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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
Honorable Jennifer B. McCoy
Chief Administrative Judge

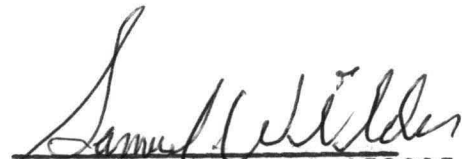
Appellate Case No. 2021-000055

Samuel Wilder, #258295.....Petitioner

v.

State of South Carolina.....Respondent

APPENDIX


Samuel Wilder, # 258295
MCCI
386 Redemption Way
McCormick, SC 29899

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1 THE COURT: All right.

2 This is Mr. Wilder?

3 MS. ELLIOTT: Yes, your
4 Honor. Since this case has a
5 little different procedural
6 background would you like for
7 me to represent that to the
8 Court?

9 THE COURT: All right.

10 MS. ELLIOTT: Mr.
11 Wilder was charged with murder
12 in February of 1998 and as
13 well as possession of a
14 firearm. He went to trial on
15 May fifth, 1999. He was
16 represented by Mr. Brown. He
17 was found guilty and sentenced
18 by Judge Brown to life and
19 five years, consecutive. He
20 filed a notice of appeal or
21 pursued an appeal. Mr. Brown
22 filed and served one for him
23 in May of 1999.

24 The appeal was
25 dismissed because Mr. Wilder

1 filed a pro se motion,
2 post-trial motion also the
3 same day when the notice of
4 appeal was filed. So the
5 notice, the appeal was
6 dismissed so the Circuit Court
7 could rule on the post-trial
8 motions.

9 The hearings, two
10 hearings were held on the
11 post-trial motions. The
12 motions were denied and he
13 appealed again. That appeal
14 was ultimately dismissed
15 because there were some
16 snafu's with the appointed
17 appellate counsel and the
18 matter is now before your
19 Honor in a post conviction
20 relief application.

21 The State is agreeing
22 to a White V. State appeal so
23 any issues as to appellate
24 counsel we are agreeing he is
25 entitled to a belated direct

1 appeal with you.

2 THE COURT: Okay. All
3 right. What, what then is
4 left besides the appellate
5 issue? The denial of the
6 right to appeal?

7 MR. BROOKS: The
8 ineffective assistance of
9 trial counsel.

10 THE COURT: Okay. Now
11 wait a minute. The -- I might
12 have missed some of the
13 details of what you just said.
14 He was tried in '98?

15 MS. ELLIOTT: Yes, your
16 Honor.

17 THE COURT: And there
18 was or was not a direct
19 appeal?

20 MS. ELLIOTT: There was
21 a direct appeal filed but it
22 was dismissed because the same
23 day the direct appeal was
24 filed Mr. Wilder filed a pro
25 se post-trial motion and the

1 Supreme Court decided that
2 that needed to be resolved
3 before the direct appeal
4 proceeded.

5 THE COURT: And they
6 just look a long time for that
7 to be resolved?

8 MS. ELLIOTT: Yes, sir.

9 THE COURT: Like seven
10 years?

11 MS. ELLIOTT: Seven
12 years. The appeal was
13 dismissed in June of 2001 and
14 there was a hearing on the
15 post trial motion November of
16 '99, I guess, and then there
17 was another one in December of
18 2001.

19 There were some delay
20 also apparently with the
21 second appeal before it was
22 dismissed.

23 THE COURT: Okay. All
24 right. I'm still -- I'm still
25 not getting it here. So the,

1 the case came back for a
2 post-trial hearing and --

3 MS. ELLIOTT: Yes.

4 THE COURT: It was
5 ruled on when?

6 MS. ELLIOTT: It was
7 ruled on in 2001. 2001.

8 THE COURT: Well, I
9 don't understand how we're
10 talking about a White V. State
11 appeal because apparently he
12 got an appeal.

13 MR. BROOKS: This is --
14 this is what happened. Maybe
15 I can help your Honor
16 understand what's going on.
17 He was tried on the '98
18 indictment. The incident
19 occurred late in '97. He went
20 to trial in May of '99. He
21 was convicted. And at the
22 time within the ten days Mr.
23 Brown had filed a notice of
24 appeal, his trial counsel, but
25 at the same time before the

1 ten days had run Mr. Wilder
2 had filed pro se post-trial
3 motions; motion for
4 reconsideration, a motion to
5 set aside the trial. He did
6 that on his own but he got it
7 in within ten days and I think
8 what Miss Elliott is saying is
9 that the Supreme Court,
10 realizing that he had gotten
11 that post-trial motion filed
12 on his own, even though he did
13 it on his own it was filed.
14 They dismissed his appeal
15 without prejudice and then
16 allowed the trial court to
17 deal with Mr. Wilder's
18 post-trial motion.

19 When they had a
20 hearing in November of '99 and
21 then there was some issue
22 about who was representing Mr.
23 Wilder for purposes of the
24 post-trial motion. There had
25 obviously been some conflict

1 between him and his trial
2 counsel, Mr. Brown. And from
3 my review of the transcript
4 the judge let Mr. Brown out
5 and appointed Mr. Grimes to
6 deal with the post-trial
7 motions.

8 That post-trial
9 hearing came about on December
10 twenty of 2001. The Court
11 then denied Mr. Wilder's
12 post-trial motion and they,
13 from my review of the
14 transcript and review of the
15 things that the A. G.'s office
16 sent to me is then a Court
17 appointed another lawyer, Mr.
18 Stratos, to do the notice,
19 file the notice of appeal.
20 That was not filed timely.
21 And then there was some, in
22 the, in the materials I got
23 from Miss Elliott there was
24 some communication between Mr.
25 Stratos and the Court of

1 Appeals, the Supreme Court
2 trying to have the appeal
3 reinstated and it was after
4 the remittitur had been
5 submitted to the lower court.
6 And obviously he was not
7 allowed to have the appeal and
8 obviously with the -- and I'm
9 going to be careful, I hope
10 that I'm not putting words in
11 Miss Elliott's mouth, is that
12 they're consenting to allowing
13 Mr. Wilder to have his belated
14 appeal since that has never
15 been dealt with in the higher
16 courts with, with prejudice.
17 It never happened.

18 THE COURT: So he did
19 file an appeal but it was
20 dismissed because it was
21 filed --

22 MR. BROOKS: It was not
23 filed timely by his Court
24 appointed counsel.

25 MS. ELLIOTT: Actually

1 I think the second appeal,
2 what happened is Mr. Stratos
3 didn't request the transcript
4 timely, didn't respond to the
5 Court of Appeals asking about
6 it. It got dismissed. The
7 remittitur was issued. Mr.
8 Stratos moved to recall the
9 remittitur and the Court of
10 Appeals declined.

11 THE COURT: And, and
12 all that occurred within one
13 year of him filing a P. C. R?

14 MR. BROOKS: He hadn't
15 filed his P. C. R. at the
16 time.

17 MS. ELLIOTT: The
18 remittitur was issued March of
19 '06.

20 THE COURT: Okay.

21 MS. ELLIOTT: And he
22 filed the application in
23 September of '06.

24 THE COURT: All right.
25 So he never has gotten a

1 direct appeal?

2 MR. BROOKS: Correct.

3 THE COURT: Despite
4 several filings for it, he
5 never got it.

6 MR. BROOKS: That's
7 correct.

8 THE COURT: All right.
9 So the State consents to that.

10 MS. ELLIOTT: Yes, sir.

11 MR. BROOKS: And
12 obviously we are very much
13 appreciative. But obviously
14 we still have the allegation
15 about ineffective assistance
16 of counsel. And I don't think
17 that they're consenting to
18 just doing the appeal and let
19 the appeal run and assuming I
20 guess fast-forwarding, Judge,
21 giving the State the benefit
22 of the doubt, assuming that
23 they prevail in the appeal,
24 they're not looking for him to
25 then file another P. C. R. I

1 believe what Miss Elliott
2 wants to do is have everything
3 taken care of here because
4 obviously my client still has
5 his claim for ineffective
6 assistance of counsel.

7 THE COURT: Okay. All
8 right. Well, what are the
9 issues regarding the
10 ineffective assistance of
11 counsel?

12 MR. BROOKS: Just bear
13 with me, your Honor. They are
14 numerous because I talked them
15 over with my client. One of
16 the things that we talked
17 about was obviously the
18 failure of his lawyer to
19 properly investigate this. He
20 indicates that his lawyer
21 never got an expert, never got
22 a private investigator to do
23 an independent investigation
24 into the matter.

25 He also indicates

1 that his trial lawyer should
2 have raised an issue or
3 challenged the jurisdiction of
4 the police, the police's
5 arrest, whether or not they
6 were -- this was -- the City
7 police officers were the ones
8 that it was their case but he
9 argued, he says his lawyer
10 should have argued that they
11 didn't have the jurisdiction
12 to get a warrant or not get a
13 warrant to pursue this case
14 because it was outside of the
15 city's jurisdiction.

16 He also raised an
17 issue about the trial lawyer's
18 failure to suppress
19 photographs in regards to
20 show-up identification and the
21 city police officers did
22 violate a warrant. He also
23 indicates that his lawyer
24 should have raised the issue
25 or challenged the issue of the

1 police officer literally
2 seizing the evidence from his
3 car. He alleges the
4 constitutional violations, his
5 lawyer should have raised and
6 challenged the police's taking
7 of that evidence.

8 He also indicates
9 that possibly the police did
10 not simply have jurisdiction
11 and that --

12 THE COURT: Well, did
13 that -- I can tell that that's
14 his list and not your list. I
15 want to know what you as, as
16 his lawyer believe are the
17 legitimate issues that need to
18 be tried here.

19 MR. BROOKS: What I
20 think, Judge, is that number
21 one, we are talking about not
22 having an expert, not having a
23 private investigator to go out
24 and talk to the various
25 witnesses in preparation for

1 trial. There were numerous
2 witnesses. They all said very
3 short blurbs.

4 I don't think -- I
5 think, I think in this type of
6 situation you're talking about
7 murder, you should have had an
8 independent defense
9 investigator go out.

10 THE COURT: All right.

11 MR. BROOKS: There was
12 an issue about whether or not
13 his lawyer should have
14 submitted an exhibit. That
15 took away his right to argue
16 last to the jury. I think
17 that that's very important.
18 That unless you got some
19 strong evidence to submit to
20 the Court to take that right
21 away, then you probably need
22 to keep that right and argue
23 last.

24 And this was one of
25 those cases that I think that

1 in, in my opinion, your Honor,
 2 since you, the Court asked me
 3 that, I think that was one
 4 that I think had a great deal
 5 more success and the outcome
 6 would have been more likely
 7 different if the defense would
 8 have had the last word.

9 THE COURT: Okay. So
 10 anything other than those
 11 three?

12 MR. BROOKS: I beg the
 13 Court's indulgence.

14 THE COURT: Sure.

15 (Whereupon, Mr.
 16 Brooks and the defendant have
 17 a private, off-the-record
 18 discussion.)

19 MR. BROOKS: And
 20 finally, your Honor, we would
 21 deal with more of the show-up
 22 identification issues, whether
 23 or not that would come
 24 properly, whether or not trial
 25 counsel challenged them

1 sufficiently.

2 THE COURT: Okay. Now,
3 you, you realize, of course,
4 that in order to prevail on
5 the failure of trial counsel
6 to call an expert or to have
7 an investigator to interview
8 witnesses, it would be
9 absolutely essential for you
10 to have your own expert or to
11 have the actual witnesses here
12 to testify.

13 There is no way you
14 could possibly prevail on
15 those claims without having
16 those witnesses here.

17 MR. BROOKS: Then this
18 would have actually been the
19 State's witnesses. Not so
20 much that -- it's our position
21 it's not so much those people
22 actually need to be here,
23 Judge, is whether or not the
24 trial lawyer had done a proper
25 investigation into those

1 witnesses and determined
2 whether or not there were
3 things that could have
4 impeached by those people that
5 were not brought out in trial.
6 So that's what I mean by not
7 having an investigator and not
8 being able to properly
9 investigate. It doesn't
10 necessarily mean to have those
11 actual witnesses here because
12 we know what they're going to
13 say in terms of looking at the
14 transcript.

15 But in terms of
16 actually being prepared and
17 actually being -- having to be
18 able to present a sharper,
19 more focused defense, to be
20 able to cross-examine them and
21 impeach them more effectively.

22 THE COURT: All right.
23 I'm ready to proceed.

24 MR. BROOKS: At this
25 time, your Honor, we would

1 call Samuel Wilder.

2

3

4

5

6

7 SAMUEL WILDER, having

8 been sworn as a witness, is

9 duly sworn and testifies as

10 follows:

11 DIRECT EXAMINATION BY

12 MR. BROOKS:

13 Q Mr. Wilder, you got
14 all your stuff out?

15 A Yeah. Pretty much.
16 I'm about ready.

17 Q All right. Mr.
18 Wilder, you were convicted of
19 murder. Is that correct?

20 A Yes, sir.

21 Q And you were
22 sentenced to life. Is that
23 correct?

24 A That's correct.

25 Q And you had Mr.

Wilder - - Direct

1 Edward Brown as your lawyer?

2 A Yes, sir.

3 Q Okay. Was he
4 appointed or retained?

5 A Retained.

6 Q Now, were you in jail
7 prior to the trial or were you out
8 bond?

9 A I was in jail.

10 Q How long were you in
11 jail for before going to trial?

12 A About eighteen
13 months.

14 Q All right. So how --
15 during that eighteen months do you
16 recall how many times you met with
17 Mr. Brown to prepare your case?

18 A Mr. Brown came and
19 saw me once about the probate
20 issue and I think he came up about
21 twice just before trial.

22 Q Okay. Now, did he
23 have an expert in your case, any
24 type of expert?

25 A Not that I know.

Wilder -- Direct

1 Q Did he have any type
2 of private investigator to go out
3 and help assist in the
4 investigation of this matter?

5 A He didn't tell me
6 about it.

7 Q Okay. Now, during
8 the trial did you testify?

9 A No, I didn't.

10 Q Okay. Was that
11 something that you discussed with
12 Mr. Brown?

13 A Mr. Brown told me
14 it's best not to testify.

15 Q Okay. Did you
16 discuss it with him why it was
17 best not to testify?

18 A Well, at the time he
19 said something about a past
20 record.

21 Q Okay.

22 MS. ELLIOTT: Your
23 Honor, I'm sorry to interrupt.
24 We're having difficulty
25 hearing from back here.

Wilder -- Direct

1 THE COURT: Is there a
2 mike in front of you that you
3 can move, use to turn up?

4 THE WITNESS: I don't
5 think.

6 MR. BROOKS: Well, I'll
7 just speak up.

8 Q Is that better, Mr.
9 Wilder?

10 A I guess it is.

11 Q All right. Now, did
12 he also discuss with you about
13 getting the last argument to the
14 jury?

15 A No, he didn't.

16 Q Didn't?

17 A He didn't.

18 Q Do you think if you
19 had gotten the last argument to
20 the jury that the outcome of your
21 case would have been different?

22 A Well, all along I
23 thought we had the, the last
24 argument. Apparently he submitted
25 an exhibit or picture or something

Wilder - - Direct

1 but...

2 Q Did you talk to him
3 about what was submitted, what
4 exhibit was submitted?

5 A He didn't discuss
6 that.

7 Q Do you know what that
8 was that was submitted?

9 A No.

10 Q But it was without
11 your knowledge and without your
12 consent?

13 A I didn't know nothing
14 about it at the time.

15 Q Okay. Now, you also,
16 you indicated that your lawyer was
17 ineffective in not challenging the
18 identification process, not
19 properly or --

20 A Yes, sir.

21 Q -- effectively. What
22 do you mean by that?

23 A Well, I'm indicating
24 that Charleston City police had
25 come to my residence in Charleston

Wilder - - Direct

1 County. They seized me in the
2 yard at gunpoint, throw me on the
3 ground, took my wallet, and they
4 proceed on to conduct a search.

5 They, they didn't
6 read me my Miranda warnings. So I
7 was seized and they conducted a, a
8 show-up by holding me in custody
9 in my yard and having people view
10 me in the city police car.

11 Q Okay. And had you,
12 you told Mr. Brown about that?

13 A Yeah.

14 THE COURT: Let me ask
15 a question. Was there a
16 hearing right before trial
17 about the constitutionality
18 of, of this?

19 MS. ELLIOTT: Your
20 Honor, there was a hearing at
21 trial, yes. Mr - - the trial
22 attorney, Mr. Brown moved to
23 suppress evidence found in car
24 at the incident location and
25 any photographs that were

Wilder -- Direct

1 taken of Mr. Wilder as a
2 result of his arrest, that was
3 all -- Mr. Brown moved to
4 suppress that at trial.

5 THE COURT: Well, was
6 did some of these witnesses --

7 MS. ELLIOTT: Well,
8 the --

9 THE COURT: Did this
10 happen the way he described
11 it?

12 MS. ELLIOTT: The,
13 the -- there was one witness
14 from the scene of the shooting
15 who was taken to Mr, Mr.
16 Wilder's location and there
17 was a show-up identification.

18 THE COURT: And was
19 there a hearing regarding the,
20 the constitutionality of the
21 show-up?

22 MS. ELLIOTT: There was
23 an in camera hearing regarding
24 this.

25 THE COURT: And where,

Wilder -- Direct

1 where is that?

2 MS. ELLIOTT: It is on
3 page -- at the very beginning
4 now. It's -- it begins on
5 page twenty-three, your Honor.

6 THE COURT: Okay. You
7 can continue.

8 Q All right. Go ahead,
9 Mr. Wilder.

10 A Where were we?

11 Q You were talking
12 about being in the police car and
13 people come by and you were shown
14 to them and I asked you did you
15 discuss this with your lawyer?

16 A Well, yes, I did.
17 okay. The, the show-up
18 identification happened right
19 there in the yard. The city
20 police pulled, pulled their car
21 up. I was made to stand in front
22 of the bright headlights and
23 another car pulled up. The same
24 thing happened and as a matter of
25 fact that whole process took about

Wilder -- Direct

1 thirty minutes, forty-five
2 minutes. I don't know. But, but
3 the last witness for the show-up,
4 show-up for identification, I
5 don't know who he was, the person
6 doing the identification, and I
7 don't know how many people was
8 looking at me. But that's what
9 happened.

10 Q Now, now, your lawyer
11 did raise this in pretrial motion.
12 Do you recall that?

13 A I recall my counsel
14 had --

15 THE COURT: Let
16 let's -- the record will speak
17 for itself. Elicit from him
18 what he knew from him. I
19 don't mean to short-circuit
20 you but I can read what's in
21 the transcript.

22 I still hadn't found
23 where there's a discussion of
24 this.

25 MS. ELLIOTT: I

Wilder -- Direct

1 would -- I apologize, your
2 Honor. I gave you the wrong
3 page number. I believe it
4 starts over on -- another in
5 camera hearing, I believe.
6 Pretrial motions started on
7 page thirteen or fourteen and
8 then an in camera hearing
9 began on page twenty.

10 THE COURT: But
11 apparently they're not dealing
12 with the identification issue
13 right there.

14 MS. ELLIOTT: No, sir.
15 And -- well, the witness the
16 show-up witness actually does
17 testify beginning on page --
18 in camera on page thirty-one.

19 THE COURT: Okay. It's
20 going to help me to understand
21 his testimony a lot more if I
22 know what happened and if I
23 can either read it or you all
24 tell me what happened in this
25 hearing and who the witness

Wilder -- Direct

1 was, did the witness
2 eventually testify, and so
3 forth.

4 MR. BROOKS: Well,
5 Judge, just to kind of shorten
6 it. That particular person.
7 Alvin Washington, he was the
8 one that the police brought,
9 pointed out Mr. Wilder, you
10 know, from the club scene of
11 the shooting and brought him,
12 Mr. Washington, to view him in
13 the car. And there was a, an
14 in camera hearing about Mr.
15 Washington's testimony at the
16 scene and that's in the
17 transcript.

18 Obviously my client,
19 he raised these issues, filed
20 several amendments to his post
21 conviction relief application
22 obviously dealing with his
23 trial counsel's
24 ineffectiveness in regards to
25 those issues.

Wilder -- Direct

1 MS. ELLIOTT: And if it
2 helps, your Honor, I believe
3 that the Court's ruling, the
4 arguments and the court's
5 rulings begin on page
6 forty-three and they go to
7 page forty-five.

8 THE COURT: Who was the
9 officer that took Mr.
10 Washington over there? Was it
11 Mr. Kragen?

12 MS. ELLIOTT: Yes, your
13 Honor.

14 THE COURT: Okay.

15 MS. ELLIOTT: The in
16 camera hearing combined two
17 issues. One was the search of
18 the car, Mr, Mr. Wilder's car,
19 and the other one was the
20 show-up.

21 THE COURT: All right.
22 Let me, let me look through
23 this for just a minute. This
24 index all out of whack.

25 MS. ELLIOTT: Okay.

Wilder -- Direct

1 Your Honor, I'm sorry
2 to interrupt but again, again
3 beginning on page two
4 thirty-three who I think was
5 the first witness to testify
6 about a photographic line-up,
7 page two thirty-three,
8 Terrance Smalls. There was
9 also an in camera proceeding
10 relating to that witness.

11 **THE COURT:** Do you
12 challenge the photographic
13 line-up or just the show-up
14 line-up?

15 **MR. BROOKS:** He
16 challenges everything, Judge.
17 He challenges everything in
18 terms of what his lawyer did.
19 I mean --

20 **THE COURT:** Well,
21 you're the lawyer. I don't
22 want -- I mean do you have a
23 legitimate basis to challenge
24 the, the admissibility of the
25 photographic line-up?

Wilder -- Direct

1 MR. BROOKS: Judge, can
2 we approach?

3 THE COURT: You, you
4 may approach.

5 (Whereupon, there was
6 an off-the-record bench
7 conference.)

8 THE COURT: The, the
9 page number you just mentioned
10 for the witness on the
11 photographic line-up was what?

12 MS. ELLIOTT: Two
13 thirty-three.

14 THE COURT: All right.
15 You can proceed, Mr. Brooks.

16 Q Mr. Wilder, do you
17 remember what I -- you remember
18 the last thing I asked you?

19 I apologize. Did you
20 discuss what happened with the
21 identification procedure with your
22 lawyer?

23 A Yes, I did.

24 Q Okay. Now, one other
25 thing. During the course of your

Wilder -- Direct

1 trial, I believe your
2 step-daughter, Shayneese
3 (phonetic). Is that her name?

4 A Yes, sir.

5 Q She testified. Is
6 that correct?

7 A Yes, sir.

8 Q And she was eleven at
9 the time?

10 A Eleven years old.

11 Q Okay. Did you and
12 your lawyer ever discuss about
13 challenging the competency of her
14 testimony?

15 A There was no
16 competency hearing on, on
17 Shayneese. I asked him why was
18 she testifying and he said, he
19 said he wasn't going to spend much
20 time with her and then there was
21 some kind of marriage break-up
22 story.

23 MR. BROOKS: Judge, one
24 thing, one additional thing we
25 want to raise in regards to

Wilder -- Direct

1 the ineffective assistance of
2 counsel was trial counsel's
3 failure to challenge the
4 competency if the eleven year
5 old witness, whether or not
6 she was truthful and reliable
7 because of her age. That was
8 never challenged. Never had a
9 hearing in regards to that.

10 It was brought up by
11 subsequent counsel in the
12 post-trial motion. There was
13 never an examination in
14 regards to that, that
15 step-daughter. And actually
16 the Court had asked trial
17 counsel about that, whether or
18 not he was going to challenge
19 that and he indicated no, and
20 that was back on page, page --
21 back on page forty-five when
22 Miss Clifford at the bottom, I
23 say line twenty-one on page
24 forty-five, Miss Clifford for
25 the State talks about it's her

Wilder - - Direct

1 understanding that Mr. Brown
2 was going to have a motion in
3 limine to suppress and she
4 indicates she had some case
5 law on it for the Court's - -
6 the Court had asked him about
7 that and he said he does not
8 have a motion on that. That's
9 one issue that my client is
10 raising that we inadvertently
11 did not mention, mention to
12 the Court that we think is a
13 very critical issue.

14 THE COURT: Okay.

15 Q Mr. Wilder, for
16 actually the court record you've
17 already published several issues
18 even though you may not actually
19 realize it.

20 A Okay.

21 Q We dealt with the
22 appeal, we brought up the fact
23 that there was no competency
24 hearing in regard to Shayneese's
25 testimony.

Wilder - - Direct

1 A Uh-hum.

2 Q And we also talked
3 about the show-up and the
4 photographic identification. We
5 presented that issue to the Court.

6 A Okay. I believe
7 that, that counsel after, after we
8 performed or after we moved to
9 suppress the evidence, the show-up
10 and the photographic line-up by
11 indicating to the Court that the
12 city police was in fact out of
13 juris, out of jurisdiction, the
14 outcome of the trial would have
15 been different.

16 Q And that's something
17 that your lawyer didn't do, didn't
18 challenge that issue?

19 A He didn't challenge
20 that, that -- he didn't challenge
21 the issue or at least I don't
22 remember him challenging the
23 issue. And there's a reasonable
24 possibility that the outcome of
25 the trial would have been

Wilder -- Direct

1 different or at least the
2 possibility to undermine the
3 confidence in the outcome of the
4 trial.

5 Q Okay.

6 A I think during, I
7 think that during trial that the
8 motion to --

9 THE COURT: We need to,
10 we need to make sure everybody
11 understands what everybody's
12 roles are here. You're the
13 lawyer. He's the witness.
14 You elicit facts from him and
15 I'll hear legal arguments
16 after all the evidence is in.

17 I don't want you to
18 be asking him what the legal
19 arguments are. All right?

20 MR. BROOKS: All right.

21 Q Now, Mr. Wilder, I'm
22 going to make sure we, we touched
23 on --

24 A Okay.

25 Q -- certain facts --

1 A Okay.

2 Q -- in regards to Mr.
3 Brown's representation of you. He
4 did not get the last word to the
5 jury. Is that correct?

6 A That's true.

7 Q And that was because
8 he had submitted some exhibit that
9 you did not, you were not familiar
10 with. Is that correct?

11 A That's correct.

12 Q Now, in addition to
13 that, obviously we talked about
14 the appeal. That was not done,
15 and the State consents to that.
16 There was no competency hearing to
17 talk about whether or not
18 Shayneese (phonetic) was competent
19 to testify. Is that correct?

20 A That's true.

21 Q Your lawyer did not
22 challenge that, not filed any
23 motions, written or oral, with the
24 Court. Is that correct?

25 A None I know of.

Wilder -- Direct

1 Q Okay. And you also
2 in regards to the show-up and
3 photographic identification, you
4 said that your lawyer did not
5 effectively raise those issues.
6 Is that right?

7 A Yes, sir. The, the
8 photograph was the proof of the
9 unlawful arrest done in Charleston
10 County, the photograph, the
11 photograph that was used in the
12 show-up --

13 Q Okay.

14 A -- for the arrest.

15 Q Okay. Now, you also
16 talked about now in regards to the
17 jurisdiction, this was actually a
18 city case. Is that right?

19 A Yes.

20 Q And you were arrested
21 outside the city's jurisdiction?

22 A In Charleston County.

23 Q And they had
24 commenced to do a seizure --

25 A Yes, sir.

Wilder -- Direct

1 Q -- outside of their
2 jurisdiction?

3 A Outside, but he never
4 mentioned that.

5 Q And your lawyer never
6 raised as an issue as to whether
7 or not they had the jurisdiction
8 to do that?

9 A Never mentioned that.

10 Q Okay. So they were,
11 do you recall how far outside of
12 the jurisdiction that this, that
13 you were when they arrested you
14 and searched your vehicle?

15 A Well, I live in
16 Charleston County right across
17 from the Charleston County police
18 station and I can't remember what
19 time that was, three or four
20 o'clock in the morning.

21 Q Was there any county
22 officer involved in that arrest
23 and search process?

24 A A county officer
25 showed up about an hour and a half.

Wilder -- Direct

1 later.

2 Q Okay. But the search
3 had already been done before this
4 county officer had arrived?

5 A Yes, sir.

6 Q And you told
7 Mr. Brown all of this information?

8 A Yes, sir.

9 Q Prior to trial?

10 A Yes, sir.

11 Q Now, you also
12 testified earlier that your lawyer
13 didn't have any type of private
14 investigator, did not do any type
15 of independent investigation of
16 this matter. Is that right?

17 A Well, at least I, I
18 never knew of an expert being
19 hired. There were some talks
20 about getting a private
21 investigator to investigate some
22 unrelated matters dealing with
23 past convictions.

24 Q Past convictions of
25 who?

Wilder -- Direct

1 A Of past convictions
2 of myself that happened back in
3 1982 and he had me to believe that
4 there was some benefit of not
5 doing an armed robbery that
6 happened in 1982 for the effect
7 that I may have been able to take
8 the stand, but the armed robbery
9 was more than ten years old.

10 Q Okay. Did you know
11 that there was, that there was a
12 possibility that that, that could
13 have been excluded from being
14 talked about?

15 A Excuse me. I didn't.

16 Q Did you, did you know
17 that, that the solicitor could
18 have been prohibited from talking
19 about that prior conviction?

20 A No. I didn't know
21 that at the time. That just was a
22 waste of time, that's with the
23 armed, armed robbery.

24 Q So are you saying
25 that knowing what you know now you

Wilder -- Direct

1 could have testified --

2 A Yes.

3 Q -- or you should have
4 testified?

5 A I would have
6 testified.

7 Q And what would you
8 have testified to?

9 A Well, from the onset
10 of the trial my step-daughter,
11 she, she testified.

12 Q No. No. What would
13 you have testified to about the
14 facts of the case that happened?

15 A About the -- what
16 happened in the case?

17 Q Correct.

18 A Well, I would have
19 testified that, that I didn't
20 shoot Connie, my wife, and I did
21 not, I wasn't separated from her
22 and it was all a make-up story
23 about the break-up, the marriage
24 break-up and all this stuff.

25 Q Is there, is there

Wilder -- Direct

1 anything else that you would have
2 testified to other than that?

3 A I would have
4 testified, I would have produced
5 phone records that we were
6 communicating. I picked her up,
7 picked her up from work on the on
8 the same day. I would have
9 testified that I paid the light
10 bill to transfer the light to the
11 new residence.

12 Q And did, did you
13 discuss with your lawyer what your
14 possible testimony could have been
15 or would have been?

16 A Well, we discussed it
17 at the table, I mean and we
18 discussed it, you know, briefly as
19 when, when he came to the county
20 jail. The main, the main point is
21 that I never knew that the State
22 created a theory that me and my
23 wife had broken up and I could
24 have testified and prove at that
25 time that we never broke up.

Wilder -- Direct

1 Right?

2 And some of the
3 evidence that's been scattered. I
4 don't have that check any more.
5 My mom had lost copies of my
6 checks that she have. I hand the
7 copies to the Clerk of Court but
8 apparently that record is
9 destroyed and -- let me see.

10 I would have
11 testified no break-up and, and I
12 would have demonstrated and maybe
13 Shayneese (phonetic) would have
14 remembeed that we started packing
15 to moveto the other house some
16 three weks before, some three
17 weeks fore we did finally move.

18 Let me interrupt you.
19 You tled about Shayneese
20 (phorc).

21 Uh-huh.

22 Shayneese (phonetic)

23 was ing with your
24 mc -in-law?

25 A No. Shayneese

Wilder -- Direct

1 (phonetic) was the step, my
2 step-daughter in the house and --

3 Q And but, after the
4 death of her mother.

5 A Uh-huh.

6 Q And while you were in
7 jail waiting to go to trial.

8 A Right.

9 Q Shayneese (phonetic)
10 was living with her grandmother?

11 A Connie's mom. Her
12 grandmother.

13 Q Which would have been
14 Connie's mom?

15 A That's right.

16 Q And you didn't have
17 the best relationship with her?

18 A Well, if, if I'm
19 accused her mother's death, no,
20 not at that time. But we had a
21 good relationship and what I'm
22 saying is Shayneese (phonetic)
23 testified as to like if it was a

24 break-up, and I believe that

25 Shayneese (phonetic) would have

Wilder -- Direct

1 also testified that we, we made
2 preparation to move some three
3 weeks before we moved and the
4 break-up was just her grandmom's
5 story.

6 MR. BROOKS: Okay. All
7 right. I beg the Court's
8 indulgence, your Honor.

9 Answer any questions
10 for Miss Elliott.

11 THE COURT: You may
12 cross-examine.

13

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20 CROSS-EXAMINATION BY

21 MS. ELLIOTT:

22 Q Mr. Wilder --

23 A Yes, ma'am.

24 Q -- now, you knew what
25 the State's theory of the case was

Wilder -- Cross

1 because you sat there during trial
2 and you heard Shayneese's
3 (phonetic) testimony and you heard
4 the other State's witnesses. Is
5 that right?

6 A I did not know what
7 the State's theory was to the day
8 of trial.

9 Q Okay. And you sat
10 through the trial and you heard
11 Shayneese (phonetic) testify?

12 A I heard Shayneese
13 (phonetic) testify.

14 Q Okay. And when it
15 was time to present evidence for
16 the defense you decided not to
17 testify at that time, did you not?

18 A Mr. Brown made that
19 decision.

20 Q Well, didn't the
21 Court question you about it as
22 well?

23 A Well, if, if Mr.
24 Brown questioned me about it, the
25 basis of my answer was after I

Wilder -- Cross

1 consult with counsel.

2 Q And if the record
3 shows that Mr -- that Judge Brown
4 said is it your decision not to
5 testify and you said yes, sir,
6 that would be true?

7 A And what I'm saying
8 is that because my counsel, I
9 consulted with counsel and at that
10 time that made me believe that
11 they would bring up some past
12 record about an armed robbery, so
13 I did not testify.

14 Q Okay. Mr. Wilder --

15 A Uh-huh.

16 Q -- when the night of
17 your arrest --

18 A Yes.

19 Q -- I think you
20 indicated the officers searched
21 your club. Is that correct?

22 A The club?

23 Q Yes.

24 A My car.

25 Q The car. But didn't

Wilder -- Cross

1 they also search your club and
2 found nothing?

3 A I know the police
4 officers was searching my car.
5 They were in my car.

6 MS. ELLIOTT: I have no
7 other questions, your Honor.

8 MR. BROOKS: No other
9 questions, Judge.

10 THE COURT: All right,
11 sir. You can come down.

12 MR. BROOKS: We would
13 call Edward Brown to the
14 stand.

15

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Brown -- Direct

1 EDWARD M. BROWN,
2 having been called as a
3 witness, is duly sworn and
4 testifies as follows:

5 THE COURT: You may
6 proceed.

7 MR. BROOKS: All right.

8 DIRECT EXAMINATION BY

9 MR. BROOKS:

10 Q Mr. Brown, you
11 represented Mr. Wilder?

12 A I did.

13 Q And you were retained
14 in this matter?

15 A I was.

16 Q Do you recall whether
17 or not you actually challenged the
18 competency of Shayneese's
19 (phonetic) testimony?

20 A I did not challenge
21 the competency of her testimony,
22 no.

23 Q Okay. Did you -- you
24 submitted some exhibit that took
25 away your ability to argue last to

Brown -- Direct

1 the Court?

2 A That was a trial
3 strategy. Yes.

4 Q All right. Was that,
5 was that a trial strategy you
6 discussed with Mr. Wilder?

7 A I did. Everything
8 that was happening, everything
9 that occurred in this case was
10 thoroughly discussed with Mr.
11 Wilder. In regards to that
12 exhibit, that's the only exhibit
13 in my opinion that had credence to
14 the position that we, that I took
15 in the cross-examination and
16 defending this case.

17 That exhibit was a
18 part of S. L. E. D.'s records
19 which showed that there was no gun
20 powder residue on Mr. Wilder's
21 hands. My theory was that if he
22 had shot the gun there would have
23 been residue on his hands. That's
24 why we submitted the exhibit and
25 that was me in closing argument if

Brown -- Direct

1 I'm not mistaken.

2 Q Could you have --
3 well, could you have gotten that
4 information in or gotten that
5 information disclosed to the jury
6 without submitting it as evidence
7 and taking away your last word to
8 the jury?

9 A Mr. Brook, we didn't
10 have a lot to work with in this
11 case and there, and that which I
12 had I thought it was best that the
13 jury have that in front of it when
14 they were deliberating. That was
15 something that we discussed and
16 something we decided on that was
17 best to do. We, meaning me and
18 Mr. Wilder.

19 Q Okay. Did you ever
20 challenge the search and seizure
21 by the Charleston City Police
22 Department based on the fact they
23 were outside their jurisdiction?

24 A As I recall, if you
25 look in the transcript, that was

Brown -- Direct

1 challenged and I think the judge,
2 Judge Brown ruled against us.

3 Q You never got a
4 private investigator in this case.
5 Is that correct?

6 A No, sir, I did not.
7 I did the investigation in this
8 case myself. The investigation
9 that I did, I knew where this club
10 was. I knew a lot of the
11 witnesses. For instance, Mr.
12 George Freeman. I knew the owner
13 of the club. I knew three or four
14 of the other witnesses. And I
15 didn't need to expend funds they
16 did not have for a private
17 investigator when I knew these
18 people myself.

19 I knew Kwadjo
20 Campbell. He testified. So I
21 didn't need to expend monies for,
22 for a private investigator.

23 Q Did you discuss with
24 him about testifying at the trial?

25 A I certainly did.

Brown -- Direct

1 Q And was there an
2 issue about a prior criminal
3 history that you thought should
4 not, you thought should cause him
5 not to testify?

6 A We talked about the
7 prior criminal history, but that's
8 not the reason he didn't testify.

9 MR. BROOKS: Okay. I
10 beg the Court's indulgence,
11 your Honor.

12 (Whereupon, Mr.
13 Brooks and the defendant have
14 a private, off-the-record
15 discussion.)

16 Q Mr. Brown did you
17 ever get any type of expert,
18 whether it be in ballistics to
19 talk about the trajectory of the
20 bullets, and questions about who
21 fired what and where?

22 A No, I did not. And
23 the reason I didn't is because
24 after I spoke with these
25 witnesses, you know, it was quite

Brown -- Direct

1 clear to me what had occurred.
2 Expending funds for an expert --
3 during this trial there was in
4 excess of ten people that
5 identified Mr. Wilder as the
6 shooter, and I knew that prior to
7 going to trial because I spoke to
8 the witnesses.

9 And if I may finish.
10 I visited Mr. Wilder on a minimum
11 of ten occasions. Mr. Wilder
12 would send messages to me through
13 his mother because she would see
14 him.

15 So to answer your
16 question, no, I didn't, didn't get
17 any experts for ballistic angles
18 and the rest of it.

19 Q Now, you testified
20 earlier that you had submitted the
21 report about gun residue or
22 lack --

23 A Lack of powder.

24 Q -- lack of powder?

25 A Residue powder on his

Brown -- Direct

1 hands. Right.

2 Q And did you get any
3 type of expert to talk about gun
4 powder residue, why it's on your
5 hands and how soon they would come
6 off, and what caused it to come
7 off, and things of that nature?

8 A No, sir, I did not.
9 But I knew from prior experiences
10 that you can put -- if you fire a
11 gun, the powder is, normally is
12 going to come on the hands but
13 that can be washed off, that could
14 be -- it could come off by simply
15 putting your hands in your pocket
16 and, and I, I just didn't see the
17 need for an expert to tell me that
18 or to tell me how you could get it
19 off. Mr. Wilder told me what
20 happened.

21 Q Okay. Well, in light
22 of knowing this information about
23 gun powder residue and how easy it
24 is to be taken off and why the
25 report would say there is no gun

Brown -- Direct

1 powder residue on his hands,
2 wouldn't it have been better to
3 not submit that and still have the
4 last word to the jury?

5 A Not in my opinion,
6 because that, that report was the,
7 the one thing that we had that I
8 think we could put before the
9 jury. You know, my, my position
10 was you had a number of witnesses
11 who identified him without any
12 hesitation. So in order to
13 counteract that the only thing we
14 had was something that would go
15 into the jury room as an exhibit
16 which would indicate that there
17 was no powder on his hands. That
18 was the trial strategy. That was
19 a decision I made or we made, I
20 should say.

21 MR. BROOKS: Beg the
22 Court's indulgence, your
23 Honor.

24 (Whereupon, Mr.
25 Brooks and the defendant have

BROWN -- CROSS

1 a private, off-the-record
2 discussion.)

3 MR. BROOKS: No other
4 questions.

5

6

7

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11

12 CROSS-EXAMINATION BY

13 MS. ELLIOTT:

14 Q Mr. Brown, I believe
15 you indicated you were retained to
16 represent Mr. Wilder?

17 A I was.

18 Q And I think prior to,
19 to you being retained he was
20 represented by the Public
21 Defender's Office?

22 A That is correct.

23 Q And did you have
24 access to the file? Do you know
25 how long the Public Defender's

BROWN -- CROSS

1 Office had represented him?

2 A It was about two,
3 three, four months. Something
4 around there.

5 Q And did you have
6 access to the information gained
7 by the Public Defender's Office
8 during that period of time?

9 A When I sent my Brady
10 motion to the Solicitor's Office I
11 got all of that from the --
12 everything that the Public
13 Defender's Office had, I got.

14 Q Okay. And when you
15 were retained did you meet with
16 your client?

17 A I met with Mr. Wilder
18 more before I was retained,
19 really, because his mother asked
20 me to go down and talk to him and,
21 yes, ma'am. I met with him.

22 Q Okay. Numerous
23 times?

24 A Yes, ma'am.

25 Q And your professional

BROWN -- CROSS

1 experience at that point in time
2 was what as far as your background
3 in criminal law and the types of
4 cases you handled?

5 A Twenty years.

6 Q Twenty years. And
7 have you --

8 A Well, no. Back up.
9 No. It wasn't twenty years. I'm
10 sorry. Fifteen years. Around
11 fifteen years.

12 Q And did -- had you
13 had the opportunity to represent
14 criminal defendants charged with
15 murder?

16 A Yes, ma'am.

17 Q Individuals charged
18 with crimes involving issues of
19 eyewitness identification?

20 A Yes, ma'am.

21 Q And did you discuss
22 with your client or if you could,
23 if I may back up just a bit. Can
24 you just very briefly characterize
25 the State's evidence in this case.

BROWN - - CROSS

1 A Overwhelming.

2 Q Okay. And did it
3 consist of -- I guess the victim
4 went to a bar and was sitting in
5 the bar. Is that correct?

6 A What happened was,
7 as, as, if I can say it. I mean I
8 need to say this. What happened
9 was Miss -- his wife was much
10 younger than he was and she -- I
11 think there was some erectile
12 deficiencies and she said, she
13 said to him I'm going out to find
14 me a real man and apparently he
15 knew where she was going and he
16 followed, he followed her to the
17 bar.

18 Q Okay. And did
19 approximately -- he fired at her
20 in the bar when she was sitting at
21 a stool, on a stool, at the bar?

22 A As memory serves me,
23 twice.

24 Q Okay. And then she
25 tried to run out of the bar and

BROWN -- CROSS

1 actually got outside?

2 A I think there was
3 another shot fired in the bar.

4 Q Okay. And then she
5 was also fired upon outside?

6 A That is correct.

7 Q And died outside?

8 A I don't know when she
9 died but --

10 Q Okay.

11 A -- that's -- I know
12 there was shots fired outside.

13 Q And witnesses
14 observed the shooter again
15 standing over her when she was on
16 the ground, shooting again?

17 A Yes, ma'am.

18 Q And about ten to
19 thirteen individuals at the scene
20 at the time identified your client
21 as the person who shot the victim?

22 A That is correct.

23 Q Some through, some
24 had had photographic line-ups
25 presented to them, some had not?

BROWN - - CROSS

1 A That's, that's true,
2 too. Yes, ma'am.

3 Q What did Mr. Wilder
4 tell you as far as possible
5 defenses and witnesses or leads
6 for investigation?

7 A Mr. Wilder's defense
8 was "I didn't do it."

9 Q Okay.

10 A And out of that I had
11 to craft a defense. Obviously
12 that was difficult.

13 Q What investigation
14 did you conduct?

15 A I, when I got the
16 Brady material, I know where this
17 club was, is or was. I went down
18 there one night while around that,
19 I think this occurred around 1:30,
20 12:30, twelve o'clock, 1:30. I
21 went down there one night by
22 myself to observe it. I went down
23 on another occasion prior to trial
24 with the prosecutor, I think it
25 was Detective Goldstein, and

BROWN -- CROSS

1 another police officer.

2 I reviewed some
3 diagrams that they were going to
4 introduce to make sure that they
5 comport with the layout of the
6 bar. I spoke with a number of
7 these witnesses that I got
8 statements from. Now, there were
9 some witnesses that would not
10 speak to me and I couldn't make
11 them speak to me.

12 I spoke, for
13 instance, I remember specifically
14 speaking with Kwadjo Campbell
15 prior to the trial. George
16 Freeman I remember specifically
17 speaking with prior to the trial,
18 during the investigation.

19 Q Okay. And you had
20 access to all discovery material?

21 A I had access to
22 everything that they gave me.
23 Yes, ma'am.

24 Q Okay. And I believe
25 you and Miss Clifford, the

BROWN -- CROSS

1 assistant solicitor at the time,
2 met shortly before trial for two,
3 two and a half hours and reviewed
4 all the State's evidence. Is that
5 correct?

6 A I think that
7 occurred.

8 Q And you and Miss
9 Clifford and the officer also went
10 to the bar shortly before trial
11 and spent some time there, the
12 scene of the shooting?

13 A We went, we, we went
14 on a Friday night because I think
15 this thing occurred on a Friday
16 night and, yeah, we went about --
17 I think it was about 11:30, twelve
18 o'clock and we stayed there about
19 an hour.

20 Q And did you have the
21 State's experts's reports in this
22 case like --

23 A I did.

24 Q -- the ballistics
25 reports?

BROWN -- CROSS

1 A I did.

2 Q And the gunshot
3 residue report?

4 A I did.

5 Q And did you have an
6 opportunity to speak with these
7 State witnesses before trial?

8 A As I recall, I did.
9 Yes, ma'am.

10 Q And I guess that
11 would also include the autopsy?

12 A Yes, ma'am, I did.

13 Q And you were able to
14 review the photographic line-ups
15 provided to the witnesses?

16 A I was.

17 Q And what is your
18 understanding of the officers
19 present at the, at the location
20 where your client was arrested?

21 A All right. As I
22 understood this, that situation,
23 there was a man by the name of
24 Alvin Washington who apparently
25 knew Mr. Wilder. He had a

BROWN - - CROSS

1 nickname. I think "Monkey."

2 In Mr. Washington's
3 report, statement, Mr. Washington
4 indicated that he knew who the
5 shooter was but he gave the, but
6 he gave that person another name.
7 And I can't remember that name.
8 But the, the, the officers took
9 Mr. Washington as I understood it
10 to where Mr. Wilder was because
11 Mr. Washington knew Mr. Wilder and
12 knew the club that he had on
13 Dorchester Road.

14 And when they took
15 him there he apparently identified
16 Mr, Mr. Wilder. Well, not
17 apparently. He identified Mr.
18 Wilder.

19 Q And at that scene is
20 it your understanding that not
21 only were Charleston police, city
22 police officers, but also county
23 officers, sheriff's deputies?

24 A It was a joint
25 investigation at that point. Yes.

BROWN - - CROSS

1 Q Okay. And would the
2 transcript also reflect that in
3 testimony from the officers
4 confirming that fact?

5 A I, I think two
6 officers said that. Yes.

7 Q And you were aware of
8 the evidence the State would
9 present and you knew what those
10 witnesses were going to say before
11 you went to trial?

12 A I think the man was
13 aware of the evidence.

14 Q And what were, what
15 was your discussion with your
16 client about whether or not he
17 should testify at trial?

18 A Mr. Wilder made a
19 conscious decision after
20 discussing it not to testify. I
21 didn't tell him not to testify. I
22 explained to him that, that what
23 the judge would charge the jury if
24 he did not testify about him not
25 testifying. But it was his

BROWN - - CROSS

1 decision not to testify.

2 Q Okay. And did you
3 tell him not to, or advise that - -

4 A No.

5 Q - - that it would be
6 in his best interests not to?

7 A No. I didn't
8 think - - personally, I didn't
9 think it was in his best interests
10 not to - - I mean to testify, but,
11 no, I didn't tell him not to
12 testify.

13 Q Okay. Well, did you
14 advise him, did you tell him that
15 would be in his best interests not
16 to?

17 A I told him the
18 decision was his.

19 Q Okay.

20 A And I could live with
21 it, live with it either way.

22 Q Did he ever want to
23 testify?

24 A He said he didn't
25 want to testify.

BROWN -- CROSS

1 Q From the get-go?

2 A No, ma'am. He, he,
3 his, Mr. Wilder's defense was "I
4 didn't do it."

5 Q Okay. And did his
6 decision have anything to do with
7 that old armed robbery conviction?

8 A No, ma'am. I didn't

9 --

10 Q As far as his
11 communication to you about it?

12 A There was some
13 discussion about the old armed
14 robbery conviction, but, no, that
15 wasn't the reason he didn't
16 testify. No.

17 Q And I believe you
18 testified that you did not hire
19 experts, defense experts in this
20 case because they would have added
21 nothing to the defense?

22 A No. I had no need
23 to. I mean, you know, there
24 was -- based on what Mr. Wilder
25 told me, I didn't see a need for

BROWN -- CROSS

1 an expert. An expert wasn't going
2 to bring anything to the defense
3 and it might have hurt us.

4 Q If, if I may back up
5 one more time and, too, and ask
6 you about Mr. Wilder's decision
7 not to testify. Whose decision
8 was it?

9 A It was his decision.

10 Q And you said that you
11 discuss -- you discussed with Mr.
12 Wilder the -- whether or not you
13 should introduce that exhibit at
14 trial prior to moving it into
15 evidence?

16 A Yes, ma'am. I told
17 Mr. Wilder, I remember this
18 specifically. I told Mr. Wilder
19 that the jury is going to have in
20 its mind all of these
21 identification of eyewitnesses,
22 and during cross-examination I did
23 my best to try to discredit some
24 of these witnesses, but obviously
25 that didn't work. But the only

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1 thing that we would have back
2 there that in my opinion that
3 would help us, was that
4 ballistics, I mean that
5 S. L. E. D. report. I think
6 that's what it was. S. L. E. D.
7 report which showed that there was
8 no powder residue on his hands and
9 if he shot the gun, you know, you,
10 I, I thought that we could
11 probably, you know, a juror might
12 probably believe that he didn't
13 shoot the gun because there was no
14 residue.

15 Q The -- I think one of
16 the first State witnesses called
17 was the victim's daughter, eleven
18 years old daughter.

19 A Yes.

20 Q Is that correct?

21 A Yes, ma'am. Yes,
22 ma'am.

23 Q Did you chat -- well,
24 obviously the record shows that
25 you did not challenge her

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1 competency and if I could ask you
2 if that was something you
3 considered and, if so, why you did
4 not do that?

5 A Well, based on my
6 understanding, I think all the
7 witnesses were competent. But I,
8 I didn't think the little girl was
9 incompetent. As a matter of fact,
10 my strategy was that I thought we
11 could get more out of her in terms
12 of showing that he was a, a good
13 step-parent. That, you know, he
14 didn't do anything inappropriate.

15 I think I asked her
16 the question, "Did he take you for
17 a ride sometime?"

18 She said, "Yes."

19 And some other
20 questions about how he treated
21 her, so I didn't, I didn't
22 challenge her as being
23 incompetent. No.

24 Q Did your client ever
25 give you any information or do you

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1 have independent information to
2 lead you to believe that she would
3 have any -- that she was not
4 capable of expressing herself
5 appropriately on the matter about
6 which she testified?

7 A No, ma'am.

8 Q And did you have nay
9 information that she was incapable
10 of understand the duty to tell the
11 truth?

12 A I -- no, ma'am.

13 Q And I believe the
14 solicitor also tried presenting
15 her as a witness, indicated that
16 she was going to call Shayneese
17 (phonetic) --

18 A She did.

19 Q -- to indicate, to
20 testify that the victim was afraid
21 of the defendant?

22 A She did.

23 Q And that, was that a
24 matter, you and Miss Clifford I
25 think the record reflects had,

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1 would have discussed prior to
2 trial or at least prior to calling
3 that witness?

4 A That she did.

5 Q And you knew she was
6 going to call that witness in an
7 effort to elicit that testimony?

8 A Yes, ma'am.

9 Q And Mr. Wilder was
10 sitting next to you at the table.
11 Did he ever indicate to you that
12 that wasn't true, that he and his
13 wife were still together, that,
14 that you should do something about
15 that testimony?

16 A No. He never did,
17 because I, I'm not so sure that,
18 that based on what I recall from
19 my personal notes, I, I'm not so
20 sure they were together. I don't
21 think they were together.

22 Q And the assistant
23 solicitor shared with you prior to
24 presenting that witness, did she
25 not, the case law to show that

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1 that testimony was appropriate and
2 proper from this witness?

3 A The case law was on
4 the State's side in that instance.

5 Q Okay. And is that
6 why you chose not to object to her
7 testimony?

8 A Well, I mean --

9 Q Well, I know you --

10 A Yes, ma'am.

11 Q -- you objected on
12 the ground of hearsay when the,
13 when the --

14 A Right.

15 Q -- when the form of
16 the question wasn't proper but not
17 to the substance of the
18 information?

19 A Right. That, that's
20 correct.

21 Q And did you, did you
22 investigate the circumstances
23 surrounding the show-up
24 identification and the
25 photographic line-ups prior to

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1 trial?

2 A Yes, ma'am, I did.

3 Q And did you - -

4 what - - did you elect to challenge
5 those identifications?

6 A I challenged the
7 photographic line-up. I think the
8 record would reflect that I did
9 and Judge Brown ruled against us.
10 I think I challenged them on the
11 grounds of being suggestive and
12 some other grounds.

13 Q And I believe at the
14 scene, the, the club, there was a
15 search warrant obtained not at the
16 scene, but where Mr, Mr. Wilder
17 was arrested, there was a search
18 warrant obtained for his, for the
19 club, his club, and also for his
20 automobile found at the club. Was
21 that correct?

22 A Yes, ma'am.

23 Q And I believe no
24 evidence was taken or no, nothing
25 useful was taken from the club as

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1 a result of that search. Is that
2 correct?

3 A Not that I'm aware
4 of. No, ma'am.

5 Q And the automobile
6 actually wasn't searched right
7 there by Charleston police
8 officers, was it?

9 A I, as I correct, as I
10 remember the automobile was
11 impounded and searched later on.

12 Q Later. It was not
13 even searched that day or that
14 night?

15 A No.

16 Q Is that correct?

17 A That's correct.

18 Q And did he ever at
19 any time indicate to you that
20 Shayneese's (phonetic) testimony
21 was the grandmother's fabrication
22 or somehow the grandmother's
23 influence over that child?

24 A No, ma'am.

25 Q He never indicated

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1 that to you at all so that you
2 could do anything about that?

3 A No, ma'am.

4 Q Okay.

5 A He did not.

6 MS. ELLIOTT: I don't
7 have anything else, your
8 Honor. Thank you.

9
10

11
12

13

14

REDIRECT EXAMINATION

15

BY MR. BROOKS:

16

Q Mr. Brown?

17

A Yes, sir.

18

Q Were there any other

19

witnesses that testified about Mr.

20

Wilder broken, having broken up

21

with the victim other than

22

Shayneese (phonetic)?

23

A No. I don't think

24

these other witnesses knew Mr.

25

Wilder and Miss -- I mean about --

BROWN -- REDIRECT

1 no. To answer your question, no.

2 Q Okay. So Shayneese
3 (phonetic) was the only one that
4 testified at trial about some
5 marital discord between Mr. Wilder
6 and the victim?

7 A That's correct.
8 During my investigation I -- my
9 daughter went to Kinder Care with
10 Mr. Wilder's wife's aunt's
11 daughter. You want me to go over
12 that again?

13 Q Would you, please.

14 A Okay.

15 Q If you would.

16 A My daughter and
17 Connie Pediway (phonetic) aunt
18 and -- Connie Pediway's (phonetic)
19 aunt and my daughter -- wait a
20 minute. Connie Pedi -- my
21 daughter and Connie Pediway's
22 (phonetic) aunt had a child. Some
23 age as my daughter. They went to
24 Kinder Care together.

25 I knew the, and one

BROWN -- REDIRECT

1 day, and this is not true and, you
2 know, going to investigate it. I
3 knew Miss -- the aunt and she said
4 I'm Connie Pediway's (phonetic)
5 aunt and then I remembered and she
6 told me that they had broken up,
7 so...

8 Q But she didn't
9 testify?

10 A No. But I knew from
11 my independent -- I mean before my
12 investigation that they were not,
13 they were not together.

14 Q But the, but the
15 whole, one of the critical
16 elements in the State's theory was
17 marital discord between Mr. Wilder
18 and Miss Pediway (phonetic).
19 Right?

20 A That's correct.

21 Q And the only witness
22 who testified and supported that
23 theory was Shayneese (phonetic)?

24 A At trial. That's
25 correct.

1 MR. BROOKS: Okay. No
2 other questions.

3 THE COURT: You can
4 step down, Mr. Brown.

5 THE WITNESS: May I be
6 excused, your Honor?

7 MS. ELLIOTT: Yes, your
8 Honor.

9 THE COURT: We're just
10 going to be a few more
11 minutes. Do you -- you all --
12 do you think you might recall
13 him? Is there -- are there,
14 are there any other witnesses?

15 MS. ELLIOTT: I think
16 this is it and he certainly
17 may be excused.

18 THE COURT: All right.

19 MS. ELLIOTT: I'm just
20 making sure.

21 THE COURT: All right.
22 You may be excused.

23 THE WITNESS: Thank
24 you.

25 MR. BROOKS: Judge,

1 that's the applicant's case
2 so. . .

3 THE COURT: All right.

4 MR. BROOKS: I mention
5 that quicker obviously for Mr.
6 Brown asking.

7 THE WITNESS: I have a
8 four o'clock meeting at a
9 school that's --

10 THE COURT: All right,
11 sir.

12 THE WITNESS: -- a
13 little delayed. But I --

14 THE COURT: Well, good
15 luck to you. Don't speed.

16 THE WITNESS: Thank
17 you, sir. No. I won't.

18 MS. ELLIOTT: That's
19 the State's case as well, your
20 Honor.

21 May I speak with Miss
22 Clifford one moment before I
23 --

24 (Whereupon, Ms.
25 Elliott and Ms. Clifford have

1 a private, off-the-record
2 discussion.)

3 MS. ELLIOTT: Your
4 Honor, the State rests at this
5 time.

6 THE COURT: All right.

7 MS. ELLIOTT: Your
8 Honor, I believe the photo,
9 photo line-up was presented
10 to, I might be wrong, but I
11 believe Mr. Smalls, Mr.
12 Wigfall but he did not
13 identify the defendant. Mr.
14 Smith, Mr. Campbell, and Mr.,
15 Mr. Washington was the
16 show-up. And then we have a
17 few other witnesses who
18 identified him in court
19 without any prior
20 identifications. And I hope
21 that's correct, your Honor.

22 THE COURT: Is the
23 photographic line-up in the
24 record?

25 MS. ELLIOTT: Yes, your

1 Honor. I believe it's in the,
2 in this one and not the trial.
3 No. It is not in this record,
4 no, but it's not because it
5 hadn't been on appeal yet.
6 But we can certainly -- I have
7 no problem with trying to get
8 that and submitting it. In
9 fact Mr. Brown had a copy of
10 it. He had a copy of it in
11 his file.

12 THE COURT: Well, have
13 you seen it?

14 MR. BROOKS: No, sir.

15 THE COURT: Well, do
16 you know whether or not
17 there's anything suggestive in
18 it?

19 MR. BROOKS: That
20 was -- that was not the basis
21 of our, our post conviction
22 relief application.

23 THE COURT: Well, what
24 other basis could there
25 possibly be? Or you, you did

1 suggest that, that he should
2 have objected or should have
3 objected differently to the
4 photographic line-up, didn't
5 you?

6 MR. BROOKS: We did,
7 Judge.

8 THE COURT: And what
9 would be the basis of the
10 objection that he should have
11 made?

12 MR. BROOKS: Beg the
13 Court's indulgence.

14 (Whereupon, Mr.
15 Brooks and the defendant have
16 a private, off-the-record
17 discussion.)

18 MR. BROOKS: Judge, I
19 do stand corrected. It would
20 be for it being unduly
21 suggestive.

22 THE COURT: Okay. And
23 tell me in what way was it
24 unduly suggestive?

25 MR. BROOKS: This was

1 a, a picture of my client from
 2 a, from a incident. Is that
 3 correct?

4 THE DEFENDANT: The
 5 photograph array? Yes.

6 MR. BROOKS: It was a,
 7 it was a picture from a prior
 8 incident that our position was
 9 that it was unduly suggestive,
 10 a prior police mug shot.

11 MS. ELLIOTT: Your
 12 Honor, I believe I misspoke
 13 earlier. I believe Mr. Smalls
 14 identified him through the
 15 photographic line-up. Mr.
 16 Smith and Mr. Campbell.
 17 Mr. Wigfall did not, was not
 18 able to. He was provided that
 19 line-up but didn't identify
 20 him.

21 THE COURT: Does it --
 22 nobody have a copy of the
 23 photographic line-up?

24 All right, ma'am.

25 MS. ELLIOTT: Your

1 Honor, Mr. Brown had all three
2 signed copies, I mean signed
3 by the witnesses in his file
4 and we can't find, the
5 Solicitor's Office can't find,
6 are not able to find their
7 files.

8 THE COURT: Does the
9 clerk's office not have the
10 exhibits?

11 MS. ELLIOTT: And they,
12 the clerk's office probably
13 does and we can run down and
14 get that if your Honor would
15 like.

16 THE COURT: Well,
17 there's no -- I mean
18 everything in here, in this,
19 in the testimony of these
20 witnesses is that there was
21 nothing suggestive, but he is
22 talking about how like
23 Terrance Smalls is talking
24 about how he noticed the
25 features of his beard and all

1 that which, which seems to at
2 least raise the question of
3 whether or not the photographs
4 themselves would be
5 suggestive.

6 But I don't know.
7 I'd have to look at the
8 photographs.

9 **MS. ELLIOTT:** And I've
10 seen them but I -- of course
11 we can, I can send Matt down
12 and see if we can get that.
13 Let me give him the General
14 Sessions number.

15 And, your Honor, if
16 it helps any, and I have seen
17 the photo line-ups, the
18 defendant wasn't the only one
19 with facial hair and I know
20 that's not the only factor
21 we're looking at, but one of
22 the witnesses, the one, the
23 witness was not able to
24 ultimately identify anyone,
25 Mr. Wigfall, indicated that,

1 he narrowed it down to two
2 photographs because of the
3 facial hair. So we know at
4 least one of them was.

5 THE COURT: Now, I've
6 read the sections of the, the
7 hearing, the hearing that took
8 place in the middle of Mr.
9 Small's testimony beginning on
10 page two thirty-three, but
11 that's really not a -- that
12 wasn't a Neal versus Biggers
13 hearing.

14 MS. ELLIOTT: The
15 testimony that was elicited
16 was on the Neal versus Biggers
17 issue, but the --

18 THE COURT: Is there
19 any place else in the record
20 where the suggestiveness of
21 this line-up is either raised
22 or ruled on, because the judge
23 never even ruled on it?

24 MS. ELLIOTT: No, your
25 Honor. This is where it's

1 litigated in camera and then
2 when each witness testified,
3 each, the other witnesses
4 testified about the line-ups,
5 the trial attorney would renew
6 his objection and the Court
7 would deny it without going
8 into any in camera
9 proceedings. And I believe
10 it's, if the Court would look
11 at the testimony presented
12 from those witnesses I think
13 all the, the factors for a
14 Neal V. Biggers is met. I
15 think it's pretty clear that
16 those witnesses had a clear,
17 had a, the ones who identified
18 him were able to see him, had
19 sufficient lighting, had
20 sufficient time to observe
21 him. They had a high degree,
22 a high level of certainty he
23 was the perpetrator.

24 And I think, now I in
25 my notes indicate that Judge

1 Brown denied the trial
2 counsel's motion with respect
3 to Terrance Smalls but I need
4 to find that page as I've
5 said.

6 Page two
7 thirty-seven, but the Court
8 did not make findings about
9 suggestiveness because I think
10 the motion was denied.

11 **THE COURT:** He never
12 even ruled on the
13 admissibility of the
14 photograph except to say that
15 it was not cumulative. The
16 suggestiveness does not appear
17 to have been raised. At
18 least -- I mean it's hinted at
19 but it's not raised.

20 **MS. ELLIOTT:** It was
21 hinted at and litigated --

22 **THE COURT:** And beside
23 that, the, the -- Mr. Smalls
24 had already identified the
25 defendant in court before

1 the -- any of this ever took
2 place and the, the question of
3 whether nor that was based on
4 his recollection or based on
5 an in-court -- I mean an out
6 of court identification was
7 never raised.

8 MS. ELLIOTT: No. It
9 wasn't. And, your Honor, but
10 I believe that, and that is
11 true but I think it's, it's --
12 all the witnesses presented
13 the testimony -- I think the
14 evidence is before the Court
15 that there is no prejudice
16 because all the evidence that
17 would have been presented in
18 camera was presented during
19 trial and I think if you
20 review the witness's testimony
21 for each witness who
22 identified him who also were
23 shown photographic line-ups
24 that there's a high level that
25 all the factors are met and I

1 think findings were made.

2 THE COURT: Was there
3 an identification charge
4 given?

5 MS. ELLIOTT: That I
6 don't know. I will look.

7 Your Honor, page six
8 oh four.

9 THE COURT: Six oh four
10 there was an identification
11 charge given?

12 MS. ELLIOTT: It begins
13 on line nineteen.

14 THE COURT: Six oh
15 four?

16 MS. ELLIOTT: Yeah.
17 Right.

18 THE COURT: Well, it
19 looks to me like that, it
20 looks, it sounds to me
21 like from reading Smalls'
22 testimony that the photographs
23 were suggestive, but I have to
24 look at it.

25 It says "How did you,

1 how did you make the
2 identification?" and he said
3 "From the beard and the hair
4 color."

5 **MS. ELLIOTT:** Well, I
6 do know he wasn't the
7 only photo -- that Mr. Smalls,
8 Mr. Wilder's testimony -- his
9 picture was not the only
10 bearded photograph in the
11 line-up.

12 But we'll, we'll get
13 those for your Honor, even if
14 we can't go downstairs, I'll
15 get copies from Mr. Brown.

16 **THE COURT:** All right.
17 Okay.

18 But Wigfall was not
19 able to make an identification
20 based on the photograph?

21 **MS. ELLIOTT:** No, sir.

22 **THE COURT:** He was not?

23 **MS. ELLIOTT:** He was
24 not. He, he narrowed it down
25 to two.

1 **THE COURT:** Did he
2 testify in front of the jury
3 that he narrowed it down to
4 two?

5 **MS. ELLIOTT:** That I
6 don't recall, but I do know
7 that he explained the reason
8 that he was able to identify
9 the defendant in court was
10 because at the bar he mostly
11 saw the defendant from a side
12 profile. The photograph was a
13 head shot, a head-on shot and
14 he couldn't identify him until
15 he saw him in the courtroom
16 and was able to see his face
17 from different angles.

18 **THE COURT:** Well, I'm
19 just going to go back and, and
20 read some more of these
21 witnesses' testimony for a few
22 minutes while you all look for
23 that line-up.

24 The exhibit submitted
25 was the report of the gun shot

1 residue test?

2 MR. BROOKS: That's
3 correct. The one that he made
4 the issue about.

5 THE COURT: Okay. Who
6 has the original?

7 MS. ELLIOTT: The
8 originals weren't in here.
9 But then I think the testimony
10 was the officer copied them --
11 I think those are the, the,
12 those are copies of copies
13 that were given to the
14 witnesses and I think they
15 print out a copy and, and show
16 that to the witnesses. Is
17 that right, Amie?

18 MS. CLIFFORD: Yes,
19 ma'am.

20 THE COURT: All right.
21 I'll be right back.

22 (Whereupon, a recess
23 was called.)

24 (The Judge enters the
25 courtroom.)

1 **THE COURT:** Okay. Have
2 you all, all had a chance to
3 look at these photographs?

4 **MS. ELLIOTT:** Yes, your
5 Honor.

6 **MR. BROOKS:** Yes, your
7 Honor.

8 **THE COURT:** Any
9 argument regarding their
10 suggestiveness?

11 **MR. BROOKS:** Judge,
12 after -- in my honest opinion
13 after reviewing them, I
14 wouldn't see them as being
15 suggestive because they all
16 appear to be, you know, very
17 similar. But obviously, you
18 know, it would be my, our
19 position that that's something
20 that should have been
21 addressed with each and every
22 individual witness that had
23 those photos shown to them in,
24 in the court I. D.

25 My client -- one

1 particular, Mr. Wigfall,
2 couldn't pick out the photo
3 but then testified in court
4 that Mr. Wilder was the actual
5 person.

6 THE COURT: All right.
7 I, didn't get a chance to
8 finish reading the transcript
9 but I went through a lot of it
10 and there's one other,
11 Washington was the one who
12 knew him and, and took the
13 police to his house.

14 MS. ELLIOTT: Yes, sir.

15 THE COURT: And was
16 then shown the defendant and,
17 and he said yeah, that's him.

18 MS. ELLIOTT: Yes, sir.

19 THE COURT: He -- and
20 Washington was there when it
21 happened?

22 MS. ELLIOTT: Yes, sir.

23 THE COURT: And saw it
24 happen?

25 MS. ELLIOTT: He saw it

1 happen and actually followed
2 the defendant outside. And he
3 actually did testify in
4 camera.

5 **THE COURT:** Okay.

6 Anything further?

7 **MR. BROOKS:** That's it
8 from us, Judge, your Honor.

9 **MS. ELLIOTT:** No, your
10 Honor, other than the State
11 would submit that our -- we
12 would -- our position is the
13 photographic line-up is not
14 suggestive.

15 **THE COURT:** All right.
16 The issue -- I made a list of
17 all the issues that you raised
18 and we'll go down them one at
19 a time as I rule and I'm -- my
20 ruling is that the post
21 conviction relief is denied
22 and I'm going to ask the
23 attorney general to prepare an
24 order.

25 You -- the first

1 issue is that you contend
 2 Mr. Brown should have gotten
 3 an expert witness and
 4 Mr. Brown has articulated a
 5 valid strategic reason not to
 6 get an expert witness on the
 7 question of the of gunshot
 8 residue and the most important
 9 reason is that it had been
 10 what, at least twenty minutes
 11 or so from the time of the
 12 shooting until the police go
 13 out to the house and see his
 14 car there with Mr. Washington
 15 --

16 MS. ELLIOTT: Your
 17 Honor, at least. I think it
 18 was probably a little more
 19 than that but yes. At least.

20 THE COURT: All right.
 21 So, so during that period
 22 there were plenty of things
 23 that could have happened
 24 during that period of time
 25 such as him washing his hands

1 that would have eliminated all
2 of the gunshot residue and
3 there would have been a
4 negative test. And calling an
5 expert who on
6 cross-examination will be
7 forced to admit all that,
8 would not necessarily be a
9 better position to take than
10 simply doing what Mr. Brown
11 did.

12 I mean everybody can
13 understand that if you fire a
14 gun there is gunshot residue.
15 Now maybe everybody doesn't
16 know that and know why there's
17 gunshot residue, and when you
18 have a solid case that there
19 is gunshot residue it would be
20 smart to call an expert
21 witness to explain all that.

22 But when the, when
23 this situation arises, there
24 is a valid strategic reason
25 not to call the expert witness

1 in my opinion. Plus as I said
2 at the beginning of this trial
3 there is no expert that has
4 been called in this case so we
5 don't know what the testimony
6 would have been. We don't
7 know how strong the testimony
8 would have been at all.

9 Now we all know who
10 practice in criminal court
11 what the gunshot residue
12 expert would have said. He
13 would have said the fact that
14 there's no gunshot residue on
15 his hands means that there's
16 no gunshot residue on his
17 hands and there are a variety
18 of reasons why that might be
19 true. Might be because he
20 didn't fire the gun. Might be
21 because he had wiped it off.
22 Might be that he washed it
23 off. Might be for a variety
24 of reasons.

25 So that to me the

1 decision that Mr. Brown made
2 not to call an expert was, was
3 not a decision that fell below
4 the professional standards
5 that Mr. Brown was held to.

6 You allege that he
7 should have hired a private
8 investigator to go out and
9 talk to the witnesses.

10 Mr. Brown says, you know, he
11 did talk to witnesses as best
12 he could himself, which is
13 probably better than hiring a
14 private investigator to go do
15 it. He knew some of the
16 witnesses.

17 I've reviewed most of
18 these cross-examinations.
19 They seem like effective
20 cross-examinations to me but,
21 nevertheless, there's been no
22 evidence offered in the trial
23 of this post conviction relief
24 case that would assist me to
25 evaluate how that might have

1 made a difference. I don't
2 think that the applicant has
3 proven that Mr. Brown's
4 decision not to hire a private
5 investigator to talk to these
6 witnesses was a decision that
7 fell below the applicable
8 professional standards, but in
9 any event even if it did --
10 which I find that it didn't --
11 but even if it did, there's
12 no -- the applicant has failed
13 to carry their burden of proof
14 that it this could have
15 affected the outcome of the
16 trial if he had done anything
17 differently in that regard.

18 As far as the
19 submission of the exhibit of
20 the gunshot residue test by
21 the defendant which caused him
22 the right to make final
23 argument, I think that was a
24 valid strategic decision and
25 so the decision to do that, I

1 mean I think it would
2 probably, would have been, you
3 know, it's possible that he
4 could have gotten that
5 information out through
6 cross-examination of a police
7 officer rather than through
8 offering the, the document
9 might have been a wise way to
10 do that, but I don't think
11 that I can say that offering
12 the exhibit which is the one
13 hope that he had of, of an
14 acquittal was a, was a
15 decision that was unreasonable
16 under the circumstances and I
17 think it was reasonable.

18 But more, but also on
19 that point there's no way that
20 I could ever know nor anybody
21 could ever know how that might
22 have affected the outcome of
23 the case to have had the right
24 for final argument and, and
25 not have to see the concede

1 the response time to the
2 State.

3 The show-up
4 lineup for Mr. Washington, I
5 mean obviously that's
6 suggestive. That, that's what
7 a show-up lineup is. And so
8 you go to the reliability
9 factors on the second prong
10 under State versus Moore and
11 Neal versus Biggers and the
12 factors all seem to me to
13 weigh in favor of reliability.
14 The witness testified that he
15 had a good opportunity to see
16 the defendant at the time of
17 the shooting. In fact I don't
18 remember if it was in his in
19 camera testimony or in his
20 testimony before the jury but
21 he was very clear that he had
22 a good view of the defendant's
23 face.

24 His degree of
25 attention, he doesn't

1 specifically address that but,
2 but there are certain factors
3 in his testimony that I think
4 indicate that he was paying
5 very close attention.

6 First of all, he saw
7 it as it began to unfold when
8 the first shot was fired. He
9 followed them outside. The
10 defendant actually walked I
11 think kind of right by him as
12 he was leaving. When he
13 followed him outside he
14 watched him, watched what he
15 did in the street, followed
16 him down the street, saw him
17 get in his car, saw him drive
18 back by, and all of those to
19 me indicate a fairly high
20 level of attention.

21 The accuracy of his
22 description, he didn't really
23 describe the, the defendant
24 himself before he went to the
25 lineup. But he did describe

1 things like the make and model
2 of the car, the color of the
3 car, and, and that may be
4 pretty much it. But there may
5 be a few other things that he
6 described that, that were
7 accurate. His level of
8 certainty was, was very high.
9 He actually interrupted Miss
10 Clifford at one point in the
11 middle of her question.

12 That's on page three fifty
13 nine at line eight to say that
14 there was no doubt about that.

15 "What makes you think
16 that's the man you saw that
17 night with the gun?

18 "That's the man I saw
19 that night with the gun" is
20 the answer.

21 "So it's based on" --
22 and that's when he interrupted
23 her and says: "No doubt about
24 that. "

25 He also, when he

1 testified later, indicated a
2 fairly high level of
3 certainty. The time between
4 the crime and the
5 confrontation was very short,
6 you know. We estimated twenty
7 minutes. It might have been
8 as much as an hour, but it was
9 pretty short.

10 But more importantly
11 and I guess this really fits
12 under factors one and three,
13 he knew this guy and he
14 testified on numerous
15 occasions that he didn't
16 necessarily know his name, he
17 wouldn't have known what to
18 call him, but he worked in
19 clubs, he worked in that club
20 and he'd seen guy in the clubs
21 before and there's one spot
22 where he specifically is asked
23 what was your identification
24 based on? This is page three
25 sixty seven.

1 "You know, working in
2 the club so long you can
3 recognize somebody's face" and
4 so this is not somebody that
5 he had to see and recognize
6 for the first time. He had
7 known the guy before and seen
8 him in these clubs and knew
9 his face. So to me evaluating
10 those factors the
11 identification is nevertheless
12 so reliable that there's no
13 substantial possibility of
14 misidentification and it
15 was -- it is admissible.

16 Now Judge Brown
17 actually went through all that
18 in the hearing that is at the
19 beginning of the trial
20 although he didn't
21 specifically rule on it, like
22 I just did.

23 He heard all that
24 testimony and he decided that
25 it was going to be admitted

1 and from the standpoint of, of
2 course the appellate court
3 will decide whether or not on
4 the direct appeal issues are,
5 are valid but from a, from a
6 Sixth Amendment standpoint
7 whether or not Mr. Brown
8 effectively represented Mr.
9 Wilder. There's nothing else
10 that Mr. Brown could have
11 done. He, he basically did
12 everything he could to make
13 sure that this, this
14 identification by
15 Mr. Washington was, was
16 effectively challenged.

17 Then you have the
18 photographic lineup and I, I
19 have now, I'm always opening
20 my mouth about stuff and then,
21 and then once I see what I'm
22 supposed to be looking at
23 beforehand I change my mind.
24 I don't think that there's any
25 suggestiveness in these

1 photographs. They all show
2 men who look very similar.
3 Their hair is similar in the
4 photographs. Their facial
5 hair is similar in the
6 photographs. In fact the
7 photograph of Mr. Brown, you
8 almost can't tell he has
9 facial hair, and you certainly
10 can't see more facial hair on
11 his face than you can on any
12 of these other three
13 gentlemen. So I see no
14 suggestiveness in the
15 photograph and there's no
16 evidence of suggestiveness in
17 anything I saw in the
18 transcript, and so you don't
19 even get to the second prong
20 of the Neal versus Biggers
21 analysis.

22 As far as the
23 competence of the witness,
24 there's nothing more than a
25 conclusory allegation made

1 that this witness, the child,
2 might not be competent. This
3 Sheneese Pediway. But in any
4 event, you know, so that I
5 don't know that there's any
6 basis on which Mr. Brown could
7 have made a challenge to her
8 competence.

9 The simple fact that
10 she was eleven or twelve years
11 old does not render her
12 incompetent, and I've read her
13 testimony. Her testimony is
14 clear. It's articulate.
15 There's nothing in the
16 testimony itself that suggests
17 that the witness is not
18 competent. So the failure to
19 challenge her competence to me
20 is not something that falls
21 below the standards to which
22 Mr. Brown was held.

23 But on the second
24 prong of the Strickland test
25 her testimony was, was

1 insignificant. You have
2 suggested that she's the only
3 witness who testified about
4 the marital problem and I --
5 and so the State had as a
6 motive he was mad about the
7 fact that she was leaving him,
8 but really this -- and that's
9 important. I don't want to
10 downplay that. But the case
11 was, was decided based on the
12 identifications and, and
13 motive can become important.
14 I mean it was important. I'm
15 not saying it wasn't
16 important. But it can become
17 crucially important if there's
18 a lack of other evidence.
19 Here there was a ton of that,
20 of identification evidence and
21 Mr. Brown articulated that
22 very well during his testimony
23 and so even if Mr. Brown had
24 challenged the competence of
25 the witness and had been

1 successful in excluding that
2 witness's testimony, there is
3 no reasonable probability that
4 the outcome of the trial would
5 have been any different.

6 And so the applicant
7 has failed on both prongs of
8 the Strickland test as to that
9 issue.

10 The question of
11 whether the defendant was
12 arrested outside of the
13 jurisdiction of the Charleston
14 Police Department is not an
15 issue at all. I don't see how
16 there's anything that Mr.
17 Brown could have done that
18 would have resulted in the
19 suppression of any evidence or
20 any change in the, in the
21 conduct of the trial and
22 certainly not in the outcome
23 of the trial.

24 And then the final
25 one that I had written down is

1 he claimed that he wanted to
2 testify and I think what he
3 said is knowing what I know
4 now, I would have testified.
5 And of course that's not the
6 applicable test. The test is
7 whether or not he was given
8 the information that he needed
9 in order to make a valid,
10 intelligent decision as to
11 whether or not he wished to
12 testify or exercise his right
13 to remain silent.

14 Where does that
15 specific -- is that inquiry in
16 the record?

17 MS. ELLIOTT: I
18 believe, your Honor, it's -- I
19 had it marked. I believe it's
20 maybe five forty-four. Five
21 forty-seven perhaps.

22 THE COURT: All right.
23 So I'm looking at five
24 forty-seven. The judge makes
25 it clear that it's his

1 decision and, and asks him:
2 "You have the right to testify
3 if you want to. Is it your
4 decision not to testify?

5 "Yes, sir."

6 So Mr. Wilder made
7 the decision not to testify
8 and the decision was an
9 intelligent one and a
10 voluntary one. There's
11 nothing that Mr. Brown could
12 have done different anyway and
13 there's no evidence that
14 Mr. Brown did anything other
15 than give him his advice on
16 whether or not he should
17 testify, which is exactly what
18 a lawyer should do.

19 The evidence is that
20 Mr. Wilder is the one who made
21 the decision, so the applicant
22 has failed in the first prong
23 of the Strickland test.
24 Secondly, though, on the
25 second prong of the Strickland

1 test he told us what he would
2 have testified to and that was
3 I didn't shoot her and we
4 didn't have marital problems.
5 I've already addressed the
6 significance of the marital
7 problems and the "I didn't
8 shoot her in the face" of the
9 testimony of as Mr. Brown
10 described it a dozen or so
11 identification witnesses,
12 there is no reasonable
13 probability that the outcome
14 of the trial would have been
15 any different had he testified
16 and so I think I've ruled.

17 Is there any issue
18 that you have raised that I
19 have not specifically
20 addressed?

21 Let's -- I'm going to
22 hand these four
23 identifications to the court
24 reporter to have them marked
25 as exhibits in the trial. I

1 look forward to receiving your
2 proposed order.

3 MS. ELLIOTT: Thank
4 you, your Honor.

5 (Whereupon, the
6 photographic lineups
7 previously referred to are
8 received and marked as Court's
9 Exhibits Nos. 1 through 4 for
10 purposes of the record.)

11 (Whereupon, the
12 matter is concluded.)

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CERTIFICATION

I, the undersigned HEATHER GAYLE BURNS, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceedings in the captioned case, relative to appeal, heard in the Court of Common Pleas for Charleston County, South Carolina on the 11th day of September, 2007.

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

DATED: August 17, 2008

Heather Gayle Burns RDR
HEATHER GAYLE BURNS, R. D. R.
Official Court Reporter