

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post-Conviction Relief

Michael G. Nettles, Circuit Court Judge

RECEIVED

Dec 22 2020

S.C. SUPREME COURT

Case No.: 2017-002269

Deonte Brown #361477, ... Petitioner,

vs.

State of South Carolina, ... Respondent.

APPENDIX

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STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
STATE VS.Deonte Steven Brown

AKA:

Race: BLACK Sex: M Age: 21DOB: SS#:Address: New Road ExtCity, State, Zip: Hollywood, SC 29449-6004DL#: SID#: SC02010079*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Murder / Attempted MurderINDICTMENT/CASE#: 2013GS1000535A/W#: 2012A1010100006Date of Offense: 7/15/2012S.C. Code §: 16-33-0029CDR Code #: 3410

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.Stephanie B.
Under, Stephanie B.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition:

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waiver Hearing ☐ Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(1) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)		\$ <u>3.90</u>
TOTAL		\$ <u>133.90</u>

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

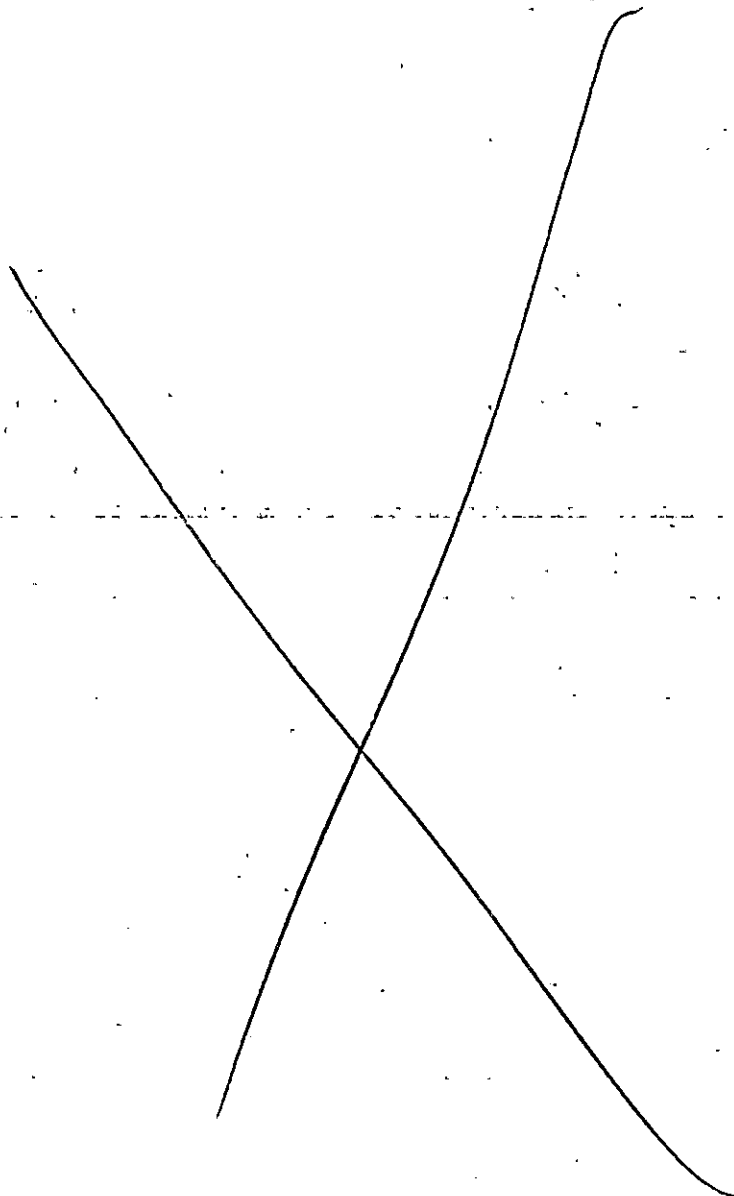
\$ _____ paid to Public Defender Fund.

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.Clerk of Court/ Deputy Clerk: C. J. HaffnerCourt Reporter: Stephanie B.

SCCA/217 (03/2011)

Presiding Judge: 213Judge Code: 9/19/14Sentence Date: 9/19/14



MHN20120705271

DOCKET NO. 2013GS1000535

WITNESSES

Charleston County Sheriff

The State of South Carolina

County of Charleston

AGENCY CASE NUMBER

2012011153B

COURT OF GENERAL SESSIONS

February Term 2013

ARREST WARRANT NUMBER

2012A1010100006

DATE OF ARREST

July 17, 2012

ACTION OF GRAND JURY

TRUE BILL

Darth Bittler

Foreperson of Grand Jury

Date:

FEB 04 2013

VERDICT

THE STATE

VS.

DEONTE STEVEN BROWN

DOB:

B/M

Indictment for

Attempted Murder

Foreperson of Petit Jury

Date:

INDICT

FILED

2/6/2013 2:22:01 PM
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

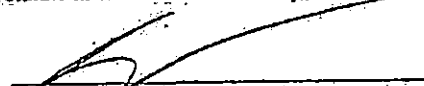
INDICTMENT

At a Court of General Sessions, convened on February 4, 2013 the Grand Jurors of Charleston County present upon their oath:

Attempted Murder

That in Charleston County, South Carolina, on or about July 15, 2012, the Defendant, DEONTE STEVEN BROWN, did, with intent to kill and malice aforethought, attempt to kill Quinton Allen. This is in violation of Section 16-3-29 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


MICHAEL O. NELSON
ASSISTANT SOLICITOR

ARREST WARRANT 2012-011153

2012A1010100006

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

THE STATE

against

Deonte Steven Brown

Address: New Road Exit

Hollywood, SC 29449-6004

Phone: _____ SSN: _____

Sex: M Race: B Height: 5' 8" Weight: 130

DL State: _____ DL #: _____

DOB: _____ Agency ORI #: SC0100000

Prosecuting Agency: Charleston County Sheriff

Prosecuting Officer: C. Smith - 0252

Offense: Murder / Attempted Murder

Offense Code: 3410

Code/Ordinance Sec: 16-03-0029

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Deonte Steven Brown
on 7-16-2012

Signature of Judge

RETURN WARRANT TO:

General Sessions
Charleston County Judicial Center
100 Broad Street, Suite 106
Charleston, SC 29401

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

AFFIDAVIT

ORIGINAL

Form Approved by
U.S. Department of Justice
April 23, 2003
80CA 314Personally appeared before me the affiant C. Smith whobeing duly sworn deposes and says that defendant Deonte Steven Browndid within this county and state on or about 7/15/2012State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Charleston)

in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

Affiant's Address 3505 Pinehaven DriveCharleston, SC 29405-Affiant's Telephone (843)202-1700

ARREST WARRANT

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

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 7/15/2012defendant Deonte Steven Brown

did violate the criminal laws of the State of South Carolina (or ordinance of

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

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

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

Sworn to and subscribed before me

on 7/16/2012

Signature of Issuing Judge

David Wilson Collier

Judge Code: 5535

Judge's Address 4045 Bridge View DriveCharleston, SC 29419Judge's Telephone (843)202-6610Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

000554

0556

BAIL set by

WITNESSES

Judge Lombardi
on 7-11-12
Type and Amount: NO BOND
Name of Surety: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____
Decision: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

DISPOSITION before

Judge _____
on _____
by _____
(indicate jury trial, bench trial, plea, not, guilty, etc.)

Name: _____
Address: _____
Telephone: _____

Disposition: _____
Sentence: _____

Name: _____
Address: _____
Telephone: _____

JURORS

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

CODEFENDANTS



2012 JUL 23 AM 9:58
JULIE J ARMSTRONG
CLERK OF COURT

FILED

Charleston County Sheriff's Office
Criminal Investigations Division
Phone (843) 554-2475



3505 Pinehaven Drive
Charleston Heights, SC 29405
FAX (843) 554-9744

STATE SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

OCA# 2012-011153-B

Personally appeared before me, a magistrate of this County, one Detective C. Smith, who, first being duly sworn, deposes and says that:

DEONTE STEVEN BROWN

did within this County and State on or about the 15 of July 2012, violate the criminal laws of the State of South Carolina in the following particulars:

**ATTEMPTED MURDER
16-3-29**

The affiant states that there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on July 15, 2012, while at 3565 Savannah Highway, Johns Island, in the County and State aforesaid, the above named defendant, **DEONTE STEVEN BROWN**, did commit offense of violation section 16-3-29 of the South Carolina Code of Laws, 1976 as amended, **ATTEMPTED MURDER**, in that he did willfully and unlawfully, shoot the victim causing severe physical injury.

That on July 15, 2012, at approximately 0415 hours members of the Charleston County Sheriff's Office responded to the Waffle House at 3565 Savannah Highway in reference to a shooting. Upon arrival Deputies found the victim, Quinton Allen, with a gunshot wound to his upper torso area. The victim was transported to the hospital to be treated for his injuries. Allen reported that the defendant came in to the incident location and asked him for a cigarette. Allen stated that he told the defendant that he didn't have one and the defendant then become angry and began cursing at him. The victim stated that the defendant and several other unknown black males then circled around him when one of the unknown black males threw a red cup at his face. The victim stated that the defendant then punched him in the face as he was attempting to leave the incident location to avoid an altercation. Allen reported that as he exited the front door he saw the defendant lift his shirt and pull a handgun from his waist band and fire a single shot at him causing physical injury. The victim stated that the defendant was a black male wearing a red shirt and blue jeans that is approximately 5'08" tall with a thin build and advised that prior to this incident had never seen this individual before.

Through the investigation and an independent witness a six person photographic line-up was comprised and shown to the victim. The victim positively identified Deonte Steven Brown as the suspect that shot him.

The aforesaid information was obtained through the verbal statement of the victim, Quinton Allen and the investigation of Detective Smith of the Charleston County Sheriff's Office and they are witnesses to prove the same against the form and dignity of the State.

Sworn to and Subscribed before me
This 16 day of July 2012

Signature of Judge

C. Smith
Detective C. Smith
Charleston County Sheriff's Office
3505 Pinehaven Drive
North Charleston, SC 29405
843-554-2475

ARREST WARRANT

2012A1010100011

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

THE STATE
opponent

Deonte Steven Brown

Address: New Road Ext

Hollywood, SC 29449-6004

Phone: (843)

SSN:

Sex: M Race: B Height: 5'8" Weight: 140

Dl. State: SC DOB:

DOB: Agency ORI #: SC0100000

Prosecuting Agency: Charleston County Sheriff

Prosecuting Officer: C. Smith - 0252

Offense: Weapons / Poss. weapon during violent crime, if
not also sentenced to life without parole or death

Offense Code: 0549

Code/Ordinance Sec: 16-23-0490

The warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of accuser

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Deonte S. Brown
on 7-19-12

Signature of Court/Clerk/Prosecutor/Officer

RETURN WARRANT TO:

General Sessions
Charleston County Judicial Center
100 Broad Street, Suite 106
Charleston, SC 29401

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

AFFIDAVIT

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2000
SCCA 919

Personally appeared before me the plaintiff C. Smith

being duly sworn deposes and says that defendant Deonte Steven Brown

did within this county and state on or about 7/15/2012

violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

Charleston

in the following particulars:

DESCRIPTION OF OFFENSE: Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

Affiant's Address 3505 Pinchaven Drive

Charleston, SC 29405

Affiant's Telephone (843)202-1700

ARREST WARRANT

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

It appearing from the above affidavit that there are reasonable grounds to believe that
on or about 7/15/2012 defendant Deonte Steven Brown

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Charleston

as set forth below.

DESCRIPTION OF OFFENSE: Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable.
Sworn to and subscribed before me

on 7/19/2012

Judge's Address 4045 Bridge View Drive

Charleston, SC 29419

Judge's Telephone (843)202-6610

Judge Code: 5535

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

BAIL set by

Judge Bliger
 on 7/19/12
 Type and Amount: \$50.00
 Name of Surety: _____

WITNESSES



PRELIMINARY HEARING held by

Judge _____
 on _____
 Defendant Attorney: _____
 Decision: _____

Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____

DISPOSITION before

Judge _____
 on _____
 by _____
 (no trial jury trial, bench trial, plea, not, pros., etc.)
 Disposition: _____
 Sentence: _____

Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____
 Name: _____
 Address: _____
 Telephone: _____

JURORS

CODEFENDANTS

FILED
 2012 JUL 25 AM 9:22
 JULIE J. ARMSTRONG
 CLERK OF COURT

STATE SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

OCA# 2012-011153-B

Personally appeared before me, a magistrate of this County, one Detective C. Smith, who, first being duly sworn, deposes and says that

DEONTE STEVEN BROWN

did within this County and State on 15th day of July 2012, violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE
POSSESSION OF A FIREARM DURING COMMISSION OF A VIOLENT CRIME
16-23-490

The affiant states that there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on July 15, 2012, while at 3565 Savannah Highway, Johns Island, in the County and State aforesaid, the above named defendant, **DEONTE STEVEN BROWN**, did commit offense of violation section 16-23-490 of the South Carolina Code of Laws, 1976 as amended, **POSSESSION OF A FIREARM DURING COMMISSION OF A VIOLENT CRIME**, in that he did willfully, unlawfully, and feloniously, have in his possession a firearm during the commission of an Attempted Murder.

That on July 15, 2012, at approximately 0415 hours members of the Charleston County Sheriff's Office responded to the Waffle House at 3565 Savannah Highway in reference to a shooting. Upon arrival Deputies found the victim, Quinton Allen, with a gunshot wound to his upper torso area. The victim was transported to the hospital to be treated for his injuries. Allen reported that the defendant came in to the incident location and asked him for a cigarette. Allen stated that he told the defendant that he didn't have one and the defendant then become angry and began cursing at him. The victim stated that the defendant and several other unknown black males then circled around him when one of the unknown black males threw a red cup at his face. The victim stated that the defendant then punched him in the face as he was attempting to leave the incident location to avoid an altercation. Allen reported that as he exited the front door he saw the defendant lift his shirt and pull a handgun from his waist band and fire a single shot at him causing physical injury. The victim stated that the defendant was a black male wearing a red shirt and blue jeans that is approximately 5'08" tall with a thin build and advised that prior to this incident had never seen this individual before.

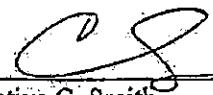
Through the investigation and an independent witness a six person photographic line-up was comprised and shown to the victim. The victim positively identified Deonte Steven Brown as the suspect that shot him.

The above information was revealed through the investigation of Detective C. Smith, of the Charleston County Sheriff's Office, and that she along with the victim are witnesses to prove the same against the form of the statute in such case made and provided for against the peace and dignity of the state.

Sworn to and Subscribed before me

this 15 day of July 2012

Signature of Judge


Detective C. Smith
Charleston County Sheriff's Office
3505 Pinehaven Drive
Charleston Heights, SC 29405
843-554-2475

STATE OF SOUTH CAROLINA

COUNTY OF Charleston
 STATE VS.
Deonte Steven Brown

AKA:
 Race: BLACK Sex: M Age: 21
 DOB: SS#:
 Address: New Road Ext
 City, State, Zip: Hollywood, SC 29449-6004
 DL#: SID#: SC02010079

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
 TO: Possession of a Firearm or Knife During Commission of a Violent Crime

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS1000536
 A/W#: 2012A1010100011
 Date of Offense: 7/15/2012
 S.C. Code §: 16-23-0490
 CDR Code #: 0549

SENTENCE SHEET

in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

Stephanie B. Linder 721516
Linder, Stephanie B. SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*, the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:	\$
§ 14-1-206 (Assessments 107.5 %)	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (Public Def/Prob)	\$500
§ 14-1-212 (Law Enforce. Funding)	\$25
§ 14-1-213 (Drug Court Surcharge)	\$150
§ 50-21-114 (BUI Breath Test Fee)	\$50
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea
Proviso 90.5 (SCCA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$ <u>133.90</u>

PTUP

_____ days/hours Public Service Employment.

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2134

Sentence Date: 9/15/14

000560

0562

MHN20120705271

DOCKET NO. 2013GSI000536

WITNESSES

Charleston County Sheriff

The State of South Carolina

County of Charleston

AGENCY CASE NUMBER

2012011153B

COURT OF GENERAL SESSIONS

February Term 2013

ARREST WARRANT NUMBER

2012A1010100011

DATE OF ARREST

July 20, 2012

THE STATE

vs.

DEONTE STEVEN BROWN

DOB:

B/M.

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

FEB 04 2013

Indictment for

Possession of a Firearm During the
Commission of a Violent Crime

VERDICT

Guilty

September 19, 2014

Foreperson of Petit Jury

Date:

INDICT

Charles Patrick

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

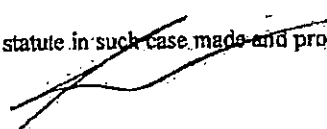
INDICTMENT

At a Court of General Sessions, convened on February 4, 2013 the Grand Jurors of Charleston County present upon their oath:

Possession of a Firearm During the Commission of a Violent Crime

That in Charleston County, South Carolina, on or about July 15, 2012, the Defendant, DEONTE STEVEN BROWN, did possess a handgun or visibly display what appeared to be a handgun during the commission, or attempted commission, of Attempted Murder, a violent crime. This is in violation of 16-23-490 of the South Carolina Code of Laws, (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


MICHAEL O. NELSON
ASSISTANT SOLICITOR

000562

0564

ARREST WARRANT

2012A1010100025

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

THE STATE
against

Deonte Steven Brown

Address: New Road Ext

Hollywood, SC 29449-6004

Phone: (843) 202-1700

SSN:

Sex: M Race: B Height: 5' 8 Weight: 140

DL State: SC DL #:

DOB: Agency Use #: SC0100000

Prosecuting Agency: Charleston County Sheriff

Prosecuting Officer: C. Smith - 0252

Offense: Murder / Murder

Offense Code: 0116

Code/Ordinance Sec: 16-03-0010, 0020

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofis to be arrested and brought before me to be
dealt with according to the law.

Signature of Judge

Date: 8-16-12

RETURN

A copy of this arrest warrant was delivered to

defendant Deonte S. Brown

on 8-16-12

Signature of Court/Clerk/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
Charleston County Judicial Center
100 Broad Street, Suite 106
Charleston, SC 29401

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

AFFIDAVIT

ORIGINAL

Form Approved by
U.S. Attorney General
April 21, 2003
SC20A-911

Personally appeared before me the affiant

C. Smith

being duly sworn deposes and says that defendant Deonte Steven Brown

did within this county and state on or about 7/15/2012

violate the criminal laws of the

State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of

Charleston

in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Murder

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

SEE ATTACHED AFFIDAVIT

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Charleston

Affiant's Address 3505 Pinchaven Drive

Charleston, SC 29405

Affiant's Telephone (843) 202-1700

ARREST WARRANT

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

It appearing from the above affidavit that there are reasonable grounds to believe, that

on or about 7/15/2012 defendant Deonte Steven Brown

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Charleston

) is set forth below:

DESCRIPTION OF OFFENSE: Murder / Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before the court to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable.

Sworn to and subscribed before me

on 8/16/2012

Signature of Judge

David Wilson, Clerk

Judge Code: 5555

Judge's Address 4045 Bridge View Drive

Charleston, SC 29419

Judge's Telephone (843) 202-6610

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

BAIL set by

WITNESSES

Judge J.
 on 17 August 2012
 Type and Amount: No Bail
 Name of Surety: No Bail

Name: _____
 Address: _____
 Telephone: _____



PRELIMINARY HEARING held by

Name: _____
 Address: _____
 Telephone: _____

Judge _____
 on _____

Name: _____
 Address: _____
 Telephone: _____

Defendant Attorney: _____

Decision: _____

Name: _____
 Address: _____
 Telephone: _____

DISPOSITION before

Judge _____

Name: _____
 Address: _____
 Telephone: _____

on _____

by _____
 (indicate jury trial, bench trial, plea, not, pros., etc.)

Name: _____
 Address: _____
 Telephone: _____

Disposition: _____

Sentence: _____

JURORS

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

CODEPENDANTS

2012 AUG 20 PM 12:10
 JULIE J. ARMSTRONG
 CLERK OF COURT

FILED

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

OCA # 2012-011153

Personally appeared before me, a magistrate of this County, one Detective C. Smith, who, first being duly sworn, deposes and says that

DEONTE STEVEN BROWN

did within this County and State on or about the 15th day of July, 2012, violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE

MURDER

16-3-10

The affiant states that there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on July 15, 2012, while at the Waffle House located at 3565 Savannah Highway, Johns Island, in the County and State aforesaid, the above named defendant, DEONTE STEVEN BROWN, did commit the offense of MURDER as defined in South Carolina Code of Laws § 16-3-10, in that he did willfully and unlawfully, shoot and kill the victim Dontaye Reed with malice and forethought and deprived indifference.

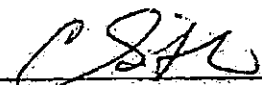
That on July 15, 2012, at approximately 0415 hours, members of the Charleston County Sheriff's Office responded to the incident location in reference to a shooting. Upon arrival Deputies found a victim, Quinton Allen, with a gunshot wound to his upper torso area. Allen was transported to the hospital to be treated for his injuries. A second victim, Dontaye Reed, was located in the parking lot of the incident location also with a gunshot wound to his lower back. Reed was transported to the hospital where he was pronounced deceased upon his arrival. Allen gave a statement to Detective C. Smith, wherein he reported that the above named defendant came in to the incident location and asked him for a cigarette. Allen reported that he did not have one and an argument ensued. The defendant exited the Waffle House and returned a short time later and became more aggressive toward Allen. The defendant then threw a red cup filled with an unknown liquid in the face of Allen. Allen then attempted to leave and was then surrounded by a large crowd of the defendant's associates. As Allen is exited through the vestibule of the business he then sees the defendant pull a handgun from under his red shirt and fire a single shot causing him physical injury. Allen was able to identify the defendant from a photographic lineup as being the individual that shot him.

On this same date Investigator E. Meyer collected one projectile from the floor of the vestibule at the incident location that investigators believe was the projectile that struck victim Allen. One projectile was also collected from the body of the deceased during autopsy. Both projectiles were submitted to the South Carolina Law Enforcement Division (SLED) for comparison. On July 31, 2012, I received a Forensic Lab Report from SLED confirming that the projectile that was recovered from the vestibule of the incident location and from the deceased body were fired through the same firearm barrel. Through statements provided by victim Allen and an independent witness the defendant was the only individual identified with a handgun during the time of the incident.

This information is known through the statement of the witness and the investigation of Detective C. Smith of the Charleston County Sheriff's Office, and they are all witnesses to prove the same against the form and dignity of the State.

Sworn to and Subscribed before me
This 14 day of August 2012

Signature of Judge


Detective C. Smith
Charleston County Sheriff's Office
3505 Pinchaven Drive
North Charleston, SC 29405
843-554-2475

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Charleston
STATE VS.Deonte Steven Brown

AKA:

Race: BLACK Sex: M Age: 21DOB: SS#:Address: New Road ExtCity, State, Zip: Hollywood, SC 29449-6004DL#: SID#: SC02010079*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: MurderINDICTMENT/CASE#: 2013GS1000537A/W#: 2012A1010100025Date of Offense: 7/15/2012S.C. Code §: 16-03-0010, 0020CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Stephanie B. Linder

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 50 days/months/years ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$ plus costs and assessments as applicable*, the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code: §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDEPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)	\$	\$ <u>3.90</u>
TOTAL	\$	\$ <u>133.90</u>

Clerk of Court/ Deputy Clerk Court Reporter:

SCCA/217 (03/2011)

PTUP

 days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning \$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.Presiding Judge Judge Code: 2134Sentence Date: 9/15/14

00056600

0568

MHN20120705271

DOCKET NO. 2013GS1000537

WITNESSES

The State of South Carolina

Charleston County Sheriff

County of Charleston

AGENCY CASE NUMBER

2012011153B

COURT OF GENERAL SESSIONS

February Term 2013

ARREST WARRANT NUMBER

2012A1010100025

THE STATE

DATE OF ARREST

VS.

August 17, 2012

ACTION OF GRAND JURY

DEONTE STEVEN BROWN
DOB:

B/M

TRUE BILL

South State

Foreperson of Grand Jury
Date:

FEB 04 2013

Indictment for

Murder

VERDICT

Guilty

September 19, 2014

Foreperson of Petit Jury

Date:

INDICT

Charles Patrick

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

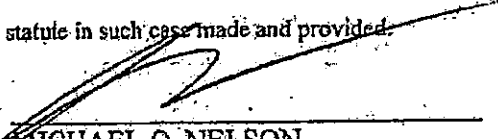
INDICTMENT

At a Court of General Sessions, convened on February 4, 2013 the Grand Jurors of Charleston County present upon their oath:

Murder

That in Charleston County on or about July 15, 2012, with malice aforethought, DEONTE STEVEN BROWN did kill and murder Dontaye Reed by means of shooting him, and that Dontaye Reed did die in Charleston County as a proximate result thereof on July 15, 2012, in violation of Section 16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


MICHAEL O. NELSON
ASSISTANT SOLICITOR

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County of Charleston

0571

IN THE COURT OF COMMON PLEAS

000569

Deonte Brown #361477

Full name and prison number (if any) of Applicant

v.

State of South Carolina

2015-CP-10-003935

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
2015 JUL 15 PM 4:53
JULIE J. ARMSTRONG
CLERK OF COURT

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional ~~Institution~~ Institution
2. Name and location of Court which imposed sentence Charleston County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) Derrick Sattell Brown, Jr
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2012A-101010006

000570

(a) September 19, 2014 - murder 50 yrs.

(b) Attempted murder - 30 yrs.

(c) Possession of weapon - 5 yrs.

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty yes

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

NO

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. N/A

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. N/A

ii. _____

iii. _____

(c) the date of each such result:

i. N/A

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. N/A

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) My attorney never filed the notice of appeal after I got convicted

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of Counsel
- (b) Actual Conflict of Interest
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) _____
- (b) _____
- (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____

(c) the disposition hereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

ND

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

0575

000573

- (a) N/A
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

i. Jim Smiley Law Firm, 178 King St. Charleston S.C
29401 #843-744-6300

ii. _____

iii. _____

- (b) the proceedings at which each such attorney represented you:

i. Trial

ii. _____

iii. _____

20. Are you now under sentence from any other court that you have not challenged?

NO

Revised 3/2003

STATE OF SOUTH CAROLINA

County of Charleston

VERIFICATION

I, Deonte Brown #361477, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Deonte Brown

SWORN to and subscribed before me this 13th day of July, 2015.

Ant J Driggers (L.S.)
Notary Public

My Commission Expires: 11-05-2019

A. Ineffective Assistance of Counsel

I'm raising the issue of Ineffective Assistance of Counsel on my attorney Jim Smiley do to the fact that he never did investigate my case to the best of his ability. I sat in the County Jail 27 month's and he never sent any investigators out to talk to the witness or send the video off to SLED to get enhance. He let the State investigate the whole case since the preliminary hearing. At the preliminary hearing the head detective who was on the case swore under oath that he could identify the shooter to this case. The detective stated that the probable cause for charging me with this crime was that they could identify me shooting on camera. Later at trial the SLED agent who enhanced the video testify and said that he was unable to identify the shooter. ON September 15, 2014 I started trial before the honorable Judge Roger Young and my attorney never had a pre-trial hearing for my case. After I got convicted my lawyer did not file for the notice of appeal so my case's are not on file with the appellate court and the courts of appeal. I don't have no copies of my sentencing sheet, indictment or no other paper work attaining to my case.

B. Actual Conflict of Interest

I'm raising the issue of Conflict of Interest in my case due to the fact that detective Lawrence who was investigating the case was in a sexual relationship with my co-defendant mother who was a possible suspect under investigation for this crime. Detective Lawrence later got fired from the Sheriff's office for the same issue with another murder case that my co-defendant got charged with 30 days after my case. He was also incarcerated but the charges later got dismissed.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Deonte Brown, #361477,

2015-CP-10-3935

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

Respondent, making its Return to the application for post-conviction relief (PCR) filed July 15, 2015, would respectfully show this Court:

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the February 2013 term of the Charleston County Grand Jury for one (1) count of Attempted Murder, Possession of a Firearm During the Commission of a Violent Crime and Murder (2013-GS-10-00535, 00536, 00537). James W. Smiley, Esquire, represented him. The Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Roger M. Young, Sr., sentenced Applicant to incarceration for fifty (50) years for Murder, five (5) years for Possession of a Firearm During the Commission of a Violent Crime and thirty (30) years for Attempted Murder, each sentence to be served concurrently. Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina

Department of Corrections, the application, and the trial transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. "He never did investigate my case to the best of his ability;"
 - b. "My attorney never had a pre-trial hearing for my case;"
 - c. "My lawyer did not file for the notice of appeal;"
2. "Actual Conflict of Interest:"
 - a. "... Detective Lawrence who was investigating the case was in a sexual relationship with my co-defendant(sic) mother who was a possible suspect under investigation of this crime;"

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

Respondent submits that Applicant's allegation of Ineffective Assistance of Counsel is without merit. In a post-conviction relief action, Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea 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 professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty-plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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

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

IV.

Respondent further interprets Applicant's allegations as due process violations. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that an Applicant must "...specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a *prima facie* showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on Applicant's allegations.

[SIGNATURE BLOCK ON NEXT PAGE]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

February 18, 2016.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

DEONTE BROWN, #361477)

Applicant)

vs)

STATE OF SOUTH CAROLINA)

Respondent)

IN THE COURT OF COMMON PLEAS

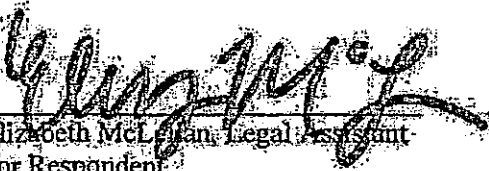
2015-GP-10-3935

AFFIDAVIT OF SERVICE BY MAIL

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

James K. Falk, Esq.
Falk Law Firm, LLC
PO Box 1058
Charleston, SC 29402

DATED this 18th day of February, 2016.


Elizabeth McLellan, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2015-CP-10-003935

DEONTE BROWN #361477,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent,)

AMENDMENT TO APPLICATION
 FOR POST CONVICTION RELIEF

BY

JULIE J. ARMSTRONG
 CLERK OF COURT

2017 JUL 28 PM 2:07

FILED

Pursuant to the Respondent's Return and Motion for More Definite Statement, the

Applicant by and through his attorney, Tommy A. Thomas, would respectfully amend and supplement his original application for Post-Conviction Relief dated February 18, 2016, by adding the following:

1. That the Applicant specifically re-alleges his claim of ineffective assistance of counsel.
2. That the Applicant alleges that defense counsel provided ineffective representation regarding the following:
 - a. Facts surrounding the original arrest of attempted murder and then enhanced to murder.
 - b. Failure to adequately question Det. Christina Smith's testimony that she was able to ID client behind the muzzle flash.
 - c. Video enhancement by SLED.
 - d. Sequence of shooting.
 - e. Failure to adequately present the possibility of two shooters.

- f. Failure to adequately present the issue of two people present with red shirts.
- g. Failure to adequately question regarding Gun Powder Residue test.
- h. Failure to properly investigate:

Defendant said the shooter was Derrick Brown. Derrick Brown was not arrested or charged. Derrick Brown's Mother was in a relationship with Detective Charles Lawrence.

Witness Chavis Heyward originally said that he did not see anything. Two years later he testifies and identifies people on the video.

~~The waitress at the restaurant gave a statement that she did not see anything.~~

However, at trial she remembers seeing a gun come out of a red sleeve.

- i. Failure to talk to witnesses before trial. No analysis of the videos and no

Private Investigator.

- j. Failure to have a suppression hearing regarding the videos.

- k. Failure to bring up the information regarding Detective Charles Lawrence and his relationship with Derrick Brown's Mother.

- l. The Applicant did not testify based on bad advice from Defense Counsel.

- m. Defense Counsel had no theory of Defense.

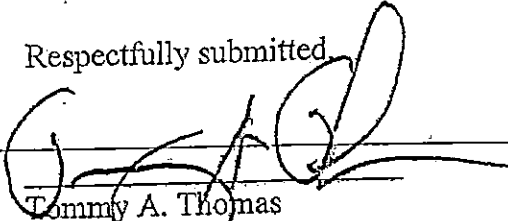
- n. There was a ten (10) year plea offer, which was not properly explained to the Applicant.

- o. Defense Counsel did not get closing argument because he put in a picture of shattered window as evidence.

- p. Defense attorney did not file an Appeal, after he told Applicant that he would.

3. Applicant believes theory of transferred intent was improperly applied.

Respectfully submitted,



Tommy A. Thomas
Attorney for the Applicant
Post Office Box 88
Irmo, SC 29063
(803) 732-5507

July 25, 2017
Irmo, SC

000586

0588

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STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2015-CP-10-03935

DEONTE BROWN

Applicant,

-VS-

STATE OF SOUTH CAROLINA,

Respondent.

)
) TRANSCRIPT OF RECORD

)
) August 7, 2017

)
) Charleston, South Carolina

)

B E F O R E:

The Honorable Michael G. Nettles, Judge.

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

Tommy Thomas, Esquire
Attorney for the Applicant

Julie Coleman, Esquire
Attorney for the Respondent

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

E X A M I N A T I O N S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
DEONTE BROWN	.5	.52	64	--
DORIS GREGORY	68	72	73	--
JAMES SMILEY	74	93	--	--

1 (August 7, 2017.)

2 THE COURT: Yes, ma'am. You're recognized.

3 MS. COLEMAN: Good morning, Your Honor. My
4 name is Julie Coleman. I'm here on behalf of the
5 Attorney General's office. We have one PCR matter before
6 the Court today, Deonte Brown, including an amendment,
7 and there were several new allegations.

8 This is Deonte Brown versus the State of
9 South Carolina, docket number 2015-CP-10-3935. Applicant
10 is presently confined in the South Carolina Department of
11 Corrections pursuant to orders of commitment of the
12 Charleston County Clerk of Court. Applicant was indicted
13 in the February 2013 term of the Charleston County grand
14 jury for murder, attempted murder, and possession of a
15 firearm during the commission of a violent crime. James
16 W. Smiley, Esquire represented the Applicant.

17 Applicant proceeded to a jury trial pursuant
18 to which he was found guilty as indicted. The Honorable
19 Roger M. Young, Sr. sentenced Applicant to incarceration
20 for 50 years for murder, 30 years for attempted murder,
21 and 5 years for the weapons charge, each sentence to be
22 served concurrently. Applicant did not appeal his
23 conviction or sentence.

24 Applicant filed a timely application for
25 post-conviction relief on July 15, 2015 alleging that he

1 was being held in custody unlawfully based on the
2 following allegations: Ineffective assistance of counsel
3 and conflict of interest.

4 The State filed its return February 18, 2016,
5 and Applicant filed an amended application on July 25th,
6 2017 alleging -- raising several new allegations of
7 ineffective assistance of counsel, including failure to
8 investigate, failure to properly cross-examine witnesses,
9 and I'm sure Mr. Thomas will go over those in more
10 detail, and he's present today represented by Mr. Tommy
11 Thomas.

12 THE COURT: Mr. Thomas, good to see you.

13 MR. THOMAS: Yes, sir. Good morning.

14 THE COURT: Be glad to hear from you, or, if
15 you'd like to call your first witness, that would be
16 fine.

17 MR. THOMAS: Just for housekeeping purposes,
18 what I would like to do, if it would please the Court, is
19 that I do have the transcript pages and the line numbers.
20 Rather than going through the process of having my
21 witness look at it, identify it, and bring it to the
22 attention of the Court, I'd just like to be able to tell
23 the Court those pages and line numbers, Your Honor.

24 THE COURT: Very good.

25 MR. THOMAS: Kind of speed things up. Your

DEONTE BROWN - DIRECT EXAMINATION

1 Honor, if it please the Court we call Mr. Deonte Brown to
2 the stand..

3 THE COURT: Mr. Brown, please come forward.

4 DEONTE BROWN,
5 having been first duly sworn,
6 was examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. THOMAS:

9 Q. Mr. Brown, you're currently serving time in the
10 South Carolina Department of Corrections?

11 A. Yes, sir.

12 Q. And what are you serving time for?

13 A. Attempted murder, murder, and possession of a
14 firearm.

15 Q. And you got how much time on those charges?

16 A. The murder charge was a 30-year sentence -- I
17 mean, excuse me. The murder charge was a 50-year
18 sentence, attempted murder was a 30-year sentence, and
19 the possession of a weapon was a 5-year sentence.

20 Q. And those are running concurrent?

21 A. Concurrent, 50 years, day for day.

22 Q. All right. When do you max out, Deonte?

23 A. I believe it's 2062.

24 Q. All right, sir. And you have filed a
25 post-conviction relief action; is that correct?

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1 A. Yes, sir.

2 Q. All right, sir. And did you file an appeal in
3 this case?

4 A. Well, I told trial counsel, you know, I wanted to
5 appeal, file a direct appeal, but one was never filed.

6 Q. So this is the only after-trial proceeding that
7 you've had?

8 A. Actually, three years -- it's coming on three
9 years. I'm just getting back in court for the first
10 stage, which is now.

11 Q. All right. Now, you understand -- you and I have
12 talked about post-conviction relief. You understand the
13 only relief you can request is a new trial?

14 A. Yes, sir.

15 Q. You understand that in requesting a new trial that
16 you have certain exposure?

17 A. Yes, sir.

18 Q. And what we mean by exposure is that if you were
19 to be successful, you could be taken back to court and
20 retried and possibly get -- and could possibly get more
21 time than you already have.

22 A. Yes, sir.

23 Q. And you understand that?

24 A. Yes, sir.

25 Q. And you want to go forward today?

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1 A. Yes, sir.

2 Q. All right. Deonte, why don't you tell us, just
3 briefly for the Court, just a very brief summary of what
4 allegedly happened.

5 A. That night, it was July 15, 2012, and we went out
6 to a nightclub in Davidson called Frazier's and after the
7 club that night, we went to the Waffle House right up the
8 street. It was maybe about 4:00 that morning when we got
9 there, and we went in. It was a bunch -- there was a
10 group of guys with us, and we came in. There was a guy
11 sitting down, and me and him exchanged words. Then it
12 turned into a physical altercation where the security
13 guards and the cook and the waitress, people trying to
14 break it up, and the fight started.

15 I was the one who, you know, initially started the
16 fight. I throw a drink in the guy's face, and that start
17 the fight, but once everyone is trying to break the fight
18 up and trying to push people out the door, you know, when
19 the gunshot went off, it came from outside, the parking
20 lot, you know, through the window, and when that first
21 shot went off, I was still on the sidewalk coming outside
22 of the door, and at that point in time, everybody, you
23 know, they started running, ducking, things like that,
24 and you can see where the second shot take place.

25 You see the muzzle flash with a body figure behind

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1 it, but you can't tell who that person is, and, you know,
2 we left the scene. And we got a call that said, you
3 know, my best friend got shot, the one who passed,
4 Dontaye Reed, find out that he got shot, and we made our
5 way to the hospital that same night.

6 Q. And then later you were arrested?

7 A. Yes. The next day was July 16th, and we got a
8 call from the U.S. marshal's agent that said he was
9 wanted -- I was wanted for warrants for attempted murder,
10 and I turned myself in that same day, and, actually, I
11 had on the same clothes that I had on the night before at
12 the incident.

13 And once I turned myself in to the county jail, I
14 got transferred to the headquarters where Detective
15 Lawrence and Detective Smith -- they was the two
16 detectives on this case, and that's when they read me my
17 Miranda rights, and I told them I waived it and I was
18 willing to answer questions. And I did write a
19 statement, and, you know, throughout the interrogation,
20 they, Detective Lawrence and Detective Smith, you know,
21 they was very untruthful, telling me things like they
22 could see me on the camera doing --

23 Q. All right. Let's -- we'll kind of get into some
24 of that, but let's just kind of keep it brief as far as
25 the summary. Did you admit or tell or give a statement

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1 saying that you committed this crime?

2 A. No, sir. Actually, my statement was stating that
3 I'm innocent of what I'm accused of. I never shot a
4 weapon that night. I never had a weapon.

5 Q. All right. Were you the shooter in this case?

6 A. No, sir.

7 Q. Deonte, you were arrested and taken to the county
8 jail; is that correct?

9 A. Yes, sir.

10 Q. And did you have a bond hearing?

11 A. They had a magistrate bond hearing for the
12 attempted murder, and it was denied.

13 Q. Why did you have an attempted murder charge?

14 A. Because the victim who the situation initially
15 started from, you know, he was the guy that got shot, and
16 then my friend, Dontaye Reed, was the guy who got killed
17 on the accident.

18 Q. Now, the victim that got shot and survived, he had
19 what they call a through-and-through, it went through the
20 fleshy part of his arm?

21 A. Yes, sir.

22 Q. Now, did you -- and then you went to General
23 Sessions for a bond on the murder charge?

24 A. Yes, and it was denied.

25 Q. All right, sir. So how long were you in the

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1 county jail pending this trial?

2 A. A total of 27 months.

3 Q. Okay. And you got a lawyer appointed to you?

4 A. Well, I had a public defender appointed when I
5 first got arrested.

6 Q. Yes, sir.

7 A. And then I hire Mr. Jim Smiley maybe a week before
8 the preliminary hearing, which was held August the 16th,
9 2012.

10 Q. And you were tried when?

11 A. I was tried at trial on September the 15th, 2014.

12 Q. You do better on those dates than I do. I have to
13 look. Okay. So Mr. Smiley was retained to represent you
14 at that point in time?

15 A. Yes, sir.

16 Q. And how many times did he come and see you at the
17 county jail?

18 A. We met each other, you know, a good bit of time.

19 Q. How did y'all prepare for this case?

20 A. I mean, you know, we talked about, you know, my
21 innocence and, like, going through the whole time me
22 sitting in the county jail, there really was no
23 investigation or no defense that, you know, he was really
24 focused on. It was just like I was telling him I'm
25 innocent.

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1 Q. Was there what we call -- and you and I have
2 talked about this, a theory of defense? Did he come up
3 with a plan as to how he was going to defend you?

4 A. Yes.

5 Q. And what was that theory, do you know?

6 A. That theory was he was going to let me testify,
7 and we was going to show how the second possible suspect,
8 you know, who was involved in this case and how his
9 mother was in a sexual relationship with Detective
10 Lawrence, who was investigating the case.

11 Q. All right. Who did you -- who do you think
12 committed this crime?

13 A. Derrick Brown.

14 Q. All right, sir. And who is Derrick Brown?

15 A. He is a friend to me, but his uncle and my mother
16 have a child together, so it's like we came up as family,
17 cousins. Him and my brother is first cousins.

18 Q. All right. Now, and Derrick Brown was there that
19 evening?

20 A. Yes, sir.

21 Q. And it's your belief that Derrick Brown was the
22 shooter?

23 A. Yes, sir.

24 Q. Did you discuss that with Mr. Smiley?

25 A. I did at one point. You know, I told Mr. Smiley

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1 what was going on.

2 Q. And did you tell him about the Detective Lawrence
3 relationship with his mother?

4 A. Yes, sir.

5 Q. And did Mr. Smiley say anything or give you any
6 idea as to what he was going to do with that information?

7 A. Well, he did take it in consideration, and, you
8 know, I didn't know how, I guess, he was going to apply
9 that, you know, how he was going to go about, you know,
10 investigating that, and I told him and nothing really
11 happened.

12 Q. Now, do you have a prior record, Deonte?

13 A. No, sir. I have -- it was an unlawful carrying
14 when I was 18, but I have no felonies or anything.

15 Q. Did y'all discuss if you take the stand and
16 testify that they could bring up any information about
17 prior history, you know, if the rules allow it? Did you
18 discuss that with your attorney?

19 A. Yes.

20 Q. Okay. And you were aware of that?

21 A. Yes, sir.

22 Q. And you felt like you still -- you felt like what?
23 Well, what did you feel like? Let me ask you that.

24 A. Well, I told him that I wanted to testify on my
25 behalf because there were certain points in the video

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1 that I can explain better than anybody because I was
2 there, and it was -- like he told me, there was one point
3 in the video that, you know, I left out and came back in,
4 right before the incident happened, but he said that the
5 State could have tried to use that and say that I left
6 out and went and got a weapon and come back in, because
7 when I did left out and came back in, like, seconds later
8 is when the altercation stopped.

9 Q. All right. Let me ask you one question before we
10 kind of move on with, you know, the events of what
11 happened. Was part of the theory of defense that you
12 didn't have a weapon?

13 A. Yes, sir.

14 Q. And I think Mr. Smiley asked all the witnesses
15 whether or not they could see a gun in your waistband?

16 A. Yes, sir.

17 Q. Okay. Did anybody see a gun?

18 A. No, sir.

19 Q. Now, you were originally charged with attempted
20 murder; is that all?

21 A. Yes. I was charged -- on the day of arrest, which
22 was July 16th, I was only charged with attempted murder.

23 Q. Now, when were you charged with murder?

24 A. The attempted murder was charged on July 16th, and
25 then the possession of a weapon, that was charged -- they

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1 bring another warrant against me on July the 19th, and
2 then the murder warrant got picked up on August the 16th,
3 which is when the preliminary hearing was held. I was
4 charged with the murder.

5 Q. You went to the preliminary hearing?

6 A. No, sir.

7 Q. Okay. Do you know who testified for the police at
8 the preliminary hearing?

9 A. It was Detective Christina Smith.

10 Q. And did she testify at the preliminary hearing
11 about any kind of identification?

12 A. Yes, she did. She testified at the preliminary
13 hearing stating that, you know, after her --

14 MS. COLEMAN: Your Honor, objection. He was
15 not at the hearing, he just testified, so he has no
16 independent knowledge of the hearing.

17 THE COURT: I'll sustain the objection.

18 MR. THOMAS: We'll move on. Thank you, Your
19 Honor.

20 BY MR. THOMAS:

21 Q. In preparing this case for trial, did you go over
22 the discovery with your attorney?

23 A. Yes, sir.

24 Q. And did you see all the videos? Did you look at
25 the videos?

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1 A. Yes, sir.

2 Q. Do you know if a private investigator was hired?

3 A. On behalf of the defense, no, sir.

4 Q. Now, who were -- and I guess players, for lack of
5 a better word. Who were the players in this case? There
6 was you, who was charged with a crime.

7 A. Actually, I was the only person charged with a
8 crime.

9 Q. How many people were there?

10 A. It was a lot, you know. It was about -- the
11 inside of the building, you know, it was crowded. It was
12 at least a total of maybe 20 to 30 people inside, and
13 outside, in the parking lot, you know, it was people in
14 the parking lot. The camera could actually only see half
15 of the parking lot.

16 Q. And you mentioned Derrick Brown.

17 A. Yes, sir.

18 Q. And he was your friend.

19 A. Yes, sir.

20 Q. And then there was Dontaye Reed?

21 A. Yes, sir.

22 Q. And who was Mr. Reed?

23 A. He was my best friend too. He was out there with
24 us that night, and, actually, he was involved in the
25 altercation in the inside, you know, before the shooting

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1 start.

2 Q. And what happened to Mr. Reed?

3 A. Well, Mr. Reed got -- he got struck by a stray
4 bullet, you know, coming out the door.

5 Q. He was killed?

6 A. Yes.

7 Q. And then there's Chavis Heyward. Who is Chavis
8 Heyward?

9 A. Chavis Heyward, he was -- he is one of Derrick
10 Brown's and Dontaye Reed, like, their close friend. He's
11 an older guy. He's older than them.

12 Q. And he testified?

13 A. Yes, sir.

14 THE COURT: And his name is what again?

15 MR. THOMAS: Chavis, C-h-a-v-i-s, Heyward,
16 H-e-y-w-a-r-d. I think he's identified incorrectly in
17 the transcript as Chris Heyward, but it's actually
18 Chavis.

19 BY MR. THOMAS:

20 Q. And then there's Dario Teran?

21 A. Yeah, Dario Teran.

22 Q. T-e-r-a-n?

23 A. Yes.

24 Q. And who is he?

25 A. Actually, he was just a customer that was in there

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1 that night. He wasn't with us, or I didn't know him.

2 Q. And he testified against you?

3 A. Yes, sir.

4 Q. All right. And then April Blodgett?

5 A. She was the waitress. She worked the register,
6 taking orders and things like that.

7 Q. Now, when you and I discussed -- and you've been
8 very involved because this is your case. You're the one
9 serving 50 years on this case, so you've been very
10 involved in looking at this, and you and I have discussed
11 this on numerous occasions. You indicated to me that you
12 felt like that there should have been a pretrial
13 suppression hearing?

14 A. Yes, sir.

15 Q. And was there one?

16 A. No, sir. There wasn't no motion or any, you know,
17 hearing.

18 Q. And what do you think could have happened at a
19 suppression hearing?

20 A. Well, there's a few things that could have take
21 place; you know, one, the witnesses with more than one
22 statements, or when they came to court they remember
23 something that wasn't in the statement that we had a
24 pretrial hearing, that we could have suppressed and
25 exclude evidence, witness statements, the video -- you

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1 know, at the video, there never was anyone that
2 identified the person behind the muzzle flash. The SLED
3 agent who testified, you know, he never said anything
4 about identifying that person, so we did have a
5 preliminary one -- excuse me, not preliminary. We did
6 have a pretrial motion whereas we could have suppressed,
7 you know, his testimony with that video if we would have
8 known that before trial.

9 Q. It was your belief -- or was it your belief that
10 there was going to be testimony that they were going to
11 be able to identify the person behind the muzzle flash?

12 A. Yes. From my understanding, the whole time that I
13 sat in the county jail waiting for trial, that was the
14 State's evidence, saying they could identify me behind
15 this muzzle flash and my red shirt.

16 Q. Did that turn out to be true?

17 A. No, sir.

18 Q. Okay. So you felt like there should have been a
19 pretrial suppression hearing?

20 A. Yes, sir.

21 Q. All right, sir. And the witnesses, there were
22 inconsistencies in their written statements and what they
23 testified to?

24 A. Yes, sir.

25 Q. Okay. And what inconsistencies were there with --

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1 well, let's take Chavis Heyward first.

2 A. Okay. Chavis Heyward, he testified at the trial,
3 and he stated that he never told Investigator Barfield
4 anything about who the shooter was or what he had on.

5 MR. THOMAS: Your Honor, if it please the
6 Court, that is page 191, lines 14 through 18 of the
7 transcript.

8 THE COURT: So Chavis never told --

9 MR. THOMAS: He testified that he didn't see
10 a gun and that he did not see who shot any bullets that
11 night and didn't see what the individual was wearing.

12 BY MR. THOMAS:

13 Q. And that was his testimony?

14 A. Yes. He got questioned back in 2012, and I have
15 that in the chain of custody, and, actually, I
16 never heard the audio statement that he gave, but it is
17 in the chain of custody, and at that time, trial counsel
18 had told me that he didn't indicate anything about who
19 had the weapon or what they had on or nothing.

20 Q. So it's your understanding that he didn't have any
21 information?

22 A. Yes, sir, basically.

23 Q. And then along comes Detective Kenneth Barfield?

24 A. Yes.

25 Q. And what role did Lieutenant Barfield play in

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1 this?

2 A. Well, he was actually the investigator for the
3 solicitor's office, and they questioned Mr. Chavis
4 Heyward before the trial, a week before the trial, and
5 that's when Detective Barfield stated that Chavis had
6 told him that information on the way to the elevator when
7 he was walking him out.

8 Q. And did Barfield,-- did he testify at the trial?

9 A. Yes.

10 Q. And they asked him at trial about his conversation
11 with Chavis Heyward?

12 A. Yes, sir.

13 MR. THOMAS: Your Honor, that's page 200,
14 lines 14 through 21.

15 BY MR. THOMAS:

16 Q. And when they asked him about that conversation,
17 your attorney, did he object to that?

18 A. No, I don't believe so, Your Honor.

19 Q. But didn't the judge allow that in?

20 A. Yes. The judge did allow that in under 613(b).

21 Q. All right.

22 MR. THOMAS: And, Your Honor, for the Court,
23 that's page 201, lines 1 through 2, and 201, line 4.

24 BY MR. THOMAS:

25 Q. So Barfield was allowed to testify what Heyward

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1 told him?

2 A. Yes, sir.

3 Q. And what did Barfield testify to?

4 A. He testified saying that after they spoke with

5 Mr. Heyward, inside the office were two other officers
6 being present, he never indicate anything about anybody
7 having a weapon or seeing the shooter. Now, on the way
8 to the elevator, it was just Detective Barfield and
9 Chavis Heyward, and he said he had a heart-to-heart
10 conversation with him, and that's when he came forward
11 and said the guy with the red shirt was the shooter. He
12 was the one that had the weapon.

13 Q. Right. But Heyward himself did not testify to
14 that?

15 A. No, sir.

16 Q. Detective Barfield testified to that?

17 A. Yeah. Detective Barfield testified to that, and
18 they never had any audio, video, or no written statement,
19 anything to prove this.

20 Q. Now, as far as your knowledge as to what --

21 THE COURT: Let me interrupt just a minute.
22 I just want to fast forward. Did Heyward ever testify?

23 MR. THOMAS: Yes, he did.

24 THE COURT: And I assume he said the same
25 thing Barfield said?

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1 MR. THOMAS: No, sir. He said -- from my
2 recollection of the transcript, he testified that he
3 didn't see the gun and he did not see who the shooter
4 was, because there's really three elements on this, Your

5 Honor: The gun, what they call shooter, and
6 identification of the red shirt, and what Heyward said,
7 he didn't see the gun, he didn't see who was shooting the
8 gun, and he couldn't tell what the individual was
9 wearing, and then Barfield testifies immediately after
10 Heyward and says that Heyward confesses or tells him on
11 the way to the elevator that the shooter -- and I
12 apologize, but I believe he says that he identified my
13 client as the shooter, and he identifies the red shirt.

14 So he says that Heyward basically comes clean
15 to somebody, I guess, as they're leaving the building
16 that, I actually did see the shooter.

17 MS. COLEMAN: And, Your Honor, if I may
18 clarify --

19 THE COURT: During the trial?

20 MR. THOMAS: During the trial, Your Honor.

21 MS. COLEMAN: And I believe that in
22 Investigator Barfield's testimony, he said that he only
23 identified the color of the shirt. I don't think he
24 identified him specifically.

25 MR. THOMAS: May have been, Your Honor, just

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1 the color of the shirt, and the case is really built
2 around -- and I apologize for complicating things. I had
3 quite a bit of time to locate it. It's built around no
4 one actually seeing my client shoot the gun. It's all

5 built on he was there, he was wearing a red shirt, and
6 they started identifying that gun, the shooter had on a
7 red shirt, so that's how they tried to link it to him,
8 and they got that in through Detective Barfield rather
9 than through the witness himself. Judge allows it in and
10 says that it is an exception to hearsay under 613(b).

11 THE COURT: Which is not offered for the
12 truth of the matter asserted?

13 MS. COLEMAN: Yes, prior statements of
14 witnesses, extrinsic evidence. When a witness has made
15 an inconsistent statement, then you're allowed to submit
16 other evidence to prove that a statement was
17 inconsistent. That's on page 478.

18 BY MR. THOMAS:

19 Q. Deonte, the next witness in this case was Dario
20 Teran?

21 A. Yes, sir.

22 Q. All right. Did Mr. Smiley -- to the best of your
23 knowledge, did Mr. Smiley have any opportunity to talk to
24 any of these witnesses? Did you have any prior
25 indication as to what they were going to say?

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1 A. No, sir. Actually, he never went out himself and
2 spoke with none of the witness throughout the whole time
3 I was in the county jail waiting for trial.

4 Q. Did he have a private investigator go out and
5 speak to these witnesses?

6 A. No, sir. The State sent investigators out, but he
7 never sent any out.

8 Q. Now, tell us about Dario Teran. What did he
9 testify to?

10 A. He testifies stating that he never saw who the
11 shooter was or what he had on. He only saw a flash, but
12 he had two statements that he wrote. One was at the
13 scene when it first happened, and then he wrote another
14 statement at the headquarters. In one of the statements,
15 he did state that the shooter had on a red jersey, but
16 when he was on the stand, he said he don't remember
17 anything. He never said that. The only thing he
18 remember was seeing a flash.

19 Q. Right. And then he says that the solicitor made
20 some attempt to refresh his memory?

21 A. Yes, sir. They gave him a statement, and they let
22 him read both statements.

23 Q. Actually, is it true to say that -- we're talking
24 about these players again, these witnesses, that all of
25 their memories were refreshed in this trial?

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1 A. Yes, sir.

2 Q. Everybody's memory had to be refreshed; is that
3 correct?

4 A. Yes, sir.

5 Q. All right. So how did they refresh Mr. Teran's
6 memory?

7 A. They gave him his statement that he had written
8 the night of the incident, and the one that he wrote the
9 next day, and he was trying to say that due to the fact
10 that he had a motorcycle accident a few months after the
11 incident, you know, that played a part, but he testified
12 on cross that he never saw who the shooter was, he just
13 saw a flash.

14 Q. All right. Now, does Mr. Smiley object to the
15 refreshing of his testimony?

16 A. No, sir. He addressed it on cross, but he never
17 objected to it.

18 Q. Did they actually allow his written statement to
19 come in?

20 A. Yes, sir. That's what the judge took as evidence,
21 his written statement, but not his testimony from the
22 stand.

23 THE COURT: I see they introduced the
24 statement.

25 MR. THOMAS: The judge allowed it to be read,

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1 and it's really not even read by the witness because he
2 said he didn't want to have to read it. It was read by
3 the solicitor, I believe, Your Honor, and so it's read to
4 the jury, and the Court says that it does not actually
5 come into evidence. So he doesn't allow the written
6 statement into evidence itself, but he allows the
7 statement to be read to the jury --

8 THE COURT: The entire -- just a part or from
9 beginning to end?

10 MR. THOMAS: From beginning to end, and, Your
11 Honor, that's on page 261 of the transcript, lines 4
12 through 18. The Court says that this is an 803
13 exception, and defense counsel at page 259, Your Honor,
14 if I'm reading -- 259, lines 5 through 6, Your Honor, he
15 agrees with the Court and says it fits the exception.

16 What it does, on page 252, lines 11 through
17 12, is it allows the information about the shooter with
18 the red shirt to come in before the jury.

19 BY MR. THOMAS:

20 Q. Let's move to April Blodgett. Who was April
21 Blodgett?

22 A. She was the waitress, the lady who worked behind
23 the register who was taking orders.

24 Q. So she was working at the Waffle House?

25 A. Yes. She was working that night.

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1 Q. Did she testify that she could see the shooter's
2 face?

3 A. Actually, her testimony from the stand was that
4 she saw the gun came out of a red sleeve, but she didn't
5 see the face or she didn't see who shot the weapon.

6 Q. All right.

7 MR. THOMAS: And, Your Honor, just for the
8 Court's information, her testimony about the shooter's
9 face is 392, lines 16 through 18; about the gun is lines
10 19 through 20, same page.

11 THE COURT: So she saw it come out of a red
12 sleeve but couldn't identify the shooter?

13 MR. THOMAS: Yes, and the red sleeve part is
14 21 through 25.

15 BY MR. THOMAS:

16 Q. Did she make a statement as well?

17 A. Yes, sir. She gave a statement the same night the
18 incident happened, and she told them everything she had
19 known at the time, the truth, and she never indicate
20 seeing anybody with their weapon or who the shooter was
21 or anything about any sleeve or nothing. She never
22 mentioned nothing in her statement.

23 Q. That was in her written statement?

24 A. Yes, sir, at the time of the crime.

25 MR. THOMAS: And, Your Honor, for the Court's

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1 information, that is 293, lines 2 through 7.

2 BY MR. THOMAS:

3 Q. Now, did she actually show her a statement to
4 refresh her memory?

5 A. Yes, sir.

6 Q. And after her memory is refreshed, does her
7 testimony change at all, do you remember?

8 A. Well, like I said, you know, she did read her
9 statement on the stand.

10 Q. She read it to herself?

11 A. Yes, to herself, to refresh her memory, and she
12 testified saying that she saw the gun came out of a red
13 sleeve, and that wasn't in her written statement.

14 Q. All right.

15 MR. THOMAS: And, Your Honor, where it's
16 refreshed is 306, lines 10 through 17.

17 BY MR. THOMAS:

18 Q. So what evidence did they have against you?

19 A. From -- I believe none.

20 Q. All right. Let me ask you this question: Did you
21 have on a red shirt?

22 A. Yes, sir. I did have a red button-down shirt.

23 Q. Is your testimony consistent that it was a
24 button-down at the trial?

25 A. Well, some witness stated that it was a

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1 button-down shirt, but the counselor made it clear that
2 it was a button-down shirt, because my shirt was wide
3 open at the time that everything was going on, and I had
4 no undershirt, so it was like you can see my chest, and,
5 actually, I'm sagging a little bit, so you can see my
6 underwear and my waistline.

7 Q. And how, if any, did Mr. Smiley use that
8 information in your defense about your attire?

9 A. He did state that, you know, the shirt was open,
10 and throughout the closing argument that he believed I
11 couldn't have had a weapon between the skin and my hip,
12 right out of the pants, when it's being that baggy and
13 loose.

14 Q. So you could not have had a gun?

15 A. Right.

16 Q. As a matter of fact, was the testimony of all the
17 witnesses that they never saw you with a gun?

18 A. Yes. You had a live witness, Chris -- I'm sorry,
19 Jesse McNeal. He was the cook that night, and he came
20 from behind the counter, trying to, you know, break up
21 the incident, and the guy who was involved in it, the
22 attempted murder victim, that was Jesse McNeal's cousin,
23 and he was one of the closest ones to the fight. He was
24 the one that actually break it up and got people to stop
25 playing, and he stated in his statement and on the stand

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1 that --

2 THE COURT: Are you talking about Jesse
3 McNeal's statement or his cousin?

4 THE WITNESS: No, Jesse McNeal's statement.

5 THE COURT: Jesse McNeal was the cook that
6 broke up the fight?

7 THE WITNESS: Yeah, and the guy that we got
8 into the altercation with, that was his cousin.

9 THE COURT: Okay.

10 THE WITNESS: And he stated he never saw me
11 pull out a weapon. He never saw me with a weapon. He
12 didn't see who the shooter was, and, actually, his
13 statement was, like, the most accurate from anyone who
14 testified or written a statement that night, and he said
15 that the bullet came through the window from the outside
16 as soon as he was trying to break up the fight.

17 BY MR. THOMAS:

18 Q. Now, the trial goes on, and then a Christina
19 Moyer-Smith takes the stand.

20 A. Yes, sir.

21 Q. Now, who is she?

22 THE COURT: Hang on one second. All right.
23 What's her name again?

24 MR. THOMAS: Christina Moyer, M-o-y-e-r,
25 hyphen, Smith, Your Honor, and her testimony --

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1 BY MR. THOMAS:

2 Q. Who was she, or who is she?

3 A. Christina Smith, she was the detective on the
4 case. Her and Detective Lawrence were the ones

5 investigating.

6 Q. All right. So this is where Detective Lawrence --
7 where he kind of comes in?

8 A. Yes, because if you look in the transcript, she
9 did state that she wasn't aware of the area of
10 jurisdiction because that was not her area that she
11 worked, so other officers helped her out throughout the
12 investigation.

13 Q. Now, does the Court have some concern about her
14 testimony? Do you remember that?

15 A. At the preliminary hearing, you know, she
16 testified to what the State's probable cause was for
17 charging me with murder. Now, at trial, when she was on
18 the stand, she was -- the State was leading her into the
19 same question to whereas her being able to identify the
20 person behind the muzzle flash with the red shirt.

21 When she was getting to that point, you know,
22 counsel did object to it, and the judge let the witness
23 know that he wasn't going to allow her to give, like,
24 his -- he wasn't going to allow her to give an example on
25 things, you know, she saw after the fact or things people

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1 have told her.

2 Q. All right. So she wanted to mix -- did she want
3 to mix in with her testimony information that she had
4 obtained from these other witnesses?

5 A. Right...

6 MR. THOMAS: All right. Your Honor, that's
7 on page 360, lines 18 through 20, and there are a couple
8 of questions in there from Ms. Moyer-Smith.

9 BY MR. THOMAS:

10 Q. Now, you said something about probable cause. Did
11 you think that there was any probable cause issues in
12 here?

13 A. Yes, because from my understanding, the State's
14 probable cause for charging me with this crime --

15 Q. Which crime is that now?

16 A. Which was the murder, the reason they picked the
17 murder charge up --

18 Q. Right.

19 A. And later through trial the SLED agent, Joseph
20 West, who worked on the video, he explains the different
21 techniques and what he used to zoom in, to slow down the
22 video, to brighten up, and he didn't say anything about
23 being able to identify that person.

24 Q. Behind the muzzle flash?

25 A. Yes, sir.

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1 Q. All right. And was there an objection made to Ms.
2 Moyer-Smith's testimony?

3 A. Yes.

4 Q. And it was your understanding that the warrant had
5 been drafted based upon the identification behind the
6 muzzle flash?

7 A. Yes. That was her probable cause.

8 Q. But she didn't testify to that?

9 A. No. The judge denied her -- the judge told her he
10 wasn't going to let her do that because the guy who
11 testified earlier didn't state anything about that.

12 Q. All right. And what did she say was the reason
13 that the warrant was drafted on, why she issued that
14 second warrant?

15 A. After the judge had denied her --

16 THE COURT: This is the magistrate?

17 MR. THOMAS: No, Your Honor. She testified
18 that she was the one who made the decision to draft the
19 warrant, to get it taken to the -- get it signed for the
20 murder charge. It came later, after the attempted murder
21 charge, and the Court has -- it appears to me the Court
22 has some concern about her basically giving kind of a
23 narrative summary of what she had obtained from all these
24 different individuals that talk about it.

25 THE COURT: At preliminary hearings, they're

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1 allowed to do that, but as I understand it, when she
2 testified at trial, she started summarizing and trying to
3 add in opinions and hearsay, but it was objected to and
4 sustained.

5 MR. THOMAS: Yes, sir, objected to and
6 sustained, and then --

7 THE COURT: What's the error we're getting to
8 here?

9 MR. THOMAS: Well, potentially -- and I'll
10 ask counsel about this too, about any kind of probable
11 cause. It's anticipated from my client that she's going
12 to say -- because she's been given information that there
13 was an identification of him behind the muzzle flash.
14 When this concern by the Court is raised and the
15 objection, it spins and turns, and then she says at the
16 end that actually the reason that she issued the warrant
17 was because of DNA evidence.

18 The DNA evidence doesn't really link my
19 client to anything, and she says the thing about -- and
20 that's page 364, Your Honor. She says that -- which I
21 thought was really disjointed, and kind of struck me as a
22 little bit odd, and this begins on line 2 through 6.

23 The DNA -- the projectile that was found
24 inside the foyer matched the projectile that was found in
25 the decedent's body and then that SLED connected the

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1 DNA that was located. The only thing they could do with
2 SLED was say that the blood on one of the projectiles was
3 the same as his blood, so I thought it was odd that she
4 does that, and she said this is when we drafted the
5 murder warrant, which has no basis to my client
6 whatsoever.

7 THE COURT: Okay. And the ineffectiveness is
8 what?

9 MR. THOMAS: And I will ask counsel about
10 this, whether or not he could have pursued any type of
11 probable cause issues regarding this in regards to the
12 warrant or whether or not there were any other objections
13 that could have been made in regards to this evidence.

14 THE COURT: Okay. All right. Very good.
15 BY MR. THOMAS:

16 Q. All right. So let's move on, and let's talk about
17 Detective Charles Lawrence.

18 THE COURT: Before we get into Charles
19 Lawrence, I want to hear everything that Mr. Brown has to
20 say about this, but I want you to just sort of
21 encapsulate the ineffectiveness with regard to his
22 testimony, and then we'll hear that evidence.

23 MR. THOMAS: Yes, sir.

24 THE COURT: Just tell me in summary what
25 we're talking about, and then we'll get into --

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1 MR. THOMAS: Okay. Your Honor, basically,
2 what you've got going on here, you go back to kind of the
3 players in this. You've got my client, of course, and
4 you've got Derrick Brown, and Derrick Brown is never
5 charged.

6 THE COURT: Are we talking about Charles
7 Lawrence or Derrick Brown?

8 MR. THOMAS: Charles Lawrence is a detective.

9 THE COURT: All right.

10 MR. THOMAS: But potential suspect, and who
11 my client tells defense counsel who he believes is the
12 actual shooter in this case, is Derrick Brown.

13 Now, Detective Lawrence doesn't testify, but
14 he floats through this, and he is mentioned in the
15 transcript, and it's nice enough to have one that
16 actually has an index in the back of it, and the Court
17 should have it as well, and Lawrence pops up six times in
18 the transcript, where somebody is talking about Detective
19 Lawrence.

20 Detective Lawrence, from my client's
21 standpoint, testifies that he has a play because he is
22 one of the investigators with Christina Moyer-Smith.
23 Christina Moyer-Smith is the one who admits on the stand
24 in her testimony that she made the decision to issue the
25 arrest warrant for murder against my client. We would

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1 tend to -- or we would suggest that Detective Lawrence
2 has a vested interest in not seeing Derrick Brown charged
3 in this crime, or even considered as a suspect in this
4 crime, because he's having an affair with Derrick Brown's

5 mother and that this information was provided to counsel
6 and that counsel never uses at trial, that this was never
7 brought up to the jury. So you have a potential --

8 THE COURT: Okay.

9 MR. THOMAS: -- shooter other than my client.

10 THE COURT: And you can elicit whatever
11 testimony you want to with that.

12 MR. THOMAS: Yes, I'll be glad to, Your
13 Honor.

14 BY MR. THOMAS:

15 Q. Now, you knew, of your knowledge, that Officer
16 Lawrence was having an affair with Derrick Brown's
17 mother.

18 A. Yes, sir.

19 Q. And you know these people?

20 A. All my life, basically.

21 Q. And you said that how is your mom -- your mom
22 is --

23 A. My mom and Derrick Brown's uncle, they had a child
24 together.

25 Q. Okay. So they're all friends?

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1 A. Yes, and my mom and Derrick Brown's mother, they
2 was best friends for, you know, majority of their lives.

3 Q. Okay. And you felt like this information was
4 important.

5 A. Yes, sir.

6 Q. And you brought it to your attorney's attention.

7 A. Yes, sir.

8 Q. And what did he tell you, if anything, about that?

9 A. Well, he didn't really speak much on it. I guess
10 he was trying to go about how he could investigate it, or
11 to bring it up, but he didn't really speak much on it.

12 Q. Did he tell you he was going to use it at trial?

13 A. Yes, sir.

14 Q. And what did he say, if anything, about that?

15 A. He was going to set that information about
16 Detective Lawrence on a sidebar in case at any point of
17 time in trial if it comes up that he would be able to use
18 it, but he never testified and he never speak on nothing
19 about that.

20 THE COURT: How does he know they were having
21 an affair?

22 THE WITNESS: From Derrick Brown's mother and
23 my mother's relationships.

24 MR. THOMAS: It was common knowledge. Was
25 it?

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1 THE WITNESS: Yes.

2 BY MR. THOMAS:

3 Q. Okay. And your mother is here?

4 A. Yes, my mother is right here.

5 Q. So you thought that information was going to be
6 used at trial?

7 A. Yes, sir.

8 Q. And were you offered a plea?

9 A. Yes, sir. I was offered a plea throughout the
10 trial. It was a plea before, and it came up like two
11 times.

12 Q. Do you remember what you were offered?

13 A. At the point in time when the solicitor was trying
14 to ask Detective Smith about, you know, her reason why
15 charging me with this crime and how she flipped -- after
16 the judge denies her, she flips the whole thing and said
17 that she didn't charge me until 2014, after she got the
18 DNA back from SLED that connects the bullet, and at that
19 point in time, they did come with me for a ten-year plea,
20 85 percent.

21 Q. And you did not take it?

22 A. No, sir. I told counsel that, you know, I was
23 trying to figure out what was going on, and the only
24 thing that anybody told me that, you know, it was a
25 really good case and that no witness identify me shooting

1 this weapon, and, you know, they don't have no physical,
2 concrete evidence, and he was, like, if -- you know, if I
3 wanted to take the plea, I could take the plea, but he
4 was, like, if -- I was telling him I'm innocent. I

5 didn't shoot no weapon that night. I didn't do this, and
6 he was, like, If you didn't fire a weapon, then I
7 wouldn't take the plea neither.

8 Q. Let me ask you two questions, and hopefully I
9 don't forget them. We all go through a process of
10 determining whether or not to accept a plea.

11 A. Yes.

12 Q. It's a mental process that you go through, and you
13 said that this plea offer, you talked to your attorney
14 about it?

15 A. Yes.

16 Q. How did you think that this trial was going to go?
17 Did you think you had a good chance or a poor chance of
18 being convicted?

19 A. Honestly, I didn't see how they could convict me,
20 you know, based on the things that I was reading and from
21 what counsel was telling me, you know, they didn't have
22 any evidence, you know, to say that I was the shooter.

23 Q. All right. Now, in making this decision, is it
24 fair to say that you would also have taken into
25 consideration the representation by counsel that he was

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1 going to use this information about Derrick -- about
2 Detective Lawrence?

3 A. Yes, sir, because at that point in time, the trial
4 wasn't over yet.

5 Q. Okay. So that played a part in your decision --

6 A. Yes, sir.

7 Q. -- to reject the plea offer?

8 A. Yes, sir.

9 Q. Which is less, much less than what you received.

10 A. And I didn't want to take the plea at the time
11 because I was saying if they're willing to give me a
12 ten-year plea and they're saying that I shot these
13 people, I'm telling him that I never even fired a weapon
14 that night. I didn't shoot anybody, so why should I take
15 a plea for that amount? If anything, it should have been
16 less. You know, I did start the fight, and in my
17 statement in the interrogation room, I admit to that.
18 You know, since day one, I never denied that. I was the
19 one who started the whole situation, but --

20 Q. I have this conversation with my clients, and I am
21 curious whether your attorney had a discussion with you.
22 Did he talk about possibility or any idea of percentages
23 of possibility of being convicted at this trial, even
24 though you didn't commit it? Did y'all talk about that?
25 Did you weigh that?

1 A. I mean, like, you know, when a plea, a ten-year
2 plea was brought, you know, the only thing he was saying
3 was, you know, It's a good case. We got a good chance of
4 winning, but at the end of the day, we still -- our

5 decision is coming from 12 people that don't even know me
6 or are just going off of what they heard.

7 Q. Let me ask you this: Did you talk about an Alford
8 plea? Do you know what Alford is?

9 A. A plea that they gave --

10 Q. You and I talked about Alford, where you do plead
11 guilty?

12 A. Yes, yes, I remember. We talked about it.

13 Q. And what is it?

14 A. It's, like, a plea to where I'm innocent, but I'm
15 believing -- let me rephrase that. It's like I'm
16 innocent but not guilty. It's, like, I'm not guilty for
17 that crime. It's a lesser offense, maybe.

18 Q. But you think you would be convicted at trial? I
19 mean, is it that if you plead -- it's a guilty plea, but
20 you could say -- you would not have to admit that you
21 committed the crime.

22 A. Right.

23 Q. All right. And would that have been a
24 consideration for you in accepting that ten-year plea?

25 A. I could have, if -- you know, if he had told me,

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1 you know, exactly -- you know, explained to me what was
2 going on at the time and --

3 Q. All right.

4 A. Like, the difference in, you know, being convicted
5 of a first degree murder and, you know, a lesser
6 included, there was a big difference.

7 Q. As a matter of fact, I guess now is the time to
8 ask you this question: Did your attorney ask for any
9 kind of lesser included charges other than murder?

10 A. No, sir.

11 Q. Did you discuss that with him?

12 A. Yes, sir.

13 Q. All right. And did you agree to that?

14 A. Well, upon what we discussed, you know, I didn't
15 agree, and to -- you know, I basically told him I was
16 going to trial for the charges I was charged with, first
17 degree murder, attempted murder, and possession of a
18 weapon.

19 Q. Did you testify?

20 A. No, sir.

21 Q. Did you have any prior conversations with counsel
22 about whether you were going to testify or not?

23 A. Yes, sir.

24 Q. And what, if anything, was asked in that
25 conversation?

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1 A. Well, from my understanding, we meet a couple
2 times before the trial, and he was going to let me
3 testify on my behalf. What actually took place --
4 because there's a lot of things that people didn't talk
5 about -- you know, because they wasn't there, so it's,
6 like, speculation, so by me testifying to certain things,
7 it was considered as evidence because I was there and I
8 know exactly what happened. I could point it out on the
9 camera.

10 Q. Why didn't you testify?

11 A. Well, I didn't testify because counsel advised me
12 not to, based upon -- at one point in time, like I said,
13 when I left out the incident and I came back in, but it
14 was, like, split seconds apart. I never left off camera
15 or anything. You know, we went out. It was right in
16 front of the building, and they have it on camera, and I
17 came back in. And he said that, you know, the State
18 could have used that as, you know, saying I went out to
19 go get a weapon and then came back in.

20 Q. All right. Now, did you have any discussion with
21 counsel about who would get the last argument in this
22 case, closing argument?

23 A. Yes, yes..

24 Q. And what, if anything, was that?

25 A. Well, from beginning of the trial and going

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1 through, you know, I thought we were getting a closing
2 argument until, you know, he said something about a
3 photo, a picture, a picture he admitted into evidence at
4 the end of the trial that was going to explain how the

5 bullet came from the outside through the window, but
6 from -- you know, the witness they used during trial, I
7 didn't see how that would help.

8 Actually, from all the evidence it's showing that
9 the shot came from outside in, but throughout the Rule 5
10 they did have a witness that said the shot could have
11 maybe went off inside.

12 Q. All right. Didn't your attorney put up a witness?

13 A. Yes. He put up one witness, and that was the
14 witness who did the GSR kit on my clothing.

15 Q. The gunshot residue?

16 A. Yes, sir.

17 Q. You testified earlier that when you turned
18 yourself in you had on the same clothes?

19 A. Yes, sir.

20 Q. And did they seize the clothes?

21 A. Yes. As soon as I came in to turn myself in to
22 headquarters, they took the shirt off of me immediately,
23 and they put me in an interrogation room, and I was in
24 there for maybe roughly an hour to an hour and a half.

25 Q. Did they find any gunpowder residue on the

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1 clothes?

2 A. No, sir, and when I first turned the clothes in,
3 they never sent it off to SLED to get gunpowder. When I
4 found that out was maybe eight months later when I was
5 going up for bond, and my bond got denied, and counsel
6 then told me that the State never did send my clothes off
7 to get tested, so he said he requested that they send it
8 off to get tested at that time.

9 Q. And that's what Whitney Barry from SLED testified
10 to?

11 A. Yes, sir.

12 Q. All right. Now, did you request after the
13 conviction that this case be appealed?

14 A. Yes, sir.

15 Q. And what was your understanding about that?

16 A. From my understanding that he was going to file
17 for my direct appeal, had the notice, and he came and saw
18 me that -- I got sentenced on a Friday, and I saw him
19 that Sunday before I went to the Department of
20 Corrections, and he was telling me that, you know, he is
21 going to file for my appeal and he would try to see if
22 any way possible that he could get me back home.

23 And my family went down and speak with him, I
24 think it was that week that I left, I guess, to sign some
25 papers or something, but once I got in the Department of

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1 Corrections, maybe six months later, I find out that I
2 have no history or no paper trail inside the appellate
3 court nowhere in the court system on my appeal, so that's
4 when I filed my PCR myself, just to get back to court.

5 Q. Because you knew that by that time your appeal was
6 untimely.

7 A. Yes, sir.

8 Q. Okay. And did your family have contact or try to
9 have contact with Mr. Smiley about your appeal?

10 A. Yes, sir.

11 Q. Okay. Now, I got one final question, and you and
12 I have discussed this. You've been waiting for this for,
13 like, three years?

14 A. Actually, next month will be three years since I
15 got convicted.

16 Q. All right, and I'm not suggesting this because I
17 left something out, or I don't think that I've left
18 anything out, but this is your opportunity: Is there
19 anything else that you think that I may have omitted or
20 failed to bring to the attention of the Court that you
21 would like to bring to the Court's attention at this
22 moment?

23 A. Well, SLED agent Joseph West who worked on the
24 video --

25 Q. Right.

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1 A. Now, he did testify and, you know, he explained
2 how they slowed the video down from 100 percent speed to
3 35 percent speed. They zoom and they brighten up, they
4 screen shot it, they did everything to capture that

5 image, and Mr. Smiley was ineffective for not questioning
6 him about the first shot, because the first shot was the
7 most important, because whoever fired that first shot was
8 the same person that was running across the parking lot
9 to fire the second shot behind the muzzle flash that
10 struck and hit my best friend, Dontaye Reed, who got
11 killed.

12 Now, if he did question that witness about that
13 first shot, that would clearly prove my innocence because
14 it is a proven fact that on the video, you can see the
15 muzzle flash with a body figure behind it, and that's the
16 second shot, but when the first shot took place, when I'm
17 still on the sidewalk by the door, you don't see no kind
18 of light, muzzle flash, or anything coming from the area
19 where I'm at on the sidewalk. So, like I said, if he did
20 address that, maybe the agent could have talked about the
21 possible -- the angle that the shot came from or what he
22 believed happened.

23 Q. All right. And you feel like he was ineffective
24 for failure to do that?

25 A. Yes, sir.

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1 Q. All right. Anything else?

2 A. And then the security guard who was working that
3 night, you know, he was an undercover officer. He was
4 armed. He didn't fire his weapon, but he was armed, and
5 he didn't testify. He didn't testify at the trial.

6 Now, I believe, you know, if he would have
7 testified, it could have helped or hurt me, the security
8 guard would have been able to tell what he saw and what
9 happened because he kicked out an individual right before
10 the shooting start, and he was able to identify that
11 individual who he kicked out came out to be the same
12 person who committed this crime.

13 Q. Who's that?

14 A. Derrick Brown, and the forensic -- the person who
15 did the autopsy, you know, she testified, and she
16 explained the cause of the death, you know, was a gunshot
17 wound. And she described the X-ray, how, you know, the
18 bullet entered from the left back, the lower front, right
19 around the waistline, and she said it went through the
20 body, from left to right, slightly upward where it hit a
21 main artery and it stopped on the seventh rib, right
22 under the skin.

23 She explains the difference in the type of range
24 and shot, and the first one was a contact shot and she
25 explains that that would have a muzzle imprint on, you

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1 know, the body. She explained that the second was a
2 close range shot, and the third would have been a
3 distance shoot.

4 Now, even though the State didn't do a complete
5 investigation of a measurement of the entire parking lot
6 from the distance where I was at on the sidewalk to the
7 distance where the attempted murder victim was at when
8 the first shot take place and the distance from where I
9 was at to the second victim, where he got shot, he never
10 did --- you know, he never did an investigation or tried
11 to look in to see what was the possible angles or the
12 distance that the shot came from, and counsel, he was
13 ineffective for not taking my statement into
14 consideration because where at the first shot take place,
15 you can see on the camera that everybody is ducking down,
16 everybody is running, but you don't know where this first
17 shot came from.

18 You don't see any muzzle flash, anything like
19 that, and I'm saying that if you can see the second
20 muzzle flash that farther away from the camera, it should
21 have been you could see the first one because it's closer
22 to the camera. So I feel he was ineffective because if
23 he had -- you know, if he had looked into that to try to
24 figure out the possible angles or the distance, it would
25 have proven my innocence because the -- from the autopsy,

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1 it showed how it was a kind of right to left kind of
2 shot, and where I was standing at, it's impossible for me
3 to make that shot to add up with the bullet wounds and
4 the angle of the wounds. It was impossible for that shot
5 to come off of that angle.

6 And, also, throughout the closing argument,
7 the State had used some photos, some screen shot photos,
8 that wasn't admitted into evidence. She was using it for
9 a demonstration, and counsel did object to it, but it was
10 a late objection, and when she was trying to explain --
11 she was trying to explain through the closing argument
12 that, you know, when the first shot take place, she said,
13 unfortunately, the camera just missed a chunk, and that's
14 where she was pointing on the screen shot picture that
15 wasn't admitted into evidence.

16 MS. COLEMAN: Your Honor, objection. This is
17 not part of his allegations or his amendment.

18 THE COURT: All right. I'll sustain the
19 objection.

20 MS. COLEMAN: Thank you.

21 MR. THOMAS: Deonte, if you would, answer any
22 questions that the Attorney General may have for you,
23 okay?

24 THE COURT: Yes, ma'am.

25 MS. COLEMAN: May I request a brief rest room

DEONTE BROWN - CROSS-EXAMINATION

1 break?

2 THE COURT: Yes. We'll stand at ease for
3 five minutes.

4 Mr. Brown, under these circumstances, you
5 can't discuss these matters with either lawyer. If you
6 need to be excused, the bailiff will assist you in that
7 regard.

8 (Recess taken.)

9 CROSS-EXAMINATION

10 BY MS. COLEMAN:

11 Q. I'll start by asking a little bit about the facts
12 of the case, and I know we've already been through this
13 in some detail, but what were you wearing the night of
14 the crime? Because that was important to the facts of
15 the case, right?

16 A. I was wearing a button-down red shirt with black
17 jeans, short pants.

18 Q. And were the jeans baggy? You said they were
19 falling down past your waist.

20 A. Yes, sir -- excuse me, yes, ma'am.

21 Q. How short or long were the sleeves on the shirt?
22 Were they full-length sleeves?

23 A. No. It was like, truthfully, really short
24 sleeves, a really short-sleeved shirt.

25 Q. And your attorney argued that in his closing

1 argument, right? I think he mentioned something about
2 the short sleeves?

3 A. Yes.

4 Q. And when he said that, I believe he was talking
5 about the testimony of April Blodgett --

6 A. Right.

7 Q. And she's the one who said she saw the gun come
8 out of the red sleeve, right?

9 A. Yes, ma'am.

10 Q. And he told the jury that you were wearing a
11 short-sleeved shirt?

12 A. Yes, ma'am.

13 Q. I know that you testified that there was no
14 evidence against you, right? The State had no evidence
15 on you; is that your belief?

16 A. Being the shooter, no.

17 Q. When you say that, you mean there's no direct
18 evidence, right?

19 A. As evidence that -- showing that I stopped the
20 fight, but --

21 Q. But there are no fingerprints, there is no --
22 there is nobody who says, Yes, Deonte Brown was the
23 shooter?

24 A. Correct.

25 Q. But there was circumstantial evidence against you,

1 right?

2 A. Correct.

3 Q. So there were, I believe, nine witnesses who
4 testified that the guy in the red shirt started the
5 fight; is that right?

6 A. Yes. They testified to say I started the fight,
7 and I admit to that since the day of my arrest, on my
8 statement I wrote.

9 Q. And there were three witnesses who testified that
10 the guy in the red shirt shot the gun, right?

11 A. No. They had no witness that, you know, testified
12 on the stand to say the guy with the red shirt shot the
13 gun, no.

14 Q. And Mr. Smiley, trial counsel, cross-examined all
15 these witnesses and initially got them to say, Did you
16 actually see him with the gun? Did you see him shoot the
17 shot, and they all said no, correct?

18 A. Correct.

19 Q. So there were three witness statements saying that
20 the guy in the red shirt had the gun?

21 A. Correct.

22 Q. Okay. And there was also a videotape of, I think,
23 six different angles of the fight; is that right?

24 A. Yes.

25 Q. And the jury saw all of that, right?

DEONTE BROWN - CROSS-EXAMINATION

1 A. Yes.

2 Q. Okay. Speaking of that videotape, one of the
3 witnesses, I think you were just talking about him a
4 moment ago, Joe West, he testified about the videotape

5 and how he enhanced the videotape; is that right?

6 A. Yes.

7 Q. Did he actually say that he had changed or altered
8 the videotape to make it clearer?

9 A. No. He said that -- the State asked him did he
10 alter the content of this video, and he said no.

11 Q. So he basically just went through and slowed down
12 the video. He didn't add to it or change it, correct?

13 A. Yes, he didn't change anything. He just zoom in,
14 brighten up, and slow it down from 35 percent -- from 100
15 percent speed to 35.

16 Q. Okay. You were testifying a few moments ago about
17 the first shot and how you think counsel was ineffective
18 for not questioning Joe West on that first shot. Are you
19 saying that he took out part of the video or he left
20 something out?

21 A. No.

22 Q. Okay.

23 A. And if you look through the transcript from both
24 point of views, the State and defense, that the first
25 shot, they don't know where that shot take place, and the

DEONTE BROWN - CROSS-EXAMINATION

1 State was saying that it came from me, but from the video
2 and the evidence, it's a proven fact that it didn't, and
3 then counsel was saying that, you know, obviously, the
4 shot -- the first shot isn't on camera. It came from
5 farther out in the parking lot, behind the car or -- it
6 didn't come from me exiting that front door because
7 there's evidence that can show on the video that they
8 never saw no gun flash.

9 Q. So the jury saw that video, right?

10 A. Yes.

11 Q. And it was ultimately their decision as to whether
12 or not it came from you; is that right?

13 A. Well, actually, to me, how they break it down
14 during the trial, they never really talked about that
15 first shot. Their main focus was on was the muzzle flash
16 with the body figure, and that was the second shot. That
17 was the main focus.

18 Q. Okay. Let's talk about the plea offer. You
19 testified that there was a ten-year plea offer from the
20 State that you rejected; is that right?

21 A. At the time, yes, I did.

22 Q. And trial counsel explained this to you?

23 A. He didn't really explain it, he just -- he told me
24 that, you know, at the time that the State was offering
25 me ten years' plea, and he didn't quite explain why the

DEONTE BROWN - CROSS-EXAMINATION

1 reason he did it or what was the technicality or issue in
2 the case. He was just basically, like, you know, it's up
3 to me, and he said that, you know, You have a good case.
4 You don't have any witness. No one said you did it. You
5 don't have no physical, no concrete evidence, and he was,
6 like, still, at the end of the day, the decision have to
7 come from the jury.

8 So he didn't really explain to me exactly what was
9 the plea for, and I wasn't going to take a plea as being
10 the shooter of the case when I know I didn't.

11 Q. Now, your attorney questioned you a few minutes
12 ago about an Alford plea and how you could plea without
13 admitting your guilt, essentially, to the Court. Is that
14 something that you would have done?

15 A. Yes. Actually, I would have taken {sic} a plea,
16 you know, if they had gave me a different charge, like
17 starting the fight, you know, like charging me for like
18 accidental death or something like that, you know, but I
19 believe I wasn't going to take any kind of plea saying
20 that I was the shooter because that's incorrect.

21 Q. And the State's offer was to voluntary
22 manslaughter; is that right?

23 A. It was voluntary, if I'm not mistaken.

24 Q. So the ten-year deal that they were offering you
25 was for you to plead and say that you did shoot him,

DEONTE BROWN - CROSS-EXAMINATION

1 correct?

2 A. Yes.

3 Q. And you weren't going to take that?

4 A. Yes.

5 Q. Okay. Detective Lawrence, we talked about him
6 some and his alleged relationship with Derrick Brown's
7 mother. Do you have any proof they were in a
8 relationship?

9 A. Yes. He got fired for another murder case he was
10 investigating that Derrick Brown was charged with, and
11 that case happened 30 days after my case, and they was
12 trying to link that case to my case to him being the
13 shooter in both cases, but nothing ever went forward.
14 Detective Lawrence got fired, you know, roughly two years
15 later for that same reason with that case.

16 Q. Do you have any paperwork or documents to prove
17 that he was fired for that reason?

18 A. Well --

19 Q. Or is that just what you've heard?

20 A. No, there's proof. I mean, I saw it, you know, on
21 the news and I saw it on the Internet. That was the
22 reason why he got fired from the case, for lying to his
23 official and then coming back again after a higher
24 official look into it, you know, his -- what he tells
25 them, the story he tell him is the detective, and the

DEONTE BROWN - CROSS-EXAMINATION

1 story was Derrick Brown mother said it was
2 correspondence, so it was, like, they made up a story
3 before the people come in and question him. And after --
4 you know, I guess it was an internal phase, they started
5 to look into it, things like that, he came out and he
6 told his chief that, you know, he did -- he slept with
7 her, you know, when he was dealing with her.

8 Q. And do you have any proof that he lied or any of
9 these things affected your case specifically or just the
10 case after yours?

11 A. Well, just a lot of things in my case that isn't
12 true, and I'm trying to show that if you lie one time,
13 you know, why couldn't you do it again?

14 Q. Okay. Now, Detective Lawrence did not -- you said
15 that he was involved in your case, but it was actually
16 Detective Smith who took over the lead -- as the lead
17 investigator in this case; is that right?

18 A. Detective Smith was the head investigator on the
19 case, and Detective Lawrence was the second one.

20 Q. Okay.

21 A. He actually was the one that questioned me in the
22 interrogation room. He was the one that booked me into
23 the county jail. He was the one who questioned the
24 majority of the witness and in the transcript SLED agent
25 Joe West stated that he received a video from Detective

DEONTE BROWN - CROSS-EXAMINATION

1 Lawrence on the same day of the incident. He drove it up
2 there to SLED himself.

3 Q. Did he testify at the trial?

4 A. Detective Lawrence?

5 Q. Yes.

6 A. No, ma'am.

7 Q. And he didn't use the statement from his interview
8 at the trial against you, did he?

9 A. No. My statement didn't come in because I wasn't
10 able to testify, so --

11 Q. And you said you didn't do it in your statement,
12 right?

13 A. Yes, ma'am.

14 Q. So they didn't use that against you at trial?

15 A. They didn't use my statement, no, they didn't use
16 it.

17 Q. So Detective Smith is the one who took over the
18 case and testified at trial, correct?

19 A. Yes, ma'am.

20 Q. And she didn't have any reason to favor Derrick
21 Brown one way or the other, correct?

22 A. No. She don't have no reason to favor him, but
23 the mistakes and the problems has already been occurred.

24 Q. If she looked at the evidence or the interview by
25 Detective Lawrence or whoever and thought that Derrick

~~DEONTE BROWN - CROSS-EXAMINATION~~

1 Brown was the shooter in this case, she could have
2 charged him, right?

3 A. Well, she could have, but she's stating that it
4 was me that, you know, she saw behind that muzzle flash,
5 and I believe she got that information from her and
6 another detective watching the video, as in Detective
7 Lawrence, and that's what they was able to come up with
8 to get me arrested for this charge.

9 Q. Let's talk about your appeal a little bit. You
10 testified that you asked your attorney to file an appeal.
11 Did you ever do this in writing, or do you have any kind
12 of letter or anything asking him for an appeal?

13 A. Well, no. When I got my time that Friday, I
14 got -- the trial was out that Thursday. I got my time
15 that Friday, and I saw my attorney on that Sunday before
16 I went to the Department of Corrections, and we had an
17 understanding that we was going to appeal this decision
18 because at time until now I'm still saying that I didn't
19 do it and I'm innocent, so why not appeal it?

20 Q. Did you ever tell your attorney that you wanted to
21 waive your right to an appeal and you wanted a
22 PCR instead?

23 A. No, sir -- excuse me. I mean, no, ma'am.

24 Q. So you testified that the night in question, the
25 night of the crime, you were the one who started the

DEONTE BROWN - CROSS-EXAMINATION

1 fight, right?

2 A. Yes, ma'am.

3 Q. And all of the witnesses' statements said that you
4 were the one that started the fight?

5 A. Yes. That's something, you know, the camera
6 shows, and, you know, you can't hide that, you know. I
7 admitted that I threw the drink in his face. You know, I
8 was the one that start this whole chaos, but from the
9 part on what happened on the outside, when the shots got
10 fired, I couldn't control that. I had nothing to do with
11 that.

12 Q. And your attorney cross-examined every single
13 eyewitness and had them say to the jury that they did not
14 see you with a gun; isn't that right?

15 A. Yes, ma'am.

16 Q. Did you have a gun on you that night?

17 A. No, ma'am.

18 Q. Okay. So when the eyewitnesses, like Dario Teran,
19 he said that he did not see who the shooter was
20 specifically, right?

21 A. Right.

22 Q. And your attorney cross-examined him and said --
23 he said you saw a flash of the gunshot, but you didn't
24 see the gunshot. You didn't see who shot it, right?

25 A. Yes, ma'am.

DEONTE BROWN - CROSS-EXAMINATION

1 Q. Do you think that that benefitted you at trial, to
2 have the jury hear that he didn't see it was you do it?

3 A. Well, it should have, but the State took in his
4 statement, and that was the evidence, what his statement
5 said, not from the stand.

6 Q. I don't have many more questions. I'm almost
7 done.

8 You testified about your decision not to testify
9 at trial, right, not to take the stand? The judge
10 explained to you twice, both before the trial and at the
11 close of the State's evidence, that it was your decision
12 whether or not to testify at trial, right?

13 A. Yeah. The judge did explain that.

14 Q. So you knew that it was your choice. You could
15 get advice from your attorney, but it was your choice
16 whether or not you wanted to take the stand?

17 A. Yes. It was my choice that -- you know, decided
18 if I wanted to take the stand or not, but counsel advised
19 me that, you know, it wouldn't be a good thing for me to
20 take the stand, and me relying on him and, you know,
21 seeing that there really isn't any strong, physical
22 concrete evidence, you know, I take faith and I trusted
23 him.

24 Q. And you thought that was good advice at the time?

25 A. Yes, because, you know, I didn't do it, and, you

DEONTE BROWN - REDIRECT EXAMINATION

1 'know, I came this far saying I'm innocent, and, you know,
2 he advised me that wouldn't have been a good idea, so I
3 felt like, you know, I wasn't going to get convicted.

4 MS. COLEMAN: No further questions. Thank
5 you.

6 THE COURT: Any redirect?

7 MR. THOMAS: If it please the Court, just one
8 or two.

9 REDIRECT EXAMINATION

10 BY MR. THOMAS:

11 Q. Deonte, let me just ask you a couple questions, if
12 I may.

13 Was there any testimony presented by any of
14 the witnesses that there was anybody else there with a
15 red shirt? Do you remember?

16 A. Yes --

17 MS. COLEMAN: Objection, Your Honor. This is
18 outside the scope of my cross-examination.

19 THE COURT: You asked him about a red shirt.
20 I'm going to allow him to ask.

21 THE WITNESS: Yes, there was testimony that,
22 you know, there was someone else there with a red shirt.

23 BY MR. THOMAS:

24 Q. Now, the videos, of all the videos, none of those
25 ever showed you as the shooter, did they?

~~DEONTE BROWN - REDIRECT EXAMINATION~~

1 A. No, sir.

2 Q. Okay. And counsel asked you about the guilty
3 plea, the plea offer, and you said that you had an offer
4 of ten years; is that correct?

5 A. Yes, sir.

6 Q. And was it your understanding that the ten-year
7 offer was based upon a plea to the voluntary
8 manslaughter?

9 A. From my understanding, I was -- I assume the plea
10 was for, you know, voluntary.

11 Q. It was something less than murder.

12 A. Yeah, yeah, and I think it was voluntary, but it
13 would still put me as being the shooter.

14 Q. All right. And you did not want to admit guilt?

15 A. Right.

16 Q. But you didn't discuss with your attorney the
17 possibility of being able to plead without admitting
18 guilt.

19 A. Yeah. We never discussed that.

20 Q. Okay. And the appeal -- counsel asked you about
21 your appeal as well. Was there any reason for you to
22 believe that Mr. Smiley had not filed this appeal on your
23 behalf?

24 A. I thought that he, you know, actually he did it.

25 Q. That was your understanding?

DEONTE BROWN - REDIRECT EXAMINATION

1 A. Yeah, from what we talked about and my
2 understanding that he was going to do it.

3 Q. All right. Did you feel like you had any
4 appealable issues?

5 A. Yes. I believed there was a lot of things that
6 could be addressed on the appeal; you know, things that
7 he did, objected to, and, you know, the jury charge of
8 the theory of the transfer defense but was never alleged
9 in the indictment, you know, so --

10 Q. How about Dario Teran? He was the guy whose
11 statement was read into the record in front of the jury.
12 Did Mr. Smiley object to that?

13 A. No, not to my knowledge he didn't, but he did
14 address it on cross.

15 Q. Right.

16 A. He did address it on cross, but he didn't object.

17 Q. Now, when counsel asked you about your telling the
18 Court that you had -- that you were not going to testify
19 and that you had discussed this with counsel; is that
20 true?

21 A. Him telling the Court that?

22 Q. No, that you told the Court that.

23 A. Yes, yes. That I told the Court that, you know,
24 the reason why I didn't testify.

25 Q. And at that point in time, what was your belief,

DEONTE BROWN - REDIRECT EXAMINATION

1 if any, in regards to this information about Detective
2 Lawrence coming out? Did you think that was still yet to
3 come?

4 A. Well, when he told me that we couldn't -- once the
5 State was finished with their case and we put up our
6 witness, and I couldn't have testified, you know, after
7 him advising me, at that point in time, I knew that
8 Detective Lawrence and this issue wasn't going to come
9 forward because, you know, it was more to the end or the
10 trial.

11 Q. All right. Did you discuss that with your
12 attorney?

13 A. No. After the fact, no, we didn't, no. When he
14 came to see me, he did say something about, you know, the
15 door was never open. The door was never opened for him
16 to speak on that, but I felt like if there was a pretrial
17 hearing, we could have discussed, you know, plenty of
18 things about the motion.

19 MR. THOMAS: Your Honor, I have no further
20 questions.

21 THE COURT: All right. You may step down.
22 Thank you, sir. You may call your next witness.

23 MR. THOMAS: Your Honor, may it please the
24 Court, we would call Mr. Brown's mother to the stand.

25 THE COURT: Very good.

DORIS GREGORY - DIRECT EXAMINATION

1 DORIS GREGORY,
2 having been first duly sworn,
3 was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. THOMAS:

6 Q. Your Honor, May it please the Court: Ms. Gregory,
7 you're related to Deonte Brown?

8 A. Yes, sir.

9 Q. And how are you related to him?

10 A. His mother.

11 Q. All right. You understand that you're under oath
12 to tell the truth?

13 A. Yes, sir.

14 Q. And is that what you intend to do?

15 A. Yes, sir.

16 Q. Tell the truth?

17 A. Yes, sir.

18 Q. All right. Now, I've got two issues that I'd like
19 to ask you about, one being the appeal. Do you have any
20 personal knowledge about any requests for an appeal?

21 A. Yes, sir.

22 Q. And was a request of Mr. Smiley made regarding the
23 appeal of this case?

24 A. Yes, sir.

25 Q. And what, if anything, did Mr. Smiley tell you.

DORIS GREGORY - DIRECT EXAMINATION

1 about the appeal?

2 A. A few days after his conviction, I went downtown
3 to his office, and we was talking about it, and he told
4 me -- you know, I signed a paper, you know, thinking that
5 was the paper to sign for his appeal.

6 Q. Right.

7 A. And nothing else happened after that.

8 Q. So you discussed the appeal with him?

9 A. Yes, sir.

10 Q. It was your understanding that an appeal either
11 was going to be or had been filed?

12 A. Yes, sir.

13 Q. And you discovered later that the appeal had not
14 been filed?

15 A. Yes, sir.

16 Q. And how much later was that, do you remember?

17 A. Not exactly, but it was a good while afterwards.

18 Q. Okay. All right. Let me ask you about Derrick
19 Brown. Do you know Derrick Brown?

20 A. Yes, sir.

21 Q. Do you know Detective Charles Lawrence?

22 A. Not personally. I've learned about him through
23 Sonya Magwood.

24 Q. And who is she?

25 A. My oldest son's aunt.

DORIS GREGORY - DIRECT EXAMINATION

1 Q. I'm sorry?

2 A. My oldest son's aunt.

3 MS. COLEMAN: Your Honor, I object. Any
4 testimony on this subject would be based on hearsay.

5 MR. THOMAS: I'm going to ask about her
6 personal knowledge.

7 THE COURT: She might have seen something.

8 MR. THOMAS: Thank you, Your Honor.

9 BY MR. THOMAS:

10 Q. Now, as far as Derrick Brown's mom, you and she
11 are good friends?

12 A. We was best friends since high school.

13 Q. Okay.

14 A. Way back in the '80s.

15 Q. Now, during the period of time your son Deonte had
16 been charged with this, were you and she still friends?

17 A. Yeah. We was still friends up until I asked
18 her -- they charged him with attempted murder.

19 Q. Okay. Do you know, of your own personal knowledge
20 as a result of a relationship with Mr. Brown's mom, that
21 she was having an affair?

22 A. Yes, sir.

23 Q. And who was she having an affair with?

24 A. With Detective Lawrence.

25 Q. Did you ever see them together?

DORIS GREGORY - DIRECT EXAMINATION

1 A. No, sir.

2 Q. Okay. But was it common knowledge she was having
3 an affair with Detective Lawrence?

4 A. Yes. We talked every day, like, two, three, four
5 times a day. I mean, we don't keep nothing from each
6 other.

7 Q. Okay. And did you have any idea or thought as to
8 who committed this crime?

9 A. Yes, sir.

10 Q. And who was that person?

11 A. Derrick Brown.

12 Q. Did you bring this information to Mr. Smiley? Did
13 you talk to him about it?

14 A. Yes, sir.

15 Q. And what did you tell Mr. Smiley?

16 A. That I believe Derrick Brown committed those
17 crimes.

18 Q. And did you tell him about the relationship
19 between Detective Lawrence and Derrick Brown's mom?

20 A. Yes.

21 Q. And what did Mr. Smiley say about that?

22 A. Nothing, really.

23 Q. Okay.

24 A. He didn't say much about it.

25 Q. Did he say he was going to use this in court or

DORIS GREGORY - CROSS-EXAMINATION

1 anything?

2 A. No. He said he was going to investigate because
3 her -- like I said, me and her talked. We was friends.
4 We talked three, four times a day, and I would go to her
5 house mostly three or four times a week. We talk about
6 everything.

7 Q. This is something you knew?

8 A. Yes, sir.

9 Q. All right.

10 MR. THOMAS: I beg the Court's indulgence,
11 Your Honor. Nothing further, Your Honor.

12 THE COURT: Any cross-examination?

13 MS. COLEMAN: Yes, Your Honor.

14 CROSS-EXAMINATION

15 BY MS. COLEMAN:

16 Q. How do you know Derrick Brown was the shooter in
17 this case?

18 A. I believe he is the shooter because of the
19 conversation that Sunday morning me and his mom had.

20 Q. So you weren't at the Waffle House, were you?

21 A. No, ma'am.

22 Q. You didn't see anything happen?

23 A. No, ma'am.

24 Q. So you don't even know who was there and who
25 wasn't, right?

DORIS GREGORY - REDIRECT EXAMINATION

1 A. No.

2 Q. Okay. So all of that is just based on what -- I'm
3 sorry, a conversation with who?

4 A. With Derrick Brown mom, Sonya Magwood.

5 Q. Okay. And I don't mean to ask you this to
6 embarrass you. Do you have a criminal record?

7 A. No, ma'am.

8 Q. No convictions from the past ten years?

9 A. No, ma'am.

10 MS. COLEMAN: Nothing further.

11 MR. THOMAS: If I could just ask one further
12 question.

REDIRECT EXAMINATION

13
14 BY MR. THOMAS:

15 Q. Counsel asked you about a conversation with
16 Derrick Brown's mother?

17 A. Uh-huh.

18 Q. What did she tell you?

19 A. That Sunday --

20 MS. COLEMAN: Objection. Hearsay.

21 THE COURT: She opened the door.

22 I think it's clear the only way she knows
23 about the affair is through conversation, which is
24 actually hearsay, so I've allowed you to at least allow
25 her to say that, but there is really not much -- sustain

JAMES SMILEY - DIRECT EXAMINATION

1 the objection.

2 MR. THOMAS: Thank you, Your Honor.

3 THE COURT: You may step down. Thank you.

4 You may call your next witness.

5 MR. THOMAS: Your Honor, that's the
6 Applicant's case.

7 THE COURT: Ms. Coleman, you're recognized.

8 MS. COLEMAN: Thank you, Your Honor. The
9 State calls Mr. Jim Smiley.

10 JAMES SMILEY,

11 having been first duly sworn,

12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MS. COLEMAN:

15 Q. Good morning, Mr. Smiley.

16 A. Good morning.

17 Q. How long have you been practicing law?

18 A. Since 1993.

19 Q. And were you appointed or retained in this case?

20 A. Retained.

21 Q. How many times did you meet with the Applicant
22 before his trial?

23 A. More than a dozen.

24 Q. Did the Applicant cooperate with you during this?

25 A. He did.

JAMES SMILEY - DIRECT EXAMINATION

1 Q. Did you file any Brady or Rule 5 motions?

2 A. Yes.

3 Q. And did you review the discovery material with the
4 Applicant?

5 A. In depth.

6 Q. What kind of evidence did the State have against
7 him?

8 A. Pretty flimsy evidence, in my view. The one piece
9 of evidence, besides, I guess, you would call them
10 statements of a witness, the people that were there, is
11 the only other piece of evidence that had circumstantial
12 evidence was the videotape, which at the preliminary
13 hearing Detective Smith said was the basis of her
14 probable cause for the murder, but then she couldn't make
15 an identification at the trial. She wasn't allowed to
16 make the identification at trial, but that was the
17 evidence.

18 Q. Based on that evidence, was there any question
19 that the Applicant was at the scene?

20 A. No question.

21 Q. Was there any question that he started the fight
22 in the video?

23 A. No question.

24 Q. And, of course, there was a question of whether or
25 not he had a gun and he was the shooter; is that what it

JAMES SMILEY - DIRECT EXAMINATION

1 all came down to?

2 A. Absolutely.

3 Q. Prior to trial, did you discuss what the elements
4 of the charge was and what the State was required to
5 prove?

6 A. Yes.

7 Q. Did he seem to understand that?

8 A. Yeah.

9 Q. Did you discuss his version of the facts?

10 A. Absolutely.

11 Q. And what was that version?

12 A. That he had come there, that he had gotten into a
13 verbal altercation with a fellow that was sitting in
14 there as he had tossed a drink in his face, at which time
15 a melee took place that sort of moved into -- and I know
16 Your Honor's been to a Waffle House, I would hope.
17 There's an indoor and an outdoor, and there's a glass
18 area in between. The altercation sort of got pushed into
19 that vestibule.

20 At the point they were in that vestibule is when
21 shots were fired, or a shot was fired, let me say that.
22 As soon as that shot was fired, everybody scrambles, and
23 you can see Deonte in the video go in, or close to the
24 vestibule. When the shot fired, everybody scatters, as I
25 argued, that Deonte went in one direction, not the

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1 direction that a person that fired the second shot came
2 from.

3 Q. Did you discuss any possible defenses with the
4 Applicant?

5 A. Oh, yeah.

6 Q. And what were the defenses?

7 A. He maintained from very beginning he was not the
8 shooter. Any of the evidence that I could see did not
9 support that he was the shooter, and what I tried -- my
10 defense was the first shot, if it, in fact, had come from
11 Deonte -- and I think I need to back up.

12 There was two bullets that were found at the
13 scene, only one gun, because they were able to determine
14 that the bullet that was found that was the
15 through-and-through, they found inside the vestibule, and
16 the one that was found in the decedent were from the same
17 gun. So one gun, two bullets, and so my defense was that
18 it would have been impossible for the first shot to have
19 come from Deonte because he was close to or in that glass
20 enclosure, and the reason I put the picture in is the
21 glass in that case shows that the shot came from the
22 outside in.

23 There's a bullet hole that shows it coming from
24 the outside in, so it could not have possibly been
25 Deonte, was my argument, and since the same gun fired

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1 twice, it couldn't have been Deonte that was behind the
2 flash, and that was the defense.

3 Q. Okay. What other strategies did you use at trial,
4 like in cross-examining the witnesses?

5 A. Well, I personally believe that we tore up any of
6 their eyewitnesses, for lack of a better way to put it,
7 people who had made statements that had been on the scene
8 pretty well so it was through cross-examination.

9 Q. And what consistent questions did you
10 cross-examine these witnesses on?

11 A. How Deonte appeared, the fact that he had on --
12 and they were long shorts. They came down to about his
13 knee. He had on a pair of underwear that was a boxer
14 type that you could see above his pants. His pants were
15 baggy. He had on a red shirt, short sleeved. That was
16 fairly distinct. He had some writing on it. It wasn't
17 just a plain red button-down shirt, and it was open. You
18 could see his chest and waistline quite clearly in the
19 video, and it flew around so it wasn't like it was
20 closed, and that you couldn't see a gun.

21 There was no way that his pants would have
22 supported a gun, though, because it would have fallen
23 out. They were too baggy and loose. Mr. Derrick Brown,
24 a/k/a Scrappy, is another fellow. He was in there, and
25 he -- when the initial argument took place between Deonte

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1 and the fellow, that was the verbal, physical, hands-on
2 fight, Derrick was in there raising cane, and he got
3 kicked out. He was thrown out by this very elderly,
4 70-year-old, 75-year-old security guard who was
5 overmatched, just in numbers of people that were in that
6 place that night, but he put Scrappy, Derrick Brown, out.

7 Derrick goes back to the back of the parking lot,
8 and you lose sight of him. The security guard, while the
9 argument is continuing -- it calms down, and it keeps
10 going. The security guard is standing outside, trying to
11 keep an eye on Derrick Brown because he was concerned
12 about Derrick Brown, so he was outside. He had just
13 started to come back inside when it broke into a fight,
14 and so Scrappy was in that back corner of the thing, so
15 we were trying to show how he looked, where Scrappy was.

16 I had a hard time figuring out how I was going to
17 use third-party guilt since he was never charged in this
18 case, but I did everything I could to put it towards
19 Derrick in the simplest fashion possible. There he was.
20 He --

21 I lost track of what your question was at
22 this point. Sorry.

23 Q. I did too. That's okay.

24 A. Ask me another one.

25 Q. What kind of investigation did you do to prepare?

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1 A. All I did was go through the discovery. I got
2 paid very little in this case. There was no money for
3 investigation. Ms. Gregory is a nice woman, and he was
4 originally charged with attempted murder. My fee was
5 \$10,000. They made me a down payment on that. Then it
6 was upgraded to murder. I did not charge an additional
7 fee.

8 His total -- I was paid about \$4,900, of which I
9 spent a little over \$800 on case expenses, so there just
10 wasn't money for investigation. I did most of what
11 needed to be done on my own and felt like I was very
12 prepared for trial.

13 Q. Did you have enough time to prepare for trial?

14 A. Certainly.

15 Q. Did you interview any of the State's witnesses in
16 this case?

17 A. I had statements from them because I didn't want
18 to get another statement. I liked the first statement,
19 quite frankly. When taken on face value, they made
20 passing mention, but none of them truly identified Deonte
21 as the shooter, one of the reasons Ms. Smith was unable
22 to rely on him for probable cause, and so to go make
23 contact with those witnesses I didn't think was going to
24 be helpful because I had what I needed for trial;
25 however, there is one witness that turned out to be

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1 crucial in the case, and, in hindsight, Monday morning
2 quarterbacking, I probably should have talked to, and
3 that was Chavis Heyward, because I was unaware, this
4 detail, of what had gone on when he had come in to be
5 interviewed right before the trial, about ten days before
6 trial, that I had no clue that Mr. Barfield was going to
7 say that Mr. Heyward had admitted to the red shirt
8 because when he had come in ten days before the trial, he
9 had told the prosecutor who had communicated this
10 information to me that he wasn't saying who shot him.

11 And so the prior inconsistent statement offered by
12 Detective Barfield, who escorted Mr. Heyward out, was a
13 surprise, to a certain degree, and I asked if it had been
14 recorded anywhere, if Detective Barfield had gone back
15 and written it down, if they had pulled the video and
16 audio to show where it took place as he left the
17 solicitor's office because I knew that that area was
18 under monitoring, and that wasn't the case. In
19 hindsight, I probably should have talked to Mr. Heyward.
20 I didn't expect it to come out the way it did, and I'm
21 still not real comfortable with the way that went down.

22 Q. If you had spoken before the trial to Mr. Heyward
23 or to Investigator Barfield, how would that have changed
24 your approach to the case?

25 A. Well, I would have known that -- well, if I would

1 have spoken to Mr. Heyward, I guess I could have
2 strengthened the fact that he didn't see anything, or
3 that he had had a conversation with Mr. Barfield. I'm
4 not calling Mr. Barfield a liar, there is just no
5 documentation to that fact, and it might have led me to
6 the warrant investigation. That is a damaging fact in
7 our case.

8 Q. Did you object to Mr. Barfield's testimony?

9 A. I certainly did.

10 Q. Okay. And was it allowed in under Rule 613(b)?

11 A. Yeah, 613(b).

12 Q. And your objection was overruled?

13 A. It was.

14 Q. Did you argue that in your directed verdict
15 motion?

16 A. I believe I did.

17 Q. Okay. What else did you argue in your directed
18 verdict motion, if you can recall?

19 A. I didn't get a transcript in this case, so -- for
20 whatever the reason is. We argued the standards, I'm
21 sure. I argued any of the objections that had been
22 overruled. I don't remember arguing the one where part
23 of a statement was read to the jury, but if I missed it,
24 I missed it, but that would have been something I would
25 have done. I can't tell you more than that, but it's

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1 certainly in the transcript.

2 Q. Would you agree with me if I said that the
3 transcript represents that the judge denied your motion
4 for a directed verdict based on the testimony of Chavis
5 Heyward and Dario Teran? Does that sound --

6 A. Certainly on Mr. Heyward. I don't know who
7 Mr. Teran is.

8 Q. And also April Blodgett?

9 A. Blodgett.

10 Q. Blodgett?

11 A. And if he denied it on April Blodgett, that
12 concerns me. I don't remember him saying that.

13 Q. What was her testimony?

14 A. She puts herself in a place that she, in my mind,
15 could not have seen what -- three years later, her memory
16 improved. The statement she wrote that night -- what
17 they did is they gathered anybody that had said they had
18 seen anything that were still on the scene, Your Honor,
19 and put them in the Waffle House, and they all were
20 sitting there together, and I made a point of this at
21 trial.

22 As they came up and passed out statement sheets,
23 they say, Write down what you want, and I had a problem
24 that they were all sitting together, writing statements,
25 but Ms. Blodgett's statement, the ones that were locked

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1 in, written statements, didn't identify Deonte as the
2 shooter, or as -- it's not until they get in trial that
3 they tried to make -- well, until their memory starts
4 getting better, and then I strongly cross-examined them
5 on that.

6 Q. So did the jury hear that he had not originally
7 written that in his statement?

8 A. That's correct.

9 Q. Now, Dario Teran, I guess is how you say his name,
10 what was his testimony at the trial?

11 A. Beg the Court's indulgence.

12 Q. And I could hand you a transcript.

13 A. I know all the players, but I don't remember their
14 names, so if I can figure out which one Dario is --

15 Q. Was it Teran? He was in motorcycle accident, and
16 he had trouble remembering. Since the crime, he had been
17 in an accident and he couldn't remember as well? Does
18 that sound familiar? And I believe, just from my reading
19 of the transcript, it seems like he was dining at the
20 Waffle House with his ex-fiancee at the time. They
21 didn't know anybody there. They were just eating.

22 A. Okay. He was one of those sitting off to the
23 side.

24 Q. Yes, and I believe he sat off to the side?

25 A. Yeah, and I made -- I remember making a point you

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1 couldn't see anything. You were ducking under the table.

2 Q. And did you cross-examine him on the motorcycle
3 accident he was in as well?

4 A. I'm sure I did. I just found where Jesse,
5 April --

6 Q. And I'm sorry if I, for some mistake, didn't give
7 him a transcript in advance.

8 A. I have several transcripts of the one I did
9 earlier. I got three of those transcripts but just
10 didn't get this one.

11 Q. He's the one whose fiancée is Wendy Patrick, I
12 believe?

13 A. Yes. Yes. I did question him about his blurry
14 memory that night and the fact that he had an accident on
15 his motorcycle.

16 Q. Do you recall him reading from his prior statement
17 that he had given?

18 A. I don't think so, as I already said, but I don't
19 remember that.

20 Q. Was there any reason to object to him reading the
21 statement or using it to refresh his recollection?

22 A. Not to refresh his recollection, but I would have
23 had a problem, and I would have be surprised if I didn't
24 object to it being read to the jury.

25 Q. Do you recall some discussion from the bench about

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1 how this motorcycle accident might have affected his
2 ability to remember and that's why they were reading it?

3 A. I don't remember that, but I'm not saying -- if
4 it's in the transcript, it certainly was discussed.

5 Q. Did you put up any witnesses?

6 A. Yes.

7 Q. And who did you have testify?

8 A. I had Ms. Barry from SLED because I thought it was
9 important to put before the jury that the clothes that
10 were collected from Mr. Brown within 24 hours, which were
11 the same clothes that he had had on that night, did not
12 have any GSR on it.

13 Q. Okay. Do you believe her testimony helped your
14 case?

15 A. It certainly didn't hurt it. In fact, I believe
16 it helped. Obviously not enough.

17 Q. What were your discussions with the Applicant
18 about him taking the stand at trial?

19 A. As you can tell, he's grown up a little bit.
20 Deonte is a smart guy, so it's not that he didn't
21 understand me. I had some concerns about some of the
22 things he would say on the stand, and I also believe that
23 a great deal of the information was already in front of
24 the jury because they had seen the video. They had seen
25 everything that had gone on, and I also have a maxim that

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1 I've always stuck to, and I told that Deonte, If you
2 think you're winning at halftime, don't give them a
3 chance to catch up, and I was as shocked as Deonte when
4 this jury came back. So was the prosecutor.

5 The ten-year offer was still put out there while
6 that jury was deliberating. That ten-year offer had been
7 on the table for quite a long time, and just so I can go
8 ahead, Alford was not available to us. I had inquired
9 about Alford because Deonte had, from day one, maintained
10 that he did not shoot his best friend, so --

11 Q. Okay. What other discussions did you have about
12 that plea offer?

13 A. I told him that while we had a good case, a case
14 that I thought we were going to prevail on, I thought the
15 odds were more in our favor. While I didn't give
16 specific odds, I thought it was balancing in our favor,
17 because I told him, There's 12 strangers that are going
18 to judge you, and, guilty or not, you got to think about
19 it.

20 But it's hard for me to let someone who is
21 maintaining their innocence without some factual way to
22 support it to plead guilty, and that was our discussion,
23 so if it wasn't clear to him about that, I had a hard
24 time telling him he should plead guilty and take the ten
25 years because he maintained he didn't shoot anybody. So

1 he's always maintained that, so it was a different
2 situation. I had inquired about an Alford plea because
3 it was a really good deal, ten years on a murder case,
4 and we went back and forth with the prosecutor as best I
5 can.

6 The prosecutor had known Deonte from juvenile drug
7 court, I believe it was, and he -- she liked him, and she
8 couldn't believe that he would be involved in this, and
9 it helped in my negotiations for getting a ten-year offer
10 on the table. It's probably the best offer I've gotten
11 on a murder case with one other example in ten years.

12 Q. Whose decision was it to reject the plea offer?

13 A. It was his. He certainly relied on my advice, and
14 I will tell you, I told him innocent people don't plead
15 guilty, so --

16 Q. As far as his appeal, is it your practice to
17 discuss the right to appeal with your clients?

18 A. Yeah. I filed an intent -- a notice of intent to
19 appeal. I served it on the solicitor within ten days. I
20 mailed it off. It was my understanding that it had been
21 perfected, but, obviously, it had not, because I screwed
22 up the appeal process, but it was filed within the ten
23 days, clocked, clocked by the clerk and served on
24 Ms. Linder within the ten days. What happened after
25 that, I'm still not quite sure, but he did not get an

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1 appeal.

2 Q. Do you have anything in your file to evidence that
3 it was -- that the appeal was filed?

4 A. I did not -- I have a trial file with me, but I
5 can provide within a couple hours a copy of it.

6 Q. Okay.

7 A. I would be glad to.

8 MS. COLEMAN: And, Your Honor, I've checked
9 on C track and in our office as well --

10 THE WITNESS: It doesn't show up. The first
11 time I was made aware that there was a problem with the
12 appeal was about six months after everything was done, is
13 Deonte made contact with an attorney in Columbia about
14 taking up his appeal, and she called me and said, Why
15 didn't you file an appeal?

16 And I said I did, and she quite strongly told
17 me how I didn't, and that was the first time it had come
18 up for me. I had a subsequent conversation with Deonte,
19 and Deonte and I talked about it and I told him I was
20 concerned about his PCR rights.

21 He said, Should I file an appeal?

22 I said, I can't tell you that. You got to
23 decide. I did one and screwed up, but I don't want you
24 to lose your PCR right. You can skip your appeal, go to
25 the PCR, and include that. I didn't do that. I told him

1 in his PCR -- because obviously, you know, I've been
2 doing it since 1993. I have a package that I do every
3 time, not often though, Your Honor, but when I lose that,
4 we send out, and I did that in this case, and I don't
5 know what happened, and I still don't to this day know
6 why it's not there, but I will provide to the Court
7 something that was clocked with this clerk's office and
8 served upon Ms. Linder. If I can't find it, I certainly
9 know I can go to Ms. Linder and get what I served upon
10 her.

11 Q. Okay. Was there ever any discussion -- do you
12 recall the Applicant telling you he wished to waive his
13 appeal?

14 A. Well, there was discussion about going straight to
15 PCR versus appeal. While it might not have been directly
16 about waiving his appeal, I told him that it could be
17 included in his PCR, that I screwed up his appeal right,
18 and that I certainly admit that while I filed it
19 somewhere down the line, I screwed up. I sent off a
20 package that I send to Indigent Defense, a letter -- it's
21 the standard thing I do every time, and I did it in this
22 case. It just -- I don't know what happened, but it
23 didn't get perfected.

24 Q. I'm sorry to bounce around from issue to issue,
25 but was there a suppression hearing in this case?

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1 A. Suppression regarding --

2 Q. Any of the evidence?

3 A. Not that I know of.

4 Q. And it appears from the transcript that you
5 stipulated to the entrance of almost, I think, all of
6 the --

7 A. Well, most of the evidence I felt like was going
8 to be favorable for us, and I wanted a lot of it to come
9 in.

10 Q. Was there any motion to suppress any witness
11 statements or the video?

12 A. Not witness statements. The video -- no, I wanted
13 the video in. The video, in my belief, and as it showed
14 in trial, did not identify Deonte as a shooter. They
15 could say they thought they had some general idea, but I
16 don't believe there was any testimony that the person
17 behind the gun is positively identified as Deonte Brown.

18 Q. And did you present that argument to the Court?

19 A. Certainly.

20 Q. If there had been a suppression hearing over the
21 video or suppression statements, do you believe he would
22 have been successful in suppressing those? Is there any
23 legal reason for them to be kept out?

24 A. No, not unless you can be more specific. I didn't
25 have a reason. Maybe somebody else can think of one I

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1 didn't think of.

2 Q. And, finally, Detective Lawrence, I don't think
3 we've spoken about him yet.

4 A. No.

5 Q. What was your understanding of the situation with
6 Detective Lawrence?

7 A. Very similar to what Deonte said. It's undisputed
8 that Detective Lawrence had an affair with Scrappy,
9 Derrick Brown's, mother. It's undisputed that in another
10 case is that effectuated a dismissal of the case and led
11 to Detective Lawrence being fired or resigning as a
12 detective for the Charleston County sheriff's office.

13 The problem is this: In this case, he had some
14 peripheral involvement, but he didn't do a report. He
15 didn't sign anything that came into evidence. He wasn't
16 on their witness list, and Detective Smith was there at
17 the beginning. I would certainly have loved to use it.
18 I wanted the jury to know, but maybe I'm not smart
19 enough. I don't know how I could have used it. I would
20 have liked to.

21 If I could have put up a third-party guilt case, I
22 would have tried to incorporate it as best I could, as I
23 had asked for any and all records regarding Detective
24 Lawrence and was told, He's not a part of this case. I
25 didn't follow up with that, no, in court about it. I

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1 didn't get anything other than that.

2 Q. Okay.

3 MS. COLEMAN: Nothing further.

4 THE COURT: Cross-examination?

5 MR. THOMAS: If I can, I think I'm going to
6 work backwards, going back to the first part of my notes.

7 CROSS-EXAMINATION

8 BY MR. THOMAS:

9 Q. The thing about Lawrence is interesting. So he
10 did lose his job?

11 A. Absolutely. He lost his job, and I'm not going to
12 say it's solely because of the affair. It's because he
13 and his paramour, Scrappy's mom, had conjured up lies to
14 cover up the affair before it was even discovered.

15 Q. All right. And I thought about this too. Were
16 you able to come up with any idea about how to get this
17 information to the jury?

18 A. No, and I contemplated it, and if he would have
19 testified, if he would have been attached to some piece
20 of evidence that had come into the trial, I think I could
21 have gotten that door opened.

22 Q. Could you have called him?

23 A. Why would I want to call him?

24 Q. I'm just --

25 A. Certainly I could have called him, but I didn't

1 think it was in my client's best interest to put up a
2 detective that had been pretty slippery during a majority
3 of his career and had a -- I still think an interest to,
4 I guess, protect Scrappy.

5 Q. But it certainly would have gone down the road to
6 showing that Scrappy could have potentially been a
7 shooter in this case?

8 A. Yeah, and I want to back up a step. When I say I
9 could have called him, I guess, but since his involvement
10 of what actually came in as investigation of the trial
11 was peripheral and was backed up in every case by
12 Ms. Smith, I don't know how far I would have gotten
13 because he probably would have just given me the thing.

14 There's another piece of this case, Judge,
15 involving Detective Lawrence that I could never verify
16 but I know happened, and it was right before he was
17 fired, while I'm still representing Deonte, is Detective
18 Lawrence went to the Charleston County Jail, got my
19 client out of jail, took him over to the sheriff's
20 office, set up video and audio equipment, did another
21 statement of him, and then took him back to the jail.

22 I found out the next day when Deonte called
23 me, and I raised hell about it; however, the video
24 disappeared, and before anything happened, he was fired
25 and not involved in the case, and in that statement, I

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1 think it was pretty self-serving statements, from when I
2 talked to Deonte anyway. It's just an interesting fact,
3 but I didn't -- I mean, I don't believe -- I'm pretty
4 confident Christina Smith wasn't present, didn't know
5 about it, didn't have anything to do with it. I'm still
6 not quite clear on the purpose of that interview. The
7 solicitor didn't know about it until I brought it to her
8 attention.

9 Q. Anything you could have done with that?

10 A. I don't know. I mean, maybe you're a smarter man
11 than I. Believe me, I spent a lot of time on that and
12 feel like, in retrospect, maybe I should have tried a
13 different case, but I tried a simple, to-the-point case
14 based on the evidence that was in front of me.

15 Q. But Ms. Smith, Moyer-Smith, she was tied to
16 Lawrence in some fashion? They were, like, first and
17 second positions?

18 A. No, sir. She was the investigator.

19 Q. Right.

20 A. Detective Lawrence was a detective in the same
21 unit in the Charleston County sheriff's office. They did
22 people crimes, crimes against persons, and he was
23 familiar with that area, and so he gave some initial
24 support on who's who, it was my understanding.

25 I believe he was present, if my memory is correct,

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1 for Deonte's statement, first statement, right after
2 arrest, where Deonte said, I'm not guilty, and gave a
3 very -- a very self-serving statement. I don't mean
4 anything other than that statement. Of course that
5 statement wasn't put into evidence.

6 Q. Right. And Lawrence was provided with a
7 transcript, and I was actually surprised that they had an
8 index, and if you look up Lawrence, he's mentioned five
9 or six times in the trial, but I guess none of that rose
10 to the ability to --

11 A. If I thought it would have, I would have run
12 through that door, and I told Deonte, I don't know what I
13 should have done with that. I would love somebody to
14 show me how. I learned something today; I don't know.
15 None of it rose to the fact that I thought I could open
16 the door and start pulling it in.

17 And also, Judge, technically, I don't want to
18 dirty up my trial. I had what I thought was a cogent
19 defense, a simple defense, but fairly hard for the State
20 to prove otherwise, so I was surprised by the verdict in
21 the case.

22 Q. I was surprised when I read the transcript that I
23 think almost everybody's memory was refreshed.

24 A. And improved.

25 Q. And improved, and I've never seen a trial that

1 way, where the solicitor almost asked every witness --

2 A. Yes, sir.

3 Q. -- can I refresh your memory?

4 A. Every single one of them, yep, and I think a lot
5 of that -- it has to do way the initial statement was
6 taken because it was all sitting around the table.

7 Q. Anything you could have done with that?

8 A. I did. At trial, I made a point of the jury
9 understanding that, You gave this statement while you
10 were inside the Waffle House, while you're sitting at
11 that table while so-and-so or the other witnesses are in
12 close proximity, because I asked them questions. Didn't
13 y'all talk about it before you gave a statement?

14 I made reference the best I could to that. It
15 seemed to me the appropriate way to have taken those
16 statements would be to separate everybody and have a
17 detective and an officer, at least, do a question and
18 answer to try to flesh out the facts. She tried to do
19 that, but at the same time it is a two-edged sword. She
20 gave an incomplete statement, and now they're at trial
21 and they're giving more information, so I had to go back
22 and forth with that.

23 Q. Right, and I thought that your motion for directed
24 verdict was very well done, and I think, if I could draw
25 the Court's attention to, Your Honor, page 382 of the

1 transcript, the trial judge actually talks about this
2 being circumstantial evidence, and he really listed four
3 items of this circumstantial evidence as before the
4 Court.

5 A. Right.

6 Q. That being -- they call him Craig Heyward, Dario
7 Teran, red shirt, the first and the fourth item being
8 April Blodgett.

9 A. Yes, sir, and based on that, as -- I mean, they
10 used the 613(b) to get in Chavis Heyward's -- saying it
11 was a red shirt, and that was Barfield. It's probably
12 the only time --

13 Q. Right, refreshed memory.

14 A. That's probably the only time in my career an
15 813(b) was successful against me, is then they used an
16 exception for Dario Teran to bring in his statement, that
17 being a prior recorded recollection.

18 Q. Actually reading his statement?

19 A. Yes, sir, 803, exception 5, used a prior recorded
20 recollection to bring it in because he doesn't -- they
21 said his ability to remember wasn't as good, yes, sir,
22 was their reasoning.

23 Q. Now, that was not objected to. If you look at
24 215, lines 5 through 6, I think you indicate that you
25 agree with the exception.

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1 A. Well, it fit the exception. It certainly fit the
2 exception, and I did not object to it. I did not know if
3 it was still the right thing to do, but when you read
4 recorded recollection, it fit, in my mind, so if I should
5 have objected, then I was ineffective in not doing so,
6 and it certainly was an important piece of evidence
7 because, as the judge said, in my directed verdict,
8 there's only four things, and you couldn't hang your hat
9 on any of those by themselves. It was only as they were
10 taken together.

11 Q. Right. And then the last, Blodgett, I think her
12 memory was refreshed as well?

13 A. And improved.

14 Q. And improved?

15 A. Yes.

16 Q. Kind of thinking about the appeal, would it be
17 your opinion that he had appealable issues?

18 A. Yes, he did in my mind, certainly.

19 Q. So it would have been worthwhile to file it?

20 A. Certainly, and I -- you know, I'm under oath. I
21 filed the notice of intent to appeal and I served on the
22 solicitor, and I will go back to the box and carry all
23 this stuff and bring it with me, or if I can't find it,
24 I'll go to Ms. Linder and get it out of their office
25 because I know I served it.

1 It wasn't a problem of it getting done or
2 neglected. It was somewhere between being done and being
3 received and clocked and perfected at the Court of
4 Appeals. I don't have an answer to that.

5 Q. These witnesses, Chavis Heyward, you said if you
6 had the ability to go back, you felt like you should have
7 been more prepared with him?

8 A. Yeah. I -- Chavis was a D.J. He was a little bit
9 older, if I remember correctly, and he's out in the
10 country. I had pretty good relationships out there. I
11 think he would have talked freely with me, but what I
12 would have discovered from talking to Chavis is that he
13 had had a conversation with Barfield, or he would have
14 told me that that man is trying to do me wrong.

15 I got blind-sided, so I feel bad that I ignored
16 Chavis, because I didn't think he was going to hurt us
17 because he wasn't going to say he saw anybody shoot him
18 with the red sleeve.

19 Q. Right. Listening to your testimony, that makes me
20 think about you had no idea about the conversation
21 between him and Detective Barfield.

22 A. I did right before the trial. I don't want to say
23 I got completely surprised.

24 Q. I wanted to see if there was discovery --

25 A. No. What I've been told is that Ms. Linder had

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1 met with Mr. Heyward to prepare for the testimony in the
2 case, and when he came in and said he didn't see nothing,
3 you know, basically, and they pressured and prodded on
4 him when he was back in their conference room, with a
5 couple of prosecutors, the detective, Mr. Barfield --
6 Mr. Barfield had to escort him out, okay? So I knew that
7 he had said no.

8 The part that Barfield said, it was never
9 reported. It was never put down for that, but I knew
10 right before the trial that Barfield was going to -- they
11 were going to try to find a way, and, quite frankly, I
12 didn't see it till it happened, whatever it was, the 613,
13 the extrinsic evidence came in against my -- I just
14 didn't see when it was going to come in, so I didn't know
15 my rules inside and out. I didn't think it would get
16 there, quite frankly, if that explains that.

17 Q. I think so, and what I was curious about is you
18 had filed a request for discovery and whether there was
19 some sort of problem out of the solicitor's office or
20 somebody with that information about that conversation of
21 Barfield.

22 A. Ms. Linder made me aware of the fact that
23 Mr. Heyward was not saying anything about seeing anything
24 when he came into prepare. She told me he was fairly
25 hostile to them, and she told me that he and Kenny had a

1 heart-to-heart and that Kenny thought he said something,
2 and that was about it, because there wasn't anything
3 recorded about that.

4 She disclosed to me that she had talked to him and
5 there was no -- he didn't see anything. As she told me
6 too, Kenny Barfield had escorted him out and thought he
7 said something there. Where the disconnect is, I didn't
8 see how they could get Barfield on the stand, so maybe I
9 screwed up there.

10 Q. You just didn't -- you didn't know --

11 A. I didn't see it.

12 Q. You didn't know the extent of what Barfield was
13 going to say?

14 A. No, sir.

15 Q. Okay.

16 A. And I say that hesitantly from memory for the most
17 part. I was surprised the way that came out. So --

18 Q. Do think there would have been any possibility of
19 an objection to that coming out based upon the fact that
20 you have not provided information, what he was going to
21 say and how damaging it could have been?

22 A. I certainly could have made an objection, whether
23 I made him an objection about testifying in general.

24 Q. Right.

25 A. But as far as discovery, I could have made the

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1 objection. I don't know if I would have won or not, but
2 I could have made the objection, and I did not.

3 Q. All right.

4 A. In retrospect, I could do a lot of things
5 different, you know?

6 Q. The SLED videos, was there any possibility of an
7 objection in there? The word enhancement is batted
8 around in the transcript pretty freely.

9 A. Well, if you see -- when you look at the videos,
10 they can call it whatever it was. It wasn't very
11 enhanced. They cleared it up, maybe 5 percent, 10
12 percent. It wasn't -- you couldn't look at it and go,
13 Wow, that clears it up.

14 They were poor videos, for the most part. Well,
15 when I say that, the ones out in the parking lot, they're
16 looking out back -- they're on the building, looking out
17 into the parking lot. You can't get detail beyond right
18 in the vestibule and right outside. You could see people
19 walking on the sidewalk right outside the building, but
20 when you went into the parking lot beyond the first row
21 of cars, you could see a shadow, and that's about it.
22 That's why I was fairly confident that it doesn't
23 identify Deonte. You can't identify anybody.

24 Q. And you testified earlier about shot one, shot
25 two, and the theory that Deonte could not have been in

1 the position to have fired that shot.

2 A. Right.

3 Q. And you may know the answer to this. In regards
4 to funding, would have been have been prudent to hire an
5 expert to try to evaluate that in regards to the
6 logistics of these shots?

7 A. Well, we didn't have funding, first of all.

8 Q. Right.

9 A. Second of all, I could watch the video. I could
10 see an outside-in shot in the glass. I knew that one gun
11 had fired both bullets, so I don't know what an expert
12 would have done for me.

13 Q. I don't know if an expert could have said it would
14 have been impossible or if you could have identified
15 Deonte on the video and contrast that to where shot came
16 from.

17 A. These shots came from very different places; that
18 is, the first shot was -- if it was, in fact, Deonte that
19 fired the first shot, it would have had to have been a
20 close range shot because there's not any dispute that
21 Deonte and the gentleman that got shot with the
22 through-and-through in his arm were engaged in -- I keep
23 calling it a vestibule, but inside the glass doors and
24 outside glass doors, because Deonte was on the threshold
25 between the outside doors and the inside doors, the

1 outside door in the vestibule, and I don't know. There's
2 no doubt that that's done. You cannot see a shot from in
3 there.

4 The other shot takes place from at least -- and
5 I'm not great with distances. At least three car
6 lengths -- using the car that was out front, at least
7 three car lengths from where the sidewalk turns into the
8 parking lot to where it came from, is his friend Snoop --
9 I don't want to say his name wrong. I'm going to call
10 him the deceased. He was laying on -- there's a curb
11 that starts the parking places after you go through the
12 drive, where you drive in, you come around a landscaping
13 curb. He was laying right on top of that where the pine
14 straw was, so the person that shot him had to be even
15 further out from that, and that was a distance, a distant
16 shot to his back, and you hear a pop.

17 You see everybody run. Everybody runs, and then
18 approximately five, no more than ten seconds later, but
19 at least five seconds later, you heard a second pop.
20 When you hear the second pop, you see a flash. When you
21 see the flash, you can tell that that person -- if you're
22 looking at the cameras, the person that shot that
23 appeared to be running from left to right and fired the
24 pistol.

25 At the prelim -- I didn't see the video at the

1 prelim. The officer testified that from the flash that
2 the person behind the flash was Deonte Brown. It was
3 presented to a jury. When I got it, you could see, even
4 in the enhanced version, is the flash and a gentleman
5 that appeared to be African American, but even that, you
6 can't say for 100 percent certain firing that gun, and
7 that gun had to be fired twice because we do know that
8 the bullet from inside and the bullet in the decedent are
9 the same.

10 Q. Right.

11 A. So it was one gun, two bullets.

12 Q. And I was curious about that. When Detective
13 Smith -- is she going down the route to try to say that
14 they identified him behind the muzzle flash and then
15 switches after the objection?

16 A. I believe that was her intent.

17 Q. It's what appears to be her intent.

18 A. Yes. That's why I thought I was going to win this
19 case. That was their strongest link, I thought.

20 Q. Then she goes into some bizarre thing about
21 DNA and then the bullets being provided?

22 A. Well, the DNA was real simple. The bullet they
23 found inside the vestibule had DNA on it. That DNA
24 matched the gentleman that had the through-and-through,
25 so they knew that that was the first -- well, that was

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1 the first bullet, and that bullet then is matched up, or
2 had been matched up, to the one that was taken from the
3 decedent. So we know the first bullet with the
4 through-and-through that was collected had DNA on it that
5 matched him, and then we know that the one from the
6 decedent came from the same gun.

7 Q. Enough probable cause to issue a murder warrant?

8 A. I made a motion at the prelim to have it dismissed
9 because I didn't believe there was. The magistrate that
10 heard it believed it was enough. He said we'd take care
11 of it downtown.

12 Q. How about any issue of transferred intent? I know
13 that pops up later on in the --

14 A. Obviously it had to be transferred intent.

15 Q. Had to be.

16 A. The decedent was never the intended target. There
17 is no doubt about it. The decedent, Snoop, was in the
18 fight; you know, he wasn't actively engaged swinging,
19 but, for the most part, he's right in the middle of it.
20 He has on a white T-shirt. I remember that fairly
21 clearly. The other boy that was there, that was one of
22 Deonte's friends, was Scrappy, so those were the three
23 guys that had been at the club because they were at the
24 Waffle House.

25 Scrappy had been kicked out and the decedent, as I

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1 call him Snoop, he's there. He gets sort of wound up.
2 They're laughing. Everybody is laughing when Deonte is
3 at first insulting, for lack of a better word, the fellow
4 that is sitting there, that is Jesse McNeal, Jesse being
5 the cook, and he's sitting there.

6 Deonte wants a cigarette or something like that,
7 and it goes back and forth, and Deonte has one of those
8 solo cups, a to-go cup, and he throws it at him, and at
9 that point, Snoop is right there in the middle of it.
10 Everything moves out. First shot, everybody scatters,
11 and then second shot, and the fellow falls down dead or
12 dies shortly thereafter. That's it, in a nutshell.
13 There was one other fellow with a red shirt there.

14 Q. That's what I'm curious about. There was a brief
15 mention of a person with a red shirt.

16 A. He was never interviewed, but there was another.
17 red shirt there. He was never identified, but there is
18 no doubt Deonte had a red shirt. There is no doubt
19 Deonte fought with the gentleman. There is just nothing
20 to show that the intent is that it would be carried on to
21 a shooting. This was fisticuffs, and it wasn't even a
22 whole lot of fisticuffs. It was more shoving and pulling
23 than anything else.

24 The only thing that made it chaotic was there was
25 so many damn people in that Waffle House that it just

1 starts growing, and the 80-year-old gentleman that was
2 the security guard was scared to death before anything
3 ever started. He got out in the parking lot and kept his
4 eye on the one fellow, and he didn't want to come back
5 in. Jesse McNeal is the only guy that stopped the fight,
6 and that was the cook.

7 Q. It seems odd, and I guess there's inconsistencies
8 in regard to seeing a gun coming out of a sleeve of a red
9 shirt. If he was wearing a short sleeve shirt, you would
10 not have seen that?

11 A. I made a point of that, I believe.

12 MR. THOMAS: Your Honor, I beg the Court's
13 indulgence for just a second.

14 BY MR. THOMAS:

15 Q. Did you see anything unusual about the arrest
16 warrants or anything like that?

17 A. Well, usually you don't wait until the preliminary
18 hearing to bring a second charge of murder.

19 Q. Right.

20 A. First of all, so it started off of being an
21 attempted murder and possession of a weapon during a
22 crime of violence. I take that case. I've already
23 started talking to the prosecutor shortly thereafter
24 before the prelim about Deonte is a witness and not a
25 shooter because he started it.

1 We went down that line as far as we could, that it
2 became apparent to me that I couldn't turn him into a
3 witness, and it didn't help any that the murder warrant
4 was served at a different time.

5 Q. Right.

6 A. If that's your question.

7 Q. Yeah. But on the form, nothing irregular about
8 the forms themselves?

9 A. No, not to my knowledge.

10 Q. Okay.

11 THE COURT: Might counsel approach the bench
12 for a moment.

13 (Discussion held at sidebar.)

14 THE COURT: Any further witnesses?

15 MR. THOMAS: No. I have none, and I'm done
16 with this witness. Thank you.

17 THE COURT: You may step down. You're free
18 to leave.

19 THE WITNESS: Thank you very much.

20 THE COURT: Any further witnesses or anything
21 from anybody?

22 MS. COLEMAN: Nothing further from the State,
23 Your Honor.

24 MR. THOMAS: Nothing further, Your Honor.

25 THE COURT: And, as I've indicated from the

1 bench, I'm going to grant the defendant a belated appeal
2 because it appears to me from the testimony presented
3 here that there was an effort to effectuate an appeal.
4 The defendant wanted an appeal, and I'm going to grant
5 him a belated appeal.

6 As far as the merits of the other issues
7 raised in the post-conviction relief, I'm going to ask
8 that the Attorney General and counsel for the Applicant
9 prepare a proposed order and send it to me within the
10 next ten days. I'm going to ask that you send it to my
11 office in Florence in its original form.

12 MS. COLEMAN: Yes, Your Honor.

13 THE COURT: And, obviously, send a copy of it
14 to opposing counsel.

15 MR. THOMAS: Thank you, Your Honor.

16 THE COURT: Anything from anybody else?

17 MS. COLEMAN: Your Honor, I guess my concern
18 is that if he -- and, obviously, he's being granted a
19 belated appeal. If he wins on that, the appeal won't
20 matter anymore.

21 MR. THOMAS: The way to do that, Your Honor,
22 is counsel, whoever is representing him, which may be me,
23 you have to do both. You have to do both. In other
24 words, when you submit the pleadings to the -- actually,
25 it will probably go to the Supreme Court because you say

1 if it's ruled in our favor, then -- well, I'm trying to
2 figure this out. Normally, what they do is they combine
3 both of them.

4 THE COURT: Let me ask y'all, I've given some
5 thought to that, but let's say the issue -- if the matter
6 goes up on appeal and it becomes apparent through the
7 appellate process perhaps defense counsel didn't
8 appropriately object to something, what is
9 procedurally -- y'all do this all the time. What do you
10 think about holding in abeyance the balance of it and
11 bringing a belated appeal?

12 MS. COLEMAN: I think there's case law that
13 says you cannot do that.

14 THE COURT: I think it says you got to
15 address all of them, that was my thought, that the case
16 law says that you got to address every single issue in
17 the appeal. Where that would take that to its logical
18 conclusion, what happens if there is an issue that comes
19 up in the appeal that goes to ineffectiveness?

20 MR. THOMAS: That's an interesting point,
21 Your Honor, and the experiences that I've had where we've
22 done that have been in two cases where the Court denied
23 the post-conviction --

24 THE COURT: Because it's not adequately
25 preserved or something?

1 MR. THOMAS: And then it's evidence of maybe
2 ineffective assistance.

3 THE COURT: That's my point, yes.

4 MS. COLEMAN: Yeah. This is White v. State.
5 A belated review of direct appeal issues, two petitions
6 are filed with the Supreme Court, one based on whether or
7 not the PCR was appropriately granted or why relief was
8 granted, and then the other would be the direct appeal
9 issues themselves, and I don't think I've actually ever
10 had a case where they granted a PCR and they granted a
11 belated appeal, and that's why I ask the question.

12 THE COURT: What do you propose I do?

13 MS. COLEMAN: Well, I guess if you feel
14 inclined to grant both, you can grant both and then have
15 them figure it out from there, I guess. They would
16 review the direct appeal issues. I mean, I feel like
17 either way, he would get a new trial, if he prevailed on
18 his PCR and his direct appeal issues.

19 I guess we can cross that bridge when we get
20 to it, but we can certainly submit proposed orders and
21 see what your decision is, and I'm sorry. I don't have a
22 better answer. I've never been in this situation before.
23 I can look into that and try to find out what the
24 procedure is.

25 THE COURT: All right. I'm going to allow

1 counsel to supplement the record with regard to what he
2 has done as far as filing an appeal.

3 MR. THOMAS: Okay.

4 THE COURT: And we'll supplement the record.

5 MR. THOMAS: All right. Thank you, Your
6 Honor.

7 THE COURT: And y'all can give me some
8 thought, of course, an order from both of you all
9 indicating -- I'm granting a belated appeal. Then you
10 can address the other issues, and I'm going to rule on
11 those.

12 MS. COLEMAN: So you're ruling today on the
13 belated appeal?

14 THE COURT: Yes.

15 MS. COLEMAN: And he will supplement the
16 record with his file.

17 THE COURT: That's right, and he's to provide
18 that -- he needs to get that to us immediately, if not
19 sooner. Do you anticipate you can get that by the end of
20 the day? If you file it, it ought to be in the clerk's
21 office, number one.

22 MR. SMILEY: I have to go
23 downstairs because -- and Dallas might be able to help me
24 in this. If I do the appeal -- y'all keep one, Dallas?

25 THE COURT: Y'all ought to get that by the

1 end of the day.

2 MR. SMILEY: Yes, sir.

3 THE COURT: And we'll deal with that. Thank
4 you.

5 MR. THOMAS: Thank you, Your Honor.

6 MS. COLEMAN: Thank you, Your Honor.

7 - - -

8 (Whereupon, the proceedings were concluded.)

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I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 7th of August 2017.

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

March 24, 2018

Circuit Court Reporter

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STATE OF SOUTH CAROLINA
County of ☒ Charleston ☐ Berkeley

COURT OF COMMON PLEAS
0719
Case No: 2015CP1003935

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Deonte Brown
Applicant / Petitioner

vs.

State of South Carolina,
Respondent.

2015 AUG -7 AM 10:16
CLERK OF COURT
ORDER
2015-CP-10-3935

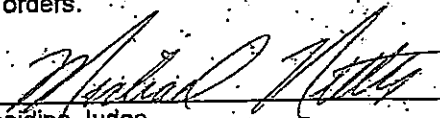
This post-conviction relief case came before the court for a hearing. Having now heard this matter, the court orders as indicated herein.

- X 1. The application for post-conviction relief is hereby: denied granted X under advisement; a formal order will be filed (see below - No.6)
2. Motion(s) was/were heard in this case and the court orders:
The motion to dismiss and/or for summary judgment is hereby granted denied under advisement, based upon the statute of limitations and/or the successive nature of the application or other reason as follows:

3. A conditional order of dismissal was previously filed in this case. Upon review of the matter, the court finds:
 Good cause as to why the case should not be dismissed has been shown in response to the order of dismissal; therefore, a hearing on the merits of the application shall be scheduled.
 The court has considered the response to the conditional order of dismissal and finds that good cause has not been shown or no response has been filed to the conditional order of dismissal; therefore, the application is hereby dismissed.
4. The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; therefore, this case is dismissed with prejudice without prejudice.
- X 5. Other: -Defendant is granted belated appeal.
-Counsel Allowed to supplement record with filed documents related to appeal, to be supplied immediately.
- X 6. The court further orders:
 The X Attorney General X Applicant's counsel is directed to submit to the court a proposed order and to serve the order on opposing counsel within 10 days.
 Both sides are directed to submit proposed orders to the court and to serve the orders on each other within days:
 The court does not request proposed orders.

IT IS SO ORDERED.

Date: 08/03/2017
Charleston, S.C.


Presiding Judge

Court Reporter: Amanda Haffenden
Attorney for Plaintiff: Tommy A. Thomas
Attorney for Defendant: Julie Coleman

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)

DOCKET NO.: 2015-CP-10-003935

DEONTE BROWN #361477,)
))
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
))
Respondent,)

POST TRIAL BRIEF

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 15, 2015. Respondent submitted its Return on February 18, 2016. An evidentiary hearing was convened on August 3, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and was represented by Tommy Thomas, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's mother, Doris Gregory, and Applicant's trial counsel, James W. Smiley, Esquire ("Trial Counsel") also testified. The Court had before it a copy of the trial transcript, the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the

Charleston County Clerk of Court. Applicant was indicted at the February 2013 term of the Charleston County Grand Jury for murder, attempted murder, and possession of a firearm during the commission of a violent crime (2013-GS-10-00535, 00536, 00537). James W. Smiley, Esquire, represented him. Applicant proceeded to a jury trial and was found guilty as indicted. The Honorable Roger M. Young, Sr., sentenced Applicant to incarceration for fifty years for Murder, thirty years for Attempted Murder, and five years for Possession of a Firearm During the Commission of a Violent Crime, each sentence to be served concurrently. Applicant did not appeal his conviction or sentence.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel:
 - a. "He never did investigate my case to the best of his ability;"
 - b. "My attorney never had a pre-trial hearing for my case;"
 - c. "My lawyer did not file for the notice of appeal;"
2. "Actual Conflict of Interest:"
 - a. "...Detective Lawrence who was investigating the case was in a sexual relationship with my co-defendant(sic) mother who was a possible suspect under investigation of this crime;"

On July 25, 2017, Applicant amended his application to include the following allegations of ineffective assistance of counsel regarding:

- a. Facts surrounding the original arrest of attempted murder and then enhanced to murder.
- b. Failure to adequately question Det. Christina Smith's testimony that she was able to ID client behind the muzzle flash.
- c. Video enhancement by SLED.
- d. Sequence of shooting.

- e. Failure to adequately present the possibility of two shooters.
- f. Failure to adequately present the issue of two people present with red shirts.
- g. Failure to adequately question regarding Gun Powder Residue test.
- h. Failure to properly investigate:
 - i. Defendant said the shooter was Derrick Brown. Derrick Brown was not arrested or charged. Derrick Brown's Mother was in a relationship with Detective Charles Lawrence.
 - ii. Witness Chavis Heyward originally said that he did not see anything. Two years later he testifies and identifies people on the video.
 - iii. The waitress at the restaurant gave a statement that she did not see anything. However, at trial she remembers seeing a gun come out of a red sleeve.
- i. Failure to talk to witnesses before trial. No analysis of the videos and no Private Investigator.
- j. Failure to have a suppression hearing regarding the videos.
- k. Failure to bring up the information regarding Detective Charles Lawrence and his relationship with Derrick Brown's Mother.
- l. The Applicant did not testify based on bad advice from Defense Counsel.
- m. Defense Counsel had no theory of Defense.
- n. There was a ten (10) year plea offer, which was not properly explained to the Applicant.
- o. Defense Counsel did not get closing argument because he put in a picture of shattered window as evidence.
- p. Defense attorney did not file an Appeal, after he told Applicant that he would.

Applicant also alleged that the theory of transferred intent was improperly applied.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of

the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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, 386 S.E.2d at 625.

IV. ARGUMENT

The Applicant was indicted at the February 3, 2013 term of the Charleston County Grand Jury for Murder, Attempted Murder, and Possession of a Firearm During the Commission of a Violent Crime.

The Applicant proceeded to a Jury Trial and at the conclusion of the State's case, Defense Counsel James Smiley made a Motion for a Directed Verdict. The Court does an excellent job in pointing out that the case is a case of circumstantial evidence and why.

The Court indicates in its ruling on the Motion that there are four pieces of circumstantial evidence presented by the State:

1. There is evidence that the shooter was wearing a red shirt. The Applicant, Deonte Brown, was wearing a red shirt. As he is being pushed out of the door to the Waffle House, shots were fired. Testimony by three witnesses at trial indicate that the individual who fired the shots was wearing a red shirt.

The Court discusses three witnesses who testified at Trial and the evidence that they present. The Court in its evaluation of Counsel's Motion for Directed Verdict, notes the circumstantial nature of their testimony. The Applicant would suggest that there are problems with each of these witnesses.

2. The witness, Chavis Heyward stated that he was at the Waffle House the night the shooting takes place. He also testified that Applicant is wearing a red shirt. He states that they were on their way outside when gun shots erupted. (Tr. p. 191, lines 5-13) He further testifies that he did not see who fired the shots. He was asked if he saw what the shooter was wearing that night and he says no. However, Detective Barfield testifies that he had a conversation with Mr. Heyward and is told that the shooter had on a red shirt. Over objection by counsel, this statement was allowed in under Rule 613 (b).
3. Another witness, Dario Teran, testified that he was eating at the Waffle House on the night in question. He indicated that his memory of that evening was kind of blurry because he had been in motorcycle accident. He indicated that the motorcycle accident was in October, 2012. (Tr. p. 256, lines 11-18) Mr. Teran testified that he gave a statement to the Police on the night in question. But in

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Court, all he could remember was seeing that night at the Waffle House was a flash on his left side. He did not remember anyone in particular involved in the fight (Tr. p. 257, lines 14-19). His memory was refreshed by his prior written statement. This statement was allowed to be read to the Jury under Rule 803, as a recollection, without objection. In Mr. Teran's statement, he states that he did see who fired the gun and he states that it was a guy with a red jersey. (Tr. 262, lines 8-12)

4. Witness, April Blodgett, who was a waitress at the Waffle House at the time of the incident testified that she remembered the gun coming out of a red sleeve. She also testified that she did not tell anyone at the time of the incident, but that she remembered this at a later date.

The court notes that this is not the strongest circumstantial evidence case that he had ever seen. However, feels there was enough circumstantial evidence to deny the directed verdict Motion.

This ruling by the Court lays out a brief and concise summary of the evidence that was presented by the State. It also highlights the areas of ineffective assistance of Trial Counsel.

CHAVIS HEYWARD

Chavis Heyward's testimony at Trial was not in itself damaging. It was only after the testimony of Investigator Barfield, that information became available to the Jury that could link the Applicant to the shooting. Trial Counsel, testified at the evidentiary hearing that in hindsight, he should have spoken to Chavis Heyward. He stated that he was unaware that Investigator Barfield was going to testify about his interview with

Heyward, until right before the Trial. Trial Counsel stated that Investigator Barfield's testimony was a surprise. Counsel stated that had he spoken with Heyward before the trial, he would have been aware of the interview with Investigator Barfield and could have been more prepared for this information.

Heyward stated at trial that he did not see the Applicant with a gun. He testified that he did not see who shot that night, or what that individual was wearing. (Tr. p. 194, lines 14-18)

Investigator Barfield's testimony (Tr. p. 192, lines 5-25) is extremely prejudicial in that it helps the Jury conclude that the shooter is an individual who was wearing a red shirt. Investigator Barfield stated that he had a conversation with Chavis Heyward when he came in to be interviewed. (Tr. p. 200, lines 14-21) Defense Counsel does make an objection to this coming in as hearsay. (Tr. p. 201, lines 1-2) However, the Court allows him to testify as to what Chavis Heyward told him. This is allowed in under Rule 613 (b) (Tr. p. 201, line 4).

Defense Counsel testified that had he known and interviewed Heyward prior to trial, he would have known that this information was going to be brought out by the State and what he allegedly told Detective Barfield. The Applicant would assert that Defense Counsel was ineffective for his failure to interview Chavis Heyward prior to trial and not obtaining this information and having knowledge of this prior to his testimony.

DARIO TERAN

Trial Counsel did not object to Dario Teran's statement being read into the record. He stated that he believed that it was an exception to the hearsay rule. Dario Teran has his memory refreshed to the point that the Solicitor actually reads a written statement that

he made after the incident before the Jury. Mr. Teran testified that his memory was blurry and that he had been involved in a motorcycle accident. The Court allows this statement in under Rule 803 and then goes further to allow the Solicitor to read Mr. Teran's written statement into the record. The Court does not allow the statement to actually come into evidence in its written form.

The damaging part of the Statement is that it allows information about the shooter with the red shirt to be heard by the Jury. The Applicant would contend that Counsel was ineffective for his failure to object to this information. He consented to allow the evidence in under Rule 803, and consented to this document being read to the Jury.

Throughout the trial, the State uses the procedure of refreshing the witnesses memory with written statements that were given to the Police at the time of the incident or afterwards. The State has to resort to this procedure in an effort to elicit the testimony from the witnesses to benefit the prosecution. This pattern of refreshed memory becomes a keystone of the State's case.

APRIL BLODGETT

The Waffle House waitress, April Blodgett was working on the night in question and gave a statement to law enforcement as an eye witness to the events. At trial, Ms. Blodgett testified that she saw the gun come out of the red sleeve, but she did not tell anyone in law enforcement about it, or write it in her statement. She stated that this was because she was on medication at the time, and could not remember everything that happened that night at the time that she wrote her statement. (Tr. p. 292-293)

The Applicant alleges that Trial Counsel was ineffective for failure to properly interview and investigate the potential testimony of April Blodgett. Had he done so, he

would have been aware of potential problems with her original statement as well as her ability to remember the facts and circumstances of the incident. She stated that she was on medication at the time and was unable to remember everything that happened. She is the last witness to take the stand that allows the circumstantial evidence to tie the shooter in this incident to an individual who was wearing a red shirt. Therefore, this information was critical in allowing the Jury to make a determination that the shooter was wearing a red shirt.

Ms. Blodgett testified that she did not see the shooters face, but that she saw the gun and saw the gun come out of a red sleeve. (Tr. p. 309, lines 1-18, lines 19-20, 21-25) It was only after her memory was refreshed by the Solicitor (Tr. p. 305, lines 4-5) and after her memory being refreshed, that she testified that she saw a gun in a red sleeve. (Tr. p. 306, lines 10-17)

Had counsel known that there was a potential medication issue in this case, he would have been able to more effectively cross examine the witness.

DETECTIVE LAWRENCE

At the Post-Conviction Relief trial, information comes out that one of the detectives, Detective Lawrence, had a relationship with Derrick Brown's Mother. Derrick Brown was a potential suspect in the shooting at the Waffle House. The Applicant would argue that Detective Lawrence had a bias in this case to show that the shooter was someone other than Derrick Brown. Derrick Brown being the son of the woman in which he was having an affair. While Detective Lawrence does not testify at Trial, he is mentioned six (6) times in the transcript. (Tr. p 16, line 21; p. 52, line 17, p. 53, line 6, p. 225, line 4, p. 367, line 14 and p. 367, line 21)

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The Applicant testified that he was friends with Derrick Brown and his family. That he had personal knowledge that Derrick Brown's Mother was having an affair with Detective Lawrence. He stated that their relationship was common knowledge. He also testified that Detective Lawrence was later fired for refusing to charge Derrick Brown with another crime because of the relationship that he had with Mr. Brown's Mother. The Applicant testified that he brought this to the attention of Trial Counsel.

Mrs. Doris Gregory, the Applicant's Mother testified that she is best friends with Derrick Brown's Mother. That she had personal knowledge that Derrick Brown's mother was dating Detective Lawrence. She went further to testify that she thought that Derrick Brown was the shooter in this incident.

Trial Counsel stated that it was undisputed that Detective Lawrence was having an affair with Derrick Brown's Mother. He stated that he caused another case to be dismissed and he was later fired because of this incident. He further stated that Detective Lawrence actually had the Applicant transported to his office for an interview without telling trial counsel, while he was representing him. He stated that this caused him concern and he complained once he found out about this incident. Any statement that was given from that interview was not used in trial.

Trial Counsel stated that he did not know of any way to use this information in trial. That he did not know a proper, appropriate or admissible way to introduce any of this information. The Applicant stated that he wanted Trial Counsel to use the information regarding Detective Lawrence at trial. That he thought that Trial Counsel was going to use this information and was surprised that this information was never brought out.

The issue of Detective Lawrence's affair raises several issues:

1. That Counsel should have used this information to show bias in the investigation of the case; and
2. It was also key factor in showing the possibility of third party guilt, which was not brought to the Jury's attention.

Generally, Rule 608 SCRE allows evidence of character, conduct and bias of a witness. Section 608 (c) states that evidence of bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

The Applicant would argue that under these circumstances he was entitled to show bias even though it was not to impeach any particular witness. Detective Lawrence skillfully does not take the stand in this case. However, he is mentioned a number of times throughout the trial and had an active role in the preparation of this case.

Detective Lawrence had a reason why he did not want any information coming out about Derrick Brown. There is evidence in the case that there were two different individuals wearing red shirts and evidence that Derrick Brown was present at the scene.

The admissibility of evidence of Third party guilt is governed by the case of State v. Gregory 198 S.C. 98, 6 SE 2d 532 (1941). Gregory states that the evidence offered by the accused as to the commission of a crime by another person must be limited by such facts as are inconsistent with his own guilt and as such the facts raise a reasonable inference of presumption as to his own innocence. Evidence which can have no other affect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another is not admissible.

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In this case, you have bias by Detective Lawrence and information that another could have committed this crime. This is more than a bare suspicion. The evidence offered by the Applicant in this case, as to the commission of the crime by another person raises a reasonable inference or presumption as to his own innocence. This case is unique in that you have elements of third party guilty as well as potential bias in the investigation. These two factors combined clearly demonstrate the potential for bias in this case, as well as meeting the standard of third party guilt. This becomes even more evident after the fact in that Detective Lawrence was later dismissed as a result of like misconduct.

THAT THERE WERE TWO PEOPLE AT THE SCENE WEARING A RED SHIRT

The Applicant also alleges that Counsel was ineffectively by not adequately presenting the fact that there were two people present with red shirts. This is important because not only is there evidence that two people were wearing red shirts, but the description of the red shirt varies. This testimony by the witnesses seemed to indicate anything from a short sleeve to a long sleeve red shirt. The waitress, April Blodgett, testified that she saw a gun inside of a red sleeve. Two witnesses testified about a second man in a red shirt. (Tr. p. 166-215)

This issue is extremely important especially in relation to the issue of third party guilt. Counsel was ineffective in not adequately bringing this point out to the Jury.

APPLICANT'S DECISION NOT TO TAKE THE STAND

The Applicant also testified that he thought that Trial Counsel was ineffective in his advice regarding the Applicant taking the stand and testifying. He stated that he had a

discussion with counsel. He believed that the strategy was that if he did not testify they would have the last argument before the Jury.

This goes hand in hand with the allegation that Counsel was ineffective for failure to get the last closing argument at Trial. Defense Counsel presented testimony from SLED forensic scientist Wendy Berry an expert on gunshot residue analysis. (Tr. p. 384-389) Ms. Berry testified that a firearm fired at a close distance would leave gunshot residue on the hands and the clothing of the shooter. Ms. Berry stated that she tested Applicant's clothing in this case and did not find any gunshot residue. (Tr. p. 396)

Trial Counsel also admitted a photograph of the shattered glass in the Waffle House. (Tr. p. 108) Trial Counsel used this photograph to cross-examine and question the State's witness, Aaron Myer. Trial Counsel testified that he used evidence to show that Applicant was not the shooter because lack of gunshot residue on his clothing and he wanted to show that the angle of the shot through the glass indicated that it came from outside of the restaurant.

However, the Applicant testified that part of his decision not to testify was based on Counsel's reassurance that if he did not testify that they would get the last argument. It was Trial Counsel's ineffective assistance of counsel which lead to Applicant not testifying and not receiving the last argument at trial.

SEQUENCE OF THE SHOOTING

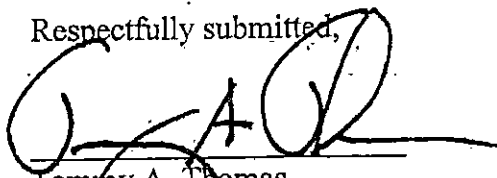
The Applicant also contends that Trial Counsel was ineffective in not adequately challenging the sequence of the shootings. The Applicant alleges that Trial Counsel failed to effectively point out that he would have been unable to fire the shots in question due to his location. Trial Counsel attempted to show that the Applicant was standing in

the vestibule next to the victim and that he could not have fired either shot, because they were shot from a greater distance. No ballistic experts were retained and Counsel was unable to show the Jury the fact that the Applicant would have been unable to fire the shots. This was a crucial mistake.

The Applicant preserves the following issue although not specifically addressed in this Post-Trial Brief. Testimony was presented by the Applicant on each of these issues:

- Failure to hire an investigator.
- Failure to advise regarding an Alford Plea.
- Attempted murder charge enhanced to murder.
- Failure to object to SLED video enhancement.
- Failure to move to suppress evidence prior to trial.
- Failure to properly explain ten (10) year plea offer.
- Failure to object to improper use of transferred intent.

Respectfully submitted,



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September 7, 2017
Irmo, SC

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Deonte Brown, #361477,

2015-CP-10-3935

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL
AND GRANT OF BELATED APPEAL
PURSUANT TO WHITE V. STATE

FILED
2017 SEP 26 PM 12:09
JULIE A. COLEMAN
CLERK OF COURT

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on July 15, 2015. Respondent submitted its Return on February 18, 2016. An evidentiary hearing was convened on August 3, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and was represented by Tommy Thomas, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's mother, Doris Gregory, and Applicant's trial counsel, James W. Smiley, Esquire ("Trial Counsel"), also testified. The Court had before it a copy of the trial transcript, the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the February 2013 term of the Charleston County

¹ White v. State, 263 S.C. 110, 208 S.E. 2d 35 (1974).

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Grand Jury for murder, attempted murder, and possession of a firearm during the commission of

a violent crime (2013-GS-10-00535, 00536, 00537). James W. Smiley, Esquire, represented him.

Applicant proceeded to a jury trial and was found guilty as indicted. The Honorable Roger M.

Young, Sr., sentenced Applicant to incarceration for fifty years for Murder, thirty years for

Attempted Murder, and five years for Possession of a Firearm During the Commission of a

Violent Crime, each sentence to be served concurrently. Applicant did not appeal his conviction

or sentence.

II. ALLEGATIONS

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel:
 - a. "He never did investigate my case to the best of his ability;"
 - b. "My attorney never had a pre-trial hearing for my case;"
 - c. "My lawyer did not file for the notice of appeal;"
2. "Actual Conflict of Interest:"
 - a. "...Detective Lawrence who was investigating the case was in a sexual relationship with my co-defendant(sic) mother who was a possible suspect under investigation of this crime;"

On July 25, 2017, Applicant amended his application to include the following allegations of ineffective assistance of counsel regarding:

- a. Facts surrounding the original arrest of attempted murder and then enhanced to murder.
- b. Failure to adequately question Det. Christina Smith's testimony that she was able to ID client behind the muzzle flash.
- c. Video enhancement by SLED.
- d. Sequence of shooting.
- e. Failure to adequately present the possibility of two shooters.
- f. Failure to adequately present the issue of two people present with red shirts.
- g. Failure to adequately question regarding Gun Powder Residue test.
- h. Failure to properly investigate:

- i. Defendant said the shooter was Derrick Brown. Derrick Brown was not arrested or charged. Derrick Brown's Mother was in a relationship with Detective Charles Lawrence.
- ii. Witness Chavis Heyward originally said that he did not see anything. Two years later he testifies and identifies people on the video.
- iii. The waitress at the restaurant gave a statement that she did not see anything. However, at trial she remembers seeing a gun come out of a red sleeve.
- i. Failure to talk to witnesses before trial. No analysis of the videos and no Private Investigator.
- j. Failure to have a suppression hearing regarding the videos.
- k. Failure to bring up the information regarding Detective Charles Lawrence and his relationship with Derrick Brown's Mother.
- l. The Applicant did not testify based on bad advice from Defense Counsel.
- m. Defense Counsel had no theory of Defense.
- n. There was a ten (10) year plea offer, which was not properly explained to the Applicant.
- o. Defense Counsel did not get closing argument because he put in a picture of shattered window as evidence.
- p. Defense attorney did not file an Appeal, after he told Applicant that he would.

Applicant also alleged that the theory of transferred intent was improperly applied.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

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professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any 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, 386 S.E.2d at 625. With respect to guilty pleas, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

V. SUMMARY OF RELEVANT TESTIMONY

Applicant

Applicant testified that after his trial he told Trial Counsel he wanted to appeal his conviction, but his appeal was never filed. He stated that, the night of the crime, he and his friends were at a nightclub called Frazier's. He stated that after the club closed, they went to the Waffle House around 4:00 A.M. He stated there was a group of men at the Waffle House, he exchanged words with them, and he got in a fight. Applicant stated that he started the fight, he threw a drink in the man's face, the fight moved outside the Waffle House, and a gun was fired. He stated that he did not shoot the gun, but two men were shot. One was injured, and the other was killed.

Applicant testified that he was originally charged with attempted murder. He stated he had a magistrate bond hearing for the attempted murder charge, and his bond was denied; after this hearing he was charged with murder. He stated he had a General Sessions bond hearing for his murder charge, and bond was denied. He stated he served twenty-seven months in the county jail before his trial. He testified he was originally appointed a public defender, but he later retained Trial Counsel Jim Smiley. He stated he and Trial Counsel met "a good bit of time" before the trial.

Applicant testified that he and Trial Counsel talked about his innocence during their meetings but did not focus on investigation or a defense. He stated their theory of the case was for him to testify at trial to show how the other suspect, Derrick Brown, shot the victim, but Derrick Brown's mother was sleeping with Detective Lawrence, so he was never charged with the crime or considered as a suspect. Applicant testified that Detective Lawrence and Detective Smith were the two investigators on his case, and Detective Lawrence worked on his case and even interviewed him without his attorney present. However, he stated that his statements from this interview were never used against him in any way at trial, and Detective Lawrence did not testify at trial.

Applicant testified that he was friends with Derrick Brown and his family, and he knew by his own personal knowledge that Derrick Brown's mother was having an affair with Detective Lawrence. He stated their relationship was common knowledge, but he had no documentation to prove the relationship. He stated Detective Lawrence was later fired for refusing to charge Derrick Brown with another crime because of his relationship with his mother, but he did not have documentation to prove this. Applicant stated he wanted Trial Counsel to use this

information to help him at trial, and he thought he was going to, but Trial Counsel told him the door had not been opened for him to address it.

Applicant testified that he told Trial Counsel he wanted to testify at trial to explain the video tape from the Waffle House. He stated he had no prior record, just an unlawful carrying of a weapon conviction. However, he stated Trial Counsel told him not to testify, because the State could have cross-examined him and shown the jury that Applicant could have left the Waffle House to get a weapon and come back in. He stated the judge explained to him that it was his decision alone whether to testify, and he chose not to do so based on Trial Counsel's advice. He stated there were a lot of people in the Waffle House, but he was the only person there charged with the crime. Applicant stated there was one other person in the Waffle House that night who was wearing a red shirt.

Applicant testified there should have been a pre-trial suppression hearing to keep out witness statements from inconsistent witnesses. He stated witness Chavis Heyward testified at trial that he did not see a gun or see who shot the gun. Applicant stated he never heard the audio statement Heyward gave, but Trial Counsel told him Heyward did not say anything about Applicant in his recorded statement. Applicant stated Investigator Barfield was allowed to testify under Rule 613(b) about Heyward's conversation with him which implicated Applicant, and Trial Counsel did not object. Applicant stated Trial Counsel did not hire an investigator and never went out to speak to these witnesses before the trial.

Applicant testified that Trial Counsel did not object to the State using statements to refresh the witnesses' memories, but he addressed it on cross-examination. He stated Trial Counsel did not object to the Solicitor reading Dario Teran's entire statement into the record under a Rule 803 exception, and Trial Counsel said on the record that he agreed with the trial

court that it fit the exception. Applicant opined this statement allowed in information about the shooter wearing a red shirt. Applicant testified that April Blodgett, the waitress at the Waffle House, testified at trial that the gun she saw came out of a red sleeve. He stated that she gave a statement after the crime but did not mention this in the statement, and Trial Counsel cross-examined her to bring that issue to the jury's attention.

Applicant testified that on the night of the crime he was wearing a red button-down shirt that was wide open, and loose, sagging pants. He stated all the witnesses testified they never saw Applicant with a gun, and Trial Counsel cross-examined every single witness about his clothing, his waistline, and how they did not see him with a gun. Applicant testified there was an issue with probable cause for the search warrant, and Trial Counsel should have challenged the warrant before the trial. He stated the State indicated they had issued the warrant based on the surveillance video tape of the shot because they could identify Applicant in his red shirt behind the muzzle flash of the shot. He testified this was not true, and you could not identify him in the video, only a shadowy figure.

Applicant testified he was offered a ten year plea deal before the trial, but he did not take it because there was no concrete evidence against him and he thought he would win at trial. He stated he would not have accepted any plea offer that forced him to admit to shooting the gun. He stated Trial Counsel explained to him that the decision to convict was up to a jury of twelve people, and he could be convicted at trial. Applicant stated he discussed with Trial Counsel whether to request a lesser included offense, and they decided not to make the request.

Doris Gregory

After Applicant's testimony, Doris Gregory took the stand. Ms. Gregory testified that she is Applicant's mother. She stated after the trial, a request was made to Trial Counsel to file an

appeal. She testified that she went to Trial Counsel's office and signed a paper for the appeal, and she thought it was filed, but it was not. She stated that she is best friends with Derrick Brown's mother, and she knew by her own personal knowledge that Derrick Brown's mother was dating Detective Lawrence. Ms. Gregory testified that she believes that Derrick Brown was the shooter, but she was not at the Waffle House and did not see any of the events that took place during the crime.

Trial Counsel

Trial Counsel testified that he met with Applicant more than a dozen times before the trial. He stated there were two bullets found at the scene of the crime, one in the vestibule at the Waffle House and one in the decedent, and both came from one gun. He stated his theory of the case was that it was impossible for the shot to come from Applicant because he was in close proximity to the victim, and the evidence showed the shot came from further away. Trial Counsel stated he cross-examined all the witnesses to confirm Applicant was wearing an open red button-down shirt and baggy pants, and that they did not see a gun in his waistline or anywhere on him. He testified he tried his best to point to Derrick Brown as the committer of this crime, but he could not prove a third-party guilt defense because Derrick Brown was never charged with this crime.

Trial Counsel testified he investigated all the discovery in this case, but he did not have funding for a full investigation outside the discovery. Still, he stated he did what needed to be done on his own, and he was very prepared for trial. He stated he received statements from the witnesses, and he chose not to interview these witnesses, because he liked their first statement and did not want to add any contradicting testimony. He opined that, in hindsight, he should have talked to Chavis Heyward, because he was unaware that Investigator Barfield was going to

testify about his interview with Heyward until right before the trial. Trial Counsel stated that Barfield's testimony was a surprise to some degree, but he knew about it before the trial. He opined that if he had spoken with Chavis Heyward before trial, he would have known about the interview with Barfield. However, he stated that he objected to Barfield's testimony and he argued his objection to the trial court, but was overruled.

Trial Counsel testified that Applicant chose not to testify at trial because most of the information he would have said was already before the jury, and he did not want to take the risk of testifying when they were already "winning at halftime." Trial Counsel stated Applicant chose to reject the guilty plea offer because he did not shoot anybody, and he believed the evidence of the case was in their favor and they were likely to win at trial. He stated an Alford plea was never available to him. He testified that he filed an appeal after Applicant's trial; he does not know what happened, but he believed he had properly filed and perfected the appeal.

Trial Counsel testified it was undisputed that Detective Lawrence had an affair with Derrick Brown's mother; it caused another case to be dismissed and he was later fired because of it. However, he stated that in this case, he was not on the witness list, he did not do any reports, and he did not sign anything that was admitted into evidence. He stated Detective Lawrence actually had Applicant transported to his office for an interview without telling Trial Counsel while he was representing him. Trial Counsel stated he was upset and complained to him once he found out, but the statement from the interview was never used at trial or against Applicant in any way. He stated Applicant's statement to Detective Lawrence did not incriminate him, but he maintained his innocence, so the State could not have used it against him at trial. Trial Counsel stated he asked for the disciplinary records against Detective Lawrence, but he did not know of a way to use them at trial that would have been proper, appropriate, or admissible. He stated he

would have brought it up at trial if the door had been opened, but it was not. Trial Counsel stated he did not want to call Detective Lawrence as a witness because it would not have been helpful to him, and he thought the trial was going well and did not want to "dirty it up" by getting into side issues.

Trial Counsel testified he did not object to Dario Teran's statement being read into the record because he believed it fit the exception to the hearsay rule. He stated he did not object to the SLED videos because they were not very enhanced, they were poor quality videos with no details outside in the parking lot, and he was fairly confident that it did not identify Applicant. He believed they were helpful to him because they showed you could not identify Applicant in the video. Trial Counsel stated he did not see any legal reason to keep the videos out of evidence. He stated he did not have funding to hire an expert to testify about the angles of the shot, but he did not think an expert would help. He stated he argued to the jury that the first shot could not have come from Applicant because he was inside the vestibule at the time, and the shot came from outside the vestibule. Trial Counsel testified he put the picture of the crack on the window into evidence to support this claim. He stated the second shot was shot from at least three car lengths from the sidewalk, and he cross-examined the State's expert witness about the distance of the shot.

Trial Counsel testified he moved to have the warrants dismissed at the preliminary hearing because of a lack of probable cause. He stated there was no question that there was transferred intent in this case because the decedent was not the intended target of the shot. He stated he did not move to suppress the witnesses' statements because he wanted them in and they helped his theory of the case.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

BELATED REVIEW OF DIRECT APPEAL ISSUES

Applicant alleges Trial Counsel failed to file an appeal as requested. The testimony presented at the evidentiary hearing clearly shows that Trial Counsel intended to file and perfect a direct appeal, but the appeal was somehow dismissed before it was perfected. This Court agrees that Applicant did not waive his right to a direct appeal. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal if requested or comply with the procedure required by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State. See Rule 227(g) (1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

This Court affirmatively finds Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes that Applicant is entitled to a belated review of his convictions. A petition for belated review pursuant to White v. State can remedy Applicant's lack of a direct appeal. Therefore, relief for this allegation is granted.

INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant has asserted several allegations of ineffective assistance of counsel. This Court finds these claims to be meritless and they should be denied and dismissed with prejudice. This Court finds Trial Counsel's representation did not fall below the standards of professional norms in any manner. Based on the testimony presented and the record before the court, this Court finds Trial Counsel's representation was not ineffective in any regard.

Failure to Investigate

Applicant alleges Trial Counsel was ineffective for failing to investigate facts that prejudiced him at trial. This allegation is meritless and must be denied.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Trial Counsel testified at the evidentiary hearing that he investigated all the discovery in this case, but he did not have funding for a full investigation outside the discovery. Still, he stated he did what needed to be done on his own, and he was very prepared for trial. He stated he received statements from the witnesses, and he chose not to interview these witnesses, because

he liked their first statement and did not want to add any contradicting testimony. This Court finds Trial Counsel made a valid strategic decision not to interview the State's witnesses in this case because he had statements from each of them that he thought were helpful to his case. If any witness strayed from the testimony in their statement at the trial, Trial Counsel used their statements to cross-examine and impeach their credibility. This Court finds neither prong of the Strickland test is met, and these allegations are denied and dismissed with prejudice.

1. Detective Lawrence's relationship with Derrick Brown's mother

Trial Counsel was not deficient for failing to investigate the relationship between Derrick Brown's mother and Detective Lawrence because he *did*, in fact, investigate and know about this relationship. Applicant, his mother, and Trial Counsel all testified that this relationship was common knowledge. Applicant has failed to present any valid, credible, or admissible information to prove the existence of this relationship or how it would have changed the outcome of the trial. Accordingly, he has failed to meet his burden of proving either prong of the Strickland test.

2. Chavis Heyward

Trial Counsel opined at the evidentiary hearing that, in hindsight, he should have talked to Chavis Heyward, because he was unaware that Investigator Barfield was going to testify about his interview with Heyward until right before the trial. Trial Counsel stated that Barfield's testimony was a surprise to some degree, but he knew about it before the trial. He opined that if he had spoken with Heyward before trial, he would have known about the interview with Barfield. However, he stated that he objected to Barfield's testimony and he argued his objection to the trial court, but was overruled.

This Court finds Trial Counsel was not deficient for failing to interview Heyward before the trial because an interview likely would not have revealed the information about Heyward's interview with Investigator Barfield. Furthermore, there is no prejudice from Trial Counsel's failure to interview Heyward because the testimony from Investigator Barfield regarding his discussions with Heyward were found admissible by the trial court and would have been allowed in regardless of Trial Counsel's knowledge of it. In fact, Trial Counsel testified that he *did* know about the testimony of both these witnesses prior to trial, so he was prepared to handle it. Trial Counsel objected to Investigator Barfield's testimony, he argued his objection to the trial court, and the trial court overruled his objection. There is nothing else Trial Counsel could have done that would have changed the testimony of this witness. Furthermore, Applicant has failed to meet his burden of proving that either of these witnesses' testimony would have changed the outcome of the trial, so there can be no prejudice.

3. Waffle House waitress April Blodgett

April Blodgett worked at the Waffle House on the night of the crime and gave a statement to law enforcement as an eyewitness to the events. At trial, Blodgett testified that she saw the gun come out of a red sleeve, but she didn't tell anyone in law enforcement about it or write it in her statement because she was on medication at the time and could not remember everything that happened that night at the time she wrote her statement. Tr. 292-293. Applicant alleges Trial Counsel was ineffective for failing to interview her to be aware of this piece of testimony before the trial. This allegation is meritless.

Trial Counsel was not deficient for failing to investigate this piece of testimony because, even if had been revealed to him prior to trial, there is nothing further Trial Counsel could have done to suppress the testimony. Additionally, Trial Counsel thoroughly cross-examined and

impeached Blodgett on this testimony at the trial. Tr. 293-303. He pointed out to the jury on cross-examination that Blodgett had not told anyone about the red sleeve until the trial, and it would have been important for her to report if she had seen it at the time. Because Trial Counsel impeached Blodgett's credibility on this testimony at the trial, there can be no prejudice from any failure to investigate this witness. Trial Counsel acted properly under the circumstances and effectively challenged Blodgett's testimony. Therefore, Applicant has failed to prove either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

4. Failure to hire a private investigator

At the evidentiary hearing, Trial Counsel testified there was no funding available in this case to hire a private investigator and he did all of the investigation himself. He testified he investigated all of the discovery materials and felt very prepared for trial. Applicant has failed to prove Trial Counsel could have or should have hired a private investigator in this case, and that any additional investigation by a private investigator would have changed the outcome of the case. Therefore, this allegation is denied and dismissed with prejudice.

Attempted murder charge enhanced to murder

Applicant alleges Trial Counsel was ineffective in his representation regarding the facts surrounding the original arrest of attempted murder that was enhanced to murder. At the evidentiary hearing, Applicant testified he was originally charged with attempted murder, and was denied bond in magistrate court. He stated that after bond was denied, and after his preliminary hearing, his charge was enhanced to murder.

This Court finds nothing ineffective about Trial Counsel's representation on his charges. Furthermore, there is nothing Trial Counsel could have done to prevent the State from enhancing the charge to murder. The charges against Applicant were within the discretion of the solicitor,

and nothing about the charges was improper. "The solicitor has broad discretion in choosing the offenses with which a defendant will be charged and in plea negotiations leading up to trial."

State v. Johnson, 287 S.C. 171, 172, 337 S.E.2d 204, 205 (1985) (citing State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975)).

Applicant has failed to prove anything about his murder charge was improper or that Trial Counsel was deficient in any way in failing to challenge these charges. Therefore, this allegation is denied and dismissed with prejudice.

Detective Christina Smith's testimony

Applicant alleges Trial Counsel failed to adequately question Detective Christina Smith's testimony that she was able to identify Applicant behind the muzzle flash of the gunshot on the Waffle House video tape. At trial, the State attempted to have Detective Smith testify about the video and who she could identify shooting the gun. However, Trial Counsel objected to this testimony about the video, and his objection was sustained. The trial court ruled that her testimony would have been "her opinions about things that other people have told her," and that all of those witnesses had already testified about what they saw the night they were there. Tr. 360, line 18-20. The trial court ruled her testimony was no probative information about a video the jury had already viewed at least two dozen times. Tr. 361.

Because Trial Counsel properly objected and was able to keep this testimony out of evidence, this Court finds he was not deficient in his questioning of this witness. None of this testimony was presented to the jury, and Trial Counsel's decision not to bring it up on cross-examination fit into his trial strategy, which he testified at the hearing was to allow the jury to see the video because you could not identify the shooter behind the muzzle flash. Detective Smith's testimony about the identity of the figure behind the muzzle flash could only have hurt

Applicant at trial, so it is reasonable that Trial Counsel chose not to question Detective Smith on the issue and object to the testimony. Therefore, because Trial Counsel was not deficient and there was no resulting prejudice from the lack of this testimony, this allegation is denied and dismissed with prejudice.

Failure to object to SLED video enhancement

Applicant alleges Trial Counsel was ineffective for failing to object to SLED's enhancement of the Waffle House videotape. This allegation is meritless because Trial Counsel's choice not to object was valid and because the "enhancements" made to the video did not change the outcome of the trial.

At trial, the State presented testimony from SLED agent Joseph West, who explained to the jury how he edited the video of the Waffle House shooting. Tr. 222-227. He stated he slowed the video down to make it clearer and easier to follow, but he did not "enhance" the video by adding or subtracting something from the image. Tr. 223. He testified the video was not changed or altered in any way from the original form he received it in; he only adjusted the brightness of the video or zoomed into certain still shots from the image. Tr. 224. He stated that, on this particular video, he slowed down the speed by 35 percent, and he changed the brightness on a few features; other than those changes, the video was not altered or enhanced in any way. Tr. 226.

At the evidentiary hearing, Trial Counsel testified he did not see a reason to object to the SLED enhanced video. He stated the video was not "very" enhanced; the video was poor quality and did not show any details of the outside parking lot. He stated he was fairly confident the video tape did not identify Applicant as the shooter. This Court finds Trial Counsel's decision not to object to this video tape valid, as the tapes were not objectionable. The tapes were

admissible under the rules of evidence, and the record shows they were not improperly altered, changed, or enhanced in a way that harmed Applicant's case. An objection to the admission of the tapes likely would have been overruled, so there can be no prejudice. This Court also finds Trial Counsel's testimony very credible that the tapes did not identify Applicant as the shooter.

which also shows no prejudice. Because neither prong of the Strickland test is met, this allegation is denied and dismissed with prejudice.

Failure to adequately challenge the sequence of shooting

Applicant alleges Trial Counsel was ineffective for failing to challenge the sequence of shooting. Trial Counsel credibly testified he argued to the jury that Applicant could not have shot either bullet because of the distance of the shot from the victims. The trial transcript shows Trial Counsel cross-examined the State's expert witness in forensic pathology, Lee Tormos, on the distance of the gunshots from the victim. Tr. 344-349. This testimony and argument clearly supported Trial Counsel's trial strategy of showing that Applicant, who was standing in the vestibule next to the victim, could not have shot either shot because they were shot from a further distance.

Trial Counsel had a clear trial strategy regarding the presentation of the shots and their sequence, and this Court finds it was adequately presented to the jury for consideration. Therefore, Applicant has failed to prove that Trial Counsel was deficient in this regard or that this deficiency prejudiced him. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to adequately present the possibility of two shooters

Applicant alleges Trial Counsel was ineffective for failing to properly present the possibility of two shooters at the scene of the crime. This allegation is meritless and must be denied.

The record before the Court shows the evidence presented at trial conclusively showed that both bullets found at the crime scene came from the same gun within a short period of time. Trial Counsel credibly testified at the evidentiary hearing that both shots came from the same gun, and his strategy was to argue to the jury that neither shot could have come from Applicant, especially the first shot, because he was standing very close to him and the testimony showed the bullet was likely shot from a further distance. This Court finds no evidence in the record supporting the theory that there were two different shooters, and Applicant has failed to produce any credible evidence showing what Trial Counsel should have done to successfully argue this theory. Applicant has failed to meet either prong of the Strickland test, and this allegation is denied and dismissed with prejudice.

Failure to adequately present the issue of two people present with red shirts

Applicant alleges Trial Counsel was ineffective for failing to present the issue of two different people wearing red shirts at the crime scene, alluding to the conclusion that the other man wearing red was the shooter, not Applicant. At trial, the Waffle House video tapes were presented to the jury, showing Applicant wearing a red button-down shirt, as well as another man in a red shirt at the counter of the restaurant. Only two of the witnesses testified about the second man in a red shirt. Tr. 166; 215. When other witnesses were asked if they saw anyone else in the Waffle House with a red shirt, they responded no. Tyh'shka Catts, for example, testified "[n]o. Everyone else had on, like, white T-shirts or blue T-shirts. No one else had on a red shirt." Tr.

156, line 13-16. Trial Counsel cross-examined these witnesses on the presence of a second man in red, and pointed out in the video that there was another man. Tr. 156-7.

It is clear from the trial transcript that there is no question from the testimony presented that the witnesses were referring to Applicant when they referred to the man in the red shirt.

While apparently there was a second man in red, he is not identified as the shooter or as the man who was involved in the fight in any testimony. None of the witnesses knew who he was. Multiple witnesses clearly identified the man in the red button-down shirt as Deonte Brown. This Court finds Trial Counsel did point out the presence of the second man in red to the jury, but it simply was not a plausible argument to rely on. Trial Counsel credibly testified at the evidentiary hearing about his trial strategy to argue that Applicant could not have been the shooter because of his close proximity to the victims.

This Court finds Trial Counsel was not deficient for failing to argue the theory of two men in red shirts because he did present this information to the jury, and he reasonably relied on a different theory of defense in his argument. Furthermore, Applicant has failed to show prejudice in this allegation because he has not shown any potential argument Trial Counsel could have made on this theory that would have changed the outcome of the trial. Therefore, this allegation is denied and dismissed with prejudice.

Failure to adequately question regarding Gun Powder Residue test

Applicant alleges Trial Counsel failed to adequately question the witnesses about the gunshot residue (GSR) test performed on Applicant's clothing from the night of the crime. This allegation is meritless. Trial Counsel presented an expert witness to testify that the GSR test results showed no GSR on Applicant's clothing. He argued to the jury his theory that Applicant could not have been the shooter for various reasons, including the fact that he voluntarily met

with law enforcement the day after the crime wearing the same clothing from the night before, and there was no GSR on his clothing. Trial Counsel presented a valid strategic argument in his case and did not fail to present this information to the jury. Applicant has failed to show deficiency or prejudice, and this allegation is denied and dismissed with prejudice.

Failure to have a suppression hearing regarding the videos

Applicant's allegation that Trial Counsel is ineffective for failing to move to suppress the Waffle House videos before the trial is meritless. At the evidentiary hearing, Trial Counsel stated he chose not to move to suppress the videos because he wanted them to come in. He opined that the videos were not harmful to Applicant, but rather they helped him, because it was not clear from watching the videos who the shooter was. He stated he was fairly confident that Applicant could not be identified from the videos. He further opined that he would not have succeeded even if he had moved to suppress the videos because they were admissible.

This Court finds Trial Counsel's testimony very credible. Trial Counsel employed a valid trial strategy when choosing to stipulate to allowing the videos into evidence, as he reasonably believed they were helpful to his client's defense. This Court further finds no prejudice from the use of the video tapes at trial because the State presented *nine* witnesses who all testified Applicant was present at the scene in a red shirt and started a fight with the victim. Although the video may have helped the jury visualize the scene and the events that took place, the State presented plenty of evidence aside from the videos that Applicant could have been the shooter. Therefore, this Court finds there is no deficiency and no prejudice as a result, and this allegation is denied and dismissed with prejudice.

*Failure to bring up the information regarding Detective Lawrence and
his relationship with Derrick Brown's mother*

As previously addressed above, this Court finds Applicant has failed to present any valid, credible, or admissible information to prove the existence of a relationship between Detective Lawrence and Derrick Brown's mother or how it would have changed the outcome of the trial. At the evidentiary hearing, Trial Counsel testified Detective Lawrence was not actively involved in this case; he was not on the witness list, he did not do any reports, and he did not sign anything that was admitted into evidence. Trial Counsel stated he asked for the disciplinary records against Detective Lawrence, but he did not know of a way to use them at trial that would have been proper, appropriate, or admissible. He stated he would have brought it up at trial if the door had been opened, but it was not. Trial Counsel stated he did not want to call Detective Lawrence as a witness because it would not have been helpful to him, and he thought the trial was going well and did not want to "dirty it up" by getting into side issues.

This Court finds Trial Counsel could not have used any accusation of this alleged relationship at trial in any admissible fashion, and Applicant has failed to prove that he should have called Detective Lawrence as a witness to present a far-fetched conspiracy defense when he chose instead to properly focus on a defense based upon the facts of the case. Trial Counsel's choice not to present this information was a valid strategical decision that this Court will not question in hindsight. This Court further finds no resulting prejudice from the failure of this alleged relationship to be presented to the jury because the State's evidence against Applicant was clearly enough to result in a conviction. Accordingly, Applicant has failed to meet his burden of proving either prong of the Strickland test and this allegation is denied and dismissed with prejudice.

Applicant did not testify based on bad advice from Defense Counsel

Applicant alleges Trial Counsel was ineffective for incorrectly advising him not to testify. This allegation is meritless. Trial Counsel credibly testified that most of the information Applicant would have testified at trial was already in front of the jury. Trial Counsel testified that he did advise Applicant not to testify because he believed at the time that they were "winning at halftime" and his testimony could only hurt the case. Regardless of this testimony, it was Applicant's decision not to testify at trial, and he alone made the choice not to take the stand. The trial judge clearly informed Applicant of his right to make this decision both before the trial began and at the close of the State's case:

So this right to testify is your right. It's not Mr. Smiley's right. He's your lawyer. He's advising you on this, but you have, and I have, everybody in this courtroom has, certain constitutional rights that only we can exercise and only we can give up, or waive. All right? The right to testify, the right to put up evidence is yours and yours alone.

Tr. 55 line 20 – 56 line 1. After the State presented their case, Applicant chose not to testify. Trial Counsel explained to the trial judge: "Your Honor, after talking with my client at great length last night and this morning, he's decided that he does not wish to testify." Tr. 400 line 10-12. The trial judge then explained Applicant's right to testify to him again, and Applicant chose not to testify. He affirmed to the trial judge that this was his decision and his decision alone. Tr. 401 line 1-3.

This Court finds Trial Counsel was not deficient in his advice to Applicant. Furthermore, Applicant has failed to prove that testifying at trial would have changed the outcome of the trial, as his testimony would not have presented any information or evidence that was not already before the jury. Therefore, this allegation is denied and dismissed with prejudice.

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Defense Counsel had no theory of defense

Applicant's allegation that Trial Counsel had no theory of defense is meritless. Trial Counsel credibly testified about his trial strategy and theory of the case at the evidentiary hearing, including his theory that the shots could not possibly have come from Applicant because he was standing so close to the victim during the fight when he was shot. Trial Counsel stated he could not use a third party guilt defense because Derrick Brown was never charged in this case, but he did his best to point to Derrick Brown as the shooter at trial. He testified about his strategy to cross-examine all the State's witnesses about the fact that none of them saw Applicant with a gun. He further testified about his strategy to stipulate to all evidence because he believed the evidence clearly did not identify his client as the shooter, and he wanted the jury to see that Applicant was not identifiable from the evidence. This allegation is clearly disputed by the testimony presented at the evidentiary hearing, and is therefore denied and dismissed with prejudice.

Failure to properly explain ten year plea offer

Applicant claims Trial Counsel was ineffective for failing to properly explain the State's ten year plea offer to him. At the evidentiary hearing, Applicant testified Trial Counsel relayed a plea offer to him, but he did not take the deal based on Trial Counsel's opinion that he had a good case because there was no concrete physical evidence against him. Applicant testified that Trial Counsel explained to him at the time that the decision at trial was up to a jury of twelve people, and he could be convicted. He stated he would not have pled guilty to any charge admitting that he shot the gun, because he did not shoot anyone.

Trial Counsel testified that he did believe the odds of taking the case to trial were in their favor, and he discussed this with Applicant when he relayed the plea offer. Trial Counsel stated

an Alford plea was never available to Applicant, and Applicant refused to plead guilty to any charge that implicated that he shot the gun, because he maintained he did not shoot anybody. This Court finds nothing deficient about Trial Counsel's relaying of the guilty plea offer from the State, or in his advice to Applicant about choosing to take it. Furthermore, Applicant can show no prejudice through this allegation because does not allege that Trial Counsel failed to relay the offer to him, but only that he misadvised him. Even if Applicant had chosen to take the ten year plea offer, the end result would still be a conviction, the same conviction he obtained at the end of his jury trial. Therefore, because there was no deficiency or prejudice, this allegation is denied and dismissed with prejudice.

Failure to get last closing argument

Applicant alleges Trial Counsel was ineffective for choosing to present an expert witness and admit a photograph of the shattered window in his defense and losing the right to have the last closing argument at trial. This allegation is meritless because Trial Counsel made a valid strategic decision to present this evidence that he reasonably believed help his defense.

At trial, Applicant presented testimony from SLED forensic scientist Wendy Berry, who was admitted as an expert in gunshot residue analysis. Tr. 384-399. Berry testified that a firearm, when fired as a close distance, would likely leave gunshot residue on the hands and clothing of the shooter. Berry stated that she tested Applicant's clothing in this case and did not find any gunshot residue. Tr. 396. Also at trial, Trial Counsel admitted a photograph of the "spider web" pattern of the shattered glass at the Waffle House after the shot was fired through it. Tr. 108. Trial Counsel used this photograph to cross-examine and question the State's witness, Erin Meyer, who processed the evidence in this case for the forensics unit at the Sheriff's Office.

At the evidentiary hearing, Trial Counsel testified that he chose to put this evidence in to further his defense strategy of showing the jury Applicant could not have been the shooter because of the lack of gunshot residue on his clothing and because of the angle the shot came through the glass from the outside of the restaurant. Trial Counsel testified the State never sent Applicant's clothing to be tested for gunshot residue, so he did, and he believed the results were good for his client. When asked if putting up Berry as a witness helped his case, Trial Counsel opined that it "certainly didn't hurt" his case. This Court finds that Trial Counsel exercised a reasonable trial strategy by using this evidence at trial and, as a result, choosing not to take the last closing argument.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Therefore, because Trial Counsel articulated a valid trial strategy and chose to present evidence in furtherance of this defense strategy, and Applicant has failed to show that retaining the last closing argument would have changed the outcome of the trial in any way, this Court finds Trial Counsel was not ineffective in this manner. Accordingly, this allegation is denied and dismissed.

CONFLICT OF INTEREST

Applicant alleges that an actual conflict of interest resulted in his conviction because Detective Lawrence, who had a minor part in the investigation of his case, allegedly had a romantic relationship with the mother of a suspect in the case. This allegation is meritless. Furthermore, this allegation is an issue that should have been raised on direct appeal and is improper for post-conviction relief. Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief.

Furthermore, to any extent that Applicant frames this allegation as one of prosecutorial misconduct, the issue is meritless. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Regardless, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant has not carried his burden of proving actual prosecutorial misconduct, and this allegation is denied and dismissed with prejudice.

TRANSFERRED INTENT

Applicant alleges that the theory of transferred intent was improperly applied. This allegation is improper for post-conviction relief, as it is a direct appeal issue, and must be denied and dismissed. Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, this allegation is denied and dismissed.

VII. CONCLUSION

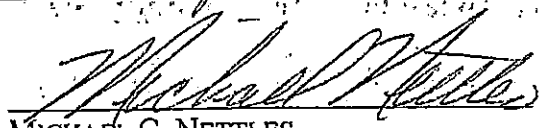
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. That this current Application for Post-Conviction Relief be dismissed with prejudice.
2. That the Applicant is granted a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). Within thirty days of service of this Order, counsel for Applicant must file a Notice of Appeal to secure the appropriate review of Applicant's convictions. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and South Carolina Appellate Court Rule 227(g) for the appropriate procedure for securing belated appellate review.
3. That Applicant remain in custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 11 day of Sept, 2017.


MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

Forence, South Carolina

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

DEONTE BROWN, #361477

Applicant.

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

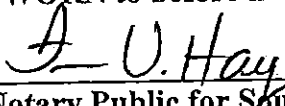
The undersigned hereby certifies that a true copy of the **Order of Dismissal and Grant of Belated Appeal Pursuant to White v. State** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

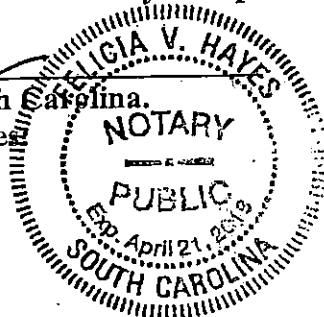
Tommy Arthur Thomas, Esquire
PO Box 88
Irmo, SC 29063

This 28th day of September, 2017.


Jennifer Jenkinson
Legal Assistant for Respondent

SWORN to before me this 28th day of September, 2017.


Notary Public for South Carolina.
My Commission Expires



THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

Michael G. Nettles, Circuit Court Judge

Case No.: 2015-CP-10-3935

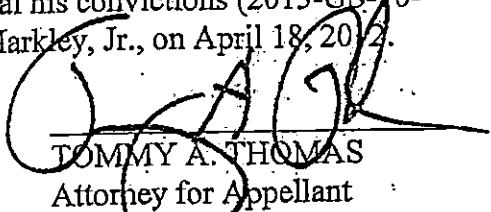
Deonte Brown #361477, ... Appellant,

vs.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Deonte Brown #361477, appeals the order of the Honorable Michael G. Nettles dated September 11, 2017, and filed September 26, 2017 denying Post Conviction Relief. Appellant received Notice of this Order on October 2, 2017. Further, pursuant to this Order, Appellant was granting a Belated Direct Appeal pursuant to White v. State. The Appellant hereby notices the Court of his intent to Appeal his convictions (2013-GS-10-00535, 00536, 00537) from The Honorable Dennis R. Markley, Jr., on April 18, 2012.


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Other Counsel of Record:

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Assistant Attorney General
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Irmo, South Carolina
October 30, 2017

FILED
2017 NOV - 1 AM 11:14
JULIE J. ARISTOTONG
CLERK OF COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

Michael G. Nettles, Circuit Court Judge

Case No.: 2015-CP-10-3935

Deonte Brown #361477, ... Appellant,

vs.

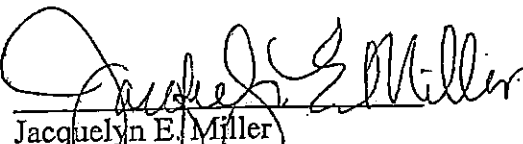
State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant,
hereby certify that I placed in the United States Mail, a copy of an Notice of Appeal, with
postage prepaid and the return address clearly shown on said envelope to the following at:

Julie Coleman, Esq.
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Columbia, SC 29211-1549

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October 30, 2017

FILED
2017 NOV -1 AM 11:14
JULIE J. ARMSTRONG
CLERK OF COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED
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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

Michael G. Nettles, Circuit Court Judge

Case No.: 2017-002269

Deonte Brown #361477,..... Petitioner,

vs.

State of South Carolina, ...Respondent.

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
PURSUANT TO WHITE V. STATE

STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the February 2013 term of the Charleston County Grand Jury for murder, attempted murder, and possession of a firearm during the commission of a violent crime (2013-GS-10-00535, 00536, 00537). James W. Smiley, Esquire, represented him. Applicant proceeded to a jury trial and was found guilty as indicted. The Honorable Roger M. Young, Sr., sentenced Applicant to incarceration for fifty years for Murder, thirty years for Attempted Murder, and

five years for Possession of a Firearm During the Commission of a Violent Crime, each sentence to be served concurrently. Applicant did not appeal his conviction or sentence.

STATEMENT OF FACTS

This matter came before the Lower Court by way of a post-conviction relief (PCR) application filed on July 15, 2015. Respondent submitted a Return on February 18, 2016. An evidentiary hearing was convened on August 3, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and was represented by Tommy Thomas, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's mother, Doris Gregory, and Applicant's trial counsel, James W. Smiley, Esquire ("Trial Counsel") also testified. Accordingly, the Lower Court granted Applicant a belated review.

The Petitioner testified that on July 15, 2012 he went out to a night club called Frasier's in Charleston County and after that went to the Waffle House for breakfast. This was around 4:00 a.m. There were a number of people present at the Waffle House and he was there with a group of people. In the Waffle House, there was an altercation between the Petitioner and another individual. There was a shot fired from outside in the parking lot. At this time he was coming out of the door. Everyone started running and that is when a second shot took place. (App. p. 593, lines 5-24)

Petitioner was notified that he was wanted for Attempted Murder and he turned himself into the County Jail. He was transferred to Police headquarters where Detective Lawrence and Detective Smith read him his Maranda Rights. He gave a written statement. (App. p. 594,

lines 13-19) In his statement indicated that he was innocent of this crime. (App. p. 595, lines 2-4)

The Petitioner testified that two individuals were shot. Mr. Dontaye Reed, a friend of his, was killed at the scene. Quinten Allen was also shot and survived. Petitioner hired Mr. Jim Smiley to represent him. He met with Mr. Smiley a number of times and they talked about his innocence. It was his understanding that the theory of defense was going to be that he would testify and that Mr. Smiley was going to show how a second possible suspect was involved in this case. This individual, Derrick Brown, was the actual shooter. Mr. Brown's Mother was in a sexual relationship with Detective Lawrence who was investigating the case. (App. p. 597, lines 6-24) Petitioner testified that he gave this information to trial counsel, but he did not believe that he investigated this matter.

Petitioner was initially charged with Attempted Murder. (App. p. 599, lines 24-25) This was later upgraded to a charge of Murder. The Petitioner testified that he believed that Counsel was ineffective for his failure to have a Pre-Trial suppression hearing. It was the Petitioner's understanding that the State's case revolved around the State being able to identify him in a photo that showed a muzzle flash. The State was saying that they could identify him behind the muzzle flash and that he was wearing a red shirt. (App. p. 604, lines 9-17)

Petitioner testified that he was concerned about the testimony of a number of witnesses. That one of the witnesses, Chavis Heyward, was questioned in 2012. Trial Counsel told Petitioner that Mr. Heyward did not indicate anything about who had a weapon or what clothing they had on. (App. p. 605, lines 14-19) In addition, Petitioner was concerned about Chavis Heyward and his interaction with Investigator Barfield. Investigator Barfield was

allowed to testify regarding his conversation with Chavis Heyward. Chavis Heyward testified at the trial that he had never told Investigator Barfield anything about who the shooter was or what he was wearing. (App. p. 605, lines 2-4) Investigator Barfield testified that they spoke with Mr. Heyward inside the office with two other officers. Barfield never indicated anything about anyone having a weapon or seeing the shooter. However, on the way to the elevator, it was just Detective Barfield and Chavis Heyward. Barfield stated that he had a heart to heart conversation with Heyward and that is when Mr. Heyward came forward and said that the guy with the red shirt was the shooter. That this individual was the one with the weapon. (App. p. 607, lines 2-12) Petitioner testified that he felt this was extremely prejudicial because he was wearing a red shirt. This testimony identified the individual with the gun as an individual who had on a red shirt. The State was therefore able to link the shooting to the Petitioner.

ARGUMENT I

The Court erred in allowing the testimony of Detective Barfield regarding the Statements allegedly made by Chris Heyward Under Rule 613 (b).

Defense Counsel James Smiley made a Motion for a Directed Verdict. The Court points out the circumstantial nature of the evidence. The Court, in its ruling on the Motion discusses four pieces of circumstantial evidence presented by the State:

“Well, I suppose one of the most remarkable things about this case is I’ve never had a case with this many different video cameras and angles of the incident that took place and there being no conclusive proof as to who the shooter was, along with this many people in close proximity of an actual shooting with no one being willing to identify who the shooter was.

So there is no direct evidence that the defendant was the shooter. It’s all circumstantial evidence, and the circumstantial evidence standard is substantial circumstantial evidence, and here is what I have written down as the circumstantial evidence that the defendant was the shooter: First, that the defendant was wearing a red jersey and that he was being pushed out the door at the time that shots were fired.

Second: Chris Hewyard told Investigator Barfield that the guy wearing the red shirt was the shooter. He denied that on direct and cross, but his statement came in under 613 (b). Not the strongest evidence in the world, but it is evidence.

That is a chain of circumstantial evidence. It's not the strongest circumstantial evidence case I've ever seen, but, in my opinion, it is enough to get you past the directed verdict at this time, so your Motions are denied."

Objection is made to the Testimony of Investigator Kenneth Barfield under the fact that it is hearsay. (App. p. 201, lines 1-2) The court however, states that this testimony is offered under 613 (b) (App. p. 201, line 4) Rule 613 of the Rules of Evidence covers prior statement of witnesses. Rule 613 (b) extrinsic evidence of prior inconsistent statements of witnesses

This case was extremely circumstantial as can be seen from the excerpt from the Court's ruling regarding Counsel's Motion for Directed Verdict. The court notes that Chris Heyward told Investigator Barfield that the guy wearing the red shirt was the shooter. He denied that on direct and cross, but his statement is allowed under Rule 613 (b). The Petitioner would assert that the Court was in error in allowing this information in under 613 (b) and that this was extremely prejudicial to the Petitioner. It is convenient that Heyward decides to tell Investigator Barfield this information before exiting the door to the parking garage (App. p. 201, lines 15-20) That Chavis tells him that the color of the shooter's shirt was red. (App. p. 203, lines 3-7)

ARGUMENT II

The Court erred in allowing the State to present frames from a video to the Jury in closing that were not introduced into evidence.

In the Solicitor's closing argument she referred to the exhibits that had been introduced into Court. She reminds the Jury that they are the Judges of the facts and that it is up to them

to decide who to believe and what to believe (App. p. 449, lines 19-22) She goes further to state that similar to defense counsel, that she is going to show certain moments of the video and it would ultimately be up to the Jury to decide what it shows. However, her argument is that based on the testimony and other items of video, that this supports her theory that the Petitioner is the one who committed this crime. (App. p. 450, lines 1-19) Defense Counsel objects and states that these are frames from the video that haven't been put into evidence. The Court rules that they are for demonstrative purposes only. That they will not go back to the Jury. That they weren't in evidence, but they were demonstrative purposes and she can show them now. (App. p. 450, lines 10-14) The State then goes frame by frame and calls attention to the these pictures on a detailed basis. (App. p. 450, lines 15-25, p. 451, lines 1-25, p. 452, lines 1-25, p. 453, lines 1-25, p. 454, lines 1-25, p. 455, lines 1-17) She concludes by saying that the video shows that "he turned back around toward the Waffle House, toward all the people and fired again, firing outside of the Waffle House. That in the beginning hit Quentin Allen. Firing back at the Waffle House from the parking lot and killed Dontaye Reed. (App. p. 456, lines 4-11)

In fact the Solicitor goes step by step through these frames in her argument to the Jury. She breaks this down to times she argues that at 4:11.10 ("that you see the Defendant with the fancy stuff on his shoulder on this red shirt holding a cup". That 3 seconds later, at 4:11.12, you see a red t-shirt that is right after that and these were showing people exiting the Waffle House. (App. p. 451, lines 2-5) "I would argue that you see the Defendant in the red shirt with the fancy shoulders." She then refers back to the video frame again from 4:12.16 "The Defendant, fancy red shirt, stuff on his shoulder, throwing a cup at Quinton Chavis." (App. p.

451, lines 19-21) This goes on for quite some time and she ends this by asking that the Jury come back with verdict of guilty for the murder of Deonte Reed and the Attempted Murder of Quinten Allen. (App. p. 456, lines 15-19)

According to Merriam Webster Dictionary evidence is defined as something such as testimony, writing or objects presented at a judicial or administrative proceeding for the purpose of establishing the truth or falsity of an alleged matter.

Demonstrative Evidence is defined as evidence in the form of objects, as maps, diagrams or models that has in itself no probative value, but is used to illustrate or clarify the factual matter of the issue. The Petitioner would argue that the video frames used at the hearing and allowed as demonstrative evidence by the Court did not meet the definition of demonstrative evidence. In addition, it is arguable that the video frames presented in this case did have probative value and were used expressly for the purpose of proving that the Petitioner was guilty of the crimes.

Our Court of Appeals in the case of Davis v. Taylor, 340 S.C. 150, 530 SE 2d 385 (2000) reviews this issue of demonstrative evidence. The Court of Appeals state that they were unable to find any South Carolina case in which the trial court refuses to admit an object into evidence or allow the use of the object for demonstrative purposes during trial. They go further to state that they believe the standard for merely showing or exhibiting demonstrative evidence would be not be higher than the standard for actually admitting demonstrative evidence, and that the Trial Court has broad discretion regarding this matter. The court references Clark v. Cantrell 399 S.C. 369, 529 SE 2d 528 (2000) and Holmes v. Black River

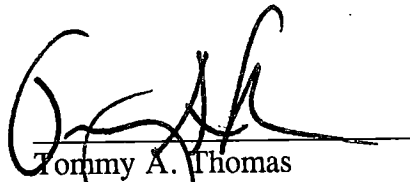
Electric, Coop, 274 S.C. 252, 262 SE 2d 875 (1980) The Court states that the omission or rejection of evidence will not be overturned unless it abuses its discretion.

The Petitioner in this case would argue that the Court did abuse it's discretion in allowing the Solicitor to use the frame stills in front of the Jury. That these frame stills were highly prejudicial. That the solicitor methodically goes through these frames, frame by frame to indicate and prove that the Petitioner was actually the individual wearing the red shirt and therefore guilty of this crime. This evidence was not used to illustrate or clarify the factual matters at issue. And was completely different than the demonstrative evidence that had been cited by the Court in the past.

CONCLUSION

For the above reasons, the Petitioner request that his conviction be set aside and a new trial granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tommy A. Thomas', written over a horizontal line.

Tommy A. Thomas
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November 30, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 30 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

Michael G. Nettles, Circuit Court Judge

Case No.: 2017-002269

Deonte Brown #361477,..... Appellant,

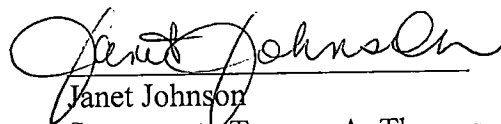
vs.

State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Janet Johnson, assistant to Tommy A. Thomas, Attorney for the Petitioner, hereby certify that I hand delivered a copy of the Appendix, Petition for Writ of Certiorari, Petition for Writ of Certiorari pursuant to White v. State and a Brief in Support of Petition for Writ of Certiorari pursuant to White v. State to:

The Office of the Attorney General's
1000 Assembly Street
Columbia, SC 29211-1549



Janet Johnson
Secretary to Tommy A. Thomas
Attorney for Applicant
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November 30, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY S.C. SUPREME COURT
Court of Common Pleas
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Michael G. Nettles, Circuit Court Judge

Case No.: 2017-002269

Deonte Brown #361477,..... Petitioner,

vs.

State of South Carolina, ...Respondent.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CASES

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State v. Gregory, 198 S.C. 98, 6 SE 2d 532 (1941)

Strickland v. Washington, 466 U.S. 668, (1984)

Rule 608 SCORE – Section 608 (c)

Rule 613 (b)

Rule 803

QUESTION PRESENTED

That Counsel was ineffective for his failure to interview Chavis Heyward and properly prepare for his testimony.

That Counsel was ineffective for his failure to object to the use of Dario Teran's and his statement being read into the record by the Solicitor.

That Counsel was ineffective for his failure to show the prejudice and bias of the criminal investigator, where a potential suspect's Mother was having a relationship with a lead detective of the case, Detective Lawrence.

That Counsel was ineffective for his failure to object to SLED video enhancement.

That Counsel was ineffective for his failure to adequately advise the Petitioner regarding taking the stand and testifying.

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Petitioner was indicted at the February 2013 term of the Charleston County Grand Jury for murder, attempted murder, and possession of a firearm during the commission of a violent crime (2013-GS-10-00535, 00536, 00537). James W. Smiley, Esquire, represented him. Petitioner proceeded to a jury trial and was found guilty as indicted. The Honorable Roger M. Young, Sr., sentenced Petitioner to incarceration for fifty years for Murder, thirty years for Attempted Murder, and five years for Possession of a Firearm During the Commission of a Violent Crime, each sentence to be served concurrently. Petitioner did not appeal his conviction or sentence.

STANDARD OF REVIEW

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner

must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the Petitioner must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the Petitioner 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, 386 S.E.2d at 625.

STATEMENT OF FACTS

This matter came before the Lower Court by way of a post-conviction relief (PCR) application filed on July 15, 2015. Respondent submitted a Return on February 18, 2016. An evidentiary hearing was convened on August 3, 2017, at the Charleston County Courthouse. Petitioner was present at the hearing and was represented by Tommy Thomas, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Petitioner testified on his own behalf at the evidentiary hearing. Petitioner's mother, Doris Gregory, and Petitioner's trial counsel, James W. Smiley, Esquire ("Trial Counsel") also testified. Accordingly, the Lower Court granted Petitioner a belated review.

In his current application, Petitioner alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel:
 - a. "He never did investigate my case to the best of his ability;"
 - b. "My attorney never had a pre-trial hearing for my case;"
 - c. "My lawyer did not file for the notice of appeal;"
2. "Actual Conflict of Interest:"
 - a. ". . . Detective Lawrence who was investigating the case was in a sexual relationship with my co-defendant(sic) mother who was a possible suspect under investigation of this crime;"

On July 25, 2017, Petitioner amended his application to include the following allegations of ineffective assistance of counsel regarding:

- a. Facts surrounding the original arrest of attempted murder and then enhanced to murder.
- b. Failure to adequately question Det. Christina Smith's testimony that she was able to ID client behind the muzzle flash.
- c. Video enhancement by SLED.
- d. Sequence of shooting.
- e. Failure to adequately present the possibility of two shooters.
- f. Failure to adequately present the issue of two people present with red shirts.
- g. Failure to adequately question regarding Gun Powder Residue test.
- h. Failure to properly investigate:
 - i. Defendant said the shooter was Derrick Brown. Derrick Brown was not arrested or charged. Derrick Brown's Mother was in a relationship with Detective Charles Lawrence.
 - ii. Witness Chavis Heyward originally said that he did not see anything. Two years later he testifies and identifies people on the video.

- iii. The waitress at the restaurant gave a statement that she did not see anything. However, at trial she remembers seeing a gun come out of a red sleeve.
- i. Failure to talk to witnesses before trial. No analysis of the videos and no Private Investigator.
- j. Failure to have a suppression hearing regarding the videos.
- k. Failure to bring up the information regarding Detective Charles Lawrence and his relationship with Derrick Brown's Mother.
- l. The Petitioner did not testify based on bad advice from Defense Counsel.
- m. Defense Counsel had no theory of Defense.
- n. There was a ten (10) year plea offer, which was not properly explained to the Petitioner.
- o. Defense Counsel did not get closing argument because he put in a picture of shattered window as evidence.
- p. Defense attorney did not file an Appeal, after he told Petitioner that he would.

Petitioner also alleged that the theory of transferred intent was improperly applied.

The Petitioner testified that on July 15, 2012 he went out to a night club called Frasier's in Charleston County and after that went to the Waffle House for breakfast. This was around 4:00 a.m. There were a number of people present at the Waffle House and he was there with a group of people. In the Waffle House, there was an altercation between the Petitioner and another individual. There was a shot fired from outside in the parking lot. At this time he was coming out of the door. Everyone started running and that is when a second shot took place. (App. p. 593, lines 5-24)

Petitioner was notified that he was wanted for Attempted Murder and he turned himself into the County Jail. He was transferred to Police headquarters where Detective Lawrence and Detective Smith read him his Maranda Rights. He gave a written statement. (App. p. 594, lines 13-19) In his statement indicated that he was innocent of this crime. (App. p. 595, lines 2-4)

The Petitioner testified that two individuals were shot. Mr. Dontaye Reed, a friend of his, was killed at the scene. Quinten Allen was also shot and survived. Petitioner hired Mr. Jim Smiley to represent him. He met with Mr. Smiley a number of times and they talked about his innocence. It was his understanding that the theory of defense was going to be that he would testify and that Mr. Smiley was going to show how a second possible suspect was involved in this case. This individual, Derrick Brown, was the actual shooter. Mr. Brown's Mother was in a sexual relationship with Detective Lawrence who was investigating the case. (App. p. 597, lines 6-24) Petitioner testified that he gave this information to trial counsel, but he did not believe that he investigated this matter.

Petitioner was initially charged with Attempted Murder. (App. p. 599, lines 24-25) This was later upgraded to a charge of Murder. The Petitioner testified that he believed that Counsel was ineffective for his failure to have a Pre-Trial suppression hearing. It was the Petitioner's understanding that the State's case revolved around the State being able to identify him in a photo that showed a muzzle flash. The State was saying that they could identify him behind the muzzle flash and that he was wearing a red shirt. (App. p. 604, lines 9-17)

Petitioner testified that he was concerned about the testimony of a number of witnesses. That one of the witnesses, Chavis Heyward, was questioned in 2012. Trial Counsel told Petitioner that Mr. Heyward did not indicate anything about who had a weapon or what clothing they had on. (App. p. 605, lines 14-19) In addition, Petitioner was concerned about Chavis Heyward and his interaction with Investigator Barfield. Investigator Barfield was allowed to testify regarding his conversation with Chavis Heyward. Chavis Heyward testified at the trial that he had never told Investigator Barfield anything about who the shooter was or

what he was wearing. (App. p. 605, lines 2-4) Investigator Barfield testified that they spoke with Mr. Heyward inside the office with two other officers. Barfield never indicated anything about anyone having a weapon or seeing the shooter. However, on the way to the elevator, it was just Detective Barfield and Chavis Heyward. Barfield stated that he had a heart to heart conversation with Heyward and that is when Mr. Heyward came forward and said that the guy with the red shirt was the shooter. That this individual was the one with the weapon. (App. p. 607, lines 2-12) Petitioner testified that he felt this was extremely prejudicial because he was wearing a red shirt. This testimony identified the individual with the gun as an individual who had on a red shirt. The State was therefore able to link the shooting to the Petitioner.

The next witness was Dario Teran. Petitioner testified that Mr. Teran stated that he never saw who the shooter was or what he had one. That he only saw a flash. Mr. Teran had written two statements. One was at the scene when the incident took place and the other he wrote at police headquarters. In one of the statements, he stated that the shooter had on a red jersey. But when he was on the stand he said that he did not remember anything. That the only thing he remembered was the flash. (App. p. 610, lines 8-18)

Petitioner testified that Mr. Teran's testimony was refreshed with a statement that was written the night of the incident and with the one that he wrote the next day. The witness stated that due to a motorcycle accident few months after the incident, he did not remember seeing who the shooter was. He just saw a flash. Petitioner testified that Trial Counsel did not object to this refreshing of his testimony. The Court allowed his written statement to come in. (App. p. 611, lines 5-19) In fact, the statement was read by the Solicitor to the Jury. However, the written statement did not come into evidence. (App. p. 612, lines 1-7)

The next witness was April Blodgett. She was a waitress at the Waffle House at the time of the incident. Her testimony was that she saw a gun come out of a red sleeve. But that she did not see the face and she did not see who shot the weapon. (App. 613, lines 3-6) She had given a statement the night of the incident and she never indicated in her statement seeing anybody with a weapon. She made no written statement regarding who the shooter was or anything about the sleeve. (App. p. 613, lines 17-22) She was shown the statement to refresh her memory and after her memory was refreshed, she was allowed to read her statement on the stand. She testified that she saw the gun come out of a red sleeve. (App. p. 614, lines 3-13)

Jessie McNeil, who was a cook at the Waffle House, also testified. He testified that the bullet came through the window from the outside. That this happened while he was attempting to break up the altercation that occurred in the restaurant. (App. p. 616, lines 10-16)

Petitioner also testified that he was concerned about the way that SLED had enhanced the video from the scene. There were techniques that were used to zoom in and brighten the video. This was an attempt to identify the person behind the muzzle flash. (App. p. 618, lines 19-25) Petitioner testified that he thought that trial counsel was ineffective for not questioning the SLED expert about the first shot, because he believed that the first shot was the most important piece of evidence. Whoever fired the first shot, was the same person who was running across the parking lot and fired the second, and would be the person behind the muzzle flash. Petitioner further testified that had he questioned the witness about the first shot, it would have clearly proven his innocence, because it was a proven fact that on the video, you can see the muzzle flash with a body figure behind it. (App. p. 634, lines 5-19)

Detective Lawrence doesn't testify at trial, but he is mentioned in the transcript and pops up throughout the trial on at least six (6) different occasions. As the Petitioner stated earlier, he believes that the actual shooter in this matter was Derrick Brown. Detective Lawrence had a vested interest in not seeing Derrick Brown charged with this crime or even considered as a suspect. This is because Lawrence was having an affair with Derrick Brown's Mother. (App. pp. 622-623) Petitioner discussed this with trial counsel and he was told that he was going to "set this information on side bar" in case at any point in the trial it comes up, that he would be able to use it. However, nothing was ever done with this information. (App. p. 624, lines 12-19).

Defense Counsel James Smiley made a Motion for a Directed Verdict. The Court points out the circumstantial nature of the evidence. The Court, in its ruling on the Motion discusses four pieces of circumstantial evidence presented by the State:

"Well, I suppose one of the most remarkable things about this case is I've never had a case with this many different video cameras and angles of the incident that took place and there being no conclusive proof as to who the shooter was, along with this many people in close proximity of an actual shooting with no one being willing to identify who the shooter was.

So there is no direct evidence that the defendant was the shooter. It's all circumstantial evidence, and the circumstantial evidence standard is substantial circumstantial evidence, and here is what I have written down as the circumstantial evidence that the defendant was the shooter: First, that the defendant was wearing a red jersey and that he was being pushed out the door at the time that shots were fired.

Second: Chris Heyward told Investigator Barfield that the guy wearing the red shirt was the shooter. He denied that on direct and cross, but his statement came in under 613 (b). Not the strongest evidence in the world, but it is evidence.

Then Dario Teran, he said that the guy wearing the red shirt was the shooter. Now, that came in under 803, purported recollection, because he stated well, he couldn't really remember due to a motorcycle accident, which he suffered a head injury.

So that statement in, and that's what the statement said. He acknowledged on cross-examination that he may not have seen that, anything more than the flash, but, nevertheless, his statement did indicate that he said that at the time the guy wearing the red jersey was the shooter.

The next item, the fourth item, is April Blodgett, the waitress, said that she now remembers seeing the gun come out of a red sleeve. Didn't remember it at the time or didn't tell anybody at the time, but she remembers it now. That was her testimony.

Then there is the fact that there were a number of people in that foyer area, but it wasn't an unlimited number of people, and the defendant was the only one in that foyer area that I could tell who was wearing a red jersey, and he was present in the foyer area when the shots were fired.

That is a chain of circumstantial evidence. It's not the strongest circumstantial evidence case I've ever seen, but, in my opinion, it is enough to get you past the directed verdict at this time, so your Motions are denied."

This ruling by the Court lays out a brief and concise summary of the evidence that was presented by the State. It also highlights the areas of ineffective assistance of Trial Counsel.

ARGUMENT I

That Counsel was ineffective for his failure to interview Chavis Heyward and properly prepare for his testimony.

CHAVIS HEYWARD

Chavis Heyward's testimony at Trial was not in itself damaging. It was only after the testimony of Investigator Barfield, that information became available to the Jury that could link the Petitioner to the shooting. Trial Counsel, testified at the evidentiary hearing that in hindsight, he should have spoken to Chavis Heyward. He stated that he was unaware that Investigator Barfield was going to testify about his interview with Heyward, until right before the Trial. Trial Counsel stated that Investigator Barfield's testimony was a surprise. Counsel stated that had he spoken with Heyward before the trial, he would have been aware of the interview with Investigator Barfield and could have been more prepared for this information.

Heyward stated at trial that he did not see the Petitioner with a gun. He testified that he did not see who shot that night, or what that individual was wearing. (App. p. 194, lines 14-18)

Investigator Barfield's testimony (App. p. 192, lines 5-25) is extremely prejudicial in that it helps the Jury conclude that the shooter is an individual who was wearing a red shirt. Investigator Barfield stated that he had a conversation with Chavis Heyward when he came in to be interviewed. (App. p. 200, lines 14-21) Defense Counsel does make an objection to this coming in as hearsay. (App. p. 201, lines 1-2) However, the Court allows him to testify as to what Chavis Heyward told him. The court allows this under Rule 613 (b) (App. p. 201, line 4).

Defense Counsel testified that had he known and interviewed Heyward prior to trial, he would have known that this information was going to be brought out by the State and what he allegedly told Detective Barfield. The Petitioner would assert that Defense Counsel was ineffective for his failure to interview Chavis Heyward prior to trial and not obtaining this information and having knowledge of this prior to his testimony.

ARGUMENT II

That Counsel was ineffective for his failure to object to the use of Dario Teran's and his statement being read into the record by the Solicitor.

DARIO TERAN

Trial Counsel did not object to Dario Teran's statement being used and read into the record. He stated that he believed that it was an exception to the hearsay rule. (App. p. 571) Dario Teran has his memory refreshed to the point that the Solicitor actually reads a written

statement that he made after the incident before the Jury. Mr. Teran testified that his memory was blurry and that he had been involved in a motorcycle accident. The Court allows this statement in under Rule 803 and then goes further to allow the Solicitor to read Mr. Teran's written statement into the record. The Court does not allow the statement to actually come into evidence in its written form.

The damaging part of the Statement is that it allows information about the shooter with the red shirt to be heard by the Jury. The Petitioner would contend that Counsel was ineffective for his failure to object to this information. He consented to allow the evidence in under Rule 803, and consented to this document being read to the Jury.

Throughout the trial, the State uses the procedure of refreshing the witnesses memory with written statements that were given to the Police at the time of the incident or afterwards. The State has to resort to this procedure in an effort to elicit the testimony from the witnesses to benefit the prosecution. This pattern of refreshed memory becomes a keystone of the State's case.

ARGUMENT III

That Counsel was ineffective for his failure to show the prejudice and bias of the criminal investigator, where a potential suspect's Mother was having a relationship with a lead detective of the case, Detective Lawrence.

DETECTIVE LAWRENCE

At the Post-Conviction Relief trial, information comes out that one of the detectives, Detective Lawrence, had a relationship with Derrick Brown's Mother. Derrick Brown was a potential suspect in the shooting at the Waffle House. The Petitioner would argue that

Detective Lawrence had a bias in this case to show that the shooter was someone other than Derrick Brown. Derrick Brown being the son of the woman in which he was having an affair. While Detective Lawrence does not testify at Trial, he is mentioned six (6) times in the transcript. (App. p 16, line 21; p. 52, line 17, p. 53, line 6, p. 225, line 4, p. 367, line 14 and p. 367, line 21)

The Petitioner testified that he was friends with Derrick Brown and his family. That he had personal knowledge that Derrick Brown's Mother was having an affair with Detective Lawrence. He stated that their relationship was common knowledge. He also testified that Detective Lawrence was later fired for refusing to charge Derrick Brown with another crime because of the relationship that he had with Mr. Brown's Mother. The Petitioner testified that he brought this to the attention of Trial Counsel.

Mrs. Doris Gregory, the Petitioner's Mother testified that she is best friends with Derrick Brown's Mother. That she had personal knowledge that Derrick Brown's mother was dating Detective Lawrence. She went further to testify that she thought that Derrick Brown was the shooter in this incident.

Trial Counsel stated that it was undisputed that Detective Lawrence was having an affair with Derrick Brown's Mother. He stated that he caused another case to be dismissed and he was later fired because of this incident. He further stated that Detective Lawrence actually had the Petitioner transported to his office for an interview without telling trial counsel, while he was representing him. He stated that this caused him concern and he complained once he

found out about this incident. Any statement that was given from that interview was not used in trial.

Trial Counsel stated that he did not know of any way to use this information in trial. That he did not know a proper, appropriate or admissible way to introduce any of this information. The Petitioner stated that he wanted Trial Counsel to use the information regarding Detective Lawrence at trial. That he thought that Trial Counsel was going to use this information and was surprised that this information was never brought out.

The issue of Detective Lawrence's affair raises several issues:

1. That Counsel should have used this information to show bias in the investigation of the case; and
2. It was also key factor in showing the possibility of third party guilt, which was not brought to the Jury's attention.

Generally, Rule 608 SCRE allows evidence of character, conduct and bias of a witness. Section 608 (c) states that evidence of bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

The Petitioner would argue that under these circumstances he was entitled to show bias even though it was not to impeach any particular witness. Detective Lawrence skillfully does not take the stand in this case. However, he is mentioned a number of times throughout the trial and had an active role in the preparation of this case. Detective Lawrence had a reason why he did not want any information coming out about Derrick Brown. There is evidence in

the case that there were two different individuals wearing red shirts and evidence that Derrick Brown was present at the scene. The possibility of another suspect opens the door to the issue of third party guilt that the other individual with a red shirt could have been Derrick Brown.

The admissibility of evidence of Third party guilt is governed by the case of State v. Gregory 198 S.C. 98, 6 SE 2d 532 (1941). Gregory states that the evidence offered by the accused as to the commission of a crime by another person must be limited by such facts as are inconsistent with his own guilt and as such the facts raise a reasonable inference of presumption as to his own innocence. Evidence which can have no other affect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another is not admissible. However, this was never pursued.

In this case, you have bias by Detective Lawrence and information that another could have committed this crime. This is more than a bare suspicion. The evidence offered by the Petitioner in this case, as to the commission of the crime by another person raises a reasonable inference or presumption as to his own innocence. This case is unique in that you have elements of third party guilty as well as potential bias in the investigation. These two factors combined clearly demonstrate the potential for bias in this case, as well as meeting the standard of third party guilt. This becomes even more evident after the fact in that Detective Lawrence was later dismissed as a result of like misconduct.

ARGUMENT IV

That Counsel was ineffective for his failure to object to SLED video enhancement.

Joseph West testified at trial that he was a Senior Agent with the South Carolina Law Enforcement Division and his program of assignment is the tech services unit that processes and handles video, audio, and electronic surveillance. (App. p. 222, lines 10-14) When asked whether or not he enhanced videos, he stated that in July, 2012, he was brought a video of the case in question (App. p. 225, lines 1-4) Interestingly, this video was brought to him by Detective Lawrence. (App. p. 225, line 4) He was shown a disc that was marked as State's Exhibit 25. He indicated that this is the disc that he worked on back on July, 2012 and that this disc was created with the enhanced pictures. (App. p. 225, lines 1-17) The State, at this point, moved to introduce the exhibit into evidence and this was without objection. (App. p. 225, lines 18-20) Mr. West testifies that he worked on the exterior camera angles (App. p. 226, lines 4-5) that he worked on the brightness of the exterior camera angle (App. p. 226, lines 7-9) and that he had a separate recording slowing down the exterior angles (App. p. 226, lines 10-11) Mr. West further testifies that he slowed the video down 35% (App. p. 226, lines 19-20) and also states again that he changed the brightness. (App. p. 226, lines 22) This was all without objection of trial counsel. It is interesting to note that the Warrant for murder was not drafted until after the SLED enhanced version of the video was provided to the Sheriff's Office. (App. p. 361, lines 1-4) Christina Moyer Smith testified that "we were able to identify folks in the video and basically identify people who are on the exterior once it was slowed down, and that the enhancement added in the investigation. (App. 362 lines 14-21) Therefore, not only did the Trial Counsel fail to object to the enhanced video, but it was this enhanced video was also used in initiating the arrest warrant for Murder against the Petitioner. Trial Counsel testified at Post Conviction that the State was trying to prove that the person

behind the flash that was in the video was Deonte Brown and it was presented to the Jury in that fashion. (App. p. 692, lines 1-4) and therefore guilty of this crime.

ARGUMENT V

That Counsel was ineffective for his failure to adequately advise the Petitioner regarding taking the stand and testifying.

PETITIONER'S DECISION NOT TO TAKE THE STAND

The Petitioner also testified that he thought that Trial Counsel was ineffective in his advice regarding the Petitioner taking the stand and testifying. He stated that he had a discussion with counsel. He believed that the strategy was that if he did not testify they would have the last argument before the Jury.

This goes hand in hand with the allegation that Counsel was ineffective for failure to get the last closing argument at Trial. Defense Counsel presented testimony from SLED forensic scientist Wendy Berry an expert on gunshot residue analysis. (App. p. 384-389) Ms. Berry testified that a firearm fired at a close distance would leave gunshot residue on the hands and the clothing of the shooter. Ms. Berry stated that she tested Petitioner's clothing in this case and did not find any gunshot residue. (App. p. 396)

Trial Counsel also admitted a photograph of the shattered glass in the Waffle House. (App. p. 108) Trial Counsel used this photograph to cross-examine and question the State's witness, Aaron Myer. Trial Counsel testified that he used evidence to show that Petitioner was not the shooter because lack of gunshot residue on his clothing and he wanted to show that the angle of the shot through the glass indicated that it came from outside of the restaurant.

However, the Petitioner testified that part of his decision not to testify was based on Counsel's reassurance that if he did not testify that they would get the last argument. It was Trial Counsel's ineffective assistance of counsel which led to Petitioner not testifying and not receiving the last argument at trial.

When asked about his decision not to testify, the Petitioner stated:

A. "Well, from my understanding, we meet a couple times before the trial, and he was going to let me testify on my behalf. What actually took place – because there's a lot of things that people didn't talk about – you know, because they wasn't there, so it's, like, speculation, so by me testifying to certain things, it was considered as evidence because I was there and I know exactly what happened. I could point it out on the camera.

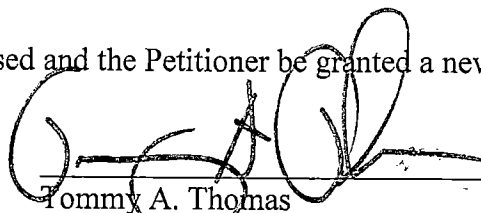
Q. Why didn't you testify?

A. Well, I didn't testify because counsel advised me not to."

Clearly the Petitioner wanted to testify and in testifying could have clarified any unresolved issues.

CONCLUSION

That the Lower Court's decision be reversed and the Petitioner be granted a new trial.



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November 30, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

Michael G. Nettles, Circuit Court Judge

Case No.: 2017-002269

Deonte Brown #361477,..... Petitioner,

vs.

State of South Carolina, ...Respondent.

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO WHITE V. STATE

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NOV 30 2018

S.C. SUPREME COURT

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White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974)

Rule 227 (g) (1), SCACR

QUESTION PRESENTED

Did the Lower Court properly grant Petitioner a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E. 2d 35 (1974)?

STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the February 2013 term of the Charleston County Grand Jury for murder, attempted murder, and possession of a firearm during the commission of a violent crime (2013-GS-10-00535, 00536, 00537). James W. Smiley, Esquire, represented him. Applicant proceeded to a jury trial and was found guilty as indicted. The Honorable Roger M. Young, Sr., sentenced Applicant to incarceration for fifty years for Murder, thirty years for Attempted Murder, and five years for Possession of a Firearm During the Commission of a Violent Crime, each sentence to be served concurrently. Applicant did not appeal his conviction or sentence.

STATEMENT OF FACTS

This matter came before the Lower Court by way of a post-conviction relief (PCR) application filed on July 15, 2015. Respondent submitted its Return on February 18, 2016. An evidentiary hearing was convened on August 3, 2017, at the Charleston County Courthouse. Applicant was present at the hearing and was represented by Tommy Thomas, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's mother, Doris Gregory, and Applicant's trial counsel, James W. Smiley, Esquire ("Trial Counsel") also testified. Accordingly, the Lower Court granted Applicant a belated review.

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel:
 - a. "He never did investigate my case to the best of his ability;"
 - b. "My attorney never had a pre-trial hearing for my case;"
 - c. "My lawyer did not file for the notice of appeal;"
2. "Actual Conflict of Interest:"
 - a. ". . . Detective Lawrence who was investigating the case was in a sexual relationship with my co-defendant(sic) mother who was a possible suspect under investigation of this crime;"

On July 25, 2017, Applicant amended his application to include Defense attorney did not file an Appeal, after he told Applicant that he would.

The Court granted Petitioner a belated appeal.

ARGUMENT

Did the Lower Court properly grant Petitioner a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E. 2d 35 (1974)?

Petitioner alleged Trial Counsel failed to file an appeal as requested. The testimony presented at the evidentiary hearing clearly shows that Trial Counsel intended to file and perfect a direct appeal, but the appeal was somehow dismissed before it was perfected. The Lower Court agreed that applicant did not waive his right to a direct appeal.

In the absence of an intelligent waiver by the Petitioner, counsel must either initiate an appeal if requested or comply with the procedure required by Anders v. California, 386 U.S. 738,

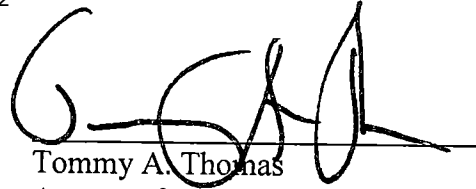
87 S.Ct. 1396 (1967). White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State, See Rule 227 (g) (1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

The Lower Court affirmatively finds Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Court concludes that Applicant is entitled to a belated review of his convictions. A petition for belated review pursuant to White v. State can remedy Applicant's lack of a direct appeal. Therefore, relief for this allegation was granted.

"The appropriate scope of review of this Court is that any evidence of probative value is sufficient to uphold the PCR Judge's finds." Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). This case meets that standard. The PCR Judge's ruling is supported by Petitioner testimony that it was his understanding that trial counsel was going to file a Direct Appeal. That Petitioner's father spoke with trial counsel regarding filing the Appeal. Once Petitioner got to the Department of Corrections, he found out that there was no history or paperwork regarding his Direct Appeal. It was at that time that he found out that the Appeal had been improperly filed. Therefore, this evidence supports the PCR Judge's conclusion that petitioner is entitled to a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974).

CONCLUSION

Therefore, based upon the foregoing the Court should grant the Petition and consider Petitioner's belated appeal.

A handwritten signature in black ink, appearing to read 'Tommy A. Thomas', written over a horizontal line.

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November 3rd 2018

ORIGINAL

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Roger M. Young, Trial Judge

Appellate Case No. 2017-002269

RECEIVED

APR 01 2019

S.C. SUPREME COURT

DEONTE BROWN

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT PURSUANT TO WHITE v. STATE

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial judge erred in allowing Detective Barfield to testify about prior inconsistent statements made by Chavis Heyward pursuant to Rule 613(b) SCRE when Heyward was advised of the substance of his statement, the time and place it was made, and who he made the statement to and yet Heyward denied making the statement, thereby making extrinsic evidence of the statement admissible?

II.

Whether the trial judge erred in allowing the State to show the jury still frames from surveillance footage that had already been admitted into evidence without objection from Petitioner for demonstrative purposes, and where even if the still images were admitted in error whether they did not prejudice Petitioner because he used the same footage to argue for his innocence?

STATEMENT OF THE CASE

In February 2013, the Charleston County Grand Jury indicted Petitioner for one count of murder, one count of attempted murder, and one count of possession of a weapon during the commission of a violent crime (2013-GS-10-535, 2013-GS-10-536, 2013-GS-10-537). From September 15-19, 2014 a jury trial was held in the Charleston County Court of General Sessions with the Honorable Roger M. Young, Sr., presiding. Petitioner was represented by James Smiley, Esq. Respondent (the State) was represented by Assistant Solicitors Stephanie Linder and Jessica Baldwin of the Ninth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Petitioner of all counts. Following the verdict, the trial judge sentenced Petitioner to a term of thirty years' imprisonment for attempted murder, five years' imprisonment for possession of a weapon during the commission of a violent crime, and fifty years' imprisonment for murder. All sentences ran concurrently with each other resulting in an aggregate sentence of fifty years' imprisonment for Petitioner. Petitioner did not file a timely notice of appeal and subsequently petitioned this Court for a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974). Petitioner has also filed a post-conviction relief claim that was denied by Judge Nettles on September 11, 2017. Judge Nettles also granted Petitioner's request for a belated appeal. (App. 761). The State consents to Petitioner's request for a belated appeal. This brief of Respondent now follows.

STATEMENT OF FACTS

In the late hours of July 14, 2012 and into the early hours of July 15, 2012, Petitioner went with some friends to Frazier's nightclub in Charleston. At approximately 4:00 AM on July 15th after the nightclub closed, Petitioner and his friends went to a Waffle House restaurant on Savannah Highway. At Waffle House, Petitioner began a verbal confrontation with Quinton Allen and threw a drink in his face. A scuffle began between Petitioner, Quinton Allen and other patrons of the restaurant. Waffle House employees attempted to remove Petitioner from the restaurant. As Petitioner was being pushed through the doorway of the restaurant, he fired one shot inside the restaurant that struck Quinton Allen in the arm. Petitioner fired a second shot into the restaurant that struck and killed Dontaye Reed.

At trial, the State's primary evidence against Petitioner was that he was wearing a red shirt that evening and multiple witnesses identified a black male with a red shirt as being the shooter. (App. 187, 262, 292). One such witness was Chavis Heyward. Prior to trial, Heyward told Investigator Barfield of the Solicitor's office that the person in the red shirt was the shooter. At trial, Heyward denied saying this. (App. 192). The State called Barfield as a witness to impeach Heyward's testimony with a prior inconsistent statement. Barfield maintained that Heyward would not give him the name of the shooter, but he told him the shooter was wearing a red shirt. (App. 203). The State also introduced enhanced surveillance footage from the Waffle House on the night of the shooting. The footage was entered without objection from Petitioner. (App. 95, 225). SLED agent Joseph West testified he did not alter the content of the video, but he added some brightness to the footage and slowed down the footage thirty five percent in some portions. (App. 226). Both Petitioner and the State used portions of the footage in their closing arguments. (App. 423, 450). At the conclusion of trial, Petitioner was convicted of all counts.

STANDARD OF REVIEW

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

I.

The trial judge properly allowed Detective Barfield to testify about prior inconsistent statements made by Chavis Heyward pursuant to Rule 613(b) SCRE, because Heyward was advised of the substance of his statement, the time and place it was made, and who he made the statement to and because Heyward denied making the statement, extrinsic evidence of the statement was therefore admissible.

Petitioner claims the trial judge erred in allowing the testimony of Investigator Barfield to impeach Chavis Heyward with a prior inconsistent statement. Petitioner's argument is without merit. The trial judge properly allowed Barfield's testimony after Heyward denied telling Barfield about the color of the shooter's shirt. Heyward was advised of the time and place of his statement and he was given an opportunity to explain or deny it. Heyward denied ever making the statement. Therefore, the State was entitled to introduce extrinsic evidence of the statement being made. Petitioner's convictions and sentences should be affirmed.

The South Carolina Rules of Evidence provide that extrinsic evidence of a prior inconsistent statement of a witness may be admissible under the following circumstances:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613 (b), SCRE.

Here, Heyward was notified of the substance of his statement, the times and places it was made, and the person to whom it was made. (App. 191-93). Heyward was notified that he was alleged to have told Barfield on August 19, 2014 at the solicitor's office that the shooter was

wearing a red shirt. (App. 191-92). Heyward was also notified that he made the same statement to Barfield in a phone conversation on September 8, 2014. (App. 192-93). Heyward denied making both statements. Therefore, the trial judge appropriately allowed the State to introduce extrinsic evidence through Barfield's testimony that Heyward did, in fact, say the shooter wore a red shirt. The trial judge's ruling was made in accordance with the requirements of Rule 613(b) SCRE and there was evidence in the record to support the trial judge's decision. Therefore, the trial judge did not abuse his discretion in admitting Barfield's testimony. Petitioner's convictions and sentences should be affirmed.

II.

The trial judge properly allowed the State to show the jury still frames from surveillance footage that had already been admitted into evidence without objection from Petitioner for demonstrative purposes. Even if the still frames were improperly shown to the jury, Petitioner was not prejudiced by the images because Petitioner used the same footage to argue for his innocence.

Next, Petitioner contends the trial judge erred in allowing the State to present still frames from the Waffle House surveillance footage to the jury in closing arguments. Petitioner's argument is without merit. The still frames were admissible as a summary of evidence that was already admitted without objection from Petitioner under Rule 1006 SCRE. However, even if the trial judge erred by allowing the still frames to be shown to the jury, Petitioner was not prejudiced by the surveillance footage because Petitioner used the surveillance footage to his advantage in closing argument to suggest he was not the shooter. Therefore, any error in allowing the frames to be presented to the jury was harmless.

The South Carolina Rules of Evidence provide that:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence. The originals or

duplicates shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 1006, SCRE. “Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony. Clark v. Cantrell, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000). An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result. State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). In ruling on the admissibility of evidence, the trial judge has considerable latitude and his ruling will not be disturbed absent a showing of probable prejudice. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). An “error without prejudice does not warrant reversal.” State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

Here, the still frames presented by the State in closing argument were used for demonstrative purposes to summarize the entire surveillance video. The trial judge’s decision to overrule Petitioner’s objection is entirely consistent with Rule 1006 SCRE. In this case a voluminous recording from the Waffle House security cameras was used to isolate specific moments within the footage that would be relevant to the jury’s deliberations. If Petitioner’s argument is taken to its logical extreme, parties in future trials could not freeze or pause videos that both sides agree have already agreed are admissible. Such an interpretation would lead to an absurd result.

Petitioner asserts the still images were not used to clarify the factual matters at issue, but that is plainly not true. On the contrary, the State used the footage for the same reason Petitioner used the footage. Both sides argued the footage corroborated their version of events. Each side spoke about the footage and used it to their advantage in closing argument. Petitioner argued the footage corroborated his version of events and even requested the footage be paused so he could

make a specific points about particular still frames. (App. 422-23). Therefore, even if still frames from the surveillance footage were shown to the jury in error, the error did not prejudice Petitioner at all because he also used still frames of the footage to argue his innocence to the jury. Therefore, any error committed in admitting the footage was harmless. Petitioner's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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By: 
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April 1, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

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APR 01 2019

CERTIORARI TO CHARLESTON COUNTY
Roger M. Young, Trial Judge

S.C. SUPREME COURT

Appellate Case No. 2017-002269

DEONTE BROWN,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

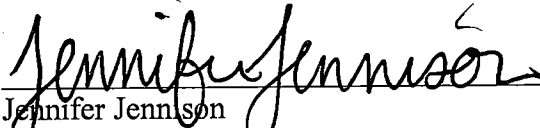
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent Pursuant to White v. State has been served upon the applicant by mailing two copies, postage prepaid, via United States mail, addressed to:

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, SC 29063

This 1st day of April, 2019.


Jennifer Jennison
Legal Assistant for Respondent

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APR 01 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

CERTIORARI TO CHARLESTON COUNTY
Roger M. Young, Trial Judge
Michael G. Nettles, Post-Conviction Relief Judge

Appellate Case No. 2017-002269

DEONTE BROWN

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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because trial counsel did advise Petitioner about his right and
ultimately it was Petitioner's decision as to whether he would
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RESPONDENT'S STATEMENT OF ISSUES

I.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for failing to interview Chavis Heyward and properly prepare for his testimony when trial counsel objected to the evidence offered by the State to impeach Heyward and even if trial counsel had spoken to Heyward before trial, trial counsel's trial strategy would not have changed and the evidence still would have been admitted?

II.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for failing to object to the prior statement of Dario Teran being read into the record by the solicitor when there was no legitimate basis on which to object to the statement being read into the record?

III.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for challenging the bias of Detective Lawrence when Lawrence was not called as a witness by the State and he was only peripherally involved with the investigation against Petitioner. Even if trial counsel was deficient in not calling Lawrence as a witness, Petitioner suffered no prejudice from this failure?

IV.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for failing to object to the introduction of a surveillance video that had been enhanced by SLED where trial counsel believed the video benefitted Petitioner and aided his defense and where even if trial counsel had objected to the introduction of the video, any objection would likely have been overruled because there was no reasonable basis to object to the video?

V.

Did the post-conviction relief court properly deny relief for the allegation that trial counsel was ineffective for failing to adequately advise Petitioner about testifying on his own behalf when trial counsel did advise Petitioner about his right and ultimately it was Petitioner's decision as to whether he would testify and not trial counsel's?

STATEMENT OF THE CASE

Petitioner, Deonte Brown is presently confined in the South Carolina Department of Corrections following his conviction at trial in Charleston County. In the late hours of July 14, 2012 and into the early hours of July 15, 2012, Petitioner went with some friends to Frazier's nightclub in Charleston. At approximately 4:00 AM on July 15th after the nightclub closed, Petitioner and his friends went to a Waffle House restaurant on Savannah Highway. At Waffle House Petitioner began a verbal confrontation with Quinton Allen and threw a drink in his face. A scuffle began between Petitioner, Quinton Allen and other patrons of the restaurant. Waffle House employees attempted to remove Petitioner from the restaurant. As Petitioner was being pushed through the doorway of the restaurant, he fired one shot inside the restaurant that struck Quinton Allen in the arm. Petitioner fired a second shot into the restaurant that struck and killed Dontaye Reed.

During its February 2013 term, the Charleston County Grand Jury indicted Petitioner for murder, attempted murder, and possession of a weapon during the commission of a violent crime (2013-GS-10-0535, 2013-GS-10-0536, and 2013-GS-43-0537). Petitioner was represented on all charges by James Smiley, Esquire. Assistant Solicitors Stephanie Linder and Jessica Baldwin of the Ninth Circuit Solicitor's Office prosecuted the case.

On September 19, 2014, Petitioner was convicted on all charges by a jury in the Charleston County Court of General Sessions before the Honorable Roger M. Young. The trial judge sentenced Petitioner to a term of fifty years' imprisonment for murder, thirty years' imprisonment for attempted murder, and five years' imprisonment for possession of a weapon during the commission of a violent crime. All sentences were to run together concurrently, resulting in an aggregate sentence of fifty years' imprisonment.

Petitioner did not file an appeal. However, Petitioner was subsequently granted a belated appeal pursuant to White v. State, 236 S.C. 110, 108 S.E.2d 35 (1974) which was granted by Judge Nettles on September 11, 2017. The State consents to Judge Nettles ruling granting Petitioner a belated appeal.

On July 15, 2015, Petitioner filed a *pro se* application for post-conviction relief (2015-CP-10-3935), alleging the following grounds for relief:

1. Ineffective Assistance of Counsel:
 - a. "He never did investigate my case to the best of his ability;"
 - b. "My attorney never had a pre-trial hearing for my case;"
 - c. "My lawyer did not file for the notice of appeal;"
2. "Actual Conflict of Interest:"
 - a. ". . . Detective Lawrence who was investigating the case was in a sexual relationship with my co-defendant(sic) mother who was a possible suspect under investigation of this crime;"

On July 25, 2017, Petitioner amended his application to allege ineffective assistance of counsel regarding:

- a. Failure to adequately question Det. Christina Smith's testimony that she was able to ID client behind the muzzle flash.
- b. Video enhancement by SLED.
- c. Sequence of shooting.
- d. Failure to adequately present the possibility of two shooters.
- e. Failure to adequately present the issue of two people present with red shirts.
- f. Failure to adequately question regarding Gun Powder Residue test.
- g. Failure to properly investigate:
 - i. Defendant said the shooter was Derrick Brown. Derrick Brown was not arrested or charged. Derrick Brown's Mother was in a relationship with Detective Charles Lawrence.
 - ii. Witness Chavis Heyward originally said that he did not see anything. Two years later he testifies and identifies people on the video.

- iii. The waitress at the restaurant gave a statement that she did not see anything. However, at trial she remembers seeing a gun come out of a red sleeve.
- h. Failure to talk to witnesses before trial. No analysis of the videos and no Private Investigator.
- i. Failure to have a suppression hearing regarding the videos.
- j. Failure to bring up the information regarding Detective Charles Lawrence and his relationship with Derrick Brown's Mother.
- k. The Applicant did not testify based on bad advice from Defense Counsel.
- l. Defense Counsel had no theory of Defense.
- m. There was a ten (10) year plea offer, which was not properly explained to the Applicant.
- n. Defense Counsel did not get closing argument because he put in a picture of shattered window as evidence.
- o. Defense attorney did not file an Appeal, after he told Applicant that he would.

Respondent served its return to the application and requested an evidentiary hearing on the application on February 18, 2016. An evidentiary hearing was convened on August 7, 2017, before the Honorable Michael G. Nettles. Petitioner was present alongside counsel Tommy Thomas, Esquire. Respondent was represented by Assistant Attorney General Julie Coleman of the South Carolina Attorney General's Office. Petitioner presented testimony from himself and from his mother. Respondent called trial counsel, James Smiley

On September 11, 2017, Judge Nettles issued a written order denying the application in full, but granting Petitioner's request for a belated appeal pursuant to White v. State. This order was filed with the Charleston County Clerk of Court on September 26, 2017. Petitioner filed his notice of appeal to this Court on November 1, 2017. On appeal, Petitioner challenges the post-conviction relief judge's denial of relief for the allegation that trial counsel failed to: (1) interview Chavis Heyward and prepare for his testimony, (2) object to Dario Teran's statement being read into the record, (3) show the prejudice and bias of Detective Lawrence, (4) object to

SLED video enhancement, and (5) adequately advise Petitioner regarding testifying on his own behalf.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for failing to interview Chavis Heyward and properly prepare for his testimony because trial counsel objected to the evidence offered by the State to impeach Heyward and even if trial counsel had spoken to Heyward before trial, trial counsel's trial strategy would not have changed and the evidence still would have been admitted.

Petitioner claims the post-conviction relief court erred in denying Petitioner relief for trial counsel's failure to interview Chavis Heyward and properly prepare for his testimony.

Petitioner's argument is without merit. Although trial counsel admitted that, in hindsight, he wishes he would have talked to Heyward, Petitioner failed to demonstrate that this would have changed the outcome of the trial in any way. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the

attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690.

Moreover, “counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and

made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690. There is a strong presumption that counsel’s decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500, 505 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

Here, Petitioner asserts trial counsel was deficient for failing to interview Heyward before trial. Petitioner’s argument fails on two counts. First, trial counsel was not deficient in failing to interview Heyward. Trial counsel testified if he had spoken to Heyward, he may “have strengthened the fact that he didn’t see anything, or that he had a conversation with Mr. Barfield.” (App. 663, lines 1-3). Petitioner’s defense at trial was already that no one saw him as the shooter. Therefore, using Heyward to “strengthen the fact that he didn’t see anything” was Petitioner’s defense to begin with. In fact, Petitioner elicited this information from Heyward on cross examination. (App. 197). Furthermore, trial counsel objected to Investigator Barfield’s impeachment testimony of Heyward. Therefore, trial counsel was not deficient for failing to speak with Heyward before trial.

Even if trial counsel were deficient for failing to talk with Heyward beforehand, Petitioner was not prejudiced by this failure. If trial counsel spoke with Heyward beforehand, Heyward may not have told trial counsel about his conversation with Barfield. If Heyward did tell trial counsel about his conversation with Barfield, trial counsel would have been unable to exclude Barfield's testimony. Trial counsel objected to Barfield's testimony and his objection was overruled. (App. 201). Therefore, Petitioner cannot prove the outcome of the trial would have been any different had trial counsel spoken with Heyward beforehand. This Court should deny certiorari.

II.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for failing to object to the prior statement of Dario Teran being read into the record by the solicitor because there was no legitimate basis on which to object to the statement being read into the record.

Next, Petitioner contends trial counsel erred by failing to object to the previously recorded statement of Dario Teran being read into the record. Trial counsel was not deficient in failing to object to Teran's statement, because there was no reason to object to it. Even if trial counsel had been deficient, Petitioner was not prejudiced by trial counsel's failure to object to Teran's statement. This Court should deny certiorari.

Rule 803(5) SCRE provides:

A memorandum, or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted, by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Rule 803(5) SCRE.

At trial, Teran testified he gave law enforcement a statement on the morning after the shooting. (App. 257). However, Teran was involved in a motorcycle accident approximately three months after the shooting and his memory was “blurry” as a result. (App. 256-58). Teran said that reading his statement would refresh his recollection of the night in question. Therefore, the solicitor read his statement into the record pursuant to Rule 803(5) SCRE. Trial counsel conceded that Teran’s statement fit under the hearsay exception of Rule 803(5). (App. 259).

Trial counsel was not deficient in failing to object to Teran’s statement because there was no legitimate basis for trial counsel to object to the statement. Teran gave law enforcement a statement when the matter was fresh in his mind on the morning after the shooting. Teran testified that he did not remember everything he said in his statement because of the memory loss associated with the motorcycle accident. Therefore, his statement was properly read into the record pursuant to Rule 803(5) SCRE. Trial counsel was not deficient in failing to object to this statement and even if he were, Petitioner was not prejudiced by trial counsel’s failure to object because the objection was likely to be overruled regardless. This Court should deny certiorari.

III.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for challenging the bias of Detective Lawrence when Lawrence was not called as a witness by the State and he was only peripherally involved with the investigation against Petitioner. Even if trial counsel was deficient in not calling Lawrence as a witness, Petitioner suffered no prejudice from this failure

Petitioner next contends trial counsel was ineffective for failing to challenge the bias and prejudice of Detective Lawrence. Lawrence was only peripherally involved in the investigation of Appellant and was not called as a witness at trial by the State. It was undisputed that Lawrence was fired from his job with the Charleston County Sheriff’s Department because he was dating Derrick Brown’s mother. Derrick Brown was present

at the scene of the shooting and trial counsel theorized that he may have been the shooter. However, trial counsel did not have enough evidence to present a third party guilt defense and therefore trial counsel agreed to not make any reference to Derrick Brown at trial. Lawrence did not testify and the State did not otherwise open the door to trial counsel admitting any evidence of the affair between Lawrence and Brown's mother.

Trial counsel was not deficient in failing to question the bias of Detective Lawrence because he had no reason to do so. Petitioner could not present a third party guilt defense against Derrick Brown because Petitioner had no proof that Derrick Brown was the shooter. Any third party guilt evidence Petitioner could have offered would have been casting a bare suspicion of guilt on Brown. Because there was no legitimate third party guilt defense for Petitioner to pursue, any evidence of Lawrence's relationship with Brown's mother was irrelevant. Lawrence wasn't called as a witness and he was only tangentially related to investigating Petitioner's case. This Court should deny certiorari.

IV.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for failing to object to the introduction of a surveillance video that had been enhanced by SLED because trial counsel believed the video benefitted Petitioner and aided his defense and even if trial counsel had objected to the introduction of the video, any objection would likely have been overruled because there was no reasonable basis to object to the video?

Petitioner next contends that trial counsel was ineffective for failing to object to the enhanced video surveillance of the Waffle House provided by SLED. Trial counsel was not deficient in failing to object to because he wanted the video to be admitted as part of his trial strategy. Even if trial counsel had objected the admission of the video, it is unlikely trial counsel's object would be sustained because there was no basis for trial

counsel to object. Therefore, Petitioner was not prejudiced by trial counsel's failure to object to the video.

There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500, 505 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Here, trial counsel testified at the post-conviction relief hearing "I wanted the video in. The video, in my belief, and as it showed in trial, did not identify [Petitioner] as the shooter." (App. 677, lines 12-14). Trial counsel therefore did not object to the admission of the video, because he believed it aided in Petitioner's defense. Even if the State used the video to argue that Petitioner was the shooter, trial counsel felt that it proved the opposite. The video was ambiguous enough that both sides used it to their advantage. Therefore, trial counsel was not deficient in failing to object to the video. However, even if trial counsel had objected, his objection was unlikely to be sustained, because there was no reasonable basis to contest the video's admissibility. This Court should deny certiorari.

V.

The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for not adequately advising Petitioner regarding his right to testify on his own behalf because trial counsel did, in fact, advise Petitioner about his right to testify and ultimately it was Petitioner's sole decision as to whether he would testify and not trial counsel's

Petitioner's final contention is that Trial counsel was ineffective for his failure to adequately advise Petitioner about testifying on his own behalf. Petitioner's argument is without merit for two reasons: (1). Both trial counsel and the trial judge advised Petitioner about his right to testify and (2). It was Petitioner's sole decision whether he wanted to testify and not trial counsel's.

Here, trial counsel testified he did advise Petitioner against testifying because he believed most of the information that Petitioner would testify to was already in front of the jury. Trial counsel also thought the case was going well for Petitioner and there wasn't much to gain by Petitioner testifying but there was a lot to lose. (App. 672-73). Petitioner was also advised on two occasions by the trial judge that he had the right to testify on his own behalf and that right was his alone and not his attorney's. (App. 55-56, 400-01).

Trial counsel was not deficient in failing to adequately advise Petitioner of his right to testify, because trial counsel did adequately advise Petitioner. Even if we assume for the sake of argument that trial counsel failed to advise Petitioner of his right to testify, the trial judge twice advised Petitioner of his rights. Therefore, Petitioner was not prejudiced by trial counsel's advisement of rights because the trial judge explained Petitioner's rights to him as well. Finally, the decision as to whether to testify was Petitioner's decision to make and Petitioner's decision alone. Petitioner chose not to testify on his own behalf. Petitioner cannot claim he was

prejudiced by trial counsel for a decision that Petitioner alone could make. This Court should deny certiorari.

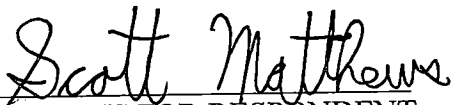
CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General
S.C. Bar No. 101464

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

April 1, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 01 2019

S.C. SUPREME COURT

CERTIORARI to CHARLESTON COUNTY
Roger M. Young, Trial Judge
Michael G. Nettles, Post-Conviction Relief Judge

Appellate Case No. 2017-002269

DEONTE BROWN,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

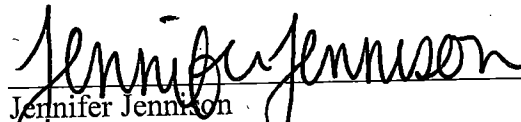
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing two copies, postage prepaid, via United States mail, addressed to:

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, SC 29063

This 1st day of April, 2019.


Jennifer Jennison
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 01 2019
S.C. SUPREME COURT

April 1, 2019

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Deonte Brown v. State of South Carolina
Appellate Case No.: 2017-002269

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari and the original and fifteen copies of the Brief of Respondent Pursuant to White v. State in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Scott Matthews
Assistant Attorney General
S.C. Bar # 101464

SM/jj
Enclosures

cc: Tommy A. Thomas, Esquire
Victim Advocacy Division

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APR 19 2019

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

S.C. SUPREME COURT

Michael G. Nettles, Circuit Court Judge

Case No.: 2017-002269

Deonte Brown #361477, ... Petitioner,

vs.

State of South Carolina, ...Respondent.

REPLY TO RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI

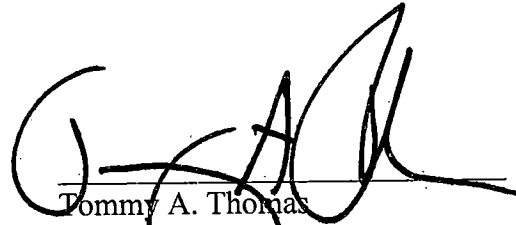
The Petitioner re-alleges the facts and issues as presented in Petitioner's Petition for Writ of Certiorari.

That the Respondent alleges in their Return to Issue III:

"The post-conviction relief court properly denied relief for the allegation that trial counsel was ineffective for challenging the bias of Detective Lawrence when Lawrence was not called as a witness by the State and he was only peripherally involved with the investigation against Petitioner. Even if trial counsel was deficient in not calling Lawrence as a witness, Petitioner suffered no prejudice from this failure."

Trial counsel did not have evidence to present a third party guilty defense and therefore, Trial Counsel agreed to not make any reference to Derrick Brown at trial.

The Petitioner believes that this is misstated. In review of both the Trial and PCR transcript, there appears to be no statement by Trial Counsel regarding Respondent's argument that Counsel agreed not to make a reference to Derrick Brown at Trial.



Tommy A. Thomas
S.C. Bar No.: 5536
Attorney for Petitioner
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

April 16, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post Conviction Relief

Michael G. Nettles, Circuit Court Judge

Case No.: 2017-002269

Deonte Brown #361477,..... Appellant,

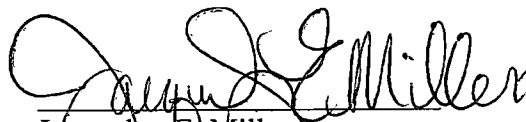
vs.

State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, assistant to Tommy A. Thomas, Attorney for the Petitioner,
hereby certify that I mailed a copy of the Reply to Respondent's Return to Petition for Writ of
Certiorari to Scott Matthews, Attorney for Respondent to:

Scott Matthews, Esq.
Attorney for Respondent
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549


Jacquelyn E. Miller
Secretary to Tommy A. Thomas
Attorney for Applicant
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Irmo, SC 29063
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April 16, 2019

RECEIVED
APR 19 2019
S.C. SUPREME COURT

Tommy A. Thomas

ATTORNEY AND COUNSELOR AT LAW

TELEPHONE:
(803) 732-5507
(803) 732-5508

HARRINGTON BUILDING
7588 WOODROW STREET
IRMO, SOUTH CAROLINA 29063

PLEASE REPLY TO:
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IRMO, SC 29063

FACSIMILE:
(803) 781-4226

INMATE LINE
(803) 732-6542

April 16, 2019

The South Carolina Supreme Court
Clerk, Daniel Shearouse
P.O. Box 11330
Columbia, SC 29211

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APR 19 2019

S.C. SUPREME COURT

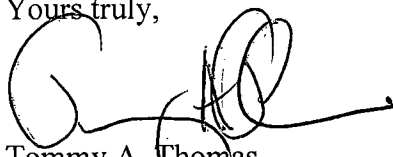
RE: Deonte Brown v. State of South Carolina
Appellate Case No.: 2017-002269

Dear Sir or Madam:

Enclosed please find for filing an original and a copy of a Reply to Respondent's Return to Petition for Writ of Certiorari and Certificate of Service.

Kindly return a clocked copy to me in the enclosed envelope. Please feel free to contact me should you have any questions. Thank you.

Yours truly,



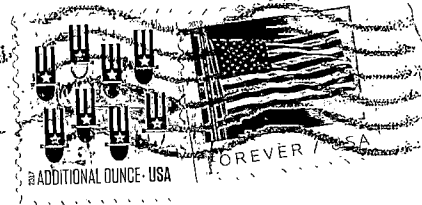
Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Scott Matthews, Esq.
Deonte Brown #361477

Tommy A. Thomas, P.C.
ATTORNEY AND COUNSELOR AT LAW
HARRINGTON BUILDING
POST OFFICE BOX 88
IRMO, SOUTH CAROLINA 29063

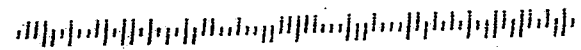
COLUMBIA SC 29211

17 APR 2019 PM 3 L



The South Carolina Supreme Court
Clerk, Daniel Shearouse
P.O. Box 11330
Columbia, SC 29211

29211-133030



The Supreme Court of South Carolina

Deonte Brown, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002269

ORDER

Pursuant to Rule 243(l) of the South Carolina Appellate Court Rules, this post-conviction relief appeal is hereby transferred to the South Carolina Court of Appeals.

FOR THE COURT

BY Dorenda J. Shealy
Chief Deputy CLERK

Columbia, South Carolina
April 19, 2019

cc:

Tommy Arthur Thomas, Esquire
Jonathan Scott Matthews, Esquire
The Honorable Jenny A. Kitchings

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Deonte Brown, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002269

Appeal From Charleston County
Roger M. Young, Circuit Court Judge
Michael G. Nettles, Post-Conviction Relief Judge

Unpublished Opinion No. 2020-UP-284
Submitted September 1, 2020 – Filed October 7, 2020

AFFIRMED

Tommy Arthur Thomas, of Irmo, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Jonathan Scott Matthews, both of
Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the denial of his application for post-conviction relief (PCR). Because there is sufficient evidence to support the PCR judge's finding that Petitioner did not knowingly and intelligently waive his right to a direct appeal, we grant certiorari as to this

question and proceed with a review of the direct appeal issue pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986). We deny certiorari on Petitioner's remaining questions.

On direct appeal, Petitioner argues the trial court erred in (1) allowing testimony of Investigator Kenny Barfield regarding statements allegedly made by Chavis Heyward under Rule 613(b) of the South Carolina Rules of Evidence and (2) allowing the State to present still video frames from a surveillance video to the jury in its closing arguments that were not introduced into evidence. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. The trial court did not err in allowing into evidence the testimony of Investigator Barfield regarding the statements allegedly made by Chavis Heyward under Rule 613(b), SCRE because Investigator Barfield's testimony was admissible as extrinsic evidence of Heyward's prior inconsistent statement. *See State v. Dawson*, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013) ("In criminal cases, the appellate court sits to review errors of law only."); *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001) ("The admission or exclusion of evidence is left to the sound discretion of the [trial court], whose decision will not be reversed on appeal absent an abuse of discretion."); *State v. Scott*, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." (quoting *State v. Laney*, 367 S.C. 369, 643-44, 627 S.E.2d 726, 729 (2006))). Here, Heyward was advised of the substance of the statement, the time and place the statement was made, to whom the statement was given, and he denied having made the statement. *See* Rule 613(b), SCRE ("Extrinsic evidence of a prior inconsistent statement is admissible only if the witness is advised of the substance of the statement, the time and place it was given, and to whom the statement was made, and is given a chance to explain or deny the statement.").

2. The trial court did not err in allowing the State to present still frames from the surveillance video to the jury during closing argument. *See Clark v. Cantrell*, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000) ("Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony."); *id.* ("Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance."); *id.* ("Demonstrative evidence is distinguishable from exhibits that compromise 'real' or substantive evidence, such as the actual murder weapon or a written document containing allegedly defamatory statements."); *id.* ("Demonstrative evidence often is admitted only for use in the

courtroom to explain and illustrate a witness's testimony, but it also may be admissible as an exhibit for the jury to examine and consider during deliberations."). Here, the State used the still video frames to summarize the entire surveillance video, which had already been admitted into evidence. The trial court did not allow the still frames to go back with the jury, and Petitioner used the same video and paused it throughout his closing argument.

AFFIRMED.¹

HUFF, WILLIAMS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post-Conviction Relief

Michael G. Nettles, Circuit Court Judge

Case No.: 2017-002269

RECEIVED

Oct 16 2020

SC Court of Appeals

Deonte Brown #361477, ... Petitioner,

vs.

State of South Carolina, ... Respondent.

MOTION TO REINSTATE APPEAL

Petitioner respectfully requests that the court consider this motion to reinstate his appeal pursuant to Rule 260, South Carolina Appellate Court Rules. Argument follows.

Tommy A. Thomas
S.C. Bar No.: 5536
Attorney for Petitioner
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

This appeal should be reinstated for consideration of arguments II, III, and V – whether counsel was ineffective for his failure to object to the use of Dario Teran’s statement being read into the record by the solicitor; whether counsel was ineffective for failing to show the prejudice and bias of the lead investigator in the case who was in a relationship with another suspect’s mother; and whether counsel was ineffective for his failure to adequately advise petitioner regarding testifying on his own behalf.

Argument II

Counsel was ineffective for his failure to object to Dario Teran’s statement being used read into the record by the solicitor.

During trial, the State called Dario Teran to testify regarding the events of the evening in question as he was a patron of the Waffle House when the shooting occurred. However, Mr. Teran suffered a head injury during a motorcycle accident that caused memory loss between the time of the incident and the time of trial. As such, Mr. Teran testified that he had trouble recalling details about the evening. Mr. Teran, along with others, provided written statements at the scene and the solicitor asked if Mr. Teran would like to use his statement to refresh his recollection, as is allowed under Rule 612, South Carolina Rules of Evidence (“SCRE”). Mr. Teran stated that he would appreciate the refresher but, due to English being his second language and his having an accent, he asked if the solicitor could read the statement.

Upon initial discussion of allowing the statement before the jury in any form, trial counsel stated that he had no objection because he believed it met the hearsay exception under Rule 803(5), SCRE:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into

evidence but may not itself be received as an exhibit unless offered by an adverse party.

Under this analysis, trial counsel was correct as it is undisputed Mr. Teran did not have adequate recollection to testify and he had recorded his recollection via a statement to law enforcement. Similarly, due to lack of objection by trial counsel, the statement was admitted and read into the record, but the document itself was not made an exhibit.

However, trial counsel failed to object pursuant to Rule 612, SCRE, which delineates how statements used to refresh recollection should be handled:

If a witness uses a writing to refresh memory for the purpose of testifying, either -
 (1) while testifying, or
 (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
 an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

During the post-conviction relief hearing, trial counsel was questioned about his recollection of Mr. Teran's testimony, particularly if there was a reason to object to him reading the statement or using it to refresh his recollection. He replied, "Not to refreshing his recollection, but I would have had a problem, and I would have be [sic] surprised if I didn't object to it being read to the jury." (App. p.671, lines 22-24) Regardless, he did not object, thus allowing the entire statement into the record. It is unclear from the record whether trial counsel had been provided the statement in discovery but, judging by his reaction at trial and his testimony during the post-conviction relief

hearing, he had not been provided the statement with the intent of it being used to refresh Mr. Teran's recollection. Therefore, he had not been afforded the chance to review it, request omissions, or take any other action. The record does not reflect whether trial counsel was given a copy to review at the time of Mr. Teran's testimony and the sidebar conference regarding the same. (App.258, line 14 – p.260, line 7) Similarly, he did not object on this ground in order to allow himself a chance to prepare for the entrance of the statement. Because of this, Mr. Teran's entire statement came into the record, notably including that Petitioner was wearing a "red baseball jersey." (App. p.261, lines 19-20) This was tied to other testimony that the shooter was wearing a distinctive red shirt.

Though trial counsel could and should have used this objection for every witness whose recollection was refreshed, Mr. Teran's testimony is particularly damning. His statement was the only testimony from the night of the incident stating Petitioner was wearing a red baseball jury. This is one of the key facts that linked Petitioner to being the alleged shooter and one of the reasons for the court to deny trial counsel's motion for directed verdict. (App. p.3825, lines 1-12) Clearly, trial counsel's failure to object and his acquiescence to this statement coming in connected the dots of very circumstantial evidence for the trial court to deny Petitioner's motion for directed verdict and, ultimately, for the jury to convict. These actions meet the burden for ineffective assistance of counsel in that it is both deficient and prejudicial as contemplated in Strickland v. Washington, 466 U.S. 668 (1984) and Cherry v. State, 300 S.C. 115, 386, Se.E.2d 624 (1989). For these reasons, Petitioner's request for certiorari should be granted for further briefing.

Arguments III and V

Counsel was ineffective for failing to show the prejudice and bias of the lead investigator in the case who was in a relationship with another suspect's mother.

Counsel was ineffective for his failure to adequately advise petitioner regarding testifying on his own behalf.

Petitioner is briefing these two issues together in that they ultimately stem from the same issue: trial counsel's failure to effectively present a defense. In Petitioner's petition for writ of certiorari, he briefed the failure of trial counsel to establish prejudice and bias of an investigator that was in a known romantic relationship with the mother of another suspect. Because this officer, Investigator Lawrence, did not take the stand for the State, trial counsel could not cross-examine him on his involvement, relationships, or potential bias. The failure of the State to present Investigator Lawrence, despite his obvious involvement in the case, is suspicious. Lawrence is mentioned repeatedly at trial by other witnesses, yet he did not testify at trial to present any of his own observations.

During the post-conviction relief hearing, trial counsel testified that he wished he could have used this information about Lawrence's relationship but "maybe [he is] not smart enough." (App. 678, lines 18-19) Trial counsel went on to testify that he "could have put up a third-party guilt case," and he "would have tried to incorporate it." (App. 678, lines 21-22) He also admitted that, "Certainly I could have called him, but I didn't think it was in my client's best interest to put up a detective that had been pretty slippery during a majority of his career and had a – I still think an interest to, I guess, protect Scrappy." (App. 679, line 25 – p.680, line 4) His testimony, ultimately, was that he preferred his simple defense: "I don't want to dirty up my trial. I had what I thought was a cogent defense, a simple defense, but fairly hard for the State to prove otherwise, so I was surprised by the verdict in the case." (App.682, lines 17-21)

Petitioner's testimony regarding theory of defense was that "[trial counsel] was going to let me testify, and we was going to show how the second possible suspect, you know, who was involved in this case how this mother was in a sexual relationship with Detective Lawrence, who was investigating the case." (App.597, lines 6-10) He further testified, "[trial counsel] was going to set that information about Detective Lawrence in a sidebar in case at any point of time in trial if it comes up that he would be able to use it, but he never testified and he never speak on nothing about that." (App. p.624, lines 15-19) Petitioner testified one reason he did not accept the ten-year plea that was on the table throughout the trial is because he was still waiting on trial counsel to bring out this and other issues:

Petitioner:...based on the things that I was reading and from what counsel was telling me, you know, they didn't have any evidence, you know, to say that I was the shooter.

Counsel: All right. Now, in making this decision, is it fair to say that you would also have taken into consideration the representation by counsel that he was going to use this information about Derrick – about Detective Lawrence?

Petitioner: Yes sir, because at that point in time, the trial wasn't over yet.

...

And I didn't want to take the plea at the time because I was saying if they're willing to give me a ten-year plea and they're saying that I shot these people, I'm telling [trial counsel] that I never even fired a weapon that night. I didn't shoot anybody, so why should I take a plea for that amount? If anything, it should have been less. You know, I did start the fight, and in my statement in the interrogation room, I admit to that. You know, since day one, I never denied that. I was the one who started the whole situation....

(App.626, line 20 – 627, line 19)

More specifically regarding Petitioner's decision to testify, he stated that he and trial counsel went back and forth as to whether he should testify. At first, he intended to testify because he knew specific evidence from the incident through firsthand knowledge. (App. p.630, lines 1-9) Trial counsel eventually advised him not to testify because he went off-camera during the

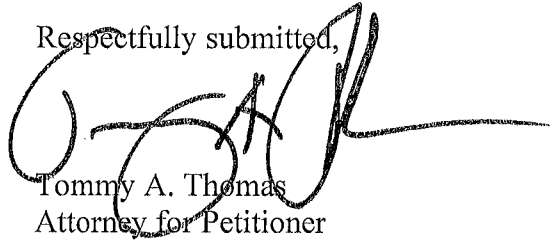
surveillance video and it could be argued that he had left to get a gun. (App. p.630, lines 11-19) However, Petitioner was still under the impression that he would get the last closing argument because he was not testifying. This changed, though, when trial counsel put up a witness to explain that the gunshot went from outside in, and another witness that did the gunshot residue analysis on Petitioner's clothing. (App. p.631, lines 1-16)

As discussed above, trial counsel stated many times throughout the post-conviction relief hearing that he could have done things differently but decided to keep his defense simple. Though he also testified that all involved seemed shocked by the guilty verdict, this does not absolve trial counsel of his duty to perform in line with the prevailing professional norms. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). In this case, presenting a third-party guilt defense would have been highly effective, considering that there was a second suspect whose involvement was obscured by questionable policework, witness statements and testimony were inconclusive, and forensics were not straightforward. This meets the idea that third-party guilt can be presented as a defense so long as it is not arbitrary or disproportionate. Holmes v. South Carolina, 547 US 319 (2006). These various elements that barely met the burden for a directed verdict should not have been left open-ended by a half-hearted defense presentation. Clearly, trial counsel's efforts could have been directed toward a more cohesive, effective defense strategy that was better understood by Petitioner. These actions meet the burden for ineffective assistance of counsel in that it is both deficient and prejudicial as contemplated in Strickland v. Washington, 466 U.S. 668 (1984) and Cherry v. State, 300 S.C. 115, 386, Se.E.2d 624 (1989). For these reasons, Petitioner requests this court grant a writ of certiorari and further briefing.

Conclusion

For the following reasons, Petitioner respectfully request that the court consider his motion to reinstate his appeal pursuant to Rule 260, South Carolina Appellate Court Fules.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. A. Thomas', with a long horizontal flourish extending to the right.

Tommy A. Thomas
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October 16, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Post-Conviction Relief

Michael G. Nettles, Circuit Court Judge

Case No.: 2017-002269

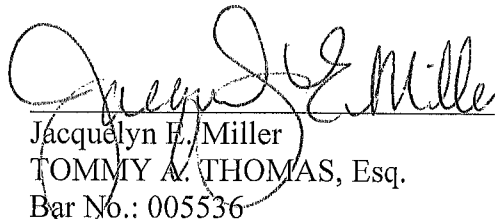
Deonte Brown #361477, ... Petitioner,

vs.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for Petitioner, hereby certify that pursuant to an Order of the Supreme Court dated March 20, 2020 regarding Operation of the Appellate Courts During the Coronavirus Emergency, I emailed a copy of a Motion to Reinstate Appeal to Jonathan Scott Matthews, Esq., at the Office of the Attorney General, at smatthews2@scag.gov


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October 16, 2020

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Oct 16 2020

SC Court of Appeals

Jackie Miller

From: Jackie Miller
Sent: Friday, October 16, 2020 11:29 AM
To: 'smatthews2@scag.gov'
Subject: FW: Deonte Brown v. State
Attachments: Deonte Brown.motion.pdf

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Oct 16 2020

SC Court of Appeals



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THOMAS LAW

October 16, 2020
VIA EMAIL

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RECEIVED**Oct 16 2020****SC Court of Appeals**

RE: Deonte Brown #361477
Appellate Case No.: 2017-002269

Dear Ms. Allen:

Attached please find a Motion to Reinstate Appeal along with a Certificate of Service.

Thank you. Should you have any questions, or need any additional information, please do not hesitate to contact me.

Yours truly,

Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Jonathan Scott Matthews, Esq. - email

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The South Carolina Court of Appeals

Deonte Brown, Petitioner,

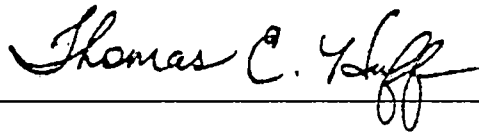
v.

State of South Carolina, Respondent.

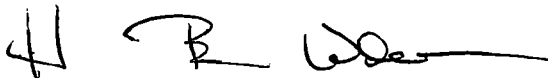
Appellate Case No. 2017-002269

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Tommy Arthur Thomas, Esquire
Jonathan Scott Matthews, Esquire
The Honorable Roger M. Young, Sr.

FILED

November 24, 2020