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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable William H. Seals, Jr., Circuit Court Judge

Appellate Case No.: 2020-000590

Tamar Yaron Bryant, Petitioner,

vs.

State of South Carolina Respondent.

APPENDIX
VOLUME II OF II

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FORM 5 2015-CP-22-01113

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN)

TAMAR YARON BRYANT #354710,)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

APPLICATION FOR POST-CONVICTION RELIEF

FILED
GEORGETOWN COUNTY, S.C.
2015 DEC -9 P 3:59
ALICIA WHITE
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, 990 Wisacky Highway, Bishopville, SC 29010

2. Name and location of Court which imposed sentence Georgetown County Court of General Sessions, P.O. Box 479, Georgetown, SC 29442

3. Name(s) of co-defendant(s) (if any) Lavern Holmes, Cameron Green, Kewan Myers, Brandon Cheeks

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2011-GS-22-00495 (murder)

   (b) ____

   (c) ____

Revised 3/2003

5. The date upon which sentence was imposed and the terms of the sentence:

(a) March 20, 2013, 35 years.

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty X

(c) after a plea of nolo contendere _____

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

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

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

i. South Carolina Court of Appeals

ii. _____

iii. _____

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

i. Appeal dismissed.

ii. _____

iii. _____

(c) the date of each such result:

i. December 23, 2014

ii. _____

iii. _____

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

i. 2014-UP-440

ii. _____

iii. _____

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

(a) _____

(b) _____

(c) _____

Revised 3/2003

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

(a) Ineffective assistance of trial counsel.

(b) Ineffective assistance of appellate counsel.

(c) ____

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

(a) Failure to properly prepare Applicant prior to trial.

(b) Failure to call witnesses and utilize evidence.

(c) Failure to raise all meritorious issues on appeal.

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

(a) any petition in a State Court under South Carolina Law? No.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.

(d) any other petitions, motions or applications in this or any other Court? No.

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. ____

iv. ____

(c) the disposition thereof:

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?

No.

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. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) PCR is the proper forum.

(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? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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. Ronald Hazzard, Esquire; PO Box 2898, Georgetown, SC 29442

ii. David Alexander,Esquire; PO Box 11589, Columbia, SC 29211

iii. _____

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

i. Trial & sentencing.

ii. Appeal.

iii. _____

19. State clearly the relief you seek in filing this application:

A new trial.

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

No.

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of LEE)

I, Tamar Yaron Bryant, 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.

Tamar Bryant

SWORN to and subscribed before me this 3rd day of December, 2015.

(L.S.)
Notary Public

My Commission Expires: 4/12/2016

Revised 3/2003

2015-CP-22-01113

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Tamar Yaron Bryant, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Tamar Bryant
Applicant

SWORN or affirmed to and subscribed before me this 3rd day of December, 2015.

Notary Public

My Commission Expires: 4/12/2016

FILED
2015 DEC -9 P 3:59
ALMA J. WHITE
CLERK OF COURT

Revised 3/2003

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS OF THE FIFTEENTH JUDICIAL CIRCUIT
Tamar Yaron Bryant, S.C.D.C. No. 354710, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2015-CP-22-01113 **RETURN**

In response to the amended post-conviction relief application filed December 9, 2015 the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Georgetown County Clerk of Court's orders of commitment. The Georgetown County Grand Jury indicted the Applicant at the May 2011 term for one count of murder (2011-GS-22-00495). Ronald Hazzard, Esquire represented the Applicant.

The Applicant proceeded to trial before a jury and was convicted as indicted. On March 20, 2013, the Honorable Larry B. Hyman, Jr. sentenced the Applicant to thirty-five (35) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. David Alexander, Esquire with the Office of Appellant Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence on December 3, 2014. State v. Tamar Bryant, Op. No. 2013-000671 (S.C. Ct. App. filed December 3, 2014). The Remittitur was sent on December 22, 2014.

II.

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

1. Ineffective assistance of counsel.
   a. Failure to properly prepare Applicant prior to trial.
   b. Failure to call witnesses and utilize evidence.
2. Ineffective assistance of appellate counsel.
   a. Failure to raise all meritorious issues on appeal.

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this return and incorporated herein are the records of the Georgetown County Clerk of Court regarding the subject conviction(s), Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v.

Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305

S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The allegation that appellate counsel was ineffective is also without merit. Respondent contends that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537, 397 S.E.2d at 526; Strickland, 466 U.S. at 687. When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of appellate counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

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

V.

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

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

JESSICA KINARD
Assistant Attorney General

By: _____

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Feb. 5, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
	)	
	)	2015-CP-22-1113
	)	
TAMAR YARON BRYANT, #354710	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tricia A. Blanchette, Esquire
P.O. Box 12725
Columbia, SC 29211

DATED this 5TH day February, 2016.

Norma Bigbee, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Tamar Bryant, #354710, Applicant, v.	)	2015-CP-22-1113
State of South Carolina, Respondent.	)	AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on December 9, 2015. Respondent submitted a Return on February 5, 2016.

In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial and appeal. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel for failure to properly advise Applicant regarding and utilize Applicant as a witness at the Jackson v. Denno hearing.

2. Ineffective assistance of trial counsel for the handling of the witness, Shaquetta Holmes.

3. Ineffective assistance of counsel for failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). (317)

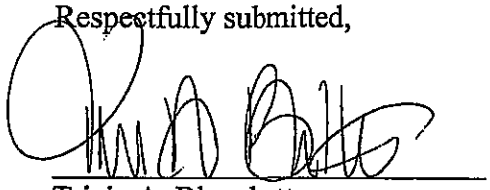
4. Ineffective assistance of counsel for failure to enter an objection or exception to the Court's comments, specifically, but not limited to comments regarding searching for the truth to the jury.

5. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, specifically, but not limited to:

    a. The admissibility of Applicant's interrogation / confession.

6. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

Respectfully submitted,



Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070

August 31, 2018

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF HORRY	)	**2015-CP-22-01113**
TAMAR YARON BRYANT,	)	
	)	
Applicant,	)	**Transcript of Record**
	)	
vs.	)	
	)	MARCH 25, 2019
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

B E F O R E:

Honorable William Seals
Georgetown County Courthouse
Georgetown, South Carolina

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

Tricia A, Blanchette, Esquire
Attorney for Applicant

Johnny E. James, Jr., Esquire
Attorney for State

Sallie Beth Todd
Circuit Court Reporter

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WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
RONALD HAZZARD				
By Ms. Blanchette	5		32	
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Certificate of Court Reporter 66

EXHIBITS

NO.	DESCRIPTION	ID	EV	PAGE
APP1	Affidavit of Ms. Holmes		X	16
APP2	Interview of Ms. Holmes		X	14
APP3	Video recorded interview		X	7

THE COURT: All right. If you'll call your next case.

MS. BLANCHETTE: Your Honor, just one moment.

THE COURT: That'll be fine.

MS. BLANCHETTE: Thank you.

MR. JAMES: The next one will be Tamar Bryant.

THE COURT: Okay.

MS. BLANCHETTE: Your Honor, I do have an additional copy of the pleadings, but I do not have an additional copy of the transcript. I hope that's in your packet.

THE COURT: Okay. I hope it is too. I'll find it right now.

MR. JAMES: I have an entire additional box for Tamar Bryant for reasons unknown to me, so if you need additional copies of anything, I'm a little bit better prepared for this one.

THE COURT: All right. Let's see if we can find it real quick. Was this a trial or a plea?

MR. JAMES: This was a trial.

THE COURT: All right. I have it and I'm ready when you are.

MR. JAMES: If it may please the Court?

THE COURT: Yes, sir.

MR. JAMES: Your Honor, this is the matter of Tamar Bryant versus State of South Carolina, docket number 2015-CP-22-01113. Mr. Bryant is present here in the courtroom today

and is represented by Tricia Blanchette, Esquire. Mr. Bryant was indicted at the May 2011 term of the Georgetown County Grand Jury for one count of murder. He was represented on that charge by Mr. Ron Hazzard, Esquire, who is also present here in the courtroom today. He proceeded to trial before a jury and was convicted as indicted on March 20th, 2013. The Honorable Larry B. Hyman, Jr. sentenced him to 35 years imprisonment. He filed a notice of appeal and that appeal was handled by Mr. David Alexander, Esquire with the Office of Appellate Defense. The Court of Appeals confirmed Mr. Bryant's conviction and sentence on December 3rd, 2014. A remittitur was thereafter sent on December 22nd, 2014.

Your Honor, applicant amended the application for relief by a filing dated August 24th, 2018. A copy of which should have been included in the packet up before the Court. I would just like to confirm that you do have a copy of that available to you.

THE COURT: All right. All right. I have it.

MR. JAMES: All right. Well since you have that in your possession, that's the call of the procedure history of the case, without any questions I'll give the floor over to Ms. Blanchette.

THE COURT: All right. Ms. Blanchette.

MS. BLANCHETTE: Thank you, Your Honor. Tricia Blanchette here on behalf of Tamar Bryant and I am prepared to

call my first witness at this time. Your Honor, the applicant would call Ronald Hazzard to the stand.

THE COURT: All right.

RONALD HAZZARD, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: Please be seated and state your name for the record.

MR. HAZZARD: My name is Ronald William Hazzard, H-A-Z-Z-A-R-D.

MS. BLANCHETTE: And, Mr. Hazzard, before I begin your examination, Your Honor, I have an extra copy of the transcript provided by the state that I can put at the witness stand.

DIRECT EXAMINATION OF MR. HAZZARD BY MS. BLANCHETTE:

Q: Mr. Hazzard, what is your current occupation?

A: I am employed by the 15th Circuit Public Defender's Office.

Q: And I would assume from that response you are a lawyer licensed in the State of South Carolina; is that correct?

A: Yes, ma'am.

Q: And how long have you been a lawyer licensed in the State of South Carolina?

A: Since 1988.

Q: Okay. And right now you said you work with the public defender's office; has criminal law always been the primary

area of your practice?

A: It has always been an area of my practice. Yes, ma'am.

Q: Okay. An area of your practice. And if I can take you back to the time before this trial, 2011, 2012, leading up to 2013. Were you working at the public defender's office then?

A: Yes, ma'am.

Q: And therefore, I assume you were appointed to represent Mr. Bryant; is that correct?

A: Yes, ma'am. I assumed representation of Mr. Bryant's case on April 13th, of 2012.

Q: Okay. From that date until the date of his trial, do you remember approximately how many times you were able to meet with him?

A: Court's indulgence, Your Honor. Approximately 15 times prior to trial.

Q: And do you remember during the course of those 15 meetings if you ever went over the interrogation video with Mr. Bryant?

A: Yes, ma'am, on several occasions.

Q: Okay. And when would you agree that that interrogation video in its redacted form was admitted at trial?

A: As far as I recall. Yes, ma'am.

Q: Okay.

MS. BLANCHETTE: Your Honor, this matter has been discussed in chambers, but the clerk's office was able to

provide a copy of that exhibit from trial, and if you'd like I can move that in as an exhibit; or if you'd just like that for your personal review I can reference the exhibit from the trail.

THE COURT: You can go ahead and put it in as an exhibit.

MS. BLANCHETTE: All right. Then, Your Honor, at this time I would move the state's exhibit number 11 that was just copied for us by the clerk's office as applicant's number 3, as I've already premarked.

THE COURT: All right.

MR. JAMES: Without objection from the state, Your Honor. The state understands that this is copy made by the clerk directly from the general sessions file.

THE COURT: All right. Applicant's number 3 is in evidence without objection.

(APPLICANT'S EXHIBIT NO. 3 IS ADMITTED INTO EVIDENCE.)

BY MS. BLANCHETTE:

Q: Now, Mr. Hazzard, I referenced the fact that that cd was ultimately admitted and played for the jury, but prior to that do you recall having a *Jackson versus Denno* hearing in this case?

A: Yes, ma'am.

Q: And as part of that hearing, do you recall that Office Clinton Busbee testified about his interactions with Mr.

Bryant that lead to the video recording that we have there?

A: Yes, ma'am.

Q: Okay. And do you recall that he testified --

MS. BLANCHETTE: And, Your Honor, just for your reference, Mr. Busbee testimony begins on Page 6 of the trial transcript and I believe we're using the same version. I know there is record on appeal and a regular transcript.

BY MS. BLANCHETTE:

Q: But as I said, beginning on line -- or Page 6, Officer Busbee testifies and he does testify about the fact that he interacted with Mr. Bryant outside of the sheriff's department before he was brought in and then you have the recorded interview. Is that what you recall?

A: Yes, ma'am.

Q: Okay. And you asked him specifically during his cross examination, on Page 15 you begin asking him about the interaction with Mr. Bryant outside before they came in and did the recorded interview; is that correct?

A: Not on Page 15, but yeah, at some point I'm sure I did ask him that.

Q: Okay. Beginning on Line 21 at the bottom of Page 15 you're asking him there about the fact that Mr. Bryant had initially said he was not guilty of the crime when they were outside.

A: Yes, ma'am.

Q: Okay. You also asked him about the fact that Mr. Bryant was only 17 years old and he wasn't given the opportunity to speak with his parents; do you recall that?

A: Yes, ma'am.

Q: And then you also asked him about, on Page 17 is my reference point, about how the story evolved from I'm not guilty I had nothing to do with it to I shot this individual. Do you recall questioning him about that?

A: At some point. Yes, ma'am.

Q: Okay. Now, on Pages 24 - 25 there is a -- what I would call a waiver of Mr. Bryant's right to testify at the *Jackson versus Denno* hearing. Do you see that reflected there?

A: Yes, ma'am.

Q: How was the decision reached that Mr. Bryant would not testify at the *Jackson versus Denno* hearing?

A: He said he didn't want to testify.

Q: And what was the advice that you provided to him on that matter?

A: The advice I provided him was the explanation of the purpose of the *Jackson v Denno* hearing, the protocol of how the hearing would go forward, and that he had the right to testify or call witnesses if he so chose, but he also had the right to remain silent. I also would have explained to him that the statement would be given outside of the presence of the jury, therefore, he didn't have to worry about the jury

hearing anything he said in the *Jackson v Denno* hearing, and he said he did not wish to testify.

Q: Okay. And then when -- after his decision there not to testify, beginning on Page 25, you begin your argument, and you argue the totality of the factors; is that what you recall?

A: Yes, ma'am.

Q: Would it have been helpful when you were arguing the totality of the factors to have the testimony of the applicant regarding what had happened that night?

A: Yeah, that would have been great.

Q: And why would that have been great?

A: Because the Court could have heard more and could have had some actual testimony to consider regarding how the interaction between Mr. Bryant and Officer Busbee unfolded. He could have testified, for instance, to the fact that he told me that he had informed Busbee that he was both high and drunk at the time he gave the statement. Things like that could have been considered by the Court. But he chose not to testify, therefore we weren't -- the only way I could put those things before the Court was to try to illicit them through cross examination.

Q: And then ultimately the Court ruled after your argument that the cd would be admitted with redactions; is that correct?

A: Yes, ma'am.
Q: Then at trial, I have it reflected beginning on Page 186, Officer Busbee testified regarding his interactions with the defendant and his procurement of the statement that was reflected on the cd. Is that what you recall?
A: Yes, ma'am.
Q: And at trial Mr. Bryant also didn't -- he chose to not testify at that time either, so the jury only had Mr. Busbee's testimony regarding the interrogation and statement.
A: That's correct.
Q: Now, when you proceeded with the *Jackson versus Denno* hearing and made your argument, was that an issue you would have anticipated being raised on appeal?
A: I apologize. I don't understand your question.
Q: I'll rephrase my question. Thank you. In making -- going forward with the *Jackson versus Denno* hearing, with making the argument you did, and I believe you referenced *Pittman* and *Bustamante*, are you making those arguments with the understanding that you're preserving those for possible direct appeal?
A: That's one of the reasons. Yes, ma'am.
Q: Okay. Would you like to explain your other reasons?
A: The other reason is to hopefully get the Court to rule in my favor at the *Jackson v Denno* hearing and exclude it at the trial.

Q: Yes. I just wanted to give you an opportunity to give the full explanation there. Did you file a direct appeal at all in this case?

A: Yes, ma'am. I believe our office filed the direct appeal and it was subsequently taken up by the Office of Appellate Defense.

Q: Okay. And were you aware that the issue of the admissibility of the interrogation or confession was not raised on appeal?

A: I was not aware of that.

Q: Okay, then I'll ask you no further questions about that. Now, I'd like to speak with you or ask you some questions about essentially the second issue raised in the application and the amendment, the amended application, and that deals with the witness Shaquettia Holmes. Are you familiar with that name and recall her being a state's witness?

A: Yes, ma'am.

Q: Okay. Now, do you recall the applicant discussing Ms. Holmes with you prior to the trial in this case?

A: Yes, ma'am.

Q: Okay. And what information did he give you regarding Ms. Holmes?

A: A great deal of information that I received from him and from anybody else in this case was very contradictory. Basically, to give a synopsis of what we discussed and what

information he provided, he indicated that on the night of the incident he was present at the Ghose Den Lounge. That through so, you know, weird happenstance he, the victim Deon Myers, two young ladies who are otherwise not involved, and Shaquettia Holmes all ended up basically hiding in the bathroom. That at some point they all decide to exit the bathroom and that he initially said his position -- the importance of Shaquettia Holmes was that as they all exit the bathroom, almost immediately after coming out of the bathroom was when Mr. Myers was killed, shot, shot and killed. And that Shaquettia Holmes would be able to verify that he, Mr. Bryant, wasn't the person who fired the fatal shot. In discussing that, we always discuss that the client has the absolute constitutional right to remain silent. They also have the right to testify in their own defense, they have the right to call witnesses. We can compel people to come and testify. So we spoke about that at length, but then his position kind of shifted and he said I don't believe she'll tell the truth because she is related to at least two others of the individuals involved, a Mr. Lavern Holmes, and a Mr. Cameron Green. And so we went back and forth on that and he said no, I don't want her to testify. Her initial statement to the police did not indicate that Mr. Bryant had shot and killed the victim. It didn't say he didn't; it just didn't say he did. Just before trial she was interviewed again by

the investigators from the solicitor's office and at that time, she then said that she had seen Mr. Bryant shoot the fatal shot that killed the victim. And so he and I discussed that as well, the change or addition to her statement as time had gone on.

Q: And I believe you may have just referenced this document, but I'm going to show you what's been premarked as applicant's number 2 and see if you can recognize that.

A: Yes, ma'am.

Q: Is that the summary of the interview that you are referencing from the solicitor's office?

A: Yes, ma'am.

MS. BLANCHETTE: Your Honor, at this time I would move this document that is entitled Shaquettia Holmes interview 3/6/13 in as applicant's number 2.

THE COURT: And objections?

MR. JAMES: No objection from the state, Your Honor.

THE COURT: All right. Applicant's number 2 is in without objection.

(APPLICANT'S EXHIBIT NO. 2 IS ADMITTED INTO EVIDENCE.)

MS. BLANCHETTE: Would you like a copy?

THE COURT: I would.

MS. BLANCHETTE: I have one for you.

THE COURT: I appreciate that. That helps a lot.

BY MS. BLANCHETTE:

Q: So you already referenced in your testimony that you obtained this interview summary. Did you have a further discussion with the solicitor as well beyond what's reflected on this exhibit?

A: I'm sure that I did.

Q: Okay. And then you conveyed that to Mr. Bryant?

A: Yes. We discussed it at length.

Q: Okay. Now, prior to her speaking with the solicitor's office, did you recall having a public defender -- sorry, a private investigator meet with her on your behalf, or on Mr. Bryant's behalf?

A: I do not recall independently, but if you wish I will check my notes.

Q: If you would like to review this and see if this helps you with your recollection.

A: Yes, ma'am.

Q: Okay. And what is that document that you have there? Can you identify it for the record, please?

A: It's an affidavit from the 15th Circuit Public Defender Investigator F. Jerome Randall. It's dated December 11th, 2012 and it is a synopsis of an interview that he did at my request with Ms. Shaquettia Michelle Holmes on that day in 2012 and what she told him in that interview.

MS. BLANCHETTE: Your Honor, at this time I would more

this affidavit in as applicant's number 1.

THE COURT: Any objections?

MR. JAMES: Without objection.

THE COURT: Applicant's number 1 is in evidence without objection.

(APPLICANT'S EXHIBIT NO. 1 IS ADMITTED INTO EVIDENCE.)

BY MS. BLANCHETTE:

Q: Now, as the transcript reflects, you did ask Ms. Holmes about her statement to law enforcement on cross examination. Is there a reason why you didn't ask her about the affidavit you had obtained through your private investigator?

A: Because the affidavit doesn't specifically say that Mr. Bryant didn't commit the crime. It simply says Mr. Myers and Tamar walked out of the bathroom ahead of her and as soon as she reached the door the shots rang out. She cannot say who did the shooting. So it's not -- the affidavit -- what she told us in December 2012 is not completely dispositive. I guess I could have mentioned that she didn't tell my investigator directly that she saw Mr. Bryant shoot Mr. Myers as she told the solicitor's investigator some approximately three months later. But, no, I guess the reason would have been because, you know, the statement she gave to us did not specifically say that someone else committed the crime.

Q: But you would agree that her story seemed to evolve a

little bit over time, and was that the point you were trying to make in her cross examination that she was remembering more details that implicated Mr. Bryant?

A: Without reviewing my questioning of her, I would assume that is an accurate, accurate statement.

Q: And specifically, on Page 138 I see in the cross where you're asking her about the information she gave to 911 versus the information she was testifying to at trial. But wouldn't it have also been helpful to juxtapose against the information she gave your private investigator?

A: Court's indulgence, Your Honor.

Q: And that's Page 138 for your reference there.

A: Thank you. Okay. Thank you, ma'am. What's your question?

Q: Yes. My question was: wouldn't it have also been helpful to juxtapose the statement she gave your private investigator against the change from her 911 call to her testimony?

A: Possibly.

Q: Now, during her testimony she does admit that Lavern Holmes, one of the co-defendant's, was her uncle; is that correct?

A: Yes, ma'am.

Q: And during her testimony she makes it clear that Mr. Holmes left first before there was an alleged confrontation or words between Mr. Bryant and the victim; and that Mr. Bryant

was the only one she saw with a gun leave the bathroom last.
A: Yes, ma'am.
Q: Okay. And do you recall that she also testifies that another individual, Cameron Green, had actually been in the club, but Mr. Green testified that he hadn't been in the club?
A: Yes, ma'am.
Q: And do you recall pointing out that inconsistency and other inconsistencies regarding the testimony in your closing argument?
A: Yes, ma'am.
Q: So again, would it have been helpful to show this interview that has somewhat different details in it that were given to your private investigator, would it have been important to bring that out in the context of the trial?
A: In a perfect world, yes. But the thing about it is if I ask her about that, and first of all the affidavit quote, unquote from my investigator is really more of a synopsis. It's not something that she has signed as being her formal statement. It's a synopsis of what he says he heard her say, so if I ask her under oath didn't you say this on December 11th, 2012 when speaking with my investigator and she says no I have nowhere to go from there. And then also, I may be put in a position of trying to put Mr. Randall on the stand to testify to what she said which is a difficult ask and even if I am able to do that then I've given away the right to final

argument for possibly a very minor gain.

Q: Okay. Specifically, in your closing argument on Page 302 of the transcript, beginning on Line 9, you're discussing Ms. Holmes and her claims. One of the statements that you make on Line 18 is I believe you're quoting things. You say, no I just showed up for a trial two years later and toss this out here. And you're essentially arguing that for two years she didn't talk to anybody. She makes the 911 call, then she just shows up at trial. But that in fact wasn't true, she had talked to your private investigator.

A: That is correct.

Q: Okay.

A: But the line before that the question is -- the hypothetical question is did you ever give a statement to the police. Did they ever get you down there and record it? So I'm referencing whether she told this to the authorities or not.

Q: Now, turning to the next issue raised in Mr. Bryant's amendment. I'd like to ask you about the malice instruction in this case and it appears on Page 316 is where it begins in the transcript, beginning on Line 7. Please let me know when you've had a chance to review through 317, Line 5.

A: Yes, ma'am. Yes, ma'am.

Q: And there on 317, Line 4 and 5, the Judge charges the jury, malice may be inferred from conduct showing a total

disregard for human life. Is there any reason that you did not object or ask the Judge to give the further general permissive inference instruction that if facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case and you may give it such weight as you determine it should receive?

A: I cannot think of why I didn't ask him for that further charge.

Q: And were you aware dating back to *Madison*, I believe in the '80's, *Elmore* and then more recently in *Belcher* in 2009, the Court made it very clear to the judges that if they gave an instruction regarding the total disregard for human life or the inferred malice instruction from the use of a weapon, then this further instruction must be given?

A: I'm sorry. What is your question?

Q: Were you aware of the caselaw stating that?

A: I'm sure I was.

Q: And you said there was no reason you did not ask for that instruction.

A: That is correct.

Q: Now, if you could look back at Page 286, beginning on Line 21. There this is the closing argument by the state, and the state argues with the gun already cocked, he pulls it

out and he fires. That is malice, that is hatred, that is ill-will. Would you agree that there they're arguing that the jury could infer malice from the exact inference that the Court charged the jury --

A: Um --

Q: --- oh go ahead. I'm sorry.

A: No. I would say that if somebody points a gun at someone and intentionally fires it and shoots is then that, that would be kind of malicious.

Q: Right. But would you say that is express malice or would that malice have to be inferred?

A: I would say that would be pretty expressed. That's how I'd take it if somebody pulled a gun and shot at me.

Q: I'm going to go all the way back to the beginning and ask you about some comments that the Judge made in opening. If you could flip the transcript to Page 74, please, Lines 20 through 21. And there the Court is making his opening instructions to the jury. Beginning on Line 20 he says, the search for the truth is often tedious. Is there any reason that you did not object to the Court's comments there talking about a search for the truth

A: Because I believe this was before, I think it's the *Beaty* case that talks about how the Judge -- reminding the Bench and Bar that you should not use search for truth in the opening instructions.

Q: Okay. And were you familiar with the *Aleksey* (ph) case and the *Daniels* case that were decided and discussed that issue, if not an issue very close to it, prior to Mr. Bryant's case.

A: *Daniels* rings a bell; *Aleksey* not so much.

Q: Okay.

A: Actually, you're talking about A-L-E-K-S-I, yes.

Q: A-L-E-K-S-E-Y.

A: Yes.

Q: But with my northern accent it may have been confusing what I was saying. But you said there was no strategic reason or any reason that you can recall why you did not object to the Court's statement there?

A: No, ma'am.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence?

THE COURT: Yes.

MS. BLANCHETTE: Your Honor, I have no further questions of this witness at this time.

THE COURT: All right. Cross.

CROSS EXAMINATION OF MR. HAZZARD BY MR. JAMES:

Q: It was a great many times you met with Mr. Bryant prior to trial, correct, 15?

A: Yes, sir.

Q: And you discussed the evidence against him in those

meetings; correct?
A: Yes, sir.
Q: And you discussed with him his inculpatory statements to law enforcement; correct?
A: At great length. And when I say I discussed them with him at great length, I actually arranged to have him brought to this courthouse so that he could sit in the chair at the defense table and listen to his statement and see his statement over the audio visual system in the courtroom to try to get him to grasp the impact that that statement may have on a jury at trial.
Q: At this courthouse?
A: Yes. Yes. Courtroom 3B, right down the hall.
Q: Why did you it was necessary to go to the extraordinary effort of actually bringing him physically to the courthouse to review that statement?
A: Because I could never get any connection with Mr. Bryant as far as seemingly getting him to grasp the severity of the situation which he found himself, and to grasp the significance of the proceeding that was coming up, that being the trial of the case.
Q: Did he ever give pause it to you any strategies or ideas of how he would, or how you could address his statement to law enforcement?
A: What he indicated to me, and again his decisions on how

to proceed on different matters changed drastically over the course of my representation of him. But his concept of dealing with his inculpatory statement was that it was going to be very simple, he told them he did it and now he was going to tell them that he didn't do it. But then he subsequently decided that he did not wish to testify.

Q: Did he make that decision that he did not wish to testify only at trial, or did he ever indicate to you that that was going to be his position prior to trial?

A: Court's indulgence. On November 30th of 2012, that was the day that we met in courtroom 3B, he was actually detained at that time at J. Reuben Long Detention Center in Conway, but we were able to convince them to transport him from Conway over here for that purpose. We reviewed in inculpatory statement to the police and portions of Cameron Green's statement that was given. Discussed trial protocol in depth, that being jury qualification and selection, opening statements, burden of proof, *Jackson v Denno* hearing on his inculpatory statement, presentation of the state's case, cross examination of witnesses, directed verdict motion, defendant's decision whether to present case in chief and whether to testify, the state's right to cross examine, closing arguments, jury charge on the law, deliberation, and verdict. Talked with him further in the courtroom lockup, the deputies were present in the courtroom, discussed the problem dealing

with his inculpatory statement at trial. Defendant of the opinion that the jury will believe him when he testifies that he was lying when he gave the statement admitting the shooting. He reiterated his desire for a jury trial, indicates that he would not entertain any plea offers. Confirmed with him at that time that his family members could arrange for suitable clothing for trial and informed him at that time as best I knew it would most likely go forward the week of December 17th, 2012. Now, let's see. We met again December 4th of 2012 at J. Reuben Long, discussed his prior record. Attempted to discuss his personal history in depth but the defendant wasn't very forthcoming with particulars. We discussed his juvenile convictions, the fact that he was on juvenile parole, has previous probation violation as a juvenile. Discussed the day of incident in detail from the time he got up that morning. Discussed whether he should testify given that he indicates he entered the club at the time of the incident with a bandana covering his face. So December 4th is the first time he kind of starts backing up on that and saying well I don't know, I don't know if I should testify. I explained to him that would most likely be seen -- the fact that he had the bandana covering his face, would most likely be seen as an indicator of his intent to commit a criminal act inside the club. We discussed the fact the prosecutor may attempt to get his co-defendant Brandon Cheeks

to testify against him at trial. Explained to him the need to speak clearly and without colloquialisms and slang if he chooses to testify. So I'm actually at this point trying to still coach him up on that but he's kind of starting to backslide on me. Let's see. On December 17th I appeared for a motion for evaluation because it had been addressed prior and I was given a one last ditch effort to try to get him an evaluation because I figured there must be something wrong with him if he's not grasping the severity of this case and what he's facing. Talked with him in the courtroom lockup. Briefly discussed his case, specifically his apparent decision to not testify, and my possible decision to call witnesses such as Shaquettia Holmes since Mr. Bryant stated she was in his presence when the victim was shot and would presumably be able to testify that Mr. Bryant did not commit the offense. February 6th talked with him by telephone when he was at J. Reuben Long. He inquired as to the trial date. I informed him at that time I had not been notified of a specific court date, but the case could possibly be called during the February 2013 court term the week of February 25th, 2013. On March 1st met with him at J. Reuben Long. Talked with him about matters that had been placed on the record during a hearing in State versus his co-defendant, Lavern Holmes. And I told him at that time his case was scheduled for trial the week of March 18th, 2013. Discussed again the issue of

testifying and whether he wanted to call witnesses to testify on his behalf. Defendant reiterated that he did not intend to testify, nor did he want to call any witnesses in his defense. Discussed and explained why out of court statements of his co-defendant could not be used against him and explained all of his fifth and sixth amendment rights to him again in detail including his right to compel testimony and confront witnesses but the conflict with is co-defendant's right to remain silent and not incriminate themselves. Also discussed and explained the concept of hearsay. He said his cellmate is somebody named Brandon Burgess, I don't remember why that is significant. Reminded him at that time to not have any conversations with cellmates regarding this case.

Q: Just to stop you because I was jotting down notes on what date was this discussion?

A: This was March 1st of 2013.

Q: Thank you.

A: On March, let's see, further in the notes, let's see, explained that the co-defendant's were scheduled to go to trial the week of May 18th, but also explained the co-defendant Lavern Holmes had requested and been granted a mental health evaluation by Judge Cottingham which might delay his trial date. Discussed whether, again, whether Mr. Bryant wants to testify, and again, emphasized he did not intend to testify under any circumstances. Discussed again the

possibility of subpoena for Shaquettia Holmes, the woman in the bathroom with defendant and the victim immediately prior to the shooting, whom the defendant states would know that he didn't commit the crime. He indicated at that time that he did not want Shaquettia Holmes to be called as a defense witness citing again her family ties to the victim and co-defendant Lavern Holmes. Discussed and explained to him the concepts of right to compel witnesses and right to confront witnesses and hearsay as regards statements made by certain co-defendants, so that's March 1st.

MS. BLANCHETTE: Your Honor, at this time I would object on relevance. I understand when he's referencing Ms. Holmes and possibly the applicant's decision to not testify at the *Jackson versus Denno*. We have not raised claims regarding a majority of this content that he is discussing. I believe he is just reading interview notes into the record at this point.

THE COURT: All right. Do you think we could tie it in a little bit better?

MR. JAMES: Absolutely, Your Honor. I will --

THE COURT: Relate it to the claims.

MR. JAMES: -- note for the sake that a majority of it did pertain to Ms. Holmes and to his decision whether or not to testify and review his rights with him.

BY MR. JAMES:

Q: But all of it sort of goes to the broader theme that I'm

picking up here, Mr. Hazzard, that you didn't have the most cooperative attorney/client relationship with Mr. Bryant; did you?

A: No, sir. Mr. Bryant was always very, very pleasant. He was never argumentative or combative in any way, shape, or form. It was just when it got down to the nuts and bolts of how do we prepare this case for trial, how do we deal with certain things, there were just things he refused to discuss and refused to acknowledge.

Q: And as part of those things that he refused to discuss and refused to acknowledge and indeed refused to do well before his trial date he repeatedly instructed you that he did not wish to testify and that ultimately he did not wish to call the witness, Ms. Holmes, in his defense.

A: Correct.

Q: And that extended to the *Jackson v Denno* hearing prior to the jury being present; correct?

A: Yes, sir.

Q: And you told him that the jury wasn't going to be present for that.

A: Yes, sir.

Q: You indicated earlier your belief that there was evidence of express malice in this case against your client; correct?

A: Yes, sir.

Q: You've testified to the statement of Ms. Shaquettia

Holmes. We've discussed the inculpatory statement that your client made to law enforcement shortly after the crime. Do you recall other evidence the state had against your client in order to make this case stick?

A: They may or may not have had testimony of certain co-defendants leading up to the case, leading up to the trial of the case. One of the big issues was whether Brandon Cheeks was going to testify, whether or not Lavern Holmes was going to testify, whether or not Cameron Green was going to testify. Specifically, with regard to Mr. Holmes and Mr. Green, whether they were going to testify consistent with the statement that had given police, if I recall correctly, indicating that Mr. Bryant had shot the decedent Mr. Myers. So that was one of the big issues was who all was going to testify, and we discussed the fact, if I remember correctly, Mr. Green had signed a proffer. I explained to him what that -- the significance of a proffer, the fact that more likely than not Mr. Green would testify at trial against Mr. Bryant.

Q: You indicated that you sought to have your client mentally evaluated; is that correct?

A: Yes, sir.

Q: All right. Were you successful in that endeavor?

A: No, sir.

Q: All right.

A: If memory serves correctly, I brought it to Judge John's

attention in July of 2012 which would have been about three months after I started representing him. He was originally represented by Richard Colvin, who was the public defender here in Georgetown before I arrived. I -- my first day here in Georgetown was April 13th, 2012. I met with Mr. Bryant shortly thereafter within three months of meeting with him I figured something wasn't quite right, so I needed to have it address. Judge John, as I recall, questioned him extensively on the record and Mr. Bryant answered all of his questions as far as an understanding of the court proceedings, the roles of the different people involved in the court proceedings, the charges against him, how much time he was facing, and so Judge John said I don't see any reason to have him evaluated. I subsequently reraised that issue in December of 2012 with Judge Culbertson and Judge Culbertson also did not see any need to have him evaluated.

Q: So based on your own interactions with him you determined that potentially there was a mental health issue that you wanted to investigate?

A: I'm sorry. I didn't understand your question, sir.

Q: Based on your own one on one interactions with your client and his demonstrated understanding of the gravity of the circumstances against him, you determined that you wanted to investigate if there were any mental health or intellectual disabilities on your client's part; right?

A: Yes, sir. I wanted to see if there was something I was missing.

Q: Okay. Did the reporting of his inculpatory statement to law enforcement also support your decision to try and pursue and mental health investigation or did it contribute to your feeling in that regard?

A: Not really, no. Not really.

MR. JAMES: I beg a moment of the Court's indulgence. I have no further questions for this witness.

THE COURT: All right. Yes, ma'am.

MS. BLANCHETTE: Yes. Thank you, Your Honor.

REDIRECT EXAMINATION OF MR. HAZZARD BY MS. BLANCHETTE:

Q: If you'd like you can turn to Page 316 of the transcript there. The Judge is giving the charge of express and inferred malice. Beginning on Line 18, I'll just read some excerpts. He says, malice aforethought may be express or inferred.

A: I'm sorry. It was Line 18?

Q: Beginning on Line 18, yes. Malice aforethought may be express or inferred. If you drop down then he says, express malice is shown when a person speaks words which express hatred or ill-will for another or when the person prepared beforehand to do that which was later accomplished and then he gives the example of lying in wait for a person and some other examples. Would you agree that Shaquettia Holmes testimony established that there were not ill words spoke between Mr.

Bryant and the victim, that when they left the bathroom there were no hostile words spoken?

A: Yes, ma'am.

Q: Okay. And the state asked you about examples of express malice, but are there some examples that you know from this case that fall into the Court's definition given to the jury of express malice?

A: Without reading the entire transcript again, I do not recall what the testimony was as far as how Mr. Bryant, Mr. Cheeks, Mr. Holmes, Mr. Myers, and Mr. Cameron Green all ended up at the Ghost Den's Lounge for the purpose of confronting the decedent. If memory serves correctly, there was a lot of kind of pre-preparation done, going around finding a gun, who had the gun, whether it was Brandon Cheeks, whether it was Mr. Bryant, why they went to the club. You know that would go more towards the issue of the preparation aspect of the reference of lying in wait.

Q: Okay. And would you agree though that as reflected in the transcript that the hostile encounter was between the victim and Mr. Lavern Holmes?

A: What I know, what I heard in police interviews, and what's in the transcript may be two different things. I do not specifically recall with regard to at trial what was said about that.

MS. BLANCHETTE: Your Honor, if I could beg the Court's

indulgence one moment.

THE COURT: Uh-huh. (Affirmative response)

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

THE COURT: All right. Anything further?

MR. JAMES: Nothing further from the state, Your Honor.

THE COURT: Okay. You may step down, Mr. Hazzard.

You may call your next witness.

MS. BLANCHETTE: Yes, Your Honor. I call Tamar Bryant to the state.

TAMAR BRYANT, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: Please be seated and state your full name for the record, please.

MR. BRYANT: Tamar Bryant.

DIRECT EXAMINATION OF MR. BRYANT BY MS. BLANCHETTE:

Q: And Mr. Bryant, we're here today because you filed a PCR application docketed at 2011 -- I'm sorry, I'm reading your indictment number. I apologize. 2015-CP-22-1113 here in Georgetown County; is that correct?

A: Yes, ma'am.

Q: Okay. And Mr. Bryant, where are you currently incarcerated?

A: Lee County Correctional Institution.

Q: Okay. And you went to trial, you went to trial back in March of 2013; is that correct?

A: Yes, ma'am.
Q: And what was the result of that trial?
A: I was found guilty.
Q: Okay. And what sentence did you receive?
A: A 35-year sentence.
Q: Okay. And who represented you at the trial?
A: Mr. Ron Hazzard.
Q: Okay. And once you were arrested in this case, was Mr. Hazzard always your attorney or did you have somebody else before?
A: I had Richard Coleman.
Q: Okay. And then Mr. Hazzard became your attorney after that and represented you up until the time of your trial; is that correct?
A: Yes, ma'am.
Q: And did you file a direct appeal following your conviction at your trial?
A: Yes, ma'am.
Q: Was that handled by the office of appellate defense?
A: Yes, ma'am.
Q: And do you recall the name of your appellate defender?
A: David Alexander.
Q: Okay. And we're here today because you, through my assistance, have filed an amended PRC application alleging both ineffective assistance of trial counsel and ineffective

assistance of appellate counsel; is that correct?
A: Yes, ma'am.
Q: And do you want to go forward on those allegations today?
A: Yes, ma'am.
Q: Now, also what is the relief that you're asking the Court to give you if he finds that you have met those allegations?
A: A new trial.
Q: Okay. And we have met countless times I think, because we've tried to do this PCR a couple of times.
A: That's right.
Q: I have explained to you that what that means is the Judge would set aside the conviction resulting from your prior trial and you'd be put back in the position you were before you even went to trial. So you'd be facing the original charges all over again, no guarantee of less time. Do you understand that?
A: Yes, ma'am.
Q: Do you also understand there's risks because you're not serving the maximum sentence for murder?
A: Yes, ma'am.
Q: Knowing that, do you still want to go forward today?
A: Yes, ma'am.
Q: Okay. And I appreciate you being super respectful and saying yes ma'am, just make sure you wait until I finish because the court reporter can only take down one of us at a

time; okay?
A: Yes, ma'am.
Q: Okay. You heard Mr. Hazzard testify and he read from quite a few notes about meetings with you. Would you agree that you all met a number of times leading up to your trial?
A: Yes, ma'am.
Q: Okay. And do you remember, and he said I believe 15 times, would you agree with that number?
A: No. I wouldn't agree with 15 times.
Q: Okay. Can you explain?
A: I'd say we met about 6 or 7 times.
Q: Okay. And that's from your memory; you don't have specific notes?
A: Yes, ma'am.
Q: Now, he talked about one of those meetings he brought you over to this courthouse, I believe it would just be a courtroom down the hallway, and showed you the interrogation video. Do you remember that happening?
A: No, ma'am.
Q: Okay. Do you recall reviewing it with me prior to this PCR hearing?
A: Yes, ma'am.
Q: So you know what video we're talking about; correct?
A: Yes, ma'am.
Q: Okay. Do you recall him giving you advice about whether

or not you should testify about a suppression hearing or a *Jackson versus Denno* hearing dealing with whether or not that statement would come in?

A: No, ma'am. He didn't explain anything to me like that.

Q: Okay. Now, if he had explained it did you understand that you could testify at a *Jackson versus Denno* hearing and then not have to testify later at your trial?

A: Can you repeat that again?

Q: Yes. I'd be happy to. Did you understand at any point that you could testify just at the *Jackson versus Denno* hearing and then not later testify at your trial?

A: No, ma'am, because he didn't explain that to me.

Q: Okay. So you didn't understand those were two separate choices, one, whether or not you testify at *Jackson versus Denno;* and two, whether or not you testify at the trial?

A: Right. Yes, ma'am.

Q: Okay. Now, do you have a copy of the transcript? Is it still there in front of you that you can use if you need?

A: Yes, ma'am.

Q: Okay. At the beginning of your trial there was a *Jackson versus Denno* hearing held and there what was addressed was the video recorded statement that you gave to law enforcement. Do you remember that happening at trial?

A: Yes, ma'am.

Q: Okay. And specifically, on Page 24 Mr. Hazzard asked the

Judge to ask you and make sure that you don't want to testify at the *Jackson versus Denno* hearing.

A: Right.

Q: And you say you did not want to testify.

A: Yes, ma'am.

Q: Now, here by way of your application and your amended application, are you alleging that you did in fact want to testify?

A: Yes, ma'am, I did. If he would have explained it to me better so I could understand what he was saying or understand what the *Jackson versus Denno* was then yes, ma'am.

Q: Okay. And Mr. Hazzard, testified to this disconnect that you two had that raised him concern. So he couldn't -- he didn't feel that you were understanding him so that's why he raised competency. Do you agree that you two had a disconnect?

A: Yes, ma'am, to a --

Q: Go ahead.

A: -- to a certain extent because I was really asking him about a bond and he was asking me -- telling me why am I concerned about a bond if I don't have a paid attorney. So we really didn't click after that.

Q: Now, as I said on Page 24 here you're asked about testifying. You tell the Court you're not going to testify at the *Jackson versus Denno* hearing. So then the Court just

hears testimony from Officer Clinton Busbee regarding your interaction with him that night. Would you have wanted the Court to also hear from you regarding what happened that night?

A: Yes, ma'am.

Q: Okay. And beginning on Line 7, Mr. Busbee's testimony, and I'm not going to read it all into the record. He starts talking about how he spotted you and he took you into custody. You were given a verbal Miranda and you all arrived at the department around 3:30 a.m. so you had to wait outside. Now, you're alleging today that you should have testified. So can you take us through what happened up until the point where he has you outside of the sheriff's department?

A: Yes, ma'am. He arrested me at a hotel. He took me and I told him I didn't do it and I wasn't there. He took me to the Georgetown County Sheriff's Office in the back and we was sitting outside for a good while. He said he was waiting on another officer to come Kinsington (sic), so we was waiting on his to come from Kinsington (Sic). And he was making small talk at first, just talking, regular talking, so I was talking to him about regular stuff, it's cold outside, stuff like that. And then he started asking me questions about what happened, so I told him I didn't know what happened. And he just got mad, I keep laughing at him, so he got mad. And then it just went from there.

Q: Now, he said you made some verbal statements outside, but your verbal statements to him were you didn't know anything.
A: I didn't know, and I didn't do it.
Q: Okay. And you were very clear to him about that?
A: Yes, ma'am.
Q: Now, once you went inside, you all went into an interrogation room; is that correct?
A: Will you repeat that?
Q: Once you went inside, did he take you to a room where he told you it was going to be recorded?
A: No, ma'am. He never said it was going to be record, but he took me to a room.
Q: Okay. And you've watched the recording. At the beginning of that he tells you that he's going to give you your Miranda rights as you did before, and he begins questioning you; is that correct?
A: Yes, ma'am.
Q: So he admits that you guys had been talking prior to that point.
A: Right.
Q: Okay. And the Judge has the video to review, I just want to hit a couple highlights with you. At about the 26-minute mark you're telling him that you don't know why you shot the victim. Is there something further that you'd like to explain or that you want the Court to know about why you made that

statement to him?

A: Because I was making him up as I went on so I had to think, I had to really convince him to believe me, but I was just making everything up so we could move on from there so we could go back so we could get back to the county.

Q: Okay. And you said you're making it up. Specifically, were there some false details that you gave him?

A: Yes, ma'am.

Q: What were those details?

A: That I met the victim at a club called G&H in 2007. That we argued, that -- I mean, it's a lot of things. The whole thing.

Q: Okay. Why -- when you were giving him false details, what was your reasoning behind that?

A: Because he would have to find out who did it -- he was going to find out who did it regardless was the way I was thinking. He's not, he's not -- he's going to believe that I didn't do it. He already know I didn't do it because he's asking me questions about other people during this time. And he's basically telling me he was just wanting me to tell him who did it, and then once I told him that I don't know, and he continues to keep asking me. Before we moved into the office at the, you know, the Georgetown Sheriff's Office and we was outside and when I told him I don't know and he tells me it's 30 years, you going to get 30 years, this sentence carries 30

years, and stuff like that. He just was mad from then, so I was just going along with everything he was saying.

Q: Did you give up?

A: Yes, ma'am.

Q: Did you feel like you had any option but to answer his questions and give him details that he was asking you for?

A: No.

Q: And during his cross examination on Page 201 your defense attorney specifically asks him about this incident that you supposedly reported in 2007 at the GH Club in Hemingway, if he looked into that to see if that was correct. Why would that have mattered?

A: Because I was in DJJ in 2007.

Q: So when you were giving him information that you knew was false, were you thinking he was going to look into that and realize your statement was false?

A: Yes, ma'am.

Q: Okay. Did you see that as a way to get out of the current situation you were in where you had been with this officer for several hours and he was not seeming -- willing to let you go?

A: Yes, ma'am.

Q: Now, at the 30-minute mark it appears, as the Judge will be able to review on the cd, that your statement concludes, but then he continues to question you; is that right?

A: Yes, ma'am.
Q: So much that at the 36-minute mark he starts asking you to identify the gun and he brings in pictures. Did you think it was ever going to end?
A: No, ma'am.
Q: And then when there's still 10-minutes left in the recording that we have, he gives you his card. What did you take that to mean when he gave you his card?
A: Like he didn't believe me and he was waiting on me to stop just lying to him and just tell him something that I didn't know. There was no other reason for him to give me his card.
Q: Now, during the trial the state talks about your demeanor, that you seemed like you didn't care, and they use other terms for it. What -- why were you acting the way you were acting?
A: Because I was trying to figure out how to get him to believe me, but I was -- I was really just trying to move on with the situation. I was trying to go ahead and get it over with, just telling him whatever he needed to hear, whatever he was trying to hear so I could -- so we could leave. So I was -- he was already mad outside and he was angry outside so I wasn't trying to get him to do the yelling and beating on tables. I just went through it so we could go.
Q: And was it clearly conveyed to you during your time with

him that he was not going to take it that you did not know the information that he was asking you for?

A: Yes, ma'am.

Q: Okay. And you testified at length here today about your interactions with Mr. Busbee that led to the statement that we have on the recording. Did you tell all that to your defense attorney?

A: He never really -- I told him that and he wasn't trying to hear what I had to say because he asked me the same question over and over and over and I would tell him the same thing over and over and over. One of the times he came and we met in Georgetown County Detention Center and he just got to the point he said that the prosecutor was more concerned about another one of my co-defendant's.

Q: Is there anything else regarding your attorney's -- well it appears on the record as your decision to not testify, but your attorney's failure to utilize you as a witness at the *Jackson versus Denno* hearing that you'd like to tell the Court today?

A: Can you repeat that?

Q: Yes. By way of your amendment you alleged that your attorney was ineffective for not utilizing you as a witness and for the way he handled your *Jackson versus Denno* hearing regarding the admissibility of your statement. Is there anything else you'd like to tell the Court about that issue

before I move on?
A: No, ma'am.
Q: Okay. I'll move on then. I want to talk with you a little bit about the witness Shaquettia Holmes. What information did you give Mr. Hazzard about Shaquettia Holmes?
A: I told Mr. Ronald Hazzard that Shaquettia Holmes knows, she knows me from where I was living. We from the same neighborhood, so she would be able to identify, and be like I wasn't there let alone on saying that I wasn't the shooter at the same time. I wasn't there and she knows me so she would be a good witness for me to be like okay he wasn't even there.
Q: Okay. And I previously admitted an interview or an affidavit that defense counsel said was a synopsis of an interview of Shaquettia Holmes. Were you familiar with this interview prior to your trial?
A: Yes, ma'am.
Q: Okay. And how was it that you were familiar with the fact that she had been interviewed?
A: Because it was in my motion for discovery.
Q: Okay. And is that something you were able to discuss with Mr. Hazzard?
A: No. We never discussed that.
Q: Okay.
A: I saw it, but we never talked about that.
Q: Okay. He testified today, and the record will properly

reflect but I'm just summarizing, that you did not want him to call any witnesses. He testified to that multiple times. He specifically said you did not want him to call Ms. Holmes. What were your discussions with him regarding Ms. Holmes?

A: You need to have her at court. I wanted him to cross examine her and question her and basically show that she's lying repeatedly, she's continuing to lie over and over. Nothing that she's saying is making any sense. But at the same time to clarify that I wasn't the one that was the shooter or that she didn't see me.

Q: And when you say she didn't see me, explain that a little bit more because I'm a little confused by that.

A: All right. That I wasn't even in the area, I wasn't in the club. She didn't see me. She knows me.

Q: Uh-huh. (Affirmative response)

A: You've got someone saying that they saw me and then she was allegedly there, then she knows me from the neighborhood. She can say whether she saw me or not. She would have told the authorities then that she saw me, or she didn't see me, no he wasn't there, I can identify him. There was none of that.

Q: Okay. And in her initial -- you had her initial 911 call where she essentially implicates her uncle Lavern Holmes.

A: Yes, ma'am.

Q: So going off of that you were wanting him to question her about whether or not she saw you in the club?

A: Yes, ma'am.
Q: Okay. And then he does this private investigator's affidavit and based upon that you were aware that Ms. Holmes was going to say that she saw you there.
A: Yes, ma'am.
Q: Okay. Did -- what did you ask him to do further regarding that information she gave in that affidavit?
A: To question her.
Q: Okay. To further question her?
A: To further question her.
Q: Okay. So the state did call her as a witness and then your attorney was able to conduct cross examination. What did you want him to do further in his cross examination of Ms. Holmes?
A: Question her some more.
Q: Okay. Did you think that he would reference the investigation that he had done, the affidavit of his private investigator?
A: Yes, ma'am.
Q: Okay. And are you alleging today that he was ineffective for not fully developing his cross examination of Ms. Holmes?
A: Yes, ma'am.
Q: Okay. I'll take that back from you, so we don't lose it. Now, we also -- I need to further ask you about this. He -- your defense attorney referenced, and we introduce, a copy of

some interview notes following an interview of Ms. Holmes by the solicitor's office and it's been marked as applicant's number 2. Do you recall reviewing that information with Mr. Hazzard after it was obtained and turned over?

A: No, ma'am.

Q: Okay. So that's not something you remember discussing with him?

A: We never talked about that.

Q: Okay. I don't want to be moving too quickly for you. Is there anything else regarding Ms. Holmes in your allegation about Ms. Holmes that you would like to testify about today?

A: No, ma'am.

Q: Okay. Now, by way of your application we have alleged that your attorney is ineffective -- was ineffective when he failed to enter an objection to the malice instruction. Would you have wanted him to ensure that the full and complete instruction was given to the jury?

A: Yes, ma'am.

Q: You've also alleged that your attorney was ineffective for failing to object to enter an exception to the Court's opening comments about searching for the truth. Would you have wanted your attorney to object or enter an exception to that?

A: Yes, ma'am.

Q: Finally, you have alleged that your appellate defender

was ineffective for not raising all meritorious issues on appeal. And we discussed that allegation; is that correct?

A: Yes, ma'am.

Q: Okay. And are you specifically alleging that he failed to raise the issue of the admissibility of your statement?

A: Yes, ma'am.

Q: And along with any other issues that the Court may deem meritorious.

A: Yes, ma'am.

MS. BLANCHETTE: Your Honor, if I could beg the Court's indulgence one moment, please.

THE COURT: Sure.

BY MS. BLANCHETTE:

Q: Mr. Bryant, before I sit down, this is your kind of long-awaited day in court. You have worked very well with me in putting together the amended application. I've tried to go through each of those claims with you today. Is there anything else that you'd like to offer to the Court in support of your application requesting a new trial?

A: No, ma'am.

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

THE COURT: All right. Cross.

CROSS EXAMINATION OF MR. BRYANT BY MR. JAMES:

Q: Mr. Bryant, you were mirandized as part of your statements to law enforcement, correct?

A: What do you mean?

Q: You were informed of your rights under *Miranda versus Arizona* such as your right to remain silent and your right to have an attorney present with you during questioning?

A: Yes, sir.

Q: And you were provided a form to that effect, correct?

A: Can you repeat that?

Q: They gave you a little piece of paper that said the same thing that you have these rights and they made you initial off on it, correct?

A: Yes, sir.

Q: Okay. And that was introduced at trial, correct?

A: I'm not sure.

Q: Okay. Without belaboring that point, I would simply direct the Court's attention to Page 198 of the trial transcript, state's exhibit number 10 indicating that the Miranda form was introduced at the original trial.

So you knew that you had your right to remain silent, correct?

A: Yes, sir.

Q: Okay. And you spoke with law enforcement anyway at length to try and just get it to move on and end?

A: Yes, sir.

Q: Okay.

MR. JAMES: No further questions for this witness.

THE COURT: All right. Redirect.

MS. BLANCHETTE: Nothing, Your Honor.

THE COURT: You may step down.

You can call your next witness.

MS. BLANCHETTE: Your Honor, our next witness would be David Alexander and Mr. James was kind enough to help me get him on the phone, but we may need a moment.

THE COURT: That'll work.

MR. JAMES: Hey David, this is Johnny James. I'm at the courthouse here in Georgetown. All right. We're going to call you as a witness here in just a moment. I'm going to step forward towards the bench so that we can all huddle around and hear you clearly.

THE COURT: Let's swear the witness in.

MR. JAMES: All right. Mr. Alexander, I'm presenting you to the clerk of court so you can be sworn in.

MR. ALEXANDER: Okay.

REPORTER'S NOTE: (Mr. David Alexander appears via telephone.)

DAVID ALEXANDER, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: Please state your full name for the record and spell it for them, please.

MR. ALEXANDER: David, D-A-V-I-D, Alexander, A-L-E-X-A-N-D-E-R.

MS. BLANCHETTE: I believe he's my witness.

MR. ALEXANDER: And I would like to thank the Court for allowing me to testify by telephone. That's a great help to our office.

THE COURT: You are welcome.

MS. BLANCHETTE: Your Honor, can you hear him best if I move ---

THE COURT: Yeah, I can hear him.

MR. JAMES: Madam Court Reporter, can you hear the witness just fine? All right.

DIRECT EXAMINATION OF MR. ALEXANDER BY MS. BLANCHETTE:

Q: And Mr. Alexander, this is Tricia Blanchett, can you hear me if I stand here?

A: Yes, Ms. Blanchette.

Q: Okay. Perfect. Thank you, Mr. Alexander. You've already stated your name for the record. What is your current occupation?

A: I am an appellate defender.

Q: And how long have you been an appellate defender?

A: Almost seven years.

Q: And how long have you been practicing law?

A: Nineteen years.

Q: Okay. And during the course of that time have you been primarily working in the area of appeals or have you had other areas of practice?

A: Other areas of practice. I did trial work; I did some transactional work in private practice before I came to appellate defense.

Q: Okay. And we're here today as you know on a PCR application of Tamar Bryant. Do you recall your representation of him on his direct appeal?

A: I do.

Q: Okay. And do you recall the issue that you raised in his case?

A: I do.

Q: Okay. Can you tell us?

A: I raised the issue relating to the Court's refusal to order that he be evaluated for mental competency.

Q: Okay. And what is your typical practice or what was your practice in this case at arriving on the issue that you were going to raise in the appellate brief?

A: The first thing I do is read the entire transcript of all the hearings if there are any that are not continuous with the trial and I make note of the objections, the motions made by the parties. Then I evaluate each one of them to see if I can find a meritorious and viable issue and try to raise the best issues I can for my client.

Q: Okay. And you said already in this case you raised the issue of competence; is that correct?

A: That's correct.

Q: When you were examining the trial transcript did you recognize that there was a *Jackson versus Denno* hearing held in this case?

A: I did.

Q: And do you recall your reasoning for not raising that issue in the appellate brief?

A: I do. I'd like to start by saying that I watched the video of Mr. Bryant's statement. It concerned me greatly. I've seen many videotaped statements. Mr. Bryant's statement, I think the trial judge may have described it as nonchalant, which I agreed with. I had never seen someone with such drab affect and just so blindly give a statement to something so serious and looking at -- you know, my notes that I took from when I looked at the video, I think I even quoted this part in the brief. He ends the statement by asking the question, so this is the statement right here? I knew the statement was the big problem in the case. That was the key piece of evidence against him. But on the record I had I just didn't see a way to win, to me this fell within the standard of review, he gets Miranda on the video. So I didn't really see a way to attack it with the record I had. I thought the competency issue was a way to do an end run around that because that would also require a reversal.

Q: And you said based upon the record you had you made your assessment. Would that assessment have been different if Mr.

Bryant would have testified?

A: It could have been.

Q: Okay. And you've not been here today to hear his testimony, so I won't ask you to speculate based upon what he's testified to today. But specifically, if he were to offer testimony about events that led up to the time before the recording stated, would that have been testimony that you would have been interested in reviewing and potentially raising?

A: Yes.

Q: And I apologize if you said this, but in briefing the competency issue, could the *Jackson versus Denno* hearing or the admissibility of the statement potentially have been a companion issue for you to the competency issue?

A: It could have been.

Q: And how do you think that would have bettered the competency issue?

A: Well I don't think it would have necessarily bettered it, that's why I didn't raise it, because I didn't think that on the record that I had I don't think it would have been successful as it was, but throughout the briefs I tried to refer to the problems that I saw in the video to try to get the Court past that. It was the competency evaluation -- I wasn't necessarily looking at an error analysis but I always think that giving the Court the context of the key piece of

evidence is extremely important.

Q: And then I'd like to ask you about some additional issues that were raised in the appellate brief. If counsel had raised an objection to the inferred malice instruction and the Court's failure to give the full instruction under *Madison* and *Elmore*, would you have raised that issue on appeal?

MR. JAMES: Objection. Not relevant to the allegation of --

MS. BLANCHETTE: Mr. Alexander, I apologize. The state has entered an objection, if you could just wait one moment.

THE COURT: Go ahead. Let me hear from you.

MR. JAMES: It's not relevant to the allegation of ineffective assistance of appellate counsel and at this point it's asking him to speculate as to what issues he would have raised with a different record.

THE COURT: All right. Let me hear from you.

MS. BLANCHETTE: Your Honor, we've raised that he should have addressed all meritorious issues. I'm asking him why he did not deem this issue meritorious and if it would have been objected to if he would have deemed it meritorious.

THE COURT: Overruled. Go ahead.

MR. JAMES: Thank you, Your Honor.

BY MS. BLANCHETTE:

Q: Mr. Alexander, if you need me to repeat my question I can, but you're free to answer at this time.

A: I would have looked at any objection raised by the trial lawyers and researched it thoroughly to determine whether or not I could have raised it or not, but I don't remember an objection about that.

Q: Okay.

MS. BLANCHETTE: Your Honor, I have no further questions of Mr. Alexander.

THE COURT: All right. Mr. James.

CROSS EXAMINATION OF MR. ALEXANDER BY MR. JAMES:

Q: Mr. Alexander, can you hear me from here?

A: I can.

Q: Your testimony was very thorough. I can't think of any further questions for you.

MR. JAMES: I have no questions for this witness, Your Honor.

THE COURT: All right. Thank you.

MR. JAMES: May Mr. Alexander be excused and disconnected?

THE COURT: Any objections?

MS. BLANCHETTE: None, Your Honor. Thank you.

THE COURT: All right. You have a good day.

MR. ALEXANDER: Thank you, Judge. Again, I appreciate you allowing me to testify by phone. Bye bye.

THE COURT: Thank you. Call your next witness.

MS. BLANCHETTE: Your Honor, as you're probably

accustomed to today, I have no further witnesses, but I do have some caselaw to hand up when that's appropriate.

THE COURT: All right. And Mr. James, do you have any witnesses?

MR. JAMES: I do not believe any further testimony is necessary, Your Honor.

THE COURT: All right. I'll be glad to hear from you, Ms. Blanchette.

MS. BLANCHETTE: Thank you, Your Honor. Again, as I stated in the prior case, I'm happy to do a closing argument, a more thorough closing argument, present a memorandum, or do a proposed order. At this time I just have some cases to hand up and give my explanation as to why I'll be handing those up and then anything further Your Honor would like I would be happy to respectfully comply with.

I will be handing up a case that I've already referenced today, I say *Aleksey*, A-L-E-K-S-E-Y, and that deals with statements about seeking for the -- seeking the truth, and the reason I hand that up is because it predated the applicant's trial. As well as *State versus Gregory Daniels*. There the Court made comments about representing the community seeking truth and justice, very similar comments to what were made here. And then finally, I'll be also handing up on that issue *State versus Michael Vernon Beaty*, which was just -- well decided multiple times in the past two years, but the final

decision came down in 2018 that deals specifically with that, but I do concede that came down after the trial of this case.

Secondly, I'll be handing up a series of cases dealing with the statement in this case. As the record reflects, counsel did correctly argue that this falls under the totality of the circumstances even though we're dealing with somebody 17 years old, in *Pittman* they made that clear that that is the standard of review and the Court is looking at the admissibility of the statement. So on that note I will be handing up *Pittman* for Your Honor's review if you would like that. And just to briefly touch on that issue, you know here what we're alleging is that he should have testified to further add to the totality of the circumstances.

Your Honor, I also believe I have another case for you on that if I can beg the Court's indulgence just one moment.

THE COURT: Sure.

MS. BLANCHETTE: I also have the *Withrow* case. It just goes into the factors that can be considered. In South Carolina we have a series of cases that have determined some of those factors. That comes from a bunch of case, some of those factors that can be considered are background, experience, conduct of the accused, age, length of custody, police representations, isolation of the minor from his or her parents, threats of violence, promise of leniency. And then we have cases such as *Williams* and *Rabon* and *Smith* that just

kind of go through and break down all of those factors. I know as a trial judge Your Honor is familiar with those factors. Again, I'm happy to address those further if you would like.

Following that, Your Honor, as to the issue of the malice instruction. I was fortunate to represent Jaquez Gibson. His case was lost on this very issue in the circuit court. His co-defendant was actually successful. I did a PCR with Judge Goodstein. My colleague and friend, Jeremy Thompson, did one with Judge Barber. The co-defendant was successful, I was unsuccessful in saying that counsel should have raised that issue and objected to the malice instruction when the general permissive inference language isn't given as required in *Elmore* and *Madison*, and also further addressed in *Belcher*. Mr. Gibson's case when up on appeal, and thankfully the Supreme Court agreed with me for once and they granted him relief and reversed the PCR court. I have a copy of *Gibson*. I believe it goes into *Elmore* and *Madison*, but even so I think *Belcher* is even more instructive. It explains -- in Gibson's case they gave the inferred malice instruction as to the weapon and it is the same one that's here. Here we don't have the weapon charge because this is post *Belcher*. But I think the reasoning is very applicable. What I understand *Gibson* to say is that this is deficient conduct, but the question would then boil down to prejudice and that's why I was asking

counsel about express malice, again I'm being very brief. I'm happy to go into this in further detail. But this is just reading from Gibson, it says, when you're looking at the issue of prejudice the Court must decide whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury. As I would just quickly say now, we submit it did and we meet both prongs as discussed in *Gibson*, but I would be happy to further flush that out using transcript examples and things like that for your court -- or for Your Honor if you'd like me to do that. And those are the case that I intend to hand up. I believe I've previously provided all of those to the state, but I'd be happy to do so if needed.

THE COURT: All right. Let me hear from the state.

MR. JAMES: Your Honor, the state would respectfully request the opportunity to provide to the Court proposed orders in this matter since it is a little bit more factually intense than the previous case, and will require references to the transcript at length and I'm sure that Ms. Blanchette would be happy for that opportunity as well.

Just very briefly, Your Honor, as to failing to advise him -- let's take a step back. Generally speaking, Mr. Bryant got up on the stand and testified at length about just how much lying he did to law enforcement immediately after he was arrested and then he comes into this courtroom today and

expects us to give any credibility to his testimony what so ever. I respectfully submit to this Court that he has zero credibility in his testimony on the stand today, not one iota. Counsel on the other hand testified very credibly that he explained to his client, and discussed with his client at length all of his various rights including but not limited to his right to testify at the *Jackson v Denno* hearing. His client refused. His rights in that regard were then communicated to him by the Court immediately prior to his decision not to testify and he refused, so it's on him for any deficiency that may have resulted from the absence of his testimony at the *Jackson v Denno* hearing. He had his opportunity and he passed it up and it didn't work out for him.

As to Shaquettia Holmes, again, counsel articulated specific strategic reasons as to why he approached Ms. Holmes the way that he did. I will not go through and restate all of that testimony but having set forth those strategic and tactical decisions it's not on this Court to go and second guess him and impose its own judgment on attorneys.

As to the failure to enter an objection or exception to the jury instruction on malice for lack of a general permissive inference instruction, Your Honor, one, counsel testified to his broad recollection that there was evidence of express malice, such that it really doesn't matter if there

were any flaws or irregularities in the malice instruction as compared to that set forth in *Elmore* and indicated by the Courts that it needed to be strictly followed.

Additionally, Your Honor, for the sake of preserving the record I'm going to argue against precedent of *Elmore* stating that the -- providing that the Court is so strictly restrained from how it may craft an inference of malice instruction ultimately it is upon the Courts to charge the law in the contexts of the facts that are provided in each case. And by restraining the Court to a very specific and narrowly curtailed charge without granting it flexibility to respond the facts that are introduced in each individual case, I believe that the appellate courts have overstepped their bounds and unnecessarily constrained the trial courts from properly guiding the juries to the law that exists in each case.

Additionally -- no I'm not going to make that argument against precedent. There was an additional one I was considering and I'm just going to go ahead and not go forward on that one.

Your Honor, as to the failure to enter an objection or exception to the Court's comments regarding the search for truth to the jury, counsel articulated that it was prior to the reminder from the appellate court's that we probably ought not be telling the juries that. I don't believe that it was

at all harmful to Mr. Bryant to tell the jury that we're involved in trying to find the truth here. Ultimately, the public trust and public faith in the judiciary as an institution is premised on the idea that it results in some sort of truthful outcome and I do not believe it is prejudicial or really even should be a deficiency to tell the jurors and invest in them the importance of the task at hand.

Your Honor, as to the appellate counsel issue, Mr. Alexander testified by telephone here today very clearly his belief that the mental health issue was better. He articulated his reasons for believing that it was superior to the *Jackson versus Denno* hearing, and again, with that articulated into the record it is not this Court's place to second guess his judgment. For all of those reasons, Your Honor, I would respectfully request that the application for post-conviction relief be denied.

THE COURT: All right. I will take it under advisement and --

MS. BLANCHETTE: And, Your Honor, I have those cases.

THE COURT: That'll be good. Thank you.

(COURT IS ADJOURNED)

C E R T I F I C A T E

I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of Tamar Yaron Bryant versus State of South Caorlina held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on March 25, 2019.

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

SBTodd

Sallie Beth Todd, CVR

Official Reporter

December 1, 2020.

Affidavit

F. Jerome Randall
P.O. Box 1666
Conway, SC 29526

RE: Tamar Bryant

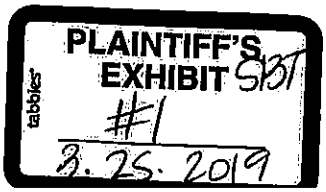
December 11, 2012

On December 11, 2012 I interviewed Ms. Shaquetta Michelle Holmes at [redacted] Georgetown, SC. This interview was in reference to Tamar Bryant's case; Ms. Holmes states that on the night of the incident at the club in Plantersville she was in the bathroom with the victim Mr. Myers and Tamar Bryant. Ms. Holmes states that Tamar and the victim had a conversation inside the bathroom; however it was not a hostile meeting. She cannot remember what was said exactly. She does remember telling the victim to calm down and just be cool, because she knew the guys did not run up in there for NO reason. She knew or suspected that they all had guns. She knew that Tamar had a gun from being in the bathroom with him. Mr. Myers and Tamar walked out of the bathroom ahead of Ms. Holmes and as soon as she reached the door the shots rang out. She cannot say who did the shooting, she remain inside the restroom until things calm down.

Ms. Holmes can be reached at [redacted] Georgetown, SC. [redacted]

Witness information:
Shaquetta Michelle Holmes
PHONE NO. [redacted]

F. Jerome Randall
Horry/ Georgetown County
15th Circuit Public Defender Office
Investigations



Shaquettia Holmes
Interview 3/6/13
Present: Erin Bailey and Ricky Todd

She was in club and saw bandanas and guns
Lavern was fussing with Deon and chased him in bathroom
She knows Tamar Bryant from around town
She saw Tamar and Lavern in bathroom
Deon was hiding behind door in bathroom, Lavern and Tamar trying to get to him
She got between them and tried to calm Lavern down
Lavern left bathroom- Tamar said to let Deon out of the bathroom
Tamar came back in club and shot Deon
She saw Tamar with a little black gun, Lavern with old timey shotgun
Doesn't recall if Tamar had bandana
Cameron Green was in the club
She did not see Kuwuan Myers
She does not know Brandon Cheek
She called 911

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Tamar Yaron Bryant, S.C.D.C. No. 354710, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2015-CP-22-01113 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed by Tamar Yaron Bryant ("Applicant") on December 9, 2015. Respondent made its return on or about February 5, 2016. The Court convened an evidentiary hearing into the matter on Monday, March 25, 2019, at the Georgetown County Judicial Center in Georgetown, South Carolina. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel Ronald W. Hazzard, Esq. ("Trial Counsel"), and appellate counsel David Alexander, Esq. ("Appellate Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Georgetown County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, the pleadings, Applicant's amendment, and the exhibits introduced at the hearing. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the May 2011 term of the Georgetown County Grand Jury for murder (2011-GS-22-00495). Ronald W. Hazzard, Esq. represented Applicant, and Erin Bailey, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

On September 21, 2012, Applicant appeared before the Honorable Steven H. John for a hearing on Counsel's motions for a mental health evaluation pursuant to State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981) and M'Naughten's Case, 8 Eng.Rep. 718 (1843). After a brief hearing, Judge John orally denied the motions.

On December 17, 2012, Applicant appeared before the Honorable Benjamin H. Culbertson for a hearing on Counsel's motion to reduce bond, as well as new motions to evaluate Applicant for competency and criminal responsibility. After a hearing, Judge Culbertson orally denied the motions.

On March 18, 2013, Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Applicant guilty as indicted on March 20, 2013. Judge Hyman sentenced Applicant to imprisonment for a term of 35 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by David Alexander, Esq., who raised the following issue:

> Whether the trial court's refusal to order a mental competency examination was erroneous because it was based on an improper consideration, a mistake of fact, and the State consented to the evaluation?

By unpublished opinion decided December 3, 2014, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Bryant, Op. No. 2014-UP-440 (S.C. Ct. App. filed Dec. 3, 2014). The Remittitur was issued on December 19, 2014.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel."
    a. "Failure to properly prepare Applicant prior to trial."
    b. "Failure to call witnesses and utilize evidence."
2. "Ineffective assistance of appellate counsel."
    a. "Failure to raise all meritorious issues on appeal."

By and through PCR counsel Blanchette, Applicant amended his application by filing on August 27, 2018, to raise the following allegations:

1. Ineffective assistance of trial counsel, in that:
    a. Counsel failed "to properly advise Applicant regarding and utilize Applicant as a witness at the Jackson v. Denno[1] hearing."
    b. Counsel was ineffective "For the handling of the witness, Shaquetta Holmes."
    c. Counsel failed "to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. Gibson v. State, 416 S.C. 260, 785 S.E.2d 121 (2016)."
    d. Counsel failed "to enter an objection or exception to the Court's comments, specifically, but not limited to comments regarding searching for the truth to the jury."
2. Ineffective assistance of appellate counsel, in that:
    a. Counsel failed "to raise all meritorious issues on appeal, specifically, but not limited to: [t]he admissibility of Applicant's interrogation / confession."

Applicant requests relief as follows:

- "A new trial."

[1] Jackson v. Denno, 378 US. 368 (1964).

At the evidentiary hearing, Applicant proceeded forward on the allegations as set forth in the August 27, 2018, amendment.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Trial Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his 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, Applicant 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 v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. 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, 286 S.C. at 442, 334 S.E.2d at 814. "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). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant 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 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. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to

consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

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. Strickland, 466 U.S. at 696. 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. Id. at 696-97.

1. Failure to Advise, Call Applicant as Witness in Denno Hearing

The Court finds Applicant has failed to meet his burden of showing ineffectiveness through his claim that Counsel was ineffective in failing to properly advise him regarding his right to testify at the Jackson v. Denno hearing, and in failing to call him as a witness. "A criminal defendant is deprived of due process of his conviction is founded, in whole or in part, upon an involuntary confession." State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing Denno, 378 U.S. at 377). "The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence." State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008). In determining whether a confession was given voluntarily, the court must consider the totality of the circumstances surrounding the defendant's giving the confession. Pittman, 373 S.C. at 566, 647 S.E.2d at 164 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). "As the United States Supreme Court has instructed, the totality of the circumstances includes 'the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use

of physical punishment such as the deprivation of food or sleep.'" Id. "[N]o one factor is determinative, but each case requires careful scrutiny of all the surrounding circumstances." Id. "Although courts have given confessions by juveniles special scrutiny, courts generally do not find a juvenile's confession involuntary where there is no evidence of extended, intimidating questioning or some other form of coercion." Id., 373 S.C. at 568, 647 S.E.2d at 165. "Once the trial judge determines that the statement is admissible, it is up to the jury to ultimately determine, beyond a reasonable doubt, whether the statement was voluntarily made." State v. Miller, 375 S.C. 370, 383, 652 S.E.2d 444, 451 (Ct. App. 2007).

Trial

The parties promptly launched into a Denno hearing at the outset of trial. (Trial Tr. 6-31). Investigator James Clinton Busbee testified he arrested Applicant, then seventeen years of age, and took him into custody at around 3:30 A.M.; officers did not draw their firearms and verbally Mirandized Applicant on the way to the patrol vehicle. (Trial Tr. 6-8; Trial Tr. 18, ll. 2-4). Busbee told Applicant he was under arrest for murder. (Trial Tr. 20, ll. 12-25). Applicant and Busbee arrived at the station and waited outside for another officer to let them in. As they waited, Applicant smoked a cigarette, drank some water, and made initial statements to the effect of that "he was with those guys but he didn't shoot that guy," and that while he had a gun on his person, he did not shoot the victim, and that another person had been armed with a shotgun; Busbee noted to Applicant that the victim had not been shot with a shotgun. (Trial Tr. 8-10; Trial Tr. 15-17; Trial Tr. 21, ll. 1-8). Once inside, Applicant was additionally provided a written Miranda warning. (Trial Tr. 8, ll. 9-11; Trial Tr. 10-11). Applicant never expressed confusion or asked any questions regarding his rights. (Trial Tr. 21, ll. 9-24). Busbee initiated the recorded interview with Applicant around a little over an hour after arresting Applicant. (Trial Tr. 15, ll.

1-12; Trial Tr. 16, ll. 4-18). The interview inside the station lasted around 30 to 40 minutes. (Trial Tr. 11, ll. 16-18). Busbee testified that he did not threaten Applicant with physical harm, did not threaten Applicant's family, never drew his weapon, and did not physically assault Applicant. (Trial Tr. 11-12). Busbee recalled that Applicant was alert, appeared to be sober, and appeared to understand and respond to his questions. (Trial Tr. 12, ll. 9-23; Trial Tr. 22, ll. 13-25). Busbee did not deny Applicant access to restroom facilities, water, or the opportunity to smoke a cigarette. (Trial Tr. 12-13). The interview was then displayed; Applicant told Busbee in effect that he shot the victim in retaliation, as the victim had shot at him and others in Hemingway, South Carolina in 2007. (Trial Tr. 13-14; Trial Tr. 201, ll. 8-16). Busbee did not recall ever asking Applicant if he wished to speak to a parent or legal guardian, but did recall speaking to Applicant's mother at some point prior to the arrest. (Trial Tr. 18-19).

After a brief argument by the State that the statements were voluntarily given, with a citation to State v. Pittman, the court inquired if Trial Counsel intended to present any evidence in the Denno hearing. (Trial Tr. 23-24). Trial Counsel explained:

> I've spoken with Mr. Bryant. Please stand up, sir. Spoken with Mr. Bryant regarding the protocol for a Jackson v. Denno hearing, I've informed him that he has the right to call witnesses on his behalf. He also has the right to testify with regard to the issues of whether or not there was any threat, coercion, promises, intimidation or force used to compel his statement. In speaking with him approximately an hour ago he indicated that he did not wish to testify in a Jackson v. Denno hearing. I ask the Court to confirm that with him for the record.

(Trial Tr. 24, ll. 4-13). Upon the trial court's inquiry, Applicant confirmed Trial Counsel's statements. (Trial Tr. 24, ll. 14-15). Applicant confirmed that he understood that if he testified in the Denno hearing it would not be heard by the jury, and again that he did not wish to testify. (Trial Tr. 24, ll. 16-21). Applicant further confirmed he had plenty of time to discuss the matter with Trial Counsel, and again confirmed he did not wish to testify. (Trial Tr. 24-25).

Trial Counsel thereafter argued the factors to be considered weighed in Applicant's favor: Applicant was young, lacked education, was of low intelligence, and suffered from mental health issues such that he did not properly understand the consequences of the waiver that was made and the rights he gave up. (Trial Tr. 25-26). Trial Counsel explained to the court that Applicant, at the age of twelve or thirteen, watched his father beat his mother nearly to death, and had been referred for clinical assessments on several occasions but was dismissed as a lack of discipline. (Trial Tr. 26-27). After the trial court noted Applicant's evident understanding during questioning by the court, Trial Counsel offered numerous citations[2] and argued the combination of Applicant's youth, his interrogation in an unfamiliar place, the lack of parent or guardian, and other stated factors provided that Applicant did not understand the consequences of his statements such that they were not intelligently and voluntarily given. (Trial Tr. 27-29). The trial court noted that the Miranda warnings included an admonition that anything Applicant said could be used against him, and Trial Counsel simply replied that the warnings did not necessarily reflect upon Applicant's capacity to understand the warnings. (Trial Tr. 29-30).

Judge Hyman found the statements were voluntarily given and provided extensive reasons for his finding on the record: it was a continuous interview in an unintimidating setting that lasted about forty-five minutes, and Applicant appeared on the video to be "very, very comfortable giving this statement or he appeared to be comfortable. In fact, he appeared to be almost nonchalant in, in giving this statement." (Trial Tr. 30-31). The trial court noted Applicant's lack of formal education, but opined he was "very street wise" and understood the criminal justice system from his prior experience with it. (Trial Tr. 31, ll. 2-15). Judge Hyman

[2] Application of Gault, 387 U.S. 1 (1967); State v. Smith, 268 S.C. 349, 234 S.E.2d 19 (1977); Withrow v. Williams, 507 U.S. 680 (1993); State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

noted there were no misrepresentations made by law enforcement, nor promises made, and ultimately the statement would come in at trial. (Trial Tr. 31, ll. 15-20).

The video recorded statement was admitted into evidence during trial and played in open court before the jury over Trial Counsel's objections. (Trial Tr. 198-200).

PCR Evidentiary Hearing

At the evidentiary hearing, Trial Counsel testified he met with Applicant on fifteen occasions prior to trial, and that he reviewed with Applicant the video recording of Applicant's interrogation many times. Trial Counsel testified that he explained to Applicant that he had a right to testify and that there would be no jury present at the Denno hearing, but Applicant did not want to testify. Trial Counsel opined that Applicant's testimony at the Denno hearing would have been great, as he could have established that he was under the influence of both drugs and alcohol at the time of his statements to law enforcement.

On cross-examination, Trial Counsel explained that he arranged to transport Applicant on November 30, 2012, to an otherwise empty Courtroom 3B at the Georgetown County Judicial Center and discuss the statement with him in the courtroom in an effort to impress upon him the severity of the situation, but Applicant simply would not grasp the gravity of his situation. Counsel recalled he asked Applicant how to deal with the statement, to which Applicant offered the simple and bewildering answer that he had told the cops he did it, so he would just tell the cops he didn't do it. Counsel testified during the same meeting he reviewed with Applicant his right to remain silent, and that Applicant would not entertain plea offers extended by the State. Counsel testified he next met Applicant on December 4, 2012, at which time he attempted to discuss with Applicant his prior convictions, but Applicant was not forthcoming. Applicant indicated he did not wish to testify, but Counsel nonetheless "coached" him on how to testify

during a trial. Counsel testified he again met with Applicant on December 17, 2012, when they appeared before Judge Culbertson, where Applicant again indicated he did not wish to testify. Counsel testified that he once again discussed Applicant's options regarding testifying and calling witnesses on March 1, 2013, and Applicant again indicated he did not wish to testify and further did not wish to call witnesses. Trial Counsel explained that Applicant was a pleasant client and never argumentative, but otherwise refused to discuss or acknowledge the case against him. Applicant's detachment was so great that Trial Counsel sought to have Applicant mentally evaluated, but his motions were rejected by both Judges John and Culbertson.

Applicant testified he only met Trial Counsel six or seven times, and that he could not remember reviewing the video recording of his statements to law enforcement in the courtroom. Applicant denied Counsel ever discussed testifying or not testifying during the Denno hearing. Applicant claimed he did not know he could testify during the Denno hearing, and then not testify during trial. Applicant testified that when he told the trial court that he did not wish to testify, he did not understand the scope of the court's questions. Applicant agreed he and Trial Counsel "had a disconnect" throughout representation, and explained it was due to remarks made by Trial Counsel about bond early in the representation.

Applicant testified to his recollection of events at the time of his arrest and interview by law enforcement. Applicant recalled that when he was arrested he denied involvement and laughed, which angered the police. The police took him into a room, but did not say anything about recording him. Applicant testified that he fabricated a statement to the police that he did not know why he shot the victim. Applicant emphasized that he made the whole thing up, and that he fabricated further answers because the police continued to ask questions when he said he didn't know anything. Applicant testified he gave information he knew to be false. Near the end

of the interview, one officer gave him a business card, such that Applicant thought the police did not believe him. Applicant testified he told the police whatever they wanted to hear in order to get it over with and move on. On cross-examination, Applicant admitted that he was aware of his rights, including his right to remain silent.

Appellate Counsel also remarked upon Applicant's statement in the context of considering which issues to raise on appeal. Appellate Counsel recognized the Denno issue and watched the videotaped statement. Appellate Counsel described Applicant as flat in affect, and not serious in his demeanor. Appellate Counsel also noted Applicant was mirandized on the recording. Appellate Counsel described the statement as a "problem," but opined he did not believe he could prevail on the issue given the record available.

Findings

Applicant has failed to demonstrate either deficiency on the part of Counsel, or any conceivable prejudice from the deficiency alleged. First, the Court finds Applicant fully understood his right to testify at the Denno hearing, and that his testimony would not be exposed to the jury. Both Trial Counsel and the Court repeatedly endeavored to impress the fact upon him and could do no more to explain it. While Applicant's age is a factor to be strongly considered in the abstract in determining if he understood Trial Counsel's advice, he was seventeen years old at the time of the incident and merely two months away from his eighteenth birthday. Applicant never expressed any confusion prior to trial to his attorney or at trial regarding his right to testify at the hearing. Applicant's arguments that he did not fully comprehend every aspect and consequence of his decisions is little more than the same argument rejected by the trial court, redressed for post-conviction relief. Trial Counsel performed within the scope of reasonably effective assistance in advising Applicant of his rights.

Second, Applicant himself repeatedly refused to testify, despite efforts by both Trial Counsel and the trial court to fully appraise him of his right to testify at the Denno hearing. Knowing his rights, Applicant himself chose not to testify, and Trial Counsel could not make him do so.

Third, even if taken as true, Applicant's testimony at the evidentiary hearing does not provide any information to establish that his statement was not voluntarily given. To the contrary, Applicant asserts he knowingly and deliberately gave a statement to law enforcement—he merely asserts that it was a fabrication. Applicant's admitted effort to deceive law enforcement reflects conscious intent to make the statement on his part, however self-destructive the statements may have been, and not any confusion as to whether he had the right to remain silent. Applicant himself admitted to understanding he had the right to remain silent. As such, to whatever extent Applicant's testimony could be relied upon as true, had it been given at the trial Denno hearing would not have changed the outcome of that hearing, such that his confession would have been excluded at trial.

Fourth, the Court does not find credible Applicant's testimony that he was lying to law enforcement during his recorded confession. In a fashion comparable to the descriptions of Applicant's demeanor in the recorded statement as relaxed, nonchalant, and not serious, this Court is struck by Applicant's similar demeanor in the course of his testimony at the evidentiary hearing. Trial Counsel also testified to Applicant's cavalier attitude toward the truth, as evidenced by Applicant's offered strategy that he could deny involvement with the killing as readily as admit to it. Applicant's detached admissions of prior dishonesty do not compel this Court to conclude he was previously dishonest, but only that his testimony at the evidentiary hearing is not to be afforded credible weight. Had Applicant provided the same testimony at the

Denno hearing, this Court can only conclude the self-destruction of his own credibility would have more likely harmed his chances of prevailing upon the motion to suppress.

The Court finds Trial Counsel performed as capably as could be expected given an uncooperative and dishonest client. Even if Trial Counsel had done anything different so as to elicit Applicant's testimony during the Denno hearing, the testimony would not have changed the outcome of the hearing. Accordingly, Applicant has failed to establish either deficiency on the part of Trial Counsel, or that but for the deficiencies alleged there was a reasonable probability of a different outcome at trial. Applicant's request for relief by way of this allegation is **DENIED.**

2. Failure to Adequately Cross-Examine Witness Shaquetta Holmes

The Court finds Applicant has failed to meet his burden of showing Trial Counsel was ineffective in his handling of the witness Shaquetta Holmes. A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony. Rule 801(d)(1), SCRE. "Extrensic 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." Rule 613(b), SCRE. "[I]f a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible." Id.

Trial

At trial, Shaquettia Holmes was called as the State's second witness. (Trial Tr. 121-41). Holmes testified she was present at the Plantersville club with her uncle Lavern Holmes and

cousin Deon Myers, the victim, on March 15, 2011. (Trial Tr. 121-22). Holmes testified right to the point:

> What happened from the incident that happened in the club to my knowledge is whenever my uncle came in the club he did have a big gun, and with him having the gun I was at the bar. With me being at the bar I felt as though I wasn't going to sit there and just let him do nothing stupid. So I went in the bathroom behind him and told him he need to leave him alone and go. So me telling him that, he left, but with him leaving Tamar in the bathroom.

(Trial Tr. 123, ll. 5-13). After clarifying Lavern was armed with large-bore long gun, Holmes continued:

> When I went in the bathroom [the victim] was just against the wall and my uncle was holding the door and with him being behind the door my thing was for him to leave him alone and go or whatever. So me stating that, I was holding Deon then and with me holding him down that's when Tamar came in and I was telling him that they had guns.

(Trial Tr. 124, ll. 9-14). After clarification that the door to the bathroom was open, and the victim was behind the open door in the bathroom, Holmes explained Applicant's appearance:

> Okay, with my uncle leaving out Tamar came in, with him coming in he was saying Deon was good, I was telling Deon no because he didn't have a gun and they had guns and he was like, "Yeah, he good," let him go see what they talking about. He insisted on leaving. With him leaving before he got to the front door, with Tamar leaving out first and before Deon got to the door whatever happened with the gunshot that's what.

(Trial Tr. 125, ll. 17-23). Holmes denied seeing the fatal shot, but only heard it. (Trial Tr. 125, ll. 24-25). Holmes further testified Applicant had been armed with "a little black gun." (Trial Tr. 126, ll. 11-12). Holmes returned to the bathroom after hearing the gunshot. (Trial Tr. 126, ll. 13-14). Applicant was not in the bathroom, and Holmes clarified that Applicant had been the first to exit the restroom, followed by the victim, followed by herself. (Trial Tr. 126, ll. 17-24).

On cross-examination, Trial Counsel walked Holmes through her testified version of events in somewhat clearer fashion: she arrived at the club sometime before 10:30 p.m. alongside Mark and Jonathan Greer. (Trial Tr. 127-28). While at the club, her uncle Laverne

entered the building toting the long gun alongside Cameron Green and quickly moved towards the victim and the restroom; the sight of the gun alarmed those who saw it. (Trial Tr. 128-30). Myers and two women with him retreated into the restroom and Laverne followed. (Trial. Tr. 132-34). Holmes testified she heard Laverne question Myers over threats he supposedly made to Laverne's family; Myers denied any such threats. (Trial Tr. 130-31; Trial Tr. 132-33). Holmes told Laverne to leave Myers alone. (Trial Tr. 132, ll. 2-4). Laverne complied, and departed, leaving Myers, Holmes, and the two women[3] in the restroom when Applicant entered with his own gun. (Trial Tr. 135-36). Holmes recalled that Myers wanted to follow Laverne and talk out the dispute, but Holmes warned him about the guns. (Trial Tr. 136, ll. 11-14). Applicant entered the restroom and indicated all was good; Myers indicated he knew Applicant and Holmes let him exit the restroom. (Trial Tr. 136-37). Myers was shot before he reached the front door. (Trial Tr. 136-37). Trial Counsel inquired if Holmes gave a statement to law enforcement, and she initially denied doing so. (Trial Tr. 138, ll. 6-13). When Trial Counsel pressed her on the subject, Holmes explained she never told any police officer that she knew Applicant or that she saw him with a gun, but rather:

> When I was on the phone with the 911 people all I could think was it was my uncle that shot him and with me screaming that someone else was like he didn't shoot him, it was the other boy and the 911 call the lady was saying that they were on their way or whatever and she was trying to calm me down because, I mean I just couldn't sit there, but ---

(Trial Tr. 138, ll. 17-23). Trial Counsel followed up, and Holmes reaffirmed that she had been screaming that she thought her uncle Laverne shot the victim. (Trial Tr. 138-39).

On redirect examination, Holmes testified she did not know who shot Myers, but had heard others exculpate Laverne and inculpate Applicant. (Trial Tr. 139-40).

[3] Holmes muddied this point in subsequent testimony, indicating the two women departed with Laverne. (Trial Tr. 137, ll. 9-14).

PCR Evidentiary Hearing

At the evidentiary hearing, Trial Counsel testified he and Applicant discussed Applicant's version of what occurred the night of the killing. Applicant admitted to Trial Counsel he was present at the club on the night of the killing, and that he had been in the bathroom with Holmes, two other women, and the victim. Applicant told Trial Counsel that Holmes would be able to confirm that Applicant was not in the restroom at the time of the shooting. Trial Counsel recalled that Holmes gave two statements to law enforcement. Holmes' first statement neither confirmed nor denied Applicant shot the victim. Trial Counsel directed a private investigator in the employ of the public defender's office, F. Jerome Randall, to separately interview Holmes, which occurred on December 11, 2012. Randall reported to Trial Counsel:

> Ms. Holmes states that on the night of the incident at the club in Plantersville she was in the bathroom with the victim Mr. Myers and Tamar Bryant. Ms. Holmes states that Tamar and the victim had a conversation inside the bathroom; however it was not a hostile meeting. She cannot remember what was said exactly. She does remember telling the victim to calm down and just be cool, because she knew the guys did not run up in there for NO reason. She knew or suspected that they all had guns. She knew that Tamar had a gun from being in the bathroom with him. Mr. Myers and Tamar walked out of the bathroom ahead of Ms. Holmes and as soon as she reached the door the shots rang out. She cannot said who did the shooting, she remain inside the restroom until things calm down.

(Applicant's Exhibit #1). Holmes' second statement to law enforcement and the prosecution in March 2013, however, unequivocally confirmed Applicant shot the victim. (Applicant's Exhibit #2). Trial Counsel conveyed the substance of the statements to Applicant and discussed them with him. When asked why he did not confront Holmes with Randall's affidavit, Trial Counsel noted that Holmes did not state that Applicant committed the crime. Trial Counsel additionally noted the affidavit was a synopsis of what Holmes told Randall, and not her own sworn statement. Trial Counsel explained that he would have needed to call Randall as a witness in

order to get the affidavit in for a very small gain, and in the process would have lost the right to the final closing argument.

On cross-examination, Trial Counsel testified that during his March 1, 2013, meeting with Applicant, Applicant indicated he did not wish to call witnesses in his own defense. With respect to Holmes, Applicant opined that he did not want her due to her connections to the victim. On redirect examination, Trial Counsel acknowledged that Holmes testified no ill words were exchanged between Applicant and the victim prior to the shooting.

Applicant testified that Holmes could have testified that Applicant was not present at the club at all. Applicant recalled he told Trial Counsel to cross-examine Holmes and clarify that she did not see him, and that he was not the shooter. Applicant denied ever discussing Holmes' statements with Trial Counsel.

Findings

The Court finds Applicant has failed to meet his burden of showing ineffectiveness. Applicant's claim appears to take two forms: failure to adequately cross-examine Holmes with her prior statements, and failure to elicit from her more favorable testimony. As to Trial Counsel's use of Holmes' first statement to authorities, he did confront Holmes with her initial statements to first responders, which she ultimately admitted, such that he could not have introduced any extrinsic evidence of the first statement. As to Trial Counsel's use of Holmes' statement to the private investigator, Holmes testimony was largely consistent, such that her prior consistent statement would have constituted hearsay. Additionally, Trial Counsel articulated a valid strategic reason to not introduce the statement to the private investigator—it was of limited value to his client and would have cost him the final argument. As to Trial Counsel's use of Holmes' second statement to authorities, the summation provided to Trial

Counsel inculpated his client *more* than Holmes' trial testimony, where she never identified Applicant as the shooter, such that any attempt to bring it in would have doubtlessly harmed Applicant's defense. As to Trial Counsel's failure to elicit more favorable testimony, attorneys cannot choose the facts available to them or make a witness testify in a particular fashion. Holmes testified in a reasonably consistent manner that Applicant was present at the club on the night of the shooting, was armed with a gun, and was in the proximate vicinity of the victim. There is nothing before this Court to suggest she was ever a potential alibi witness. Assuming for the sake of argument that Holmes repeatedly fabricated a story and could today provide Applicant an alibi, she did not testify at the evidentiary hearing as would be necessary for Applicant to meet his burden of proving so. Finally, it is difficult to discern how *any* change in Holmes testimony, realistic or fantastic, could have changed the outcome at trial where the other evidence which would have been unaffected conclusively pointed to Applicant's guilt: Cameron Green testified Applicant confessed to shooting Myers while being assailed by Lavern, Applicant himself confessed to law enforcement, and the bullet recovered from the victim was of the same caliber as the revolver identified by Applicant as the one he used in the killing. For all of these reasons, the Court finds Applicant has failed to demonstrate any deficiency in Trial Counsel's handling of Holmes' as a witness, or any reasonable possibility that but for the deficiencies alleged the outcome at trial would have been different, and his request for relief by way of this allegation is **DENIED.**

3. Failure to Object to Malice Instruction

The Court finds Applicant cannot show ineffectiveness on the part of Trial Counsel for failing to object to the exclusion of the "general permissive inference instruction" from the trial court's jury instructions regarding malice. In State v. Elmore, 279 S.C. 417, 803 S.E.2d 781

(1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 69 n. 5, 406 S.E.2d 315, 328 n. 5 (1991), the Supreme Court of South Carolina held that the trial court's instruction on malice as it related to the use of a deadly weapon constituted a mandatory presumption, and set forth a jury charge consistent with the Due Process Clause for trial courts to utilize in the future:

> The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would simply [be] an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Elmore, 279 S.C. at 421, 308 S.E.2d at 784. The Elmore Court firmly advised the bench "that hereafter only slight deviations from this charge will be tolerated." Id.

The Supreme Court returned to the inference of malice from the use of a deadly weapon more than 25 years later in State v. Belcher, and held that the first sentence of the above charge could not be instructed to juries where the record contained evidence to reduce, excuse, mitigate, or justify a homicide or assault and battery with intent to kill. 385 S.C. 597, 685 S.E.2d 802 (2009). The Court distinguished the remainder of the charge as the "general permissive inference instruction," and noted that it remained valid. Id., 385 S.C. at 612, n. 9, 685 S.E.2d at 810, n. 9.

A few years later, in Gibson v. State, the Supreme Court reversed a denial of post-conviction relief where the trial court charged the inference of malice from the use of a deadly weapon, but failed to include the remainder of the Elmore charge. 416 S.C. 260, 785 S.E.2d 121 (2016). Gibson was decided in simple fashion, without briefing or oral arguments, based on the very reasonable observation that total omission of the general permissive inference language was no "slight deviation" from the Elmore charge, in clear disregard for Elmore's admonition.

At trial, the trial court provided a standard instruction on malice which concluded that malice "may be inferred from conduct showing a total disregard for human life." (Trial Tr. 316-17). The trial court did not instruct the jury on the inference of malice from the use of a deadly weapon.

At the evidentiary hearing, Trial Counsel could not think of any reason to request any further jury instructions regarding the inference of malice.

The Court finds Applicant cannot show deficiency on the part of Trial Counsel by way of this allegation. The general permissive inference of malice portion of the Elmore is only necessary and required as part of a complete instruction on the inference of malice from the use of a deadly weapon,[4] and there had never been any requirement to charge the language in a stand-alone fashion. The language of the Elmore charge is specifically tailored to deal with the perceived and real dangers in instructing the jury that inference may be inferred *from the use of a deadly weapon*, and represents a solution to the then-recurring problem of jury instructions which provided for burden-shifting presumptions in violation of the United States Constitution. The second part of the Elmore charge serves as a cautionary restraint on the first part, and is of little instructional value standing alone. Standing alone, the instruction demanded would be confusing. Additionally, the Court notes that the trial court's charge appears comparable to that approved of in State v. Cottrell, which similarly only instructed "that malice could be inferred from conduct showing a total disregard for human life." 421 S.C. 622, 643-44, 809 S.E.2d 423, 434-35 (2017). Furthermore, even if the Supreme Court subsequently holds that the general permissive inference instruction was required in every case involving malice aforethought, the absence of any clear precedent to that effect at this time and at the time of trial provides that

[4] Though not terribly relevant to this Court's analysis, it bears acknowledgment that the Supreme Court of South Carolina has since consigned the "inference of malice from the use of a deadly weapon" charge to the dustbin of history. State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

Counsel could not have possibly known to demand the language, or object to its exclusion. For all of these reasons, Applicant cannot show any deficiency on the part of Counsel by way of this allegation.

As to prejudice, even if the charge were required, the Court cannot conceive of how Applicant was prejudiced by the absence of the general permissive inference instruction. In the absence of the implication of malice from the use of a deadly weapon, the instruction demanded says little more than what is already instructed to the jury: that they may use evidence and give it such weight as they determine it should receive. (Tr. 309, ll. 18-22). The Court finds there is no reasonable probability the outcome of trial would have been different if only Counsel had requested, and the trial court had charged the jury with a naked general permissive inference instruction. Thus, Applicant cannot meet his burden of showing Strickland prejudice.

For all of these reasons, Applicant's request for relief by way of this allegation is **DENIED.**

4. Failure to Object to Truth-Seeking Instruction

The Court finds Applicant has failed to meet his burden of showing Trial Counsel was ineffective in failing to object to the trial court's opening remarks to the jury regarding the "search for the truth." "Jury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they 'run the risk of unconstitutionally shifting the burden of proof to a defendant.'" State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998)); see also State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (notwithstanding lack of preservation of issue, advising trial courts to not instruct any jury that their duty is to return a verdict that is "just" or "fair" to all parties); State v. Beaty, 423 S.C. 26, 32-34, 813 S.E.2d 502, 505-06 (2018)

(instructing courts not to use "search for the truth" language in opening remarks to the jury, but finding no prejudice from the error). "Truth seeking" instructions may be entirely harmless where they are provided in a context distinct from the burden of proof, such as instructions on determining witness credibility. Id., 343 S.C. at 28-29, 538 S.E.2d at 252-23. "[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." Id., 343 S.C. at 27, 538 S.E.2d at 251 (citing State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)).

At the outset of the trial, Judge Hyman addressed the jury:

> It seems that every time we turn on the TV there is a trial going on of some sort of some sort of TV show or movie, and every one of those trials seem to be the most riveting and exciting things that you can imagine. In reality that's not necessarily how a trial really goes. *The search for the truth is often tedious, repetitive and slow* and that's as it should be for we have here at stake this, this day, this week is not only the right of the State to punish those that it feels has or have violated the laws of this state, but also we have the liberty of this Defendant at stake and he has plead not guilty to the indictment that I presented to you earlier, and again, I want to make sure that you understand that this indictment is not evidence in this case, it is just the document by which he is charged.

(Trial Tr. 74-75) (emphasis added). Later in the opening remarks, Judge Hyman discussed judging witness credibility with the jury:

> At the end of the case you and you alone will determine or say what happened, what transpired during this event. You as jurors will judge the credibility or believability of every witness who testifies in this trial. In doing so you can apply just about any test that you in your experience have determined to be a fair and reasonable and responsible way of *determining what the truth is.*

(Trial Tr. 76, ll. 1-7) (emphasis added). The trial court's ultimate instructions charged the jury, repeatedly, that Applicant was presumed innocent unless and until the State proved his guilt beyond a reasonable doubt. (Trial Tr. 310-11; Trial Tr. 312, ll. 15-17; Trial Tr. 315, ll. 2-9; Trial Tr. 316, ll. 3-6; Trial Tr. 317-18; Trial Tr. 319, ll. 21-22).

At the evidentiary hearing, Trial Counsel simply remarked that he did not object to Judge Hyman's remarks about the search for truth, and that the trial was before the Supreme Court's most recent admonition against using truth-seeking language in remarks to the jury.

The Court finds Applicant has failed to show any deficiency on the part of Trial Counsel or any prejudice from the deficiency alleged. Judge Hyman's remarks did not impress upon the jury any impression that their duty was to seek the truth, but rather (1) explained that real trials were much more time intensive than those reflected on television, and (2) that jurors had wide discretion in making credibility determinations. The "truth seeking" language employed by Judge Hyman appears to be precisely of the kind held to be acceptable in Aleksey, and substantially less concerning than the comments addressed in Beaty, which affirmatively described a trial as "a search for the truth in an effort to make sure that justice is done." Beaty, 423 S.C. at 32, 813 S.E.2d at 505. If the comments at issue in Beaty were not sufficient to prejudice the defendant, the comments at issue here absolutely do not prejudice Applicant. Accordingly, the Court finds no deficiency on the part of Trial Counsel by way of this allegation, nor prejudice therefrom, and Applicant's request for relief is **DENIED.**

B. Ineffective Assistance of Appellate Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Rather, appellate counsel has a professional duty to choose among potential issues according to

their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .")).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

At the evidentiary hearing, Applicant testified he believed Appellate Counsel should have raised the voluntariness of his statement to law enforcement and the denial of his motion to suppress under Jackson v. Denno.

Appellate Counsel testified he recognized the Denno issue and watched the videotaped statement. Appellate Counsel described Applicant as flat in affect, and not serious in his demeanor. Appellate Counsel also noted Applicant was mirandized on the recording. Appellate Counsel described the statement as a "problem," but opined he did not believe he could prevail on the issue given the record available. Appellate Counsel opined the denial of the Denno

motion could have been raised as a companion issue to the denial of Trial Counsel's motion to have Applicant's mental health evaluated, but would not have meaningfully bettered his argument.

The Court finds Applicant has failed to meet his burden of showing ineffectiveness on the part of Appellate Counsel. The issue insisted upon by Applicant is not clearly superior to that raised by Appellate Counsel. Appellate Counsel did not overlook the issue, but actively reviewed the evidence, considered the possibility of raising the Denno hearing on appeal, and opted instead to pursue the denial of the request for a mental health evaluation as the strongest issue available. As this Court has similarly found there is nothing in the record to support a finding that Applicant's statement was not voluntarily given, so too does this Court agree in Appellate Counsel's judgment that raising the issue on appeal would not have borne fruit. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

[*Conclusion and signature on following page*]

III. 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 notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 5 day of December, 2019.

WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit

Marion, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Tamar Bryant, #354710, Applicant, v. State of South Carolina, Respondent.	2015-CP-22-1113 MOTION PURSUANT TO RULE 59(a) & (e), SCRCP

Pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, Applicant would move before this Court for relief as follows.

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on December 9, 2015. Respondent submitted a Return on February 5, 2016.

On March 25, 2019, an evidentiary hearing was convened at the Georgetown County Judicial Center in front of the Honorable William H. Seals, Jr. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Johnny E. James, Jr., Assistant Attorney General. At the evidentiary hearing, Applicant proceeded on the allegations set forth below, which were filed via Amendment dated August 27, 2018:

> In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial and appeal. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel for failure to properly advise Applicant regarding and utilize Applicant as a witness at the Jackson v. Denno hearing.

2. Ineffective assistance of trial counsel for the handling of the witness, Shaquetta Holmes.

3. Ineffective assistance of counsel for failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016). (317)

4. Ineffective assistance of counsel for failure to enter an objection or exception to the Court's comments, specifically, but not limited to comments regarding searching for the truth to the jury.

5. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, specifically, but not limited to:

    a. The admissibility of Applicant's interrogation / confession.

6. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

Following the evidentiary hearing, the Court requested Respondent submit a proposed Order. Following the submission of a proposed Order, an Order of Dismissal was signed on December 5, 2019 and filed on December 20, 2019. A copy of this Order was received by undersigned on January 17, 2020, from which this Motion is timely filed.

ARGUMENT

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

Applicant would further move the Court to reconsider the standing Order and findings therein. Specifically, Applicant would ask the Court to reconsider the following issues:

Ineffective assistance of counsel for failure to enter an objection or exception to the jury instruction on malice for lacking the general permissive inference instruction. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016).

Applicant submits that it is reversible error to find that counsel was not deficient for failing to object when the court failed to instruct the juror properly on inferred malice and to find that Applicant was not prejudiced as a result. Interestingly, the standing Order cites to case law that supports a finding of deficiency and prejudice. Applicant submits that the absence of an instruction on the inference stemming from the use of a deadly weapon is an erroneous basis on which to deny relief.

An inferred malice instruction has two components, the charge detailing the circumstances under which malice may be inferred and the "the general permissive inference instruction: 'If facts are proven beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). A defense attorney's failure to object to the lack of a general permissive inference instruction, where it is warranted, constitutes ineffective assistance of counsel. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016).

In Belcher, the South Carolina Supreme Court concluded that the inference of malice form the use of a deadly weapon is a "half-truth" because "[o]ther facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of [malice's] component parts" which "include the absence of justification, excuse and

mitigation." 385 S.C. at 609-10, 685 S.E.2d at 808. Similarly, the blanket instruction that malice can be inferred from conduct that shows a total disregard for human life, as was instructed in the instant case, conveys a half-truth because there are circumstances where an individual would act in such a way with justification, excuse or mitigation. Accordingly, the permissive inference is required when a "total disregard" inference is given, just as it is when the "deadly weapon" inference charge is given.

While Belcher deals specifically with a charge that permits the inference of malice from the use of a deadly weapon, the South Carolina Supreme Court has stated that all inferences should be accompanied by the general permissive inference instruction. See State v. Mattison, 276 S.C. 235, 238 277 S.E.2d 598, 600 (1981) ("[W]e strongly suggest to the Trial Bench that a more appropriate instruction on implied malice would deal with the evidentiary nature of the presumption and that the implication does not require the jury to infer malice but only permits it"), overruled on other grounds by Belcher.

Additionally, the proper standard for prejudice has not been applied as the Court has failed to consider: "whether the erroneous malice instruction contributed to the jury's verdict based on all the evidence presented to the jury." Gibson at 265, 786 S.E.2d at 265. "The Court must weigh the significance of the presumption to the jury against the other evidence of malice considered by the jury without the erroneous malice charge." Id.

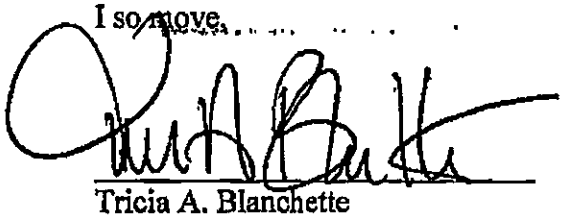
Therefore, Applicant would ask the Court to reconsider the findings denying relief on the matter of the inferred malice instruction.

Ineffective assistance of counsel for failure to enter an objection or exception to the Court's comments, specifically, but not limited to comments regarding searching for the truth to the jury.

Applicant submits that the standing Order acknowledges the improper comments made by the court but erroneously excuses counsel's failure to object and ensure that Applicant received a fair trial. As the Order notes, counsel provided no explanation for his failure, so Applicant would urge the Court to reconsider the Order, which creates an explanation for counsel's prejducial error.

In conclusion, Applicant would request that the Court review the full record, reconsider the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP.

I so move.



Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070

January 23, 2020

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP- 22-1113

Tamar Bryant, # 354710
PLAINTIFF(S)

State of South Carolina
DEFENDANT(S)

Submitted by: William H. Seals, Jr.

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **STAYED DUE TO BANKRUPTCY**

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

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: See below.

FILED
2022 MAR -9 PM 3:50
GEORGETOWN COUNTY
BARBARA Y. WHITE
CLERK OF COURT

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

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

Circuit Court Judge | 2157 Judge Code | 3/6/2020 Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This matter comes before the Court on Applicant's Motion Pursuant to Rule 59(a) & (e). After careful and deliberate reconsideration of the arguments made at the evidentiary hearing, all evidence presented, the Court's Order denying and dismissing the application with prejudice, Applicant's Motion Pursuant to Rule 59(a) & (e), and all case law, the Court is hereby denying Applicant's Motion Pursuant to Rule 59 (a) & (e).