Mental Illness for the above named individual signed by Betty J. Burroughs, of the Alvin S. Glenn Detention Center, dated January 31, 2006.

This court has also received the Order of Bond dated February 1, 2006, signed by Circuit Court Judge James W. Johnson, Jr. This Order requires that upon posting of bond, the above named individual shall be released to a residential facility for treatment and shall be under the care of Dr. Philip Steude, until such time as Dr. Steude believes that Mr. Herring has achieved maximum benefit of treatment.

This court has received confirmation from the Richland County Clerk of Court that bond has been posted. Dr. Steude and Palmetto Baptist Hospital have confirmed that an inpatient bed is available immediately. The Richland County Sheriff's Department is awaiting the dismissal of Mr. Herring from this Emergency Application status in order to transport him to the Palmetto Baptist Hospital.

Therefore it is ordered that the Application for Involuntary Emergency Hospitalization for Mental Illness is dismissed. Mr. Herring is ordered released to the Richland County Sheriff's Department to be transferred to Palmetto Baptist Hospital pursuant to his Order of Bond.

AND IT IS SO ORDERED.

Jacqueline D. Belton
 Jacqueline D. Belton
 Associate Judge of Probate

February 1, 2006
 Columbia, South Carolina



Richard A. Harpootlian, P.A.

ATTORNEYS AT LAW
P.O. BOX 1090

1410 LAUREL STREET

COLUMBIA, SOUTH CAROLINA 29202

RICHARD A. HARPOOTLIAN
rah@harpootlianlaw.com

TELEPHONE (803) 252-4848
FACSIMILE (803) 252-4810

May 4, 2007

VIA FACSIMILE & FIRST CLASS MAIL

Deputy Solicitor John Meadors
Richland County Solicitor's Office
1701 Main Street
Columbia, South Carolina 29201

in re: State v. Dewain Herring

Dear Deputy Solicitor Meadors:

Last week you informed me that you and Solicitor Giese were sending a video from Chastity's to NASA to enhance the images.

If you would be so kind as to let me know the result of those efforts and if any exculpatory evidence was gleamed from the enhancement, I would be most appreciative.

With warm personal regards, I am

Sincerely,

Richard A. Harpootlian
Richard A. Harpootlian

RAH:hal



Psychiatric Evaluation
Dewain Herring
DOB:
Date of Evaluation: 9/12/15
Place of Evaluation: Kirkland Correctional Institution
Date of Report: 8/20/16

Identifying Information: Dewain Herring is a 72 year old married male and former attorney referred for psychiatric evaluation by his attorney Tricia Blanchette. Mr. Herring was convicted of Murder and sentenced to 30 years in Richland County. This evaluation was conducted as part of his Post Conviction Relief.

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Sources of Information:

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Interview Notes Virginia Herring, Chandler Herring by Tora Brawley, Ph.D. 6/3/16
Psychiatric records Dr. Stuede 1995-2007
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Hearing Healthcare Records of SC
Baptist Hospital records 2006
Neuropsychological Evaluation report Bill Haxton, Ph.D. 6/17/06
Alvin S. Glenn Detention Center records
Trial transcript May 2007
SCDC records
Attempted telephone conference Shep Jordan 8/20/16



Pertinent Statements:

Educational History:

Mr. Herring graduated from University of South Carolina in 1966 with a degree in Business Administration. He completed law school in 1969. He worked as an attorney for what is now Bank of America for ten years and then opened a solo practice for a year. He worked as a partner in a very successful practice including estate planning until 1995 when he again entered a solo practice. Records indicate he had a decline in his practice prior to his criminal charges.

Medical History:

He has a history of sleep apnea and his family reports he was on CPAP (Continuous Positive Airway Pressure). He reports his machine is old, and he does not use CPAP presently.

Mr. Herring was evaluated by an SCDC physician soon after his sentence. A CT scan of his head was ordered and showed

He was admitted to Baptist Hospital in 2006 with a Deep Venous Thrombosis (DVT). He also had a gunshot wound to his arm. He had a long history of hypertension. He was noted to have decreased strength in his left upper extremity. He developed anemia after his gunshot wound. He was also evaluated in the ICU in 2/2006 for atypical chest pain.

He also has a history of being treated for glaucoma.

He has a history of basal cell carcinomas of the face and required rhinoplasty grafting.

He reports he receives Prilosec for GERD and Simvastatin for his lipids. He reports he has received Flomax in the past for his prostate. He reports he receives Lasix. He also reports "bad osteoarthritis" and is prescribed Meloxicam.

Psychiatric History:

Mr. Herring had a prior history of outpatient psychiatric treatment. He received inpatient treatment at Baptist Hospital in Columbia, SC in 1996 and 2006 and Just Care in 2006.

Records from Dr. Steude indicate he was diagnosed with Bipolar Affective Disorder and had been in treatment with him since 1999, although Mr. Herring reports Dr. Steude treated him as an inpatient in 1996. He had been prescribed various medications including: Wellbutrin (antidepressant), Celexa (antidepressant), Depakote (mood stabilizer) . His condition had been stable for a long period of time. A note from 2001 indicates that he was having problems with feeling irritated, not sleeping well and being confrontational, which are symptoms consistent with his diagnosis (4/18/01). A note from 2007 indicates he had difficulty concentrating (4/20/07). A note from 2007 reported that he was praying for a heart attack.

On 6/16/06 he was noted to talk loud and have disorganized thoughts.

After he was shot, he was transferred to the psychiatric ward at Baptist Hospital. He was placed in alcohol rehab as well. When he entered Alvin S Glenn, he was committed to Just Care by Dr. Elin Berg. The commitment papers indicated he was confused and required constant observation. He was prescribed Valproic Acid, and two antidepressants (citalopram and Bupropion) while confined.

He reports his present medications include: Venflaxine 300mg daily, Lamotrigine 150mg in the morning and 200mg at night and Escitalopram 40mg in the morning. He reported a depressed mood at the time of his evaluation. A note from 4/28/06 cited he had a profound difficulty taking on new cases. A note from 5/23/06 noted that Mr. Herring was processing Dr. Steude's request for psychological testing for his IQ and memory functions.

A letter to EMSI in May 2007, noted that Mr. Herring had been abstinent from alcohol over a year and still had cognitive difficulties.

Mr. Herring had a psychological consultation from his insurance company in 2006. The issue was mild cognitive impairment. The psychologist noted that Dr. Steude had interviewed Mr. Herring's son and wife, who also noticed cognitive slowing, despite his abstaining from alcohol. Dr. Steude noted he was not taking on new work but instead checking on old clients. In a letter to his insurance company, he reported he had difficulty concentrating and focusing. He also noted problems with math, spelling and having to reread information.

Family History:

Mr. Herring's mother allegedly was diagnosed and treated for Bipolar Affective Disorder. He reports she also had Rheumatoid Arthritis. His mother allegedly committed suicide at age 60. His father abused alcohol.

Substance Use History:

Mr. Herring has a long history of alcohol abuse. Notes from Dr. Steude indicate he had a long pattern of drinking and minimizing his alcoholism. While under bond, Dr. Steude recommended he receive inpatient treatment in Columbus North Carolina. He completed inpatient treatment from 2/23/06-4/13/06.

Mental Status Examination:

Mr. Herring was talkative and often had to be redirected. He was easily distractible. He was circumstantial when providing history. His mood was euthymic. His affect was constricted. He was not psychotic. He was not suicidal or homicidal.

On cognitive screening, he exhibited some perseveration on a test of verbal fluency. He was able to register three items but could only recall one with prompting after five minutes. He was able to reproduce a visual design.

Neurological Screening Examination:

He was able to perform rapid motor movements without perseveration. He did not have any frontal release signs. His Romberg was negative. His tandem gait was normal.

Results of Testing:

He was evaluated by Bill Haxton, Ph.D in 2006. He was found to have perseveration on frontal lobe tasks. He was also found to have deficits in processing speed.

He was examined by Dr. Tora Brawley in March 2016. He was found to have a decline in his functioning. He had deficits in verbal learning, verbal memory, verbal fluency, abstract reasoning and motor functioning.

Diagnoses:

Major Neurocognitive Impairment Due to Multiple Etiologies, with behavioral disturbances
Alcohol Use Disorder, In a Controlled Environment

Obstructive Sleep Apnea

Hypertension

Basal cell carcinomas of the face with elephant trunk repair

Hyperlipidemia
Benign Prostatic Hypertrophy

Opinions:

1. Mr. Herring was suffering from a neurocognitive disorder at the time of his offense.
2. Mr. Herring was suffering from Bipolar Disorder at the time of his offense.
3. Mr. Herring was suffering from alcohol intoxication at the time of his offense.
4. Mr. Herring was administered an intramuscular benzodiazepine before he provided a statement to the police.
5. Administration of the benzodiazepine exacerbated his underlying neurocognitive disorder and affected his ability to provide a statement to law enforcement. The effect of administering a benzodiazepine to an individual with underlying cognitive impairment causes disinhibition.
6. While Mr. Herring's bipolar disorder was introduced during his legal proceedings, there is no evidence that his cognitive impairment/ dementia was presented during his proceedings. He had significant frontal lobe dysfunction tested by Dr. Bill Haxton.
7. Such evidence would have been helpful in mitigation as his capacity to conform his conduct to the requirements of the law was diminished. His behavior was impulsive and reckless.

Donna Schwartz Maddox, MD

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 IN THE MATTER OF:)
)
DEWAIN HERRING)
 (Alleged Mentally Ill Individual))

IN THE PROBATE COURT
 Case No: 2006-MI-40-158

ORDER

06 FEB -1 PM 4:22
 JACQUELINE D. BELTON
 PROBATE JUDGE
 RICHLAND COUNTY, S.C.

FILED

This court has received the Application for Involuntary Emergency Hospitalization for Mental Illness for the above named individual signed by Betty J. Burroughs, of the Alvin S. Glenn Detention Center, dated January 31, 2006.

This court has also received the Order of Bond dated February 1, 2006, signed by Circuit Court Judge James W. Johnson, Jr. This Order requires that upon posting of bond, the above named individual shall be released to a residential facility for treatment and shall be under the care of Dr. Philip Steude, until such time as Dr. Steude believes that Mr. Herring has achieved maximum benefit of treatment.

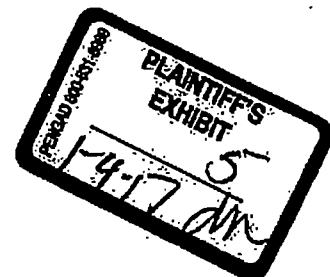
This court has received confirmation from the Richland County Clerk of Court that bond has been posted. Dr. Steude and Palmetto Baptist Hospital have confirmed that an inpatient bed is available immediately. The Richland County Sheriff's Department is awaiting the dismissal of Mr. Herring from this Emergency Application status in order to transport him to the Palmetto Baptist Hospital.

Therefore it is ordered that the Application for Involuntary Emergency Hospitalization for Mental Illness is dismissed. Mr. Herring is ordered released to the Richland County Sheriff's Department to be transferred to Palmetto Baptist Hospital pursuant to his Order of Bond.

AND IT IS SO ORDERED.

Jacqueline D. Belton
 Jacqueline D. Belton
 Associate Judge of Probate

February 1, 2006
 Columbia, South Carolina



Richard A. Harpootlian, P.A.

ATTORNEYS AT LAW

P.O. BOX 1090

1410 LAUREL STREET

COLUMBIA, SOUTH CAROLINA 29202

RICHARD A. HARPOOTLIAN
rah@harpootlianlaw.com

TELEPHONE (803) 252-4848
FACSIMILE (803) 252-4810

May 4, 2007

VIA FACSIMILE & FIRST CLASS MAIL

Deputy Solicitor John Meadors
Richland County Solicitor's Office
1701 Main Street
Columbia, South Carolina 29201

In re: **State v. Dewain Herring**

Dear Deputy Solicitor Meadors:

Last week you informed me that you and Solicitor Giese were sending a video from Chastity's to NASA to enhance the images.

If you would be so kind as to let me know the result of those efforts and if any exculpatory evidence was gleamed from the enhancement, I would be most appreciative.

With warm personal regards, I am

Sincerely,

Richard A. Harpootlian
Richard A. Harpootlian

RAH:hal



CURRICULUM VITAE
RALPH ROBERT TRESSEL

DATE OF BIRTH:

NATIONALITY: U.S. CITIZEN

MARITAL STATUS: MARRIED

WIFE: CYNTHIA L. GEYER

TWO CHILDREN – AGES 20 AND 18
TWO STEP CHILDREN – AGES 24 AND 21

HOME ADDRESS:
HIRAM, GEORGIA 30141

PROFESSION: CHIEF CRIMINAL INVESTIGATOR
COBB COUNTY DISTRICT ATTORNEY'S OFFICE
70 HAYNES STREET
3RD FLOOR
MARIETTA, GA. 30090

FORENSIC INVESTIGATOR/CONSULTANT FORENSIC EVIDENCE AND INVESTIGATION

TITLE: OWNER – *FORENSIC INVESTIGATIVE SERVICES*

EDUCATION:

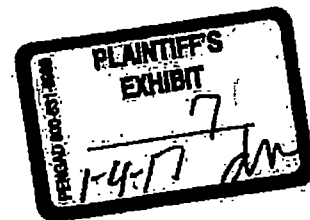
GRADUATED: SPRAYBERRY HIGH SCHOOL 1971

KENNESAW JR. COLLEGE – 1971-1972

SPECIALIZED TRAINING:

BASIC RECRUIT TRAINING
COBB REGIONAL POLICE ACADEMY
1973 80 HOURS

BASIC MANDATE TRAINING
GEORGIA POLICE ACADEMY
1973 120 HOURS



**ROBBERY & BURGLARY SEMINAR
COBB REGIONAL POLICE ACADEMY
1974 16 HOURS**

**RAPE INVESTIGATION COURSE
COBB REGIONAL POLICE ACADEMY
1975 16 HOURS
GOVERNOR'S CRIME AWARENESS PROGRAM
COBB REGIONAL POLICE ACADEMY
1976 16 HOURS**

**SEX CRIMES WORKSHOP
GEORGIA STATE UNIVERSITY
1977 40 HOURS**

**ARSON & BOMB WORKSHOP
COBB REGIONAL POLICE ACADEMY
1978 40 HOURS**

**BASIC HOSTAGE NEGOTIATIONS
F.B.I. - ATLANTA, GEORGIA
IN ASSOCIATION WITH F.B.I., QUANTICO, VIRGINIA
1977 40 HOURS**

**ADVANCED CRIMINOLOGY
GEORGIA POLICE ACADEMY
IN ASSOCIATION WITH F.B.I., QUANTICO, VIRGINIA
1978 50 HOURS**

**HOMICIDE INVESTIGATION
UNIVERSITY OF GEORGIA
1979 40 HOURS**

**TERRORISM SEMINAR
UNIVERSITY OF GEORGIA
1979 40 HOURS**

**POLICE SUPERVISION
UNIVERSITY OF GEORGIA
1979 40 HOURS**

**INTERVIEWS AND INTERROGATIONS
GEORGIA POLICE ACADEMY
1979 40 HOURS**

**POLICE DISCIPLINE
COBB COUNTY POLICE DEPARTMENT
1980 4 HOURS**

**FIREARMS INVESTIGATION TECHNIQUES
DEPARTMENT OF THE TREASURY
1981 40 HOURS
STRESS MANAGEMENT
COBB COUNTY POLICE DEPARTMENT
1981 4 HOURS**

**BLOOD STAINS/SPATTER WORKSHOP
FLORIDA INSTITUTE OF LAW ENFORCEMENT
ST. PETERSBURG, FLORIDA
1981 40 HOURS**

**SEX CRIMES
GEORGIA POLICE ACADEMY
1981 40 HOURS**

**INTERVIEWS AND INTERROGATIONS
LEVEL II
GEORGIA POLICE ACADEMY
1981 40 HOURS**

**HOSTAGE NEGOTIATIONS
COBB REGIONAL POLICE ACADEMY
1982 40 HOURS**

**SEARCH AND SEIZURE
COBB REGIONAL POLICE ACADEMY
1982 16 HOURS**

**COMPUTER APPLICATIONS IN LAW ENFORCEMENT
GEORGIA POLICE ACADEMY
1984 40 HOURS**

**SEARCH WARRANTS & AFFIDAVITS
GEORGIA POLICE ACADEMY
1984 16 HOURS**

**LAW ENFORCEMENT SUPERVISION
GEORGIA POLICE ACADEMY
1984 120 HOURS**

**MEDICO-LEGAL DEATH INVESTIGATION
ST. LOUIS UNIVERSITY SCHOOL OF MEDICINE
ST. LOUIS, MISSOURI
1985 40 HOURS**

**ARSON INVESTIGATION SEMINAR
ATLANTA, GEORGIA
1986 16 HOURS**

**HOMICIDE INVESTIGATION
NATIONAL LAW ENFORCEMENT INSTITUTE
ATLANTA, GEORGIA
1986 16 HOURS**

**POLICE MEDICO-LEGAL INVESTIGATION OF DEATH
UNIVERSITY OF MIAMI SCHOOL OF MEDICINE
MIAMI, FLORIDA
1986 40 HOURS**

**BLOODSTAIN EVIDENCE SEMINAR
NATIONAL LAW ENFORCEMENT INSTITUTE
SANTA ROSA, CALIFORNIA
1988 40 HOURS**

**SATANIC & CULT INFLUENCES IN HOMICIDE
VALENCIA COMMUNITY COLLEGE
1989 28 HOURS**

**SECOND NATIONAL CONFERENCE ON CHILD FATALITIES AND
PHYSICAL ABUSE
NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE
AMERICAN PROSECUTOR'S RESEARCH INSTITUTE
SAN DIEGO, CALIFORNIA
1991 32 HOURS**

**FORENSIC SYMPOSIUM 2011
FORENSIC EXAMINATION & CRIME SCENE PROCESSING
NORTH GEORGIA COLLEGE & STATE UNIVERSITY
DAHLONEGA, GEORGIA
MARCH 2011, 16 HOURS**

**CRIME SCENE RECONSTRUCTION
PATTERN INJURY INTERPRETATION
DR. JOSEPH L. BURTON
MARIETTA, GEORGIA
1985 - 2010**

**EXECUTIVE TRAINING
GEORGIA CHIEFS OF POLICE
DULUTH, GEORGIA
OCTOBER 2011 60 HOURS**

**GEORGIA CHIEFS OF POLICE CONFERENCE
ATLANTA, GEORGIA
JANUARY 2012 14 HOURS**

**GEORGIA CHIEFS OF POLICE CONFERENCE
SAVANNAH, GEORGIA 14 HOURS
JULY 2012**

**GEORGIA CHIEFS OF POLICE CONFERENCE
ATHENS, GEORGIA
JANUARY 2013 14 HOURS**

**GEORGIA CHIEFS OF POLICE CONFERENCE
SAVANNAH, GA
JULY 2013 14 HOURS**

**GEORGIA CHIEFS OF POLICE CONFERENCE
ATLANTA, GEORGIA
JANUARY 2014 14 HOURS**

**GEORGIA CHIEFS OF POLICE CONFERENCE
SAVANNAH, GEORGIA
JULY 2014 14 HOURS**

**GEORGIA CHIEFS OF POLICE CONFERENCE
ATLANTA, GEORGIA
JULY 2015 14 HOURS**

**GEORGIA CHIEFS OF POLICE CONFERENCE
ATLANTA, GEORGIA
JANUARY 2016 14 HOURS**

**GEORGIA CHIEFS OF POLICE CONFERENCE
SAVANNAH, GEORGIA
JULY 2016 14 HOURS**

**BIOMECHANICS AND OCCUPANT KINEMATICS
DR. JOSEPH L. BURTON
MARIETTA, GEORGIA**

**1990 – 2010
PREVIOUS EMPLOYMENT:**

**SENIOR FORENSIC INVESTIGATOR
BURTON & ASSOCIATES
ALPHARETTA, GEORGIA
1999 – 2010**

**OPERATIONS MANAGER
COBB COUNTY MEDICAL EXAMINER'S OFFICE
MARIETTA, GEORGIA
1985 – 1998 (RETIRED)**

**SERGEANT, CRIMES AGAINST PERSONS UNIT
COBB COUNTY POLICE DEPARTMENT
MARIETTA, GEORGIA
1978 – 1985**

**DETECTIVE, CRIMES AGAINST PERSONS UNIT
COBB COUNTY POLICE DEPARTMENT
MARIETTA, GEORGIA
1975 – 1978**

**POLICE OFFICER – PATROL DIVISION
COBB COUNTY POLICE DEPARTMENT
MARIETTA, GEORGIA
1973 – 1975**

ADDITIONAL INFORMATION:

MEMBER:

**FRATERNAL ORDER OF POLICE (inactive)
POLICE OFFICER'S ASSOCIATION OF GEORGIA (inactive)
GEORGIA CHIEFS OF POLICE ASSOCIATION
INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE
ATLANTA METROPOL**

INSTRUCTOR:

**DEATH INVESTIGATION
NORTH CENTRAL GEORGIA LAW ENFORCEMENT ACADEMY
1983 – 1998**

**HOMICIDE INVESTIGATION
NORTH CENTRAL GEORGIA LAW ENFORCEMENT ACADEMY**

1983 – 1998

**CRIME SCENE PROCESSING
NORTH CENTRAL GEORGIA LAW ENFORCEMENT ACADEMY
1990 – 1998**

**INMATE AND JAIL DEATHS
NORTH CENTRAL GEORGIA LAW ENFORCEMENT ACADEMY
1990 – 1998**

**DRUG DEATHS
COBB COUNTY DISTRICT ATTORNEY'S DRUG AWARENESS PROGRAM
1985 – 1998**

**ADVANCED CRIME SCENE PROCESSING
NORTH CENTRAL GEORGIA LAW ENFORCEMENT ACADEMY
1993 – 1998**

**ADVANCED CRIME SCENE PROCESSING
NORTH WEST GEORGIA LAW ENFORCEMENT ACADEMY
1995 – 1996**

CONSULTANT

- **ABUSED AND BATTERED CHILDREN**
- **BLOOD SPATTER INTERPRETATIONS**
- **CRIME SCENE RECONSTRUCTION**
- **HOMICIDE INVESTIGATIONS**
- **TRAFFIC ACCIDENT RECONSTRUCTION**
- **INJURY PATTERN INTERPRETATIONS**
- **CRIME SCENE EVIDENCE COLLECTION**
- **EVIDENCE COLLECTION/RETENTION**

APPOINTMENTS:

**JANUARY 1990
ELECTED BOARD OF DIRECTORS
NATIONAL SUDDEN INFANT DEATH SYNDROME
GEORGIA CHAPTER**

**MAY 1990
APPOINTED
COBB COUNTY CHILD ABUSE PROTOCOL COMMITTEE PURSUANT TO
GEORGIA H.B. 1318**

JULY 1990

RECIPIENT

**INSTRUCTOR'S CERTIFICATE TO TEACH DEATH INVESTIGATION TO
LAW ENFORCEMENT OFFICERS OF THE STATE OF GEORGIA (RENEWED
1995)**

JANUARY 1991

ELECTED

**BOARD OF DIRECTOR'S OF SUDDEN INFANT DEATH RESEARCH
FOUNDATION
ASSISTED WITH INCORPORATION OF SAME**

Forensic Investigative Services

R. Robert Tressel

Hiram, Georgia 30141

Tricia Blanchette, Attorney
PO Box 12725
Columbia, SC 29211

Re: Dewain Herring

Ms. Blanchette,

I have been asked to review the provided case file materials on the above captioned case to provide my professional opinion(s) in regards to my analysis of the forensic evidence, crime scene investigation and to determine if a crime scene reconstruction is possible from the documentation available from the crime scene.

Credentials and the Field of Crime Scene Investigation

My curriculum vitae is attached to this report and details my training and employment history. Briefly, however, I began my training in 1973 when I went through basic police training at the Cobb County, Georgia, Regional Police Academy, followed by basic training conducted by the Georgia Police Academy. I worked in different capacities for the Cobb County Police Department for twelve years, including detective and sergeant in the Crimes Against the Person Division. I spent the subsequent thirteen years as Operations Manager for the Cobb County Medical Examiner's Office. From 1985 to the present, I have worked in a private capacity as a forensic investigator and consultant in the field of forensic evidence and investigation. Since April, 2011, I have been the chief criminal investigator for the Cobb County (Georgia) District Attorney's Office.

My specialized training is in the fields of criminal investigatory practices and crime and accident scene reconstruction. I first spent some twenty years doing this in various capacities exclusively on behalf of various law enforcement agencies. While I continue to work as a consultant to law enforcement agencies, I have also worked for almost thirty years as a consultant for insurance agencies to help reconstruct accidents of various kinds, and for prosecuting authorities and criminal defendants, helping to analyze and reconstruct crime scenes.

I have more than forty years of training and experience working for the police and other law enforcement agencies, and for private clients, collecting and examining evidence, directing investigators in the proper methods of collecting evidence (including interviewing witnesses) to obtain a full picture of what transpired during a crime or accident, and reconstructing crime and accident scenes from evidence such events



typically generate. This includes witness accounts, ballistics, blood spatter, vehicle placement, crime scene photographs, police and autopsy reports, and numerous other factors. Once an accident or a crime has occurred, it is often necessary to examine and reconcile multiple sources of information to determine how the events unfolded. The available evidence may lead to a single narrative of events or may narrow the field of possibilities without leading to a conclusive picture of what happened. By the same token, without careful examination, the available or known evidence may seem to lead to a particular narrative but, while plausible, is one of only many possibilities as to what happened.

My goal in reviewing all available sources of evidence is to determine from this evidence what plausibly may have occurred. In some cases, this may result in ruling out a suggested sequence of events; in other cases, my review and analysis may confirm a suggested sequence. In yet other cases, this review may demonstrate that several or many scenarios could explain the forensic evidence, not just the scenario offered by law enforcement.

Crime Scene Investigations

A thorough crime scene investigation is the heart and soul of any criminal investigation.

The physical evidence recovered and documented from any crime scene is the pivotal point of a criminal investigation. The direction the criminal investigation takes is based on what evidence has been recovered and documented, where this evidence is located and how does this evidence assist the Investigator in determining the sequence of events that led to the incident.

Investigation of the crime scene is the only opportunity the Investigator has to preserve, recover and have analyzed these physical clues. Other case information, such as that gathered from Interviews or Witness statements must be carefully evaluated as to their validity based upon the physical evidence obtained from the crime scene. Details of the crime scene initially thought to be irrelevant, may become crucial in understanding exactly how the incident occurred.

In Homicide cases, proper crime scene investigation is not just a process of documenting the physical evidence found, it is to provide a sound basis for the Investigator or Prosecutor to explain through a comprehensive evaluation of all aspects of the crime scene investigation why certain pieces of evidence were found in the locations they were in.

A violent crime scene presents special aspects that the Investigator must be aware of. It's not just where evidence is found, but what can this evidence tell us about how the incident occurred, where victims and/or witnesses were located when injuries occurred and what might be the sequence in which events occur. The crime scene is merely a piece of the "puzzle" that must be evaluated with other components of the incident to thoroughly understand how a crime was committed.

Other pieces of this "puzzle" include but are not limited to:

- Wounds or injuries received during the course of this event.
- Laboratory evaluation of the evidence recovered (Bullets, knives, blood stains etc.)
- Witness statements and/or interviews.

If the incident involves the death of an individual, the post mortem and autopsy of the deceased becomes a vital piece of the "puzzle". Location of wounds, directionality of these wounds, and determining entry and exits of wounds must be evaluated with all other components of the crime scene evaluation to assist the Investigator in determining the significance of each piece of evidence recovered.

Documentation of the crime scene is done through three (3) primary steps.

- Written or verbal description of the crime scene, including location of items of evidence.
- Photographs or videotape of the crime scene to depict exactly what was observed at the crime scene.
- Diagram of the scene with measurements showing the location of evidence. (This is done so that if the crime scene needs to be reconstructed, an accurate depiction of where and what was recovered can be done)

Failure to document the crime scene properly and precisely can hinder any prosecution and sometimes invalidate conclusions reached from the overall assessment of the crime scene.

As a consultant on crime scenes, I am often asked to evaluate the opinions and/or conclusions reached by Investigators and Prosecutors. In evaluating these opinions and/or conclusions I must rely on the documentation they relied on to reach their conclusions or opinions. If certain pieces of this "puzzle" are missing or documentation is not thorough then validation of these conclusions or opinions cannot be confirmed. Additional scene information becomes necessary to complete this evaluation process and if that information was not gathered at the time of the scene investigation, then only possible scenarios can be postulated.

The validity of possible scenarios cannot be performed without the proper processing and documentation of any crime scene. Attempting to reconstruct or evaluate a crime scene without proper documentation and without evaluating all available pieces of the "puzzle" and how they portray the sequence of events leads to misleading and inaccurate conclusions and/or opinions that can be detrimental to any prosecution or defense of a criminal offense.

MATERIAL REVIEWED

- Richland County Sheriff's Department incident report -- Shooting at 3722 River Dr., Columbia SC on 01/29/06 resulting in the death of John Henry Johnson, B/M 32 years old.
- Coroner's File on John Henry Johnson
- Richland County Sheriff's Department Use of Force Report for the incident at _____, Columbia SC.
- SLED investigative report on Use of Force at _____, Columbia SC.
- SLED crime scene photos, _____, Columbia SC.
- Trial Transcript May 2007

Additionally, I traveled to Columbia SC on 5/20/16 to view the trial exhibits. I also received the still photos taken from the surveillance video from Chastity's Gold Club from the night of 01/29/06.

INCIDENT

Herring was charged with the January 29, 2006 shooting of an employee of Chastity's Gold Nightclub. 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 Johnson and a bouncer named Donnie Hawkins escorted Herring to the front door at 11:57 p.m. John Johnson 42 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 Johnson had just gone

inside when they saw Herring's vehicle coming back down River Drive toward Chastity's. According to Hawkins, John Johnson was right inside the door. Hawkins saw a flash of light come from the side of the vehicle, and heard John Johnson say, "Oh shit!" John Johnson 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. (From SC Supreme Court).

OPINIONS

- Crime Scene documentation from Chastity's Gold Club (Photos and written documentation) are insufficient to allow a trajectory analysis

When attempting to determine where a weapon was fired from, an entry site must be identified (either on the victim or through and intermediate object). Final location of the bullet will assist in determining trajectory, however with an intermediate target (the door) where the bullet completely passes through a trajectory can be determined.

Documenting the trajectory can be done through several means; dowel rods or probing tools, laser sights designed for trajectory analysis or by documenting the locations of the entry and exit defects with measurements as to the height from the bottom of the door and how far inboard of the door edge.

In this investigation, Crime Scene Technician Ray Livingston testified that he did no trajectory analysis other than relying on the photographs and the video surveillance.

In contrast, SLED performed extensive trajectory analysis on the use of force incident at Columbia SC. Sled's investigation and trajectory analysis provides locations from where shots inside the house were fired from.

From the crime scene photographs from Chastity's we can only determine that the bullet that passed through the door was traveling left to right and upward. Without the proper measurements, the precise location the shot was fired from cannot be determined.

Trial Exhibits #8 and #9 indicate that the trajectory of the projectile was from the front to the back, from the left to the right and upward. Exact angles cannot be determined from the existing documentation. Trial exhibit #11 shows the defect in the door to be essentially round indicating an intact projectile passing through the door. Trial exhibits #12 and # 16 shows that the exit in the rear of the door began to splinter the wood indicative of a projectile beginning to deform and loose its spiraling.

The autopsy report of John Johnson indicates he had an entry gunshot wound to the left ear that appeared small caliber with no exit wound. X-rays taken at the time of the autopsy revealed 5 bullet fragments contained in the cranial vault. The fragments are indicative of separation of the projectiles lead from the cooper jacket after entering the cranial vault.

This lack of proper crime scene documentation for bullet trajectory is not consistent with a best practices approach and is not consistent with the state of art techniques commonly utilized for trajectory analysis.

Additionally, the surveillance video and stills recovered from the video do not reveal the precise location of Dewain Herring's vehicle at the time the shot was fired.

- At the time the shot was fired through the door the entry door was closed. From the direction of travel of Dewain Herring, he would not be able to determine if anyone was standing behind the door.

The stills from the surveillance video appear to show that the door is closed. The door opens from the right side swinging to the left in the video. Dewain Herring is traveling from the left side of the camera view to the right. As the victim and the other individuals entered back into the club, anyone to the left of the door in the driveway area would have their view blocked of who was entering the club.

Stills from the video show reflecting light from the front entry on the side of the black SUV and from the other vehicles in the parking lot. The reflections appear squared in the stills. There is an image that appears in what appears to be the open window as the vehicle passes by. This image appears in several frames that travels with the vehicle motion. The first appearance of this image occurs prior to the vehicle being in a position for a shot to be fired from creating the left to right trajectory of the projectile. This image does not change appearance as the frames progress and appears to be squared as the other light reflections captured by the camera.

- This surveillance CD was taken by Investigator Charles Earles to NASA in Florida for enhancement. NSA computer science engineer Brad Lawrence worked with the CD and was unable to make any additional enhancements to the video. At that time Investigator Earles learned that NASA may have been able to work more with the enhancement had they had the actual hard drive from the surveillance system.

From the available evidence the image several witnesses discussed as a possible muzzle flash is not a muzzle flash but a light reflection.

- At trial the defense called ballistic expert Lawton Yates who opined that the trajectory of the projectile could have been a ricochet off of a pillar or metal pole.

A semi-jacketed hollow point projectile, like the one recovered from John Johnson, begins to peel or separate the lead core from the cooper jacket. If the pieces of the projectile recovered from John Johnson had struck some surface hard enough to alter its trajectory it should have also resulted in the beginning of separation of the lead from the cooper jacket. In beginning its separation, the secondary impact to the door would have caused at least some of the jacket to come off and imbed in the wood door.

The autopsy report does not indicate any major deformity of the projectile prior to striking John Johnson in the left ear, separating the lead and cooper jacket after entering the cranial vault.

It is my opinion that the projectile struck and entered the door without any prior contact with a solid surface, penetrated through the door intact and separated upon entry through John Johnsons skull into the cranial vault.

These opinions are given within a reasonable degree of certainty. I reserve the right to amend these opinions should additional materials become available.



R. Robert Tressel
Forensic Investigator

Dutch Fork Psychological Services LLC

NEUROPSYCHOLOGICAL EVALUATION



NAME: H. Dewain Herring
DATE OF BIRTH:
AGE: 62 years, 6 months
GENDER: Male
EVALUATION DATE: June 17, 2006
EXAMINER: William E. Haxton, Ph.D.

CONFIDENTIAL INFORMATION
 Do not release without express
 permission of the client.

Referral Information and Brief History

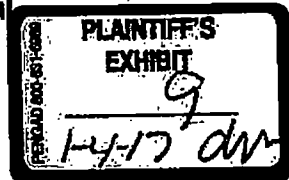
Dewain Herring is a 62-year-old male who was referred for neuropsychological evaluation by his psychiatrist, Phillip Steude, MD, who suspects possible decline in cognitive functioning. Specifically, Dr. Steude questions whether Mr. Herring is currently capable of functioning well enough to maintain his current career as an attorney who provides expert witness court testimony. As a result, psychological evaluation was undertaken to examine higher level cortical functioning.

The following historical background was provided by Mr. Herring.

Mr. Herring is married and has children. He graduated from the University of South Carolina in 1966 with a degree in Business Administration. He then entered law school, which he completed in 1969. During his senior year in law school he began working full-time for the State Bank & Trust Co. (now Bank of America). After working as an attorney for this company for ten years, he opened a solo law practice in 1978. The following year he went into partnership with two associates, specializing in estate planning, asset management, trusts, wills, power of attorney, and small business incorporation. He continued to work as a partner in this firm until 1995 when he once again developed a solo practice. At the time he left the group practice, the firm employed 27 attorneys. Since 1995 he has specialized in providing expert witness testimony. He noted that this practice requires intensive preparation for each case as well as good concentration and alertness while undergoing cross-examination on the stand.

In recent years Mr. Herring has noticed increasing difficulty with case preparation. He stated that it now takes him longer to digest information and to identify central issues while avoiding 'chasing rabbit trails.' While he used to be very well organized, he now has to rely on his office assistant to help him locate papers that he has misfiled or misplaced.

In 1998 Mr. Herring was diagnosed with Bipolar Disorder. He currently takes Depakote, Celexa, and Wellbutrin to control the symptoms of this disorder. Additionally, he



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reported that he abused alcohol for several years. He is now in recovery from alcohol dependence, having completed a residential substance abuse treatment program from 2/23 to 4/13/06.

Given the cognitive abilities required for performance in Mr. Herring's career and the areas of decline he is reporting, the current evaluation focused on general intelligence, verbal learning and recall ability, executive functioning, and processing speed.

Behavioral Observations:

Mr. Herring arrived promptly for evaluation. He was casually dressed and well groomed. He was congenial and exhibited a sense of humor throughout interview and during formal testing. Speech was relevant, rational, and coherent, and there was no evidence of a thought disorder. The purpose for the evaluation was explained to him, as well as the importance of putting forth good effort on abilities measures in order to achieve optimal performance. During the interview Mr. Herring demonstrated a facility at recalling dates for key events. He also was noted to respond very quickly on tasks of mental arithmetic. However, he often hesitated while searching for appropriate words or phrases and he appeared to have difficulty recalling some recent events. For example, although the arrangements for payment for the evaluation had been previously discussed, Mr. Herring asked questions about this as though discussing it for the first time. He appeared to put forth good effort on all tests administered. As evidence of this, it was noted that during testing he frequently corrected himself or embellished his answers, improving on his initial responses. Attention level was within normal limits, and it is believed that the obtained results represent valid estimates of his current functioning.

Results and Interpretations

Estimates of Prior Optimal Cognitive Functioning

Given Mr. Herring's level of education, the nature of his profession, and his history of successful legal practice, it is believed that he likely functions within the high average to superior range of intellectual ability. In order to determine whether he currently suffers from a decline in functioning, it is first necessary to estimate his prior optimal level of cognitive functioning. Two methods were employed for this purpose.

The Peabody Picture Vocabulary, Third Edition (PPVT-III) was administered as a measure of receptive vocabulary. The ability to recognize words and their meanings tends to be retained over time even when other abilities diminish. Because long-term storage of word knowledge is typically persistent over time, this measure is often used to estimate previous levels of intellectual functioning following central nervous system insult. This test required Mr. Herring to match pictures depicting objects and/or activities with orally presented words.

Mr. Herring demonstrated superior performance on this measure with a Standard Score Equivalent of 121 (92nd percentile). Based on this performance, it is likely that Mr. Herring's overall cognitive abilities have historically been in the superior range.

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Another predictor of intellectual functioning is the Barona regression equation, which takes into account the individual's age, gender, education, occupation, and other demographic variables. This equation predicts that Mr. Herring's Full Scale IQ should be approximately 119, commensurate with the results of the PPVT-III. An FSIQ of 120 will be used for comparisons with current functional levels.

Intellectual Functioning

The Wechsler Adult Intelligence Scale, Third Edition (WAIS-III) was administered as a measure of current cognitive ability as compared with other his age. Mr. Herring achieved average to high average performance with a Full Scale IQ (FSIQ) of 111 (77th percentile). The chances are 95 out of 100 that his true abilities fall within the 107 to 115 range. The FSIQ is composed of the Verbal IQ and Performance IQ. Mr. Herring demonstrated high average verbal processing abilities (VIQ = 114, 82nd percentile) and average nonverbal abilities (PIQ = 106, 66th percentile). The WAIS-III further breaks these abilities down into four indexes of cognitive ability: Verbal Comprehension Index (VCI), Perceptual Organization Index (POI), Working Memory Index (WMI), and Processing Speed Index (PSI). Of particular note is that Mr. Herring's Processing Speed Index falls in the low average range with a standard score of 88 (21st percentile). Additionally, while performing a task requiring him to repeat strings of digits (Digit Span), he exhibited perseveration in his responses by repeatedly ending with the same string of digits from a previous trial.

Scores for the WAIS-III were as follows:

<u>SCALE</u>	<u>Std Score</u>	<u>Percentile</u>	<u>Qualitative Description</u>
Verbal IQ	114	82	High Average
Performance IQ	106	66	Average
Full Scale IQ	111	77	High Average
<u>INDEX</u>			
VCI	110	75	High Average
POI	105	63	Average
WMI	94	34	Average
PSI	88	21	Low Average
<u>VERBAL SUBTESTS</u>			
Vocabulary	14		High Average
Similarities	10		Average
Arithmetic	17		Superior
Digit Span	10		Average
Information	12		Average
Comprehension	11		Average
<u>PERFORMANCE SUBTESTS</u>			
Picture Completion	12		Average
Digit-Symbol Coding	8		Low Average
Block Design	10		Average

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Matrix Reasoning	11	Average
Picture Arrangement	14	High Average

Mr. Herring demonstrated relative strengths on subtests measuring expressive vocabulary, ability to perform mental arithmetic, and ability to utilize visual details to arrange items in proper sequence.

In summary, Mr. Herring's overall intelligence is currently in the average to high average range, with particular strengths in verbal abilities and analytical, sequential processing. Holistic processing abilities are average. His working memory is average for his age and his processing speed is low average.

Executive Functioning

The Wisconsin Card Sorting Task was administered to assess Mr. Herring's abstract problem-solving ability. This measure required him to match cards according to particular characteristics that were not disclosed beforehand, thus requiring inductive reasoning ability. Mr. Herring had difficulty taking advantage of feedback regarding correct and incorrect matches; he was unable to complete any of six possible sets of categories, reflecting poor executive functioning. His performance was characterized by perseverative errors, that is, a tendency to repeat the same strategies which had already proven to be incorrect.

	<u>Standard Score</u>	<u>Percentile</u>	<u>Description</u>
Total Correct	69	2	Deficient
Perseverative Errors	72	3	Moderately Low
Categories Completed	—	< 1	Significantly Impaired

Executive functioning was further assessed with the Stroop Interference Test, a measure of cognitive control. Mr. Herring's T-score of 60 suggested mild deficiency in ability to control impulsive, over-learned responding in favor of novel responses.

For someone who functions in at least the average range in most areas and has an estimated previous IQ in the superior range, these results are surprisingly low. Mr. Herring currently experiences difficulty utilizing part-to-whole reasoning to solve abstract problems. In addition, he has difficulty altering his performance based on corrective feedback. He has mild difficulty maintaining a goal in mind and suppressing habitual responses in favor of less familiar ones. These problems would make it considerably more difficult for him to think on his feet and to discern the main points of complicated legal arguments.

Verbal Functioning

As noted above, Mr. Herring's overall verbal comprehension abilities remain high average. The Boston Naming Test was administered as a measure of ability to recall names of familiar objects depicted in pen-and-ink drawings. Mr. Herring's scaled score of 13 reflected high average ability (82nd percentile). Mr. Herring's ability to rapidly

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generate words within given phonemic and semantic categories was tested with the F-A-S Test of Verbal Fluency. He demonstrated average performance with scaled scores of 9 on each task (36th percentile).

In summary, Mr. Herring's verbal functioning remains adequate with good vocabulary and name recall abilities. His verbal fluency is average for his age.

Memory

Verbal memory was assessed with the Rey Auditory Verbal Learning Test. Mr. Herring demonstrated average ability to learn a list of words presented repeatedly across five trials. His performance revealed an adequate learning curve with no interference.

Nonverbal memory was tested with the Rey-Osterrieth Complex Figure. His direct copy of this design revealed high average ability to reproduce details in a complex geometric figure. Delayed memory was average.

Summary and Conclusions

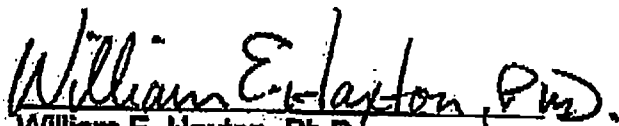
Dewain Herring is a 62 year old man who was referred by his psychiatrist for evaluation of possible decline in cognitive abilities. He has had a successful career as an attorney, performing estate planning and asset management in both group and solo practices, as well as providing expert witness testimony.

Current testing reveals that Mr. Herring is functioning within the average to high average range of intelligence. His predicted intelligence, based on tests of receptive language and demographic regression equations, falls in the superior range (approximately 120). Thus, it appears that Mr. Herring has experienced a mild to moderate loss of cognitive functioning. His verbal and nonverbal memory abilities are likewise average for his age, as is verbal fluency. Confrontation naming (ability to recall the names of common objects) remains high average. In general, he has retained verbal and mathematical abilities, skills which typically persist despite losses in other areas.

Although Mr. Herring has retained many cognitive abilities, he experiences marked deficiencies in several areas. Processing speed is below average compared with his same-age peers. In addition, executive functioning is particularly problematic; Mr. Herring exhibits difficulty forming abstract concepts, shifting and maintaining cognitive strategies, and utilizing corrective feedback to improve performance. In addition, he has a tendency to perseverate by repeating previously learned information out of context.

Because of his history of good verbal and mathematical skills, Mr. Herring can give the impression that he is continuing to function at his previously optimal level. However, these skills mask his loss of ability to quickly process new information and to integrate disparate pieces of abstract information to formulate a comprehensive conceptualization of central themes. Because these processing and abstraction abilities are necessary in Mr. Herring's line of work, the loss of these cognitive skills likely impairs his ability to successfully maintain his legal practice at this time.

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William E. Haxton, Ph.D.
Licensed Clinical Psychologist

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
H. Dewain Herring (SCDC #321951),
Applicant,
v.
State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-40-03783

ORDER DENYING
POST-CONVICTION RELIEF


2019 MAY 10 AM 8:34
RICHLAND COUNTY
FILED
JANELLE YARBOROUGH
C.C.P. CLERK

This matter comes before the Court upon Application for Post-Conviction Relief (“PCR”) filed by Applicant H. Dewain Herring (“Applicant”) on June 4, 2010. Respondent State of South Carolina (“the State”) filed its Return on July 21, 2010. An evidentiary hearing was convened at the Richland County Judicial Center on January 4, 2017. Applicant appeared along with his counsel, Tricia A. Blanchette, Esquire (“PCR Counsel”); and the State was represented by then-Assistant Attorney General Jessica E. Kinard, Esquire.

For the reasons set forth below, the Application for PCR is DENIED.

PROCEDURAL HISTORY

The underlying case concerns the conviction of Applicant, a former Columbia-area attorney, for the shooting death of an employee of Chastity’s Gold Nightclub (“Chastity’s”) after he was removed from the club in the early morning hours of January 29, 2006. He was subsequently indicted during the February 2006 term of the Richland County Grand Jury for murder (2006-GS-40-00881) and pointing and presenting a firearm (2006-GS-40-00914). On May 7, 2007, Applicant proceeded to jury trial before the Honorable G. Thomas Cooper, Jr., at the



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Richland County Judicial Center, raising the defense of involuntary intoxication. He was represented by Richard A. Harpootlian, Esquire ("Trial Counsel").

I. Prosecution's Case-in-Chief

According to witnesses, Applicant – as identified by several eyewitnesses – arrived at Chastity's at around 11:00 p.m. on January 28, 2006. While inside the club, he signaled to "Mia," a dancer, that he wanted a private "lap dance" in the club's "Champagne Room." After Applicant was escorted to the Champagne Room by Carl, a bouncer, Mia left the room to freshen up before performing the dance. When Carl checked on Applicant, he was completely nude, masturbating, and said he was "waiting on a girl." Carl told him to leave, but Applicant did not respond.

Carl went and got another bouncer, "John John," who went in the room to talk to Applicant. Eventually, Applicant and John John emerged, and Carl told Applicant that the police would be called if he didn't leave. A third bouncer, Donald Hawkins, overheard Applicant threaten to kill Carl and John John and intervened to assist John John in escorting Applicant outside the club. Surveillance video from the club showed Applicant exiting at 11:56 p.m.

When Applicant got into his vehicle, he leaned towards the glove compartment before driving out of the parking lot. Just after midnight, the bouncers watched him drive away, and one took down his license plate number. Soon after, they saw Applicant's vehicle driving back towards Chastity's, so they went back inside the building. John John stood just inside the front door watching Applicant through the window.

According to video surveillance, Applicant's vehicle returned to the club's parking lot, stopped directly in front of the building before firing a gunshot, then drove away. John John was struck by the bullet that passed through the club's front door, killing him.



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Police officers were called to the club, given Applicant's license plate number, and shown video surveillance footage – all of which helped to identify him. They ultimately went to Applicant's home to speak to him, but he didn't answer the door; so officers obtained a search warrant and forcibly entered the home. As they approached him, Applicant retrieved a gun and pointed it them, refusing to put it down even when ordered by officers to do so. During the standoff, Applicant was shot in the arm by one of the officers before they retreated. After a significant period of time negotiating with him – both by the officers on the scene and the 911 operator contacted by Applicant – Applicant was taken into custody.

The South Carolina Law Enforcement Division (“SLED”) assisted in the investigation of that evening's events. Although Applicant initially denied having been to Chastity's that evening, after being advised that there was video footage of him, he admitted being there but having a “hazy” recollection of the night. Applicant also told SLED agents that he had driven his vehicle there, that he went into the Champagne Room for a lap dance, and that he had a gun in his car at the time – although he was unsure which of his five firearms he had taken that night. Finally, Applicant told SLED agents multiple stories about firing his weapon while leaving Chastity's – that didn't recall doing so; that if he did, it's possible that his Ruger .357 pistol “went off” accidentally; and that he remembered shooting the gun but wasn't aiming at anyone. Applicant was arrested and charged with the murder of John John.

Officers located gunshot residue in the passenger's side of his vehicle, though none was found on the driver's side or on his hands. They also found a Ruger .357 in Applicant's home, from which one round of ammunition had been fired. Bullet fragments retrieved during John John's autopsy were conclusively matched to Applicant's gun.



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II. Trial Defense

Several witnesses testified in Applicant's defense at trial. In particular, a dancer from Chastity's testified that she had heard stories of people putting things in others' drinks at the club. A second dancer testified that she believed that she had been involuntarily drugged at Chastity's. A third dancer observed the second that evening and agreed that she had been drugged.

Applicant also presented the testimony of Lawton H. Yates, Jr., who was qualified as an expert in the areas of firearms and ballistics. Yates testified that no trajectory analysis was done by law enforcement at Chastity's on the night of the incident. He further opined that headlines in nearby traffic could have caused the reflection at issue in the video and that the video showed no evidence of a gun being fired from Applicant's car. Yates further explained that it was likely that the gun could have accidentally discharged if Applicant was moving towards the glove compartment.

Applicant testified in his defense. He admitted to the jury that went to Chastity's that night and that it is his image captured on video. Applicant believed that he was drugged at the club, testifying that he ordered a drink there but had no coherent memory of anything that happened afterwards. He didn't deny pointing a gun at the officers in his home, but told the jury that he wears glasses, is hard of hearing, and sleeps with a medical device that makes an audible humming noise. Finally, Applicant testified – and was vigorously cross-examined – about having a clear memory of certain events yet claiming not to recall others at all.

Applicant's next witness was Dr. John Holbrook, an expert in pharmacology. Dr. Holbrook opined that Applicant did ingest a "date rape drug" on the evening in question. He testified that date rape drugs can cause amnesia and loosen inhibitions. In his opinion, because Applicant's behavior was allegedly out of character, because he demonstrated behavioral disinhibition when

he undressed, and because he had no memory after a certain time, Applicant must have been drugged. According to Dr. Holbrook, had Applicant been drug tested that evening, results would have indicated the presence of some drug. Finally, in explaining why Applicant may not have appeared intoxicated to observers, Dr. Holbrook testified that the drugs should have worn off by the time Applicant was being questioned by police.

III. Prosecution's Rebuttal at Trial

The State's first reply witness was Dr. Demi Garvin, an expert in forensic toxicology. In preparation for her testimony, she reviewed relevant incident reports, witness statements, medical records, recordings of 911 calls, and the testimony of Applicant and Dr. Holbrook. Dr. Garvin testified that in her opinion, to a reasonable degree of scientific and medical certainty, Applicant was not involuntarily intoxicated at the time of the incident. In fact, given the amount of alcohol voluntarily ingested by Applicant, any surreptitiously-given drug would have rendered him relatively incapacitated or significantly impaired. In her opinion, Applicant's intentional actions and ability to fend for himself were inconsistent with such a level of intoxication. Finally, Dr. Garvin testified that she believed that Applicant knew right from wrong at the time of the incident.

IV. Conviction

On May 21, 2007, Applicant was found guilty as indicted. Judge Cooper sentenced him to concurrent terms of imprisonment of thirty (30) years for murder and five (5) years for pointing and presenting a firearm. Applicant is now confined in the South Carolina Department of Corrections ("SCDC") pursuant to orders of commitment issued by the Richland County Clerk of Court as a result of his conviction.


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V. Appeal

Trial Counsel filed and perfected a direct appeal on Applicant's behalf. The appeal was certified to the Supreme Court of South Carolina from the Court of Appeals upon counsel's motion. On December 21, 2009, the Supreme Court affirmed Applicant's conviction and sentence. *State v. Herring*, 387 S.C. 201, 692 S.E.2d 490 (2009). A timely Petition for Rehearing was filed but was denied on May 14, 2010. The Remittitur was issued the same day.

VI. Petition for Writ of Habeas Corpus

After filing this Application for PCR (on June 4, 2010), Applicant also filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina. *Herring v. Stevenson*, 0:11-160-MBS-PJG. That petition, filed on February 3, 2011 pursuant to 28 U.S.C. §2254, was dismissed upon the District Court's grant of summary judgment in favor of the State. By Opinion and Order filed on March 19, 2012, the Honorable Margaret B. Seymour accepted the Magistrate's Report and Recommendation, dismissed the petition, and denied a certificate of appealability. Nevertheless, Applicant attempted to appeal the District Court's decision in the United States Court of Appeals for the Fourth Circuit. By unpublished per curiam opinion and Judgment, both filed on August 21, 2012, the appellate court dismissed the appeal.

VII. Current Application for PCR

In response to the initial Application for PCR, the State filed its Return on July 23, 2010, and filed a Motion for a More Definite Statement on June 29, 2012. In response, on September 12, 2016, Applicant filed his "Amendment to Application for Post Conviction Relief."



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In the Application and Amendment, Applicant alleges that he is being held in custody unlawfully due to ineffective assistance of Trial Counsel.¹ Specifically, Applicant alleges that:

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.

¹ Although Applicant initially alleged that both Trial Counsel and appellate counsel were ineffective, the Amendment explicitly abandoned any claims regarding appellate counsel.

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), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

In addition to the written allegations, Applicant offered testimony of several witnesses in support of his claims. During the evidentiary hearing, Trial Counsel, Tora Brawley, Ph.D., Donna Schwartz Maddox, M.D., R. Robert Tressel, and Peter Skidmore testified on Applicant's behalf.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where an application for PCR alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of

performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRPC.

The court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). 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." *Id.* at 117-18. In the absence of sufficient proof, the Application for PCR must be denied.

I. Plea Negotiations

Although Applicant alleges that Trial Counsel was deficient in failing to engage in meaningful plea negotiations, this Court disagrees.

During the evidentiary hearing, Trial Counsel testified that he did, in fact, attempt to negotiate a favorable plea offer for Applicant. According to Trial Counsel, the State's only offer was for Applicant to plead "straight up" to murder. When asked about the potential of using Applicant's insurance policies as leverage for a better plea offer, Trial Counsel competently and credibly described the intricacies of the policies and how that would become a reality in terms of settlement. Trial Counsel testified that when he broached the subject, the Solicitor indicated that



neither his office nor John John's family was interested in such a quid pro quo. No other evidence was presented on this issue.

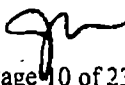
Based on the foregoing, the Court finds that Applicant has failed to meet any of the *Strickland* requirements as to this allegation. Not only is there a lack of evidence as to Trial Counsel's alleged deficiency, but the evidence suggests the opposite – that Trial Counsel did more than necessary by investigating and suggesting a plea bargain that involved complex civil remedies for the victim's family. Therefore, this allegation is denied and dismissed.

II. Change of Venue

Next, Applicant contends that Trial Counsel should have petitioned the court for a change of venue and that his failure to do so rendered his performance deficient. Specifically, Applicant argues that the media coverage of this case warranted conducting the trial in another county. The Court disagrees.

Trial Counsel conceded that there was "a lot of media attention" to this case but stated that he nevertheless chose not to request an alternate venue. In his opinion, Lexington County would have been less favorable to Applicant than Richland County, and he believed it unlikely that a judge "would move it as far away as Charleston." Trial Counsel believed that he could select a "good jury" in Richland County as long as appropriate questions were asked of potential jurors during *voir dire*. No other evidence was offered on this issue.

Attorneys must be given leeway to make reasonable strategic decisions. *Strickland*, 466 U.S. 668. "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).



Here, Trial Counsel articulated a reasonable trial strategy. In particular, he evaluated the potential outcomes of a motion for change of venue and provided credible testimony regarding his choice not to file such a motion. The Court can find neither deficiency nor prejudice to Applicant with respect to this allegation; therefore, this allegation is denied and dismissed.

III. Witnesses, Objections, Jury Instructions and Closing Arguments

Next, Applicant argues that Trial Counsel rendered ineffective assistance 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. At the outset of the evidentiary hearing, PCR Counsel indicated that this allegation is merely “a catchall issue” to be discussed in more detail by the other allegations; and this Court agrees with that assessment.

The only portion of this claim which is not encompassed by other allegations is Trial Counsel’s alleged failure to call available witnesses at trial. At the evidentiary hearing, however, Applicant failed to present testimony from any witness who could have or should have been available to testify during the trial. Because prejudice from Trial Counsel’s failure to call witnesses cannot be shown where the witnesses do not testify at the PCR hearing, this allegation must be denied and dismissed. *See, e.g., Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992).

IV. Applicant’s Mental Health

The apparent focus of the Application for PCR is the assertion that Trial Counsel failed to properly address Applicant’s mental health throughout the case. Applicant argues that Trial Counsel should have consulted experts and used their findings to assist in plea negotiations, pre-trial hearings, presenting a defense at trial, in closing arguments, and in overall mitigation.



In an effort to prove this allegation, Applicant presented testimony from Doctors Tora Brawley and Donna Schwartz Maddox, both of whom evaluated Applicant at separate times. Dr. Brawley, an expert in neuropsychology, evaluated Applicant on March 15, 2016 by interviewing him and administering a battery of tests to assess his level of cognition. Those findings, according to Dr. Brawley, are consistent with the presence of mild dementia.

Dr. Brawley subsequently conducted a "dementia interview" with Applicant's wife and son. She testified that after the interviews and having reviewed Applicant's test results and prior medical records, she believed that Applicant was suffering from mental impairments at the time of the incident, which comports with another doctor's report from that time.²

Dr. Donna Schwartz Maddox, a psychiatrist, was admitted as an expert in forensic psychology. She also examined Applicant and was able to develop several diagnoses, as well as explanations for those conditions. Like Dr. Brawley, Dr. Maddox found signs of dementia in Applicant. She also diagnosed Applicant with alcohol abuse disorder, obstructive sleep apnea, hypertension, and a number of other medical problems. Ultimately, Dr. Maddox opined, to a reasonable degree of medical certainty, that Applicant was suffering from a neurocognitive disorder at the time of this offense. Additionally, Dr. Maddox testified that, while people with dementia have varying levels of functioning, Applicant "appears a lot more intact than what he is because he has very good vocal skills and he can answer questions."

² Applicant also offered the report of a neuropsychological evaluation performed by Dr. William E. Haxton, dated June 17, 2006. The report concludes that Applicant "experiences marked deficiencies in several areas" and that. "[b]ecause of his history of good verbal and mathematical skills, Mr. Herring can give the impression that he is continuing to function at his previously optimal level. However, these skills mask his loss of ability to quickly process new information and to integrate disparate pieces of abstract information to formulate a comprehensive conceptualization of central theme."



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Trial Counsel also testified on this issue, stating that he was aware that Applicant was suffering from mental illness because he had been under the care of a psychiatrist, Dr. Phil Steude, prior to the incident. In fact, Trial Counsel contacted Dr. Steude to determine whether Applicant's diagnosed bipolar disorder and prescribed medications would support a defense to the criminal charges. Trial Counsel testified that if Dr. Steude would have provided helpful information, he would have presented his testimony at trial.

Trial Counsel stated that he relied heavily on the opinions of Dr. Steude, who made no mention of dementia or the June 2006 report of Dr. Haxton – only bipolar disorder. More specifically, he testified that he relied on the treating psychiatrist, Dr. Steude, to interpret any reports for him. He also admitted that his understanding of dementia was not entirely correct at the time, believing that Applicant's demeanor in their meetings was inconsistent with dementia; however, no one – including Dr. Steude – corrected his misapprehension. Trial Counsel also testified that he had concerns about whether mental health expert testimony would be admissible at trial, although he believes that it may have been useful during plea negotiations or regarding voluntariness of a statement during a *Jackson v. Denno*³ hearing. However, Trial Counsel clarified that he neither knew nor had reason to know of the full extent of Applicant's mental health issues during his representation.

Ultimately, the Court finds that this allegation must be denied. Trial counsel reasonably relied on the advice and interpretation of Applicant's treating psychiatrist, Dr. Steude, who he believed to be the ultimate expert – someone with existing experience and knowledge of the

³ 378 U.S. 368 (1964).

Applicant both before and after the incident.⁴ See *Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008) (counsel not ineffective for relying on expert opinion in structuring a defense of client). Trial Counsel's testified that he had no reason to doubt the accuracy of Dr. Steude's opinion and evaluation of Applicant, which is both logical and credible. While Applicant likely suffered from dementia at the time of the incident, the Court cannot find that Trial Counsel's representation was deficient.

Applicant is also unable to satisfy the second prong of the *Strickland* test, as the State presented overwhelming evidence of Applicant's guilt. It is well-settled case law in South Carolina that the prejudice prong of *Strickland* cannot be satisfied if there is overwhelming evidence of guilt. See *Payne v. State*, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing *Strickland*, 466 U.S. at 687). Therefore, this allegation is denied and dismissed.

V. Crime Scene Investigation

In support of his contention that Trial Counsel failed to properly prepare and fully utilize a crime scene investigation expert prior to and during trial, Applicant offered the testimony of Ralph Robert Tressel. Tressel is the Chief Criminal Investigator for Cobb County District Attorney's Office in Marietta, Georgia, and is an expert in crime scene investigation and homicide investigation. In preparation for his testimony, he reviewed the transcript of the trial as well as the physical evidence collected by law enforcement.

⁴ While Applicant presented expert testimony from Drs. Brawley and Maddox, their testimony is not probative as to whether counsel was deficient in relying on Dr. Steude's opinion. See, e.g., *McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008) (finding that a later expert opinion does not show incompetence of counsel for relying on the first expert counsel consulted with). Requiring counsel to further investigate their experts' opinions would defeat the entire purpose of consulting with experts. See *Stokley v. Ryan*, 659 F.3d 802, 814 (9th Cir. 2011).

I. Trajectory

Tressel criticized the manner in which the criminal investigation was conducted and managed in Applicant's case. Specifically, he first testified that the photos and written documentation collected by police officers at Chastity's were insufficient to analyze the trajectory of the projectile that killed John John. Tressel stated that no relevant measurements were taken and, therefore, no analysis could be done, in contrast with the treatment of the shooting at Applicant's home. He also criticized law enforcement for not keeping the door through which the projectile traveled. Finally, Tressel testified that, based upon his review of the video surveillance and still photographs from Chastity's, he was unable to see the "distinctive marking of a flash of a gun going off," but recognized that there could be reasonable explanations for that.

This testimony seems to have been introduced to counter the extensive testimony about the gun's flash that was presented at trial; however, the Court does not find it persuasive regarding the allegation to which it is aimed, which is one of ineffective assistance of counsel for failure to properly prepare and fully utilize an expert of this nature. Tressel testified about a number of other things, such as whether sending the surveillance video to NASA for analysis was or could have been beneficial; if a proper chain of custody had been followed regarding NASA analysis; whether the bullet could have ricocheted; and whether the shot could have been firing by accident. However, none of his opinions bear on the undisputed fact that a gun was fired from Applicant's vehicle towards Chastity's; and none of his testimony impacted on the trial testimony given by Yates. Therefore, the Court cannot find that further expert witness testimony at trial would have been necessary or that the failure of Trial Counsel to retain additional experts rendered him deficient.



Because Trial Counsel performed within expected norms, he cannot be deemed deficient under the *Strickland* standard. Even if he was deficient, Applicant has not proven that he suffered prejudice as a result of the alleged deficiency. In particular, there is no evidence that the testimony of an additional expert witness would have had an impact on the result of the trial. Rather, at trial, the State presented overwhelming evidence of Applicant's guilt. The law is well-settled that the prejudice prong of *Strickland* cannot be satisfied if there is overwhelming evidence of guilt. See, e.g., *Payne v. State*, 355 S.C. 642, 645. 586 S.E.2d 857, 859 (2003) (citing *Strickland*, 466 U.S. at 687). Therefore, this allegation is denied and dismissed.

VI. NASA Enhancement Testimony

Applicant believes that Trial Counsel was ineffective because he failed to object to the testimony and accompanying exhibit introduced by the State regarding NASA's enhancement of the video surveillance. Applicant contends that because no witness from NASA testified at trial, Trial Counsel should have objected to the introduction of the testimony and exhibit.

In response to this allegation, Trial Counsel testified that he believed that the exhibit and testimony in question were actually helpful to Applicant's case. Trial Counsel initially lodged an objection but withdrew it after hearing the witness' testimony (by way of proffer outside of the jury's presence) and determining that the testimony supported Applicant's defense – that the gun fired accidentally rather than Applicant having intentionally aimed and shot at the door to Chastity's. In fact, he believed that the video bolstered the testimony of Ron Yates, the expert in firearms and ballistics retained by Applicant. Trial Counsel also didn't believe it necessary to locate the NASA analyst that created the video because "there wasn't anything pejorative" about the video.



In response, Tressel offered the legal opinion that the person who analyzes the evidence should be the witness to testify about it at trial. The Court also heard the testimony of Peter Skidmore, a private investigator retained by Applicant, who attempted to locate the NASA analyst. Ultimately, although Skidmore located him, the analyst was unable to find his file for Applicant's case.

After considering the evidence presented on this issue, the Court cannot find that Trial Counsel rendered ineffective assistance to Applicant. Instead, Trial Counsel objected to the testimony, previewed the testimony in the jury's absence, determined it to be favorable, and withdrew his objection – a credible, reasonable trial strategy. In order to obtain relief, Applicant “must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland*, 466 U.S. at 689; *see also, e.g., Solomon v. State*, 347 S.C. 635, 557 S.E.2d 666 (2001) (finding failure to request “not guilty” option on verdict form was not unreasonable for strategic reasons where counsel’s strategy was to argue that defendant was guilty of only the lesser offense). Applicant has not met his burden; therefore, this allegation must be denied and dismissed.

VII. Search Warrant

Next, Applicant argues that he is entitled to a new trial because Trial Counsel was not familiar with Richland County's updated policies regarding the issuance of search warrants. Applicant also complains that Trial Counsel should have objected when the State introduced as an exhibit an incomplete copy of the policy (which is, in fact, an Order issued by then-Chief Justice of the Supreme Court of South Carolina). The Court disagrees.

During the evidentiary hearing, Trial Counsel testified about what occurred during the pre-trial hearing wherein Applicant moved for suppression of a search warrant. Trial Counsel admitted

that at the time of trial, he was unaware that an Order had been issued permitting Richland County officers to obtain search warrants via facsimile. He learned of it either during or immediately prior to trial. However, Trial Counsel testified that he had time to research the issue prior to trial, leading him to believe that the appropriate procedure had not been followed.

At trial, the State introduced an incomplete copy of the Order as an exhibit, and Trial Counsel made no objection. During the evidentiary hearing, he indicated that, at the time, he was unaware that it was an incomplete document. Trial Counsel looked but was unable to locate a copy of the Order in any of the places one would expect to find an administrative order. Although he raised this issue on appeal (and it was raised by other counsel in Applicant's Petition for Writ of Habeas Corpus), he did not pursue the issue any further at trial because the best argument to make was that regardless of the presentation of the exhibit, law enforcement had not complied with its mandates. The court disagreed and denied the suppression motion.

Ultimately, the Court finds that Trial Counsel was not deficient in his initial ignorance of the administrative order or in his failure to object to the introduction of an incomplete copy of the administrative order. He had time to research and review the Order and made a thorough legal argument about the Order as applied to the search warrant at issue. Trial Counsel also successfully preserved the issue for appeal (though that appellate argument was later denied). There is no evidence which would support Applicant's contention that Trial Counsel's performance fell below prevailing professional norms or that he suffered prejudice as a result. *See, e.g., Cherry*, 300 S.C. at 117, 386 S.E. 2d at 625 (*citing Strickland*, 466 U.S. at 688). Therefore, this allegation is denied and dismissed.



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VIII. Applicant's Trial Testimony

Applicant also criticizes the handling of his trial testimony and the light in which he was portrayed by Trial Counsel.

Trial Counsel testified that he prepared Applicant for his testimony over several weeks. Applicant went to Trial Counsel's office five or six times, during which Applicant's testimony was rehearsed and a mock prosecutor "battered him about" with questions. According to Trial Counsel, Applicant "did extraordinarily well" and "really, really knocked it out of the park." He believed that it was important to portray Applicant as contrite and upset that he had killed another human being. Trial Counsel felt that Applicant was well-prepared for his testimony. Despite the preparation, however, Trial Counsel felt that Applicant performed horribly at trial, showed no contrition, and became stoic. He testified that it was the worst testimony he had ever seen and that everyone was shocked by the performance. In hindsight he admitted that Applicant's poor presentation may have been attributed to dementia; however, at the time of trial he was unaware of any issues which could impact Applicant's demeanor. When asked about his characterization of during closing arguments, Trial Counsel explained, "You know, the jury had seen him. They had heard him. I mean, I don't know how you undo that."

The Court finds the uncontroverted testimony of Trial Counsel to be credible. It appears that his meetings with Applicant were numerous, lengthy and thorough – well beyond professional norms. Any detriment to the case caused by Applicant's testimony was owing only to issues which were unknown to – and could not have been foreseen by – Trial Counsel. Therefore, the Court cannot determine that Trial Counsel's performance was deficient or that his representation caused any prejudice to Applicant; and this allegation must be denied and dismissed.



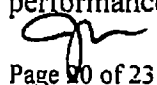
IX. Testimony of Drs. Holbrook and Garvin

Applicant also believes that Trial Counsel failed to properly prepare and utilize Dr. Holbrook's testimony at trial; that this failure "opened the door" to the State's introduction of Dr. Garvin as a rebuttal witness; and that Trial Counsel should have objected to Dr. Garvin testifying about matters which exceeded the scope of her expertise.

At trial, Dr. Holbrook testified in support of Applicant's defense of involuntary intoxication and discussed the potential consequences of ingesting illicit drugs at the same time as Applicant's prescribed bipolar medications. The State objected to this testimony, arguing that it raised the issue of Applicant's mental health. Trial Counsel testified that he certainly never intended to "open the door" to discussions regarding Applicant's mental health, particularly because he believed that doing so could suggest that Applicant was voluntarily – rather than involuntarily – intoxicated at the time of the incident.

In response to Dr. Holbrook, Dr. Garvin testified, giving expert opinions regarding involuntary intoxication. Trial Counsel believed the fact that she would testify would be helpful to their case, but ultimately it was "[a]pparently not positive enough." He disputed PCR Counsel's suggestion that involuntary intoxication was "a last minute defense," stating that he recalled interviewing employees of Chastity's about patrons' drinks being "spiked."

The explanations offered by Trial Counsel amount to clearly-articulated strategic decisions and, therefore, cannot reasonably be challenged. *See, e.g., Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531 ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). As to the preparation of Dr. Holbrook for his trial testimony, the Court similarly finds Trial Counsel's performance to be sufficient. Further, Applicant has



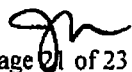
shown no prejudice resulting from the fact that Dr. Holbrook was questioned about statements that had not reviewed prior to trial because, among other reasons, he testified after reviewing them that they did not change his opinions. For the foregoing reasons, this allegation is denied and dismissed.

X. Jury Charge Regarding “Accident”

Applicant argues that Trial Counsel failed to offer any evidence to support a jury charge on the defense of accident, as he outlined in his opening statement; and that he failed to object to comments made about such a charge by the Solicitor in his closing argument. Trial Counsel confirmed that accident was one of the main theories of Applicant’s defense but also testified that the trial court “took that off the table” when he refused to instruct the jury about that defense.

In addition, PCR counsel questioned him about *State v. Santiago*, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006), a case in which Trial Counsel introduced the expert testimony of Dr. Maddox on mental health issues. Trial Counsel admitted that he had discovered a way to “back-door[] the testimony” of expert witnesses and offer testimony from psychiatrists. When asked to juxtapose this strategy with the testimony of Dr. Holbrook in this case, Trial Counsel explained that the strategy only works in federal courts.

Trial Counsel also testified about the concepts of accident and voluntariness, which he maintains that he fully explored as defenses. He stated, “We attempted to show that either he was fumbling with the gun or the gun was below the window of the car when it went off, as if he had taken it out of the glove compartment and it went off either accidentally or he was not competent to handle it.” While this supported Trial Counsel’s intended accident argument, the trial court’s refusal to instruct the jury on that defense caused him to refocus his efforts on proving involuntary manslaughter. He also explained that, because the trial judge had ruled that accident was not a



defense, he did not view the statements made during closing argument as objectionable in the context.

The Court finds the theories and defenses described by Trial Counsel to be rational, well-articulated, and well within the realm of professional norms. In fact, despite the trial court's refusal to charge the law of accident to the jury, Trial Counsel was able to introduce evidence related to an accident in an attempt to show a lack of malicious intent and to counter the State's evidence. Applicant has not met his burden of proving ineffective assistance of counsel, and this allegation must be denied and dismissed.

XI. Solicitor's Closing Argument

Applicant's final argument is that Trial Counsel should have objected to the Solicitor's closing argument. He contends that the argument contained improper bolstering, burden shifting, injecting personal testimony, and errantly stating what the court's instructions would be.

Although Applicant takes issue with the Solicitor praising the work of law enforcement and asking the jury for fairness, Trial Counsel explained that he saw no reason to object to those statements. Instead, he explained his distaste for repeated objections and leaving a bad impression on jurors; and he stated that when he makes an objection, he wants it "to really count." Trial Counsel also testified that he didn't believe that improper bolstering occurred and that the statements made by the Solicitor didn't cause "any major harm."

Applicant has failed to prove that Trial Counsel's credible, clear trial strategy fell below reasonable professional norms or that, but for his conduct, the outcome of the trial would have been different. Because the evidence fails to meet the requirements of *Strickland*, this allegation is denied and dismissed.




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IT IS, THEREFORE, ORDERED that the Application for Post-Conviction Relief is DENIED and DISMISSED with prejudice.

IT IS FURTHER ORDERED that Applicant shall remain in the custody of the South Carolina Department of Corrections to complete the service of his sentence.

AND IT IS SO ORDERED.



Jocelyn Newman
Circuit Court Judge

May 9, 2019
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

FILED
MAY 17 2019 PM 4:02
ANGELIE W. HERRIDGE
C.C.P. & G.S.

Plaintiff's Attorney:
Tricia A. Blanchette, Bar No. 74904
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Leesville, SC 29070
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Defendant's Attorney:
Lindsey Mccallister, 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: Rule 59, SCRCP

Estimated Time Needed: 30 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

May 17, 2019
Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT:
- EXEMPT:
 - 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: _____

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 PURSUANT TO
 RULE 59(a) & (e), SCRPC**

2016 MAY 20 PM 4:02
 JENNIFER W. JACOBSON
 C.C.P. & C.S.
 FILED
 RICHLAND COUNTY

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. Thereafter, the Honorable Robert E. Hood issued an Order Authorizing Discovery.

On September 12, 2016, Applicant, through counsel, filed an Amendment to Application for Post Conviction Relief. By way of the Amendment, Applicant abandoned any claim(s) of ineffective assistance of appellate counsel and moved 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), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

On January 4, 2017, an evidentiary hearing was convened at the Richland County Courthouse in front of the Honorable Jocelyn Newman. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Jessica E. Kinard, Assistant Attorney General. Applicant, through counsel called the following witnesses: Tora Brawley, Ph.D., Donna Schwartz Maddox, M.D., Richard A. Harpootlian, Esquire, R. Robert Tressel, and Peter Skidmore. At the conclusion of the hearing, the Court requested proposed Orders from both parties, which were submitted in or about June 2017.

On May 9, 2019, the Honorable Jocelyn Newman issued an Order Denying Post-Conviction Relief, which was filed on May 10, 2019. Applicant, through counsel, received a copy of the Order on May 14, 2019, from which this Motion follows.

ARGUMENT

In Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. § 17-27-80. Therefore, Applicant would respectfully request that the Court ensure that specific findings of fact and conclusions of law are entered on each issue raised and the record before the Court and testimony of each witness is properly addressed in the standing Order of Dismissal (“Order”).

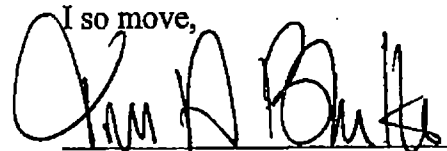
Additionally, Applicant would move the Court to reconsider the standing Order and reconsider the proposed Order Granting Post Conviction Relief, which is attached

herein and incorporated in this argument by reference. By way of this proposed Order, Applicant does not concede any of the issues raised in the Amendment.

Specifically, Applicant would ask the Court to carefully reconsider and review the Order as it addresses the issues relating to mental health. Applicant is concerned that the Court has not considered every aspect of Applicant's case that was prejudiced by counsel's failure to properly address his mental health. Additionally, Applicant would ask the Court to reconsider her findings that accept counsel's excuses for not properly addressing Applicant's mental health and her finding that prejudice is absent due to overwhelming evidence of guilt.

CONCLUSION

In conclusion, Applicant would request that the Court review the full record, including the evidentiary hearing transcript, reconsider the standing Order of Dismissal, reconsider Applicant's proposed Order Granting Application for Post Conviction Relief, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRPC.

I so move,


Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

May 17, 2019

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 GRANTING APPLICATION
FOR POST CONVICTION RELIEF**

PROCEDURAL HISTORY

A. Post Conviction Relief

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.

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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.

On January 4, 2017, an evidentiary hearing was convened at the Richland County Courthouse in front of the Honorable Jocelyn Newman. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Jessica E. Kinard, Assistant Attorney General. At the outset of the hearing, Applicant's counsel gave an opening argument addressing the issues raised and providing references to the trial transcript. Applicant was sworn and questioned by this Court regarding his desire to proceed on his Application, and he affirmed that he was seeking a new trial. PCR Transcript pp. 6-8. Applicant, through counsel called the following witnesses: Tora Brawley, Ph.D., Donna Schwartz Maddox, M.D., Richard A. Harpootlian, Esquire, R. Robert Tressel, and Peter Skidmore. At the conclusion of the hearing, this Court requested proposed Orders from both parties, from which this Order follows.

B. General Sessions

Applicant is presently confined in the South Carolina Department of Corrections pursuant to Orders of commitment from the Richland County Clerk of Court. During the February 2006 term of the Richland County Grand Jury, Applicant was indicted for Murder (2006-GS-40-00881) and Pointing and Presenting a Firearm (2006-GS-40-00914). On May 7, 2007, Applicant proceeded to trial in front of the Honorable G. Thomas Cooper, Jr. and a jury at the Richland County Courthouse. Applicant was represented by Richard A. Harpootlian, Esquire. On May 21, 2007, Applicant was found guilty as indicted. The Honorable G. Thomas Cooper, Jr., sentenced Applicant to a term

of thirty (30) years on the murder conviction and five (5) years concurrent on the pointing and presenting a firearm conviction.

A direct appeal was filed and perfected by Richard A. Harpootlian, Esquire. On December 21 2009, the South Carolina Supreme Court affirmed Applicant's conviction and sentence. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). A timely Petition for Rehearing was filed and denied on May 14, 2010. The Remittitur was handed down on May 14, 2010.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id., 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. Bell v. State, 321 S.C. 238 (1996); see also Cherry v. State, 300 S.C. 238 (1989); Rule 71.1(e), SCRPC.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's

performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (citing Strickland, 466 U.S. at 688). 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.

A. ISSUES PRESENTED

1. Trial counsel rendered ineffective assistance of counsel by failing to engage in meaningful plea negotiations.

By way of the Amendment and at the evidentiary hearing, Applicant alleged that trial counsel failed to engage in meaningful plea negotiations. Applicant has also raised matters regarding plea negotiations by way of Issue #4. Therefore, this Court will address matters related to plea negotiations below in Issue #4.

2. Trial counsel rendered ineffective assistance of counsel by failing to argue for a change of venue.

By way of the Amendment and at the evidentiary hearing, Applicant alleged that trial counsel rendered ineffective assistance of counsel by failing to argue for a change of venue. When trial counsel was asked about failing to move for a change of venue, he acknowledged that there was a lot of media attention, but he felt they could get a good jury in Richland County if the "appropriate voir dire questions were asked." PCR Transcript p. 101, Ins. 9-16. On redirect, counsel was asked about his prior testimony about race being an issue in the case, and he responded that the "race piece wasn't a factor on change of venue." PCR Transcript p. 168, ln. 20 – p. 169, ln. 7.

In support of this allegation, Peter Skidmore was called to the stand and explained that he had provided investigative services on over a hundred murder cases and had

looked into the media attention leading up to and surrounding Applicant's trial. PCR Transcript pp. 214-15. He explained that he would have voiced concerns to trial counsel regarding the influence of the media attention on the jury and urged counsel to move for a change of venue. PCR Transcript pp. 215-216.

This Court has reviewed the pertinent portions of the trial transcript and considered the testimony offered at the evidentiary hearing. This Court finds that trial counsel provided a sufficient basis for his strategic decision to not pursue a change of venue. Therefore, this claim must fail on the first prong of the Strickland analysis. Additionally, this Court finds that any prejudice would be based upon pure speculation. As a result, this claim fails on both prongs of the Strickland analysis.

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.

As Applicant's counsel indicated at the outset of the evidentiary hearing, this Court finds that this allegation is a mere catch all allegation. This Court finds that portions of this allegation are encompassed in the other allegations contained herein and finds that the only portion not addressed by other allegations is "failing to call available witnesses." At the evidentiary hearing, Applicant did not call factual or lay witnesses that would have been available to be called at trial. Therefore, this Court finds that Applicant has failed to meet his burden of proof to show that trial counsel failed to call factual or lay witnesses at trial.

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.

At the evidentiary hearing, Applicant called Dr. Tora Brawley to the stand, and she was qualified as an expert in the area of neuropsychology. PCR Transcript p. 37.

When asked to explain neuropsychology, Dr. Brawley responded:

Neuropsychology is the study of brain behavior relationships. We conduct specific testing that looks at how different areas of the brain are actually working. Where an MRI gives you a picture of the brain, these tests tell us how the areas are functioning, how they are – at what capacity they are functioning.

PCR Transcript p. 37, lns. 10-16. She conducted a neuropsychological evaluation of Applicant, including a clinical interview and battery of neuropsychological tests, on March 15, 2016, and her report generated from that evaluation was admitted as Applicant's Exhibit 2. PCR Transcript pp. 38-41. She explained that post evaluation she reviewed a cognitive testing report prepared by William E. Haxton, Ph.D. from a neuropsychological evaluation conducted of Applicant on June 17, 2006. PCR Transcript p. 40, Applicant's Exhibit 9. She explained her basis for determining that the results of her testing of Applicant were valid. PCR Transcript pp. 41-42. Dr. Brawley summarized her findings:

Mr. Herring had several areas of deficit. He had deficits of verbal learning, verbal memory, verbal fluency, abstract reasoning, motor functioning. He was very low, for instance, at the fourth percentile, for his memory for a story. He was at the second percentile for his ability to copy a figure. So, overall I felt that these results were consistent with mild dementia.

He was also reporting some depression, but I didn't feel like that could account for what I was seeing here.

The fact that he had such high level premorbid or what we consider beforehand abilities, and he is conversationally, what I call conversationally intact, he can mask some of those deficits to people if they are just having a general conversation with him. It is not until you get

to the actual testing that you find the extent of the organicity that we have got here.

PCR Transcript p. 42, ln. 20 – p. 42, ln. 13. She also explained her finding that Applicant was “tangential,” as follows: “He had a hard time staying on task and on questions. I would ask a question and he would start to answer it, and then would go off and I had to kind of reel him back in. It was hard to keep him on task.” PCR Transcript p. 43, lns. 14-21.

Dr. Brawley also testified about the dementia interviews she conducted with Applicant’s family. She discovered that Applicant’s family had noticed changes in Applicant’s cognition for years prior to 2006, but they had attributed it to his psychiatric symptoms and alcohol consumption. PCR Transcript pp. 45-46.

Throughout her testimony, Dr. Brawley addressed Dr. Haxton’s evaluation and report from 2006. Dr. Brawley explained that the premorbid level of functioning she found was consistent with what Dr. Haxton found in 2006. PCR Transcript p. 44.

Specifically, she testified:

And Dr. Haxton also did a battery of testing. A lot of similar tests that I give, some were a little bit different, but they were comparable. I was able to compare scores. He had declined in a couple of areas since that testing. But at that time Dr. Haxton noted that he had mild to moderate loss of cognitive functioning, marked ---

Again, my results are consistent with those of Dr. Haxton. He also noted some perseveration or repeating, some of the same behavioral things that I noted in my report. And he felt that also his deficits impaired his ability to successfully maintain his legal practice at this time, which was the question that Dr. Steude had posed to him. So he did note significant impairments in cognition at that time.

PCR Transcript p. 47, lns. 6-20, p. 49, ln. 5-15.

On cross-examination, the following took place:

Question: Dr. Brawley, just to make sure that I understand, Dr. Haxton's findings you believe show a precursor to the conditions that you found?

Answer: I think that Dr. Haxton's findings show that there was also dementia present at the time that he evaluated him in 2006.

PCR Transcript p. 51, lns. 4-9.

When asked, Dr. Brawley indicated that she would have been willing to work with Attorney Harpootlian prior to and throughout the trial. PCR Transcript pp. 49-50. She responded that she was not contacted by Attorney Harpootlian regarding Applicant's case. PCR Transcript p. 50.

Following Dr. Brawley, Dr. Donna Schwartz Maddox (Dr. Maddox) took the stand. She was qualified as an expert in the area of forensic psychiatry. PCR Transcript p. 58. She explained that some of the materials she relied upon in reaching her findings included the file of Dr. Steude (Applicant's treating psychologist at the time of the crime and trial) and neuropsychological evaluation done by Bill Haxton dated June 17, 2006. PCR Transcript pp. 60-61. She recalled evaluating Applicant at Kirkland Correctional Institution in September of 2015 and requesting a neuropsychological evaluation and family interviews by Dr. Tora Brawley. She addressed the causes that she identified that contributed to Applicant's present dementia. She also explained that Dr. Haxton's report and Dr. Steude's file were helpful to establish that Applicant was suffering from dementia at the time of his crime. PCR Transcript pp. 61-2.

When asked, Dr. Maddox affirmed that Applicant's counsel had originally contacted her asking for an evaluation due to Applicant's previously diagnosed bipolar disorder. She explained that she interviewed Applicant, and it was clear that "he was

having cognitive difficulty.” PCR Transcript p. 64, ln. 24 – p. 65, ln. 8. Specifically, she testified:

What I noticed in the exam, he would often – as Dr. Brawley mentioned, he was very circumstantial. It was very hard to just get – he had a lot of information he wanted to share, but he would get so distracted, and would kind of go from one topic to the other, that it was very difficult to get him to cooperate, even though he was trying. So I had much more luck when I administered -- part of my exam is I do neurological evaluation, and I also do a neuropsychological screening. So I had him do some tests. And those tests showed symptoms of dementia.

PCR Transcript p. 65, lns. 9-21. In further addressing her dementia diagnosis, Dr.

Maddox explained:

Persons with dementia, they can have different levels of functioning. Mr. Herring appears a lot more intact than what he is because he has very good vocal skills and he can answer questions. The problem is there is a lot of other things that your brain does that is important to dementia. So I did not have Dr. Haxton’s results until after the testing as well. So they confirmed. It was very helpful for this case in particular because they were present -- they would have been available around the time of his offense, and they were certainly very similar with Dr. Brawley’s findings.

PCR Transcript p. 67, lns. 20 – p. 68, ln. 7.¹

In summation, Dr. Maddox went through each of her diagnoses listed in her report. She opined that within a reasonable degree of medical certainty Applicant was suffering from a neurocognitive disorder at the time of his offense, which was verified for her by the information contained in Dr. Haxton’s report and interviews of Applicant’s family. PCR Transcript pp. 71-2.

Finally, Dr. Maddox addressed her concerns with the medications administered to Applicant prior to his police interrogation and written statement. She explained that “intramuscular medications like Ativan, which is what he received, that can cause disinhibitions. It worsens dementia.” PCR Transcript p. 75, ln. 25 – 76, ln. 2. She further

¹ Dr. Maddox also addressed her review of an MRI scan from 2011, which was abnormal. PCR pp. 70-71.

explained that the medication could account for Applicant not remembering what he said during the interview or volunteering more information than he normally would have without the medication. PCR Transcript pp. 76-7.

Dr. Maddox acknowledged that she had previously worked with Attorney Harpootlian and would have been willing to assist him with Applicant's case. PCR pp. 78-9. She indicated that she would have followed the same methodology and felt confident, based upon Dr. Haxton's test results, she would have reached the same diagnosis. PCR pp. 79-80. She agreed that she would have been willing to consult and assist in plea negotiations and mitigation if not needed to testify at a trial. PCR pp. 80-1. She indicated that she would have been willing to testify at Jackson v. Denno hearing regarding Applicant's statement and at trial. PCR p. 83. She referenced Applicant's testimony and repeated responses that he did not remember and indicated that she would have advised that Applicant not testify at trial. PCR p. 82. Specifically, the following testimony was offered:

Question: What would have been your advice regarding putting him on the stand and having him testify at trial? You would have advised him not to do that?

Answer: Absolutely, because, just as you – in looking at this testimony, he would have difficulty remembering. He could easily be confused.

The problem with dementia is when you are conversationally attacked, like Mr. Herring is, you can't tell – there is a condition in dementia called confabulation. And what that means is, your brain, when it can't remember something, it fills in the gaps. And it is not lying, it is not on purpose. Your brain fills in the gaps. And so you can't tell – no one is a human lie detector, so you can't tell when somebody with dementia is confabulating or they are actually relying upon their memory to recall something. So his memory also would not have been reliable in this case.

PCR Transcript p. 82, lns. 7-21.

Finally, Dr. Maddox was asked about the trial reply testimony of Demi Garvin, who was qualified as expert in the area of clinical and forensic toxicology and drug chemistry. Trial Transcript p. 2101. She responded that the appropriate expert to testify about whether Applicant's actions were purposeful would be a forensic psychologist or forensic psychiatrist. PCR Transcript pp. 84-5. In explaining her opinion of the testimony offered by Demi Garvin, that was based upon an analysis of Applicant on the surveillance video, she concluded: "Judging someone's intent or purposes just based on movements is not a good methodology." PCR Transcript p. 84, ln. 20 – p. 85, ln. 3. She further explained that "persons with dementia... may not be intoxicated to the point that you are stumbling or that you can't perform certain motor tests or neurological tests, but you still can be significantly cognitively impaired because of the underlying mental condition." PCR Transcript p. 85, lns. 15-22. She agreed that she would have been capable of testifying instead of trial counsel merely asking Dr. Garvin about her knowledge of Applicant's mental health and medications.

When Attorney Harpootlian took the stand, he testified that he was familiar with the Order he obtained for Applicant to receive emergency mental health treatment. PCR Transcript p. 104. In response to whether he was aware that Applicant was suffering from a mental illness at the time of his representation he responded:

Yes. He had been under the treatment prior to this incident by Dr. Phil Steude, who is a psychiatrist here in town. And Dr. Steude, we contacted Dr. Steude about, you know, trying to figure out if there was some mental defense.

Steude indicated that Dewain had been diagnosed bipolar and was on medication at the time of the incident, or had been prescribed medication.

And that alcohol and that medication did not mix very well, that it made the person – affected their conduct, mental thoughts.

And, of course, the testimony was clear that he had been playing golf that day with Chris Isgett and they had been drinking and then he – apparently he had some drinks at the different establishments he had gone to. So it was clear, he was drinking alcohol with that medication, and that could provide some explanation for his conduct, which would be voluntary intoxication, which is not a defense.

So we actually attempted to show that his conduct was more consistent with him being given a, in the vernacular, Mickey, somebody had put something in his drink. We had an expert testifying about that. Apparently that didn't go very far.

PCR Transcript p. 104, ln. 18 – 105, ln. 17.

Attorney Harpootlian acknowledged that he assisted Applicant with obtaining disability coverage due to cognitive impairment and inability to operate his law practice, probably had Dr. Haxton's report and was on notice of Applicant's cognitive impairment. PCR Transcript pp. 106, 121, 171-2. He explained that he was relying upon Dr. Steude to review it and give him an opinion, which he recalled as: "Bipolar was all he ever talked about." PCR Transcript p. 106, lns. 11-17. On cross-examination, he stated: "I now know that the information I received from Dr. Steude was not complete or accurate." PCR Transcript p. 164, lns. 20-22. After being asked about Dr. Steude's expert qualifications, he responded that he did not "know what he is qualified in." PCR p. 169, ln. 20 - 170, ln. 1.

He confirmed his familiarity with and utilization of Dr. Maddox as an expert. When asked why he did not utilize her services, he again responded that deferred to Dr. Steude. PCR Transcript p. 107. He explained:

If somebody had – I apologize for interrupting – if somebody had explained to me the relevance of that – you say dementia. I mean, I have talked to him. I know that Mr. Herring has been diagnosed with dementia

right now. I talked to him this morning. He was conversant with me. I talked to Donna outside.

I said, What is going on here? Because my concept of dementia is different than apparently what it really is.

And she indicated, He is conversant. That doesn't mean he doesn't have dementia.

So if somebody would have explained to me prior to this trial – and Dr. Steude would have been the one to do that – explained to me that dementia affects him in this way, which would have perhaps explained – I mean, that may have been relevant on a GBMI or if you could get that in to a jury it might have allowed them to conclude it was not murder, it was not Mouzon murder, it might have been voluntary or perhaps an involuntary.

PCR Transcript p. 108, ln. 17-109, ln. 12.

Referring to his involvement in the PCR stemming from State v. Santiago, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006), he admitted that even if the testimony of Dr. Maddox regarding dementia was not admissible in the form of a defense, he would have utilized it in plea negotiations. PCR Transcript p. 111. When further asked about Santiago, he said he would have utilized Dr. Maddox at the Jackson v. Denno hearing and in front of the jury to address the voluntariness of Applicant's statement. He further affirmed that he would have proffered her testimony, if deemed inadmissible. PCR Transcript pp. 112-13. When asked why he did not get an expert to aid in his the argument he made on the voluntariness of Applicant's statement, he responded that he did not think about it. PCR Transcript p. 114.

Turning to the testimony of Applicant at trial, Attorney Harpootlian explained extensive preparation was undertaken with Applicant prior to trial. PCR Transcript p. 115-116. He described Applicant's testimony as follows: "Horrible. Awful." – "Bizarre." – "Train wreck." He ranked it as, "the worst," testimony he had ever seen. PCR

Transcript p. 116-17. In response to whether he would have approached the case differently if he would have been advised by Dr. Maddox that Applicant should not take the stand, he said he would have “absolutely” approached the case differently. PCR Transcript. p. 118. When asked how his approach would have differed, he referenced that diminished capacity is not a recognized defense, so he would have to get in in “through the back door.” PCR Transcript p. 119, lns. 8-13. He explained that he would have had to gotten it in via mitigation, specifically, to argue against the Mouzon charge. PCR Transcript pp. 119, 121-2.

Turning to the testimony of Dr. Garvin, Attorney Harpootlian agreed that Dr. Garvin was “absolutely” allowed to be called in reply as a result of the defense calling Dr. Holbrook to testify about involuntary intoxication. PCR Transcript p. 127. When asked about his prior assertion that he did not want to divert away from the involuntary intoxication defense by going into Applicant’s medications, he acknowledged that he did in fact ask Dr. Garvin about Applicant’s medications being used to treat anxiety and depression. PCR Transcript pp. 126-7. He could not think of a reason he did not object to Dr. Garvin’s testimony about interpreting Applicant’s actions and he admitted that he should have objected and requested a curative instruction. PCR Transcript p. 125.

When asked about the Solicitor’s description of the defense as the shotgun effect and asked about the defense strategy, Attorney Harpootlian responded:

Well, I wouldn’t describe it that way. I would describe it as there was a variety of different considerations that the jury should go through. Again, this is a reasonable doubt defense, not that he didn’t do it. There are defenses where he didn’t do it, he wasn’t the guy that pulled the trigger, he wasn’t the guy that drove by in the car, he wasn’t he guy that broke into the house. That is not this case.

This case is, he is the guy that shot, but he didn't intend to kill anybody. It was reckless, not malice under Mouzon, but simply reckless under involuntary manslaughter.

And so there are a number of ways to get to that. And so we tried to develop each of them, whether it was involuntary intoxication, you know, fumbling with the gun, shooting at the building, whatever.

PCR Transcript p. 147, lns. 2-19.

On cross-examination, he further explained the defense, as follows:

Well, that, you know, the he shot the guy, but that it wasn't malicious. It wasn't Mouzon malice, darkness of heart, absence of social conscious shooting. It was an involuntary manslaughter. A reckless disregard for the lives of others. And that would be involuntary manslaughter, which is a much lesser sentence, parolable, all those sorts of things.

PCR Transcript p. 158, lns. 6-13.

It is apparent from trial counsel's testimony that he attempted to shift the blame to Dr. Steude for his failure to properly address Applicant's mental health prior to and during trial, but this Court is not persuaded by trial counsel's blame shift, specifically in light of the trial transcript and his apparent failure to discuss the matter with Applicant. Trial counsel's testimony does not establish a reasonable trial strategy to weigh against his failure to address Applicant's known cognitive impairment. See Reeves v. State, 415 S.C. 366, 782 S.E.2 747 (Ct. App. 2015)(Reversing the denial of post conviction relief reasoning that trial counsel was deficient for failing to discuss with Reeves hiring a medical expert to more thoroughly challenge the State's medical evidence presented at trial and finding that trial counsel did not present a legitimate trial strategy for failing to consult with an expert before trial or call an expert at trial.)

While on the stand, Attorney Harpootlian conceded that he utilized the findings of Dr. Haxton from 2006 when he assisted Applicant in obtaining disability coverage for

cognitive impairment prior to trial, yet he failed to establish that he discussed those findings with Applicant or any duly qualified expert in the area of mental health.² He also repeatedly agreed that he would have and/or should have utilized the findings of Dr. Maddox and Dr. Brawley, which encompass the findings of Dr. Haxton. He acknowledged his involvement in the Santiago case where Dr. Maddox was the expert utilized in the area mental health, and he conceded that he should have utilized her to argue against the voluntariness of Applicant's statement pre-trial and in front of the jury as was addressed in Santiago, 370 S.C. 153, 634 S.E.2d 23. See also State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974) (Holding the lack of mental capacity is an important factor to be considered, amongst other factors, in determining if a confessions is voluntary, and finding that the trial court erred in not allowing a psychiatrist to testify before the jury about mental capacity at the time of confession.). As addressed in detail above, he further agreed that both experts and their findings regarding Applicant's mental health could have been used in plea negotiations, formulation of a defense, determination of whether Applicant should testify, argument against the Mouzon charge, mitigation and in other ways to back door a diminished capacity defense.³

Additionally, this Court finds that trial counsel was deficient in opening the door to the reply testimony of Dr. Garvin and failing to object to her testimony that exceeded

² It must be noted that even though trial counsel testified about Dr. Steude and his treatment of Applicant, the State did not call Dr. Steude to testify regarding his diagnosis of Applicant and/or what was discussed with counsel prior to trial.

³ This Court finds the instant case analogous to Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001), where the South Carolina Supreme Court held that the trial court did not err in refusing to charge diminished capacity because it is not recognized in South Carolina and the instructions, taken as a whole, properly presented the elements of malice. See State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956). Yet, in Gill, Dr. Harold Morgan, a forensic psychiatrist, was allowed to testify in front of the jury regarding Gill's intellectual capacity (I.Q.) and personality disorder and opine regarding his inability to handle problems or think of the consequences of his behavior. Id. at 220, 552 S.E.2d at 32. Here, trial counsel could have utilized the testimony of the mental health experts as was done in Gill.

her areas of expertise as explained by Dr. Maddox and detailed above. See State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) After Dr. Holbrook was called by the defense at trial, the State argued that his testimony regarding involuntary intoxication actually encompassed the issues of criminal capacity and sanity. The State made a lengthy argument based primarily upon State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007). Trial Transcript pp. 1871-1883. At the conclusion of the defense argument, the trial court found that Dr. Holbrook's testimony would not be struck, but the State would be allowed to provide rebuttal testimony. Trial Transcript pp. 1184-6.

When Dr. Garvin was called in rebuttal, she was qualified in the areas of chemical and forensic toxicology and drug chemistry. Trial Transcript p. 2101. She opined that within a reasonable degree of medical certainty Applicant was not given a substance involuntarily that caused his intoxication. Trial Transcript p. 2106. Without objection, she testified that Applicant's actions were purposeful, provided reasons for his behavior, and distinguished his actions from amnesia. Trial Transcript pp. 2111-12, 2162. On cross-examination and redirect, she also distinguished Applicant's behavior from the case studies offered by the defense since the people in the case studies had underlying psychiatric disorders. Trial Transcript pp. 2162, 2164-5, 2168, 2183. Counsel did ask her about Applicant's medications from his hospitalization, and she acknowledged that the medications were used to treat anxiety and depression. Trial Transcript p. 2166.

Once again, counsel's prejudicial ineffective assistance in the area of Applicant's mental health is clearly demonstrated by the testimony of Dr. Garvin at trial. As a result of the State's partially winning argument that the defense offered mental health testimony through Dr. Holbrook, Dr. Garvin was called as the lone witness to provide testimony on

mental health, which is an area that exceeds her expertise as Dr. Maddox explained and is detailed above. Clearly, trial counsel opened the door to Dr. Garvin's testimony and then admittedly failed to object or ask for a curative instruction.

After reviewing the record and considering the testimony and evidence offered at the evidentiary hearing, this Court finds counsel was deficient for failing to properly address Applicant's mental health prior to and during trial in the specific areas herein addressed. The failure to properly address Applicant's mental health is not reasonable or excusable when so many areas of the defense and trial were impacted.

This Court cannot justify counsel's reliance on Applicant's treating psychiatrist when no testimony or evidence has been submitted regarding the advice rendered by Dr. Steude beyond counsel's testimony. Furthermore, this Court is not convinced that all that was ever discussed with Dr. Steude was "bipolar" since counsel assisted Applicant in obtaining disability coverage for cognitive impairment prior to trial as a result of the testing conducted by Dr. Haxton under the direction of Dr. Steude.

This Court is also constrained from finding counsel's performance reasonable after reviewing the mental health testimony elicited by the defense from Dr. Garvin and contrasting such to the testimony offered by the mental health experts at the evidentiary hearing. In light of the testimony offered by Dr. Brawley and Dr. Maddox, this Court finds counsel's excuse that he relied upon Dr. Steude lacking in the face of the damage his failure to address Applicant's mental health caused prior to and during trial.

Applicant has presented evidence of prejudice through the testimony of the mental health experts called at the evidentiary hearing, testimony of Attorney Harpootlian, the exhibits, and the record. In Reeves v. State, 415 S.C. 366, 782 S.E.2d

747 (Ct. App. 2015) and McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), prejudice resulted from failure to refute the State's experts and failure to utilize an expert in the development of a defense, but here the deficiency and prejudice goes beyond that addressed in Reeves and McKnight. As Attorney Harpootlian conceded he would have approached the case completely differently if he had utilized and obtained the findings of Dr. Maddox and Dr. Brawley, which encompassed the findings of Dr. Haxton from 2006. This Court finds it to be clear that counsel's deficient performance directly affected the outcome of not only trial but of Applicant's case as a whole. As a result, this Court finds that Applicant has met his burden as to both prongs of the Strickland test, and a new trial must be granted.

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.

At trial, the defense called Lawton H. Yates, Jr., and he was qualified in the area of firearms and ballistics. Trial Transcript p. 1591, ln. 17. As was noted at the evidentiary hearing, he testified that no trajectory was done by law enforcement at the club scene. Trial Transcript p. 825. He further opined that traffic could have caused the reflection at issue in the video and that there was no evidence of a gunshot from the car or the video. Trial Transcript pp. 1693-5. He explained that he would expect to see a flash or fireball when a gun is shot. Trial Transcript p. 1636, ln. 14. He further explained with the four pound trigger pull resulting from the gun being cocked, it was likely that the gun could go off if Applicant was moving towards the glove compartment. Trial Transcript p. 1643, ln. 1.

At the evidentiary hearing, Applicant called R. Robert Tressel, Chief Criminal Investigator for the Cobb County District Attorney's Office in Marietta, Georgia. PCR Transcript p. 175. Mr. Tressel was qualified as an expert in the area of crime scene investigation and homicide investigation. PCR Transcript p. 180, ln. 3-9. He explained the items had had reviewed and that he had visited Richland County Courthouse to review evidence. PCR Transcript pp. 181-84. After providing an overview of the role crime scene investigation plays in a homicide investigation, he went into his specific opinions. PCR Transcript pp. 182-3. He explained that the crime scene investigation that was conducted was not consistent with "best practices approach." PCR Transcript p. 199.

First, he opined how the trajectory analysis conducted at the club scene was insufficient. PCR Transcript pp. 184-192. He referenced trial court exhibits, including pictures and a diagram, and explained what he could ascertain regarding the shot from the exhibits. PCR Transcript pp. 187-192. He further referenced the video and still photographs derived from the video. PCR Transcript pp. 192-196. He indicated his main take away from the video is it establishes Applicant could not see if anyone was behind the door based upon the direction the door swings. PCR Transcript p. 193, ln. 12 – p. 194, lns. 4-6. Regarding the still photos, he explained how he utilized the photos to ascertain that the "flash" referenced at trial was merely rectangular reflections coming off the sides of the vehicle. PCR Transcript pp. 195-96. In addressing the autopsy report, he opined that the bullet stayed intact until it struck the victim. PCR Transcript pp. 196-197. When asked about the trial expert's theory about a ricochet, he explained that he totally disagreed with it. PCR Transcript pp. 197-198. He explained that he agreed with the

State's argument that the ricochet theory was implausible. PCR Transcript p. 198, Ins. 15-22.

Further addressing the discharge of the weapon, Mr. Tressel acknowledged that the defense expert briefly touched on the possibility of an accidental discharge. PCR Transcript pp. 204-205. He explained that not only cocking but also uncocking the weapon could have caused an accidental discharge. PCR Transcript p. 206.

At the conclusion of his testimony, Mr. Tressell recapped the major contentions he held with the defense expert's trial testimony and evidence. PCR Transcript pp. 207-8. He testified that he would have been willing to assist defense counsel and testify at Applicant's trial if he had been contacted by defense counsel. PCR Transcript p. 207.

At trial, much time and effort were put forth by both sides arguing and addressing the issue of the "flash." Trial Transcript pp. 452, 457, 461-3, 469, 576-78, 581-3, 851, 943, 944-45, 949, 950, 2220, 2222, 2288, 2283. The appellate records also demonstrate that it became an accepted fact that the video evidenced a "flash." In sum, the flash supported the State's theory that Applicant was aiming at the club when the gun was fired, and the gunshot was not the result of an accidental discharge. This Court is persuaded by Mr. Tressel's review of the still video shots and explanation that the contentious flash may have simply been a recurring reflection and finds his opinion would have supported the defense theory of an accidental discharge. Additionally, he offered testimony regarding the potential accidental discharge while uncocking the gun, which further supports the defense theory of an accident.

In opening, the defense told the jury about the lesser included offense of involuntary manslaughter and then stated: "And then there's another, it's not a crime, but

accident, accident; that is, the unintentional. The dropping of a gun, it goes off and hits somebody, mishandling of a weapon.” Trial Transcript p. 391, lns. 17-14. Unfortunately for Applicant, the trial court declined the defense request for an accident charge, and the State argued in closing: “His Honor is not going to tell you, he will not tell you that you can use accident as a defense. Accident is not a defense in this case. You cannot find the defendant not guilty because of accident.” Trial Transcript pp. 2073-74, 2297, ln. 25 – 2298, ln. 3.

In review of the trial record, evidence and testimony offered at the evidentiary hearing, this Court is convinced that the testimony of Robert Tressel demonstrated that trial counsel was ineffective for failing to properly prepare and fully utilize a crime scene investigation expert prior to and during trial. Here, the utilization of the still photos and explanation offered by Mr. Tressel at the evidentiary hearing regarding the reflection went beyond Mr. Yates mere offering of an opinion about a reflection at trial.

Additionally, Mr. Yates failed to address the possibility of an accidental discharge while uncocking the weapon. It is abundantly clear, as is further discussed below, that the State hung their hat on the video and the theory that the shot was evidenced from the video thus putting the trajectory in a location where Applicant intentionally shot at the door causing the death of the victim. As a result, this Court finds that the testimony of Mr. Tressell, in conjunction with the testimony of the mental health experts, could have been utilized to support the defense theory of involuntary manslaughter and to obtain a charge on accident. Based upon a showing of deficient performance and prejudice, this Court finds that a new trial must be granted under Strickland.

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.

At the evidentiary hearing, Robert Tressel testified that he had raised a concern to PCR counsel regarding the testimony and admission of the NASA disc. PCR Transcript pp. 203-4. He explained when evidence is sent to an outside agency or expert, he would typically expect to see a chain of custody for transmittal of the evidence and reports from any reviewing agencies or experts, which he did not see in his review of Applicant's case. PCR Transcript pp. 201-3.

Peter Skidmore testified that he shared Mr. Tressel's concerns and worked to locate Brad Lawrence, named as the person utilized at NASA. PCR Transcript pp. 216-7. Mr. Skidmore testified that he located Brad Lawrence and confirmed that he worked for NASA. Unfortunately, Mr. Lawrence was unable to locate a file in connection with Applicant's case. PCR Transcript pp. 217-8.

While on the stand, Attorney Harpootlian explained that he did not object to the testimony or the introduction of the NASA video "because I thought that actually the video was helpful based upon Ron Yates' testimony." PCR Transcript p. 130, lns. 8-14. Attorney Harpootlian further explained how the video aided the defense. PCR Transcript pp. 134-35. This Court cannot fathom how Attorney Harpootlian's evidentiary hearing testimony can be reconciled against his extensive arguments and ultimate request for a mistrial due to the testimony stemming from the playing of the video at trial.

During closing argument, the State explained: "We sent it to Cape Canaveral. We tried to get it more clear. You can't. But you will see it back there. Thank goodness we have the video." Trial Transcript p. 2219, lns. 20-23. Referencing the video, the State

opined: "That's good evidence. That showed the shot." Trial Transcript p. 2220, Ins. 24-25. The State further argued: "That tape – those 39 seconds are why we are here today." Trial Transcript p. 2288, In. 4.

Nevertheless, this Court is not convinced that trial counsel was deficient for failing to object to the NASA disc since Chuck A. Earles testified that he personally took the disc to NASA and counsel contemporaneously objected when Mr. Earles testified regarding his trip to NASA. Trial Transcript pp. 1351-2. Not discounting the importance placed on the video by both parties, this Court finds that Applicant was not prejudiced by the admission of the NASA video as the defense argued that "a guy who works in a strip club" came to testify about the flash but NASA was absent because they saw no gun or flash.⁴ Trial Transcript p. 2283, Ins. 16-25. As a result, this Court cannot find deficiency or resulting prejudice, so this claim must fail under both prongs of Strickland.

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.

From the trial record, it appears that no one in the courtroom had a copy of Chief Justice Toal's order regarding the procurement of search warrants when it was referenced by Agent Lawrence on the stand. Trial Transcript pp. 261-64. Later, it was argued that the Order was not evidence, merely the testimony regarding it. Trial Transcript pp. 345-

⁴ Additionally, this Court is not convinced that the video was as integral as both parties contended at trial. Applicant's testimony at trial amounted to an admission to firing the weapon, the question was whether the shot was intentional and non-accidental. As is discussed above, the still photos developed from the video and addressed by Mr. Tressell were integral to the defense theory that the video does not display the shot but a mere reflection.

46. It is reflected that the evening was taken to research the issue, so it appears the defense was not aware of said Order prior to trial. Trial Transcript p. 344. As was introduced and discussed at the evidentiary hearing, the Order as introduced at trial was incomplete (missing a page). Trial Transcript pp. 363-4.

Based upon the record and testimony offered, this Court finds that counsel was not deficient for failing to be aware of the Order issued by Chief Justice Toal prior to trial or for failing to ensure that a complete copy of the Order was introduced at trial. As the record reflects, counsel made extensive argument regarding the validity of the search warrant and the Order at issue even though he was surprised by it at trial. PCR Transcript pp. 136-140. Counsel's argument preserved the issue that was later raised and denied on appeal. As a result, this Court finds that the record supports that counsel's performance did not fall below prevailing professional norms and no prejudice resulted from counsel's performance.

8. Trial counsel rendered ineffective assistance of counsel in the handling of Applicant's testimony and portrayal at trial.

This Court finds that the portion of this allegation dealing with Applicant's testimony has been properly addressed in conjunction with the allegation involving Applicant's mental health. As to Applicant's portrayal at trial, Attorney Harpootlian was asked about the comments he made in closing and if he wasted the opportunity to portray Applicant in a light more favorable to the jury. PCR Transcript p. 142, ln. 24 – p. 143, ln. 1. In response he stated: "You know, the jury had seen him. They had heard him. I mean, I don't know how you undo that." PCR Transcript p. 143, lns. 2-3. This Court finds the

real deficiency is found in the decision to have Applicant testify in light of his mental health condition, which has been addressed above.

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.

This Court finds that the majority of this allegation has been addressed and is encompassed in the above discussion and findings under the allegation involving Applicant's mental health. As far as Applicant's allegation that counsel failed to properly prepare Dr. Holbrook, this Court finds it difficult to deem counsel ineffective and identify resulting prejudice. While on the stand, Dr. Holbrook was confronted with statements he did not review prior to trial, but he was given time to review the statements and determined that his opinion did not change. Transcript p. 1951. Even though the State argued to the jury that Dr. Holbrook had not reviewed the complete file and his opinion may change, this Court finds the State's argument does not amount to deficiency on the part of counsel or resulting prejudice. Therefore, this portion of the claim does not pass the Strickland test.

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.

This Court finds that this allegation has been addressed above.

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.

While on the stand at the evidentiary hearing, Attorney Harpootlian was asked about each portion of the closing argument at issue, and he explained that in the context of the argument he did not see a reason to object. Trial Transcript pp. 2299, 2243, 2315-6, 2298. He further explained that he did not repeatedly object because you do not want to keep popping up making objections. PCR Transcript p. 148. He preferred to make objections that really counted and he was not sure that the Solicitor's comments caused any harm. PCR Transcript p. 148.

This Court has reviewed the transcript and listened to the testimony offered by trial counsel. As a result this Court finds that Applicant has failed to establish deficiency or prejudice under Strickland.

B. CONCLUSION

Based upon the foregoing, this Court orders that the Application for Post Conviction Relief is hereby granted. This Court further finds that no other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

IT IS THEREFORE ORDERED:

1. That Applicant has met his burden of proof as to his specific allegation of ineffective assistance of trial counsel as detailed above, but has failed to meet his burden of proof as to all other allegations of ineffective assistance of trial counsel as detailed above;
2. That the Application for Post Conviction Relief be granted and the Applicant's convictions be vacated and he be granted a new trial;
3. That Applicant be transferred from the custody of South Carolina Department of Corrections to the custody of Richland County pending the disposition of his criminal case, with normal bond proceedings.

AND IT IS SO ORDERED this ___ day of _____, 201__

Honorable Jocelyn Newman
Circuit Court Judge

_____, South Carolina

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.)

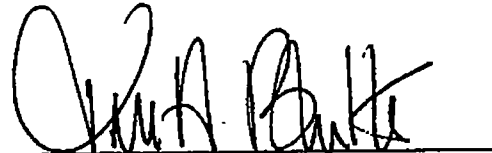
CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent.)

FILED
2019 MAY 20 PM 4:02
JEANNETTE W. McBRIDE
C.C.P. & G.S.

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed this Motion Pursuant to Rule 59, SCRCP, in the mail on this this 17th day of May 2019 to Lindsey McCallister of the Attorney General's Office, at:

Office of the Attorney General
ATT: Lindsey McCallister, Ast. AG
Post Office Box 11549
Columbia, SC 29211



Tricia A. Blanchette
Attorney for Applicant
PO Box 2147
Leesville, SC 29070

May 17 2019

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010CP4003783

H. DEWAIN HERRING (SCDC #321951)

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: NEWMAN, J.

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. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit); Rule 43(k), SCRCP (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCP; 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:

Applicant's Motion Pursuant to Rule 59(a) & (e), SCRCP (filed on May 20, 2019) is DENIED.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

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.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2757

Judge Code

January 3, 2020

Date

2020 JAN -7 AM 10:40
RICHLAND COUNTY
FILED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

AMENDED JUDGMENT IN A CIVIL CASE

CASE NO. 2010CP4003783

H. DEWAIN HERRING (SCDC #321951)

STATE OF SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: NEWMAN, J.

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

RICHLAND COUNTY
FILED
2020 FEB 14 PM 3:50
C.C.P. # 2010CP4003783

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:

Applicant's Motion Pursuant to Rule 59(a) & (e), SCRPC (filed on May 20, 2019) is DENIED without hearing and without formal written order.

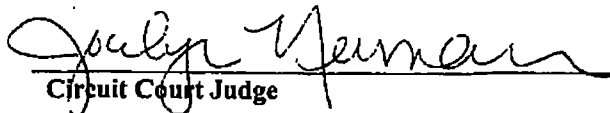
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E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2757
Judge Code

February 10, 2020
Date

