

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Kristi F. Curtis, Circuit Court Judge

Appellate Case No.: 2020-001398

Carnail M. Graham #304093,..... Petitioner,

vs.

State of South Carolina, ...Respondent.

APPENDIX

Tommy A. Thomas, Esq.
Attorney for Petitioner
7588 Woodrow Street
P.O. Box 88
Irmo, S.C. 29063
(803) 732-5507

Chelsey F. Marto, Esq.
Office of the Attorney General
Attorney for Respondent
P.O. Box 11549
Columbia, SC 29211-1549

RECEIVED

May 03 2021

S.C. SUPREME COURT

INDEX

Trial Transcript Volume I - dated October 13, 2014.....	1
Trial Transcript Volume II – dated October 14, 2014	135
PCR Transcript dated November 26, 2018	1057
PCR Application dated August 10, 2017	1139
Amendment to PCR Application dated November 29, 2018.....	1145
Return and Motion for a More Definite Statement	1148
Sentencing Sheet, Indictment, Warrant	1153
Order of Dismissal	1157
Notice of Appeal	1189

1 well, damn, two people are home, let's come back
2 another time. They had something for those people,
3 they had something for them. One of them had a .357,
4 and the other one had a handgun. Don't be fooled.

5 When you roll up to a house at 3 o'clock in the
6 morning with two cars home, the lights out, you are
7 going in to kill and take whatever's in that house.
8 They knew those people were home. That's why they went
9 in armed.

10 Folks, we have burglaries all the time, people go
11 in unarmed, nobody's home, take their stuff and leave.
12 I know, I've come home, my house been broke in, TV
13 gone. So I know something about that, I know that goes
14 on.

15 That's not the case here. They didn't go in when
16 nobody was home, they didn't go in unarmed for a
17 television. They went in to kill. They went in with

18 loaded weapons. They knew those people were home, they
19 knew it. They knew she was home and they knew he was
20 home. And they went in at 3 o'clock to catch them off
21 guard, to get the jump on them. They wanted to get in
22 there and immediately trap those people so they
23 couldn't get away.

24 Now, how do you know that? Look at the setup of
25 this mobile home. They knew these people lived here,

1 okay. They knew enough to know this was Splurge's room
2 because they came in through the front door. Once they
3 went in through this front door, there is no denying
4 these people were trapped down at the end of this
5 trailer. There is no denying you can't get out without
6 passing this door from that bedroom. They went in with
7 two guns through the front door to trap those people so
8 they couldn't get out. This was planned out.

9 Now, they want you to believe, oh, well, attempted
10 robbery, burglary, you can't find them, that's not what
11 kind of case this is. I'm here to tell you, you're
12 damn right that ain't what kind of case this is. Those
13 people went in there with loaded weapons, and they went
14 through the front door and trapped those people off.
15 They didn't go in there to threaten, they went in there
16 to kill, and they did, and they did.

17 Now, what caught them off guard was she was on the
18 couch. I'm sure they assumed everybody was going to be
19 back in that bedroom. So she jumps up, she's shot.
20 Once they bust through that door and they shoot her,
21 the alarm goes off. Splurge is up, he immediately
22 starts shooting down from the bedroom, from this
23 bedroom right here (indicating), bam, bam, bam.

24 Now, there's something else that is at the least
25 disturbing. They want to tell you, well, Splurge was

1 in there firing his gun off, he shot five shots. He
2 had a gun in his house, he was shooting, that's all
3 they want to tell you. I'm here to tell y'all, if
4 somebody breaks in your house at 3 o'clock in the
5 morning and you hear, bam, bam, bam, grab a weapon.
6 That's what I'm here to tell you. This saved his life.
7 This gun firing back saved his life.

8 I'm here to tell you he was well within his
9 rights. If somebody breaks in your house at 3 o'clock
10 in the morning, you hear the alarm, the door is busted
11 in, and you hear bam, bam, bam, my suggestion is if you
12 have a gun, shoot back. He was well within his rights
13 to defend his home and his self.

14 They are so busy trying to make him out the
15 criminal, they want to convince you that that's not
16 okay. They want to convince you that he's the bad guy
17 for firing back. That's not the case, folks. You have

18 a right when somebody such as Dubba and Cutty break
19 into your house armed, I'm here to tell you, fire back.
20 You have a well within your right to fire back.

21 And that's something else that's disturbing, to
22 say the least. They want to convince you that Splurge
23 shot her. I don't know, they said it in openings, now
24 they have worked up some way to tell you that in
25 closing. The only problem with that is that is

1 absolutely impossible, absolutely impossible.

2 And here's why. These are gun fragments we
3 collected from the scene. Now, I don't know how many
4 people know what about guns, but Agent Green told you
5 every gun leaves a specific marking. You can have two
6 Tauruses, .360s, .357s, .45s, .40, same caliber, same
7 manufacturer. Every gun leaves a different marking on
8 the bullet that it shoots. It's like a fingerprint,
9 every gun makes their own markings on that bullet.

10 What he told you was this bullet, Evidence 70,
11 that came from the autopsy, was the only bullet that
12 was not fired from this gun, the only bullet that was
13 not fired from this gun.

14 You have two fragments here, two, three, four,
15 five. Here are the five bullets that were fired from
16 this weapon. This was the only one that did not match
17 the weapon, this one. This is the only bullet that was
18 not fired from a gun within that house. So please put
19 your mind to rest, he did not shoot her, somebody else
20 did.

21 And ask yourself, why are they trying to tell me
22 that, why? They are trying to trick you to think that
23 Splurge shot her. Splurge is a drug dealer, now he's
24 the killer. There's nothing to that. Put your mind at
25 ease. If you need to re-listen to that testimony of

1 Agent Green, re-listen to it. Because I'm telling you
2 he said it two or three times, this bullet did not come
3 from this gun.

4 That means somebody brought a gun into the house
5 and shot it. And here is the bullet that was
6 recovered. So put your mind at ease, somebody from
7 outside that house brought a weapon in and shot her.

8 Now, the question is, who shot her? Here she is,
9 this is the woman. They don't want to show you this
10 picture. Here she is, killed, no shoes on, no socks.
11 Who loaded up that van with Keir Johnson, with Bootsie,
12 who was it?

13 Well, you heard from Howard Parker. He told you
14 he had no pending charges then and none now. What did
15 he tell you? He told you he saw three people in that
16 van, Bootsie and, oh, Cutty and a guy he didn't know, a
17 third male he couldn't see. So we already know we got

18 the brown van that showed up and Cutty in the van and a
19 third, unidentified male.

20 Well, who is that third unidentified male? Well,
21 the person to tell you would be Keir Johnson, Bootsie.
22 And he told you who was in that van, Dubba, him and
23 Cutty. He told you who went into that house, Dubba and
24 Cutty.

25 Now, like all people when they do something or

1 something's going on, they like to talk about it. So
2 how else do we know that Dubba went in that house? You
3 heard from two people, Sedieka McClam and Spain,
4 Kachief Spain. Now, they want to tell you, oh, Sedieka
5 McClam, he found out through the discovery process.

6 Well, folks, there was no tattoos or physical
7 description in the discovery. So how did he know about
8 that. The only way he could have known about that was
9 to see them on Dubba's arms. That's how he knows. He
10 wants you to believe this discovery crap, and that's
11 what it is, crap.

12 Sedieka McClam saw Dubba in December. Dubba had
13 not been arrested, he was not arrested until months
14 later. And he saw those tattoos, and he was able to
15 identify him. There was nothing in that discovery
16 about tattoos, and he knew about it.

17 Spain told you, I overheard him talking to Ace.

18 What he tell Ace? They don't have nothing on me, they
19 don't have nothing on me, but, yeah, I shot her, in
20 there talking to his cousin in the jail.

21 Now, I would love to have somebody other than
22 Sedieka McClam and Spain. But unfortunately, people
23 hang around people they have something in common with.
24 Dubba, Cutty, Bootsie, Howard, Terry Bease, these
25 people hang around together, because they all have

1 something in common. So obviously to collect evidence
2 and to collect information, you have to get it from the
3 people that are around these people.

4 Now, they're telling you these people have made
5 some sort of deal. Y'all saw them, they came out in an
6 orange suit cuffed up, and they walked out of here in a
7 orange suit cuffed up. Did they look like they were
8 getting some wonderful deal to you, having their feet
9 and their hands shackled, shuffling in here and
10 shuffling back out?

11 They wanted to tell you that's a great deal for
12 these people, what a great deal they are getting. You
13 didn't see when they got done them walk out that door,
14 you saw them walk right back into lock-up. That's what
15 you saw.

16 Now, Mr. Frederick got up here and told you, my
17 client was threatened. And Christine Snyder from the

18 jail came up here and told you he was threatened.
19 Well, I came up here and asked her, where did you get
20 that information? Inmates, that's where I get my
21 information.

22 So hold up, hold up, hold up. So now what an
23 inmate says is true. If an inmate tells Ms. Snyder
24 that he's being threatened, it must be true. But don't
25 believe these other inmates, they are lying. Just

1 believe the inmate that says my guy was being
2 threatened.

3 I want you to think about that, too. Who did you
4 hear that information from, who, who did you hear it
5 from? You didn't hear it from the inmate. You heard
6 it from Christine Snyder who said she received that
7 information. Who did she receive it from, what is he
8 in jail for, what is his prior record, what does he
9 have to gain by telling Ms. Snyder that?

10 Not even that, what was he threatened about? We
11 have no idea. What was he threatened about at the
12 jail? We don't know. We're given this limited
13 information that he was threatened. We don't know who
14 told her the information.

15 MR. FREDERICK: Judge, I'm not sure she can object
16 to that and then argue it in her closing argument.

17 THE COURT: I allowed you to make inferences and
18 comments, Mr. Frederick. I'm going to allow the same
19 leeway to the State.

20 MR. FREDERICK: Yes, sir.

21 THE COURT: Thank you. You may continue, ma'am.

22 MS. LIVESAY: Thank you, Your Honor. We don't
23 know. We don't know, do we. We were given this little
24 bit of information, and we don't know anything else
25 about it. How convenient is that, how convenient is it

1 for that. I would love to have brought you an
2 investigator to come up here and say, yeah, I received
3 information that Carnail Graham, Dubba, confessed at
4 the jail and said he did it. But that's not what I
5 did. Here is the guy who says that, here.

6 MR. FREDERICK: Got to object to facts not in
7 evidence, judge. That is not a reasonable inference to
8 be drawn from the testimony.

9 THE COURT: I appreciate that. Solicitor, you'll
10 confine yourself to the record. Thank you. Continue
11 on.

12 MS. LIVESAY: You heard from the people who gave
13 us that information. That's who you heard from,
14 Sedieka McClam and Spain. Now, they keep telling you
15 about a guy named Little Manzy, Little Manzy, 110,
16 throwing out all these street names. I could probably
17 name 50 off the top of my head, street names, Jeezie,

18 Giz, Murder, Big Bad, there's probably a thousand of
19 them in Conway, a thousand.

20 Now, they want you to believe that Little Manzy is
21 the killer. First, first, you got to get past Splurge
22 shot her. They first wanted to get up here and tell
23 you Splurge shot her. But if you don't believe that,
24 if you don't believe Splurge shot her, then now we're
25 going with my guy wasn't even there, Little Manzy shot

1 her. That's what -- that's what -- if you don't
2 believe that Splurge shot her, we're going with game
3 plan number two, and that's that Little Manzy shot her.
4 The problem with that is we didn't hear one shred
5 of evidence that put Little Manzy in that van, not one
6 witness. Not Howard Parker, not Keir Johnson, not one
7 witness said they even saw Little Manzy that night.

8 There is not one shred of evidence that brings up his
9 name other than Mr. Frederick and David Canty. There
10 wasn't one witness that was out that entire night that
11 ever saw a Little Manzy, nobody. Nobody saw him.

12 And now, they want to come up here and tell you
13 Little Manzy's the shooter, and we don't have one
14 witness that saw him in the van or even saw him out
15 that night, period. Don't believe that. That is them
16 trying to trick you. There is not one shred of
17 evidence. I want you to think back from every witness.

18 There is not one shred of evidence that he was in that
19 van, none.

20 Now, the second thing they want to tell you is the
21 phone records, the phone records, why -- why my guy was
22 not there with the phone records. That's what both of
23 them are saying. Well, that is a great argument, it
24 really is.

25 The only problem with that argument is, one, Cutty

1 had two phones, he had two phones. Keir Johnson told.
2 you that, and Keir had two phones. And not only do we
3 know that Cutty had two phones, but we know that he
4 wasn't using that 855 number.

5 Now, how do we know that? For one, Keir Johnson
6 told us, yes, I never heard from Cutty. Yes, his
7 number's on the records, but I never heard from him.
8 Those were all the calls leading up. Then, I brought
9 the guy in, Terry Bease, AKA Little Papi, slash, Butta
10 One. He was the call at 3:18. Now, he was friends
11 with these people, he told you that. I'm friends with
12 these people, I been friends with them a long time, and
13 I'm a drug dealer.

14 I mean, he is up here telling you, I'm a drug
15 dealer and I know these people. But what he also told
16 you was, yeah, that's my number at 3:18, that was the
17 call, I see that on the phone records. But I never
18 talked to Cutty. Whoever had that phone was not Cutty,
19 he was not on the other line.

20 Now, these are his friends. If he wanted to help
21 them out, he could have. He could have walked in here
22 and said, yes, that is my number, that is Cutty's
23 number and I talked to Cutty on the other end of the
24 line. That was Cutty I talked to that night. He would
25 have had since 2012 to get that story straight.

1 These boys have been sitting in there, I think
2 David Canty said, waiting for a trial 900 days. Well,
3 you've had 900 days to tell Lil Papi to come in here
4 and say that was you on the other end of the line. But
5 that's not what he told you. Keir Johnson told you, I
6 never talked to him, the guy at 3:18, the next phone
7 call. Let's get it straight, let's talk to the people
8 that -- that was talking to that 855 number.

9 That's the evidence. Who was that person? We
10 don't know. But what we do know is it was not Thomas
11 Booker James, it was not Cutty. I'm here to tell you
12 them boys knew they were going to commit a murder.
13 They were planning, they were loading that gun, it was
14 a revolver, bullet by bullet, planning, plotting,
15 thinking.

16 I can guarantee you they were not dumb enough to
17 take their phones to Brown Swamp. I can tell you,

18 Cutty did not take that phone with him, and we know it
19 because everybody that talked to that phone number says
20 it was not him.

21 Dubba's phone was dead, or at least one of them
22 was dead from 2:30 until six in the morning. They were
23 thinking. That's why these -- that's why these people
24 have two phones, they are thinking all the time. They
25 are planning all the time, and these boys were as well.

1 They had two phones. Cutty did not take that phone out
2 there with him and neither did Dubba.

3 The only one that took and was caught with both
4 his phones and, for some reason, drove the van out
5 there, the same van he uses everyday, was Bootsie, the
6 one that was in special ed when he was a kid. He the
7 only one that got caught with both of his phones on him
8 and drove the van out of there that he drives all the
9 time. He was the only one.

10 These two boys were too smart for that. No, they
11 wanted to tell you when they got up in here in
12 openings, they wanted to tell you, oh, yeah, and you're
13 going to talk to Keir Johnson, guess what, his street
14 name is Bootsie and Splurge, and you're going to hear
15 about 110 and Little Manzy. The two people they left
16 out, the two people they left out was this boy here,
17 his name is Cutty. They didn't want to tell you that

18 in opening. Everybody is a piece of crap with a street
19 name. What they didn't tell you is, oh, this one right
20 here is called Cutty.

21 Something else Mr. Frederick told you in opening,
22 yeah, and there was two Crips in the car. That's what
23 he told you, two Crips in the car with Bootsie. Well,
24 what he didn't tell you was, you're right, you're right
25 about that, there was a Crip in the car. And guess who

1 it was, this one right here. You notice he didn't tell
2 you that in opening. He was so busy up there trashing
3 Splurge, he forgot to tell you, by the way, my guy's
4 name is Cutty and, by the way, he's in the Crips. He
5 didn't tell you that.

6 And when Mr. Canty was up here so flustered that
7 his guy had been charged with anything, he forgot to
8 tell you, oh, yeah, Lil Bootsie, he's a piece of trash,
9 Splurge is a piece of trash, this guy's name Cutty,
10 he's a Crip. And by the way, their names are tattooed
11 on my client's arm. Bootsie's name is tattooed on my
12 client's arm. He's such a piece of crap, such a piece
13 of trash, he's a liar, but yet his name is tattooed on
14 my guy's arm.

15 And guess who else's name is up there? Oh, Cutty,
16 his name is on there too, his street name is up there.
17 He didn't tell you that. He didn't tell you that. And
18 that's key information.

19 Because here's the deal, there are 44 gangs in
20 Conway, 44. Bootsie is extremely close to these two
21 boys. This boy has his name tattooed on his arm.
22 Think about that, think about how many men you see
23 walking around with another man's name tattooed on
24 their arm. That is a close relationship, that is a
25 close bond.

1 If you're going to break into a house and kill
2 somebody, you are going to take the people that are
3 close to you. You're not going to pick up some random
4 guy, you are going to take somebody that you're close
5 to that you can trust is going to drop you off and be
6 right there to pick you back up after it's over with.
7 These boys were close.

8 They want to tell you that Bootsie wants to tell a
9 lie. Bootsie could have told any two names. If he
10 wanted to tell you Little Manzy, he could. If he
11 wanted to tell you 110, he could. These boys are his
12 friends. He could have told you two people that he had
13 no relationship to, or two people that he didn't like,
14 or two people anything. He could have told you
15 anybody, but he didn't. He told you these two people.

16 He has no reason to lie on these people. They are
17 all friends, and they have been friends a long time.

18 He's here telling on these people because it's the
19 truth. Howard saw Cutty get in that car. The three of
20 them rode out there with their weapons at 3 o'clock on
21 a Tuesday night. That's what they're thinking about,
22 that's what they're worried about.

23 And they shot a innocent girl. And then when they
24 are ultimately arrested, Dubba is out there in the
25 jail, they ain't got nothing on me, they ain't got

1 nothing on me. Out there telling people that,
2 bragging, yeah, I shot her, but look at this discovery,
3 they ain't got nothing on me.

4 Folks, he was out there telling that because he
5 knew what happened. The one thing they brought up,
6 there's only three people, three people that know what
7 happened in that room, three people. Because they were
8 the only ones in the room when she got shot. Dubba,
9 Cutty and Keia. That victim and those two boys are the
10 only ones that know what happened.

11 Dubba was the one that knew she jumped up off that
12 couch, and he knows that he shot her. That's why he
13 told that guy that. He's the only one that would know
14 that. He didn't say Cutty shot her, he didn't say
15 Little Manzy shot her, he didn't say any of that. He
16 said she jumped up and I saw her, and she saw me and I
17 shot her.

18 And there's something even worse than that. He
19 knew he shot her, he knew he shot her. And instead of
20 backing out of that house saying, oh, my God, I've made
21 a terrible mistake, oh, my God, he goes to the bedroom
22 down the hall and starts looking through it. This
23 shooting her came no shock to him. It didn't shock his
24 conscience, it didn't veer him away from the goal while
25 they were there.

1 Look at this room. This is State's Evidence No.
2 19, look at it, bedside table turned over, drawers all
3 out of it. Shooting her was merely a step to get to
4 what they wanted, which was whatever drugs and money
5 they could find in that house.

6 They knew they shot her. Immediately they could
7 have backed out of that house, but they didn't. And
8 I'm here to tell you they didn't because that didn't
9 come as a shock to them. They were ready for that to
10 happen. They shot her and kept moving through that
11 house, looking for whatever it was they wanted, drugs,
12 money, guns, whatever it is they wanted.

13 They want to tell you everybody in here has got a
14 reason to lie, everybody. If these people had a reason
15 to lie, they could have blamed it on anybody. But they
16 didn't. Ironically, they blamed it on the same guy
17 that Howard Parker saw out that night. Ironically,

18 they blamed it on that same guy that's out at the jail
19 bragging that we ain't got nothing on him and that he
20 shot that girl. Bootsie had no reason to lie.

21 They want to tell you that he's scared of a Crip,
22 there are Crips in the car. This guy is a Crip. If he
23 was going to blame it on somebody, it wouldn't be
24 somebody in the Crip that is a close friend of his. He
25 came up here and told you the truth.

1 There's not one shred of evidence that points to
2 anybody else. And they want to get up here and tell
3 you that I took the bait, I took the bait. I'm the
4 only one that believes this horrendous story, I'm the
5 only one that's listening to these people. That's what
6 Mr. Canty wants to tell you.

7 Heather von Herrmann didn't fall for it, nu-uh.
8 The guy that had it after me, or after Heather, he
9 didn't fall for it. But yet here we are. Here we are.

10 Heather von Herrmann dismissed some cases against
11 Bootsie, and she told you why. But the one she didn't
12 dismiss was the murder case. She has discretion to
13 dismiss it, to plead it, to charge it with anything she
14 wants to. She has that power. She told you that
15 sitting from this stand right here. She's not only a
16 witness, she's a attorney for our office at one time
17 and still a lawyer. She told you, these are the

18 reasons why I dismissed it, but what I didn't dismiss
19 was that murder case.

20 Now, he wants you to believe, oh, she didn't think
21 anything of it, she didn't think anything of it. Well,
22 she did not dismiss that case, folks, I'm here to tell
23 you. The ones she thought there was nothing to she
24 dismissed. She had the authority and she did it. But
25 the one she did not dismiss was that murder case.

1 And they want to tell you, well, he wasn't charged
2 with filing a false police report. That's what --
3 that's what Mr. Canty came up here and told you. Did
4 you notice that, did you notice he wasn't charged with
5 filing a false police report? I got some news for you
6 folks. These two boys back here, right here, you're
7 going to get an indictment from her, that's what you're
8 going to get, whether or not they are guilty.

9 And guess what, you are not going to get a charge
10 for littering. They threw them guns out of the car,
11 didn't they throw those guns out of the car? But we
12 didn't charge them with littering. Didn't they get out
13 at Tiffany Oliver's house, but we didn't charge them
14 for trespassing. Do not fall for such ridiculous
15 nonsense of he wasn't charged with filing a false
16 police report.

17 He is carrying a murder charge, folks. They want
18 to get up here and tinker with a filing a false police
19 report on a man that is charged with murder. We also
20 didn't charge them with littering, we also didn't
21 charge them with trespassing. Think about that. When
22 they're up here telling you that kind of stuff, think
23 about it, it's ridiculous. The man is charged with
24 murder. These two guys are charged with murder.

25 And I'm not putting on a bunch of littering and

1 trespassing charges. They trespassed on Tiffany
2 Oliver's land, they threw the guns out the window, but
3 we didn't charge them for that because they are charged
4 with murder. The same reason Bootsie didn't get
5 charged with that, he is carrying a murder charge. We
6 don't need to charge him with that. That's not what
7 we're here for.

8 A woman has been killed. We are not here to worry
9 about some trespassing or littering or filing a false
10 police report charge. These people have killed
11 somebody. That's what we're working on. Don't be
12 fooled by that, don't be fooled by that. They want to
13 tell you that Bootsie, we're up here playing make a
14 deal. Bootsie is charged with murder, murder. And
15 they want to tell you that he's been given some deal.

16 That charge is still pending. He got up here and
17 told you he was the driver in a murder charge. And
18 they want you to believe he's getting some sort of
19 deal. Don't believe them, do not believe that. If we
20 wanted to do something for Bootsie, we could, we could.
21 But yet he is still charged with murder. That has not
22 been dismissed. If he wanted to get a deal, he would
23 not be carrying a murder charge, I can tell you that
24 much. It is ridiculous to think that we are giving
25 some guy a deal, and he is walking around charged with

1025

1 murder. That is nonsense; folks. Don't believe it, do
2 not believe it.

3 They want to tell you, well, that shoe print they
4 got by the van, that is just key, key evidence. That's
5 what they want you to believe. The problem is the van
6 was parked back here on Colletta Court. David Grissett
7 tells you that those boys, and so does Keir Johnson,
8 came running out from Splurge's house here and jumped
9 in the van right here (indicating). The footprints
10 they want you to worry about are back here
11 (indicating).

12 We know who was in the van, we know who was back
13 here. Keir Johnson was back here. Those boys were
14 dropped off, he pulls the van up here (indicating). He
15 sees them running, he starts the van back up, goes up
16 here and picks them up along in this area (indicating).

17 This is where the evidence is, but there were no
18 footprints collected from this area. But they want you
19 to worry about some footprints back here (indicating).
20 With the only guy that we got saying, yes, I was back
21 here, I was in the van, we got that covered. But
22 that's what they want you to focus on, some tire prints
23 and footprints on a guy that's already up here telling
24 you, I parked the van back here, this is where I was.
25 And when I'm driving through here, I picked them up.

1 There's no footprints along in here to collect.

2 But they want to fool you, they want to act like
3 this footprint along in here is the seal, the breaking
4 moment of the case. But that's not the case. We've
5 already got that guy, that's Keir Johnson. But that's
6 what they want you to believe, some footprint back
7 here, some tire print back here, a tire print we
8 already told you from Keir Johnson, I'm driving the
9 van. There's the brown van I was driving. What do we
10 need a tire print for? He's told you, I'm driving that
11 van.

12 They want to get off on these things that are
13 nothing but rabbit holes for you to go down. They want
14 you to believe first Splurge shot her. She, I mean, it
15 was loud, I mean, it was a reenactment up here of how
16 she ran down the hallway, and they knew that she turned
17 to the left and she was shuffling through that door. I

18 mean, it was a complete reenactment. Think about that,
19 think about what you've been told.

20 Now think about the evidence. The evidence tells
21 you this bullet didn't come from that gun, Splurge did
22 not shoot her. So ask yourself, why are they telling
23 me that, why are they trying to convince me of this
24 reenactment of her running down the hallway, turning to
25 the left, shuffling in and, bam, Splurge shoots her,

1 when we know by the very bullet that came out of her
2 that it did not come from Splurge's gun. Why are they
3 trying to tell you that?

4 And then if you don't believe that, well, then
5 believe Little Manzy shot her. Again, go back through
6 the testimony, go back through the evidence. Not one
7 person saw him out here. They want you to let that guy
8 go and believe that Little Manzy went in that house
9 when there is not one shred of evidence that points to
10 Little Manzy, not one. Not one witness saw him out
11 that night.

12 And then they want to point you to the phones.
13 Well, if you don't believe Lil Manzy shot her, at least
14 believe that my guy wasn't out there. Nobody talked to
15 Cutty that night. No witness that I put up or that
16 they put up, no witness that either side put up said
17 that I talked to Cutty from that phone, not one. Think

18 about that, not one witness that anybody put up said
19 that.

20 And the only person that says, I called Dubba that
21 night was Keema Crooms, his girlfriend that he has two
22 children with, who ironically could not -- here, look
23 at these, what time did you call him, we got the phone
24 records, let's get it straight, what time did you call
25 him. Oh, I can't --

1 MR. CANTY: Objection, Your Honor. There was no
2 testimony that she ever called my client. There's
3 nothing in the record to support that, nor anything
4 from which it could be inferred.

5 THE COURT: Mr. Canty, you're not here to testify.
6 If you have an objection, you state there's an
7 objection. And if I need to, I'll send the jury out.
8 Thank you, sir.

9 MR. CANTY: Outside the scope of the record, Your
10 Honor.

11 MS. LIVESAY: Thank you, Your Honor.

12 THE COURT: Solicitor, again, let's stick with the
13 record, please. Thank you, ma'am.

14 MS. LIVESAY: Thank you.

15 THE COURT: Continue on.

16 MS. LIVESAY: The one phone number she couldn't
17 give you was her own phone number. She knew without a

18 doubt what his phone number was on November the 8th,
19 2011. But what does it tell you, she didn't know her
20 own phone number? Think about that, does that make
21 sense?

22 They had made such an issue over these phone
23 records. They had a great big board up here, all of
24 them listed out. Y'all saw that. And this great big
25 tremendous map, all these sticky notes on them. The

1 phone records is the way to go, the phone records, the
2 phone records. Well, let's see where this woman
3 called, oh; no, no, no, we don't want to hear that,
4 nu-uh. Don't show her those phone records, we don't
5 want to hear that. All of that, nobody wanted to hear
6 it then.

7 MR. FREDERICK: Judge?

8 MS. LIVESAY: After we just got through hearing --

9 THE COURT: Yes, sir.

10 MR. FREDERICK: I object to facts not in evidence.
11 It wasn't phone records she was trying to show her. It
12 was a phone dump.

13 THE COURT: Y'all come over here and talk to me
14 for just a second, please.

15 (WHEREUPON, a bench conference was held off the
16 record in the presence of the jury but out of the
17 hearing of the jury.)

18 MS. LIVESAY: She didn't know her own phone. What
19 does that tell you, what does that tell you? She
20 remembered his phone number from 900 days ago but
21 couldn't remember her own.

22 They want to talk about bias testimony. This is
23 his girlfriend with two kids, has two kids with this
24 man, and those are the only two kids she has is with
25 this man. Think about it. Think about it, think about

1 that testimony. She wants you to believe she made some
2 phone call that night. And it's so important to her,
3 but yet she can't even remember her own phone number
4 that she called from. Why is that? Think about it.

5 I'm going to suggest to you, all the evidence, all
6 of it, points to Keir Johnson, Bootsie. I'm not going
7 to deny that. I called him, but don't let -- don't let
8 me tell you anything other than he participated in a
9 murder, and he is charged with murder. And they all
10 acted together which ultimately ended in her life --
11 ended her life. So don't -- don't let me get up here
12 and tell you anything other than he's guilty.

13 Don't be fooled by that, okay. Bootsie is charged
14 with murder and he gave them a ride and he
15 participated, and it's hand to one is hand of all.
16 Whether he went in that house or not, he gave them a
17 ride and he gave them a ride away from the scene. Key
18 point, no doubt about it.

19 But I'm also here to tell you he didn't act alone.
20 He was sitting in that car while the two of them, Cutty
21 and Dubba, close friends, been close friends, got his
22 name tattooed on them, got Lil Bootsie's name tattooed
23 on them. They saw those two cars, went to the front
24 door. Didn't go through the back door, went through
25 the front door. Dogs back there, they didn't want the

1 dogs barking, I'm sure, they didn't want anything to
2 alert these people that they were coming.

3 So they busted through the front door pitch dark
4 at night and shot a girl, and after kept looking
5 through that house. Then they got in that car and they
6 dumped those guns and they took off. No doubt about
7 it, no doubt about it.

8 I'm going to ask you today to find them guilty.
9 Beyond a reasonable doubt is not beyond anything.
10 Nobody knows without any doubt what happened except the
11 people that were there. Beyond a reasonable doubt is
12 if you are firmly convinced that these boys did it,
13 firmly convinced. And I'm here to tell you that every
14 piece of evidence points to them. There is not one
15 piece that points to anybody else because there was
16 nobody else in that van.

17 They want to tell you, well, Lavena Jackson
18 planned it, this person did that, this person did this.
19 That may all be true. But at the end of the day these
20 boys are on trial because they are ultimately the ones
21 that went in, that pulled the trigger. They are
22 ultimately the ones that kicked in that door and pulled
23 the trigger. That's what we're here today for.

24 And I'm here to tell you Splurge didn't do it.
25 I'm here to tell you Lil Manzy didn't do it. I'm here

1 to tell you the only people that did it are Dubba and
2 Cutty and Bootsie. Those were the three that went out
3 there. And I'm going to ask you to find them guilty of
4 murder because that's what this is.

5 Please review all the evidence. If you need to
6 hear any testimony again, please listen to it. Because
7 all of it is key in this case, because all of it points
8 to Dubba and Cutty. They want to lead you down a road
9 that there is no end to because there is no truth in
10 that road.

11 Those boys planned this thing out. They loaded
12 those weapons, they got transportation. This phone is
13 nothing but a rabbit hole. Nobody you've heard from
14 out of all the testimony said that Cutty called from
15 that phone, none of them. Not one witness that anybody
16 put up said he called from that phone. Don't be
17 fooled. Those boys are running around at night with

18 two or three phones. They do it for a reason. They
19 are too smart for that. Don't let that fool you.
20 Don't let this stuff fool you.

21 I'm going to ask you today for a verdict that
22 speaks the truth, and that verdict is guilty. That
23 young girl was killed unarmed in her own home. Ask
24 yourself, why are they trying to turn it on Splurge,
25 why are they trying to turn it on anybody else. Don't

1 fall for that, don't. He didn't shoot her, that bullet
2 didn't even come from his gun. Ask yourself these
3 questions.

4 They tell you he's been waiting 900 days, he has.
5 And so has Ronnie Pertelle. He's waited 900 days, he's
6 waited 900 days for justice. And we're here today to
7 get it. And I'm asking you to find them guilty of
8 murder. Thank you for your time.

9 THE COURT: All right, ladies and gentlemen, we
10 are almost at the stage where I'm going to give the
11 case to you for your deliberations and your unanimous
12 decision. We've been in here, again, for a while. I
13 want you to take a very short break for five minutes,
14 clear your minds because you need to know the law that
15 you have to apply to the facts and evidence you find to
16 be true. Take a short break, five minutes, and we'll
17 finish that up. Thank you very much.

18 (WHEREUPON, the jury exited the courtroom at
19 12:32 p.m.)

20 THE COURT: Take a short break, five minutes.
21 When we come back, the doors will be locked. Thank
22 you.

23 (WHEREUPON, a brief recess was taken at
24 12:32 p.m.)

25 THE COURT: Thank you very much. Ask the jury to

1 come in, please. Ask the jury to come in, please.

2 MR. FREDERICK: We're ready, judge.

3 (WHEREUPON, the jury came into open court at
4 approximately 12:39 p.m.)

5 JURY CHARGE

6 THE COURT: All right, ladies and gentlemen, it's
7 now my duty and responsibility to give you the law that
8 you will apply to the facts and evidence you find to be
9 true. I told you at the very beginning that I would
10 not indicate to you in any way what I believe the facts
11 of this case are because that's not my job. It is your
12 job and your responsibility to look at the facts and
13 evidence in this case and find that evidence which
14 convinces you it's true.

15 Now, in that same vein, if you came into this
16 courtroom with any preconceived ideas of what the law
17 is, what it ought to be, what it should be, what you
18 hoped it would be, you'll disregard that. You will
19 take the law that I now give to you and apply it to the
20 facts and evidence you deem to be true.

21 I told you at the very beginning that one of your
22 jobs, duties and responsibilities was to judge the
23 credibility, and that is the believability of the
24 witnesses that have come before you and testified in
25 this case. And I told you that if you thought about it

1 for a second, it's something you do every single day of
2 your life because you use your good common sense and
3 your good judgment. And we're going to be asking you
4 to do that now, use your good common sense, use your
5 good judgment. Find that evidence which convinces you
6 it's true.

7 Looking at the witnesses that have testified in
8 this case, you could believe one against several, you
9 could believe several against one, you could believe a
10 portion of what a witness says and disregard the
11 remaining portion of it. If you've got a good and
12 sound reason for doing so, you can disregard in its
13 entirety the testimony of a particular witness.

14 You look at whether or not the witness has
15 exhibited to you any kind of interest, motive, bias,
16 prejudice they might have in giving you the testimony
17 they gave you from the witness stand. And obviously
18 you consider the opportunity for knowledge, how did
19 they come about that information that they gave you
20 from the witness stand.

21 In your examination of the facts and evidence, you
22 don't have any friends to reward, you don't have any
23 enemies to punish, and your result of your examination
24 must be a full and complete examination, find that
25 evidence which convinces you of its truth.

1 Two types of evidence that are generally portrayed
2 in every single case that's tried, this one's no
3 exception, direct and circumstantial evidence.

4 Direct evidence, that's a type of evidence that's
5 testimony of a person who asserts or claims actual
6 knowledge of a fact. Circumstantial evidence, that's
7 proof of a chain of facts indicating the existence of a
8 fact. The law doesn't make any distinction between
9 those two. A greater degree of certainty is not
10 required of one over the other.

11 But to the extent that the State relies on
12 circumstantial evidence, all of the circumstances must
13 be consistent with each other and when taken together
14 conclusively point to the guilt of the accused beyond a
15 reasonable doubt. The State, as always, has the burden
16 of proof to prove the defendants guilty beyond a
17 reasonable doubt.

18 In this case I qualified more than one witness to
19 give their opinion. Sometimes they're called expert
20 witnesses. What we're actually allowing them to do is
21 give their opinion. Normally we don't allow people to
22 give their opinion, they got to tell you what I saw,
23 what I heard, what took place in my presence.

24 But some witnesses by their education, experience,
25 training, we'll allow them to give their opinion in a

1 certain particularized field. Now, just because the
2 Court did that does not give them any special status
3 over some other witness. You judge all of the
4 witnesses the same, you judge all of their credibility
5 and believability. You find out evidence from wherever
6 it comes that convinces you of its truth.

7 In this case the defendants did not testify. I'm
8 telling you and assert to you that this cannot be
9 considered by you in any way in deciding this case. It
10 is not part of this case. You cannot use it mentally,
11 obviously you cannot talk about it in the jury room. I
12 told you at the very beginning defendants are presumed
13 innocent of the crime charged, and the State has to
14 prove the defendants guilty beyond a reasonable doubt.
15 These defendants, no defendants are required to
16 prove anything to the jury. The State must prove its
17 case to you beyond a reasonable doubt.

18 The testimony of a witness can be discredited or
19 impeached by showing that the witness previously made
20 statements which are inconsistent with their present
21 testimony. Earlier contradictory statements are
22 admissible in that vein. It is your job, again, to
23 judge credibility and believability. And the weight
24 you give, if any, to any earlier statements is up to
25 you. You can consider this in determining whether or

1 not to believe a witness' testimony in any of its
2 particulars.

3 The prior record of a witness. Our rules of
4 evidence allow that testimony of a witness can be
5 discredited or impeached by showing the witness has
6 been convicted of a crime for which they could have
7 been imprisoned for more than one year or the crime
8 involved dishonesty. Now, as to this evidence, it's
9 only offered on the issue of credibility.

10 A person who has a past criminal record can
11 testify during a trial. Their past record does not
12 affect their ability to testify. The past record may
13 be only considered by you if it is to be considered by
14 you, in determining their credibility or their
15 believability, that being one of your jobs and
16 responsibilities.

17 The credibility of a witness, again, being up to
18 you to determine, you could consider whether a
19 particular witness has a motive or exhibited any amount
20 of motive to testify. You can consider, if you choose,
21 again, it's your choice, whether a particular witness
22 may gain some reward, personal advantage, reduction in
23 sentence or vindication through their testimony.

24 I told you this at the very beginning, there are
25 two defendants in this case. Each of them is charged

1 with murder. The case of each defendant and the
2 evidence and the law concerning that defendant must be
3 considered by you separately and individually. Your
4 verdict does not have to be the same for both
5 defendants.

6 The fact that you find one defendant guilty or not
7 guilty does not control your verdict on the other.
8 When more than one person is charged with a crime, if
9 the evidence warrants, that is the evidence you believe
10 to be true in accordance with the law, you can convict
11 one, acquit the other, you could acquit both or you can
12 convict both. It depends upon your view of the
13 testimony and the evidence as to each defendant
14 considered separately.

15 Defendant Graham has raised the defense of alibi.
16 Alibi means the defendant was at another specified
17 place and time when the crime was committed, and
18 therefore being impossible for the defendant to have
19 been at the scene of the crime. Mere denial of
20 presence at the scene of a crime does not constitute an
21 alibi.

22 Now, even though this has been raised by the
23 defendant, again, there is no burden on the defendant
24 to prove alibi. Can't switch the burden. The burden
25 of proof is always on the State of South Carolina to

1 prove the defendant guilty beyond a reasonable doubt.

2 The issue has been raised, the State must prove the
3 guilt of the defendant beyond a reasonable doubt.

4 The defendants are presumed innocent. That
5 presumption of innocence didn't end at the beginning of
6 the trial, it hasn't ended now. It only ends if and
7 until you believe as to that defendant for the facts
8 and evidence you find to be true, the State has proven
9 the defendant guilty beyond a reasonable doubt. This
10 is an important rule of law that no matter what the
11 charge may be, whatever defendant is charged with, they
12 are presumed innocent of the crime for which the
13 indictment, the charge, was issued unless and until
14 guilt has been proven to you beyond a reasonable doubt.

15 This presumption of innocence is not just some
16 legal theory, it's not just some legal phrase that's
17 thrown around. It's a substantial right to which every
18 defendant is entitled unless and until the State proves
19 the defendant guilty beyond a reasonable doubt.

20 What is reasonable doubt? The kind of doubt that
21 would cause an ordinary, reasonable person to hesitate
22 to act. Proof beyond a reasonable doubt is proof that
23 leaves you firmly convinced of the defendant's guilt.
24 Now, there are very few things that we can know in this
25 world with absolute certainty. The law does not

1 require the State of South Carolina to give you that
2 kind of proof.

3 What is required is based upon your view of the
4 evidence, the evidence you find to be true, you are
5 firmly convinced the defendant is guilty of the crime
6 charged; you must find the defendant guilty. On the
7 other hand, based upon the evidence you find to be
8 true, you are not firmly convinced of the guilt of the
9 defendant beyond a reasonable doubt, you must give the
10 defendant the benefit of the doubt and find him not
11 guilty.

12 The defendants are charged with the crime of
13 murder. The State must prove to you beyond a
14 reasonable doubt that the defendant killed another
15 person with malice aforethought. Malice, that's some
16 kind of hatred or ill will or hostility towards another
17 person. It's the intentional doing of a wrongful act
18 without just cause or excuse and with an intent to
19 inflict an injury or under circumstances that the law
20 would infer an evil intent.

21 Now, malice aforethought, it's not required that
22 this kind of malice exists for any particular time
23 before the act is committed. But it has to exist in
24 the mind of the defendant just before and at the time
25 the act is committed. It has to be this combination of

1 the evil intent and the act.

2 It can be express or inferred, express when
3 somebody says or does something that expresses that
4 kind of intent. Inferred means that you can look at
5 the conduct showing a total disregard for human life.
6 Inferred malice, this kind of inferred malice, can also
7 arise when a deed is done with a deadly weapon.

8 What's a deadly weapon? Deadly weapon is any kind
9 of article or instrument or substance of any kind which
10 is likely to cause death or great bodily harm if used.
11 Whether an instrument has been used as a deadly weapon
12 depends on the facts and circumstances of each case.

13 In the law of the State of South Carolina there's
14 a principal that if a crime is committed by two or more
15 people who are acting together in committing the crime,
16 the act of one is the act of all. A person who joins
17 with another to commit an unlawful act is criminally

18 responsible for everything done by the other person
19 which happens as a probable or natural consequence of
20 the acts done in carrying out that common plan and
21 purpose. The act of one is the act of all, or it is
22 sometimes classified the hand of one is the hand of
23 all.

24 Prior knowledge that a crime is going to be
25 committed without more, just the knowledge a crime is

1 going to be committed, is not sufficient to make a
2 person guilty of that crime. Mere knowledge that
3 another person is going to commit a crime even if the
4 defendant is present is not sufficient. Guilt must be
5 shown by actual or constructive presence at the scene
6 as a result of a prior arrangement.

7 The State must prove beyond a reasonable doubt by
8 the evidence you believe this theory of the hand of one
9 is the hand of all. A principal in a crime is somebody
10 who either actually commits the crime or who is
11 present, aiding, abetting or assisting in some way in
12 committing the crime. When a person does an act in the
13 presence of another and with the assistance of another,
14 the act is done by both.

15 Where two or more acting with a common plan or
16 intent are present at the commission of a crime, it
17 does not matter who actually committed the crime. The

18 hand of one is the hand of all. Present at the
19 commission of a crime means to be sufficiently near to
20 aid or abet or assist in the commission of the crime.

21 Now, mere presence at the scene of a crime is not
22 sufficient to convict somebody under this theory of the
23 hand of one and the hand of all. Defendant's presence
24 where a crime is being committed or association with a
25 person who commits a crime does not make them an

1 accomplice or an aider or abetter. The burden, again,
2 is on the State of South Carolina to prove every
3 element of the crime.

4 If you find after reviewing all of the evidence
5 the State has proved regarding a defendant that that
6 defendant was only present at the scene and did not
7 aid, abet or assist in any way, they have not proved
8 beyond a reasonable doubt this theory of the hand of
9 one, the hand of all. There must be some kind of
10 participation in some way other than mere presence.

11 There has to have been some common design or
12 intent to commit a crime, and the crime must have been
13 committed with the person aiding and abetting or
14 assisting. Intent means intending the result which
15 actually occurs, not involuntarily. Intent may be
16 shown by the acts and conduct of each defendant or
17 other circumstances from which you could infer intent.

18 That, ladies and gentlemen, is the law that you
19 will apply to the facts and evidence you find to be
20 true. There being two cases, there are two verdict
21 forms, very straightforward. We have State of South
22 Carolina versus Thomas Booker James. On the charge of
23 murder we, the jury, by unanimous consent find the
24 defendant, Thomas Booker James -- there's two choices,
25 I put one before the other, don't assign anything to

1 that, I got to put one before the other -- not guilty
2 or guilty.

3 The other verdict form, State of South Carolina
4 versus Carnail Marchindla Graham. On the charge of
5 murder we, the jury, by unanimous consent find the
6 defendant Carnail Marchindla Graham not guilty or
7 guilty. Those are the two verdict forms.

8 You heard me use the term unanimous. I said at
9 the beginning and I said it now, it means exactly what
10 you think it means. Whatever your verdict is, whatever
11 verdict you reach, it must be unanimous, twelve zero.
12 Not eleven one, ten two or any combination thereof.
13 Whatever the verdict is, it must be the verdict of each
14 and every member of the jury.

15 Madam forelady, when you take the verdict form,
16 you check the appropriate block, you sign your name,
17 put today's date, you are telling the Court, every
18 single member of the jury agrees that is their verdict.
19 So if called upon in the courtroom to say that is their
20 verdict, they would be able to affirm that:

21 What I'm going to ask that you do, madam forelady,
22 is take the regular members of the jury. And, madam
23 alternate, you'll stay with us, please, now. Take the
24 other members of the jury to the jury room. Do not, do
25 not begin your deliberations until the bailiff brings

1 in to you the exhibits and the verdict forms.

2 Thereafter, you can begin your deliberations.

3 Now, clerk of court's office has got together
4 hopefully a fairly nice lunch for you which they'll
5 bring in to you shortly. My suggestion would be to
6 enjoy that, then you begin your deliberations. You can
7 do whatever you want to. But don't begin any
8 deliberations until the bailiff hands to you the
9 verdict forms and all of the exhibits.

10 Madam forelady, take the jury to the jury room.

11 (WHEREUPON, the jury exited the courtroom at

12 1:01 p.m.)

13 THE COURT: Is there any reason at this time that
14 the Court should not excuse the alternate from the
15 State?

16 MS. LIVESAY: No, sir.

17 THE COURT: From the defense, Mr. Frederick?

18 MR. FREDERICK: No, sir.

19 THE COURT: And Mr. Canty?

20 MR. CANTY: No, Your Honor.

21 THE COURT: All right, very good. In this case,
22 ma'am, I appreciate very much your hard work, your
23 dedication and your sacrifice to be a member of this
24 jury as the alternate. I can't tell you how many
25 times, and you saw in here just by choice, another

1 this case you have done everything that the Court
2 expected and beyond to represent the interest of your
3 clients. You were very -- you were knowledgeable about
4 the case, and you represented each respective party
5 with a great deal of diligence and fervor, and I
6 appreciate that. Please examine with the court
7 reporter that we have all of the proper exhibits going
8 to the jury. Thank you very much.

9 MR. FREDERICK: Thank you, judge.

10 THE COURT: We'll be at ease until the jury needs
11 us.

12 (WHEREUPON, a luncheon recess was taken at
13 1:04 p.m.)

14 (WHEREUPON, Court's Exhibit No. 4 was marked for
15 identification only.)

16 THE COURT: Thank you very much, you may be
17 seated. Thank you. All right. Counsel, the jury has
18 asked to rehear some testimony of Keir Johnson, so I'm
19 going to bring the jury in to do that.

20 Ask the jury to come in, please.

21 (WHEREUPON, the jury came into open court at
22 approximately 3:14 p.m.)

23 THE COURT: All right. Madam forelady, ladies and
24 gentlemen of the jury, I understand that you want to
25 hear some of Keir Johnson's testimony. The way that we

1 do that is the court reporter playing back the actual
2 testimony of the witness. I'm sure you remember this,
3 from beginning to end, from the start of the direct
4 examination through all of the cross and redirect, it's
5 two and a half hours.

6 And so we're here at your pleasure. You can hear
7 every single second of it if you want to. You can stop
8 at any time. If there's a particular part or something
9 that you were wanting to hear, the court reporter can
10 try and find that and play that portion for you. It's
11 at your direction.

12 So I wanted to make that clear first. How much or
13 how little of it we hear is completely guided by your
14 directions, all right. So with that, madam forelady,
15 would you like us to start right at the very beginning
16 of that, or do you need to talk about it some more?

17 THE FOREPERSON: We will go back.

18 THE COURT: You want to talk about it more? Sure,
19 absolutely. Why don't you go ahead and do that. And
20 then you just send me a note and let me know what you
21 want to do, all right? Thank you, ma'am.

22 (WHEREUPON, the jury exited the courtroom at

23 (3:16 p.m.)

24 THE COURT: We'll be at ease until the jury needs
25 us. Thank you very much.

1 (WHEREUPON, a brief recess was taken at 3:16 p.m.)

2 THE COURT: Thank you very much, you may be
3 seated. Thank you. All right. Counsel, the jury
4 indicated they want to start with the
5 cross-examination. So ask the jury to come in, please.

6 (WHEREUPON, Court's Exhibit No. 5 was marked for
7 identification only.)

8 (WHEREUPON, the jury came into open court at
9 approximately 3:36 p.m.)

10 THE COURT: All right. Madam forelady, you've got
11 in your note about starting with the cross-examination
12 of the witness, and the court reporter is ready to
13 start with that. Again, we're here at your
14 convenience. If at any point in time you indicate that
15 you've heard what you want to hear, you can just
16 indicate that to the Court, and we will stop at that
17 time; all right?

18 THE FOREPERSON: All right.

19 THE COURT: All right. Go ahead.

20 (WHEREUPON, the court reporter played back the
21 requested portion of testimony.)

22 THE COURT: Madam forelady, you indicated that you
23 have heard the portion of the testimony you wanted to
24 hear?

25 FORELADY: Yes, sir.

1 THE COURT: Very good. You can go back and resume
2 your deliberations. Thank you very much.

3 (WHEREUPON, the jury exited the courtroom at
4 4:10 p.m.)

5 THE COURT: All right counsel, we'll be at ease
6 until the jury needs us. Thank you very much.

7 (WHEREUPON, a brief recess was taken at 4:11 p.m.)

8 (WHEREUPON, Court's Exhibit No. 6 was marked for
9 identification only.)

10 THE COURT: Thank you very much. You may be
11 seated, thank you. All right. Before we bring the
12 jury in to receive the verdict, let me talk to
13 everybody for a second, please.

14 We will soon receive the verdict in this case. I
15 do not know what it is, we will all receive the verdict
16 at the same time. Whatever the verdict is, it will be
17 received with respect, and it will be received with

18 silence. I will not tolerate any kind of showing of
19 emotion, reaction of any kind to the verdict.

20 If you find this to be a problem, you can leave
21 the courtroom. But understand, if you violate my
22 directions, you will be detained by an Horry County
23 sheriff's deputy. Whenever these proceedings are over
24 with, I will hold a contempt of court proceeding and
25 decide what sentence will be imposed upon you.

1 We have asked this jury to do a very difficult
2 thing, and we will respect their job and their verdict.

3 Further understand that after the verdict is read
4 and whatever court proceedings may follow, if any,
5 please understand that no one, no one, will be allowed
6 to leave the courtroom for some period of time which
7 could be up to 30 minutes. You will stay in the
8 courtroom. No one will be going anywhere. If you
9 cannot follow any of these directions, please leave the
10 courtroom now.

11 You are now bound by the Court's order. Thank you
12 very much. Ask the jury to come in.

13 (WHEREUPON, the jury came into open court at
14 approximately 7:35 p.m.)

15 THE COURT: All right, madam forelady, has the
16 jury reached a verdict in these matters?

17 THE FOREPERSON: Yes, sir.

18 THE COURT: All right. Could you hand the verdict
19 forms to the clerk, please, ma'am.

20 THE FOREPERSON: (Complied.)

21 THE COURT: Please publish the verdicts.

22 CLERK OF COURT: In the general -- in the Court of
23 General Sessions, 15th Judicial Circuit,
24 2014-GS-26-2361, State of South Carolina, County of
25 Horry, State of South Carolina, Thomas Booker James on

1 the charge of murder, we, the jury, by unanimous
2 consent find the defendant Thomas Booker James guilty.
3 Signed by foreperson Deborah Shofner, October 20th,
4 2014.

5 In the Court of General Sessions, 15th Judicial
6 Circuit, 2012-GS-26-3077, State of South Carolina,
7 County of Horry, State of South Carolina, Carnail
8 Marchindla Graham on the charge of murder, we, the
9 jury, by unanimous consent find the defendant Carnail
10 Marchindla Graham guilty. Signed by foreperson Deborah
11 Shofner, October the 20th, 2014.

12 Ladies and gentlemen of the jury, if this is your
13 verdict, so signify by raising your right hand.

14 (WHEREUPON, All jurors' hands were raised.)

15 THE COURT: Thank you very much. All jurors
16 having affirmed their verdict, does the State wish the
17 jury polled?

18 MS. LIVESAY: No, sir.

19 THE COURT: Does the defense regarding Mr. James
20 want the jury polled?

21 MR. FREDERICK: Yes, Your Honor.

22 THE COURT: Mr. Canty also?

23 MR. CANTY: Please, Your Honor.

24 THE COURT: Roll by number, please.

25 CLERK OF COURT: Please stand when I call your

1 THE COURT: Solicitor, do you have sentencing
2 sheets?

3 MS. LIVESAY: I'm getting them, Your Honor, yes,
4 sir.

5 THE COURT: Yes, ma'am, I need for you to please
6 tell me your name, and then I'll be glad to hear from
7 you, ma'am.

8 MS. PERTELLE-GOFF: Your Honor, my name is Shelan
9 Pertelle-Goff.

10 THE COURT: Yes, ma'am.

11 MS. PERTELLE-GOFF: I'm the sister of Keia.

12 THE COURT: Yes, ma'am.

13 MS. PERTELLE-GOFF: I do thank the justice system
14 for the verdict that they came upon. And also I want
15 to say it's not only Keia life that is gone today, it's
16 also gone two lads over here as well. And I want y'all
17 to know I forgive y'all, and I will be praying for

18 y'all. And I just wish the best for everybody who had
19 anything to do with this, because it was just injustice
20 and just senseless. And for that I want to tell the
21 Court thank you.

22 THE COURT: Thank you, ma'am.

23 MS. LIVESAY: That's all from the State, Your
24 Honor.

25 THE COURT: Very good. Mr. Frederick?

1 MR. FREDERICK: As to sentencing, judge?

2 THE COURT: Yes, sir.

3 MR. FREDERICK: Judge, if we believe Keir
4 Johnson's testimony, which was the only testimony,
5 competent testimony against these two, and apparently
6 the jury did, then Thomas was not the shooter. And in
7 Keir Johnson's statements, one of his many statements,
8 judge, he said that when they left the house that
9 Thomas was in the back seat of the car with his head in
10 his hands crying.

11 Keir Johnson, if we believe anything he said, he
12 said that he didn't think that Thomas knew what was
13 going to happen and that he didn't think that Thomas
14 was responsible. That's in Keir Johnson's statements,
15 if we believe anything that he said, judge. Any
16 leniency that you can show Thomas, I appreciate it.

17 THE COURT: Thank you very much, sir.

18 MR. FREDERICK: Do you want to say anything?

19 DEFENDANT JAMES: I just want to let these people
20 know, that God as our witness, we had nothing to do
21 with that at all. We been telling them that from the
22 beginning. They know as well as the detectives know
23 who really done that. Our lawyer showed them the proof
24 of who really done it. We innocent, and we going to
25 keep fighting because we didn't do nothing. We didn't

1 have nothing to do with it at all, we was never at the
2 people house, we never been there in our life. And I
3 just want y'all to know that.

4 THE COURT: Thank you very much, sir. Yes, sir.
5 Anything else, Mr. Frederick?

6 MR. FREDERICK: No, Your Honor.

7 THE COURT: Thank you, sir. Mr. Canty?

8 MR. CANTY: Your Honor, Mr. Graham has five
9 children. Your Honor heard all of the evidence, and
10 Your Honor has heard the jury's verdict. To my
11 knowledge, his position is unchanged. My view of the
12 evidence is that it was far weaker against my client
13 than it was against Mr. James. I thought it as an
14 absence of evidence.

15 I've come to know Carnail during the course of the
16 past two and a half years, and I see him as a very
17 humane individual. I see him as a conscientious

18 individual, and I do not see him -- this is completely
19 beside the point at this point -- I do not see him as
20 the type of person capable of doing what has now been
21 attributed to him.

22 I would ask the Court to take into consideration
23 paucity of the evidence, the quality of the evidence
24 and his five children. Thank you.

25 THE COURT: Thank you, sir.

1 DEFENDANT GRAHAM: How you doing today, Your
2 Honor. First of all, they did a good job, they did
3 whatever they felt best for them to do. For 32 months
4 I stayed incarcerated, and I ain't said nothing, I
5 ain't spoke about the situation. I just took and took
6 and took and took and took and took.

7 I know that man. I know that woman right there.
8 I know that dude right there. I know that dude with
9 the glasses on. I practically know the whole family.
10 I stressed my point over and over and over again. I
11 ain't had nothing to do with that girl getting killed.
12 I never went to that girl house.

13 I ain't -- I mean, to be honest with you, the girl
14 was like my family. A lot of people got on the stand,
15 they said their piece. They said whatever best for
16 them to say. Some of them say they didn't know me,
17 some of them said they didn't see, some of them

18 whatever. I'm a man, I accept responsibility. This is
19 not a responsibility I'm going to accept.

20 Like I said, I know that man, I know that girl. I
21 would never hurt you, man. I would never hurt him.
22 For 32 months I fought this case, I fought and I fought
23 and I fought. I couldn't get through to nobody for
24 them to get the truth. Names start popping up, people
25 start coming up. Nobody wanted, nobody wanted to take

1 it.

2 I talked to that lady right there, I talked to
3 that lady sitting right there, Ms. Baker and Ms. Pop, I
4 talked to them. I advised them to go get the phone
5 records. I told Ms. Baker to go get the phone records.
6 I asked her to tell her to go get the phone records. I
7 requested it. They came and talked to me about my
8 tattoos.

9 Your Honor, I'm going to be honest, yeah, I got
10 Bootsie name tattoo on me. Yeah, I got him tattoo on
11 me. But what they didn't tell you, I got 32 more names
12 tattoo on me. I got 34 people names tattooed on my
13 arms, Your Honor, because I say he was my friend.
14 Yeah, I consider Bootsie as a friend, I did. By the
15 end of the day I have more love for that man. I do.

16 And that girl right there, if nobody else, I have
17 more love for them two. They're my friends. I knew

18 Keia since this big (indicating), I knew her since this
19 big (indicating). Ain't no money in the world would
20 make me go in no house and kick no door. I didn't need
21 the money. I could have borrowed money from her if I
22 needed the money. If I needed money, I could have went
23 to her and got the money. I could have went to him and
24 got the money. I ain't need no money. I ain't had to
25 kick that door. I didn't even know where the girl

1 stayed at. That's all I got to say, man.

2 THE COURT: Thank you, sir. Anything else, Mr.
3 Canty?

4 MR. CANTY: No, Your Honor.

5 THE COURT: Thank you, sir. Mr. Frederick, do you
6 know the date of incarceration regarding your client
7 for credit?

8 MR. FREDERICK: Judge, I don't.

9 THE COURT: All right, very good. Mr. Canty, do
10 you know that?

11 MR. CANTY: I believe April of 2012. It could
12 have been earlier.

13 THE COURT: All right. Well, I'm not going to put
14 a -- unless we know the exact date, then I will reflect
15 the credit for time served to be calculated according
16 to the records.

17 SENTENCE

18 THE COURT: Having listened to the evidence in
19 this case, the first thing that stands out is just the
20 absolute tragedy regarding the loss of the victim in
21 this matter, who by all accounts was a good person and
22 did not deserve the fate that life handed to her.

23 Based upon the Court's observation of the
24 testimony in this matter, the potential sentences for
25 murder being 30 to life, in 2014-GS-26-2361, the State

1 of South Carolina, County of Horry versus Thomas Booker
2 James, the sentence of the Court is defendant is
3 committed to the State Department of Corrections for a
4 determinate term of 32 years, defendant given credit
5 for the time he has already served.

6 Regarding 2012-GS-26-3077, the State of South
7 Carolina, County of Horry versus Carnail Graham, the
8 sentence of the Court is defendant's committed to the
9 State Department of Corrections for the determinate
10 term of 32 years. Defendant's given credit for the
11 time he has already served.

12 Defendants are remanded to the custody of the
13 Horry County sheriff's office. Thank you very much.

14 These proceedings are now at an end. Everyone
15 will remain in the courtroom until discharged by the
16 Horry County sheriff's office. Thank you.

17 MR. CANTY: Thank you, Your Honor.

18 (The hearing concluded at approximately 7:55 p.m.)

19 (End of Transcript of Record.)

20

21

22

23

24

25

~~Handwritten text, mostly illegible due to a large diagonal X drawn across the page.~~

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) 2017-CP-26-05189
CARNAIL M. GRAHAM,)
Applicant,) Transcript of Record
vs.) (Post-Conviction Relief)
November 26, 2018
STATE OF SOUTH CAROLINA,)
Respondent.)

B E F O R E:

Honorable Kristi F. Curtis
Horry County Courthouse
Conway, South Carolina

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

Tommy A. Thomas, Esquire
Attorney for Applicant

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

TAKEN BY:

Dixie C. Eubank
Circuit Court Reporter

PREPARED BY:

Kay H. Richardson
Circuit Court Reporter

Graham v. State - 2017-CP-26-05189

2

INDEX

I N D E X

1		
2	<u>NOVEMBER 26, 2018</u>	<u>Pg.</u>
3	Carnail Graham	
4	Direct by Thomas	5
5	Conswella Smith	
6	Direct by Thomas	47
7	Cross by James	52
8	David Canty	
9	Direct by James	55
10	Cross by Thomas	74
11	By the Court	80
12	Certificate of Court Reporters	81

E X H I B I T S

15	<u>No.</u>	<u>ID</u>	<u>EV</u>
16			
17	(No exhibits were marked or admitted.)		
18			
19			
20			
21			
22			
23			
24			
25			

1 NOVEMBER 26, 2018

2 MR. JAMES: If it may please the Court.

3 Your Honor, this is the matter of Carnail M. Graham
4 versus State of South Carolina, Docket Number 2017-CP-26-
5 05189. Mr. Graham is present here in the courtroom today and
6 is represented by Mr. Tommy Thomas, Esquire. Mr. Graham was
7 indicted at the July 2012 term of the Horry County Grand Jury
8 for murder. He was represented on that charge by Mr. David
9 Canty, Esquire, and was prosecuted by Ms. Nancy Livesay of the
10 15th Circuit Solicitor's Office. Mr. Graham proceeded to
11 trial before the Honorable Steven H. John and a jury on
12 October 13th, 2014, and was thereafter found guilty as
13 indicted on October 17, 2014. Judge John then sentenced him
14 to imprisonment for a term of 32 years. He thereafter filed a
15 timely Notice of Appeal, which was perfected by the Office of
16 Appellate Defense and was denied by unpublished opinion
17 decided October 19, 2016. And that case was remitted on
18 November 8th, 2016 and he filed his application for post-
19 conviction relief on August 14, 2017. So, it is timely.

20 Your Honor, the state filed a motion for a more definite
21 statement along with its return because the application for
22 relief only alleges a broad claim of ineffective assistance of
23 counsel. Over the course of the Thanksgiving holiday, Mr.
24 Thomas has been kind enough to pepper me with a handful of
25 phone calls explaining to me in a little bit more detail what

1 his allegations are going to be, but if he would articulate
2 them onto the record out of the outset for clarity purposes, I
3 would greatly appreciate.

4 MR. THOMAS: Your Honor, if it please the Court, for the
5 reasons that we discussed back in chambers. I had to kind of
6 drop everything and start putting this case for trial and
7 we've had ample opportunity to do that. I did not have an
8 opportunity to amend to include all of the issues. I will be
9 glad to submit a written amendment for the Court and I can do
10 that probably tomorrow, Your Honor. And again, the attorney
11 general has been kind enough, we have spoken and I have
12 attempted to let him know about all the issues that we intend
13 to raise today.

14 THE COURT: That sounds good.

15 MR. THOMAS: Yes, ma'am.

16 THE COURT: I'm here all week. So --

17 MR. THOMAS: Okay. Your Honor, if it please the Court,
18 we'd call Mr. Graham to the stand.

19 CLERK: Place your left hand on the Bible and raise your
20 right hand.

21 CARNAIL GRAHAM, HAVING BEEN DULY

22 SWORN TESTIFIES AS FOLLOWS:

23 CLERK: Please state your name for the Court and spell
24 your last name, please.

25 MR. THOMAS: If it please the Court?

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

5

1 THE COURT: Hang on just a minute and he's gonna tell us
2 his name and spell his last name for the court reporter,
3 please.

4 MR. THOMAS: Okay.

5 MR. GRAHAM: Carnail Graham. 304093.

6 DIRECT EXAMINATION OF CARNAIL GRAHAM BY MR. THOMAS:

7 Q: Carnail, you okay?

8 A: Yeah, I'm straight.

9 MR. THOMAS: He's extremely nervous, Your Honor.

10 BY MR. THOMAS:

11 Q: Carnail, let me -- would some water help you? It's okay.
12 It's all right. Just as we talked, just take your time and
13 tell the truth. Okay? It's gonna be all right. I'm not
14 going to ask you anything you don't know.

15 Carnail, I know that -- that you are nervous today, and I
16 know that you've had this on your mind for a long time. Tell
17 us a little bit, just a very short explanation of what
18 happened, so we all know kind of what happened and what you've
19 been charged with?

20 A: All right.

21 Q: You're charged with what?

22 A: I've been charged with murder.

23 Q: Okay. Any other charges or just murder?

24 A: No, I'm only charged with murder.

25 Q: Okay. And what did they say happened? Someone got

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

6

1 robbed or what happened?

2 A: Okay. They said on November the 8th of 2011, a victim go
3 by the name Quille Pertelle was shot and killed, you know, and
4 I get in a robbery.

5 Q: Now, where was this at? Was this at a trailer park?

6 A: This was inside Brown Swamp Trailer Park. I can't
7 remember the address.

8 Q: All right. And who lived in that trailer?

9 A: Shaquille Pertelle and Splurge; I don't remember his
10 government name but I will be better off by speaking his urban
11 name ---

12 Q: Everybody had nicknames?

13 A: Yeah, everybody. So I will be --- I'll be more
14 comfortable speaking in urban and --- in nicknames versus
15 saying their government name.

16 Q: Okay. So, so Splurge and his girlfriend lived in the
17 mobile home?

18 A: Yes, sir.

19 Q: And who ended up getting killed?

20 A: The girl.

21 Q: And how was she killed?

22 A: She was shot one time.

23 Q: Okay. And what did the police -- what did they say
24 happened; was it a robbery or what?

25 A: Okay. They say -- they say on the time of the crime,

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

7

1 they say that three defendants went out there to pick up drugs
2 or buy drugs. In the midst of getting the drugs, a robbery
3 had taken place.

4 Q: Okay. And in that robbery ---

5 A: And in the midst of the robbery, they said that once the
6 door was kicked open, that the victim jumped up ---

7 Q: It's okay.

8 A: --- the victim jumped out the chair and took off running
9 down the hallway -- proceeded to run down the hallway. And
10 the midst ---

11 Q: Yeah. And then she was shot?

12 A: Y'all excuse me. You know, in the midst of her running
13 down the hallway, she got shot.

14 Q: Okay. All right. Now, so you're -- you were tried and
15 convicted?

16 A: Yes, sir.

17 Q: And you received what kind of sentence?

18 A: I received 32 years.

19 Q: Okay. Day for day?

20 A: Day for day.

21 Q: Okay. And how old are you Carnail?

22 A: As of right now, I'm 32 years old.

23 Q: Okay. And when do you max out, do you even know?

24 A: 2056.

25 Q: '56. Okay. Now, you understand that you're asking for

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

8

1 post-conviction relief today?

2 A: Yes, sir.

3 Q: You and I have talked about that, and you understand that
4 this is not a time cut; you're asking that your conviction be
5 set aside?

6 A: Yes, sir.

7 Q: Okay. You understand that there is some risk in that if
8 your conviction is set aside, that you could be retried?

9 A: I ready. I want that.

10 Q: Okay. But you understand that and you want to proceed
11 today?

12 A: Yeah. Yeah.

13 Q: Okay. All right. Now, when were you arrested, Mr.
14 Brown?

15 A: I was arrested April the -- excuse me, Your Honor; please
16 work with me.

17 Q: It's okay. Take your time.

18 A: I was arrested April the 27th of 2012.

19 Q: Now, is that right at when this happened or --

20 A: No, sir. It was like five months after it happened.

21 Q: Five months?

22 A: Five or six months after it happened.

23 Q: Okay. And why were you arrested at a later date?

24 A: Because when the situation first took place, I was never
25 even considered as a suspect, considered as even have partaken

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

9

1 in the crime, period.

2 Q: Okay. And there was a key witness in this trial, wasn't
3 there?

4 A: Yes, sir.

5 Q: And what's his name?

6 A: Keir Lamont Johnson.

7 Q: And what's his nickname?

8 A: Bootsie.

9 Q: Bootsie. Okay. Now, You were arrested because of
10 Bootsie?

11 A: Yeah, I got -- I'm only -- I only got a warrant issued
12 for my arrest just because he told them that I was with them.
13 I never got a warrant for my arrest because nothing physical
14 or anything of that nature.

15 Q: And he was supposedly what in this robbery?

16 A: He was supposed to be the person that drove the people
17 out there and took the people to the getaway spot once they
18 jumped out the van.

19 Q: Did he tell a whole lot -- a whole bunch of different
20 stories?

21 A: Technically, he gave six statements.

22 Q: Okay. And did he -- did he ever make bond?

23 A: Oh, yes, sir. Okay, once they -- once they issued a
24 warrant out for my arrest, they issued for me and Tommy James
25 which will by the name of Cutty. Once they issued an arrest

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

10

1 ---

2 Q: Now, who is Cutty?

3 A: Cutty is my codefendant, the one that actually had the 32
4 years with me, Thomas James.

5 Q: Y'all were tried together?

6 A: We was tried -- we sat together at trial.

7 Q: Okay.

8 A: Okay. When they issued a warrant for us and -- in April,
9 once they issued a warrant, they locked us up. A week after
10 they issued a warrant, they didn't even take Keir Lamont

11 Johnson up for a bond hearing. They gave him a bond hearing
12 through the computer. They gave him a \$30,000 surety bond.

13 Q: Consent Bond?

14 A: Consent bond off the fact of that he gave up two names.

15 MR. JAMES: Objection, hearsay. I'm not sure where he's
16 getting his firsthand knowledge of precisely how much Keir got

17 on his bond in this --

18 A: It's in black-and-white, sir. It's not hearsay at all.

19 BY MR. THOMAS:

20 Q: You know it of your own personal knowledge?

21 A: Yes. Just like my -- my -- my lawyer who represented me
22 is sitting back there --

23 Q: You can't tell me who told you anything.

24 A: No, I had it in black-and-white. It was in my paperwork.

25 Q: All right. So, he was released on bond after he gave

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

11

1 that statement?

2 A: Yes, sir; like right after.

3 Q: All right. Now, you had a retained attorney or ---

4 A: Appointed.

5 Q: Appointed. And who was appointed to represent you?

6 A: Mr. David Canty.

7 Q: Okay. Now, you said that you had a codefendant that you
8 went to trial with and what was -- what is his name?

9 A: His name Thomas James a/k/a his nickname is Cutty.

10 Q: Cutty. So, we're gonna be talking about Bootsie; is that
11 right?

12 A: Okay. All right. In the open trial, Thomas James'
13 lawyer, Mr. Bobby Frederick, opened the statement up. He
14 opened the trial up.

15 Q: No, no, no. All right. Let me ask you this? So, who was
16 who?

17 A: Bootsie is Thomas James -- I mean Bootsie is Keir Lamont
18 Johnson, that's the driver.

19 Q: Okay.

20 A: All right.

21 Q: And then you are who?

22 A: I am Duba (spelled phonetically), Carnail Graham.

23 Q: Okay. And then your codefendant?

24 A: Is Cutty, is Cutty; Thomas Booker James.

25 Q: And he was represented by Mr. Frederick?

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

12

1 A: Yes, sir.

2 Q: Okay. All right. Now, in -- did you ever make bond?

3 A: Oh, I was never even given a bond.

4 Q: Okay. So, how many ---

5 A: I apologize. I apologize. Being as we're on the record,
6 let me state facts. I was given a bond a month before my

7 trial.

8 Q: All right. How much was that bond?

9 A: It was \$80,000.

10 Q: Okay. Did you get out?

11 A: No. They told me that they wasn't gonna risk allowing my
12 sister to bond me out being as though my trial was in two and
13 a half weeks, three weeks.

14 Q: Okay. All right. Now, so you were unable to go to your
15 attorney's office?

16 A: Yeah, I never had a chance to go to his office.

17 Q: All right. So he came to you?

18 A: Yeah, he came. Out of three years, he came probably
19 like, truthfully, because, you know, about like seven to eight
20 times.

21 Q: Okay. Now, when he came to see you, y'all were preparing
22 this case for trial?

23 A: Yes, sir, we was.

24 Q: Did you ever get a plea offer?

25 A: Never.

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

13

1 Q: Okay. Now, so, it was always a trial?

2 A: Yes, sir, always was a trial.

3 Q: And what did y'all discuss when he'd come to see you?

4 A: Mostly it was about I was trying to like when he'd come
5 see me, I'd get him to try to look at certain things. Like
6 one time I had asked him to get the videotape from Walgreens.
7 And the only reason why I asked him to get the videotape from
8 Walgreens, because the tape would've showed and proved where I
9 was at at the time. But he told ---

10 Q: All right. Okay. Now, kind of jumping ahead a little
11 bit, but your defense in this was alibi?

12 A: Yes, sir.

13 Q: You were saying that you were not there?

14 A: Yes, sir.

15 Q: And where were saying you were at?

16 A: I was saying I was at home.

17 Q: With who?

18 A: With my kids' mother and my newborn child.

19 Q: Okay. And did she testify at trial?

20 A: Yes, sir.

21 Q: And she testified that you were with her?

22 A: Yes, sir.

23 Q: Okay. And you had asked -- and I'm sorry, going back to
24 your -- what you were saying about Walgreens?

25 A: Yes, sir.

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

14

1 Q: Why did you want him to get a video from Walgreens?

2 A: I wanted him to get the tape from Walgreens, because I
3 remember where I was at that night. But when he -- when he
4 had sent the investigator -- when he called -- I think he
5 called somebody, I believe he went himself and asked them if
6 they had it and they say yeah, they will have it. But when it
7 came time for my trial, he was like, it's kind of -- it would
8 be good and not good to get it, because even though it
9 wouldn't place you with Keir Lamont Johnson at the time, it
10 still would place you out and about at the time. So, he was
11 like, it's not best to get it. But my thing was, it doesn't
12 matter if it placed me at the football game; it doesn't matter
13 if it placed me at the grocery store; it doesn't matter if it
14 placed me at a car dealership; it tears down the whole
15 statement where Keir say he picked me up at 12 o'clock and we
16 was together.

17 Q: All right. And what time were you at the Walgreens?

18 A: I was at the Walgreens at like 12:55, 1 o'clock.

19 Q: Okay. Now, what time did this robbery or whatever it
20 was, happen?

21 A: Okay. It started -- they said it was 2:30, but the first
22 initial 911 call was made at 3:07.

23 Q: So, there was some discrepancy in the times?

24 A: Yeah, they ain't have it right at all.

25 Q: Okay. All right. Now, so I think I asked you about your

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

15

1 codefendants. You had Keir Johnson, who was Bootsie, and
2 Duba, who was you?

3 A: Yes, sir.

4 Q: And Cutty, who was your codefendant?

5 A: Yes, sir.

6 Q: Okay. And did you go over the discovery with your
7 attorney? Were you able to see all the evidence ---

8 A: Yeah.

9 Q: --- that the state had against you?

10 A: Yes, sir.

11 Q: Okay. Now, ---

12 A: Except for -- except for they didn't put the fed guys in
13 my -- in my motion period. They just brought them up two
14 weeks before my trial.

15 Q: Who are the fed guys?

16 A: Sadeeka (spelled phonetically) McClain and Kachev Spain.

17 Q: Gotcha. We'll talk about them. Okay?

18 A: Yes, sir.

19 Q: Now, and Mr. Canty hired a private investigator?

20 A: Yes, sir.

21 Q: Did that private investigator come to see you?

22 A: Yes, sir.

23 Q: And what did you -- what was the focus of -- of y'all's
24 cooperation together; what was he trying to -- what did you
25 want him to find for you?

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

16

1 A: He was trying -- I wanted him to basically -- what I'm
2 here for today, just for the truth, you know. And I wanted
3 him to go back and go talk to certain witnesses that the
4 detective who actually, Mr. Vagosko or Vageska (spelled
5 phonetically), I may not be pronouncing it right -- but that
6 was the lead detective in the whole case -- that he didn't do.
7 So, every time he came and see me, I would say, well can you
8 please go look back at the trailer for this; can you please
9 look into the guns; can you please go speak to this person;
10 can you please try to find and get in contact with this
11 person, and he would tell me yeah, and every time he would
12 leave, when he would come back to see me, he would have
13 information on everything I had. So it got to the point where
14 like the third time, no, no, no, don't quote me on -- I mean,
15 don't quote me -- the second time he came to see me, he was
16 like, you know, there's so much in your case that's showing
17 and proving, man, you're innocent. I'm really -- you know,
18 I'm going to really go in, but I only have 56 hours to -- to
19 -- to get my, I guess, packet or whatever you want to call it,
20 together and have it ready for trial.

21 Q: Let me ask you, this is a good time for this question.
22 You gave your attorney information about who committed this
23 crime?

24 A: No, sir.

25 Q: Okay. But there was information about other people who

Graham v. State - 2017-CP-26-05189

17

CARNAIL GRAHAM - DIRECT BY THOMAS

1 committed this crime?

2 A: Yes, sir. Okay ---

3 Q: Who were they?

4 A: Can I speak?

5 Q: Yeah, sure.

6 A: All right. In the opening statement -- I'm glad you
7 brought it back up. Mr. Frederick, which is my codefendant,
8 Thomas James, lawyer. All right. Thomas James told Mr.
9 Frederick what all actually had happened and what took place
10 and who was involved. On the opening statement, Mr. Frederick
11 opened the opening statement up with the names and he was
12 gonna -- he was gonna be able to show and prove to them how
13 all the information that Mr. James gave to him, how it will
14 show and prove that I wasn't involved in the case. But the
15 prosecutor kind of like, ain't no kind of, she just pushed it
16 out the way. And being as though I was never on the scene for
17 crime, it wasn't like I can get up there and say I seen these
18 people or I was with these people. So that was the purpose of
19 Mr. James telling the truth.

20 Q: But in the community, there was some common knowledge ---

21 A: Yeah.

22 Q: --- who -- about who committed the crime?

23 A: Yes, sir.

24 Q: And -- and that common knowledge, who were those people?

25 A: Inside of my transcript in black-and-white, they got the

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

18

1 names of Keir Lamont Johnson; inside my transcript, they got
2 the name of Donovan Johnson; inside my transcript, they got
3 the name of Brandon Wells; and inside my transcript, they got
4 the name of Sha-Rah McCray ---

5 Q: So -- so the common denominator is Bootsie?

6 A: Yes, sir; he is the driver.

7 Q: He's the driver. So, but the other names of the other
8 guys, what were their nicknames?

9 A: Bootsie, Amigo -- as far as inside my transcript there's
10 Bootsie, Amigo, One-ten (spelled phonetically) and B. Wells.

11 Q: All right. And those are the guys -- those were the
12 guys, who in the community it was common knowledge that they
13 had -- were the ones that committed this crime?

14 A: From what the transcript say, yes, sir.

15 Q: Okay. All right. Now, whoops -- I'm sorry, Your Honor.

16 THE COURT: All right.

17 MR. THOMAS: It wasn't strategic.

18 THE COURT: It happens. It happens all the time.

19 MR. THOMAS: Yes, ma'am.

20 BY MR. THOMAS:

21 Q: Okay. So, did you bring that to the attention of Mr.
22 Canty?

23 A: Yes, sir.

24 Q: All right. And what did he say?

25 A: Mr. Canty was on -- on the issue as like he see it,

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

19

1 because of what was in black-and-white.

2 Q: Yeah.

3 A: But being as though that I was telling him as my lawyer
4 that I was never on the crime scene, it would only made it
5 place me as hearsay if I was to get up there using people's
6 names that I ---

7 Q: So it made it difficult for you because you weren't --
8 you weren't there?

9 A: I wasn't there.

10 Q: Okay. So, any information that you had to have would've
11 come secondhand from somebody else?

12 A: Yes, sir.

13 Q: Okay. And did you give that information to your private
14 investigator?

15 A: What, the secondhand information?

16 Q: Yeah, the secondhand information ---

17 A: Yes, sir.

18 Q: --- that you had?

19 A: Yes, sir.

20 Q: Okay. All right. And so what evidence did they have
21 against you?

22 A: Nothing.

23 Q: All right. There was a -- there was a weapon that was
24 involved?

25 A: Yes, sir.

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

20

- 1 Q: And were they able to race that weapon to you?
- 2 A: No, sir.
- 3 Q: Okay. And did you talk about -- well, let's do this.
- 4 How many times was the victim shot?
- 5 A: One time, sir.
- 6 Q: Okay. And you discussed this with Mr. Canty?
- 7 A: Yes, sir, numerous of times.
- 8 Q: Were you able to determine what caliber of bullet it was
- 9 that was used?
- 10 A: Yes, sir, they got the bullet out the victim body.
- 11 Q: And what caliber was that?
- 12 A: .357.
- 13 Q: Okay. And this -- were there guns that were found at the
- 14 scene?
- 15 A: Yes, sir.
- 16 Q: And what caliber guns were found at the scene?
- 17 A: Inside my transcript, they said it was a AK-47.
- 18 Q: Yep?
- 19 A: A .44 long-nose revolver.
- 20 Q: An AK-47 is a rifle, right?
- 21 A: Yes, sir, a rifle.
- 22 Q: Okay. And she was not shot with a rifle?
- 23 A: No, sir; she was not shot with a rifle.
- 24 Q: All right. And so, it was an AK-47?
- 25 A: Yes, sir, a AK-47.

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

21

1 Q: Right.

2 A: Yes, sir.

3 Q: And what else?

4 A: A .44 long-nose revolver.

5 Q: A .44?

6 A: Yeah, a .44.

7 Q: Okay.

8 A: And a .357.

9 Q: A .357. Where was -- when was -- when and where was the
10 .357 found?

11 A: Okay. The .357 was hidden. The person that was firing
12 the .357, which was the victim's boyfriend, hid the .357. The
13 .357 was found like two weeks later, once the father went
14 inside the trailer to breakdown the trailer to get all his
15 daughter's stuff out the trailer and take all the beds and
16 stuff out.

17 Q: Yeah.

18 A: The .357 was wrapped up inside a shirt, stashed between
19 the bed. So, they never -- detectives, when they arrived on
20 the scene, they was never able to get the gun at first,
21 because he never gave them the gun. He hid the gun.

22 Q: Do you know if these weapons and stuff was sent to SLED?

23 A: Okay. In the beginning, they said a ballistic dude did
24 the ballistic on the .357, and .357 came back that it was the
25 one fired by ---

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

22

1 Q: Somebody from SLED?

2 A: Yeah, but he couldn't be found. He was on emergency
3 vacation. They didn't have no number to contact him; it
4 wasn't no way to find him; so they had to pursue my trial. So
5 my lawyer was trying to get a continuance, I think, or
6 something like that or somebody -- I'm trying to make sure I
7 quoted facts, because it's all -- it was something about,
8 well, like hold up, can we get another ballistic, you know,
9 like to go over this gun, because the first ballistics is
10 saying that the victim boyfriend fired his gun, but y'all
11 saying we can't find him. So, now we have to find -- get
12 somebody else to do it. To sum up the story to make it short,
13 they got somebody else to do it.

14 Q: From SLED?

15 A: From SLED, yes, sir. Once he did it, he didn't -- he --
16 he compared the bullet to fragments outside of -- outside of

17 the cabinet, outside of the T.V. Now, mind you, if I could

18 stand up, the victim and the boyfriend bedroom is at the

19 bottom of the hall, right?

20 Q: Right.

21 A: The cabinet is up the hallway, right?

22 Q: Right.

23 A: The T.V. is up the hallway?

24 Q: Right.

25 A: The couch is sitting right here in the middle from where

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

23

1 they described it -- in my trial they described where the
2 couch was at. The couch was basically like if you look, you
3 could see straight down the hallway.

4 Q: Now, the couch was opposite of the door where they
5 allegedly came in?

6 A: No, the couch sat directly in front of the door.

7 Q: Okay.

8 A: Okay. So, this is my thing, if you got the bullet
9 fragments from outside of the cabinet, you got the bullet
10 fragments from the T.V., and you got the bullet fragments from
11 out of the couch, right? So, therefore, that mean all them
12 bullet fragments had to be coming from this way, because
13 that's the only way you could've got the bullet fragments from

14 out of these spots.

15 Q: Come from which way?

16 A: Coming from down the hallway, because the victim's
17 boyfriend was shooting.

18 Q: Okay.

19 A: Okay. But mind you, if you've got the couch sitting
20 facing the entrance to whereas they say I was the one come in
21 that, all right, there's only one footprint they got off the
22 door, mind you, it was a size six-and-a-half shoe print.
23 That's the only footprint they got. They said the door was
24 kicked and it was kicked supposedly by me, but I wear a ten-
25 and-a-half, but I'm not going to take a long time with it.

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

24

1 Q: Okay.

2 A: Okay. So they said once I supposedly kicked the door, I
3 supposedly had fired a gun, once she jumped up off the couch
4 and said that some people was coming in the house and started
5 calling her boyfriend name. But, the forensic who gave on the
6 body -- I mean, the autopsy of the body said the bullet hit
7 main arteries to the point where it wouldn't have been
8 possible for the victim to get shot in the abdomen the way
9 they was shot at and make it from the couch all the way down
10 the hallway through the corner of the door behind the bed.
11 But this was my thing, it's self-explanatory, if the victim
12 was shot and instantly was able to bleed out within 10 to 15
13 seconds, it should've been a blood trail. There was no blood
14 trail because the victim's boyfriend moved the body and put
15 the body from the hallway in the bedroom. So, it
16 automatically threw off the evidence in searching of the house
17 because when they came through to do the house, there was no
18 blood trail. So his story is they came into my house, they
19 shot my girl, she made it down the hallway, she jumped behind
20 the bed. That was his story. But my thing is this, and
21 inside my -- inside the motion -- I mean inside the trial
22 transcript, it tells you there was a desk behind the door.
23 Now, if there's a desk behind the door, that mean you can only
24 open the door at an angle; there's no way possible you can
25 open the door wide open. So, it was at an angle. The victim

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

25

1 was hit at that direct angle as the way the door was open.
2 Now, if I'm shooting a gun or if anybody in this courtroom was
3 shooting a gun and you shooting a gun out the door, you're
4 going to shoot that gun at the angle because it's the only way
5 you can fire the gun unless you shoot straight through the
6 door. If you -- if you don't shoot straight through the door,
7 you're gonna have stick your revolver or -- or your -- or your
8 automatic weapon through that door to fire it down the door,
9 because the only ---

10 Q: So, you thought that that theory of what happened and how
11 she got shot made more sense, more common sense that she would
12 have been shot from someone firing from the bedroom?

13 A: Yeah, it's self-explanatory. It's not ---

14 Q: And that would've been Splurge, who was the boyfriend,
15 right?

16 A: Yeah, that's the only person that was shooting from down
17 there.

18 Q: When the police arrived, they found her body where?

19 A: In -- see, this is where it's crazy at, because in the
20 motion, they got her body laying in the hallway, but in his
21 statement and in my trial, they said her body was behind the
22 bed. But if you pull up the exhibits and you look at her
23 body, her body is in the middle of the hallway. So, how could
24 her body, if the exhibit people take the pictures of the body
25 and it's laying in the hallway, did how did the body get

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

26

1 behind the bed?

2 Q: Well, I think the officer testified that she was in the
3 bed?

4 A: No, no. The exhibits shows and proves she is laying in
5 the corner on the floor in the doorway with her arm behind her
6 head. I remember this -- this my life, like I remember it
7 like yesterday. I remember every exhibit. It shows her
8 laying on the floor with her arm halfway behind her head with
9 one blood spot at a angle. And then inside the statements it
10 said -- I mean inside my trial they kept saying, oh, she was
11 behind the bed. She jumped over him and dived behind the bed.
12 She jumped over him and dived behind the bed. She jumped over
13 him and dived behind the bed. But, my lawyer was trying to
14 argue it, but they wouldn't --
15 Q: Okay. So, so -- so, in your mind, there was some
16 discrepancy about how she got shot?

17 A: Yes, sir.

18 Q: Okay. And did you feel like it would've been important
19 to have had a ballistics expert, your own ballistics expert?

20 A: Yeah.

21 Q: Did you talk to Mr. Canty about hiring your own
22 ballistics expert?

23 A: To be honest, Mr. Canty was trying to do that. Like when
24 I asked him, I was like, you know, what do you think we should
25 do; he was like we already -- like, they not trying to give us

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

27

1 no continuance on trial; they just pushing us through, like we
2 ain't got no choice.

3 Q: Okay. So, actually, a -- a motion for a continuance was
4 made?

5 A: I mean, you might would have more recollection of that
6 than me, because I don't have it.

7 Q: Okay. Do you know that, and I think you mentioned this
8 in a motion for -- was made for a continuance to hire a
9 ballistics expert?

10 A: Yeah.

11 Q: That was done at trial?

12 A: Yes, sir.

13 Q: Okay. And there was also the motion for a continuance

14 because of lack of witnesses; do you remember what that was?

15 If you don't, you don't; that's fine.

16 A: No, I -- but like we want to put it all on record.

17 Q: Okay.

18 A: Can you requote that question for me again?

19 Q: There was a motion made, a pretrial motion made on page
20 63, transcript for a statement about lack of the ability to
21 obtain witnesses?

22 A: I don't recall that. I ain't gonna lie. It's been so
23 long, I don't ---

24 Q: Okay. I'll ask Mr. Canty about that.

25 A: Okay.

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

28

1 Q: Okay. Now, were there any fingerprints found?

2 A: Oh, yeah, there was a lot of fingerprints.

3 Q: Were your fingerprints found?

4 A: None.

5 Q: Okay. And was there any DNA evidence found that matched
6 you?

7 A: Oh, none.

8 Q: And you mentioned a footprint. There was a plaster cast
9 done of a footprint?

10 A: Yeah, they did it -- they did a plaster cast on the
11 footprints. They took sizes of the footprints. They made me
12 stand up in trial and hold my foot up in trial.

13 Q: Did those --

14 A: It showed that it wasn't my footprint.

15 Q: Okay. It didn't match your size?

16 A: No way near.

17 Q: All right. You feel like Mr. Canty adequately

18 represented those issues, those items to the jury?

19 A: Before I give the answer to that, can you break that down
20 to me a little more, so that way I can give the correct
21 answer?

22 Q: You had -- you retained Mr. Canty to handle your defense?

23 A: Yes, sir.

24 Q: And do you believe that he was adequate in his bringing
25 to the jury's attention this lack of evidence?

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

29

1 A: No, he ain't do it -- he ain't do it like -- if you ask
2 me, he ain't did it how I feel like it should've been done.

3 Q: Okay. All right. And did he have anybody there at the
4 hearing that could have disputed the ballistics expert; he
5 didn't have a witness there, did he?

6 A: You talking about did we have witnesses there to dispute
7 me?

8 Q: Yeah. No, no. Did you have a witness, your own
9 ballistics witness there?

10 A: No, sir.

11 Q: Okay. All right. Now, there was a motion made to sever
12 the trial; do you know what that means, to try the cases
13 separately?

14 A: Separate, right?

15 Q: Yeah.

16 A: Yeah.

17 Q: And was that --- that was denied?

18 A: Yeah. I don't even -- to be honest with you, it had to
19 be denied, because they took us together.

20 Q: All right. And ---

21 MR. THOMAS: Your Honor, if I could beg the Court's
22 indulgence just for a second?

23 BY MR. THOMAS:

24 Q: Okay. Let's talk about theory of defense, and you and I
25 have talked about that. In other words, how Mr. Canty was

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

30

1 going to defend you, you know, what your defenses were that he
2 was going to present on your behalf at trial; do you
3 understand that?

4 A: Uh-huh, (affirmative response).

5 Q: Okay. And one of those was an alibi?

6 A: Yes, sir.

7 Q: Okay. And do you know offhand what the others were?

8 A: Yeah, we -- I had an eyewitness who gave a statement to
9 the arriving investigators and detectives of the crime. She
10 was a witness of the crime.

11 Q: And who was -- who was that person?

12 A: Conswella Smith.

13 Q: Is she here today?

14 A: Yeah, she here today; yes, sir, she here.

15 Q: Okay. And did you bring her information, what she had,
16 to the attention of Mr. Canty?

17 A: Yes, sir. He spoke to her hisself. He subpoena her for
18 her to come testify.

19 Q: All right. Did she testify?

20 A: He didn't put her up, but he said that they didn't prove
21 the burden of my guilt, so he wasn't gone put her up then.

22 Q: Okay. You feel like she would've been helpful for you?

23 A: Yes, sir, I feel -- I feel as though if he would have put
24 her on the stand and if I'm able to break it down and showing
25 proof, then, yes, sir, it would have been way different.

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

31

1 because she would have been able to testify under oath on how
2 many people she seen. She would've been able to testify on
3 the complexion of the people she seen. She would have been
4 able to testify on the height of the people she seen. And
5 this is not a statement she made up; this is the statement she
6 gave the night of the crime. You know what I'm saying?

7 Q: Right.

8 A: That's like -- that's like ---

9 Q: And did any of that description match you?

10 A: None of it matched me.

11 Q: Okay.

12 A: This is before she even heard my name was tied to it;
13 this was before she knew anybody was tied to it; this is

14 before -- the only thing she knew was somebody just been in my
15 yard. These people were in my yard. She talked to 911, she
16 told them these people in my yard, I hear these shots, I see

17 these people running from this house. This is what I seen.
18 She got it in black-and-white.

19 Q: Did she know you?

20 A: Yeah, she know me.

21 Q: Okay. All right.

22 A: Yes, sir. I ain't gonna lie; yes, sir, she know me.

23 Q: Okay. So, if you had been one of those two people, she
24 could've identified you?

25 A: Dealing with this situation, I hate to say it, because I

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

32

1 don't want to take nothing from you, she would've told on me.

2 Q: Yeah.

3 A: Because of the victim. Because of the victim, it was --
4 it was -- the victim was Quille, man, all of us know Quille,
5 everybody, even me. She's like -- she would've told on me.

6 Q: All right. And you feel like Mr. Canty did not handle
7 that information, that evidence properly?

8 A: No, I feel as though -- I feel as though he didn't handle
9 that one right there well at all.

10 Q: Okay. And I think we've spoken earlier about One-ten and
11 B. Wells and those guys?

12 A: Yeah, of the fact of what was in my transcript; yes, sir.
13 Everything that I'm quoting you was inside my transcript.

14 Q: Okay. All right. Now, Keir Johnson takes the stand and
15 testifies?

16 A: Yes, sir; he took the stand and testified.

17 Q: And he was -- he was charged with murder as well?

18 A: No, he never was charged with nothing.

19 Q: Okay.

20 A: I had -- I had had the article, the newspaper article
21 drew up to whereas it stated in the article that he was given
22 a year probation and the murder charge was dropped for his
23 cooperation in testifying against me. But inside my trial,
24 the prosecutor made sure she put it thousands of times over
25 and over, he's not getting no deal; he's getting tried for

Graham v. State - 2017-CP-26-05189

33

CARNAIL GRAHAM - DIRECT BY THOMAS

1 murder just like everybody else; he's gonna get the same
2 amount of time; he was a -- participated in it; we have not --
3 we're not helping him; he's gonna be held accountable for the
4 same crime.

5 Q: Was he ever tried for murder?

6 A: Never, it was dropped. It was threw out.

7 Q: Did he have other charges that were dismissed that you're
8 aware of?

9 A: All his charges that he caught -- I sat in county 36
10 months. He caught six charges; he caught six felony charges
11 in the midst of me sitting in the county. All those was
12 throwed out. The murder charge that actually got me caught up
13 in this situation was throwed out. Everything that he had to

14 -- that had him tied to the crime, they overlooked it; they
15 threw it out. Every charge that he caught from stabbing his
16 girlfriend up was throwed out, everything. There's nothing

17 that they left on his head. He didn't catch no time for
18 nothing.

19 Q: And he was their star witness?

20 A: And he was their star witness.

21 Q: Okay. Do you know of your own personal knowledge, not
22 what somebody told you, but do you know of your own personal
23 knowledge why Keir Johnson would have blamed you and Cutty?

24 A: Yes, sir.

25 Q: Why?

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

34

1 A: To save everybody else.

2 Q: What you mean save everybody else? One-ten and B. Wells
3 and that crowd?

4 A: Yes, sir.

5 Q: Okay. Do you know of your own knowledge, again, not what
6 somebody told you, do you know of your own knowledge if he --
7 was he afraid of those people?

8 A: Yes, sir.

9 Q: Was there any reason to be afraid of those people?

10 A: Man, yes, sir.

11 Q: Okay. And did you bring this information to the
12 attention of your attorney?

13 A: No, sir, not at the time, because to be honest, I didn't
14 know. The only person knew was Thomas James and he brought it
15 to my lawyer and his lawyer. See, I couldn't give names on
16 what happened, because I wasn't there.

17 Q: Cutty did?

18 A: Yes, sir. But, I have it in my transcript, like I was
19 saying in the beginning, when the trial was opened up ---

20 Q: All right. So, you personally didn't do it, but your
21 codefendant did, brought this information to his lawyer?

22 A: Oh, yeah, yeah, yeah. Yes, sir, and he took it to my
23 lawyer, too.

24 Q: Okay. All right. Now, Ms. Smith, she lives in the
25 trailer park in question, the trailer park we're talking

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

35

1 about?

2 A: Yeah, she stayed like two trailers down from the trailer
3 that the crime took place at.

4 Q: All right.

5 A: If -- I might be mistaken and saying it wrong. If it's
6 not two, it's one. I know they like was like right beside
7 each other, though.

8 Q: Okay. Now, did you make -- did you testify?

9 A: No, sir. My lawyer told me that there wasn't no need for
10 me to get on the stand, because they didn't prove my guilt.

11 Q: Did you have a prior record?

12 A: Yes, sir. Oh, because we're putting it on record and

13 we're speaking the truth, and also, he said it wasn't -- I'm

14 going to quote it over. He said there wasn't no need for me
15 to get on the stand, because they didn't prove my guilt, plus
16 my record, being the way I had charges prior, like prior

17 charges in my life, they was gonna -- they was gonna bring
18 that up against me. But this is the thing that I want to
19 point out to the Court, people in life set patterns -- and I'm
20 going to say it fast and make it short and simple. People
21 with life set patterns at the things they do. If it's
22 football, basketball, or if it's dealing in negativity, it's a
23 pattern set, unless he's just kind of off or crazy and it just
24 happened spontaneous. If you go back to the time I was a kid,
25 I'm talking about dealing with getting charges and case

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

36

1 opened, any charge I ever had in my life, I never had an armed
2 robbery. I never had a home invasion. I never been locked up
3 in trouble for burglaries. The only thing I ever had on my
4 record was drug charges and jumping out -- from not having
5 license and jumping out the car and running from the police.

6 Q: All right.

7 A: You see what I'm saying? And I felt like if they would,
8 because my lawyer kept saying like they gonna use your record.

9 I wanted them to use my record, because my record would've

10 showed -- I hate to say it, but who I am as a person, not who

11 y'all trying to say I am, because my record not gonna show --

12 not gonna lie, it's gonna show what I've been doing throughout

13 my life, if it was negative. Now, I'm not saying that just

14 because my record is saying, oh, you've been doing -- selling

15 drugs, selling drugs, or you've been jumping out and running

16 from the police doesn't mean that you're not capable of

17 killing nobody. I know and understand that in my heart. I

18 know and understand that, but how can you place me as far as

19 being a murderer or a killer when you ain't even showing and

20 proving it to it in evidence. It's not showing the proof at

21 all. The only thing I'm locked up for is hearsay.

22 Q: So, do you believe that you -- that Mr. Cauty fully

23 explained to you, so you understood, about taking the stand

24 and testifying?

25 A: Yes, sir. You talking about now or then?

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

37

1 Q: Then?

2 A: Yes, sir. He told me that if I was to take the stand,
3 they was gonna come at me with my record; they were gonna try
4 to make it look like I was this type of person, that type of
5 person. And as of right now, we're talking about this day,
6 because I can never forget this day, he was like, but as of
7 right now, they haven't showed and proved that you broke into
8 this house -- I mean kick in this door and robbed and killed
9 nobody. So, therefore -- cause I'm not -- I'm not charged
10 with robbery; I'm just charged with murder.

11 Q: Right.

12 A: So, he's like there's no evidence showing and proving --
13 how he said it, because I want to make sure I tell the truth
14 on the man. He was like no physical evidence, no forensic
15 evidence, nothing ties me to this crime. So, he was like, I
16 feel as though, you know, there's no need to put you up there,
17 because then they can probably damage where you're at right
18 now.

19 Q: Right. But that advice turned out to be wrong?

20 A: I got 32 years, sir.

21 Q: Okay. All right. Now, I've got two last topics and I
22 want you to -- and you and I have talked about this. There
23 was cell phone evidence. I want you to be brief, because you
24 and I talked a long time about the cell phone evidence. But
25 let's try to walk through it as quickly as we can. Now, in

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

38

1 the cell phone evidence, there were, and I call them players,
2 who was involved with the cell phones?

3 A: All right. Check this out. This where -- this where we
4 get -- we get real, excuse my language. This where -- this
5 where, okay, in the opening statement, I'm going to stand up,
6 in the opening statement, Mr. Frederick gave the names and
7 it's in my transcript. It says, that Thomas James told me
8 these are the people that went out here to commit these
9 crimes, but he didn't go himself, right, that's in the opening
10 statement. This is before the phone expert come. Now, mind
11 you, out of my whole trial, the whole trial, every witness
12 they put on the stand, the only person that had scientific
13 proven facts was the phone expert. Right?

14 Q: And he came and testified?

15 A: Yeah, he testified.

16 Q: Okay.

17 A: Okay. Once he testified under oath, you had -- you had

18 Bootsie number, you had B. Wells number, you had One-ten momma
19 number, and you had McCray number, which was Amigo. Right?

20 This is inside my transcript. This is -- this is all black-
21 and-white, this is what --

22 Q: So, the only new person that they were talking about that
23 we haven't spoken about this morning is Amigo?

24 A: Yeah, but I'm about to get to that now that we're on the
25 phone.

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

39

1 Q: Okay.

2 A: All right. Before they put the phone expert, they put
3 the AT&T phone analyzer on the stand. The phone analyzer
4 female lady said, well, I can't -- I can't -- I can't match
5 this name, which was Donavon Johnson, to this number, but a
6 woman name comes up to this number, which was his mother's
7 name. I can't -- the AT&T lady said, I can't match Brandon
8 Wells name, because it's not in his name. The only phone was
9 -- that was labeled to this person name was Amigo. This was
10 in my trial; this is what came out in my trial. In my trial
11 they showed and proved that his phone placed him at the
12 studio, it placed him at the crime scene, and it placed it
13 where the van was dropped off at. Mind you, One-ten momma

14 phone, placed him at the crime scene, placed him at the
15 studio, placed where the van was dropped off.

16 Q: How does the studio fit into this?

17 A: The studio is where everybody is supposed to got together
18 and plotted the whole situation.

19 Q: And then left from there ---

20 A: And then left the studio and went straight to the crime
21 scene.

22 Q: Gotcha.

23 A: Committed the crime, things got crazy, they ran and left,
24 jumped in the van, high-speed chase, jumped out the van.

25 Brandon Wells phone shows and proves that he was at the

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

40

1 studio, the crime scene, and where the van was dropped off at.
2 My phone shows and proves that I was inside Crane Creek
3 Apartments, seven miles away, at the time of the crime when
4 the crime took place. The same place where by baby momma
5 testified saying that I was home at the time of the crime.
6 But with it being like this, okay, you got a phone expert that
7 come out of West Virginia; he was from West Virginia. He
8 never met my kids' mother. He's going off of what the towers
9 are showing where it's pinging at. If the tower shows and
10 proves that I'm seven miles away from the crime, and I have a
11 witness testifying saying I was here at the crime, and these
12 people never got together and even had a conversation to even
13 deal with this crime. It shows and proves without -- and if
14 you use -- if my lawyer would have put Ms. Swella (spelled
15 phonetically) on the stand from the jump, it would've placed
16 four people at the crime scene, because it's out of her
17 statement that she gave to the investigator. She said that a
18 vehicle pulled up in my yard. When the vehicle pulled up in
19 my yard, I talked to Keir Lamont Johnson. I couldn't tell you
20 description-wise of the face of driver's seat or the passenger
21 seat because I couldn't see his face, but I can tell you he
22 was short, because he got out and walked around to the
23 driver's seat. So, therefore, that's two people right? She
24 also gonna state inside of her statement that I also witnessed
25 run up off the side of my trailer and jump in the van when the

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

41

1 van was pulling off to leave. I can't tell you their face
2 description -- because this is what she said. Everything I'm
3 going off of is what she said in her statement. I can't tell
4 you their face description, but I can describe these people to
5 you. So, therefore, it would've showed and proved that it's
6 four people involved in this crime. And if four people
7 involved in this crime and an eyewitness placing them all at
8 5'6" -- under 5'6", how can you put a person that's 6'1" tall
9 2 -- at that time I was 252 pounds, inside this 5'6" category
10 with these four people, when you only got one footprint.
11 Right? It would've showed and proved without a shadow of
12 doubt, there's no way possible that you can take Keir Lamont
13 -- I mean, you could take Carnail Graham and place him in the
14 vehicle when you got fingerprints. All the fingerprints is
15 these people names. These fingerprints it ties Thomas James
16 to the crime; it ties Lashalla (spelled phonetically) to the
17 crime; it ties Chubb to the crime; it ties Keir to the crime,
18 because all these fingerprints was inside this van. Everybody
19 that was tied to this crime fingerprints was inside this van
20 except for mine. Now, I ain't no genius to wipe down no van
21 and just wipe my fingerprints down and not wipe no other
22 fingerprints down because if you wipe it down, you just gonna
23 wipe the whole van down. You not gonna just wipe my
24 fingerprints off. So, why do you have 19 fingerprints, but
25 none on mine if I was inside this vehicle anytime that day or

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

42

1 that night.

2 Q: Now, and these people, the cell phone expert places these
3 people that you're talking about; the One-ten, B. Wells ---

4 A: It places ---

5 Q: --- and Amigo?

6 A: Yes, sir. It places -- it places every single last
7 person that's inside my transcript, it places every single
8 last one of them at the crime scene. It places them all at
9 the spot where the van was dropped off at. It places them all
10 at the studio.

11 Q: And you talked to your attorney about that?

12 A: Yeah, my attorney knew. He knew. He knew all this. I
13 made sure -- I made sure he knew because I'm not gonna -- I'm
14 not gonna sit here and try to downplay it, but I'm gonna just
15 speak on what I felt like he could've helped me and what --
16 what could've been different in my case. So I ain't gonna sit

17 here and say oh, Mr. Canty didn't know. Mr. Canty knew

18 because I brought it to him. Me and him went over it a lot of
19 times. I made sure like, Mr. Canty, look at this, make sure
20 you point this out. Make sure you show them this right here
21 and -- and he tried. Certain parts he tried, but when it came
22 to putting the witnesses on the stand and pushing the issue
23 about that gun, he ain't do that, and I felt like that
24 would've been a totally different outcome on my case.

25 Q: Okay. All right. I've got one last section to ask you

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

43

1 about that you and I talked about. You said that you felt
2 like there was a problem with the solicitor's closing, closing
3 argument?

4 A: Yes, sir. She was vouching. She was vouching to the
5 jury that everything that Johnson was saying was to be the
6 truth.

7 Q: By Johnson, you mean ---

8 A: Bootsie. Bootsie. Everything, she vouched. She made
9 sure she stood on that. She made sure she stood like on his
10 truth, right?

11 Q: Right.

12 A: Okay. So you telling the Court everything that Bootsie
13 is saying is the truth without a shadow of a doubt; ain't

14 nothing he's saying is wrong; don't believe Carnail Brown
15 lawyer; don't believe Tommy James' lawyer; believe me because
16 I got the witness; I'm putting him on the stand.

17 Okay. If this man telling you the truth and you telling me
18 his story is a -- is a one hundred percent truth without the
19 shadow of a doubt, then why he said I was shooting a .45
20 automatic, a hundred percent sure I had a .45 automatic, and
21 the victim was killed with a .357 automatic, I mean, revolver.

22 Q: So, and you and I talked about this, too. To use a legal
23 term, you're saying that you feel like she bolstered his
24 testimony?

25 A: Yes, she bolstered his testimony to -- to -- to lure the

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

44

1 jury into finding me guilty.

2 Q: Which is the same thing of you saying she was vouching
3 for him?

4 A: Yeah, she vouched for him. And see, and -- and in the
5 eyes of the law, that's -- that's what it's called, vouching.

6 Q: All right. Now, Carnail, you and I talked about this and
7 I'm not implying that I've left anything out, but or forgotten
8 anything. You've waited a long time for this day and today is
9 your day in court for your post-conviction. Is there anything
10 that you feel like I've forgotten that we've talked about,
11 that I haven't brought to the Court's attention that you feel
12 is important today?

13 A: Yes, sir.

14 Q: What's that?

15 A: About the phone call -- the phone call that Terry B.
16 a/k/a (Inaudible) said and in my transcript go by the name of

17 Little Peppy said he received. They overlooked that. They
18 said to tie me to this crime, the only way they could've tied
19 me to this crime was to try to say I was using Thomas James
20 cell phone, right? That's the only way. That's the only way
21 they could even implement me any kind of way.

22 Q: That you were using whose cell phone?

23 A: Thomas -- Cutty's cell phone.

24 Q: Cutty's cell phone?

25 A: Yeah, because they couldn't -- it was -- it was no other

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM - DIRECT BY THOMAS

45

1 way to say I was with these people, period. But when they
2 used his cell phone and tried to say I called off the cell
3 phone, the witness that they said that the phone call went to
4 -- it's in my transcript -- the man testified under oath he a
5 hundred percent sure that it wasn't me on the phone. They
6 asked this man numerous of times how long he knew me and how
7 long he knew Cutty. He told them that he knew me and Cutty
8 all his life. He knowed us since childhood friends. He was
9 not mine; he was on the stand for the prosecutor. He never
10 took the stand in my behalf. He took it for the prosecutor.
11 So everything that he was on the stand and saying, it was for
12 the prosecutor. When she asked him, she asked him three
13 times, it's in my transcript, she said -- no, twice, to make
14 sure it's the truth, twice. She asked him one time who was on
15 your phone. I mean, when the call came through on your phone,
16 was Thomas James or Carnail Graham on that phone? He said,
17 no, ma'am, it wasn't. She came back with the question again
18 and -- and left my name out and said, Thomas James, when Cutty
19 called your phone -- this is what she said -- when Cutty
20 called your phone -- when Cutty phone called your phone, was
21 Cutty on the phone; he said no. She never asked him again
22 about me until the end when she got -- when she got to the end
23 and asked him again, well, who was that on the phone when
24 Cutty phone called your phone? He said, I'm a hundred percent
25 sure it was neither one of them. So, if I wasn't on Cutty's

Graham v. State - 2017-CP-26-05189
CARNAIL GRAHAM -, DIRECT BY THOMAS

46

1 phone, the eyewitness that you put on the stand saying no, it
2 wasn't him on the phone; the gun that your star witness saying
3 that I supposed to be firing and that's the only gun I'm
4 firing, they don't got no shell cases of it and that ain't
5 even the gun that killed the victim. I'm not locked up for
6 home invasion; I'm not locked up for armed robbery; I'm locked
7 up for murder. How can I kill somebody with a .45 if the
8 victim was killed with a .357. The victim weren't shot
9 nothing but one time.

10 Q: So, and you figured -- it's your opinion that your
11 attorney didn't -- didn't properly clarify that?

12 A: No, what he did ---

13 Q: There was no testimony that you were the one that called?

14 A: No, he ain't -- no, he just when Terry B said it, it was
15 just like it just went over everybody head like, nobody paid
16 it no attention. Nobody. It ain't so much not my lawyer;

17 none of the lawyers or the prosecutor paid it no attention.

18 They were just trying to hurry up and get him off the stand.

19 Q: Okay. All right. Carnail, is that it?

20 A: Yes, sir.

21 Q: Okay.

22 MR. THOMAS: No further questions, Your Honor.

23 THE COURT: Mr. James?

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

Graham v. State - 2017-CP-26-05189
CONSWELLA SMITH - DIRECT BY THOMAS

47

1 THE COURT: Thank you, sir; you can step down.

2 MR. THOMAS: Your Honor, if it please the Court, we'd
3 call Ms. Conswella Smith to the stand.

4 CLERK: Please left hand on the Bible and raise your
5 right hand.

6 CONSWELLA SMITH, HAVING BEEN DULY SWORN,
7 TESTIFIES AS FOLLOWS:

8 CLERK: Please have a seat and state your name for the
9 Court and spell your last name?

10 COURT REPORTER: Spell your first and last name, please?

11 MS. SMITH: Conswella Smith, C-O-N-S-W-E-L-L-A, S-M-I-T-
12 H.

13 COURT REPORTER: Thank you.

14 DIRECT EXAMINATION OF CONSWELLA SMITH BY MR. THOMAS:

15 Q: Ms. Smith, I want to thank you for being here today.

16 Could you tell us a little bit about your presence at this

17 crime scene that night that this happened? What did you see,
18 if anything?

19 A: Yes, sir. I got a phone call that there was a car over
20 on the next road over and it kept riding back and forth. And
21 so me and my fiancé and my neighbor, we got up. And then the
22 car down my road, turned around, and they stopped like from
23 where she is to my house.

24 Q: How far were you from Splurge's trailer? Next door?

25 A: No, sir, he lived on the next road. Like there's a

Graham v. State - 2017-CP-26-05189
CONSWELLA SMITH - DIRECT BY THOMAS

48

1 trailer in the way blocking it.

2 Q: Yes, ma'am.

3 A: A double-wide, and I live right in front of that double-
4 wide.

5 Q: Okay.

6 A: And he lived right behind it.

7 Q: So you saw the van?

8 A: Uh-huh, (affirmative response).

9 Q: And what did you do, if anything, when you saw the van
10 that night?

11 A: I started talking to them.

12 Q: Who did you talk to?

13 A: Little Bootsie.

14 Q: Okay.

15 A: Some guy said his name was Que.

16 Q: Was that Keir Johnson?

17 A: Que.

18 Q: Was he the driver?

19 A: I'm not sure because I didn't go all the way out there,
20 but I came off the porch and I started talking to Little

21 Bootsie, and he was telling me -- me and him had a

22 conversation and he asked me how I was doing and I asked him

23 how his mom was doing and -- and the other dude, Que, said

24 something about, did I know where Juniper Bay was. And, by

25 the time I could tell him, the shots had went off real loud

Graham v. State - 2017-CP-26-05189
CONSWELLA SMITH - DIRECT BY THOMAS

49

1 and they crunk up and pulled up, and two guys ran and jump in
2 the van with them.

3 Q: Yes, ma'am. And do you know -- you know Carnail Graham?

4 A: Yes, sir.

5 Q: And when you -- did you see the two people running from
6 the house?

7 A: Yes, sir.

8 Q: And was one of those individuals, either one of those
9 individuals Carnail Graham?

10 A: No, sir.

11 Q: Now, you're sure about that?

12 A: Yes, sir.

13 Q: Okay. And did you tell Mr. Canty that; did you talk to

14 Mr. Canty?

15 A: I'm not sure. I just -- the guy asked me what happened
16 and I told them that ---

17 Q: Somebody come and speak to you about it?

18 A: I'm not sure, I forgot. It's been a little while.

19 Q: Okay.

20 A: But I did talk to a couple of detectives and the
21 solicitors came out there. I talked to a couple of people. I
22 ain't gonna -- I don't know they name, but ---

23 Q: Okay. All right. Now, Ms. Graham, do you know why --
24 did you -- were you subpoenaed to come to court?

25 A: Yes, sir.

Graham v. State - 2017-CP-26-05189
CONSWELLA SMITH - DIRECT BY THOMAS

50

1 Q: And who subpoenaed you?

2 A: I think it was his lawyer.

3 Q: His lawyer?

4 A: Uh-huh, (affirmative response).

5 Q: Okay. And did he put you on the stand?

6 A: When, during the ---

7 Q: Did you testify?

8 A: No, they didn't my testament because they said they
9 already was gonna go with who they had, somebody else.

10 Q: Okay. Now, and I don't mean to embarrass you, but I want
11 to make sure that, you know, we have all the truth out before
12 the Court. Do you have -- have you been arrested before; do
13 you have a prior record?

14 A: Yes, ma'am -- yes, sir.

15 Q: Okay. And you understand that you're here today to tell
16 the truth?

17 A: Yes, sir.

18 Q: And are you telling the truth?

19 A: Yes, sir.

20 Q: Okay. And you were there; you saw the people come out of
21 the trailer?

22 A: Yes, sir. I couldn't see them that good, but I seen like
23 the two guys -- while I was talking to Que and Little Bootsie

24 ---

25 Q: Yes, ma'am.

Graham v. State - 2017-CP-26-05189
CONSWELLA SMITH - DIRECT BY THOMAS

51

1 A: --- and as we was talking, the two dudes came running out
2 the trailer. When I heard the shots, that's when they crunk
3 up and pulled up, and that's when the two guys came running
4 out the trailer from the side of Yogi's (spelled phonetically)
5 trailer, my neighbor that's in front across from me. They
6 started running from around his trailer and they jumped in the
7 van.

8 Q: But you're sure that neither one of those were Carnail
9 Brown?

10 A: I didn't see him. I know the other guys, but I didn't
11 see Duba.

12 Q: But you saw the guys running?

13 A: I didn't see -- I seen the short -- it was like two short
14 guys.

15 Q: Okay.

16 A: I didn't get to see their face, but I seen them when they
17 jumped in the van, like how tall they were and short. And
18 that's -- when they was asking me, was they tall or short, and
19 I told them it was two short dudes and I talked to Bootsie and
20 Little Que in my yard.

21 Q: Okay. So, they weren't as tall as Carnail?

22 A: Hu-uh, (negative response).

23 Q: Okay.

24 A: They was skinny, and one of them was short, and the other
25 one was a little shorter than me.

Graham v. State - 2017-CP-26-05189
CONSWELLA SMITH - CROSS BY JAMES

52

1 Q: Okay.

2 MR. THOMAS: Your Honor, I beg the Court's indulgence.

3 Your Honor, I have no further questions.

4 THE COURT: Mr. James?

5 CROSS-EXAMINATION OF CONSWELLA SMITH BY MR. JAMES:

6 Q: Ms. Smith, thank you for being here today.

7 A: Okay.

8 Q: So you were outside talking to Bootsie and Que in the
9 van, correct?

10 A: Yes, sir.

11 Q: And then shots rang out?

12 A: Well, they split out.

13 Q: All right. About what time of night was it when the
14 shots rang out?

15 A: It was about 2:30, 3 o'clock, maybe. It was early in the
16 morning because I got the phone call when they started riding
17 in the trailer park.

18 Q: So, it was dark out?

19 A: Uh-huh, (affirmative response).

20 Q: All right.

21 COURT REPORTER: You have to answer loud.

22 A: Yes, sir.

23 Q: Unfortunately, the court reporter can't really look at
24 you when you're nodding or shaking your head. So, you have to
25 articulate yes or no.

Graham v. State - 2017-CP-26-05189
CONSWELLA SMITH - CROSS BY JAMES

53

1 A: Okay.

2 Q: What was your reaction when you heard the gunshots?

3 A: I almost had a heart attack. I was so scared, because I
4 ain't never, you know, I ain't never experienced no mess like
5 that.

6 Q: Generally, it's a peaceful neighborhood?

7 A: Yes, sir. I've been there for 18 years. We ain't never
8 had no ---

9 Q: So you almost had a heart attack, you were scared. Did
10 you flee from the scene or ---

11 A: No, I didn't go nowhere, I just -- because they took off
12 when they heard the shots, that's when the guys in the van had
13 pulled up to the other trailer right in front of me, right

14 there, they pulled up, and that's when the other two guys
15 jumped in the van and they went canning out that way. They
16 went to the left to Juniper Bay.

17 Q: So you heard the shots, heart attack, and then all at the
18 same time, the van kind of peels off from you to go pick up
19 the guys?

20 A: We already had the cops on the way.

21 Q: Okay.

22 A: Because I had already called -- we had called the cops
23 first, because they kept riding in the trailer park, so we was
24 scared.

25 Q: Okay. So, you had already called law enforcement, just

Graham v. State - 2017-CP-26-05189
CONSWELLA SMITH - CROSS BY JAMES

54

1 telling them hey, there's this sketchy looking van roaming
2 around?

3 A: Yes, sir.

4 Q: Okay. And you said you didn't get a very good look at
5 the guys who were running out?

6 A: No, I didn't see their faces.

7 Q: How well lit is the neighborhood?

8 A: It's dark; we ain't got no lights back there.

9 Q: Okay. So you just kind of like saw the figures as they
10 went towards the van?

11 A: Yeah.

12 Q: Okay. And you reported all of this to law enforcement?

13 A: Yes, sir.

14 Q: And you said you spoke with multiple detectives?

15 A: Yes, sir.

16 Q: But you couldn't necessarily remember speaking to Mr.

17 Canty?

18 A: I'm not sure.

19 MR. GRAHAM: My lawyer.

20 Q: The elder gentlemen sitting back here?

21 A: Oh, yes, I talked to him. I spoke with his lawyer.

22 Q: So, you did speak to Mr. Canty?

23 A: Yes, sir.

24 MR. JAMES: And just to be clear on the record, I've

25 stood to the side and pointed out Mr. Canty who is sitting in

1 the gallery for her to get a visual identification of him.

2 I have no further questions for this witness.

3 THE COURT: Anything else, sir?

4 MR. THOMAS: No, Your Honor, nothing further.

5 THE COURT: Okay, ma'am, you can step down.

6 MR. THOMAS: Your Honor, I beg the Court's indulgence
7 just for a second.

8 Your Honor, if it please the Court, that is the
9 applicant's case.

10 THE COURT: Mr. James?

11 MR. JAMES: The state calls David Canty.

12 CLERK: Raise your right hand.

13 DAVID CANTY, HAVING BEEN DULY SWORN,

14 TESTIFIES AS FOLLOWS:

15 CLERK: Have a seat and state your name for the Court and
16 spell it.

17 MR. CANTY: David Canty, C-A-N-T-Y.

18 DIRECT EXAMINATION OF DAVID CANTY BY MR. JAMES:

19 Q: Good afternoon, Mr. Canty?

20 A: Good afternoon.

21 Q: I had to find a clock and figure out if it's still
22 morning or afternoon.

23 Did you represent Mr. Graham on his charges for murder?

24 A: I did.

25 Q: So you're a licensed attorney practicing in this state?

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

56

1 A: That's correct; 37 years this month.

2 Q: How much of that criminal?

3 A: Half my practice over that time has been criminal
4 defense.

5 Q: So, to say the least, you're experienced in criminal
6 defense?

7 A: I've tried quite a few cases.

8 Q: Okay. Do you recall about how many times you met with
9 Mr. Graham prior to trial?

10 A: I can't disagree with his assessment. I believe it was
11 six or seven, and he would telephone me sometimes from the
12 jail.

13 Q: So, on top of the six or seven meetings, there were a
14 number of other phone calls or letters?

15 A: Correct.

16 Q: Did you file motions pursuant to Rule 5 and Brady?

17 A: Yes, we did.

18 Q: All right. Did you receive materials responsive to those
19 requests?

20 A: We did.

21 Q: Were there any materials that came in late in the
22 process?

23 A: Oh, yes. Let me point out that, initially, this file was
24 in the hands of Heather von Herrmann, who was an assistant

25 solicitor. The case was actually tried by Nancy Livesay. I

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

57

1 believe that was because Heather had left the solicitor's
2 office. She was a witness in the trial, though.

3 Q: You indicated that there were some materials that came in
4 late; what materials were they?

5 A: Well, perhaps the most troubling was the firearms'
6 analysis. The case actually had two trial dates. We received
7 the first one on the eve of the first trial date and we
8 received the second one on the eve of the second trial date.

9 Q: What did you do when you got those materials on the eve
10 of the first trial?

11 A: Well, one of our theories was that the victim had been
12 shot and killed by her boyfriend by mistake, and not by
13 whoever entered the trailer. And the .357 Magnum rounds that
14 were recovered totaled four in the first analysis. The second

15 analysis, I counted for all five of her boyfriend's bullets
16 from his revolver and excluded the bullet recovered from the

17 victim's spine as having come from that revolver. As a
18 consequence, I should point out that my -- that Carnail's
19 codefendant's counsel, Bobby Frederick, we're personal
20 friends, and we actually shared office space briefly sometime
21 before this. Bobby was at the time the President of the South
22 Carolina Association of Criminal Defense Lawyers and something
23 of an activist on expert witnesses, he was able to get a
24 firearms expert to come from Georgia to the trial and to
25 review the reports provided by the SLED agent, and the reason

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

58

1 we did not put him on the stand was he indicated to us that
2 with the limited time that he had and the inability to
3 actually physically examine the materials, that he was not
4 able to contradict the SLED lieutenant, who gave the second
5 report that accounted for all five bullets from the
6 boyfriend's gun. And additionally, I would mention that there
7 were -- the only evidence against Carnail were three paid
8 liars, basically. One was his -- the alleged wheel man.

9 Q: I'm going to cut you off if I can. We're going to get to
10 that here in just a second, but just to ---

11 A: Well, you asked me about late production.

12 Q: Okay.

13 A: We got a statement from an inmate, a federal inmate, that
14 the solicitor's office had had for about two years saying I
15 heard this story or I know these facts, and they were -- the
16 recitation of facts was plainly inaccurate, and my personal
17 belief is that Heather von Herrmann got this letter, read it
18 and said this is obviously BS and did not disclose it and had
19 no intention of using it. However, Ms. Livesay made that
20 witness central to her case.

21 Q: So the ballistics expert that came in, had a very brief
22 opportunity to try and look at the physical evidence, correct?

23 A: Correct. Well, I don't know that he had any opportunity
24 to look at the physical evidence. He was present in the
25 courthouse, but I do not believe that he was afforded the

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

59

1 opportunity to look at the bullet fragments.

2 Q: All right. And you requested a continuance, correct?

3 A: Oh, absolutely, yes. And, there's a transcript of a
4 lengthy hearing before Judge John, and I think you can tell
5 from the tone that we were not to be afforded that indulgence.

6 Q: Was there a reason why you didn't seek the services of a
7 ballistics expert earlier than the receipt of the second
8 report?

9 A: Because the first report only accounted for four of the
10 bullets. The first report did not contradict our theory.

11 Q: So you did not feel that you needed a ballistics expert
12 until you received that second report?

13 A: Exactly. The second report says we've got all five
14 bullets, could not have possibly come from that revolver.
15 That was brand new.

16 Q: Do you recall how the state argued the discrepancy in the
17 reports at trial?

18 A: I don't believe that Ms. Livesay even mentioned it. I
19 don't have any recollection of that. I'm in my 60s now, and
20 I've found that my memory is not what it used to be.

21 Q: Did Mr. Graham give you any leads to follow up on?

22 A: Most certainly. He was a fount of information. Every
23 time we met, every time we spoke, he had -- he essentially
24 briefed me. He had a list of things for me to do.

25 Q: Did he provide you with witnesses to go and talk to?

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

60

1 A: Oh, absolutely, yes.

2 Q: Was one of those witnesses Conswella Smith?

3 A: I don't believe I spoke to her personally, other than in
4 the courtroom, but the private investigator got a statement

5 from her, and we had a police statement from her as well.

6 And, I believe it was my subpoena that brought her to the
7 courtroom.

8 Q: Okay. You subpoenaed her to the courtroom, but as the
9 transcript reflects, she was not ultimately called as a
10 witness?

11 A: That's correct.

12 Q: Why is that you did not call Ms. Smith as a witness?

13 A: Well, that's probably what troubled me more than anything
14 else about this case. If my memory serves me well, we were in

15 the fourth day of trial, it was late on Thursday afternoon,

16 and there were several considerations. One is that we were

17 apprehensive that if we called another witness at this point,

18 that the jury would hold it against us for keeping them past

19 their dinnertime. Ms. Conswella, as you pointed out, has a

20 significant criminal record, a number of convictions of crimes

21 of moral turpitude, which would have been brought out on

22 cross-examination. And, we felt, Mr. Frederick and I, rather

23 strongly and I think everyone in the courtroom, as far as I

24 could tell, except obviously the jury, felt that the state had

25 utterly failed to prove its case. They had zero objective

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

61

1 evidence. They had three jailhouse snitches. All of the
2 objective data corroborated Carnail's alibi.

3 MR. JAMES: I beg a moment of the Court's indulgence.

4 BY MR. JAMES:

5 Q: Did you have an opinion as to the substantive helpfulness
6 of her testimony or what you expected her to testify to?

7 A: I think it would have been helpful, because our theory
8 was that they're actually four perpetrators and not three, and
9 that our clients, that is Carnail and Mr. James, were not
10 among those four. So it would have established that. But as
11 I said, there were several considerations, and we really felt
12 that the state had utterly failed to prove their case.

13 Q: Earlier there was testimony that the theory of the case
14 was that the victim was ultimately shot and killed by her
15 boyfriend shooting down the hall not by whoever it was that
16 intruded into the building, correct?

17 A: That's correct. That was based not only on the caliber
18 of the bullet, but on the testimony of the forensic
19 pathologist. He indicated the bullet entered level, slightly
20 left of center, through her heart, through her lung, and into
21 her spine. My question to him was, I asked him if he was a
22 sportsman. He was; a hunter. He had done unknown number,
23 thousands of autopsies. I asked him could someone with a
24 wound like that run 45 feet and then jump over an obstacle,
25 and he said that that was very unlikely. And, I don't know if

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

62

1 you're familiar with a .357, but it is a high velocity round,
2 and it's not just the weight of the slug, it's the kinetic
3 impact. I -- my personal belief is that she was shot
4 accidentally by her boyfriend as she made her way down the
5 hall.

6 Q: I'll admit I don't have much familiarity with firearms.
7 Like the Christmas Story, I'll just shoot my eye out.

8 A: But it was also important, let me say this, to go to Mr.
9 Bootsie's credibility. His statement -- he gave five
10 statements prior to his testimony, and he said that when
11 Carnail got in the van, he had a semi-automatic weapon. And,
12 she was not killed with a semi-automatic weapon. So Carnail,
13 unless he had switched guns on the way to the van, could not
14 have been the killer.

15 Q: When he took the stand, Mr. Graham contested that the
16 photographic evidence that was introduced at trial, showed
17 that the victim was located in the hallway, not by the bed.
18 Do you recall the substance of the photographic evidence?

19 A: I do not. I recall the testimony was that she had run
20 down the hall and the door could only open partway because
21 there was a dresser behind it. And that she had jumped
22 through that partially open door and over her boyfriend onto
23 the bed.

24 Q: Would it be an accurate recollection of trial to say that
25 the door opened by 45 degrees at most?

Graham v. State - 2017-CP-26-05189

63

DAVID CANTY - DIRECT BY JAMES

1 A: I believe that's right.

2 Q: Okay.

3 A: And I knew that the revolver had been found a couple of
4 weeks later by the victim's father. I knew that the police
5 had found two firearms, two other firearms and a good deal of
6 drugs at the time that they responded to the crime scene, but
7 it didn't occur to me that the boyfriend had actually
8 concealed the revolver.

9 Q: Did you ever visit the crime scene in your course of
10 preparation for trial?

11 A: Absolutely.

12 Q: So you were able to take a look at the trailer in
13 question?

14 A: We were not able to enter the trailer.

15 Q: Okay.

16 A: But, we were around it in the neighborhood. We walked

17 it, both Mr. Frederick, myself, Mr. Frederick's associate, my
18 paralegal, and a private investigator. Interviewed several of
19 the neighbors.

20 Q: Was that a single wide, double wide, triple wide?

21 A: Single wide is my recollection.

22 Q: So it wasn't a big trailer?

23 A: No.

24 Q: Did you look into -- see if I may rephrase that. At
25 trial, there was evidence introduced to show phone tracking.

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

64

1 locations of not only Mr. Graham's phone but the phones of
2 various other persons; is that correct?

3 A: That is correct. That was an expert witness that Bobby
4 located, identified, retained, and he gave, I thought, an
5 excellent presentation.

6 Q: Just for clarity, who -- what was the order of operations
7 at trial? Who got to argue and question first; was it you or
8 Mr. Frederick?

9 A: Say that again, argue and question?

10 Q: The order of operations at trial, who was the person who
11 got to question witnesses first; Mr. Frederick go first or
12 you?

13 A: Generally, it was Mr. Frederick, and I would follow him.

14 Q: Okay. And, so Mr. Frederick is the one who called the
15 phone expert witness?

16 A: Correct.

17 Q: Okay. And what was your interpretation of the substance
18 of that testimony?

19 A: That Carnail Graham's alibi was corroborated and that the
20 individuals that Mr. Frederick named in his opening statement
21 were placed at the crime scene at the time of the crime. This
22 is 3 o'clock in the morning in a trailer park in a fairly
23 remote area west of Conway. And I remain convinced that Mr.
24 Graham is not guilty, if that means anything.

25 Q: Mr. Graham indicated that he wanted you to get a tape

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

65

1 from Walgreens to show his presence at around midnight, if I
2 recall the testimony correctly; is that correct?

3 A: What he indicated to me was that he had gone to buy
4 diapers and formula at Walgreens, and that there was
5 surveillance video that would corroborate that. I didn't
6 doubt him in the slightest. I did call Walgreens, and they
7 indicated to me that they only kept their surveillance video
8 for 72 hours; that's my recollection. What I did mention to
9 Carnail was that I was troubled by the fact that if we had an
10 alibi defense, putting you seven to ten miles away from the
11 crime scene, and then we produce video closer to the time of
12 the crime scene that has you closer to the crime scene, then
13 it certainly makes it plausible that you were in the area and,

14 in fact, I think I used the words out and about at that time
15 in that area.

16 Q: So, first, the video was no longer available by the time
17 you could go looking for it?

18 A: That's what Walgreens indicated to me.

19 Q: All right. And, second, you weren't sure that it would
20 have been helpful?

21 A: I think it may have been harmful.

22 Q: Did you investigate the possibility of bringing a defense
23 based on third-party guilt?

24 A: I thought our alibi defense was seamless. So Mr.
25 Frederick made that argument to the jury; I did not.

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

66

1 Q: So you felt alibi was the better strategy?

2 A: All the objective evidence indicated that the alibi was
3 corroborated. He simply was not there when it happened.

4 Q: But in some respects, due to the efforts of codefendant's
5 counsel, the possibility of third-party guilt was nonetheless
6 hinted at to the jury?

7 A: I think Mr. Frederick, when he named the perpetrators,
8 that's fairly direct.

9 Q: Do you recall Mr. Graham raising the issue of other
10 people's guilt to you?

11 A: Oh, certainly, yes. He named the people who were
12 involved, but there was not -- this was hearsay information to
13 him.

14 Q: Right.

15 A: And I believe he probably learned it from Mr. James,
16 would be my guess; I'm not certain. But, there was a crew

17 that hung out at that studio that included these people. And,
18 there was evidence that there was an older woman who had been
19 at the trailer about nine hours earlier, whom had informed
20 someone about the presence of drugs and money, and that that
21 was the actual source of the hatching of the plot that
22 evening. And she was a person that was either related to the
23 victim or a friend of the victim, but she had been at the
24 trailer to visit the victim. Another extraordinary thing that

25 I really think I should point this out is the chief detective

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

67

1 in this case and the chief investigator in this case, both of
2 whom we were quite prepared to cross examine, were never
3 called as witnesses, and I think there was some compelling
4 reasons why the solicitor took that path. They would not have
5 withstood cross-examination.

6 Q: Do you recall if there was any blood trail to indicate
7 the victim's movement or the movement of her body after ---

8 A: My recollection is that this wound was so lethal that
9 there was very little bleeding. Her death was quite prompt
10 according to the forensic pathologist. She would not have
11 survived.

12 Q: And it was one bullet through the left side of the chest?

13 A: Slightly to the left and horizontally into the lung, the
14 heart, the spine.

15 Q: Into the aorta into the spine. Was there an exit wound?

16 A: No.

17 Q: Okay. The bullet was ultimately recovered from the
18 victim?

19 A: In the autopsy; that's correct.

20 Q: You indicated that you learned of the fed guys, the
21 snitches, late in the process. Were you still able to impeach
22 their testimony?

23 A: It was self-impeaching is the best way that I can
24 describe. He described a meeting with Carnail Graham that
25 could not have happened, because Carnail had been in jail for

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

68

1 two weeks at that point. He described Carnail leaving in a
2 van that had been in police custody for about six weeks at
3 that point. This is when I learned about selling stories and
4 we found out that this fellow was in the same federal
5 detention center in Florence with another witness. And
6 apparently, these people trade stories in order to testify to
7 try to get their sentences reduced. And in this case, this
8 fellow was successful, despite the fact that his factual
9 allegations were impossible to believe. He was one of three
10 snitches that they used as their case in chief.

11 Q: Do you recall looking into the footprint evidence that
12 was collected from the scene?

13 A: I recall that there was a footprint and it was a size
14 six-and-a-half, and Carnail's shoes obviously were much
15 larger. I don't recall, I think Mr. James may have worn that
16 size. There was -- I didn't deal with it.

17 And let me say this, there were a hundred, if not three
18 hundred examples of blatant falsehoods by the star witness.
19 His testimony was I gave five statements. Statements one and
20 two were completely false. You should believe part of
21 statement three, don't believe the rest of it; believe
22 statement four; and statement five was false. That was his
23 testimony.

24 Q: Did you and Mr. Graham discuss the possibility of him

25 testifying at trial?

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

69

1 A: Yes.

2 Q: What did y'all discuss on that subject?

3 A: Well, we discussed it on a number of occasions and I
4 pointed out to him that we don't have to make that decision
5 until the state has rested. And, Carnail has been to the
6 Department of Corrections a couple of times previously, and he
7 had a quite a number of unrelated charges pending against him,
8 unrelated to his home invasion. I felt that if he took the
9 stand, his credibility would be severely impaired because the
10 charges, as he's pointed out, he was never charged with armed
11 robbery, but there was a lot of cocaine, crack cocaine. He'd
12 had been to the Department of Corrections twice for crack, and
13 these home invaders went to this trailer for the purpose of
14 robbing the occupants of their crack, powder cocaine, and
15 money.

16 Q: So how did you advise him as to whether or not he should
17 testify at trial?

18 A: Because of the nature of his record, all the crack
19 convictions, I was afraid that that would do him more harm
20 than good. And, as I said, a consideration also in Ms.
21 Conswella's case, was we felt strongly that the state had
22 utterly failed to prove its' case. We thought we might get a
23 directed verdict. I halfway expected Judge John to act as the
24 13th juror. When I looked in those jurors' eyes, there were
25 three white men on that jury that gave me the impression that

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

70

1 they were going to convict him no matter what the evidence
2 was. When that jury came back, the white women who were on
3 the jury were in tears. And as I said, I don't think anyone
4 in that courtroom expected the verdict that we got. Let me
5 say this, I've known Judge John for 40 years; we're personal
6 friends. I've seen him sentence a lot of people. My personal
7 view, my opinion is that he gave 32 years rather than life,
8 because he had concerns also.

9 Q: Did you have an opportunity to speak to any of the jurors
10 after they rendered their verdict?

11 A: This case garnered a lot of attention. The courtroom was
12 fairly full every day. And, when the jury brought back their
13 verdict, Judge John ordered the deputies to escort the jurors
14 from the courtroom to their cars in the parking lot, so there
15 was no opportunity for that.

16 Q: And going back to the question of whether or not Mr.

17 Graham would testify, he was aware that he could testify if he
18 wanted to?

19 A: He was.

20 Q: Okay. And it was his decision not to?

21 A: I think he -- he followed my advice.

22 Q: Do you recall the substance of the state's closing
23 argument?

24 A: It was an appeal to emotion rather than a reference to
25 the facts. I think if you read mine and you read Bobby's and

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

71

1 you read hers, you'll be astonished by the contrast. She
2 emphasized the fact that Mr. Graham had gang tattoos on his
3 arms, and that the names of the codefendant and the state's
4 star witness were among those names. And as he's pointed out,
5 there's something like 28 people who have their names tattooed
6 on his arms. I -- I thought her closing was an appeal to
7 emotion rather than to the evidence.

8 Q: I'm going to go through a handful of portions of the
9 testimony, because there is an allegation non-specific though
10 it may have been, that the state vouched for Bootsie in the
11 course of its' closing argument. Do you have a copy of the
12 transcript up there?

13 A: My file is back there. I don't have one with me.

14 Q: Let's see if I can hook you up real quick.

15 MR. JAMES: If I may approach the witness?

16 THE COURT: Uh-huh, (affirmative response).

17 BY MR. JAMES:

18 Q: All right. I am handing you a copy of the amended record
19 on appeal Volume 2 of 2, which includes the portions of the
20 transcript that I'm going to go over as far as I can tell.
21 And, we'll be starting at page 1019, and I'll give everybody a
22 moment to flip around.

23 MR. BROWN: You said 1019, right?

24 BY MR. JAMES:

25 Q: 1019. On page 1019 from line 16 to 19, the solicitor

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

72

1 argued, he has no reason to lie on these people, referring to
2 Bootsie. They're all friends, they've been friends a long
3 time. He's telling on these people because it's the truth.
4 There was no objection there. Do you believe that that's
5 objectionable?

6 A: Arguably, I think there's a different standard in closing
7 as opposed to examination or cross-examination. I tend to be
8 differential to counsel in closing arguments. But that's
9 perhaps probably objectionable. And I would just point out,
10 that the simple assertion that he has no reason to lie on
11 these people is simply farcical in -- given the circumstances.
12 He has every reason in the world to lie and he did lie, but

13
14 Q: And certainly, throughout trial, you endeavor to show
15 that he had plenty of reasons to lie?

16 A: Yes.

17 Q: He had 30-to-life reasons to lie?

18 A: Correct. And I believe he got one-year probation for
19 this murder.

20 Q: That's not reflected in the record, but I do believe you
21 are correct?

22 A: Flipping over to page 1021, line 20. Again the Solicitor
23 asserted Bootsie had no reason to lie; it's likely the same
24 answer, but I'll ask the same question. Did you believe that

25 to be objectionable?

Graham v. State - 2017-CP-26-05189
DAVID CANTY - DIRECT BY JAMES

73

1 A: I think it could've been, yes, but again, it was simply
2 farcical in the face of what had been presented in the
3 courtroom.

4 Q: And moving forward to pages 1024 to 1025, quote, if he
5 wanted to get a deal, he would not be carrying a murder
6 charge, I can tell you that much. It's ridiculous to think
7 that we are giving some guy a deal and he is walking around
8 charged with murder. That is nonsense, folks, don't believe
9 it. Do not believe it.

10 A: Obviously, she was -- I don't know if it was an existing
11 material fact at the moment, but in hindsight, obviously that
12 was not what happened.

13 Q: He still had the murder charge pending against him at the
14 time of trial?

15 A: I believe so.

16 MR. JAMES: I beg a moment of the Court's indulgence.

17 BY MR. JAMES:

18 Q: Mr. Canty, you felt confident when the jury went to
19 deliberate that they were going to rule in your client's
20 favor, did you not?

21 A: Yes.

22 Q: How did Mr. Graham feel or did Mr. Graham communicate to
23 you how he felt?

24 A: I honestly do not recall, but obviously, as counsel, I
25 have a different perspective. I know I'm going home that

Graham v. State - 2017-CP-26-05189
DAVID CANTY - CROSS BY THOMAS

1 night and his life was on the line.

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

4 BY MR. JAMES:

5 Q: Please answer any questions Mr. Thomas may have for you.

6 MR. THOMAS: Your Honor, I just have a few actually.

7 CROSS-EXAMINATION OF DAVID CANTY BY MR. THOMAS:

8 Q: Mr. Canty, it's good to see you.

9 A: Good to see you.

10 Q: It's always nice to see somebody who has been practicing
11 law longer than me, and I'm glad that you're retiring.

12 A: Looking forward to it.

13 Q: Yes, sir.

14 Just kind of listening to everything, I know that you
15 felt like there was just really no evidence to support a
16 conviction for Mr. Graham. Looking back, do you think it

17 would've been prudent to call Ms. Smith, Consweilia Smith?

18 A: Yes, obviously.

19 Q: Yeah.

20 A: That was a tactical decision and, if I knew then what I
21 know now, obviously, I would put her on the stand.

22 Q: Yeah. The other thing that jumped out to me, too, and
23 it's always -- hindsight is always 20/20. I know that there
24 was a motion made to get -- for a continuance to get the

25 ballistics expert and then there was a motion for witnesses.

1 Did you think about -- could you have called the
2 investigators, you said that you felt like -- or would that
3 have lead you just to direct examination? Could you've been
4 effective with calling those people that didn't come?

5 A: You're referring to the chief, the lead detective ---

6 Q: Yes, sir?

7 A: --- and the chief investigator?

8 Q: Yes, sir.

9 A: I felt that it was a strategic blunder on the part of the
10 solicitor. I have since learned that among the State
11 Association of Assistant Solicitors, whatever they are called,
12 that that particular strategy has been promoted. When you've
13 got a detective that you do not want subjected to cross

14 examination, don't call him.

15 Q: Yeah.

16 A: And that's what she did. But my thought at the time was,

17 boy, she's really screwed up, and I'm gonna argue to the jury
18 there sits the chief detective. You didn't hear from him.
19 There sits the lead investigator. You didn't hear from her.
20 Why not? I submit there's a reason. I think that's in my
21 closing.

22 Q: Okay. And the firearm, I know that co-counsel or the
23 codefendant's counsel you said had hired or had somebody kind
24 of on standby as ballistics?

25 A: Well, this -- when we got the second report on the eve of

Graham v. State - 2017-CP-26-05189
DAVID CANTY - CROSS BY THOMAS

76

1 trial, he had contradicted the first report that we intended
2 to rely on for our theory that the boyfriend shot the victim.
3 Second report said boyfriend could not have shot the victim.
4 All the bullets are accounted for. In -- I think it was maybe
5 24 hours prior to the trial, Bobby located this witness in
6 Georgia, who was the only one who could possibly get to court
7 in time and he did. He came directly to the courthouse, I
8 believe. And, he looked at the reports, and he said, the
9 problem I have is I don't have the time, I don't have access
10 to the materials; I am not in a position to contradict the
11 SLED lieutenant.

12 Q: Right! Would it have been beneficial to have hired
13 somebody earlier?

14 A: Had we known it would be an issue, had we known that that
15 second report was going to be dropped on us on the eve of
16 trial.

17 Q: Yeah! How about just to have looked at the ballistics of
18 the trailer, would that have been possible?

19 A: Well, there is fairly extensive documentation of the
20 ballistics in the trailer.

21 Q: Yeah.

22 A: There was one bullet fired by the boyfriend that went
23 through the floor that they never recovered.

24 Q: Yeah. And the thing I never did really understand is
25 that the bullet that was recovered from the victim was a .357?

Graham v. State - 2017-CP-26-05189
DAVID CANTY - CROSS BY THOMAS

77

1 A: Correct.

2 Q: But there was some sort of discrepancy between the
3 rifling between that bullet?

4 A: That was the SLED lieutenant's testimony.

5 Q: Uh-huh, (affirmative response).

6 A: And I'll be candid. I am married to law enforcement. My
7 wife is a state law enforcement officer, has been for 25
8 years. I did not believe the SLED lieutenant.

9 Q: Yeah.

10 A: It was far too convenient.

11 Q: It didn't make any sense when I was reading the
12 transcript. I couldn't figure out this as well.

13 A: It was far too convenient.

14 MR. THOMAS: Your Honor, if I could beg the Court's
15 indulgence just for a second.

16 BY MR. THOMAS:

17 Q: Now, you were talking about the cell phone tower, which I
18 think Mr. Graham had testified to. That actually supported
19 your theory that there were four or more than two?

20 A: I don't recall if it placed all four of them at the scene
21 of the crime, but I'm sure that it placed at least three of
22 them at the scene of the crime.

23 Q: Right.

24 A: And obviously I have a lot of files. Carnail only has
25 one. He studied it.

Graham v. State - 2017-CP-26-05189
DAVID CANTY - CROSS BY THOMAS

78

1 Q: Yes.

2 A: He says, it puts them at the crime scene, it puts them at
3 the studio beforehand, and it puts them at the scene where the
4 van was abandoned afterwards; and I have no reason to
5 contradict or disbelieve him.

6 Q: Let me ask you this, which I thought was interesting.
7 Carnail's sister had indicated to me that she brought this to
8 your attention that there was some recording of Keir Johnson
9 -- I guess, Bootsie -- saying that Carnail could not have been
10 involved in this crime. Were you aware of that or did she
11 bring that to your attention?

12 A: I believe I do have a recollection of that, and I think
13 it was she worked in a convenience store and there was

14 surveillance video in the convenience store, and she related
15 to me a conversation that she had with him at the convenience
16 store.

17 Q: Right.

18 A: And this was, I'm not sure, Carnail made it clear enough,
19 but Bootsie had been in jail for six months, and then he
20 contacted law enforcement and said I've got a statement to
21 give about this home invasion and murder, named Carnail and
22 Cutty. And then, lo and behold, he got a bond. He got
23 serious felony charges dismissed. And, you know, he was
24 running through the raindrops without getting wet. As far as
25 that particular recording, I've never heard or seen the

Graham v. State - 2017-CP-26-05189
DAVID CANTY - CROSS BY THOMAS

79

1 recording.

2 Q: Okay. Would it have been -- would it have been usable
3 had you had it?

4 A: It would be an admission by Bootsie that he was lying.
5 But, let me reiterate, we had 600 other examples of Bootsie
6 lying. He is a pathological liar.

7 Q: Right.

8 A: He said, I lied in statement one; I lied in statement
9 two; part of statement three is true, the rest of it is lies;
10 believe me in statement four; and statement five is lies.

11 Q: Yeah. Did you have any information that Bootsie was
12 being threatened by these same players, One-ten and those
13 guys?

14 A: Well, I didn't personally. Mr. Frederick and I discussed
15 the fact that by fingering Carnail and Cutty, Bootsie was
16 protecting all of these other people, and wondered if it was

17 because of a business relationship or because these people
18 were killers; I don't know, or perhaps both. I mean, they
19 shot and killed the victim in this case. And I should mention
20 also that every source of information indicated this victim
21 did not have an enemy. She was beloved by everyone who knew
22 her.

23 Q: Yes, sir.

24 MR. THOMAS: Your Honor, if I could beg the Court's
25 indulgence.

Graham v. State - 2017-CP-26-05189
BY THE COURT

80

1 I have no further questions, Your Honor.

2 MR. JAMES: Nothing on redirect, Your Honor.

3 THE COURT: Thank you, sir.

4 MR. CANTY: Thank you. May I be excused?

5 THE COURT: You may.

6 MR. JAMES: The state has no further witnesses, Your
7 Honor.

8 THE COURT: Anything else?

9 MR. THOMAS: No, Your Honor, nothing in reply.

10 BY THE COURT:

11 THE COURT: I can tell you that I will read every page of
12 this, and I will take it under advisement, and I'll read every
13 bit of this transcript and take a hard look at it.

14 MR. THOMAS: Your Honor, if it please the Court, I will
15 provide you with that amended list of the issues, Your Honor.

16 THE COURT: Thank you.

17 MR. THOMAS: Yes, ma'am.

18 MR. JAMES: Thank you, Your Honor.

19 THE COURT: Thank you.

20 ADJOURNED.

21

22

23

24

25

Graham v. State - 2017-CP-26-05189
CERTIFICATE OF COURT REPORTER

81

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Carnail M. Graham v. State of South Carolina, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on November 26, 2018, as reported by Dixie C. Eubank.

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

Kay H. Richardson
Official Court Reporter

March 3, 2021.

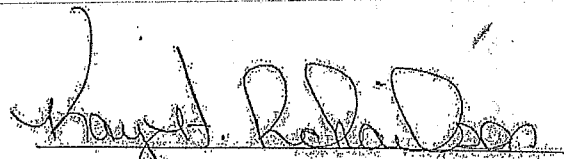
Graham v. State - 2017-CP-26-05189
CERTIFICATE OF COURT REPORTER

81

C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Carnail M. Graham v. State of South Carolina, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on November 26, 2018, as reported by Dixie C. Eubank.

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



Kay H. Richardson

Official Court Reporter

March 3, 2021.

2017 CP 26 05189

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

CARNAIL M. GRAHAM #304093)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

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 Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472
2. Name and location of Court which imposed sentence Horry County Court of General Sessions, 1301 Second Ave., Conway, SC 29526
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012-GS-26-3077 - Murder
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) October 22, 2014 - 32 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. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. October 19, 2016
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2016-UP-437
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in

custody unlawfully:

(a) Ineffective Assistance of Counsel

(b) _____

(c) _____

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

(a) _____

(b) _____

(c) _____

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

(a) any petition in a State Court under South Carolina Law? 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) _____

(b) _____

(c) _____

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Dorchester)

I, Carnail M. Graham, 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.

Carnail M. Graham

SWORN to and subscribed before me this 10
day of August, 2017

[Signature] (L.S.)
Notary Public

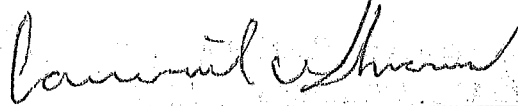
My Commission Expires: 3/17/24

FILED
HORRY COUNTY
2017 AUG 14 PM 2:39
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

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

I, Carnail M. Graham, 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:

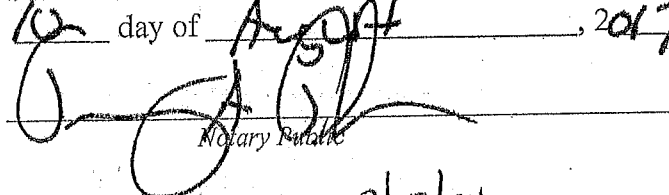
- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this

12 day of August, 2017


Notary Public

My Commission Expires: 3/17/24

FILED
 Horry County
 2017 AUG 14 PM 2:39
 RENEE N. ELVIS
 CLERK OF COURT
 Horry County, SC

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
CARNAIL M. GRAHAM,)
#304093)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2017-CP-26-5189

AMENDMENT TO POST-
CONVICTION RELIEF APPLICATION

That the Applicant realleges paragraph ten (10) of the original Application for Post-Conviction Relief for ineffective assistance of counsel.

The Applicant further supplements the Application with the following:

That counsel was ineffective for the following reasons:

1. Counsel was ineffective in not properly preparing the case for trial.
2. That Counsel was ineffective in not properly presenting Pre-Trial Motions to:
 - a. Hire a ballistics' expert. That counsel failed to anticipate that a ballistic expert would be necessary.

- b. Failure to locate and subpoenaed witnesses for trial.

3. For ineffective cross-examination of the State's Star Witness, Keir Johnson.

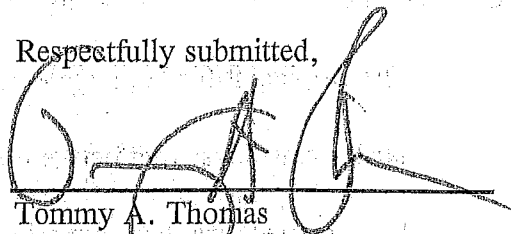
4. For failure to properly present at Trial the testimony of Conswella Smith. Ms.

Smith was an eye witness to the two alleged perpetrators of the crime returning from the mobile home to the van. That her testimony would have been that the Applicant was not one of the individuals that she saw returning to the van.

HORRY COUNTY
2018 DEC -3 PM 1:05
RECEIVED
CLERK OF COURT
HORRY COUNTY, SC

5. That counsel was ineffective for not properly using cell phone data and in examining the cell phone expert to show that the Applicant was not present at the scene.
6. That counsel was ineffective for not objecting to the Solicitor's closing argument in which she improperly bolstered the statements of Keir Johnson. She also appealed to the emotional interest of the jury rather than the factual evidence that was before the Court.
7. That counsel was ineffective for not adequately explaining to the Applicant his right to take the stand and testify.

Respectfully submitted,



Tommy A. Thomas
Attorney for Applicant
7588 Woodrow Street
Irmo, SC 29063
(803) 732-5507

November 29, 2018

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

CARNAIL M. GRAHAM,)
 #304093)
 Applicant,)

DOCKET NO.: 2017-CP-26-5189

v.)

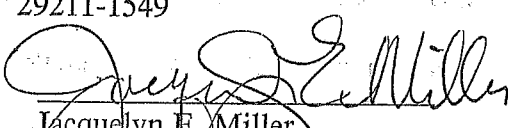
CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,)
)
 Respondent.)

HORRY COUNTY
 2018 DEC -3 PM 1:56
 JACQUELYN E. MILLER
 CLERK OF COURT
 HORRY COUNTY, SC

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Applicant hereby certify that I placed in the United States Mail, a copy of an Amendment to Post-Conviction Relief Application, with postage prepaid and the return address clearly shown on said envelope to Johnny James, Esq. of the Attorney General's Office, at:

Johnny James, Esq.
 Attorney General's Office
 P.O. Box 11549
 Columbia, SC 29211-1549


 Jacquelyn E. Miller
 Secretary to Tommy A. Thomas
 Attorney for Petitioner
 P.O. Box 88
 Irmo, SC 29063
 (803) 732-5507

November 29, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Carnail M. Graham,	)	Case No.: 2017-CP-26-05189
S.C.D.C. No. 304093,	)	
	)	
Applicant,	)	
	)	RETURN AND MOTION FOR A MORE
v.	)	DEFINITE STATEMENT
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

In response to the application for post-conviction relief filed by Carnail M. Graham (Applicant) on August 14, 2017, Respondent would show this Court:

I.

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the July 2012 term of the Horry County Grand Jury for murder (2012-GS-26-03077).

On November 8, 2011, Keia Pertelle was shot in the chest and killed when intruders invaded her mobile home located outside of Conway, South Carolina. Tr. 155-57. Applicant was implicated by the getaway driver, "Bootsie," who, after being charged in the murder, told law enforcement that Applicant expressed during the getaway his belief that he'd just killed the victim. Tr. 541-43.

David J. Canty, Esq. represented Applicant, and Nancy Livesay, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. Applicant proceeded to trial before the Honorable Steven H. John and a jury on October 13, 2014. The jury found Applicant guilty as indicted on October 17, 2014. Judge John sentenced Applicant to imprisonment for a term of 32 years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Lara M. Caudy, Esq., who raised the following issue to the Court of Appeals of South Carolina:

Whether the court erred by refusing to conduct a pretrial hearing to ascertain the reliability of the testimony of Keir Johnson, Sedieka McClam, and Kachief Spain, who were all jailhouse informants, and by failing to determine that the testimony of each of these witnesses was reliable and corroborated before the witness was allowed to testify before the jury?

By unpublished opinion decided October 19, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Graham, Op. No. 2016-UP-437 (S.C. Ct. App. filed October 19, 2016). The Remittitur was issued on November 8, 2016.

II.

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

1. "Ineffective Assistance of Counsel"

Attached to and incorporated herein are the records of the Horry County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

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 (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 v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 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). 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.

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity the facts upon which

his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCP; Mangal v. State, Op. No. 27726 (S.C.Sup.Ct. refiled October 4, 2017) (Shearouse Adv.Sh. No. 38 at 12). All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCP. Pro-se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be

sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to Respondent.

VI.

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

VII.

WHEREFORE, Respondent respectfully requests that this Court grant its motion for a more definite statement set forth in Section IV., above, and thereafter convene an evidentiary hearing on the allegations of ineffective assistance of counsel.

Respectfully submitted,

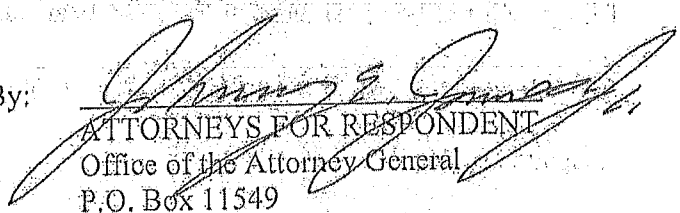
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

20 Nov 2017

STATE OF SOUTH CAROLINA

1153 IN THE COURT OF GENERAL SESSIONS

COUNTY OF Horry
 STATE VS.
Carnail Marchindla Graham

AKA: _____
 Race: BLACK Sex: M Age: 28
 DOB: 1986 SS#: [REDACTED]
 Address: [REDACTED]
 City, State, Zip: Conway, SC 29526
 DL#: [REDACTED] SID#: _____

INDICTMENT/CASE#: 2012GS2603077A/W#: M972397Date of Offense: 11/8/2011S.C. Code §: 16-03-0010, 0020CDR Code #: 0116

SENTENCE SHEET

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
 TO: Murder / Murder 30-210☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC ☐ §17-25-45
 w/minor 1st or Lewd Act)

The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

SCB75159

Livesay, Nancy

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 32 years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

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

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

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

SPECIAL CONDITIONS:

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

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____

☐ Set by SCDPPPS

Recipient: _____

*Fine:		\$
§ 14-1-206 (Assessments 107.5 %)		\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ <u>5.00</u>
3% to County (if paid in installments)		\$ <u>3.90</u>
TOTAL		\$ <u>1339.00</u>

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ 25.00 beginning 10/20/2014

\$ _____ paid to Public Defender Fund

Other: _____

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

Clerk of Court/ Deputy Clerk

Court Reporter: Melanie Huggins Ward

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 729Sentence Date: 10/20/14

WITNESSES

Paul Vescovi Horry County Police Department

DOCKET NO. 2012-GS-26-

3077

The State of South Carolina
County of Horry

Heather von Hermann
12H01973

COURT OF GENERAL SESSIONS

JULY 2012 TERM

231151 2012 JUL 3 16
COURT DATE
PLED GUILTY/TRIAL

ARREST WARRANT NUMBER

M972397
CDR: 0116/16-03-0010, 0020
DOA: 4/30/2012

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

JUL 26 2012

VERDICT

Foreperson of Petit Jury
Date:

THE STATE

vs.

Carnail Marchindia Graham
B/ M
1519 Grainger Rd Apt F3
Conway, SC 29526-3318
DOB: 1986-07-25
SSN: 251635751

ATTORNEY: Canty, David James

Indictment for

MURDER

J. Gregory Hembree, Solicitor

1154

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT

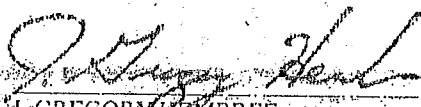
At a Court of General Sessions, convened on JULY 26, 2012, the Grand Jurors of Horry County present upon their oath:

MURDER

CDR: 0116-16-03-0010,0020

That Carnail Marchindla Graham, while acting in concert with another, did in Horry County, on or about November 8, 2011, willfully, feloniously, and intentionally kill the victim, Shaquille Shante Pertelle, with malice aforethought, either express or implied, by means of shooting, and the victim did die as a proximate result thereof on or about November 8, 2011 in Horry County, in violation of Section 16-03-0010, S. C. Code of Laws, 1976, as amended.

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


J. GREGORY PEMBREE
FIFTEENTH CIRCUIT SOLICITOR

ARREST WARRANT

M-972397

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

THE STATE

11109728

against

Carnail Marchindla Graham

Address:

Conway, SC 29526-3318

Phone: SSN: [REDACTED]

Sex: M Race: B Height: 6 2 Weight: 220

DL State: SC DL #: [REDACTED]

DOB: [REDACTED] 1986 Agency ORI #: SC0260400

Prosecuting Agency: Horry County Police Department

Prosecuting Officer: Paul Vescovi - 1822

Offense: Murder / Murder

Offense Code: 0116

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

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Carnail Graham
on 4-29-2012

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
PO Box 677
1301 2nd Avenue
Conway, SC 29528

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

Personally appeared before me the affiant Paul Vescovi whobeing duly sworn deposes and says that defendant Carnail Marchindla Grahamdid within this county and state on or about 11/08/2011 violate the criminal laws of theState of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Horry)

in the following particulars:

DESCRIPTION OF OFFENSE: Murder / Murder

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:On November 8, 2011, around 3:00 AM, a burglary / shooting resulted in the death of a nineteen year old human female occurring
at 1016 Brison Court in the Conway Section of Horry County, SC. Contemporaneous to the reported shooting, a van, with unique
characteristics and identified by witnesses was observed leaving the scene after picking up two masked suspects who were fleeing
from the home. The vehicle was identified through fingerprint analysis as well as witness statements as being in the custody and
control of the defendants contemporaneous to the shooting. The investigation further developed a cooperating co-defendant that
implicated the defendant, corroborated the other witness statements, and provided intimate knowledge of the crime itself. Therefore
probable cause exists to believe the defendant was a material participant in the death of the victim.

C#11109728

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Horry

Affiant's Address

Conway, SC 29526-

Affiant's Telephone: (843)915-5350

ARREST WARRANT

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

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

on or about 11/8/2011 defendant Carnail Marchindla Graham

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

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

DESCRIPTION OF OFFENSE: Murder / Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable.
Sworn to and subscribed before meon 04/27/2012

Signature of Issuing Judge (L.S.)

Gregory Derek Blanton

Judge Code: 5858

Judge's Address Surfside Magistrate OfficeMyrtle Beach, SC 29588-7575Judge's Telephone (843)915-5291Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

AFFIDAVIT

Approved by
S.C. Attorney General
April 21, 2003
SCCA 518

1156

FILED
Horry County
2012 MAY -8 PM 3:20

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Carnail M. Graham,
S.C.D.C. No. 304093,

Case No.: 2017-CP-26-05189

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

FILED
HORRY COUNTY
1000 JUN -5 P 1:42
REBE N. EVANS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Carnail M. Graham¹ ("Applicant") on August 14, 2017. Respondent made its return on or about November 20, 2017. The Court convened an evidentiary hearing into the matter on November 26, 2018, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by Tommy A. Thomas, 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, David J. Canty, Esq. ("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 Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records (including the Record on Appeal), and the pleadings. The Court finds as follows:

¹ A/k/a "Dubba." (Tr. 202, ll. 3-19; Tr. 216, ll. 14-15; Tr. 430, ll. 17-23).

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the July 2012 term of the Horry County Grand Jury for murder (2017-CP-26-05189). David J. Canty, Esq. represented Applicant, and Nancy Livesay, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On October 13, 2014, Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty as indicted on October 13, 2014. Judge John sentenced Applicant to imprisonment for a term of thirty-two years.

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

Whether the court erred by refusing to conduct a pretrial hearing to ascertain the reliability of the testimony of Keir Johnson, Sedioka McClam, and Kachief Spain, who were all jailhouse informants, and by failing to determine that the testimony of each of these witnesses was reliable and corroborated before the witness was allowed to testify before the jury?

By unpublished opinion decided October 29, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Graham, Op. No. 2016-UP-437 (S.C. Ct. App. filed Oct. 19, 2016). The Remittitur was issued on November 8, 2016.

Present Application

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

1. "Ineffective Assistance of Counsel"

By amendments provided to this court and formalized by filing December 3, 2018, Applicant supplemented the original application with the following grounds for relief:

1. "Counsel was ineffective in not properly preparing the case for trial."
2. "That Counsel was ineffective in not properly presenting Pre-Trial Motions to:"

- a. "Hire a ballistics' expert. That counsel failed to anticipate that a ballistic expert would be necessary."
- b. "Failure to locate and [subpoena] witnesses for trial."
3. "For ineffective cross-examination of the State's Star Witness, Keir Johnson."
4. "For failure to properly present at Trial the testimony of Conswell Smith. Ms. Smith was an eye witness to the two alleged perpetrators of the crime returning from the mobile home to the van. That her testimony would have been that the Applicant was not one of the individuals that she saw returning to the van."
5. "That counsel was ineffective for not properly using cell phone data and in examining the cell phone expert to show that the Applicant was not present at the scene."
6. "That Counsel was ineffective for not objecting to the Solicitor's closing argument in which she improperly bolstered the statements of Keir Johnson. She also appealed to the emotional interest of the jury rather than the factual evidence that was before the Court."
7. "That counsel was ineffective for not adequately explaining to Applicant his right to take the stand and testify."

Applicant requests relief as follows:

- "New Trial"

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 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 Prepare for Trial

Applicant alleges generally that Counsel was ineffective in failing to adequately investigate and prepare the case for trial. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable

decision that makes particular investigations unnecessary.” Id. at 691. “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Id.

“The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” Id. “Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” Id. “In particular, what investigation decisions are reasonable depends critically on such information.” Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

At the evidentiary hearing, Applicant testified he met with Counsel seven or eight times prior to trial. Applicant and Counsel reviewed all of the discovery turned over by the State, but Applicant noted that the “Fed guys” were not identified to Applicant. Applicant asked Counsel

to obtain video surveillance from a Walgreens in order to establish where he was located at a particular time, but Counsel told him such a video could be either helpful or harmful because it would establish Applicant was out and about in the community near the time of the burglary and killing. Applicant recalled that Counsel employed the services of a private investigator, and that when Applicant would ask for things, the PI would get relevant information.

Applicant denied giving Counsel any first-hand information as to who could have perpetrated the crime, but noted that his co-defendant Thomas Booker James (a/k/a "Cutty") brought up names, and that the identities of the perpetrators was "common knowledge" in the community. Applicant asserted that the home invasion and killing was perpetrated by "Bootsie" (a/k/a Keir Johnson), "Migo" (a/k/a Sha'Rah McCray a/k/a "Lil Manzy"), "110" (a/k/a Donavan Johnson), and "B-Wells." Applicant recalled that he brought the information to the attention of Counsel, but that Counsel could not put Applicant on the stand to testify to any of it because it was all based on hearsay.

Applicant emphasized that no weapon was ever traced to him. Applicant recalled that the victim, Keia Pertelle, was shot one time by a .357 caliber round, and that law enforcement recovered a rifle, a .44 revolver, and a .357 from Victim's bedroom; the .357 was hidden, wrapped in Victim's clothes. Applicant further recalled that SLED investigated the ballistics of the crime scene. Applicant asserted that he wore men's shoes sized 10 to 10 ½, whereas the door was kicked in by a size 6 ½ shoe imprint.² Applicant also noted there was no blood trail. Based upon this information, Applicant opined that the victim's boyfriend was the shooter, and moved Pertelle's body down the hallway. Applicant emphasized that no footprints, DNA, or anything else matched to him. Applicant also testified that his fingerprints were not found on the van, and that he was not such a genius as to be able to wipe away his own fingerprints and no others.

² This testimony is addressed more specifically in Section II.A.7, below.

Applicant recalled Counsel attempted to obtain a continuance in order to retain a ballistics expert, and because witnesses were not present. Applicant also recalled Counsel also moved to sever the defendants' trials, but the motion was denied. Applicant testified Johnson ultimately received a probationary sentence after Applicant's trial and conviction. Applicant opined Johnson wanted to "save everybody else" and was afraid of the actual perpetrators.

Counsel testified he possessed some thirty-seven years of legal practice, half of which was in criminal law. Counsel concurred in Applicant's estimation that they met six or seven times. Counsel confirmed motions were filed pursuant to Rule 5, SCCrimP, and Brady, and that he received materials responsive to those motions. Counsel noted that the solicitor originally assigned to the case was Heather Von Herrmann, but that Nancy Livesay ultimately prosecuted the matter at trial. Counsel testified that he received ballistics reports on the eve of two different trial dates. The first trial date was continued. The motion for a second continuance was denied. Counsel opined that he had no need for any ballistics expert until he received the second, revised ballistics report from the prosecution.

Counsel articulated over the course of the hearing two concurrent theories of defense: (1) Applicant was not present at and thus did not participate in the home invasion and (2) the home invaders did not shoot Pertelle, but rather she was shot and killed by her boyfriend. Counsel testified he investigated the neighborhood where the shooting took place, including the trailer in which Pertelle was shot. Counsel also noted the phone tracking expert corroborated Applicant's alibi. Counsel subpoenaed Conswella Smith to testify at trial, but did not call her as a witness.³

Counsel recalled that Applicant told him he purchased diapers from a Walgreens store on the night of the killing. Counsel testified that Walgreens only retained video surveillance recordings for seventy-two hours. In any event, Counsel opined that the video, assuming it

³ This subject is explored in greater detail in Section II.A.5, below.

corroborated Applicant's story, would have been harmful to Applicant to the extent it demonstrated he was "out and about." Counsel believed the better strategy was to more simply argue that Applicant was not at the scene of the crime. On cross-examination, Counsel admitted he never heard or saw the video.

As to the jailhouse informants, Counsel asserted they were "self-impeaching." Counsel testified he learned about how informants and inmates would "sell stories" while incarcerated in order to enable testimony of the kind presented at trial. Counsel recalled that he felt very confident when the jury began deliberations.

Findings

The Court finds Counsel provided effective assistance. Counsel reviewed materials provided in discovery, visited the crime scene, and otherwise employed the services of a private investigator. Counsel's testimony reflects that he inquired into the existence of the Walgreen's surveillance, and that it was unavailable after the passage of seventy-two hours. In any event, Counsel articulated a reasonable strategic reason to not further pursue the video: it would provide evidence to show Applicant was "out and about" rather than at home all night on the night in question, potentially undermining one of the theories of defense. Applicant presents no evidence to this Court which, if investigated more thoroughly by Counsel, could have changed the outcome at trial. Applicant presents to this Court no surveillance video, no evidence the jailhouse informants developed their testimony from his discovery materials, no evidence of probative value to support a theory of third-party guilt, nor anything else⁴ Counsel could have obtained through additional investigation or preparation. Applicant has failed to meet his burden of proof as to either prong of Strickland. For all of these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

⁴ Notwithstanding the testimony of Conswella Smith, addressed separately below.

2. Failure to Retain, Present Ballistics Expert

Applicant alleges Counsel was ineffective by failing to retain and present the testimony of an independent ballistics expert at trial. An applicant for post-conviction relief cannot show that he was prejudiced by counsel's failure to call a favorable expert witness to testify at trial if that witness does not later testify at the PCR evidentiary hearing or otherwise offer testimony within the rules of evidence; mere speculation as to what such testimony might be is insufficient to satisfy an applicant's burden of proof. Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 776-77 (2008) (citing Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005); Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 180-81 n.2, 810 S.E.2d 836, 839 n.2 (2018). The relevant testimony from the evidentiary hearing is summarized in the prior section.

The Court finds Applicant has failed to meet his burden as to prejudice, and need not further explore this allegation in great detail. Applicant did not present the testimony of an independent ballistics expert at trial, nor did he present what the substance of that testimony might be within the rules of evidence. Applicant offers, at best, mere speculation. Additionally, Counsel articulated a reasonable basis for not retaining an independent ballistics expert: prior to the revised report it was unnecessary, and after the revised report it was impossible after the Court denied his request for a continuance. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

3. Failure to Locate and Subpoena Witnesses

Applicant alleges Counsel was ineffective for generally failing to locate and subpoena witnesses for trial. To whatever extent this allegation overlaps with Applicant's allegations regarding Conswella Smith, the allegations regarding Smith are addressed in Section II.A.5,

below. Otherwise, the South Carolina Supreme Court “has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.” Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis original). Other than Smith, Applicant offered no witness testimony at the evidentiary hearing, or otherwise offer such substance in accordance with the rules of evidence. Accordingly, Applicant failed to meet his burden of proof, and his request for relief by way of this allegation is **DENIED**.

4. Failure to Adequately Cross-Examine Witness Keir Johnson

Applicant alleges Counsel was ineffective in failing to adequately cross-examine witness Keir Johnson.

Trial

Keir Johnson, a/k/a “Bootsie” testified at trial to precisely what happened the night Keia Pertelle was murdered, and implicated both Applicant and James. Johnson testified that his and James’ names were tattooed on Applicant’s body. (Tr. 529-30). Johnson explained how Applicant called him from James’ (or “Cutty’s”) phone and asked for a ride to buy some drugs on the night of the murder. (Tr. 531, ll. 18-19; Tr. 534-35). Johnson picked up Applicant and James, and they parked on a back road by “Splurge” and Pertelle’s mobile home. (Tr. 531, ll. 19-21). Johnson testified that he spoke to Conswella Smith in the trailer park while Applicant and James went inside Splurge’s trailer; when a neighbor emerged, Johnson circled the block and returned to the same spot and resumed chatting with Smith. (Tr. 531-32). Applicant and James emerged from the house, got back in Johnson’s van, and he drove away at their direction. (Tr. 532, ll. 4-8). As they left the scene, a Horry County police officer “served around” to follow

them; Applicant held a gun to Johnson's head and commanded him to make a getaway. (Tr. 532, ll. 9-12; Tr. 613, ll. 4-11). Johnson "hit the gas," evidently lost the police, and parked the van in "somebody's backyard[;]" all three men took off into the woods. (Tr. 532, ll. 9-15). During the getaway, Applicant expressed to his cohorts that he thought he "just killed that motherfucker" and threw two guns out the window. (Tr. 542-43; Tr. 585, ll. 1-25). Johnson recalled Applicant and James wearing blue latex gloves that they discarded in the woods, and that they did not wear masks. (Tr. 631, ll. 1-21).

Johnson later asked his girlfriend to call the police and report the van stolen, and he falsely explained to law enforcement that he was robbed of the van while at a gas station, concealing his involvement in the murder. (Tr. 543-44; Tr. 599-602). Johnson picked up a charge for driving without permission with intention to deprive, and made bond the following day. (Tr. 544, ll. 7-12). Authorities later charged Johnson for his involvement in Pertelle's death. In addition to other charges, the murder charge remained pending at the time of Applicant's trial. (Tr. 544-47; Tr. 575-77). Johnson also admitted that he previously gave false statements to law enforcement out of fear, but that he also provided them a truthful version of events after hiring a lawyer. (Tr. 544-47; Tr. 553, ll. 3-12).

During his cross-examination of Johnson, Counsel immediately focused on Johnson's statements to detectives the morning after Pertelle was murdered, eliciting acknowledgment from Johnson that he "lied through [his] teeth" and that it was a "[p]ack of lies[.]" (Tr. 604-05; Tr. 606, ll. 11-16). Counsel also drew contrast between Johnson's sworn claims of innocence and Johnson's intentions to admit culpability or claim innocence in the future, drawing a sustained objection but no cure. (Tr. 605-06). Pressed by Counsel, Johnson testified that he decided to be truthful only after talking to his lawyer. (Tr. 607-08). Counsel dove into the substance of

Johnson's "truthful" statements to law enforcement and confronted Johnson with two inconsistencies in particular: Johnson denied knowing who 110 was even though a 110 was listed in Johnson's cell phone contacts; and Johnson denied knowing Billy Freshley even though he gave detectives Freshley's phone number and address. (Tr. 608-10; Tr. 616, ll. 2-17).

Counsel also noted that Johnson's charges for robbery and possession of a weapon during the commission of a violent crime, pending for two years, were dropped shortly after his statements to detectives inculcating Applicant and James. (Tr. 610-12). Counsel noted other, non-specific charges also resolved to Johnson's favor, to which Johnson only replied that he "got a good attorney, sir[;]" Counsel agreed. (Tr. 612, ll. 14-18). Counsel also questioned whether Johnson ever assisted law enforcement in recovering the murder weapon if, as Johnson testified, Applicant threw it out the window of the van at a known location; Johnson testified he told investigators where the gun was tossed. (Tr. 613-16). Counsel pointed out Johnson never mentioned Mike Pyatt in his statements to law enforcement, to which Johnson claimed that he did tell his lawyer and the solicitor that he had been picked up by Pyatt. (Tr. 616-17). Counsel also observed that even after inculcating Applicant and James, Johnson told investigators that he had been watching television with his girlfriend until 2 a.m., or had been sleeping at his

girlfriend's house. (Tr. 617-18). However, Johnson alternately offered that he was called by Applicant at around 1:40 a.m. or 1:43 a.m., which Johnson asserted fell within the parameters of "around 2 o'clock." (Tr. 619-20). When Counsel incorporated the phone records into his questioning regarding the timing of the first call, Johnson lost his patience as Counsel noted the call was recorded at 1 a.m. (Tr. 620-21).

Counsel then went back over Johnson's version of events in detail, with some emphasis on Johnson's indication that neither he nor Smith ever heard any gunshots. (Tr. 621-30).

Applicant and James emerged from the home walking at a fast pace, but not running, such that Johnson was not suspicious. (Tr. 626-27). When Counsel touched on the detail of the “blue lights” on the patrolling police cruiser that passed and began to turn around after the men after the killing, Johnson downplayed them, explaining “I wasn’t even paying them blue lights no attention. I just hit the gas when he told me to drive.” (Tr. 627-28). Counsel pointed out Johnson’s inconsistent claims in prior statements that he picked up Applicant and James “on Ninth Avenue” and, alternately, that he picked up Applicant at Applicant’s house and was surprised to see James with him. (Tr. 630, ll. 7-13). Counsel reviewed how Johnson also varied as to precisely what it was that Applicant said during the getaway: in one statement, Johnson recalled Applicant claimed he shot a dog, and during trial Johnson recalled Applicant claimed he shot “the bitch” or alternately “that MF’er[;]” Johnson finally settled on “I think I just shot that motherfucker.” (Tr. 630, ll. 14-25). Counsel also drew attention to Johnson’s claim in his third statement that he had never seen Applicant with a gun before the night of the killing, and Johnson’s claim in his fourth statement that Applicant was known to carry guns. (Tr. 632, ll. 5-13). Counsel probed Johnson’s spotty memory against his prior statements that he had stopped to get gas on the way to the victim’s home, and had purchased a cigar during that same stop. (Tr. 632, ll. 14-23). Counsel reminded Johnson that he denied Billy Freshley had nothing to do with the matter in his third statement to investigators, but that the phone records indicated Johnson called him at 2:48 a.m., some seventeen minutes before Pertelle was killed—Johnson professed poor memory. (Tr. 633-34). Finally, Counsel drew contrast between Johnson’s testimony that Applicant called him from James’ cell phone, but told the detective that he was surprised that James was with Applicant when he picked them up. (Tr. 634-35).

Johnson was apparently exhausted by cross-examination. (Tr. 635, line 21).

In closing arguments, Counsel was blunt in his treatment of Johnson:

Bootsie. I don't have to go on about Bootsie, he's a liar, he's a thief, he's a dope dealer. His story has changed over and over and over again. Every time he's confronted with a lie his story changes. Two different locations where he picked Carnail up. He said, and I thought this was remarkable, he said he was going to get himself an ounce of crack cocaine to resell, and he didn't hear any gunshots.

And the two men that came walking out of the trailer, he said they were fast walking, but they weren't running. And they got in the van, and he started up the van. He had a very pleasant conversation with Conswella, they knew each other. And he drove up to Highway 548, Brown Swamp Road, he took a left, and nothing out of the ordinary, just scored some dope.

Police car comes by, my client pulls out an automatic pistol, that's the first he suspected something had gone awry. Didn't hear any gunshots. I don't need to go in – I counted 192 lies that Bootsie told, and I don't – you don't want to hear 192 lies. But he's one of the rare people you can tell that they're lying because their lips are moving.

(Tr. 981, ll. 2-24). Counsel then listed the benefits Johnson had already received by virtue of his "cooperation" with the State. (Tr. 981-83). Counsel additionally observed that Johnson denied seeing the van since the killing, denied knowing Billy Freshley despite identifying Freshley's phone number and reciting Freshley's address to detectives, and failed to take law enforcement to the location of the murder weapon despite supposedly knowing of its location. (Tr. 983, ll. 9-24). Counsel offered that law enforcement never pursued Johnson's knowledge of the gun's location because they understood Johnson to be untruthful. (Tr. 983-84). Counsel briefly contemplated the thinking of the prior prosecutor, Heather von Herrmann, and again reviewed the scope of the charges against Johnson which were dropped, and which were never pursued to start with. (Tr. 984-86). Counsel then moved on to address the jailhouse informants.

Findings

This Court finds Counsel provided effective assistance. This Court's review of the trial record reveals a cross-examination of Johnson that was exceedingly thorough. Johnson was

impeached with innumerable inconsistencies between his myriad statements and his trial testimony, to the point that Johnson evidently began to lose composure while on the witness stand. Applicant fails to indicate what, if any, additional subjects could have been raised in cross-examination to further impeach Johnson, nor can this Court independently identify any. Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

5. Failure to Call Witness Conswella Smith

Applicant alleges Counsel was ineffective in failing to call Conswella Smith as a witness at trial. “[W]here evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel’s failure to bring it forward.” Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011).

Trial

Smith did not testify at trial, but was referenced in arguments and by other witnesses. Attorney Frederick summarized the substance of her expected testimony in his own opening statement. (Tr. 33-34). David Grissett, a neighbor and more distant witness to the getaway van, testified he called Smith to alert her that a suspicious van was parked outside of her house. (Tr. 123-24; Tr. 134, ll. 17-22; Tr. 138-41). Grissett also testified to hearing gunshots before men burst from the trailer and fled into the getaway van. (Tr. 127-28; Tr. 134-35; Tr. 141-42). Keir Johnson testified he spoke with Smith, an old friend of Johnson’s grandmother, outside of the trailer while waiting on Applicant and James to return from buying drugs. (Tr. 531-32; Tr. 541, ll. 7-18; Tr. 623, ll. 2-12; Tr. 623-26; Tr. 632-33). During closing arguments, both Frederick and Counsel attacked the adequacy of the State’s case in part by pointing out that the State failed to call Smith as a witness, even though other witnesses confirmed she spoke to the men in the

getaway van, heard the gunshots, and even pointed out to investigators where to take a cast of a shoeprint. (Tr. 325-26; Tr. 954, ll. 19-25; Tr. 974-75; Tr. 991, ll. 9-12).

PCR Evidentiary Hearing

At the evidentiary hearing, Applicant testified he brought to Counsel's attention that Conswella Smith was a potential defense witness. Applicant testified that Counsel did not put Smith up as a witness at trial because he believed the State had failed to meet its burden of proof. Applicant testified Smith's description of events was inconsistent with Johnson's, and would have helped him and would have changed the outcome of the case.

Applicant called Smith as a witness at the evidentiary hearing. Smith testified she received a phone call about a suspicious van outside of her house. Smith described her trailer as near that of Rodney McElveen's (a/k/a "Splurge") trailer where Pertelle was shot and killed. Smith walked outside, spoke to Johnson at the van, and additionally heard the voice of a person she identified as "Q." While talking to Johnson, shots rang out and the van cranked to life. Smith testified that she saw two people jump into the van, and that neither of them was Applicant. Smith could not recall speaking to Counsel, but testified she spoke to multiple detectives. Smith admitted she possessed a prior criminal record. Smith additionally admitted that she could not see the fleeing perpetrators very well, but described both of them as short and skinny. On cross, Smith testified she was outside talking to Johnson at sometime between two to three a.m. Smith testified that the sound of gunfire nearly gave her a heart attack, and that she was scared. Smith described the neighborhood as peaceful, dark, and not very well lit.

Counsel testified he subpoenaed Smith to appear as a witness at trial, but ultimately chose not to call her for three reasons. First, Counsel was of the belief that she would not be well-received by the jury. Second, Counsel noted that Smith possessed a significant criminal record

with which she could be impeached. Third, Counsel opined that the State had failed to prove its case, and that all of the objective data supported Applicant's alibi. Counsel testified her testimony would have been helpful. On cross, Counsel again testified that in retrospect, he believed he should have called Smith, but described his trial decision as a tactical one.

Findings

The Court finds Counsel provided effective assistance. First, Counsel articulated valid strategic reasoning for not calling Smith as a witness at trial, and no evidence was presented to this Court to refute or diminish his expressed concerns. Additionally, this Court notes the record corroborates Counsel's testified belief-at-the-time that the State had failed to meet its burden, and that not calling her supported his arguments to that end—Counsel argued the jury should draw favorable inferences from the absence of Smith as a witness, alongside the absence of other evidence. Second, this Court enjoyed the opportunity to closely observe Smith as a witness and weigh her credibility, and this Court finds her testimony regarding what she saw and heard after the gunshots not credible. This Court also does not find credible Smith's testimony that she heard the voice of a "Q" while talking to Johnson. Smith's testimony was uncertain in its delivery, and the reliability of its substance was further diminished significantly by the circumstances of her observations—by her own admission she could not see very well, as it was dark and unlit, and she was understandably terrified by the sound of gunfire. Other testimony at trial provided that the getaway van lacked a muffler and was very noisy. The Court finds Counsel's concerns about Smith as a witness is validated by the Court's own observations of her on the witness stand and its review of the record.

The Court *does* find credible Smith's testimony that she was prompted to go outside by a phone call, that she spoke with Johnson at the van, and that she heard the gunshots. The Court

notes that Smith's testimony that she heard the gunshots is inconsistent with Johnson's bewildering and self-serving trial testimony that neither he nor Smith heard any such gunshots prior to the defendants emerging from the trailer. However, Smith's testimony to this point was merely cumulative and of little value for the purpose of impeaching Johnson as Grissett had already testified to hearing the gunshots from a location farther away from the trailer. Smith's other credible testimony is also merely cumulative Grissett's description of what occurred.

For all of these reasons, Applicant cannot meet his burden of proof by way of this allegation, and his request for relief is **DENIED**.

6. Failure to Adequately Cross-Examine State's Cell Phone Expert

Applicant alleges Counsel was ineffective in failing to properly utilize cell phone location data to cross-examine expert witness Roger Boyell.

Trial

For context, much of Keir Johnson's testimony is summarized in detail in Section II.A.4., above. Of particular note, Johnson testified repeatedly that Applicant asked him, by way of a phone call from James' phone, to give a ride to the scene of the killing for the purpose of purchasing drugs.

Co-defendant's counsel Frederick called Roger L. Boyell, an electronics engineer qualified as an expert witness in the field of "electronic communications, specifically cell phone tracking." (Tr. 803-12, quoted text at Tr. 812, ll. 9-10). Boyell explained at length to the jury how cell phones communicated with the nearest cell phone tower, often only a mile or two away, and that telecommunications companies recorded the towers utilized to connect calls. (Tr. 812-18). Boyell reviewed the "cell sites" in the areas proximate to the killing and where the defendants' phones were tracked on the night in question, and prescribed them artificial labels of

A-G. (Tr. 820-24; Tr. 838-39). Boyell testified he reviewed records provided by telecoms for six phone numbers corresponding to five individuals: Keir Johnson, Sha'rah McCray, Michael Pyatt, codefendant James, and Applicant. (Tr. 825-38). By reviewing those records, Boyell was able to identify the proximate cell site used by the phones at the times they made calls. (Tr. 839-63). With respect to Applicant's phone, Boyell noted that his phone was silent for much of the evening, but that he made calls at 2:16 a.m., 2:18 a.m., 6:24 a.m., and 6:28 a.m., with "nothing in between." (Tr. 851, ll. 18-20; Tr. 853-54). With respect to the first pair of overnight calls, Boyell explained they connected through a cell site "a mile and a half southwest of Conway[.]" which faced east-northeast, such that "the phone would have to be somewhere along Cates Bay Highway or Ninth Avenue." (Tr. 851-52). Boyell then clarified further that Applicant's phone would have been "east-northeast of this site which is on — where Fourth Avenue takes a turn, this is Fourth Avenue takes a turn to the south." (Tr. 852-53). Boyell testified Applicant's phone was tracked in the approximately the same location during the second pair of sunrise phone calls. (Tr. 853, ll. 13-23).

On the first cross-examination, Counsel directed Boyell to consider State's Exhibits 75 and 76⁵—a Motorola "smartphone" and a Sanyo "flip-phone", respectively—acknowledge that they probably contained GPS capabilities, and that such capabilities could have been utilized to track the phone's location to within ten meters, such that the phone *could* have contained data to show that it "traveled from downtown Conway out to Brison Court, down Dirty Branch Road and then back up into Conway[.]" (Tr. 863-69, quoted text at Tr. 869, ll. 1-3).

On the second cross-examination, prosecutor Livesay elicited acknowledgements from Boyell that he was only provided one phone number associated with James, and if James possessed a second phone, he could not know where it was on the night in question. (Tr. 870, ll.

⁵ Keir Johnson testified they were both his phones. (Tr. 535-36).

8-18). Boyell was also unaware that other witnesses had testified to receiving calls from James' phone only to hear a different person. (Tr. 870, ll. 19-23). As to Applicant's phone, Boyell was not aware that it was not recovered by law enforcement until sometime well after the killing. (Tr. 870-71).

Closing arguments proceeded with attorney Frederick going first, Counsel going second, and solicitor Livesay going last. Frederick plainly explained and summarized Boyell's extended testimony: the phone records showed the phones associated with Johnson, Sha'rah McCray, "Lil Manzy", and Mike Pyatt were proximate to the scene of the killing and/or where the getaway van was ditched; Applicant and James' phones were away in downtown Conway throughout the night. (Tr. 950-52). Frederick emphasized that the phone location records explicitly placed James in downtown Conway three minutes after Johnson could be definitively placed near Brison Court. (Tr. 952, ll. 4-21). Arguing against the culpability of *both* James and Applicant, Frederick asserted that if Applicant called Johnson from James's phone, since James' phone was in downtown Conway while Johnson was at the crime scene, that information would exonerate Applicant, and to the extent the testimony placed Applicant and James together it exonerated the both of them. (Tr. 952-53).

Counsel noted the phone records in his own closing arguments, and that they corroborated Johnson's admission of involvement in the crime, tracking him from downtown Conway, to the vicinity of the trailer park where the shooting occurred, and then to the location where the van was abandoned. (Tr. 977, ll. 5-13). Counsel also noted that the phone records showed Sha'rah McCray following the same path at the same times, despite Johnson's testimony initially denying he knew McCray. (Tr. 977, ll. 14-25). Emphasizing the discrepancy, Counsel argued the State's "whole case hangs on Bootsie saying Carnail and Thomas James, nobody else,

just three men. Sha'Rah McCray makes four. That means Bootsie's lying, again. We know Bootsie's a liar." (Tr. 977-78).

Later returning to the cell phone records, Counsel asserted the records totaled 26,000 pages, and criticized the State for failing to retain and present its own expert to present and explain the records. (Tr. 990-91). Furthermore, Counsel assailed, the State attempted to exclude the records because they simply did not fit with their theory of the case. (Tr. 991, ll. 4-8).

Counsel introduced his treatment of Boyell's testimony by generally characterizing his professional background as that of an electrical engineer, and that such engineers were the very stereotype of a nerd: "they got the coke bottle glasses, they got the pocket protector, they got the slide rule on their belt." (Tr. 992, ll. 4-17). Summarizing Boyell's findings, Counsel indicated Applicant's location on a map when he made calls at 2:18 a.m. and at 6:24 a.m. (Tr. 992, ll. 18-23). Like attorney Frederick, Counsel also pointed out that James' phone was in downtown Conway at the time Johnson was both (1) at the crime scene and (2) on call with James' phone. (Tr. 992-93). Third, Counsel argued Johnson's cousin, McCray, was at the crime scene a mere four minutes before the first 911 call, and was thereafter recorded at the scene where the van was ditched. (Tr. 993, ll. 5-16).

The State summarily dispensed with the value of the phone records by noting that Johnston testified James had not one, but two phones, and that he had not been using the phone number identified in the records as belonging to James on the night of the killing. (Tr. 1014-15). Livesay also pointed out the testimony of Terry Bease, a/k/a "Lil Papi," whose call with James' phone was reflected in the phone records, but who testified that James was not the person he spoke to on the phone that night. (Tr. 1015-16). Livesay broadly declared the defendants "were not dumb enough to take their phones to Brown Swamp. I can tell you. Cutty did not take that

phone with him, and we know it because everybody that talked to that phone number says it was not him.” (Tr. 1016, ll. 16-20). Addressing Applicant’s phone, the State similarly asserted that he had two phones, one of which was dead, and that he had not taken the phone reflected in the records with him to the scene of the killing. (Tr. 1016-17). “The only one that took and was caught with both his phones and, for some reason, drove the van out there, the same van he uses every day, was Bootsie, the one that was in special ed when he was a kid.” (Tr. 1017, ll. 3-6). Again, Livesay argued Applicant and James “were too smart for that.” (Tr. 1017, line 10).

PCR Evidentiary Hearing

As previously noted, at the evidentiary hearing, Applicant testified he did not give Counsel information about who else could have committed the crimes, but James told his attorney, who in turn communicated with Counsel. Applicant testified Johnson was the common element among the names proposed as potential perpetrators. Applicant speculated that Johnson had wanted to “save everybody else” and was afraid of “Migo,” “110,” and “B-Wells.” Applicant generally opined that Counsel should have pushed evidence regarding the whereabouts of his phone harder. Applicant acknowledged that there was testimony he had set the crime in motion by a phone call from James’ phone, but noted that Bease, a/k/a “Lil Papi”, had denied talking to Applicant or James during the phone call.

Counsel testified that Boyell’s trial testimony was consistent with Applicant’s alibi, and noted that the jury was instructed on third-party guilt.

Findings

The Court finds Counsel provided effective assistance. A review of the testimony and arguments presented at trial show that everything which could have been elicited from the phone records appears to have been presented to the jury—namely (1) that the locations recorded for

James' and Applicant's phones were not consistent with their perpetrating the home invasion and killing and (2) that the locations recorded for phones belonging to other individuals, such as McCray, were consistent with their involvement. The argument advanced by Applicant at the evidentiary hearing—that Johnson lied to the favor of the actual perpetrators—was advanced at trial. Applicant's suggestion that Counsel missed favorable testimony by Bease misapprehends the substance of Bease's testimony, and conflates multiple phone calls made by different persons to James' cell phone. Applicant presents no arguments which, if presented alongside the cell phone records at trial, would have changed the outcome at trial. For these reasons, Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

7. Failure to Object to Solicitor's Closing Argument

Applicant alleges Counsel was ineffective in failing to object to portions of the State's closing argument which (1) improperly bolstered the testimony of Keir Johnson and/or (2) improperly appealed to "the emotional interest of the jury." To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." Id., 428 S.C. at 550, 837 S.E.2d at 40 (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). A PCR court must view the alleged impropriety of the prosecutor's argument in the context of the entire record, and the Applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Id.

“It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence.” United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994); see also State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (“Undoubtedly, a Solicitor may argue the State’s version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.”). A prosecutor should “prosecutor with earnestness and vigor” and “may strike hard blows, [but] is not at liberty to strike foul ones.” Berger v. United States, 295 U.S. 78, 88 (1935). “If a Solicitor’s closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs.” New, 338 S.C. at 319, 526 S.E.2d at 240. “On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury’s passions or prejudice.” Id. “[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.” Berger at 88.

“Generally, the assessment of witness credibility is within the exclusive province of the jury.” Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). Solicitors may not make explicit personal assurances or indicate there is information not presented which supports the testimony, i.e. vouch, as doing so improperly invades the province of the jury and places the government’s prestige behind the witness. Id., 416 S.C. at 250, 785 S.E.2d at 477 (citing Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004)); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002)). “Thus, solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom.” Id. (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)).

Trial

At trial, the State offered an impassioned argument after hours of closing by both defense attorneys, focused primarily on defending Johnson's credibility and challenging Applicant and James' theories of third-party guilt:

They want to tell you that Bootsie wants to tell a lie. Bootsie could have told any two names. If he wanted to tell you Little Manzy, he could. If he wanted to tell you 110, he could. These boys are his friends. He could have told you two people that he had no relationship to, or two people that he didn't like, or two people anything. He could have told you anybody, but he didn't. He told you these two people.

He has no reason to lie on these people. They are all friends, and they have been friends a long time. He's here telling on these people because it's the truth.

(Tr. 1019; ll. 8-19) (emphasis added). After reviewing the disclosures made by Applicant to the jailhouse informant, Livesay returned to the subject of Johnson's credibility:

They knew they shot her. Immediately they could have backed out of that house, but they didn't. And I'm here to tell you they didn't because that didn't come as a shock to them. They were ready for that to happen. They shot her and kept moving through that house, looking for whatever it was they wanted, drugs, money, guns, whatever it is they wanted.

They want to tell you everybody in here has got a reason to lie, everybody. If these people had a reason to lie, they could have blamed it on anybody. But they didn't. Ironically, they blamed it on the same guy that Howard Parker saw out that night. Ironically, they blamed it on that same guy that's out at the jail bragging that we ain't got nothing on him and that he shot that girl. *Bootsie had no reason to lie.*

They want to tell you that he's scared of a Crip, there are Crips in the car. This guy is a Crip. If he was going to blame it on somebody, it wouldn't be somebody in the Crip that is a close friend of his. He came up here and told you the truth.

(Tr. 1021, ll. 6-25) (emphasis added). The State later once again returned to Johnson's credibility in the context of his pending charges:

A woman has been killed. We are not here to worry about some trespassing or littering or filing a false police report charge. These people have

killed somebody. That's what we're working on. Don't be fooled by that, don't be fooled by that. They want to tell you that Bootsie, we're up here playing make a deal. Bootsie is charged with murder, murder. And they want to tell you that he's been given some deal.

That charge is still pending. He got up here and told you he was the driver in a murder charge. And they want you to believe he's getting some sort of deal. Don't believe them, do not believe that. If we wanted to do something for Bootsie, we could, we could. But yet he is still charged with murder. That has not been dismissed. If he wanted to get a deal, he would not be carrying a murder charge, I can tell you that much. It is ridiculous to think we are giving some guy a deal, and he is walking around charged with murder. That is nonsense, folks. Don't believe it, do not believe it.

(Tr. 1024-25).

PCR Evidentiary Hearing

Applicant briefly testified that the State vouched for Bootsie's credibility in closing arguments, noting the portions indicated above. Applicant did not testify to the allegations that the State improperly inflamed the passions of the jury.

Counsel testified that the State's closing broadly appealed to juror's emotions, but more specifically took issue with the evidence and arguments introduced regarding Applicant's gang tattoos. As to the claims of vouching, Counsel addressed each of the above excerpted arguments in turn. As to the emphasized testimony from page 1019, Counsel opined that the argument was arguably improper bolstering, but that it would fall within the scope of deference afforded to closing arguments. As to the emphasized testimony from page 1021, Counsel opined the argument could have been improper bolstering, but was facially farcical. As to the emphasized testimony from pages 1024-25, Counsel testified that the murder charge was indeed still pending at the time of trial.

Findings

The Court finds Counsel provided effective assistance. This Court has thoroughly reviewed the Solicitor's closing arguments in their entirety and finds that the arguments

complained of constituted fair inferences based upon the evidence presented at trial and did not contain any improper suggestions, insinuations, or improper assertions of personal knowledge. The Court finds the State's closing did not improperly appeal to the passions of the jury, but rather reflect the "earnestness and vigor" that is part of the State's prosecutorial duty. The Court finds the State did not vouch for Johnson's credibility, but rather appropriately argued for the credibility of its most key witness based upon the facts in the record and reasonable inferences therefrom. No valid basis existed for Counsel to object to the identified portions of the State's closing. Applicant cannot show any deficiency in Counsel's treatment of these portions of the State's closing argument, and accordingly his request for relief by way of this allegation is **DENIED.**

8. Failure to Adequately Explain Right to Testify

Applicant alleges Counsel was ineffective in failing to adequately explain to him his right to take the stand and testify in his own defense.

Trial

After some back-and-forth by attorney Frederick as to precisely when to conduct the colloquy, the trial court addressed both defendants together regarding their right to testify. (Tr. 893-99). The trial court opened by advising Applicant and James that if at any time they had any questions or concerns, that they would let him know or otherwise advise their attorneys of as much; both men agreed. (Tr. 895, ll. 1-12). The trial court instructed the defendants that they had the right to present a defense, and that they had the right to not be a witness against themselves, explaining "that means nobody can make you testify in this case. You can testify if you want to, but nobody can make you do it." (Tr. 895, ll. 13-22). Both men confirmed they understood. (Tr. 895, ll. 22-25). The trial court continued by emphasizing that the decision to

testify was to be made by the defendants, and that if they chose to testify the process would be as they observed for witnesses throughout trial, including cross-examination by the State; both men affirmed they understood. (Tr. 896, ll. 1-13). The trial court inquired as to past convictions, but the State was unprepared to answer. (Tr. 896, ll. 14-22). Attorney Frederick acknowledged James possessed a prior drug conviction and a prior conviction for pointing and presenting. (Tr. 896-97). Counsel generally described Applicant's prior record as "significant" and that there were a number of matters into which the State could inquire if it cross-examined Applicant. (Tr. 897, ll. 4-11). The trial court summarily explained the scope of the State's right to ask about prior convictions on cross-examination of defendants and the men affirmed they understood. (Tr. 897-98). The trial court also told Applicant and James that if they did not testify, he would instruct the jury to give no consideration to the fact that they did not testify, and to draw no conclusions from the fact. (Tr. 898, ll. 9-14).

The defendants denied they had any questions to ask of the trial court or that they needed to talk to their respective attorneys before the trial court asked them what they wanted to do. (Tr. 898, ll. 15-25). Both men declined to testify. (Tr. 899, ll. 1-6).

PCR Evidentiary Hearing

Applicant took the stand at the evidentiary hearing and was visibly nervous. As previously noted, Applicant was aware of the "common knowledge" in the community that other men were thought to have committed the home invasion and killing, but that he understood from Counsel that he could not testify about hearsay at trial. Applicant testified that the door was kicked in by a size 6 ½ shoe,⁶ but that he wore size 10 to 10 ½ shoes. Applicant indicated he and

⁶ The Court is unable to find a basis in the record for this assertion by Applicant. There is testimony in the trial transcript about a cast of a shoe impression found where the getaway van was parked, (Tr. 325-26) but that would not provide the conclusion asserted by Applicant. In any event, the cast of the shoe impression was introduced at

Counsel discussed the possibility of Applicant testifying. Counsel told him there was no need for his testimony and that Applicant had a prior record of convictions. Counsel was concerned about revealing a pattern of narcotics activity and flight from the law. Counsel told Applicant that testifying would be harmful to his case.

Counsel acknowledged the footprint issue. Counsel testified he and Applicant discussed on multiple occasions the possibility of Applicant testifying. Counsel advised against doing so, in part because Applicant had numerous, unrelated pending charges relating to crack cocaine.

Findings

The Court finds Applicant has failed to meet his burden of proving ineffective assistance. The testimony of both Applicant and Counsel on this point is consistent: they discussed Applicant's right to testify, explored the strengths and weaknesses of the options before them, Counsel advised against doing so, and Applicant opted not to do so. Applicant offered no testimony or other evidence at the evidentiary hearing to show that his decision to not testify at trial was not knowingly, intelligently, and voluntarily made. Additionally, other than the size of his own shoes, Applicant did not offer the substance of what he would have offered in testimony had he taken the stand at trial. Applicant's limited testimony as to his shoe size would not have changed the outcome at trial. Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.

[Conclusion and signature on following page]

neither the original trial nor this evidentiary hearing, and the Court affords Applicant's hearsay testimony on this point no probative value.

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 11th day of June, 2020.

Kristi F. Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Sumter, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Post Conviction Relief

Kristi F. Curtis, Circuit Court Judge

Lower Court Case No.: 2017-CP-26-05189

FILED
HORRY COUNTY
2020 OCT 22 P 1:13
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

Carnail M. Graham #304093, ... Petitioner

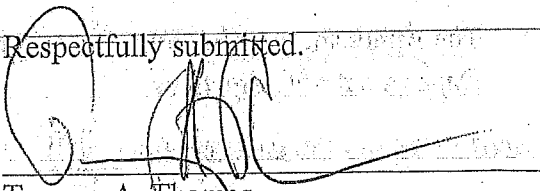
vs.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

The Appellant, Carnail M. Graham, appeals the Order of Dismissal signed by the Honorable Kristi F. Curtis, dated June 1, 2020 and filed on June 5, 2020. Appellant received written notice of entry of this order on September 22, 2020.

Respectfully submitted,


Tommy A. Thomas
Attorney for Petitioner
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

October 20, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Post Conviction Relief

Kristi F. Curtis, Circuit Court Judge

FILED
HORRY COUNTY
2020 OCT 22 P 1:13
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

Lower Court Case No.: 2017-CP-26-05189

Carnail M. Graham #304093,..... Petitioner

vs.

State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Petitioner
hereby certify that pursuant to an Order of the Supreme Court dated March 20, 2020 regarding
Operation of the Appellate Courts During the Coronavirus Emergency, I emailed and mailed a
copy of the Notice of Appeal to Johnny Ellis James, Jr., Esq., at the Office of the Attorney

General, at jjames@scag.gov


Jacquelyn E. Miller
TOMMY A. THOMAS, Esq.
Bar No.: 005536
Post Office Box 88
Irmo, SC 29063
(803) 732-5507

October 20, 2020

[Faint, mostly illegible text, possibly bleed-through from the reverse side of the page. The text appears to be organized into several paragraphs.]