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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable J. Cordell Maddox, Circuit Court Judge

GENE TONY COOPER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001149

APPENDIX

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his sister's house, had to get with the other people to get their story straight.

And I also left one off. Where did Bo take the police back in 1992, I think the defense asked about that, to look for the shotgun? To Tony's house in Pelion and they couldn't find it there. That's where he said it was buried. Interesting.

Oh, and he knows Gerald LeGrand. Don't you remember, Gerald said, I met up with Tony. There was some fellow with him that might have been Bo, but I went there to meet with Tony. I bought him a hamburger at Dutch Square Mall at the Hardees or something. Bo doesn't know him. His attorney approached Bo Sutherland. Everything points to the defendant. What points to Bo Sutherland? The defendant.

Ladies and gentlemen, you know the elements of the crime, murder, armed robbery, kidnapping and criminal conspiracy. The State claims Tony Cooper was involved. He killed Kimberly Quinn.

The law says the hand of one, the hand of all, that's part of the law, that's just not a cop out by the State, that's the law. You may find that Bo wasn't totally truthful, you can believe part of his testimony, but Tony was down there, we know that.

The defendant was down there.

Again, the State -- and we agree we must prove the case beyond all reasonable doubt. You've heard of reasonable doubt. It's a doubt that would cause a reasonable person to hesitate to act in their most important affairs.

Let me give you a little scenario to kind of help you out, it's not the end all be all, but it's kind of like if you found a house. It's your dream house. It's got everything you want in it, got a great kitchen, great bedroom, pool, whatever you like, whatever your dream house is and you were ready to buy, but there's one problem.

Let's say it was painted chartreuse or something, something you don't like, would that be a reason for you not to buy it? I mean, you can always have your house painted. You can get the seller to paint your house or something else. Just a paint job, probably wouldn't cause you to hesitate.

But if, for instance, if the electrical system was shot, now that might cause you to hesitate. That's something major you don't want to get involved with and that's kind of where you would hesitate to act.

It's not being asked to convict your best friend's son, that's nothing. That's a ploy to get sympathy from you, ladies and gentlemen, that's not what reasonable doubt is. Reasonable doubt is a serious doubt.

And I want to remind you, you can have reasonable doubt about a piece of evidence or a piece of testimony, but still, still not have reasonable doubt as to the defendant's guilt, because you can eliminate that piece of evidence and if there's other evidence that still convicts him beyond a reasonable doubt, you can do that.

Kimberly Quinn may not have been the best person in the world, ladies and gentlemen. I can't vouch for her conduct or anything like that, but just because she may have done some things that you don't like, she didn't deserve to die this way. She didn't deserve to have her head literally blown off and her body mutilated. Nobody deserves that, nobody, nobody in this world.

The State has proven the defendant guilty beyond all reasonable doubt, ladies and gentlemen, of murder, armed robbery, kidnapping and conspiracy. Everything points to him, the evidence points to him.

You have heard more than enough evidence. The State asks you to bring back verdicts that do justice in this case, that do justice to Kimberly Quinn and her family. And there's only four verdicts that do that, that's guilty of murder, guilty of armed robbery, guilty of kidnapping and guilty of conspiracy. Find the defendant, Gene Tony Cooper, guilty of all four charges. Thank you.

THE COURT: All right. Ladies and gentlemen, as you have heard, the State of South Carolina has charged the defendant with the offenses of murder, kidnapping, armed robbery and conspiracy to commit armed robbery.

Now, you should distinctly understand that an indictment just contains allegations on the part of the State and is in no way to be considered as evidence. The only evidence in the case is the testimony from the witness stand and any exhibits or stipulations which have been introduced in evidence or any testimony that's been read to you.

Please pay close attention because I'm often asked if I provide to you a written copy of any legal instructions, which I do not provide.

Now, to the indictments, the defendant has pled not guilty, which places upon the State the burden

of proving a defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove innocence. A defendant does not have to produce any evidence or witnesses. The burden is always upon the State to prove a defendant's guilt beyond a reasonable doubt.

Can everyone hear me okay?

JUROR: A little bit louder.

THE COURT: Now, I charge you that it is a vital, important rule of law that a defendant in a criminal trial must always be presumed innocent until a defendant's guilt has been proven beyond a reasonable doubt. This presumption of innocence remains with the defendant at all times throughout the trial and is only removed when and if the State has proven guilt beyond a reasonable doubt.

For it is your solemn duty, ladies and gentlemen, if not convinced of guilt beyond a reasonable doubt, to find the defendant not guilty.

What is a reasonable doubt in the law? A reasonable doubt is a doubt that would cause a reasonable person to hesitate to act. All reasonable doubts must be resolved in favor of the defendant. Suspicion, however strong, does not suffice to sustain a conviction. As indicated, the

burden of proof is always upon the State.

Now, ladies and gentlemen, under the laws of this state, you are the finders of the facts in this case. I do not have the right to pass upon the facts or express any opinion that I might have as to the facts to you, nor may I indicate in any way what I think about the guilt or innocence of a defendant.

You should form no opinion in that regard from anything I may have said or done or if you've construed any acts or statements or if you think I've made some kind of gesture or I've reacted to something throughout the trial, that's not the case, ladies and gentlemen. And, certainly, if you have done that, you should disregard that in any way and you must not consider that in any way as any opinion that I might have about this case and you must not consider that during your deliberations.

Now, you've heard some references to stipulations that have been made between each side in this case. Generally, it's the -- a stipulation to some underlying fact about some issue or situation and that's an agreement between the parties as to certain facts. And you should accept those as being true, but you may consider those stipulated facts in any way whatsoever during your

consideration of the issues in this case.

Also, there have been some references during the trial to prior proceedings in Mr. Cooper's case. Please understand that these prior proceedings have nothing to do with Mr. Cooper's guilt or innocence. He is presumed to be innocent, as I've told you, of all charges against him. And a cloak of innocence remains with him throughout these proceedings unless the State establishes guilt beyond a reasonable doubt. You may not speculate on any prior hearing or proceedings, but must base your verdicts entirely on the evidence or the lack of evidence in this case since this trial has begun.

Now, you are also the judges and the sole judges of the credibility or the believability of the witnesses who have testified in this case. In passing upon their credibility, you may take into consideration many things, such as, the demeanor or manner of testifying; was the witness forthright or hesitant; whether the witness had reason to be biased or prejudiced; whether a witness' testimony was contradicted on the one hand or whether it was supported, corroborated or consistent on the other hand; whether a witness made any previous statements which are inconsistent with the witness' present

testimony; you may consider such statements in your determination of the truth of any statements or testimony, as well as your consideration as to the credibility of that witness; and what was the witness' opportunity for observation and knowledge of the matters about which the witness has testified.

You may believe a small portion of a witness' testimony and disregard the larger or vice versa. You may believe one witness against many or many against one. You may believe all, some or none of a witness' testimony, it's entirely up to you.

Now, you may have heard a reference to evidence of some other crime or misconduct by a witness. Evidence of some other crime that was committed by a witness may be considered by you on the limited issue of credibility or impeachment of that witness and certainly must not, in any way, be considered as evidence of -- that a person committed a crime on the particular occasion in question.

It's not provided to you for any other purposes and you should not consider it for any other purposes. You may give it such weight as you may believe it to be entitled on the sole issue of the credibility or believability of that witness.

Now, rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call expert witnesses. Witnesses who by education and experience have become an expert in some art, science, profession or calling may state their opinions as to relevant, material matter in which they profess to be an expert and may also state the reasons for their opinions.

You must consider expert testimony as you would any other testimony and give it such weight as you may believe it to be entitled when considered with all of the other evidence in this case. Such testimony is given for the purpose of enlightening you and not for the purpose of controlling your judgment.

Now, there are two types of evidence which are generally presented during the trial, direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact.

The law makes absolutely no distinction between

the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

You should weigh all of the evidence in the case. After weighing all of the evidence, if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

Now, by the same Constitution that makes you the finders of the facts, I am made the sole and only instructor in the law. You must accept as correct the law which I charge, apply to the law the facts as you find them to be and reach your verdict. Put aside any conceptions you may have had as to the law before coming today and accept the law as I instruct it to be. For purposes of your duty as jurors here today, you should not be concerned about what the law ought to be, but rather what I charge you the law is at the present time in this state.

Now, I've read to you the charges that are alleged in the indictments. I'm going to go over each of those offenses at this time.

In one of the indictments, the defendant is charged with the offense of murder. Murder is the

unlawful killing of any person with malice aforethought either expressed or inferred. Hence, in order to convict of murder, the State must not only prove the killing of the victim was caused by the defendant, but it was done with the reckless intent that is with malice aforethought.

Now, criminal intent is a necessary element of this offense. It must be proved by the State beyond a reasonable doubt. It's a state of mind which operates jointly with an act in the commission of a crime. Criminal intent is a mental state, a conscious wrongdoing. It's up to you, the jury, to determine what the defendant intended to do based on the circumstances shown to have existed.

There's no way medical science can dissect a person's brain and determine what that person had in mind, so the law states that criminal intent may be inferred from the circumstances shown to have existed. Of course, you have the right to reject any such inferences.

I would also instruct you that motive is that which leads or attempts the mind to indulge in a criminal act. It's the cause or reason that induces a person to act. Motive is not an essential element of the crime of murder and need not be shown by the

State. However, the presence or absence of motive may be considered in determining criminal intent, which I have instructed you is an essential element of this offense.

I'll use this time to discuss with you a little bit about the concept of malice aforethought. I tell you that while the law does not require that malice shall exist for any particular length of time before the commission of the act in question, it must be aforethought, which means that malice must have been conceived in the mind of the defendant and must have accompanied the act of killing.

Malice is defined in the law of homicide as a term of art. That is a technical term importing wickedness and excluding just cause or legal excuse. It is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong.

The words expressed or inferred do not mean different kinds of malice, but merely the manner or the way in which the only kind of malice known to the law may be shown to exist, that is, either by direct evidence or inference.

Now, malice may be expressed as where there may be previous threats of vengeance or lying in wait or

other acts of preparation that show that the deed was within a defendant's mind. Malice may also be inferred as where, though not directly expressed, it is indirectly but necessarily inferred from facts and circumstances which are proved.

Malice may be implied or inferred from the willful, deliberate and intentional doing of an unlawful act without just cause or legal excuse. If a person using a deadly weapon deliberately and intentionally and without just cause or legal excuse takes the life of another, malice may be inferred if facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction. This inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with all the other evidence in the case and you may give it such weight as you determine it should have.

In any event, an inference in no way lessens the burden on the State to prove malice beyond a reasonable doubt. In other words, evidence of malice from the use of a deadly weapon is simply an evidentiary fact to be considered by you along with all the other evidence in the case and given such weight as you determine it should have, including

your right to reject any such inference.

Now, one cannot be convicted of a crime which is defined in terms of a result as a murder unless one's act is the proximate cause of the result, which in murder is the death of the victim.

Now, ladies and gentlemen, in another indictment -- and if I didn't say as it would apply to all of the offenses that I go over with you, the State must prove all of the elements of an offense beyond a reasonable doubt. If the State has failed to prove any one or more of the elements of an offense beyond a reasonable doubt, you must find the defendant not guilty of that offense.

In another indictment, the defendant is charged with the offense of kidnapping. The State must prove beyond a reasonable doubt that the defendant knowingly and unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away another person without authority of law.

To do something unlawfully is to do something contrary to a law. Something done without the authority of law means to do something the law does not sanction or condone or provide justification for. And knowingly means with knowledge, consciously, not accidentally.

Seize means to take hold of suddenly or forcibly. Confine means to limit, restrict or enclose within bounds, imprison, shut or keep in. Inveigle means to allure, entice or lead astray by false representations or promises or other deceitful means. Decoy means to lure successfully. Kidnap is to remove a person against his or her will by unlawful force or by fraud. Abduct means to carry off secretly or by force or for an illegal purpose. Carry away means to remove. Those are the terms in the statute that I've just tried to define for you.

Now, the State does not have to prove that the defendant did all of these things, instead if you find beyond a reasonable doubt that the defendant did any of these things, you may find the defendant guilty of kidnapping if the defendant also acted with the reckless intent that I discussed with you.

Now, a kidnapping does not have to be for any personal or monetary gain or for any illegal purpose. It may be for any reason whatsoever.

In another indictment, the defendant is charged with the offense of armed robbery. Under South Carolina law, armed robbery includes all of the elements of strong armed robbery or common law robbery, plus an additional element. So I'm just

going to go over the basic concepts of robbery first and then tell you what the additional element is.

Robbery is the felonious taking away of the goods of another against the owner's will and without his consent by force, intimidation or violence. This is essentially larceny by force.

In order to convict a defendant of robbery, the State must prove beyond a reasonable doubt the following: First, the State must show that the property belonged to another person and that either the property was not owned in some way by the defendant or the defendant did not otherwise have a right to possession.

Second, the State must show that the defendant took the property and carried it away.

Third, the State must show that the time the defendant took and carried away the property, he did so with an intent to steal that property by permanently depriving the owner of the use of the property.

Fourth, the State must show that the property was taken by the defendant from the person or immediate presence of the owner. Property is on another's person if it is in their hand, in their pocket or otherwise attached to their clothing.

It's within the presence of another if it's close enough and sufficiently within the person's control that had the person not been overcome with violence or prevented by fear, the person could have stopped the taking.

And, fifth, the State must show that the taking of the property was accomplished through actual, physical violence or threats of such violence.

Now, the offense which the defendant is charged with is armed robbery. And armed robbery is defined by statute and includes all of the elements that I just went over with you, plus an additional element describing the statute which may be met by one of two possible means.

Pursuant to South Carolina code section 16-11-330 part A, a person is guilty of armed robbery if that person commits robbery, as I've defined that offense to you, one, while armed with a pistol, dirk, slingshot, metal knuckles, razor or other deadly weapon. Deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily injury. And the jury must determine whether a deadly weapon was used based upon all the facts and circumstances presented. Or, second under the

statute, while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person presents during the commission of the robbery reasonably believed to be a deadly weapon.

Now, it is not necessary for the State to prove that the perpetrator be armed throughout the commission of the crime, rather armed robbery may be established by the State by proving beyond a reasonable doubt that the perpetrator arms himself or becomes armed with a deadly weapon at any time during the progress of the taking or while the robbery is being perpetrated.

Now, finally, ladies and gentlemen, the indictment for conspiracy to commit armed robbery. Now, the State -- for this indictment, the State must prove beyond a reasonable doubt that the defendant combined with one or more persons for the purpose of committing an unlawful act or committing a lawful act by unlawful means. There must be a mutual understanding, agreement or common intention in plan. Mere passive knowledge of or consent to the criminal conduct of another is not enough to make a person a conspirator. There must be guilty knowledge and participation.

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STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Daniel F. Pieper, Circuit Court Judge

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RESPONDENT,

V.

GENE TONY COOPER, JR.,

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Similarly, the mere fact that a defendant may have associated with another person or met with another person and discussed common names and interest does not necessarily establish proof of the existence of a conspiracy or that the defendant was involved in the conspiracy.

I further instruct you that a defendant in an alleged conspiracy must have had an intent to advance the common goal of the agreement. If the persons involved are not acting in concert, but are instead acting separately and individually, then you may rightfully conclude that they are not involved in a conspiracy.

On the other hand, it is not necessary that the agreement be a formal one, that it be in writing or that the persons hold a meeting and expressly state the terms of the common plan or that the agreement be stated in words between them, the agreement of a criminal conspiracy may come into being through an implied, mutual understanding. The willful, intentional and knowing adoption by two or more persons of a common plan is sufficient. No overt acts need to be shown to establish a conspiracy. A conspiracy may be shown by circumstantial evidence and the conduct of the parties.

In order to convict the defendant of conspiracy, the State must prove beyond a reasonable doubt not only that the defendant knew of the unlawful conduct, but that the defendant agreed to combine with the other persons for the purpose of accomplishing the unlawful conduct.

Now, there are a couple more principles that I need to go over with you pertaining to this case. First, is this doctrine that's called hand of one, hand of all. If a crime is committed by two or more persons who are acting together in the commission of that offense, the act of one is the act of all. This is true if there are two persons or more than two persons involved in the act.

If two or more persons are acting together, assisting each other in the commission of an offense, the law says that under these circumstances, the act of one is the act of all or is more commonly referred to the hand of one is the hand of all.

Now, I've discussed with you each of the offenses and the elements of those offenses. The State also has the burden of proving identity beyond a reasonable doubt. You may consider the opportunity a witness had to observe the alleged

offender at the time of the offense and to thereafter make an identification. You may consider all of the facts and circumstances in determining this issue.

It is for you, the jury, to determine whether the State has proven the identification of a defendant beyond a reasonable doubt considering the credibility of the witnesses, the opportunity and circumstances of observation and any such direct and circumstantial evidence as you deem appropriate. And you should apply the same legal standards to any direct or circumstantial evidence that you consider pursuant to my previous instructions on direct and circumstantial evidence.

If the State has failed to prove the identity of a defendant beyond a reasonable doubt, then you must find the defendant not guilty.

Now, regarding intent, ladies and gentlemen, I've gone over with you one or more -- I've gone over with you several offenses, four different charges in the indictments. In a case in which one or more criminal offenses arise, the State, in order to establish guilt as to multiple offenses, must prove beyond a reasonable doubt that the defendant had the reckless intent to commit each separate

offense.

Also, ladies and gentlemen, the defendant has raised the defense of alibi. For an alibi to exist, the defendant must have been at another specified place at the time the crime was committed and that it was therefore impossible for the defendant to have been at the scene of the crime. Mere denial of presence at the scene of the crime does not constitute an alibi.

There is no burden on a defendant to prove an alibi. The burden is on the State to prove beyond a reasonable doubt that the defendant was actually present at the scene of the crime, actually participated in it and was not somewhere else. In other words, the State has the burden of disproving the existence of an alibi beyond a reasonable doubt.

Now, you have been selected as fair and impartial jurors sworn to impartially try and determine the facts of this case. When you comply with your oath to do so, then no one will have a right to criticize your verdict and you will have fully discharged your duty as jurors.

Listen to the views of each juror during your deliberation.

Mr. Foreman, make sure everyone has the

opportunity to speak and address or comment upon the views of the other jurors.

Now, at this point, I'm going to send back with you a verdict form. As to each of these charges, you have two choices, either not guilty or guilty. And there's no significance in the order in which I put them on there. Obviously, I had to put one first on this verdict form.

As to each indictment, if you have a reasonable doubt as to whether the defendant is guilty or not guilty, then find the defendant not guilty. If, however, the State has proven guilt beyond a reasonable doubt, then find the defendant guilty.

Now, each indictment charges a separate and distinct offense. You must decide each indictment on the evidence or the lack of evidence in the law applicable to it. The defendant may be convicted or acquitted on any or all of the offenses charged. You're going to be asked to write a separate verdict for each indictment on this form.

Now, one important thing, ladies and gentlemen, as to each of these charges, your verdict might be unanimous. Each and every one of you must agree on the verdict. It is not a majority verdict. That means when you come back in after your verdict is

reached, I could ask the clerk to call out your name individually and have you stand and the clerk will say, Is this your verdict and is this still your verdict. And I'll -- if this is your verdict, then obviously that's how you would respond to that question. That means each and every one of you say that this is your verdict. So please keep that in mind.

Now, at this point, I'm going to send you to the jury room, ladies and gentlemen. Do not discuss any deliberations yet. I always give the attorneys one final opportunity to go over any concluding matters with me. Sometimes I need to bring you back out and explain something further or I might need to add something, sometimes I don't necessarily cover everything that maybe I should cover or somebody asks for me to clarify something. So I'll give them the opportunity to discuss that with me.

Also, it gives us the opportunity to get all of the exhibits together, make sure that everything that's been actually introduced into the trial of the case is back there with you during your deliberations. So please do not begin any deliberations yet.

Where is our alternate juror?

JUROR: Right here.

THE COURT: Do you have anything in the jury room?

JUROR: My hat.

THE COURT: We'll go ahead and send you to the jury room before I send the jury out. At this point, your service is concluded, sir. I want to thank you very much. I know it's been a long trial, but the law does not allow me to send you in once they're ready to begin their deliberations. So thank you again so much for your participation.

We'll go ahead and let him get his stuff out of the jury room, please, and let me know when he's out of the jury room.

Thank you, sir.

(The alternate was excused.)

THE COURT: All right. Ladies and gentlemen, I'll send you to the jury room at this time. Again, please do not discuss this case in any way.

(The jury retires to the jury room.)

THE COURT: All right. Any objections to the charge from the State or anything you think that needs to be clarified or anything?

MR. BELL: Nothing from the State, Your Honor.

THE COURT: All right. Defense, I had already

put on the record that I preserved your objection. I don't know if I really actually explained it too well.

The defendant had submitted a proposed charge that's in the record that there have also been references by one or two State's witnesses about having appealed their convictions and having received new trials or resentencings. Please do not assume or expect that anything of this sort recurred in this case. Once the question of Mr. Cooper's guilt or innocence is properly submitted to you and you render your verdict, that verdict is final and no other court may second guess it or charge it -- or change it -- I'm sorry.

And he put that in the record and I did not charge that and his objection is preserved. Anything else other than that one?

MR. BRUCK: Beyond that, the defendant has no objections or requests for additions.

THE COURT: All right. So, at this point, if you could please get all of the exhibits together in one stack and let's double check again that nothing's being sent back that was not admitted into evidence and let's put that on the record before we send it back.

(Pause.)

THE COURT: All right. So let's put on the record, each side has reviewed the exhibits and nothing is being sent back that was not introduced into evidence; is that correct from the State?

MR. BELL: That's correct.

THE COURT: Defense?

MR. BRUCK: Yes.

THE COURT: And I think we previously went over, there are no objections to the verdict form, correct?

MR. BELL: That's correct.

MR. BRUCK: Correct.

THE COURT: All right. Mr. Bailiff, once y'all get those exhibits together with the verdict form, you may tell them they can begin their deliberations.

I appreciate the courtesies y'all extended to each other and to the Court throughout the trial. Thank you.

MR. BELL: Thank you, Your Honor.

THE COURT: We'll be at ease.

(Jury commenced their deliberations at 3:40 p.m.)

(A recess transpired.)

(The following occurred during jury deliberations at 4:02 p.m.)

THE COURT: The jury has asked for a transcript for Investigator Hite's testimony. I can tell them we can play it back to them or if they want to have something specific, they can let me know. Is that okay? I'll write it out and y'all can look at it.

(Pause.)

THE COURT: Do you wish to look at my response and see if there's any objection before I send it back?

(Pause.)

THE COURT: Any problem with that from the State?

MR. BELL: No problem from the State.

THE COURT: Defense?

MR. BRUCK: No objection from the defense.

THE COURT: All right. Send that to the jury. Let's see what they say.

(A recess transpired.)

(The following occurred during jury deliberations at 5:00 p.m.)

THE COURT: Here's a note.

(Pause.)

THE COURT: We'll going to replay that

testimony. Bring the jury in, please.

(The jury returns to the courtroom at 5:10 p.m.)

(Court's Exhibit Number 12, jury note, was marked for identification purposes.)

THE COURT: All right. Ladies and gentlemen, we got your note about that testimony. We'll play it back to you at this time.

Just in case you didn't understand my last note, we don't ever provide any kind of written transcripts to the jury. If there's certain testimony you wish played back or any portion of it, you're welcome to request that and we'll be happy to play it back to you.

Go ahead, Madame Court Reporter.

(Whereupon, the testimony of Sharon Freeman Clonts was played for the jury.)

THE COURT: All right. Ladies and gentlemen, I'll send you back to the jury room to resume your deliberations. Thank you.

(The jury retires to the jury room at 5:26 p.m. to continue its deliberations.)

THE COURT: We'll be at ease.

(A recess transpired.)

(The jury returns to the courtroom at 6:05

p.m.)

THE COURT: All right. Ladies and gentlemen, we have received your request about the smoke break. And, at this time, I'm going to let you stop your deliberations. And the deputies will coordinate taking those of you who need a smoke break down to do that.

My instructions to you are this. You must not discuss this case in any way whatsoever during this break. So those of you that go downstairs to take the smoke break, you must not discuss this case in any way. Those of you that remain in the jury room, you must not discuss the case in any way. When everyone is assembled back together, then I will give you your instructions again about beginning your deliberations. Please remember that.

Now, if any of you want to go down with them to just get some fresh air, they'll take you to that same area, just let the deputies know. Again, at this point, stop your deliberations and I will let you know when to resume.

JUROR: I hate to tell you, but I haven't heard one word you said. You've got a soft voice.

THE COURT: I'm sorry. What I said was I'm going to -- everyone has agreed to give you a break,

at this point, to some of you requesting a smoke break. My instructions are you must stop your deliberations at this time. You must not discuss the case in any way. Those of you that go downstairs for the break, do not discuss the case. Those of you who remain in the jury room, do not discuss the case. When the break is over, I will send the bailiff or the clerk to notify you to begin your deliberations again.

Does everybody understand?

JUROR: But I have a question, may I --

THE COURT: If it's about the case, I can't, but if it's just about this break, I can hear you.

JUROR: Are we allowed to call home to let someone know that we will not be there directly?

THE COURT: If you give the clerk the name and number, the clerk will call for you. She'll take care of that right now, also. I realize it's running late and some of you didn't anticipate this, but --

JUROR: I'm so sorry. I didn't bring my medicine, but I've got to have it.

THE COURT: That's okay. Do you have someone coming over with it right now, ma'am?

JUROR: She's calling him, but I don't know if

he'll be home.

THE COURT: Well, if not, we'll send someone for it, all right.

JUROR: Okay.

THE COURT: All right. You can go back to the jury room. Again, stop your deliberations at this point. Thank you.

(The jury retires to the jury room at 6:08 p.m.)

THE COURT: All right. Thank you. We'll be at ease again.

(A recess transpired.)

BAILIFF: They're back now.

THE COURT: You can direct them to start back.

(The jury resumed their deliberations at 6:33 p.m.)

(A recess transpired.)

(The following occurred during jury deliberations at 9:00 p.m.)

THE COURT: The jury has another request for a smoke break. Any objection to that, State?

MR. BELL: No objection from the State, Your Honor.

THE COURT: Defense?

MR. BRUCK: No objection.

THE COURT: I don't want it to be a long smoke break, ten minutes at the most.

Also, I just wanted to see if y'all had any objection to my correcting a clerical error on the speedy trial order. It's nothing really substantive. On the dates that I put for trial, we accidentally typed 2005 instead of 2006. Do y'all mind if I amend the original order to show the weeks of May 22nd and 29th, 2006?

MR. BELL: No objection from the State, Your Honor.

MR. BRUCK: That's fine.

THE COURT: All right. Thank you.

(A recess transpired.)

BAILIFF: The jury is back, Your Honor.

THE COURT: All right. Tell them they can resume their deliberations.

(The jury resumed their deliberations at 9:12 p.m.)

(A recess transpired.)

(The following occurred during jury deliberations at 9:46 p.m.)

THE COURT: I'm just trying to decide whether or not it would be a good idea to ask the jury, if everyone consents, that if they want to recess and

pick back up in the morning. Any objection from the State?

MR. BELL: No objection from the State, Your Honor.

THE COURT: Defendant?

MR. BRUCK: None from the defendant.

THE COURT: All right. It's my understanding then, also each side would waive having the jury sequestered for the evening; is that correct?

MR. BELL: Yes, Your Honor, the State would waive.

MR. BRUCK: The defense waives. I would suggest the clerk may direct Mr. Hill to go home and not go to work.

THE COURT: I'll ask him to do that. Do y'all have any objection to my doing it by note to the jury?

MR. BELL: No objection from the State, Your Honor.

MR. BRUCK: That's fine.

(Pause.)

THE COURT: If there's not any objection, I'm going to say, Members of the jury, would you like to recess for the evening or would you like to continue deliberating today? Any objection?

MR. BELL: No objection from the State.

MR. BRUCK: No objection.

THE COURT: And I had mentioned to y'all at the bench, I just wanted to make sure that the record was absolutely clear that the State withdrew its notice of a death penalty in this case. So a sentence of death was not an option in this case upon a guilty verdict and, therefore, everyone agreed that any sentencing proceeding will be conducted by the Court; is that correct?

MR. BELL: That's correct, Your Honor. We did that in open court, I think, in Moncks Corner.

MR. BRUCK: Yes, we agree with that.

THE COURT: All right.

(Pause.)

THE COURT: Mr. Bruck, insofar as sequestration, can you discuss that with your client, too?

(Pause.)

MR. BRUCK: We've discussed it and he concurs.

THE COURT: Is that correct, Mr. Cooper, you concur, if the jury requests that they be allowed to break for the evening, you concur, and your counsel's statement, you wish to allow the jury to go home rather than be sequestered?

DEFENDANT COOPER: Yes, sir.

MR. BRUCK: Your Honor, you might have been planning to do this anyway, but if it comes to that, it might be helpful to tell the jury that normally you would sequester them and so they're really being entrusted, all the more reason why they should be especially careful to avoid any information.

THE COURT: Anything special the State would like me to say?

MR. BELL: Your Honor, we just ask that you do what you usually do, don't discuss the case until you come back in the morning.

THE COURT: They did indicate they would like to recess for the evening.

(Court's Exhibit Number 13, jury note, was marked for identification purposes.)

THE COURT: All right. Bring the jury in.

(The jury returns to the courtroom at 9:55 p.m.)

THE COURT: All right. Ladies and gentlemen, I received your note that you would like to recess for the evening. I'm going to repeat my instructions. You must not discuss this case in any way whatsoever, must not expose yourself to any type of coverage, media, newspaper, T.V., radio, or contact

from anyone in any way whatsoever.

I understand from an earlier conversation that someone may have a night job. Sir, you will not be able to report to your job tonight. If you have any problem with your employer, you have the clerk call your employer and straighten that out, all right?

Now, I had a couple of options. I could keep you here until a decision was reached, ladies and gentlemen. I could send you to a hotel and sequester you and then bring you back in the morning or I could send you home under the premise that you follow my instruction and not have any type of contact or discussion about this whatsoever. So far throughout this trial, I trust that's been done and you've indicated to me that's what you've been doing and everyone has agreed to do that. So please keep that in mind.

This case has been important to everyone involved. And you have had front row seats in this case throughout the proceeding, so please don't taint this in any way by having a conversation or contact or discussion about this case in any way. You may not discuss it in any manner until such time as you all reconvene tomorrow and I instruct you to begin your deliberations.

So, at this point, I will go ahead and excuse you for the evening. If you will please report back at 9:15. Is that okay with everyone? We'll proceed with the deliberations. Thank you very much and see you tomorrow.

If any of you would like to be escorted out to your car, if you'll let the bailiff know, the clerk and the deputies will arrange for that. One of you needs a ride, I understand the deputy will arrange for that, too.

(The jury was excused for the day.)

THE COURT: All right. See y'all tomorrow. Thank you.

(Whereupon, the proceedings were concluded for May 31, 2006.)

(The following proceedings were held on June 1, 2006.)

(The jury resumed their deliberations at 9:38 a.m.)

(A recess transpired.)

THE COURT: All right. I understand we have a verdict. Is the State ready to proceed?

MR. BELL: The State's ready, Your Honor.

THE COURT: Defense ready?

MR. BRUCK: Yes, sir.

THE COURT: Bring the jury in, please.

(The jury returns to open court to report its verdict at 10:38 a.m.)

THE COURT: Good morning, ladies and gentlemen.

I understand now, Mr. Foreman, that the jury has reached a unanimous verdict as to each charge; is that correct?

FOREMAN: That is correct.

THE COURT: Could you hand the verdict form up to me, please?

(The clerk hands the verdicts to the Judge.)

THE COURT: All right. Madame Clerk, please publish the verdict.

Please stand.

THE CLERK: Indictment 90-GS-32-83 and 84, the State versus Gene Tony Cooper. As to an indictment for murder, indictment number 1990-GS-32-0083, We, the jury, unanimously find the defendant guilty.

As to the indictment of kidnapping, indictment number 1990-GS-32-0083, We, the jury, unanimously find the defendant guilty.

As to the indictment for armed robbery, indictment number 1990-GS-32-0083, We, the jury, unanimously find the defendant guilty.

As to the indictment of conspiracy to commit

armed robbery, indictment number 1990-GS-32-0084, We, the jury, unanimously find the defendant guilty.

Mr. Foreman, ladies and gentlemen, as I call your name and number, please hold your hand up so I can recognize you. I will ask you as to the verdicts, what is your verdict and are they still your verdicts, and please respond at that time.

Juror Number 48, Tara Fields, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Guilty, yes.

THE COURT: You can say yes or no.

THE CLERK: Juror Number 227, Sandra Bella.

JUROR: Guilty.

THE CLERK: Wait for the question, please, ma'am. As to these verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes.

THE CLERK: Number 115, Dawn Morgan, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes.

THE CLERK: Number 78, Lawrence Kean, as to the verdicts, were these your verdicts and are they still your verdicts? I'm sorry, Mr. Kean was

excused. I apologize.

Number 70, Brandon Hill, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes.

THE CLERK: Number 219, Michael Edwards, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes.

THE CLERK: Number 26, Patricia Cavanaugh, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes.

THE CLERK: Number 30, Howard Clark, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes, ma'am.

THE CLERK: Number 149, Larhorda Smith, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes.

THE CLERK: Number 230, Ronda Taylor, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes.

THE CLERK: Number 206, Howard Puckett, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes.

THE CLERK: Number 166, Gloria Ward, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes.

THE CLERK: Number 154, Susan Steele, as to the verdicts, were these your verdicts and are they still your verdicts?

JUROR: Yes.

THE CLERK: All jurors polled, Your Honor.

THE COURT: All right. The jury's been polled. Any matters pertaining to the jury before I excuse them?

MR. BELL: None from the State, Your Honor.

THE COURT: Defense?

MR. BRUCK: No, sir.

THE COURT: All right. Ladies and gentlemen, I want to thank you for your service in the case. I know it's been a long case. I'm satisfied that you gave each side your complete and upmost attention. It's your job to decide who and what you wish to believe and apply those facts to the law. I'm

satisfied you gave everyone your fair and just consideration of the issues in this case.

At this point, you'll be excused. Again, I want to thank you on behalf of the State, as well as the county for your service. If you would like to stay during the sentencing component of this proceeding, you're welcome to stay. Otherwise, you're excused and I hope y'all have a great weekend. Thank you very much.

(The jury was excused.)

THE COURT: All right. Any matters for the Court, motions or otherwise before sentencing?

MR. BRUCK: I would renew the motions made at the close of the defense case, that is motion for a directed verdict on the grounds stated at the time and also the motion to dismiss for lack of a speedy trial, renewing the grounds made prior to trial and made at the close of the defense case.

THE COURT: All right. For the reasons previously stated, I deny those motions. Anything further?

MR. BRUCK: No, sir.

THE COURT: All right. Insofar as sentencing is concerned, this was all under the old law in '89; is that correct?

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(Brief Recess.)

THE COURT: Anything from the State on sentencing?

MR. BELL: Yes, Your Honor. I think we have a couple. I think my colleague would like to address the Court. I know one member of the victim's family would like to address the Court. And then I'll address the Court at the end of that, Your Honor.

THE COURT: Yes, sir.

MR. LUPTON: Your Honor, with regards to prior record, I think the Court is aware that the defendant has three prior armed robbery convictions from 1977, a string of armed robberies that occurred in multiple counties. Also, in that stream of crimes, was a housebreaking and grand larceny.

Your Honor, once he was sentenced to the department of corrections for those various offenses, he entered the department of corrections, at the time, I believe he was 17 or 18 and was sent to Manning Correctional, which was, at the time, a facility where younger violent offenders were housed to keep them away from the CCI population. At that point, he was caught plotting an escape, was transferred to CCI.

While in CCI, he made three attempted escapes.

One was handled in-house administratively with revocation of good time and two resulted in Richland County convictions for escape. Your Honor, one of those he made it out of a work detail and had to be fired upon in downtown Columbia endangering citizens of Columbia in that escape attempt.

The third escape attempt was he rushed the gate. He got through the bars of his cell and made it out, hid out in the yard and during a shift change was able to rush some of the guards and get out of the gate before he could be caught. At that point, bloodhounds and a search had to be initiated and it took a couple of hours before he was finally caught.

While he was in the maximum security unit at CCI, he was also involved in an incident where he managed to escape from his locked cell and shanked a fellow inmate. I believe he stabbed him three times with an illegal shank.

So the defendant represents both a danger to the community even while incarcerated and a danger to others. I think the Court should take that into consideration.

I also think the Court should take into consideration that in the process of this offense,

there was some coconspirators that gave statements to the police, his niece, Brenda McLauren, that the defendant got with them and put them up to giving him a false alibi, which she admitted later. In the process of that admission that she gave him a false alibi, was still trying to cover for him, admitting that he was involved in casing the robbery, but said that he backed out of it after discovering she didn't have the money.

That evidence was not available to the Court based on Fifth Amendment privileges with that coconspirator, but I think that is relevant to the Court's decision on sentencing.

Your Honor, the defendant has also made threats against the lives of various officials involved in this case, including Solicitor Myers who is in the back of the courtroom. Some of that was relayed to his wife who gave information about that. And then based on spousal privilege, the State was not allowed to present that to the jury or the Court.

Along with that information, she also stated that he had confided in her that he had been working on Bo Sutherland to get Bo Sutherland to take the blame for the offense while in the department of corrections. That information was not available to

the jury or the Court based on spousal privilege assertion, but I think that it is relevant at this point in consideration of sentence. Thank you, Your Honor.

MR. BELL: If it please Your Honor, I think the brother of the victim, Mr. Robby Branham, would like to address the Court.

THE COURT: Come forward, please. State your full name for the record, please.

THE WITNESS: Robby Branham. Thank you, Your Honor, for allowing me to speak. The family of Kimberly Quinn would like to express to the Court some of what we have felt since the day in October of '89. The pain and hurt we have felt due to this malicious and very brutal crime can never be taken back from our hearts and our minds. These proceedings have brought back many tearful feelings and truths about what we have been through.

A mother's life was shortened by her everyday thoughts about her daughter's death. She was never able to forget how brutal this was to a child whom she gave birth to.

My life was changed dramatically due to this life changing event. I was able to survive due to the love of my wife and through the faith we shared

in God.

Amanda, Kim's daughter, had to endure and live with the thoughts of her mother and the loss of her mother's loving arms wrapped around her now gone forever, also her not being able to help out her mother due to her own condition at the time. Amanda had to also take another loss just ten months after losing her own brother in a house fire that she was burned in, also. I can't even fathom why she was spared from this or even from the defendant's intentions that night.

I know that the so-called motive for this event has come out and supposedly has said, and I can say it is a disgrace that people felt that way that the fire occurred the way it did. If they had only taken the time to learn about why or how the fire occurred the way investigators did. They found that the landlord and the furnace company were at fault not my sister, who was not even -- not at home at the time, but a baby-sitter was.

Only if the defendant could have known the love that my sister had for her children. She would have gladly laid down her life for her children. The hurting she was going through from losing her son and seeing and caring for her daughter was -- from

death was greater than anyone should have to bear.

This is only a small part of what has come and gone through our hearts and minds during the 16 plus years. If we could draw pictures of what we have felt as family and friends, I feel sure it would have filled many rooms.

All this being said, we ask that the defendant be given the maximum sentencing for the crimes he has been found guilty of. We know without a doubt that the defendant would be dangerous outside of the penitentiary due to his lack of care for human life and a desire to see it treated with malice. We hope that this time these proceedings will stand more firmly upon the truth and we hope not to have to see the judicial system be used again for this. In the end, God knows all. Thank you.

THE COURT: All right. Thank you, sir.

MR. BELL: Your Honor, I would just like to end up by saying this, that, first of all, when we took the death penalty out, it wasn't because we didn't think this case was serious, we wanted to concentrate. It was a short time and it was a complicated case and we wanted to make sure that we got a guilty verdict and we did that.

We think that based on his prior record, based

on the serious nature of this crime, the terrible nature of this crime just over money, the shameless, the -- it's not even -- it's not worth a life for money like that, Your Honor. We think that this case demands the maximum verdicts in each and we would ask for consecutive time on this, Your Honor, because we think that he's a dangerous individual, he needs to spend the rest of his life in prison, Your Honor.

THE COURT: All right. Anything further?

MR. BELL: Nothing from the State.

THE COURT: Defense.

MR. BRUCK: Your Honor please, the jury has spoken and, obviously, I'm not going to question anything they have done. I would like to respond to some things Mr. Lupton said.

The account -- as you know, Tony Cooper went to prison when he was 17, at a time when he was under the domination of an older criminal, Robert Sutherland. The incidents in prison were at the very beginning of his time in prison. And the strongest proof of that is the fact that he was paroled despite these prior escape attempts.

These were -- what Mr. Lupton was describing were events that occurred when Tony Cooper was in

his teens or just 20 years old. He's now 47. I've represented him nearly 16 years and he is not the person now that he was in 1989 when this crime occurred. Obviously, he has aged. He has matured.

I have never had a client who has been so appreciative of the work that I and the other lawyers working with me and Mr. Andrews' staff have done. I've just seen Tony Cooper grow up. It happened too late. But I am firmly convinced that if he is released as an old man, society has absolutely nothing to fear for him -- from him.

Thirty years is 30 calendar years. He would be 60 before he could be released under that sentence. And taking everything into account, including this still rather hazy facts of exactly who did what to whom and why, in this case, I think 30 -- we would submit that a 30 year sentence is punishment enough in this case.

Your Honor is aware of plea negotiations that occurred between the parties. I realize that's all water over the dam now, but I don't think that the record as a whole supports the notion that society requires that Tony Cooper die in prison. And I would ask the Court to fashion a sentence that allows him when he is an old man, to be able to be

released to go home.

THE COURT: Anybody else? Does the defendant wish to address the Court?

DEFENDANT COOPER: Judge, I'd like to ask the Court to consider giving me a little bit of light in the future. I'd like to ask the Court that.

THE COURT: All right. Anything further?

MR. BRUCK: No, sir.

THE COURT: Anything further from the State in response?

MR. BELL: Nothing from the State, Your Honor.

THE COURT: You may be seated.

All right. It's the judgment of the Court, having considered all of the facts and circumstances of this case, that on the murder charge you receive a sentence to life in prison. On the kidnapping, there is no sentence pursuant to the statute since you were convicted of murder. On the armed robbery, 25 years. On the conspiracy, five years. Good luck to you, sir.

Thank y'all.

MR. LUPTON: Thank you, Your Honor.

MR. BRUCK: Thank you, Your Honor.

MR. COOPER: Can I say something, Judge? I'm the daddy. I'd like to say something.

THE COURT: I'm happy for you to say something. They indicated they didn't have anyone else, sir, but I'll be happy to hear from you.

MR. COOPER: Can I speak now?

THE COURT: If you wish to approach, you may say something, sir. Come forward, please.

You want to bring him back out.

I'm sorry, I didn't understand that there was anyone else that wished to speak. I thought y'all indicated there was no one else that wished to speak. I'm happy to hear everyone out, sir.

State your full name for the record.

MR. COOPER: Reverend Gene Cooper. The only the mistake that -- I raised that boy. The only mistake he did when he come out of prison, he hired Bo Sutherland, if he would have done what the prison had told him. Bo Sutherland, I knowed him since he was 14 years old. I stayed right down the street from him.

Now, we better be sure what we're doing because the Bible says there's a curse following all lawyers. So you better be sure a man is guilty.

The only thing my son is guilty of is hiring Bo Sutherland. And they were, I thought, good friends. They used to fix cars and everything. But the only

thing he's guilty of is hiring him because if my son would have been there, Bo Sutherland might have been dead, but that girl would not because he had a passion for women. I've seen him take things and buy stuff for women that had children that didn't have no daddy, didn't have nothing in the house. He would take my lawn mower and sell it and go get them something.

But I want to tell you, you got a curse following you. You better be sure what you're doing. I'm an ordained minister and I have authority to tell you that. And you can take my book, the Bible and --

THE COURT: Sir, if you could address the Court, please, not any individual. This is a sentencing phase in the court. I understand your passion for this.

MR. COOPER: Well, I mean, I want to say if Tony had of been there, I don't believe that girl would have got killed. Now, Bo might have got killed because he would have tried to take the gun away from him.

THE COURT: All right. I understand your feelings, sir. The way our system works is the jury gets an opportunity to assess all of the facts and

make those determinations. I don't even fill that role, the jury makes that decision.

MR. COOPER: I just wanted to say that. And I appreciate you letting me and the Lord bless you.

THE COURT: No problem, sir. I'm happy to hear from anyone that wishes to address the Court. Anyone else?

(There was no response.)

THE COURT: All right. Thank y'all very much.

MR. LUPTON: Thank you, Your Honor.

MR. BELL: Thank you, Your Honor.

THE COURT: All right. We shall be adjourned. I thank y'all again for your courtesies to one another and to this Court. I appreciate it.

(For purposes of the record, State's Exhibit Number 44, follow-up report, was marked for identification purposes.)

END OF PROCEEDINGS

AFFIDAVIT OF JAMES M. FRAZIER, III

Being duly sworn, I, James M. Frazier, III, would offer the following:

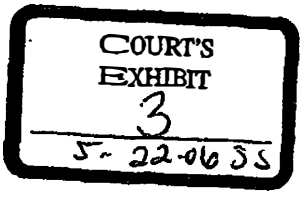
I am an Assistant General Counsel for the Office of General Counsel of the Texas Department of Criminal Justice, a state governmental entity which includes the Texas prison system. My duties with that office include providing legal advice to the department regarding the rendition of prisoner witnesses from the department's correctional facilities. In addition to reviewing the legal sufficiency of rendition paperwork, I also schedule hearings in district courts for renditions, and attend them as a representative of the department.

The State of Texas is a signatory to the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act, and the State of South Carolina does not appear to be a signatory to that Act. The Texas Department of Criminal Justice will not honor a mere subpoena presented to us for one or more of our prisoners to appear as a witness in a state court in South Carolina. What is required for the department to release one of its prisoners to South Carolina authorities to be a witness in a criminal proceeding in that state is an executive agreement between the governor of South Carolina and the governor of Texas. The agreement must be accompanied by documentation guaranteeing protection of the prisoner witness from civil lawsuits and/or criminal prosecution from circumstances arising in South Carolina prior to the rendition.

The department's procedures take into account our opinion that a prisoner witness has a legal right to a hearing before a district judge who will then decide whether or not the prisoner witness is to be transported to the requesting state. The Texas Department of Criminal Justice will not release its prisoners to the requesting state without such a hearing and an appropriate order of transport from a district judge. We are aware of only two judges in the state of Texas who hold hearings for prisoner witness renditions to other states.

A request was made for the rendition of Phillip Gary Farmer, an inmate currently incarcerated in and in the custody of a correctional facility of the Texas Department of Criminal Justice, by B. Harrison Bell, Jr., a South Carolina prosecutor, as witness in the case of State v. Gene Tony Cooper. The appropriate paperwork, including the governor's warrant, was submitted by the State of South Carolina and received by the State of Texas.

My office received the governor's warrant and other paperwork for the subject rendition on May 10, 2006. I promptly contacted the court coordinators for both judges and discovered that neither judge was available for the remainder of the month of May for the rendition hearing. On or about May 11, 2006, I informed Mr. B. Harrison Bell, Jr. by telephone call that there were no judges available for a rendition hearing for the remainder of the month of May 2006. I have no reason to believe the South Carolina



authorities were aware of that unavailability before this week when I first informed them of such.

The State of South Carolina followed the proper procedures for the only means available to it to summon to one of its courts a prisoner witness from the State of Texas.

James M. Frazier III

JAMES M. FRAZIER, III
ASSISTANT GENERAL COUNSEL
TEXAS DEPARTMENT OF CRIMINAL JUSTICE

STATE OF TEXAS

COUNTY OF WALKER

SWORN to before me this 12th day of MAY, 2006

(SEAL) Veronica McGuire
Notary Public, State of Texas
My Commission Expires
01 28 2010
Notary without Bond

Veronica McGuire
Notary Public for Texas

My Commission Expires: 01/28/2010

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

AFFIDAVIT OF B. HARRISON BELL

Being duly sworn, I, B. Harrison Bell, testify as follows:

I am the lead prosecutor in the case of State v. Gene Tony Cooper. In that capacity, I attended a status conference concerning the setting of the trial date in this case on or about February 8, 2006. At that time several potential trial dates were discussed.

During the beginning to middle of March 2006, I discovered that the case was set for trial on May 22, 2006. Until that time, I did not know the trial date had been set. Upon information and belief, opposing counsel was also unaware prior to this time that the trial date had been set. Both sides discovered this when inquiring about the trial date in order to subpoena witnesses. It appears that both parties misunderstood the court during these discussions and believed that the dates being discussed were merely potential trial dates.

I began attempting to subpoena Phillip Gary Farmer, an inmate in the Texas Department of Corrections, at this time.

Farmer was contacted in the Texas Department of Corrections and it was determined that he was willing to testify and that his testimony would be consistent with his testimony in the original trial.

The State of Texas refused to honor a subpoena for the attendance of Farmer as a witness in this trial because South Carolina was not a signatory State in the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act. Thus, I was required to research the proper forms and procedures for requesting interstate rendition from Texas to South Carolina.

As part of the rendition process, I was required to arrange for two police officers to go to Texas, take custody of the witness and transport him back to a secure facility in South Carolina, then similarly return him once the trial was over. I arranged for the witness' housing in the Lexington County Detention Center. I also requested that two SLED agents be assigned to go to Texas and return with the prisoner.

It took seven to ten day for SLED to assign the requested agents. At this point, non-refundable airline tickets were purchased to enable the witness transportation.

Additionally, once this information was provided by SLED, the rendition paperwork was finalized and taken to the Honorable Judge Daniel F. Pieper for signature on April 20, 2006. Once signed, it was taken to the Lexington Clerk of Court for signature and finally to the Governor's Office.

Governor Mark Sanford signed that request on or about April 27, 2006. The request was forwarded to the South Carolina Secretary of State. From there it was further processed, then forwarded to Texas.

COURT'S EXHIBIT
4
5-2-06

The Honorable William Keesley
Court of General Session
Lexington County S.C.
105 South Lake Drive
Lexington, S.C. 29072

RE: Restraining order

December 11, 1997

Dear Mr. Keesley,
On Wednesday, December 10, 1997 I telephoned David Bruck, Attorney, to speak with him. Mr.Br advised me that he was unable to talk with me due to a motion for a restraining order being filed by my Attorneys, Wayne Floyd, Bill Rast and Diana Holt. Please be advised that I do nc agree with my Attorneys actions on this issue and I pray the court not to grant this motion. If the court has granted the motion I request for it to be dismissed as soon as the court ca do so. Thank you for your time and consideration in this matter.

Respectfully submitted,
Robert Bo Southerland

Robert "BO" Southerland SK#4825
Lieber Correctional Inst.
P.O. BOX 205 UA1-227
Ridgeville, S.C. 29472

Sworn to before me this 12 day of
December, 1997 at Ridgeville, S.C.
Witness Edward Whitaker
My Commission expires
My Commission Expires December 2, 2001

DEFENDANT'S EXHIBIT 3
5:24cv55

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON)	Indictment No.'s 90-GS-32-83 & 84
)	
STATE OF SOUTH CAROLINA)	
)	
v.)	STIPULATION
)	
GENE TONY COOPER,)	
Defendant.)	
)	

The parties hereby enter the following Stipulation for publication to the jury:

The State and the Defendant have agreed that on the morning of Friday, October 6, 1989, shortly after 7:00 a.m., Peter "Tony" Demos went to the victim's residence along with Ms. Norma Campbell in order to help look for the victim, Kimberly Quinn. While there he found the victim's wallet laying on the ground at the edge of the grass in her driveway. The wallet was recovered and contained her South Carolina Driver's License, but not her South Carolina Identification Card. Additionally, there was no cash in the wallet when recovered.

The parties further stipulate that the wallet in evidence is the wallet he found that morning.

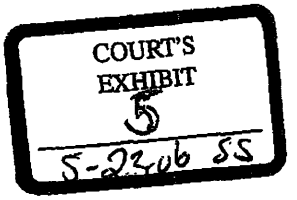
We Consent to this stipulation:

For the State:

B. Harrison Bell
Senior Assistant Solicitor

For the Defendant

David I Bruck
John E. Duncan
Attorney for the Defendant



STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Indictment No.'s 90-GS-32-83 & 84
	)	
STATE OF SOUTH CAROLINA	)	
	)	
v.	)	STIPULATION
	)	
GENE TONY COOPER,	)	
Defendant.	)	
	)	

The parties hereby enter the following Stipulation:

The State and the Defendant have agreed that the body found in this case on October 8, 1989, as well as the hand and feet found on October 11 ~~and~~ 12, 1989 was the victim Kimberly Quinn.

We Consent to this stipulation:

For the State:

B. Harrison Bell
Senior Assistant Solicitor

For the Defendant

David I Bruck
John E. Duncan
Attorney for the Defendant

COURT'S EXHIBIT
6
S-23-96 SJ

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Indictment No.'s 90-GS-32-83 & 84
	)	
STATE OF SOUTH CAROLINA	)	
	)	
v.	)	STIPULATION
	)	
GENE TONY COOPER,	)	
Defendant.	)	
	)	

The parties hereby enter the following Stipulation for publication to the jury:

The State and the Defendant have agreed that attorney Jonathan Harvey represented the victim, Kimberly Quinn, in a personal injury case arising out of an automobile accident during the time period involved in this case. Mr. Harvey had negotiated a settlement in that case for $7,750, and had informed her prior to October 4, 1989 that she was to receive $2,837.18 as her portion of this settlement after all fees and expenses were deducted.

However, Mr. Harvey had deposited the settlement check from the insurance company in his trust account. The bank had placed a 10-day hold on this money. Therefore, it was not available to be paid to Kimberly Quinn until Tuesday, October 10, 1989. As a result, she had not been given her portion of the settlement money prior to her death.

We Consent to this stipulation:

For the State:

B. Harrison Bell
Senior Assistant Solicitor

For the Defendant

David I Bruck
John E. Duncan
Attorney for the Defendant

COURT'S EXHIBIT 7
S-3606 85

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	Indictment No.'s 90-GS-32-83 & 84
	)	
STATE OF SOUTH CAROLINA	)	
	)	
v.	)	STIPULATION
	)	
GENE TONY COOPER,	)	
Defendant.	)	
	)	

The parties hereby enter the following Stipulation for publication to the jury:

The State and the Defendant have agreed that Kimberly Quinn was sent a check by the South Carolina State Treasurer's Office in the amount of $149, for Aid to Families with Dependent Children (AFDC) to which she was entitled. This check was mailed to her so that she would receive it on October 1, 1989.

Bank records show that this check was cashed at the South Carolina National Bank (now Wachovia) located at the corner of Knox Abbott Drive and 12th Street in Cayce at 9:17 a.m. on Friday, October 6, 1989. The check was cashed at the drive-thru teller from one of the 2 farthest outside lanes. The check was sent through the drive-thru tube along with the victim's South Carolina Identification Card.

If called to testify, the teller who cashed the check would say that she had no independent memory of the transaction. She did not see who cashed the check, what type vehicle was used, how many people were in the vehicle, or what sex the person or persons were. However, she would testify, that it was her policy to cash AFDC checks that were sent through the tube with a valid driver's license or identification card if the card was in the same name as the check regardless of who presented the check.

We Consent to this stipulation:

For the State:

B. Harrison Bell
Senior Assistant Solicitor

For the Defendant

David I Bruck
John E. Duncan
Attorney for the Defendant

COURT'S EXHIBIT
8
5-23-06 SS

The State and Robert Southerland reached an agreement prior to his testimony in this trial.

Mr. Southerland agreed to testify for the State.

For its part, the state agreed not to seek the death penalty when Mr. Southerland is re-sentenced for the murder of Kimberly Quinn.

The effect of this agreement is that Mr. Southerland will not be sentenced to death, and could receive a sentence of not less than 30 years, in the discretion of the sentencing judge.

If the state had not agreed to withdraw its request for the death penalty, Mr. Southerland could not have received any sentence other than death, or life imprisonment without parole.

COURT'S EXHIBIT
10
D- 25-06 55

There is evidence of a blood alcohol level in this case. The parties agree that at the time of this offense, a blood alcohol level of 0.100 % or greater created an inference of impairement, and a blood alcohol level of 0.050% or less conclusively proved a person was not impaired due to alcohol.

COURT'S EXHIBIT
11
5-30-16 SS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Lexington County

The Honorable Ralph King Anderson, Jr., Circuit Court Judge

THE STATE ,

Respondent,

v.

ROBERT H. SOUTHERLAND,

Appellant.

MOTION TO STRIKE ALL GUILT PHASE ISSUES FROM INITIAL BRIEF OF APPELLANT OR, IN THE ALTERNATIVE TO SUPPLEMENT RECORD ON APPEAL

The above named Respondent, the movant in this matter, would respectfully show unto this Court as follows:

I.

Appellant was indicted at the January, 1990 term of court by the Lexington County Grand Jury for conspiracy to commit murder, kidnapping and armed robbery. He was later indicted at the January, 1991 term of court for murder, kidnapping, armed robbery and forgery. All of these charges stemed from the October 5-6, 1989 death of Kimberly Ann Quinn. The State sought the death penalty.

On March 2-9, 1992, Appellant was tried before the Honorable Ralph King Anderson, Jr. and a jury. The jury found him guilty of murder, kidnapping, armed robbery, forgery and conspiracy. Following a sentencing proceeding in accordance

with S.C. Code Ann. §16-3-20 (Supp. 1992), the jury found the existence of two statutory aggravating circumstances: that the murder was committed while in the commission of kidnapping and robbery while armed with a deadly weapon. See, §16-3-20 (c) (a) and (d). Based upon this finding, on March 9, 1992, the jury recommended a sentence of death. That same date, Judge Anderson, after making the requisite affirmation of the jury's sentence, imposed a sentence of death for murder. He imposed consecutive sentences for each of the remaining convictions. Appellant then timely served and filed a Notice of Appeal. His appeal of his sentence and conviction, which has been consolidated with this Court's mandatory review of his sentence under S.C. Code Ann. §16-3-25 (Supp. 1992), is presently pending before this Court.

II.

On April 11, 1992, following his conviction and sentence, Appellant gave a statement to David I. Bruck, Esquire, counsel for Appellant's co-defendant, Gere Tony Cooper, Jr.[1] In this sworn statement, a copy of which is attached as Exhibit A and incorporated herein by reference. Appellant admits that he murdered Kimberly Quinn. In pertinent part, he stated that:

> Kim was unconscious. I picked her up and put her in the front seat of the car. Why someone didn't see me I don't know. Then I drove out to the pond. She

[1] Cooper, who was likewise convicted and sentenced to die for his part in Ms. Quinn's murder, also has an appeal pending before this Court. See, State v. Gere Tony Cooper, Jr., Docket No. ____

> started moaning. I had her pocketbook. There was $800 in cash in the pocketbook, some 60 Xanax, and about 12 of them generic Valiums. Also a welfare check. The welfare check was folded. There was a highway department ID. There wasn't any wallet, though. If she had a wallet it must have fallen out of her pocket.
>
> First, I was going to drown her. But I had a shotgun in the car. It was my shotgun. I thought about how she had killed her young 'un to get money for drugs. She deserved it. I shot her in the back. She was laying on the ground on her left side. She was breathing heavy. I was about 6 feet away and I popped another one. I hit her in the back of neck. Joel Sexton doesn't know anything about gunshot wounds. I stood back and pumped two more rounds in her head. These were not close wounds. I stood back to do it. The last gunshot probably just hit the top of the head.

(See Exhibit A, pp. 2-3)

Appellant thereafter indicated that no one had contacted him about giving a statement and that he had contacted Cooper's attorney about giving one. He also indicates that he did not wish to talk to his own lawyers about the statement; that he wished to handle the matter himself; that Cooper's attorney advised him that "this could hurt my own case" and that although he was aware that his statement would be used against him, he wished to give a statement, which he claims was true. Appellant then swore to this statement on April 13, 1992. (See Exhibit A, p. 3)

III.

In the Initial Brief of Appellant, Appellant raises two guilt phase issues. These are found in Arguments II and III.

respectively. (See Initial Brief of Appellant at pp. 9-29). In Argument II, Appellant claims the trial judge erroneously admitted evidence of (1) his involvement in a burglary two weeks before the murder, during which he acquired a shotgun the State contended was the murder weapon, and (2) his disposition of the murder weapon on October 6, 1989, in exchange for drugs. He predicates his argument upon the alleged lack of credible evidence connecting him with the murder. (See Initial Brief of Appellant at pp. 9-22). In Argument II, he assets that the trial judge erred by excluding evidence that the victim was allegedly involved in a conspiracy to smuggle drugs into CCI and that she was a prostitute. In part, Appellant maintains on appeal that "in the context of this evidence further confirming Cooper's guilt of the crimes, Appellant's guilt would have appeared less plausible. The fact that Kimberly Quinn had conspired to smuggle drugs with Cooper and others was, furthermore, 'so ultimately connected with the crimes charged that its introduction was appropriate to complete the story of the crime.' The exclusion of the evidence, on the one hand, created the illusion that the State's case against Appellant was stronger than it was and, on the other, denied Appellant the opportunity to present "a complete defense.'" (Initial Brief of Appellant at p. 29) (Citations omitted). (See also Initial Brief of Appellant at pp. 23-29)

IV.

The State has filed an Initial Brief of Respondent on June 25, 1993, contemporaneous with this Motion, in which Respondent submits that Appellant's claims in his Arguments II and III are without merit. However, based upon Appellant's sworn statement, admitting his guilt, Respondent would respectfully ask this Court to issue an Order striking these arguments. In support of its position, Respondent would rely upon this Court's prior decisions in State v. Whetsell, 276 S.C. 295, 277 S.E.2d 891 (1981); State v. Sroka, 267 S.C. 664, 230 S.E.2d 816 (1976); and State v. Patterson, 263 S.C. 176, 209 S.E.2d 39 (1974).

In Patterson, the defendant was convicted of murder and appealed. On appeal he raised a contention that the trial judge erroneously failed to instruct the jury in the lesser offense of voluntary manslaughter. While his appeal was pending, Appellant testified at the trial of his alleged co-defendant. In his sworn testimony, Patterson claimed that he was the triggerman. On appeal, this Court held that "[i]f there was any error in the court's refusal to submit involuntary manslaughter, which we do not concede, Appellant has waived the error by his subsequent explicit testimony." 263 S.C. at ___, 209 S.E.2d at 41.

This Court in Patterson further held that the trial judge did not abuse its discretion by allowing the State to add Patterson's subsequent sworn testimony to the transcript of

record and it refused to address several other issues which, "if maintained, could only result in the futility of another trial of a defendant who is inextricably tied to the death weapon and who, since his connection has freely and voluntarily declared his guilt in a most solemn fashion." Id.

In the subsequent case of Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981), the Appellant had brought an action for Post-Conviction Relief, under S.C. Code Ann. §17-27-10, et. seq. (1985). They were granted relief on the basis of trial counsel's alleged ineffectiveness for failing to make a motion to suppress evidence. On appeal, the Court held that the guilty plea acted as a waiver of the alleged Fourth Amendment violation. The Court further held that ". . . review of a trial error is unnecessary where a defendant admits in open court after his conviction that he is guilty." Id., citing State v. Sroka, supra.

Therefore, in light of Whetsell, Sroka, and Patterson, the State would ask this Court to strike Arguments II and II from the Initial Brief of Respondent. A retrial in the guilt phase of this case would be a futile act, since Appellant has freely and voluntarily admitted his guilt in a sworn statement, although fully aware of the effect his statement would have, as well as his right to counsel. See, State v. Patterson, supra. See also, State v. Whetsell, supra; State v. Sroka, supra. In the alternative, the State would ask this Court to allow it to supplement the Record on Appeal by adding

the affidavit hereto and having this Court consider the same with regard to Arguments II and II.

WHEREFORE, Respondent would respectfully move this Court for an Order striking Arguments II and II from the Initial Brief of Appellant: or, in the alternative, for an order allowing the State to supplement the Record on Appeal, by including the April 11, 1992 statement of Appellant; and for such other and further relief as this Court may deem fair and just.

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

HAROLD M. COOMBS, JR.
Senior Assistant Attorney General
Chief, Criminal Appeals Section

WILLIAM EDGAR SALTER, III
Assistant Attorney General

HONORABLE DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

By: 
William Edgar Salter, III

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Lexington County

The Honorable Ralph King Anderson, Jr., Circuit Court Judge

THE STATE ,

Respondent,

v.

ROBERT H. SOUTHERLAND,

Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the within Motion to Strike All Guilt Phase Issues From Initial Brief of Appellant or, in the Alternative to Supplement Record on Appeal on Appellant by depositing a copy of the same in the United States mail, addressed to his attorney of record, Joseph L. Savitz, III, 1122 Lady Street, Suite 940, Columbia, South Carolina, 29201. I further certify that all parties required to be served have been served. This 25th day of June 1993.

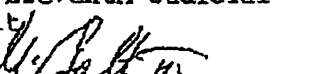
T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

HAROLD M. COOMBS
Senior Assistant Attorney General
Chief, Criminal Appeals Section

WILLIAM EDGAR SALTER, III
Assistant Attorney General

HONORABLE DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

By: 
William Edgar Salter, III

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

STATEMENT OF ROBERT SOUTHERLAND

April 11, 1992

RS

The Wednesday before Kim Quinn was killed, Red Farmer called Tony. I was at Tony's house when Red called. I don't know whether Red said anything to Tony about a check, but I do know that he was looking for some reefer when he called Tony. Tony gave the phone to me. Red told me that this girl was getting a check, and that she wanted to buy a half pound of reefer. I said, "Yeah, I can arrange to get whatever she wants." I was under the impression that she was going to have cash. We were talking around the price. I told him that I'd have to get back with him. He said he'd call back and I told him that I would let him know something for sure.

After talking to Red that Wednesday night, I met up with Gerald LeGrand at the McDonald's near Dutch Square around 9:00 or 10:00 p.m. He wanted me to do it the next day. I was driving Tony's car at that time. I'd been driving it for a long time. LeGrand had a dude with him named Chico when I met him at McDonald's. The guy looked like Tony. He wasn't quite as heavy-set as Tony but he looked almost like him. Chico was someone that Farmer and LeGrand knew. They were all mad at Tony because he wouldn't lend them any more money after he got married. I guess he needed his money because he had four young 'uns to support. LeGrand said that Chico knew where she lived. He said to meet up with him the next day and Chico would show me where she was.

On Thursday morning I met Chico at the Shire poolroom in Triangle City. Chico said that Red wanted me to call him. I called Red on the phone from the Fastfare on Leaphart Road where Brenda works. I guess it was at the schoolhouse number. It was the number that Brenda gave me. I told Red that I could get the reefer. I told him the price was 800 bucks. Then he said that "she'd been fucking up a lot of people's dope." A lot of people didn't feel too good about her. She'd been "stepping in" people's cocaine, according to Red. That means that she'd been cutting the cocaine. Red said, "You could kill her." He said I could just take the money and everything. He told me that she'd killed her young 'un where it was supposed to be an accident. She did it to get the insurance money, so that she could buy more drugs.

After I called Red, Chico showed me where the house was. This was around 11:00 a.m., maybe 11:30. I was still driving Tony's car. We smoked reefer. I looked at all the possible ways to go into her house, around the back, and so on. I called her three times. The first and last time I got her answering machine. The middle time she picked up the phone and I acted like I'd got a wrong number.

RS

After watching the house for a while we rode off and went

RS down to Piggy Park to get something to eat. We came back and looked at her house again. Red had said that she had a boyfriend who might be living there with her, so I wanted to check it out to be sure that he wasn't around. I told Chico to tell LeGrand that I would do it.

Red was supposed to get $500 for the information.

After watching her house I waited around. I went to a bar, and I sat around my trailer for a while. Brenda already went down to her house that day and had found out that Kim didn't have any big check. Brenda got off a little after 3:00 that day. Me and Chico went down to the Fastfare and told Brenda to go and see if she had the money. We followed Brenda down there and parked. Brenda went down to the girl's house. She was there about 15 or 20 minutes. We met Brenda in the Post Office parking lot. She said that she didn't have the check cashed--she was getting the big money the next Tuesday. Brenda said she did have the money for the reefer. After she told me that she left and went on home or wherever she went. I took Chico back to the Shire. He was driving a dirty white Volkswagen. I didn't see him again after that.

I went back over there to Kim Quinn's house at 12:30 or 1:00 a.m. that night. The front porch light was on and the door was open. I just walked up there. I guess Red had already talked to her. She invited me in. We started smoking reefer that I had brought with me. Then I hit her in the chin with my fist. She went down. Brenda had told me that Kim had been doing morphine for a few days. I guess that's why she went down pretty easy. I hit her again. Her daughter was sleeping right in the next room. She didn't wake up, thank God. I was by myself when I did this.

Kim was unconscious. I picked her up and put her in the front seat of the car. Why someone didn't see me I don't know. Then I drove out to the pond. She started moaning. I had her pocketbook. There was $800 in cash in the pocketbook, some 60 Xanax, and about 12 of them generic Valiums. Also a welfare check. The welfare check was folded. There was a highway department ID. There wasn't any wallet, though. If she had a wallet it must have fallen out of her pocket.

First I was going to drown her. But I had a shotgun in the car. It was my shotgun. I thought about how she had killed her young 'un to get money for drugs. She deserved it. I shot her in the back. She was laying on the ground on her left side. She was breathing heavy. I was about 6 feet away and I popped another one. I hit her in the back of neck. Joel Sexton doesn't RS

know anything about gunshot wounds. I stood back and pumped two more rounds in her head. These were not close wounds. I stood back to do it. The last gunshot probably just hit the top of the head.

I can produce the rings and the shotgun.

Why I chopped her hands and feet off I'll never know. I tried to chop off her head. That blood and liquid looking kind of stuff started slinging so I stopped. I hit her once in the back of the neck with the axe. The blade was dull and it didn't do anything. I was having trouble chopping the leg because of the pants, so I pulled the pants off, then chopped the other foot off. Then when I done that I grabbed the stumps and pulled her. Put the branches and the log on her, and then the chair that was up by the steps of the cabin. Put all that on top of her. I got a plastic gas can out of the trunk of the car. I felt like she had burned her son, so she should burn too. I poured the gas on her and put a match to it. The fire started going up into the bush, so I gathered everything up and got out of there.

The deal was that if anything came down over this they (Red and LeGrand) were going to blame Tony. They were mad at Tony because he wouldn't lend them any more money. That's what they told me, anyway. Their reason I don't know. When I was arrested I made a statement putting this on Tony because that's what everyone had planned to do. The statement that I made to the police was not true. I knew where everything was because I had thrown them there myself, not because Tony had told me anything.

Anyway, that Friday morning I went over to Tony's around 6:00 or 7:00 a.m. I left Tony's about 8 or 8:30. I told him I had something to do. I told him that I'd meet him at my trailer at South Congaree. I went on down to the bank in Cayce and cashed the welfare check. I was by myself when I cashed the check. I was still driving Tony's Cougar. After I cashed the check I went back to the trailer. Tony came over and we went over to Lexington and talked to the manager of the apartment where we had a bid on repairing some damage from Hugo. Then we drove around. We went to the office where we usually worked out of. That afternoon Tony went on home. That night around 8:30 or 9:00 I went back to McDonald's at Dutch Square. I met LeGrand there. I gave him $200. They asked about some reefer. I told them that she was dead.

RS

Altogether, I got about $1200 worth of money, Valium, and Xanax. I ate the pills myself.

RS

I put her hands and feet in a bag and threw them in the creek. I know where the rings and the shotgun are. I am willing to take the police to find them, but I want to have someone with us when we go.

Tony Cooper didn't have anything to do with this. I have made this statement because this is the truth. No one contacted me or asked me to make it. Tony Cooper has not pressured or forced me to make this statement, and neither has anyone else. After I decided to make this statement, I sent word to Tony Cooper's lawyer, David Bruck, that I wanted to talk to him. When he was here seeing another client, I asked one of the officers to get him to come and talk with me. David Bruck told me that I needed to discuss this statement with my own lawyers, because this could hurt my own case. However, I don't want to talk to my lawyers about it. I want to handle this situation myself. I understand that everything in this statement could be used against me in my own case. I still have decided to go through with this statement. I have read over this statement carefully before signing it, and everything in it is true. RS

END OF STATEMENT

Signed: Robert Southerland
ROBERT SOUTHERLAND

Sworn to and subscribed before me

This 13 day of April, 1992.

Ken Wadley L.S.
Notary Public for South Carolina

My Commission Expires 03-13-1996

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

INDICTMENT FOR

MURDER AND KIDNAPPING AND ARMED ROBBERY AND FORGERY

At a Court of General Sessions, convened on the 8th day of January, 1990, the Grand Jurors of Lexington County present upon their oath:

COUNT ONE - MURDER

That GENE TONY COOPER, JR.

did in Lexington County on or about the 5th and 6th days of October, 19 89, feloniously, wilfully and intentionally and with malice aforethought kill one Kimberly Ann Quinn by means of shooting the victim's head, neck and back with a shotgun, and that the said Kimberly Ann Quinn did die in Lexington County as a proximate result thereof on or about the 6th day of October, 1989.

COUNT TWO - KIDNAPPING

That GENE TONY COOPER, JR.

did in Lexington County on or about the 5th and 6th days of October, 19 89, unlawfully seize, and confine, inveigle, decoy, kidnap, abduct, or carry away one Kimberly Ann Quinn without authority of law and without her consent, in violation of Section 16-3-910 of the 1976 South Carolina Code of Laws, as amended.

SE-30-02

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

Tony McMahon
Deputy SOLICITOR

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

INDICTMENT FOR

MURDER AND KIDNAPPING AND ARMED ROBBERY AND FORGERY

At a Court of General Sessions, convened on the 8th day of January, 1990, the Grand Jurors of Lexington County present upon their oath:

COUNT THREE - ARMED ROBBERY

That GENE TONY COOPER, JR.

did in Lexington County on or about the 5th and 6th days of October, 19 89, while armed with a deadly weapon, to wit: a shotgun, feloniously take from the person or presence of Kimberly A. Quinn by means of force or intimidation goods or monies of the said Kimberly A. Quinn, such goods or monies being described as: assorted rings, check made payable to Kimberly Quinn, U.S. currency, and a South Carolina Indentification Card.

COUNT FOUR - FORGERY

That GENE TONY COOPER, JR.

did in Lexington County on or about the 6th day of October, 19 89, with intent to defraud, falsely make, forge, counterfeit, cause or procure to be falsely made, forged, or counterfeited, utter and publish as true, or wilfully act or assist in any of the foregoing, in regard to an instrument of writing, to wit: check #307084226 made payable to Kimberly Quinn, [redacted], West Columbia, dated September 25, 1989, in the amount of One Hundred Forty-Nine ($149.00) Dollars, drawn on the S.C. National Bank from the Office of State Treasurer.

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

SOLICITOR

WITNESSES

Hemer, LCSD

ARREST WARRANT NO. C560955,
C546057

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury

1/8/90

VERDICT

Foreman of Petit Jury *Date:*

DOCKET NO. 90-GS-32 -0083

The State of South Carolina,

County of LEXINGTON

COURT OF GENERAL SESSIONS

January TERM 1990

THE STATE

vs.

GENE TONY COOPER, JR.

CDR #116, 095, 137, 070

Indictment for

MURDER AND KIDNAPPING
AND ARMED ROBBERY AND
FORGERY

Donald V. Myers, Solicitor

1564

WITNESSES

Salters, WCPD

ARREST WARRANT NO. C545962,
C546055

ACTION OF GRAND JURY

TRUE BILL

Steven R Brown 1/8/90

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury *Date:*

1588

DOCKET NO. 90-GS-32 0084

The State of South Carolina,

County of LEXINGTON

COURT OF GENERAL SESSIONS

January TERM 1990

THE STATE

vs.

GENE TONY COOPER, JR.

CDR #049

Indictment for

CONSPIRACY TO COMMIT KIDNAPPING,
ROBBERY WITH A DEADLY WEAPON,
MURDER ~~AND/OR OTHER CRIMES~~

SRB

Donald V. Myers, Solicitor

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

INDICTMENT FOR

CONSPIRACY TO COMMIT KIDNAPPING, ROBBERY WITH A DEADLY WEAPON, MURDER ~~AND/OR OTHER CRIMES~~

At a Court of General Sessions, convened on the 8th day of January, 1990, the Grand Jurors of Lexington County present upon their oath:

That GENE TONY COOPER, JR.

did in Lexington County and other places, on or about the 5th day of October, 1989, and on other dates, unlawfully, wilfully, knowingly and wickedly unite, combine, agree, confederate, ban together or conspire with Robert H. Sutherland, Brenda Jean McLaurin or Phillip Gary Farmer or any combination thereof and have a tacit understanding with one another, each other and among themselves for the purpose of committing robbery with a deadly weapon of Kimberly A. Quinn; and/or to unlawfully kidnap Kimberly A. Quinn and the said Gene Tony Cooper, Jr., Robert H. Southerland, Brenda Jean McLaurin and/or Phillip Gary Farmer did any overt act(s) towards carrying out such unlawful agreement, confederation or conspiracy in violation of Section 16-3-920 of the Code of Laws of South Carolina, as amended; and/or to murder the said Kimberly A. Quinn in pursuance of said agreement and conspiracy all against the peace and dignity of the State and contrary to the statute in such cases made and provided.

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

Deputy SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Lexington)
STATE VS.)
Gene Tony Cooper)
AKA:)
Race:)
DOB:)
Address:)
City, State, Zip)
DL# SID#)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
1990 -GS- 32 - 0083
A/W#: A560955
Date of Offense: 10-5-89
S.C. Code §: 16-3-10
CDR Code #: 0 1 1 1 1 6
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Murder
in violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0 1 1 1 1 6
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
~~The plea is the result of Negotiations or Recommendation~~, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

B. Hamm, Jr. — Solicitor
Defendant
David P. Bruce — Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of LIFE days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of ____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms:
☐ set by SCDPPPS
Recipient:

PTUP _____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other:

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211(A)(1) (Conv. Surcharge)	$100	$100
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§73.3, 1B TP (Law Enforce. Funding)	$25	$25
§33.7, 1B TP (Drug Court Surcharge)	$100	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$125

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

Ruth A Caraway — Clerk of Court/Deputy Clerk
Court Reporter: S Shepard

PRESIDING JUDGE: D. J. Pope
Judge Code: 0 1 1 0 1 8
Sentence Date: 6/1/06

White – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
COUNTY OF Lexington)
STATE VS.)
Gene Tony Cooper)
AKA:)
Race:)
DOB:)
Address:)
City, State, Zip)
DL# SID#)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
1990 -GS- 32 - 83
A/W#: C546057
Date of Offense: 10-5-89
S.C. Code §: 16-3-910
CDR Code #: 0 1 0 1 9 1 5
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Kidnapping
in violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 0 1 0 1 9 1 5
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
~~The plea is:~~ ☐ ~~Without recommendations or Recommendation~~, ☒ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

T. Hamm Rolly — Solicitor
Defendant
David J. Bruck — Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☐ **State Department of Corrections**, ☐ **County Detention Center**, for a determinate term of _____ days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms:
☐ set by SCDPPPS
Recipient:

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§73.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
§33.7, 1B TP (Drug Court Surcharge)	$100	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$125.00

PTUP _____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning
$ _____ paid to Public Defender Fund
Other: No sentence because the defendant was sentenced pursuant to 16-3-20 (murder) and 16-3-910 says not to sentence on Kidnapping.
☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

Bill A Conway — Clerk of Court/ Deputy Clerk
Court Reporter: S Hyatt

Cooper — PRESIDING JUDGE
Judge Code: 0 1 1 0 1 8
Sentence Date: 6/1/06

White – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
COUNTY OF Lexington)
STATE VS.)
Gene Tony Cooper)
AKA:)
Race:)
DOB)
Address:)
City, State, Zip)
DL# SID#)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
1990 -GS- 32 - 83
A/W#: 1990-GS-32-83
Date of Offense: 10-5-89
S.C. Code §: 16-11-330
CDR Code #: 01 1 3 19
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Armed Robbery
in violation of §16-11-330 of the S.C. Code of Laws, bearing CDR Code # 01 1 3 19
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor Defendant Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms:
☐ set by SCDPPPS
Recipient:

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211(A)(1) (Conv. Surcharge)	$100	$100.00
§14-1-211(A)(2) (DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§73.3, 1B TP (Law Enforce. Funding)	$25	$ 25.00
§33.7, 1B TP (Drug Court Surcharge)	$100	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$125.00

PTUP _____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning
$ _____ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $600 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk
Court Reporter:

PRESIDING JUDGE
Judge Code: 011018
Sentence Date: 6/1/06

White – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA)
COUNTY OF Lexington)
STATE VS.)
Gene Tony Cooper)
AKA:)
Race:)
DOB:)
Address:)
City, State, Zip)
DL# SID#)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:
1998 -GS- 32 - 0089
A/W#: C-595962
Date of Offense: 10-5-97
S.C. Code §: 16-17-910
CDR Code #: 0 1 0 1 4 1 9
☐ CASE RESTORED
SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Conspiracy Commit Gun Robbery
in violation of § 16-17-910 of the S.C. Code of Laws, bearing CDR Code # 0 1 0 1 4 1 9
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is ~~pursuant to Negotiation or Recommendation~~, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor Defendant Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: $_____ plus 20% fee: $_____
Payment Terms:
☐ set by SCDPPPS
Recipient:

*Fine:		$
§14-1-206 (Assessments 107.5%)		$
§14-1-211 (A)(1) (Conv. Surcharge)	$100	$100.00
§14-1-211 (A)(2) (DUI Surcharge)	$100	$
§56-5-2995 (DUI Assessment)	$12	$
§ 35.13 (Public Def/Prob)	$500	$
§73.3, 1B TP (Law Enforce. Funding)	$25	$25.00
§33.7, 1B TP (Drug Court Surcharge)	$100	$
§50-21-114(BUI Breath Test Fee)	$50	$
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$125.00

PTUP
_____ days/hours Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol Testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $_____ beginning
$_____ paid to Public Defender Fund
Other:

☐ Appointed PD or appointed other counsel, §35.13 TP Requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk
Court Reporter: D Shepherd

PRESIDING JUDGE
Judge Code: 0 1 1 0 1 8
Sentence Date: 6/1/06

White – Clerk *Green* – Corrections *Canary* – Probation *Pink* – Defendant SCCA/217 (7/2003)

ORIGINAL

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 2nd, 2009

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

ORIGINAL

FORM 5

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF Lexington) 2013 JUN -5 P 1:13

)

Gene Tony Cooper Jr 084279) BETH A. CARRIGG

Full name and prison number (if any) of Applicant.) CLERK OF COURT LEXINGTON S.C.

) 2013CP3201929

v.) APPLICATION FOR

) POST-CONVICTION RELIEF

State of South Carolina)

)

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 SCDC McCormick Correctional Institution
2. Name and location of Court which imposed sentence Lexington County
3. Name(s) of co-defendant(s) (if any) Robert Bo Sutherland & Red Farmer
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
   - (a) _____
   - (b) _____
   - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
   - (a) June 1, 2006 Life + 25yrs + 5 ?
   - (b) _____

Revised 3/2003

(c) _____

6. Check whether a finding of guilty was made:

FILED
2013 JUN -5 P 1:13
BETH A. CARRICO
CLERK OF COURT
LEXINGTON SC

(a) after a plea of guilty _____

(b) after a plea of not guilty Jury Verdict Guilty

(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. SC Court of Appeal

ii. SC Supreme Court

iii. US Supreme Court

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

i. DENY

ii. DENY

iii. DENY

(c) the date of each such result:

i. Nov 2009

ii. Nov 7, 2012

iii. May 13, 2013

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

i. _____

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) 1 Volation US Const Amend VI | 2 Volation Amend XIV

(b) 3 Volation Amend VIII | 4. Volation Amend V

(c) 5 Volation US Const Article III Section 3

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

(a) 1 Ineffective Assistance of Counsel for Defense

(b) Impair Attorney ability = Court not enforce

(c) Court Orders to Speedy Trial = Back of Page →

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

(a) any petition in a State Court under South Carolina Law? _____

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

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. _____

A:1 Volation of US Const Amend VI

FILED
Apr 15 2005 Judge sign Court Orders for
2013 JUN Prosecution Donnie Myers have Jury Trial in 2005
and if any Defence in 30 days
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC
2005 Prosecution Donnie Myers was
ARREST for DUI = Judical Fraud
Two Time Court Orders Volated in Death Peanlth Case
Volation Speed Trial = Volation Confront Accusers & Inpartial Jury

A:2 Volation US Const Amend XIV
Duc Process of Law = Equal Protection of LAW

B:3 Volation of US Const Amend VIII
Cruel and unusual = Torture Not Enforce Two
Court Orders in Death Peanlty Case on "Mind"!

B:4 Volation of US Const Amend V
Duc Process of law come before the Total
Destruction of Person life = Judical Torture

C:5 Volation of US Const Article III Section 3
Robert Bo Southerland Confession in Open Court
Establish Iegally with in Consitution of the
United State By Judge West Brooks.
Prosecution SC. Knowingly pay Southerland
Purjury in Jury Trial Change his Confession
with Deal = Judical Sponsered Purjury

May 2006 Jury Trial the long delay Inpain Attorney
professional ability Volation Speed Trial duc process of law
Confront Accuser Red Farmer & Inpartial Jury, judgement
formed in Volation of Consitution of United States

Back of Page 4

Chief Justice Toal recused herself from this case! Then how can Chief Justice Toal appoint Judge Daniel F. Pieper if one is a conflict of interest Both involvment are conflict of interest!

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?

_____

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) _____

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

(a) your arraignment and plea? _____

(b) your trial, if any? Yes FILED

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes 2012 JUN -5 P 1:13

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

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

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

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

i. David Bruck = Jury Trial: ph(540)458-8188

ii. Robert Dudek = Appeal: ph(803)734-1330

iii. _____

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

i. David Bruck= _____

ii. Robert Dudek= _____

iii. _____

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

Dismissal of Charges: Only Possible Remedy

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

NO

ORIGINAL

2013CP3201929

STATE OF SOUTH CAROLINA)
)
County of)

VERIFICATION

I, , 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.

SWORN to and subscribed before me this 03 day of June, 2013

(L.S.)
Notary Public

My Commission Expires: 12.16.2016

FILED
2013 JUN -5 P 1:13
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

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

I, , 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 03 day of June, 2013.

Notary Public

My Commission Expires: 12/16/2019

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON Gene T. Cooper, S.C.D.C. No. 084279, Applicant, v. State of South Carolina, Respondent.	)	IN THE COURT OF COMMON PLEAS THE ELEVENTH JUDICIAL CIRCUIT Case No. 2013-CP-32-1929 **RETURN**

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed June 5, 2013 would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was true bill at the January 1990 term of the Court of General Sessions for Lexington County for Murder, Kidnapping, Armed Robbery, Forgery (1990-GS-32-0083), and Conspiracy to Commit: Kidnapping, Robbery with a Deadly Weapon, and Murder (1990-GS-32-0084). On February 11-22, 1991, Applicant proceeded to trial after which he was found guilty of Murder, Kidnapping, Armed Robbery, and Conspiracy to Commit Armed Robbery, for which he was sentenced to death.

Applicant appealed his conviction and sentence and the Supreme Court of South Carolina reversed Applicant's conviction only for Murder and his death sentence on January 10, 1994. State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994). On September 4, 1995, Applicant filed an application for Post-Conviction Relief, attacking the remaining charges. The PCR court granted

relief on December 3, 1998. Respondent appealed the PCR court's ruling. On August 12, 2002, the South Carolina Supreme Court upheld the PCR judge's decision. It thereafter remanded the matter to Circuit Court. Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002).

Applicant filed a speedy trial motion in order for his remanded case to be reheard. On August 18, 2003, the Honorable Marc H. Westbrook heard the first motion. Applicant was represented by David Bruck, Esquire, and Robert Lominack, Esquire. A second speedy trial hearing was held on February 15, 2005 before the Honorable William P. Keesley. David Bruck, Esquire, again represented Applicant. A final speedy trial motion was heard on July 15, 2005 before Judge Keesley. David Bruck, Jack Duncan, and Stuart Andrews, Jr., Esquires, represented Applicant. Subsequently, a motion to dismiss hearing was held on February 8, 2006 before the Honorable Daniel F. Piper. David Bruck and Jack Duncan represented Applicant.

On May 22 – June 1, 2006, Applicant's case was called to trial before the Honorable Daniel F. Piper, and a jury. David Bruck, Jack Duncan, and Stuart M. Andrews, Jr., Esquires, represented Applicant. At the conclusion of the trial, the jury found Applicant guilty of Murder, Armed Robbery, Kidnapping, and Conspiracy to Commit Armed Robbery. On June 1, 2006, Judge Pieper sentenced Applicant to life imprisonment for Murder, twenty-five (25) years for Armed Robbery, and five (5) years for Criminal Conspiracy.[1] The South Carolina Court of Appeals affirmed Applicant's convictions. State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009). The Supreme Court dismissed Applicant's Writ of Certiorari on November 7, 2012. State v. Cooper, No. 27184 (S.C. November 7, 2012). The Remittitur was issued on November 27, 2012. Applicant appealed the decision to the United States Supreme Court. The United States Supreme Court denied Applicant's Writ of Certiorari on May 13, 2013.

[1] Applicant was not given a sentence for the Kidnapping conviction because according to the sentencing sheet filled out by Judge Pieper, "No sentence because the defendant was sentenced pursuant to 16-3-20 (murder) and 16-3-910 says not to sentence on kidnapping."

II.

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

1. Ineffective Assistance of Counsel.
2. Due Process Violations of US Constitution, in that;
   a. "Sixth Amendment violation for speedy trial."
   b. "Fourteenth Amendment violation of due process of law."
   c. "Eighth Amendment violation for cruel and unusual punishment."
   d. "Article III, Section 3 violation for prosecution knowingly paying Robert Bo Southerland for is testimony, and Chief Justice Toal appointing Judge Pieper was a conflict of interest."

III.

Applicant's first claim is an allegation of ineffective assistance of trial counsel. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption

in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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

IV.

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

meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code '17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

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

VIII.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

Dec. 9th, 2013

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON GENE T. COOPER, # 084279 Applicant, vs STATE OF SOUTH CAROLINA, Respondent	IN THE COURT OF COMMON PLEAS IN THE ELEVENTH CIRCUIT 2013-CP-32-1929 AFFIDAVIT OF SERVICE BY MAIL

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

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

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

Kristy G. Goldberg, Esq.
1720 Main St. Ste. 301
Columbia, SC 29201

DATED this 9th day of December, 2013

Troyeshi Brailey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA) **COUNTY OF LEXINGTON)** **)** **GENE TONY COOPER)** **SCDC # 084279)** **Applicant,)** **)** **vs.)** **)** **)** **STATE OF SOUTH CAROLINA,)** **Defendant.)**	**IN THE COURT OF COMMON PLEAS** **2013-CP-32-1929** **AMENDED APPLICATION FOR POST CONVICTION RELIEF**

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows:

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

(a) Ineffective assistance of trial counsel for failing to request a continuance to ensure the attendance of witness Red Farmer as an in-person trial witness.

(b) Ineffective assistance of trial counsel for failing to request that the Court exclude testimonial evidence from Red Farmer.

(c) Ineffective assistance of trial counsel for failing to object and conceding to allowance of the Applicant's prior housebreaking and grand larceny convictions and introducing information regarding the Applicant's sentence on those prior convictions.

(d) Ineffective assistance of counsel for failure effectively challenge the testimony regarding the photo identification by Dana Harley.

(e) Ineffective assistance of counsel for failure to object to the speculative statement when witness Rick McDermott testified that the log was "too heavy for one person to lift alone," which the state was then allowed to address in closing argument over objection. Tr. 1103 and 1146

(f) Ineffective assistance for failure to assist in having the Applicant submit his DNA for comparison to the available DNA evidence in this matter.

(g) Ineffective assistance of counsel for failure to object when the State argued facts not in evidence. Tr. 1204.

(h) Ineffective assistance of counsel for allowing the jurors to be aware of prior trial proceedings.

(i) Ineffective assistance of counsel for failure to call Applicant to the witness a second time to provide context and substance regarding his interview with Investigator Edward Hite as suggested by the Court. Tr. 1043

(j) Ineffective assistance of counsel for failure to object when an out-of-court statement by the Applicant's mother was elicited for the truth of the matter and no hearsay objection was raised. Tr. 1061

(k) Ineffective assistance for failure to effectively cross-examine Investigator Hite.

(l) Ineffective assistance of counsel for failure to recuse himself from representation of the Defendant when he became interjected as a witness in the trial.

(m) The cumulative effect of trial counsel's errors constitute ineffective assistance of counsel.

Kristy Goldberg
Attorney for Applicant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 10 day of November, 2017

STATE OF SOUTH CAROLINA) **COUNTY OF LEXINGTON)** **)** **GENE TONY COOPER,)** **SCDC # 084279)** **Applicant,)** **)** **vs.)** **)** **)** **STATE OF SOUTH CAROLINA,)** **Defendant.)**	**IN THE COURT OF COMMON PLEAS** **2013-CP-32-1929** **CERTIFICATE OF SERVICE**

I certify that on this date I served an Amended Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this application to the Office of the Attorney General via U.S. Postal delivery.

Kristy Goldberg
Attorney for Applicant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This ~~15th~~ 16th day of November, 2017

STATE OF SOUTH CAROLINA) COUNTY OF LEXINGTON)) Gene Tony Cooper, SCDC # 084279,) Applicant,)) v.)) STATE OF SOUTH CAROLINA) Respondent.)	IN THE COURT OF COMMON PLEAS 2013-CP-32-1929 SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF

1. Place of Detention: McCormick Correctional Institution.

2. Name and location of Court which imposed sentence: Lexington County Court of General Sessions, Lexington County Courthouse, Lexington, South Carolina.

3. Name(s) of co-defendant(s): Robert "Bo" Southerland, Phillip "Red" Farmer.

4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
   a. 90-GS-32-083 – Murder, Armed Robbery, Kidnapping.
   b. 90-GS-32-084 – Conspiracy to Commit Armed Robbery

5. The date upon which sentence was imposed and the terms of the sentence:
   a. June 1, 2006
      i. Armed Robbery – 25 years
      ii. Murder – life sentence
      iii. Kidnapping - no sentence
      iv. Conspiracy - 5 years

6. A finding of guilty was made after a trial by jury.

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

8. If you answered "yes" to (6), list
   a. The name of each Court to which you appealed:
      i. South Carolina Court of Appeals
      ii. South Carolina Supreme Court
      iii. United States Supreme Court.
   b. The result in each such Court to which you appealed:
      i. Affirmed
      ii. Dismissed Writ of Certiorari
      iii. Denied Writ of Certiorari

c. The date of each such result:
   i. 2009
   ii. November 7, 2012
   iii. May 13, 2013
d. If known, the citations of any written opinion or orders entered pursuant to such results:
   i. State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009)
   ii. State v. Cooper, No. 27184 (S.C. November 7, 2012)
   iii. N/A

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

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

a. Counsel was ineffective in failing to request a continuance to ensure the attendance of witness Red Farmer as an in-person trial witness.

b. Counsel was ineffective by unreasonably admitting impeachment evidence against Red Farmer which was more harmful to the Applicant's case than helpful.

c. Counsel was ineffective in conceding to allowance of the Applicant's prior housebreaking and grand larceny convictions and failing to object based upon the fact that they were overly prejudicial in that they are similar to the facts underlying the charges at issue in trial. Further, counsel was ineffective in that he unreasonably introduced information regarding the Applicant's sentence on those prior convictions including the fact that he had spent time in prison, all of which was unnecessarily prejudicial.

d. Counsel was ineffective in failing to obtain an instruction from the Court that witness Robert Southerland should not be allowed provide testimony introducing evidence regarding the Applicant's prior Armed Robbery convictions which were inadmissible and prejudicial.

e. Counsel was ineffective by failing to properly and effectively challenge the testimony regarding the photo identification by Dana Harley.

f. Counsel was ineffective in failing to object to the speculative testimony by Rick McDermott that the log was "too heavy for one person to lift alone," which the state was then allowed to address in closing argument over objection. Tr. 1103 and 1146.

g. Ineffective assistance for failure to assist in having the Applicant submit his DNA for comparison to the available DNA evidence in this matter.

h. Counsel was ineffective in failing to object when the State argued facts not in evidence. Tr. 1204, lines 4-6.

i. Counsel was ineffective in failing to call the Applicant as a rebuttal witness to provide context and substance regarding his interview with investigator

Edward Hite as suggested by the Court. Tr. 1043.

j. Ineffective assistance for failure to effectively prepare for the direct examination of the Applicant and the cross-examination of investigator Hite.

k. Ineffective assistance of counsel for failure to recuse himself from representation of the Defendant as he was a necessary witness in the trial.

l. The cumulative effect of trial counsel's errors constitute ineffective assistance of counsel.

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

a. As described above.
b. As described above.
c. As described above.
d. As described above.
e. As described above.
f. As described above;
g. As described above.
h. As described above.
i. As described above.
j. As described above.
k. As described above.
l. See all prior allegations.
m. Applicant reserves the right to Amend this Application with the specific facts underlying each allegation for post-conviction relief

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 petitions in State or Federal Courts for habeas corpus or post-conviction relief? No.
c. Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in # 7? 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: n/a.
b. The name and location of the Court in which each was filed: n/a.
c. The disposition thereof: n/a.
d. The date of each such disposition: n/a.
e. If known, citations of any written opinions or orders entered pursuant to each such disposition: n/a.

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: n/a.
    b. The proceedings in which each ground was raised: n/a.

16. If any ground set forth in (9) 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: All issues in Section (9) are being presented for the first time in the context of claims of ineffective assistance of counsel during the jury trial.

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

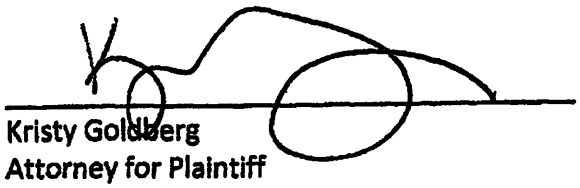
    a. Your arraignment and plea? Yes.
    b. Your trial, if any? n/a.
    c. Your sentencing? Yes.
    d. Your appeal, if any, from the judgment of conviction or imposition of sentence? n/a.
    e. Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction which you filed? n/a.

18. If you answered "yes" to one or more parts of (17), list:
    a. The name and address of each attorney who represented you:
        i. David Bruck, Washington & Lee School of Law, Sydney Lewis Hall, Lexington Virginia 24450
        ii. John Duncan, 137 E. Butler Street, Ste. 3, Lexington, SC 29072
        iii. Stewart Andrews, Nelson Mullins, PO Box 11070, Columbia, South Carolina, 29211
        iv. Robert Dudek, S.C. Commission on Indigent Defense, PO Box 11589, Columbia, SC 29211
    b. The proceedings at which each such attorney represented you:
        i. Trial and sentencing
        ii. Trial and sentencing
        iii. Trial and sentencing
        iv. Appeal

19. State clearly the relief you seek in filing this application: Conviction reversed with remand for new trial..

20. Are you now under sentence from any other court that you have challenged? No.

Respectfully submitted,



Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 29 th day of November, 2017

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS
Gene Tony Cooper, SCDC # 084279, Applicant,	2013-CP-32-1929
v.	CERTIFICATE OF SERVICE
STATE OF SOUTH CAROLINA Respondent.	

I certify that on this date I served the Second Amended Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this Notice to the State Attorney General's Office, by delivering a copy of this motion via U.S. Mail said copy to the Office of the Attorney General, Post Office Box 11549, Columbia South Carolina 29211.

Kristy Goldberg
Attorney for Plaintiff

Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
Phone (803) 667-6633
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 29 th day of November 2017

State of South Carolina — Court of Common Pleas

County of Lexington — Eleventh Judicial Circuit

Gene Tony Cooper,
Applicant,
vs.
State of South Carolina,
Defendant.

Transcript of Record

2013-CP-32-1929

December 11, 2017

Lexington, South Carolina

B E F O R E:

The Honorable J. Cordell Maddox, Jr., Judge

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

Kristy G. Goldberg, Esquire
On behalf of the Applicant

William Edgar Salter, Senior Assistant Attorney General
On behalf of the State of South Carolina

Stacy S. Johnson
Circuit Court Reporter

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EXHIBTS

NO EXHIBITS WERE INTRODUCED

(Whereupon, the following proceedings were held December 11, 2017, beginning at 2:50 P.M.)

THE COURT: All right. Yes, sir.

MR. SALTER: Good afternoon. This is Gene Tony Cooper versus the State of South Carolina. 2013-CP-32-1929.

Mr. Cooper filed his original CPR on June 5th of 2013. He was originally indicted in January 1990 in Lexington County for murder, kidnapping, armed robbery, forgery and conspiracy to commit a kidnapping, robbery -- excuse me -- kidnapping, robbery with a deadly weapon and murder. He was tried on February 11th through the 22nd, 1991, and was -- he was convicted of murder, kidnapping, armed robbery and conspiracy to commit armed robbery and received a death sentence.

He appealed his convictions and death sentence and the South Carolina Supreme Court reversed his murder conviction on January 10, 1994. On September 4, 1995, he filed his first PCR application, which he attacked the remaining charges, the noncapital counts. The PCR judge granted relief and the State of South Carolina through myself appealed that decision and the South Carolina Supreme Court upheld his PCR judge's decision on August 12, 2002.

There were several motions hearings held in connection with his motion for a speedy trial, which was

ultimately denied, and on May 22nd through June 1st, 2006, he received a jury trial before the Honorable Daniel Pieper and Mr. Bruck, who's in the courtroom today, and Mr. Duncan, who's in the courtroom today, and Stewart Andrews, represented him at the trial. The jury found him guilty of murder, armed robbery, kidnapping and conspiracy to commit armed robbery. He was then sentenced to life in prison for murder, twenty-five years for armed robbery and five years for conspiracy. The South Carolina Court of Appeals and the South Carolina Supreme Court denied relief on appeal. The remittitur was issued on November 28, 2012.

Again, this is a 2013-case, but unlike the ones before -- that have come before you today which had 2013 filing dates, Mr. Bruck was under an order of protection because of his involvement in another case, so.

THE COURT: Okay. And by the way -- off the record.

(Off the record discussion.)

THE COURT: Okay.

MS. GOLDBERG: Thank you, Your Honor. I have filed amended applications in this case. The most recent was the second amended application filed November 30th of 2017.

Is a copy of that in your file?

THE COURT: It is.

MS. GOLDBERG: All right. Very good.

That is -- those are the allegations we're proceeding on today; however, I am gonna withdraw allegations E, as in elephant, and G, as in golf. The remaining ones we will go forward on.

THE COURT: All right. E and G?

MS. GOLDBERG: Yes, sir.

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

MS. GOLDBERG: And without anything further, I'm gonna go ahead and call my first witness, if that pleases the Court?

THE COURT: All right. That will be fine.

MS. GOLDBERG: At this time I would call David Bruck to the stand.

THE COURT: All right.

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

(Whereupon, David Isaac Bruck was duly sworn by the Clerk of Court.)

DAVID ISAAC BRUCK,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. GOLDBERG:

Q. All right. Please state your name for the record.

A. David Isaac Bruck.

Q. Thank you, sir.

All right. Can you tell the Court about your involvement in this case.

A. Yes. I represented Tony Cooper on direct appeal starting in 1991 right after his death sentence -- conviction and death sentence.

Q. And maybe you could go even -- just to make sure the Court's aware of the procedural history in the case, go ahead and tell the Court a little bit more about the background and then how you got involved.

A. Well, if I'm remembering correctly, Mr. Cooper was arrested and charged in the fall of -- in October of 1989 and was tried, I think, in early 1991. I didn't represent him at that time. I was at that time the chief attorney of the Office of Appellate Defense and in that capacity I took over his case to handle his direct appeal, which I did.

The South Carolina Supreme Court reversed his murder conviction, but affirmed his other noncapital convictions essentially because of the rules of procedural default; that his claim on the murder conviction was -- was not defaulted because of the in favorem vitae rule that existed at the time, but his other claims were. As a result, he wanted to challenge his remaining convictions, and I represented him on that by filing an application for

post-conviction relief that was eventually granted after quite some time.

The State appealed the grant -- that was -- Judge Keesley was the post-conviction judge. The State appealed the grant of post-conviction relief and cert was granted to review that, but the Court upheld the grant of post-conviction relief. I think you already stated that that was in 2002. That's sound about right.

Mr. -- I was then appointed to represent Mr. Cooper on his retrial and the -- he wanted to have a speedy trial, we moved for speedy trial, and there was some period of further delay over our objection. We litigated the issue of speedy trial. The State moved to have me disqualified. That was denied. The State then -- Solicitor Myers said he had a conflict and withdrew, if I'm remembering correctly, and was replaced by the First Circuit Solicitor's Office, and the case eventually came on for retrial in May of 2006, Mr. Cooper was convicted, and that was the end of my representation. The Office of Appellate Defense, which I had long since left, represented him on appeal, on direct appeal, and on -- I think they petitioned for cert to the U.S. Supreme Court on the speedy trial issue, if I'm remembering correctly. I may be wrong about that. Eventually he was --

Q. So at this time -- go ahead. I'm sorry.

A. Eventually the -- his second conviction and life sentence was upheld.

Q. So at the time of his second trial in 2006, you had represented him for how many years?

A. Fifteen years.

Q. Just to acquaint this Court with the case, can you tell or describe a little bit about the facts of the case and the evidence.

A. Well, to summarize it very briefly, he and Robert Southerland, Bo Southerland, were arrested and charged jointly with having kidnapped and murdered a lady named Kimberly Quinn, and the State's theory was that this had been set up by a -- or the crime had been proposed by an inmate who they had known while they were both inmates at CCI. They were both paroled and this inmate at CCI had called them and said that she had -- Ms. Quinn had a check that could be -- that they could rob, steal from her, an insurance check, and that was according to the State's theory the motive for the crime.

And the State's case was that both these men cased the apartment where Ms. Quinn was living and then kidnapped her and took her to a remote location and killed her. They did not find the check, made some phone calls that later came into evidence, and that was essentially the case. The body was mutilated after the murder, postmortem, and burned

in an apparent effort to destroy evidence.
Q. Is this a case where there was any direct evidence -- physical evidence or direct evidence tying Mr. Cooper to the crime charged?
A. No. No, it -- as the State Supreme Court summarized the evidence -- and I think the best summary of the evidence or the most helpful one is contained in the post-conviction opinion of the State Supreme Court, and they pointed out that essentially the case rested largely on witness credibility and there was no strong or clear evidence linking Mr. Cooper to the crime.
Q. I think to quote that particular opinion that you just referenced, the Supreme Court states the only direct evidence of respondent's involvement in the crime of conspiracy came from respondent's alleged co-conspirator, Red Farmer. Does that sound accurate to that opinion?
A. Yeah, that's -- that's right. And Mr. Farmer only testified at the first trial and his testimony was admitted over our objection in transcript form at the retrial because the State did not manage to secure his presence at trial. He was serving a life sentence in Texas by that time.
Q. The State did not secure his attendance, is that what you just said?
A. Right.

Q. He wasn't present at that trial, but did the Court allow his prior testimony to be offered?
A. Yes, they did over our objection.
Q. Why was Red Farmer so important?
A. Well, he was the -- he had made the phone call to set up the crime. It was apparently his idea. At least the -- the robbery that according to the State's theory led to the murder was his idea and he had called someone at Tony Cooper's residence. It was in dispute whether he talked to Southerland or to Cooper, but he called that number and there was some back and forth communication. So he was the linchpin of the State's theory and he was the only member -- until Southerland turned State's evidence at the second trial, he was the only person who gave any direct testimony of what happened.
Q. So leading -- leading up until the beginning of the May 2006 trial, Red Farmer's testimony was the only testimony that specifically incriminated Tony Cooper. Is that fair?
A. Yes. I mean, there was circumstantial evidence that -- that the State felt or that it was alleged to corroborate his testimony in some respects, phone calls and so forth. But, yes, that was the only direct testimony.
Q. During the trial when the Court determined that Red

Farmer would not be -- the case would go forward with his testimony from the prior hearing, the judge did grant you the opportunity to request a delay or a continuance to secure Red Farmer's attendance. Is that accurate?

A. If that's what -- this case was tried eleven years ago and I've sustained many figurative blows to the head since then, so I can't say that I remember everything that's in the transcript, but if the transcript reflects that, then, yes, he gave us the opportunity. It sounds right.

Q. Do you remember -- given the importance of Mr. Farmer, do you remember why you did not agree to or request a delay in this case so that you could have him physically present in court?

A. Well, my client was asserting his right to a speedy trial and -- and we had been fighting for a speedy trial for quite some time and finally we had the trial and I have to assume -- I don't clearly remember thinking, but I have to assume that he wasn't and we weren't willing to see the trial date that we had finally secured by moving for a continuance. We felt that it was the State's responsibility to have the witnesses there and that they had not used reasonable efforts to obtain his testimony and that the prior testimony was inadmissible and that -- we hoped that if there was another conviction that the

appellate courts would agree.
Q. Now when you were preparing for trial, you prepared as though you would be able to cross-examine Mr. Farmer in person; is that right? Is that right or is that wrong?
A. We were expecting him to be there, so I have to -- I have to think that that's what we did. Everyone was expecting him to be there.
Q. What did you do to prepare for that cross-examination?
A. Well, we had gathered -- we'd investigated his life since 1989 and gathered a fair amount of evidence, documentary evidence, about his very colorful history since then, which shed -- we thought shed a great deal of adverse light on his credibility, including a different version of his own involvement in the crime that he gave during his own sentencing hearing in a Texas criminal trial where he ultimately received a life sentence for drug trafficking, and so we had -- he had told a different version of this crime under oath, and we had that. We had his -- circumstantial evidence that he had been an informant and had fled -- absconded while out on bond serving as an informant for the State in Aiken County after he was released with almost no additional time for his role in -- in Kimberly Quinn's murder, so we had an awful lot of impeachment on it.
Q. Now as far as Tony's defense in trial, what was his

defense?
A. His defense was that he didn't do it.
Q. It was complete innocence?
A. Complete innocence. He had maintained his innocence since the day of his arrest and before.
Q. It wasn't that he had thought circumstances should be mitigated to a lesser charge?
A. No, no.
Q. There was no request for that, it was complete innocence, correct?
A. No, he had insisted on his innocence for the entire seventeen years.
Q. Now one of the things that you just mentioned that you obtained regarding Mr. Farmer was his testimony from a Texas sentencing hearing, which was admitted in this trial; is that right?
A. Yes, we offered it.
Q. All right. And if the Court would give me the lenience here, I'm gonna just cite from the record -- the trial transcript record for a second, if that's okay?
THE COURT: Sure. Have you got a copy for him?
BY MS. GOLDBERG:
Q. Do you have -- well, it's on your computer probably.
A. It was on my computer. I don't have a paper copy.
Q. I've actually got this citation typed up here, so I

can give you one to read along, if you'd like. This thing has been well-loved. That's where I'm reading.

All right. I'm reading at the top of 753. This is the testimony of Red Farmer. "This guy got out on parole after being locked up seventeen years, who happened to be my cellmate, and robbed and killed a girl and told me about it. Well, SLED, which happens to stand for the South Carolina Law Enforcement Division, charged me with the same crime they just charged him for because I knew about it and I didn't tell on him. It just so happened his niece, which was my age and he's a little older than me, was coming to visit me and I called and talked to her one evening and he got on the phone and told me about it. Well, she overheard it and, excuse my French, but when -- and I'll -- it hit the fan -- I'll editorialize for the Court -- I was standing in front of it. They locked me up for conspiracy to commit murder, kidnapping and armed robbery. They said well, if you testify for us, then we'll just give you the conspiracy charge and it won't even hurt you at all. Because I still had a couple years left in prison before I could get out. Well, seeing as how extensive my record is already, I felt this was in my best interest to tell them what I knew, so I did. Well, that man got a life sentence and eventually got a death sentence questioned."

That transcript excerpt right there, what Mr. Farmer

said in Texas --

A. Yes.

Q. -- how do you believe that helped Tony at trial?

A. Well, he is omitting his own culpability. Basically makes it sound like he had just overheard this whole transaction and that he had only plead guilty -- that he wasn't guilty of anything, that he'd only pled guilty because it had absolutely no effect. And, in fact, said something about just to satisfy me, they gave him a charge which made it sound as though this was sort of part of his cover or something. I mean, it was just a -- it was a very distorted and dishonest account of his own prior testimony, which actually involved his being the prime mover in this crime and then having gotten an extraordinarily sweet deal in exchange for his testimony.

Q. This -- this testimony by Farmer still accused Tony Cooper of committing the crime, correct?

A. Right.

Q. It was a second more recent statement by Farmer that incriminated Tony once again. Is that fair?

A. Yes.

Q. Now that statement also mentions that Tony had been previously in prison for seventeen years. Is that accurate? If my notes are correct here, the very top of 753.

A. Yeah, I don't actually think that that is accurate. I don't think he served seventeen years.
Q. It also states, Mr. Farmer's statement, that Tony had been in a maximum security institution. Is that right?
A. Right.
Q. Was there any beneficial reason for the jury to know either of these things?
A. No, I guess there wasn't.
Q. Does this evidence prove Tony's innocence?
A. It doesn't prove his innocence. We thought that it impeached Farmer's credibility and I argued to the jury on that basis.
Q. Now you also challenged Farmer's credibility by offering the testimony of a lady named Kim Turner from Texas. Who was that?
A. She was an intern or an assistant to a lawyer that we had asked -- in Texas who I knew slightly and had just asked if he would interview Farmer and he brought her with him, I guess, as a witness to the conversation.
Q. Why did you call her as a witness?
A. It was --
Q. And if you -- I saw you flipping. If you wanted to look. She's around -- 884, 885 are gonna be the relevant pages.
A. I think it was mainly because Farmer implied to her

that -- he said this time I'll tell the truth if I'm recalled to testify and made it sound as if -- it was sort of anybody's guess about what his testimony would be this time, although he still told a story which was broadly consistent with his trial testimony.

Q. Ultimately Farmer -- not Farmer, Ms. Turner testified that Red was consistent with his state -- with his original testimony. That's what you just said?

A. Whatever she said. I think it was substantially like that, yeah.

Q. Did that testimony -- did her testimony go the way that you anticipated it would?

A. I don't know if it went the way on -- on -- with benefit of hindsight, I don't -- I don't think that we should have called her. I don't think we -- I think we lost more than we gained by calling her.

Q. The jury became aware that Mr. Farmer made a new statement to her three weeks before trial?

A. Yes.

Q. And that was still consistent with his original testimony from back in 1991?

A. Consistent is a judgment term, but, yeah, it was -- it was not fundamentally different.

Q. While there may be have been details that were different, did it waiver regarding Mr. Cooper's guilt?

A. Not that I can recall.
Q. Was that helpful for Tony's innocence defense?
A. As I say, on balance I don't think it was. There were things that we got from her that we wanted, but I think on balance it probably set us back. We would have done better not to call her.
Q. The solicitor's office in their closing argument actually highlighted the fact that Farmer never wavered on who committed the crime in the prior trial in 2001 or in May of that year. Does that sound fair to the closing -- your memory of the closing argument?
A. Yes.
Q. Now back in the first trial, back in 1991, Red Farmer, what would his motive have been to lie at that point in time?
A. Well, he would have been culpable for the murder if -- if he had helped to set it up, no matter who actually committed it, and so his motive -- I mean, what I argued to the jury at the second trial was that his motive -- he had an obvious motive to cooperate with the State in order to get leniency, and he got an extraordinarily lenient deal, but he also had a motive not to -- well, we argued that there was a second person that wasn't Tony Cooper with Southerland who committed this crime and that he had a motive to -- not to name that person because that person

could flip back on him, and also he appeared to have a motive or a reason for a grudge against Tony Cooper having to do with a history of drug trafficking at CCI and that Cooper, after he had gotten out, had run afoul of this drug trafficking ring or whatever by refusing to lend them money or words to that effect. I don't -- I'm testifying from memory, but it seems like that was the theory.

Q. And in the first trial in 1991, Red Farmer also -- in addition to everything you just said, also admitted to accepting a bribe to testify against Tony. Do you recall that?

A. No. Maybe the transcript will recall it better than me if it's in there.

Q. Given the fact that he had so much motive to lie in the first trial when he first testified, once you realized that he wasn't going to be testifying in person did you ever consider just leaving that testimony as it stood and not introducing the second statement -- second and third statements incriminating Tony?

A. I don't recall whether we considered it or not. You know, we found a lot of additional impeachment and thought that without that the testimony would be unchallenged, but it could well be that that would have been a better course. I can't really say.

Q. Now Tony Cooper had convictions prior to this --

these convictions. Do you remember what they were or when they were?

A. Yes, he was convicted of armed robbery and housebreaking back when he was seventeen years old along with Bo Southerland, his co-defendant, who was considerably older -- seven or eight years older than Tony.

Q. In preparation for this hearing today, have you had the opportunity to go back and look at certain excerpts of the trial transcript?

A. Yes.

Q. And we can go to the page if you need to, but I think you'll probably remember. As to what prior convictions were gonna be allowed in for impeachment purposes when Tony testified, can you tell this Court what happened with the armed robbery convictions?

A. Well, Judge Pieper excluded it. We objected to both the priors as too remote. They had occurred in 1977, which was twenty-two years before the crime, and Judge Pieper excluded the -- the armed robbery conviction because it was remote and too similar, but did not exclude the housebreaking conviction.

Q. And specifically when Mr. Cooper was on trial, one of his charges was armed robbery?

A. Yes.

Q. Okay. When you said Judge Pieper excluded it, did you really have to even argue this point or did the judge bring it up and have this opinion on his own?
A. Whatever is in the transcript is what happened.
Q. That would reflect it. Now as you just mentioned a minute ago, you were aware that Mr. Cooper and Bo Southerland were co-defendants in those prior convictions, correct?
A. They were not tried together. They were tried separately.
Q. But they had been --
A. They were.
Q. But they were convicted of the same charges?
A. Yes.
Q. Prior to Mr. Southerland's testimony in this second trial, did you anticipate him to be a difficult witness?
A. Mr. Southerland?
Q. Uh-huh.
A. Yes.
Q. Are you aware in looking back through the transcript that Mr. Southerland told the jury that Tony Cooper had been convicted of -- armed robbery convictions prior?
A. Yes, he blurted that out unresponsively to a question.
Q. Given the prejudicial nature of armed robbery convictions in a situation like this where they're clearly

not allowed for impeachment purposes, did you ever consider asking the Court in advance of Mr. Southerland's testimony to instruct him that he's not allowed to testify to Mr. Cooper's prior convictions?

A. I don't think I did consider that.

Q. Any particular reason why you didn't?

A. Probably because I didn't think of it.

Q. Now you also mentioned there was a housebreaking and, I believe, there was a grand larceny. Is that fair?

A. That sounds right.

Q. Do you recall the testimony of the victim's daughter at trial?

A. Yes.

Q. Do you recall generally what that was?

A. Yes. At the second trial, she testified if I'm -- and I -- this is by memory, I haven't gone back to read the testimony, but I seem to recall that she remembered hearing the men -- like a fight or the men coming into the house and made an identification of Mr. Cooper.

Q. She testified that two men came in and her -- and the victim would not let them in and she heard loud and angry voices.

A. Yes.

Q. Is that fair?

A. (Nods head.)

Q. And throughout the State's case, they did assert as part of all these charges that some items were stolen from the victim's house; is that correct?
A. Yes, I believe that's correct.
Q. Now Mr. Cooper wasn't charged specifically with burglary or housebreaking or grand larceny. He didn't have those charges pending as a result of these facts?
A. Right.
Q. Could the State have charged him with those charges from these facts?
A. From those facts, I think a burglary, yeah, in the nighttime, breaking in.
Q. Would you agree that those facts offered by the State are substantially similar to a housebreaking and a larceny?
A. Well, they are a burglary and a larceny, yes.
Q. Similar enough to result in prejudice as a result of the jury being aware of a prior housebreaking and larceny?
A. Well, maybe.
Q. Is there any particular reason why you didn't argue at trial that those convictions -- those prior convictions should also be kept out from impeachment because although not charged with those charges they are substantially similar?
A. I can't think of a reason, no.
Q. No particular reason that you didn't feel the need to

make the argument?
A. No.
Q. Now as I understand things, I know that I've spoken with you and the State has spoken with you prior to our hearing today, I understand that generally you're of the opinion that the trial would have necessitated evidence that Tony had been in prison previously. Just the facts of the case required --
A. Yes.
Q. -- the information that he had been in prison previously?
A. Yes.
Q. Okay. Does that necessarily mean that the jury had to know what he was in prison for?
A. No.
Q. Does that mean the jury needed to know what length of a sentence he had served previously?
A. No.
Q. Or what security level in prison he had been in?
A. No.
Q. Do you think it would have been possible for this trial to be presented factually if the jury was only aware that Bo and Tony were associates who knew each other and knew of individuals in prison? Was that possible?
A. You know, until this moment I've never thought about

that. I guess it might have been possible. It would -- it would have required some editing of Red Farmer's narrative and whether the Court would have required that, I don't know, but it could have been done.

Q. Okay. All right. I'm gonna hand you the transcript and have you look at Page 1103. This is the solicitor's closing argument. There's a line on this page where the solicitor states, quote, laid over the body was this log that I believe the testimony was as big as around -- as big around as a person and eight feet long and testimony is it was too heavy for one person to lift alone.

A. Uh-huh.

Q. Based on your understanding of the case, why would the solicitor have said that? Why was that fact important to the State's case?

A. Well, it was to -- it was to claim that the -- at least the burning of the body, the attempt to destroy the body, had to have been committed by two people, not just by one, and their theory was that the two people were Southerland and Cooper.

Q. Aside from this fact, can you think of any other evidence out there that necessitated the presence of two people versus the possibly of it just had been one?

A. Off the top of my head, no.

Q. Because there was a period of time where

Mr. Southerland claimed that he did all of this alone, correct?
A. Right.
Q. So there was nothing necessarily to dispute that or that he would have had to have had someone with him other than the statement by the solicitor?
A. Right. Now --
Q. I guess physical evidence is kind of what I'm asking, for, but --
A. Right. Yes.
Q. Now you objected to that statement in the solicitor's closing.
A. Yes.
Q. What basis did you object?
A. Well, I said that there was no testimony that the log was too heavy for two people, but you pointed out that, in fact, there was some opinion testimony from a police officer that the log was too heavy for two people.
Q. For the record, that's on Page 343 of the transcript. And when that SLED agent, McDermott, testified that he thought the log was too big for two people to lift, you did not object, correct?
A. Right.
Q. Is there any particular reason why you did not object?
A. No. I thought about that and I -- I didn't think it

was -- I cross-examined him later and established that he had no reason -- no basis for that, but it -- it was objectionable. I don't think it was -- there was no foundation laid for that opinion and -- or conclusion and I probably should have objected.

Q. And, of course, preventing that evidence from coming in at all would be preferable to just challenging it on cross-examination. Is that fair?

A. Yeah, I think that's probably right.

Q. Now I have -- I've given you the closing arguments. If you'll look at Page 1204 of the transcript, lines four through six, the solicitor says, quote -- well, the solicitor says we're talking about Mr. Cooper's wife, that she, quote, said Bo usually came to use the phone and she would -- and would never let him in. She didn't like that. Why would he have to come inside rather than if there's a phone out in the middle?

What is the solicitor's point in saying that? Based on your understanding and knowledge of the case, why -- why would that point be important at all?

A. There was a dispute as to -- as to who answered the phone, if I'm remembering correctly. Was it -- when the call was made from CCI to Tony Cooper's house, did Tony Cooper answer the phone or did Bo answer the phone, and it was our position that Bo answered the phone and he was the

one who conspired, and I think the State's theory was no, it was more likely Tony, which was Red Farmer's version.
Q. And when Mr. Cooper testified, he testified that he didn't answer that call?
A. Right, and that the phone was outside or there was an extension cord and that it could have been outside or --
Q. So the solicitor was attempting to directly impeach Tony's testimony there?
A. Yes.
Q. Or discredit Tony's testimony there might be better.
A. Right, and also -- yes, I think that's fair.
Q. And you have reviewed the transcript in preparation for today's hearing?
A. I haven't read the entire trial record. I've read the parts of it that I was directed to.
Q. Are you aware that in the testimony of Mr. Cooper's wife she does not ever at any point testify to what the solicitor said in that excerpt at any point in time?
A. I'm not aware of that.
Q. Is there any particular reason why you didn't object to that statement?
A. Well, if she didn't say that and he said that she did, then I -- I should have objected. So I don't know.
Q. Now I believe you testified earlier that you represented Mr. Cooper for fifteen years leading up to

this trial?
A. Yes.
Q. Is there anything specifically that happened at trial that you had overlooked, forgotten about, any particular mistake that was made in that regard?
A. Yeah, as I told you and Mr. Salter on Friday, the -- the testimony from Mr. Hite that was introduced in rebuttal about an inconsistent alibi that Hite said Tony had given, which was not used at the first trial, just got a little lost in the shuffle in our trial preparation and when the State pulled that out to impeach Tony and then proved it later, I'd just forgotten about it, which was -- so we were surprised by that.
Q. When you were preparing Mr. Cooper for his direct examination, did you ever go over with him any potential way to attack or explain or address that -- that statement at all or had it been forgotten about in your preparations as well?
A. As best I can recall, it had been forgotten about in my preparations. We may have made the mistake of basing our preparation too exclusively on the prior trial record. We had the statement, but it just did not pop up.
Q. Would you agree then Investigator Hite's testimony was important?
A. I think it was important, yeah.

Q. What impact do you think it made on this case?
A. Well, I can't say what impact it had on the jury, but it was not helpful that a law enforcement officer recounted an alibi that Tony had given that was not the same as the alibi that he testified to.
Q. Do you recall that the jury actually asked to rehear Investigator Hite's testimony?
A. I don't recall that, but --
Q. And for the record it's on Page 1262. And that's the only witness they asked to rehear the testimony of. What does that mean to you?
A. Well, it means that somebody at least on the jury might have thought it was important.
Q. Do you think that was a problem for Tony's case?
A. Yes.
Q. Now -- and prior to his testimony in front of the jury, you proffered a little bit of the testimony with the Court regarding your belief, and I'm quoting here but I don't know if it's a direct quote, I believe you were under the impression that he had been fired or asked to resign or there was some kind of misconduct. What is -- what happened there? Tell me what you knew at the time and what the background of that situation was.
A. At what page?
Q. Well, it's actually 1050 through 1053.

A. Well, I -- I knew that he had been involved in the Quattlebaum matter which involved a celebrated incident involving an unlawful videotaping of Mr. Duncan with his client by Quattlebaum in Lexington County, and so that was what that concerned.

Q. And that incident, generally speaking, ultimately resulted in what sort of documentation? What were you aware of? There was what kind of opinion?

A. Well, among many other things, there was a South Carolina Supreme Court opinion reversing Quattlebaum's conviction and narrating the sequence of events that led up to -- to the issue about the videotape.

Q. You were aware that Investigator Hite had been a part of that situation?

A. Yes.

Q. Did you know at that time how he had been a part of that situation?

A. Well, what I must not have recalled was that he had given an incident report -- a lengthy incident report about the entire case, which seems to have been strategically omitted -- or at least omitted any reference to a videotape, so it seemed to be a materially incomplete report in the Quattlebaum matter.

Q. When you cross-examined Investigator Hite, what was your -- what were you trying to get the jury to believe?

What was your strategy in the cross-examination that you actually did do with him?
A. Well, I was trying to establish that his -- his recordation of Mr. Cooper's statement was likely to have been inaccurate for many reasons.
Q. He had documentation where he had taken down notes. Is that fair?
A. Right.
Q. And you --
A. He didn't have his original notes. He had some sort of a rather incomplete memo that had been -- that was undated, if I'm not mistaken, and that he testified was fairly close to the time of the interview, and that's all there was. And then he hadn't testified at the first trial or hadn't testified about that, so that it was sort of a fragment of -- of notes which were -- which we thought was a -- and he had no memory of the entire interview, so that whatever he could reconstruct was all he knew.
Q. He was solely testifying based on his notes?
A. Yes.
Q. And you were challenging the accuracy of those notes?
A. Yes.
Q. And did you cross-examine him on the fact that previously there was documentation that he had omitted information in his reports in the past in a way that

favored the State unfairly?
A. No.
Q. Should you -- and you were aware of that or did you not think about it in that way? Do you recall?
A. I -- I mean, I was familiar generally with the Quattlebaum case. I ended up representing Quattlebaum on his retrial or on remand, but I did not as best I can recall notice the fact that Hite had specifically been tagged with having filed a written -- an incomplete or materially incomplete incident report, and I think if I had realized that I would have attempted to cross-examine him about it. Whether I would have been allowed to do that or not, I can't say.
Q. You do think that may have made a difference in Hite's -- in Tony's -- in Tony's case?
A. I don't -- it's awfully hard to say.
Q. That's all right. That's not a fair question.
A. It wouldn't have hurt him.
Q. Now turning to Bo Southerland, and I know we've addressed him a little bit briefly, but go ahead and explain to the Court your relationship with Bo Southerland.
A. Well, I didn't really have one except for the fact that I've represented a lot of people on death row and that was back in the day when a few of us that had many clients on death row were really allowed sort of the run of the

place and so I was told by an officer that Bo wanted to speak to me one day when I was out there visiting other clients, and I don't remember if I went up to his cell door then or got -- communicated through the officer, but determined that Bo was bound and determined to talk to me about Tony, that he wanted to clear Tony, and he didn't want his own lawyers to know anything about this. Bo was at that time on direct appeal from his own conviction and death sentence.

Q. Ultimately you did speak with Bo?

A. Yes.

Q. And he gave you a statement?

A. Yes.

Q. Now prior to this trial the State moved at some point to have you removed from the case claiming that you could be a potential witness given the fact that the co-defendant, Bo Southerland, had given you a statement, and you opposed that motion to be removed from the case; is that right?

A. Yes. I -- yes. Was it -- was the grounds that I could be a witness or that I had violated an ethical rule by talking to Southerland? I don't remember which it was, but they definitely moved to exclude me, which I was somewhat flattered by. That's the highest form of praise from Mr. Myers.

Q. What did the Court ultimately end up deciding in that matter?
A. Judge Pieper decided under the circumstances that it would be too prejudicial, too harmful, to Mr. Cooper to not have me as -- as his attorney and so he -- the witness advocate rule has that exception in it; that you can't be both a witness and an attorney unless removing the -- disqualifying the lawyer would be unduly prejudicial to the client and Judge Pieper felt that this was such a situation.
Q. The Court knowing all that information kept you as counsel?
A. Yes.
Q. Did they -- did the Court rule that you could testify, if necessary?
A. I don't think it ever came to that. I think we sort of left it like let's see what happens. But it didn't close the door on my being a witness depending on what Mr. Southerland had to say.
Q. Now regarding the statement you took from Mr. Southerland, how did that get in writing? How did that get memorialized?
A. I talked to him, made some notes, went home, typed it up and he signed it.
Q. Now at trial Southerland actually accused you of

changing the substance of his statement to help your client. Is that fair?

A. Yes.

Q. In fact, he specifically says on Page 7 -- I'm sorry, on Page 465, which I can give you if you don't have it, if you need it. I don't -- what you -- he claimed that you said I don't want Tony Cooper's name involved with Red telling him about the money. Did he go -- he went so far as to challenge you specifically. Let me give you that because it's not fair. 465.

A. Yes.

Q. So Mr. Southerland is personally accusing you, Tony Cooper's lawyer, of editing and altering his statement?

A. In effect, yes.

Q. And you can put that in different words if you think it should be described differently. That might not have been the best way. Now you were the only witness who could say otherwise to his challenge; is that right?

A. Yes.

Q. Now if you'll look with me on Page 468, lines 12 through 20.

A. 12 through 20.

Q. If you will read into the record lines 12 through 20.

A. Question: Isn't what really happened was at first you told me you weren't positive what Red said about a

check and that's what's in the first draft and I wrote that up and thought about it and came back and said well, what do you mean you're not positive and you told me well, you don't know whether he knew about the check or not, and so that's what I put in your statement. Now that's the way it went, isn't it?

Q. Who's saying that?

A. Me.

Q. And that's information within your personal knowledge that you're presenting in front of the jury, correct?

A. Well, I'm putting it in a question, yes.

Q. You weren't under oath at the time?

A. No.

Q. You're essentially testifying though; is that fair?

A. Well, there wasn't any objection, but I suppose you could -- one could construe it that way.

Q. And Southerland just continued to accuse you of telling him to intentionally admit information?

A. Yeah.

Q. Now if you'll recall during the cross-examination by the State, they made a point to try and let the jury know that at some point you refused further contact from Bo. What were they trying to prove or what were they trying to show; do you remember?

A. Well, I assumed that it was -- that once I got my

statement, I didn't want him to change it or something, some inference like that. When, in fact, his lawyer's had objected to this communication and I was -- had instructed me not to communicate with him.

Q. Was any of this testimony by Mr. Southerland a surprise to you during the trial?

A. Well, the part that -- where he sort of directly -- I don't know how to -- accuse me of rewriting his statement for him, that was a surprise. I think I should have foreseen that something like that would happen. I was a little taken in by Bo. He was so persuasive when he initially went down this road and he stuck to it for many, many years and then at the last minute did a one-eighty and said that none of this was true and he had been forced to do it by a group of people, including Tony Cooper and three other inmates who very conveniently had all been executed, so I couldn't interview any of them. He picked his coconspirators carefully.

Q. Once it became apparent that you were a necessary witness regarding the --

MR. SALTER: Objection, Your Honor.

THE COURT: Okay. What's the objection?

MR. SALTER: I don't believe -- I think that that's assuming that he -- that it was apparent he had to be a necessary witness.

THE COURT: Yeah, I --

MS. GOLDBERG: Well, that's -- I mean, he can disagree.

THE COURT: Yeah, just rephrase it. I don't think it's completely apparently, but go ahead.

MS. GOLDBERG: Okay.

BY MS. GOLDBERG:

Q. Did it -- well, I'll just say it that way then. Did it become apparent at some point that you were the only witness who could testify regarding the reliability of Bo's statement?

A. Well, I don't know about the reliability of the statement, but I was the only witness other than Bo to the taking of the statement, yes.

Q. Whether -- to whether the accuracy of the statement to what he actually said. I'll put it that way.

A. Yes. Now Bo signed the statement, but, yes, he gave a different version of how it came to be drafted.

Q. Once that happened that you became a potential witness in that regard, is there any particular reason why you didn't testify or recuse yourself from the matter at that point so that you could testify?

A. I may -- any particular reason, no. I mean, I must have thought that -- whether I thought that Bo had been -- that Bo's credibility was sufficiently damaged that it

didn't really matter that much or -- I don't actually recall what the thought process was about that.

Q. If you'll look somewhere in all of that transcript and find Page 1235.

A. 1235?

Q. Yes.

A. Yes. It's all falling apart. Okay.

Q. Lines 13 and 14.

A. Okay.

Q. The solicitor claims that you approached Bo Southerland?

A. Yes.

Q. And also then if you'll go to Page 1227.

A. 1227? I'm sorry, 1 --

Q. 227.

A. 12 -- okay, yes. Yep.

Q. All right. If you'll read lines 3 through 17.

A. You want me to read it out loud?

Q. Yeah, this is of the record. This is a part of the State's closing argument. If you'll read Lines 3 through 17.

A. He gave the statement in April of 1992, I believe. You've got the evidence. There is Defendant's 1 and 2 or 2 and 3. And it's interesting there's two versions or there's two different ones. I don't know why they had to

go back and get it straight. Apparently Bo -- Bo told you why. Because it didn't help their client. And remember -- keep going or --

Q. That's fine. So the State in their closing argument against Mr. Cooper they are not only, of course, challenging the defense's case they're impugning your character as part of their case. Is that accurate?

A. Well, I don't know -- I don't know if they're impugning my character, but they're adopting Bo's story of what happened.

Q. Would you agree that it would prejudice and hurt your client if the jury believed that his lawyer would intentionally coerce or obtain an untruthful statement to help his client?

A. Yes.

Q. At the end of the day in this trial the jury did not know that Investigator Hite had intentionally omitted information and reports he had given to benefit the State, correct?

A. Correct.

Q. But they were told that you had intentionally omitted statements to benefit your client; is that fair?

A. Yes.

Q. Did you have a good chance at winning this case?

A. I --

Q. Did the jury consider this case?
A. The jury considered it, yes.
Q. Were they -- how long were they out?
A. You know, I don't recall. A little while.
Q. They deliberated awhile?
A. Yeah.

MS. GOLDBERG: No further questions.

THE COURT: Yes, sir.

MR. SALTER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SALTER:

Q. Mr. Bruck, I'll try to be a little bit briefer than I was on Friday. You are currently, I believe, a clinical professor of law and director at the Virginia Capital Case Clearinghouse; is that correct?
A. Yes.
Q. You've been there since 2004?
A. Yes.
Q. Could you go through some of your prior work history? I know you mentioned Appellate Defense, but could you go through some of your prior work history before that?
A. During law school, I clerked at the Richland County Public Defender's Office for about a year, then I was an assistant public defender at the Richland County Public Defender's Office for about three years and was gone for a

year, came back, and began specializing in the defense of capital cases. I worked part-time on a contract basis for the South Carolina Office of Appellate Defense, which by then -- which then was brand new, and handled the bulk of their death penalty appellate work for about the next seven years, from 1980 to 1987, and also had a private practice in which I did primarily death penalty trial court-appointed work. In 1988, I became the Richland County Public Defender, stayed there for only a year, and went to the South Carolina Office of Appellate Defense as chief attorney there running that agency for the next three and a half years until January of 1992, then I went back into private practice. At that time I began to work on contract, which was sort of a halftime job, for the Federal public defender system nationwide as something called Federal Death Penalty Resource Counsel, which was a consulting function to assist court-appointed lawyers in the Federal courts in death penalty cases throughout the country, and I've been doing that ever since in one degree or another in the twenty-five years since then. I also continued to handle post-conviction and appellate cases and trial cases, capital cases. In 2002, I worked for one semester as a visiting scholar at the -- at Washington and Lee School of Law and then went back to Washington and Lee in 2004 to run a death penalty trial clinic that you

referred to, the Virginia Capital Case Clearinghouse, and I've been doing that ever since. I also teach a couple of law school classes in addition to the clinic and have continued from time to time to handle some court-appointed cases both in Virginia where I'm now also a member of the Virginia Bar and in Federal court, and I've recently handled two capital trial cases in Federal court.

Q. All right, sir.

MR. SALTER: Your Honor, since he just mentioned that, I previously filed a motion in this case. I'm withdrawing my motion because Mr. Bruck spoke to me on Friday with opposing counsel listening to the conversation and she was able to interpose an objection to anything she would have found objectionable.

THE COURT: If y'all have reached an agreement, that's fine.

MR. SALTER: All right.

BY MR. SALTER:

Q. Prior to representing Mr. Cooper in the 2000 resentencing, do you know roughly how many murder cases you've tried?

A. I don't. I think I've handled about twenty capital murder cases that have gone to trial, or fifteen, somewhere in that neighborhood, maybe a little fewer, and then some number of noncapital cases mostly in the earlier part of

my career. Probably another ten.
Q. And you've done other major felonies when you were with the public defender's office?
A. Yes.
Q. Okay. And we've gone through the fact you previously represented Mr. Cooper both on direct appeal and his original PCR?
A. Yes.
Q. And you represented him again in the PCR appeal?
A. Yes.
Q. And you were familiar with the -- obviously the proceedings and the trial of his co-defendant, Bo Southerland?
A. Yes.
Q. All right. Do you have a copy of the Southerland trial transcript?
A. Did I have one?
Q. Yes.
A. Yes.
Q. Okay. And you obviously had transcripts of the original trial in this case?
A. Yes.
Q. So you had a pretty good roadmap of where most witnesses were going with their testimony?
A. Yes.

Q. That helped you in preparing, right?
A. Yes.
Q. So it's not your typ -- this wasn't your typical trial where lawyers start from day one and start the investigation. A lot of it had already been done?
A. Yes.
Q. Okay. Do you recall how many times you may have met with Mr. Cooper either before trial or in preparation for the 2006 thousand trial?
A. I don't recall.
Q. Okay. You don't recall? More than once?
A. Oh, yeah.
Q. Enough -- was it enough to in your estimation prepare adequately for both yourself and your co-counsel?
A. Yes, I think we met with him enough.
Q. And Mr. Cooper, did he appear to understand your various conversations with him?
A. Yes.
Q. And he was cooperative?
A. Yes.
Q. Okay. And I believe you testified earlier he's steadfastly claimed he was not involved in the murder, correct?
A. Absolutely.
Q. Do you recall how you and your co-counsel divided your

responsibilities?
A. I know that we did, but I don't recall how we did.
Q. Did the three of you discuss important strategic matters?
A. Yes.
Q. That would have included matters such as whether or not you should recuse yourself?
A. Yes, I -- I would think so.
Q. Okay.
A. I have a feeling they probably didn't want to be abandoned by me since I was the person who had handled the case the longest.
Q. All right. Now you were asked about the absence of direct evidence tying Mr. Cooper to the crime. In this case not only -- you not only had Mr. Southerland's testimony that went forward in this case, but in the prior Southerland trial itself there was a different eyewitness who testified, correct?
A. I don't recall.
Q. You don't recall whether or not David Burrows, Mr. Cooper's stepson, may have testified in that trial?
A. That sounds familiar. I'm -- you know, it's been quite a while.
Q. All right. Now as I understand it, the State's theory of the case was that Mr. Farmer acquired information

from his cellmate that Ms. Quinn was gonna come into an insurance check?
A. Right.
Q. And he had passed that information along to a Brenda McClaren, correct?
A. That sounds familiar. I really have not gone back and reconstructed the story.
Q. Mr. Cooper's niece?
A. Yeah -- yes, I think that's right. Whatever the transcript will reflect.
Q. And Farmer asked her to have Mr. Cooper contact her?
A. That sounds right. I think so.
Q. If the record reflects that, then you're not gonna dispute that?
A. If the record reflects that, you don't need me, but, yes.
Q. Can you recall anything that we haven't covered in terms of what you and your co-counsel did to prepare for this trial in terms of investigation?
A. If you jog my memory, I might recall more, but -- I mean, it seems like we chased down some witnesses who ended up not being called or looked for some witnesses. We asked for some DNA analysis to be done that had never been attempted by the State and that came back as pretty much of a dry hole.

Q. Because the samples were degraded?
A. Right, and that was the testimony from the SLED analyst.
Q. All right. Do you recall whether or not you y'all had an investigator to assist you?
A. Yes, I -- I don't recall his name, but I do remember that we had somebody -- or I feel like we did.
Q. And you apparently had access to at least one person outside of the state because you had Ms. Turner's testimony that you offered?
A. Yes. I don't know access exactly, but there was a lawyer in East Texas who was willing to help out and he brought her in.
Q. Okay. I think the other day when we spoke you indicated your theory was to present a reasonable doubt defense; is that correct?
A. Yes.
Q. Okay. I believe you said that the reason for that was that because of credibility problems Mr. Southerland made the State's case in some ways weaker; is that correct?
A. Well, weaker -- I don't know if he made it weaker than it would have been without it, but he certainly had gigantic credibility problems in my estimation.
Q. And many of those were explored by you?
A. Well, I did my best or at least I tried.

Q. You were asked about your failure to request a continuance when the trial judge ruled that Mr. Farmer's prior testimony would be able -- the State would be able to publish that to the jury?
A. Correct.
Q. And I believe you testified that essentially it was a question of which right do you assert. Would that -- would that be correct? The right to a speedy trial versus --
A. I think that's right.
Q. The right to a speedy trial versus the right to confrontation, correct?
A. Yes.
Q. And you gathered a great deal of information to -- in addition to the prior cross-examination with which to impeach Mr. Farmer?
A. Yes.
Q. Did you also not consider the fact that a continuance might be somewhat prejudicial in light of what effect it may have on a jury?
A. Well, I'm trying to remember if this was a mid trial continuance or a continuance of the --
Q. Yes, sir. It was during the trial itself.
A. Yeah, I don't remember if we thought about that or not, but we didn't think it was in our client's interest to have a continuance to let the State make up for their

failure to get Mr. Farmer there.

MR. SALTER: Your Honor, may I approach the witness?

THE COURT: Yes, sir.

BY MR. SALTER:

Q. Or do you have a copy of the transcript?

A. I do have a copy if you'll point me at which page.

Q. Okay. If you'll turn to Page 628 and review lines 2 through 16.

A. Uh-huh. Yes.

Q. Okay.

A. Oh, I'm sorry. I was looking at the wrong page. Yes, apparently we were concerned of prejudice from the interruption of the trial for a long period of time, a week or more.

Q. Right. Because a jury might catch wind of publicity?

A. Yes.

Q. And may forget facts?

A. Yes.

Q. And those were matters that you obviously considered, as well as the fact that your client wanted a speedy trial?

A. Apparently, yes.

Q. Okay. And you'd been given overnight to think about whether or not you wanted a continuance?

A. Yes.

Q. Okay. You also maintained your objection to

Mr. Farmer's testimony; did you not?
A. Yes.
Q. And you've covered some of this on direct examination, but you introduced the prior Aiken County charges, I believe?
A. Yes.
Q. And do you remember anything that was kind of fishy about those charges?
A. Yes. He was allowed to stay at-large for three years and -- and then absconded. I can't remember exactly what it was, but there was something about it that strongly suggested that he was an informant for the -- that he had become an informant for Aiken County authorities and then had absconded when his case was being called for trial.
Q. And you also published his two Texas convictions for manufacturing methamphetamine and possession of methamphetamine in 2001, correct?
A. Yes.
Q. And both of those carry life sentences?
A. Yes.
Q. All right. And then you published the testimony that you've been asked about today from his sentencing?
A. Yes.
Q. All right. Did you feel it was more advantageous to get that information before -- potential impeachment

before the jury than it was for them to hear that, again, he's said that your client committed the crime?

A. Well, I must have thought that because I did it.

Q. All right. But you would have -- you would have weighed that determination before -- making that assessment rather before you decided to introduce that evidence, correct?

A. I certainly hope so.

Q. Would that have been something that you would have discussed with your co-counsel?

A. I would imagine that we talked about it.

Q. Okay. Now in the Texas sentencing testimony, he minimized his own involvement not only in this murder, but in the charges out there as well; did he not?

A. Whatever is in the transcript. I don't remember what he said, but that sounds right; that he, yeah, was making himself out to be pretty much innocent of everything.

Q. For instance, he -- I think he admitted that he had lied about his knowledge of methamphetamine in order to get a deal with the authorities in Texas on his first charge.

A. That's -- that sounds like Red Farmer, so if that's what's in the transcript I'm not surprised.

Q. Now you've indicated in hindsight you thought that it was a mistake to put Ms. Turner up. Kimberly Turner.

A. Yes.

Q. I mean, she provided an additional inconsistent version by Mr. Farmer, correct?
A. It was somewhat inconsistent, yes. It was -- I mean, it was a mixed bag.
Q. But while you think it was a mistake in hindsight, you obviously didn't think that at the time.
A. If I thought it was a mistake before I called her, I wouldn't have called her.
Q. Now in the conversation that Mr. Farmer had with Ms. Turner, didn't he suggest that someone had helped him put a spin on his 1991 testimony to make Mr. Cooper look bad?
A. Did he suggest that when?
Q. In the -- in the conversation with Ms. Turner. It may help -- if it will help you -- if it will help you, if you'll turn to Page 886, lines 13 through 17.
A. Okay. Oh, yeah. Someone had helped him put a spin on it and that his testimony had made Mr. Cooper look bad, yes.
Q. The obvious implication from that is it was the prosecution that helped to put a spin on it or -- or law enforcement?
A. Yes.
Q. Now in your opening statement you informed jurors that unlike most cases you weren't gonna object to a lot

of information concerning Mr. Cooper's past.
A. Yes.
Q. You even mentioned the fact that he had gone to prison along with Bo Southerland, correct?
A. Yes.
Q. And your reason for doing this was what?
A. Well, Southerland was gonna come in and if he -- I think at that point I expected Southerland to testify because I had the whole metaphor about the gun to the head and so I -- it was so preposterous to me that Bo Southerland had been intimidated into clearing Tony Cooper while they were both on death row given the actual relationship between them and that Southerland was an older and more experienced criminal and -- and a very tough guy and so I wanted the jury to have the background for that.
Q. All right. And I believe you testified earlier that you didn't think there was any way you'd be able to keep out information about the prior incarceration, correct?
A. I must have thought that because I went into it without trying to keep it out.
Q. That's basically because of how the crime under the State's theory originated.
A. That -- that is what I was thinking. I'm not sure I was right, but that is what I thought, yes.

Q. Okay. Had you and your co-counsel determined that -- prior to the trial itself, had y'all made a determination that you were going ahead and you were going to admit to this prior incarceration for the reasons you've already --
A. I don't have a -- I don't really have a memory about that. We did meet and talk. I like to think that I didn't do everything on my own say-so and that we discussed it, but I don't -- I can't tell you I recall a conversation about it.
Q. But basically you wanted to get a grip on the -- on the State's evidence, but you wanted to be able to control it somewhat so that you could use it in your defense, correct?
A. Well, if -- yes. If you think something's coming in anyway, you might as well be the first to tell the jury about it and -- and put it in the proper context if you can, so I assume that's what I was trying to do.
Q. Now you objected to all of Mr. Cooper's 1977 convictions coming in because they were too remote?
A. Yes, I did.
Q. All right, sir. You also argued that the '77 armed robbery conviction should be excluded as it was too similar to the armed robbery for which he was on trial, correct?
A. Yes.

Q. But you didn't make the similar argument with respect to the housebreaking and grand larceny?
A. That's correct.
Q. Were you aware of any South Carolina case law that would have supported such an argument?
A. I don't know if I was or not. I imagine if I had been aware of some, I would have cited it.
Q. Okay. And you'd previously been the head of our Office of Appellate Defense here in South Carolina, so you have a great deal of experience in South Carolina law?
A. Well, I can't say I -- I can't say I carry all the case law around in my head, but, yes, I have appellate experience.
Q. Yes, sir. Now you were asked if under the facts of this case Mr. Cooper could have been charged with burglary.
A. Yes.
Q. Now he wasn't indicted for or arrested for burglary, was he?
A. No.
Q. All right. So that charge wasn't even before the jury?
A. That's right.
Q. Okay. The Applicant, Mr. Cooper, also alleges ineffectiveness because you introduced the evidence of the plea to the housebreaking and grand larceny charges, but,

again, that would have been consistent with what you just told me a minute ago, correct? If you know it's coming in --

A. I'm sorry, who introduced evidence of the plea?

Q. That you did. When Mr. Cooper testifies, one of the first things you do is you go through --

A. Right.

Q. -- and say are you guilty of --

A. The judge had already ruled it was coming in, so -- so, yes.

Q. And that way he appears to be more honest about his past, sort of like stating it in opening statement, correct?

A. Yes.

Q. You were asked about why you did not move -- why you did not object and move for a curative instruction or move in limine to preclude Mr. Southerland from testifying about the prior armed robbery convictions, correct?

A. Yes.

Q. Do you -- would you, again, explain for the Court why you --

A. I guess I didn't foresee that he was going to volunteer that information unresponsively to a question. Knowing Bo Southerland as I then did, I probably should have foreseen that, but I didn't foresee that and that's

why I didn't make the motion.
Q. Now Mr. Southerland was constantly evasive on cross-examination, wasn't he?
A. I think that's a fair statement.
Q. And at every turn he wanted to interject your client's involvement in the crime as opposed to answering questions on cross-examination, right?
A. Yes.
Q. And I believe you argued to the jury, did you not, that they got to -- and I'm quoting -- got to see how he dodged and weaved and played games with me. He was willing to answer the State's questions, but when it came for cross-examination, forget it. That would be fair?
A. Yeah, I thought that was very fair.
Q. All right, sir. Now do you recall that Judge Pieper later charged the jury that they could -- they could not consider any of Mr. Cooper's prior legal proceedings in their deliberations?
A. I've not committed the charge to memory, but if that's in the transcript, then I'm sure he --
Q. If I tell you it's on Page 1221, lines 2 to 13.
A. -- I'm sure he did. 1221?
Q. Yes, sir.
A. No.
Q. 1241. I'm sorry. I apologize.

A. That's all right. Well, I think he's talking about in his prior hearing or proceedings, in other words, the fact that he had been tried before and convicted before wouldn't be considered.
Q. All right. Now if you look at Page 1242, lines 13 through 25, doesn't he also instruct the jurors that they could only consider evidence of another crime or misconduct by a witness on the limited issue of credibility?
A. Yes.
Q. All right. And your client was a witness as well?
A. Yes.
Q. All right. You mentioned the victim's daughter.
A. Yes.
Q. Now she had not testified to the two men using loud voices in the original trial, had she?
A. No. She was a very young child at that time.
Q. But one of the things that the defense did in order to mitigate that -- the impact of that testimony was you hired an expert, correct?
A. Yes.
Q. And that would have been Dr. Lori Van Wallendael? I apologize if I get her name incorrect.
A. I -- yes.
Q. A cognitive psychologist?
A. Yes, from UNC-C, I think. Charlotte.

Q. And how were y'all trying to use her?
A. Well, as best I recall, she was an expert on eyewitness identification and on the -- the psychology of eyewitness identification and we wanted her to shed light on reasons why both of the eyewitnesses, the gentleman who had seen Mr. Southerland and someone else in the truck on the day of the crime, and also Amanda. And particularly talking about the reliability and suggestibility of child witnesses which, is a particular area of age and equivalence.
Q. Now you were asked earlier about the failure to object to Mr. -- or SLED Agent McDermott's testimony concerning the logs?
A. Yes. Uh-huh.
Q. If you would turn to Page 343 and look at lines 7 through 12.
A. Yes. Yes.
Q. All right. The State there was just simply asking him what he factually observed; were they not?
A. Correct.
Q. All right. So there -- that being his factual observations, there was nothing for which you could object, was there?
A. Well, not from the question. The answer was I think one included -- I think one person couldn't move it and he

-- it didn't seem like there was any way to tell why he thought that.

Q. All right. But you were able to impeach him on cross-examination; were you not? If you'll look at Page 346, line -- beginning at Line 24 and it goes to 347, Line 11, to see if that would refresh your recollection.

A. I brought out that he didn't -- didn't lift it, didn't touch it, didn't see anyone else lift it, didn't know how much it weighed, so, yes, I suppose.

Q. And you also addressed this in closing; did you not?

A. Yes.

Q. And you referred in closing to testimony by Lieutenant Jim Springs, did you not, about it was a rotted log?

A. Yes, which suggested --

Q. And a rotted log everybody knows is hollow?

A. Yes, or at least light -- lighter than a regular log.

Q. All right. You were asked about your failure to object to the State's closing argument addressing Bo Southerland coming into the house to use the telephone, whether or not there was any evidence to support that?

A. Yes.

Q. All right. That wasn't a crucial point to the State's case, was it, though?

A. Well, it -- I mean, it was important to know whether it was -- it was crucial to know who was on the other end

of the line of the call from Red Farmer, yes.
Q. But -- and your client had offered testimony to the effect that anyone could have been using it. He was not using it, correct?
A. Yes.
Q. And that anyone else could have been using it including Bo Southerland?
A. Yes.
Q. Because Bo was around that day?
A. Yes.
Q. And the phone would have been outside according to your client?
A. Yes. I think that's -- yeah, it was outside. Yes.
Q. You were questioned about Eddie Hite's testimony. Prior to your client's testimony, had not the defense and the State agreed either to stipulate or to read Mr. Hite's prior testimony into the record?
A. Yes.
Q. And that was because the State was then planning -- the State was intending to offer Mr. Hite's testimony to impeach the prior testimony of Mr. Cooper's mother; is that correct?
A. Yes.
Q. Okay. So you -- y'all knew that was coming?
A. We knew that was coming.

Q. You didn't know that Mr. Hite would testify to matters to impeach Mr. Cooper's testimony then?
A. I -- that had been lost in the shuffle, yes.
Q. All right. There's no question in your mind though that your client wanted to testify?
A. No, he wanted to testify.
Q. In fact, you -- it was necessary for him to do so in order to get an alibi defense, wasn't it?
A. I thought it was -- I mean, whether it was necessary or not, I thought it was the right thing for him to do.
Q. Okay. Why would that be?
A. Well, I just thought -- I thought that the jury needed to hear Tony denying this as he had denied it for so many years. He hadn't testified at the first trial and that had not been a successful strategy and it just seemed like a better approach.
Q. I see. Now prior to his testimony -- Mr. Hite's testimony, y'all had a Jackson v. Denno hearing, correct?
A. Yes.
Q. And prior to his testimony because of the way -- you understood the way the case was gonna go. There was no reason for you to prepare to cross-examine him, was there?
A. No reason for me to prepare to cross-examine?
Q. Mr. Hite.
A. No. No, that's right because we thought they were

just gonna introduce his testimony by transcript.
Q. But you were obviously aware of his role in October of '89 in this case?
A. Well, I had been aware of it at some time. I mean, sometimes you just forget about something and I had -- when I was in the courtroom, I remembered being shocked back to the realization that oh, my goodness, he's gonna impeach Tony's trial testimony --
Q. But there was never any --
A. -- or at least that there was a -- I think what first happened was that Tony was cross-examined on the basis of his statement and then if I'm remembering correctly that first came up in the Jackson v. Denno hearing or did it? Right?
Q. Yes, sir.
A. And that was before cross-examination.
Q. All right. But you -- you had been provided the information, the underlying information?
A. Yes. Yeah, we had it somewhere.
Q. In other words, there was no discovery violation?
A. No.
Q. Do you recall the Judge offering you the opportunity to recall Mr. Cooper as a witness following Mr. Hite's testimony in camera?
A. I think that's right. If it's in the transcript,

then I'm sure it's right.
Q. Do you recall why you did not?
A. Well, I -- I don't know that he had any additional basis for any additional testimony that would tend to support suppression, which is what the point of the in-camera hearing was.
Q. All right, sir. And I believe you asserted at that time that it was the State's burden of proof and that your client didn't have to prove anything.
A. Right. Right.
Q. All right. However, Judge Pieper excluded the Miranda form, did he not, that Mr. Hite had used?
A. Whatever is in the transcript. I remember there was some -- Tony -- Hite said that Tony said something, which I think could be fairly interpreted as an assertion of the right to silence. I'm not gonna answer that because it would bury me or something to that effect.
Q. He was asked whether or not he'd ever seen Bo with a shotgun and he said -- and the response according to Mr. Hite was I can't answer that because it would bury me, correct?
A. Right.
Q. And you convinced Judge Pieper that that was an invocation of his right to remain silent?
A. Well, that was the basis of our objection and it was

sustained though. I'm not sure I convinced him of it.
Q. All right. You were also able to exclude the Miranda form itself; were you not?
A. If that's what's in the transcript, then, yes.
Q. All right. If you'd turn to Page 1046, lines 7 through 9.
A. Okay. And? You want me to read that?
Q. No, sir. Just refresh your recollection.
A. I thought what he was keeping out there was the business about it will bury me.
Q. Okay. I'll move on. Now you were -- you had an opportunity to cross-examine Mr. Hite --
A. Yes.
Q. -- about whether or not he was pressured to resign or fired as a result of his involvement in the Quattlebaum case?
A. Yes.
Q. And he denied that?
A. Yes.
Q. So there wasn't any further you could go in that line of impeachment?
A. Not that I know of.
Q. That's fine. You were asked why you didn't try to impeach him with the role he played in the Quattlebaum taping.

A. Yes.
Q. Were you aware that in the Quattlebaum case itself that the Supreme Court upheld that the officers could not be impeached with that, with their role in taping as a specific act of misconduct under Rule 608(b)?
A. I don't recall that, but if you're looking at the Quattlebaum decision I won't argue with the opinion.
Q. Okay. Now you agreed with Ms. Goldberg that Mr. Hite's testimony was important?
A. I think it was, yes.
Q. Okay. But he was a reply witness, wasn't he?
A. Yes.
Q. He wasn't a part of the State's case in chief?
A. No.
Q. Okay. Are we -- strike that, please. Now in your cross-examination of Mr. Hite, did you not elicit that he only had a vague recollection of the interview?
A. Yes.
Q. And he couldn't remember the details?
A. Right.
Q. And that -- I believe you established that he was -- just looked back on how he testified in 1991?
A. I established that he looked back on?
Q. That all he was doing was looking back on how he testified in 1991 and repeating that?

A. Yes.
Q. Okay. And that he was testifying from his notes that he'd made even earlier?
A. Yes.
Q. And he didn't have those notes with him?
A. Right.
Q. Okay. And do you recall how you attacked the prosecution's evidence in that regard in your closing?
A. Well, yeah, that it was sort of secondhand and -- and it was not actually his testimony and also that it wasn't even his police department's case and the whole thing was likely to have been a bother and something that he wasn't really focussed on having an exact and complete record because it was a City of Lexington case or a Lexington Police Department --
Q. West Columbia?
A. -- West Columbia, sorry, case and he was working for the sheriff's department, so the whole thing wasn't even his department.
Q. I believe -- I believe you argued that even a clerk could have presented that testimony, correct?
A. Right.
Q. And didn't you also point out that your client had actually gone to the police and asked them -- or gone to the sheriff's department and asked them to be interviewed?

A. Yes.
Q. And that was not something a guilty man would do?
A. Right.
Q. All right. On direct examination you went through your -- the statement you took from Mr. Southerland in 1992. You introduced that at -- at trial as Defendant's Exhibit 2, correct?
A. Whatever number, yes.
Q. Okay. And you introduced -- and you also introduced the first page of the draft that was prepared several days earlier; did you not?
A. I don't recall that, but if it's there, then I must have.
Q. Now you -- you were under an order after July 13, 2005, I believe it was, not to have further contact with Mr. Southerland without his lawyers present?
A. That sounds right. I think his lawyer made some motion to that effect.
Q. Now in that same -- I believe in that same order Judge Keesley denied the State's motion to have you removed.
A. Okay.
Q. All right. Now when the State tried to elicit from Mr. Southerland that you had no problems talking to him in '93, but then thereafter wouldn't talk to him, you

objected; did you not?
A. I think I did.
Q. And ultimately after hearing your argument did not the judge ultimately rule that they couldn't go any further on that line of questioning?
A. I think that's right.
Q. And didn't he -- didn't he also instruct the jury that as a matter of law an attorney cannot speak with an individual represented by counsel without consent of that counsel?
A. That sounds familiar.
Q. So he explained that to the jury and obviously you were satisfied at that point in time at least that that was sufficient, correct?
A. Well, I didn't ask for anything more if that's what you mean, so.
Q. Correct. And you would have asked for more if you didn't think that was sufficient; would you not?
A. I'd like to think I would have, but I just don't have a recollection of that moment of my thinking beyond what's in the transcript.
Q. All right. But you would agree with me though that lawyers are often put in situations where the take a statement from someone even though they're the only person who can witness that statement?

A. Well, it's a very bad idea, and this case demonstrates why. And I use this whole episode as a teaching tool with my students with myself as the -- as the object lesson in how not to handle a situation like this.
Q. But it does happen?
A. Yeah, obviously it happens because it happened here.
Q. And I realize you do -- the better practice would be to have someone else present?
A. Yes.
Q. But it does happen and it happened in this case?
A. Yes, sir.
Q. Do you know of anything that -- do you know of any matters to which you felt the necessity to testify in order to further impeach Mr. Southerland?
A. Well, if I had I would have testified, so I can extrapolate from that that the answer is no, but I don't have any independent recollection of our thinking about that from eleven years ago.
Q. It's fair to say that you had thoroughly impeached Mr. Southerland, correct?
A. Well, I tried.
Q. At length, correct?
A. At length, yes.
Q. All right. And you devoted a very large segment of your closing argument to why Mr. Southerland's account

should not be believed?
A. Well, he was a very large and inviting target, so, yes.
Q. Thank you, sir.
A. Thank you.
Q. You were asked on direct examination, quote, to basically compare -- I withdraw that.

MR. SALTER: I have nothing further, Your Honor.

THE COURT: Do you have a lengthy redirect?

MS. GOLDBERG: No, sir, Your Honor.

THE COURT: Okay. I'll need an old man break in a moment.

MS. GOLDBERG: Yes, sir. Real brief.

REDIRECT EXAMINATION

BY MS. GOLDBERG:
Q. Mr. Bruck, I guess you said -- you testified earlier that regarding Mr. Farmer -- getting a continuance or a delay for Mr. Farmer to testify, you had to choose between which right to assert, the confrontation right or the speedy trial right?
A. Yes.
Q. You went with the speedy trial right?
A. Yes.
Q. Was that successful?
A. Obviously not.

Q. Now one of the -- if the transcript reflects that Mr. Farmer could have been acquired in person by June 5th, which is about five days after the end of the trial, would you disagree with that from your recollection?
A. Not if that's what the transcript says. I always agree with the transcript.
Q. And regarding concern such as publicity, you, of course, could have requested a gag order, things like that, to fix those issues; is that fair?
A. Well, yes, but, I mean, the -- we had been conducting a public trial so there would have been publicity that couldn't have been gagged.

MS. GOLDBERG: No further questions.

THE COURT: Okay. Thank you, sir.

Can he be released?

MR. SALTER: Yes, sir, Your Honor. Please.

THE COURT: Thank you. Be safe.

(Witness excused.)

THE COURT: Let's take a break.

How many more witnesses do you have?

MS. GOLDBERG: Maybe none. Let me check.

THE COURT: Okay. Let's take a break and be back in five or ten minutes.

(Recess taken.)

BAILIFF: All rise. Court's now in session.

THE COURT: Thank you. Have a seat.

Have you got anybody else?

MS. GOLDBERG: Your Honor, the Applicant rests. I just have argument.

THE COURT: All right. Anything from the State?

MR. SALTER: Nothing from the State, Your Honor.

THE COURT: Okay. Yeah, I mean, I'm happy to hear from y'all.

MS. GOLDBERG: Thank you, Your Honor. May it please the Court?

THE COURT: Yes, ma'am.

MS. GOLDBERG: I do want to state one thing for the record to just clear up testimony. When Mr. Bruck was testifying, he stated that he believed the victim's daughter identified the Defendant in the trial. That was incorrect. It's not reflected in the transcript, so I just wanted to make sure.

MR. SALTER: I would agree -- I'd agree that it's not reflected in the transcript, Your Honor.

MS. GOLDBERG: Right.

THE COURT: Well, you said daughter. Was it a niece? Because I heard niece mentioned, too.

MS. GOLDBERG: That was the Defendant's niece.

THE COURT: Okay. I just want to make sure I'm not mixing it up either.

MS. GOLDBERG: Right. Yes, Your Honor.

All right. So as to the first allegation, and I'm just gonna go in order with what's on my second amended application.

THE COURT: Okay.

MS. GOLDBERG: The first one is that he should have requested a continuance to ensure the attendance of Mr. Farmer. Mr. Bruck testified that was an important witness leading up to trial. It was the only witness who had ever directly incriminated the Defendant. The transcript reflects they could have had him present in court on June 5th and the argument is simply that it was unreasonable not to have him present.

THE COURT: Okay.

MS. GOLDBERG: Similarly, but I believe more importantly, given the fact that that was not done, that the trial continued on and that he was not present, the Applicant's argument is that the defense should not have used the impeachment evidence against Red Farmer. The information that was presented to the jury only hurt the Applicant's case. Mr. Farmer was the only person who directly incriminated the Defendant other than the co-defendant, who clearly had other issues regarding credibility.

In 1991 when Mr. Farmer previously testified, he had

plenty of reasons to lie as testified to previously. He was impeached with his pending charges, he had admitted to even taking a bribe to testify. That impeachment offered -- the impeachment evidence offered in this new trial only showed that Farmer was inconsistent on admitting his own involvement in the situation and some details such as motive. He was never at any point in time inconsistent regarding accusing the Defendant and being a witness against the Defendant. Those inconsistencies were minor, but the newer confirmations of the original story at a time in which Mr. Farmer no longer had a reason to lie were significant and the solicitor used this to their advantage in arguing exactly like I just stated in their closing argument. It was unreasonable. The defense team clearly had prepared. They had worked very hard, gathered all this information, prepared to confront Mr. Farmer in trial to get him to -- to attempt to get him to change his story, but when Farmer became unavailable they should have changed their course and that plan and they did not to the detriment of Mr. Cooper.

The next allegation, failure to properly argue against housebreaking and grand larceny, as stated my argument is that those charges are remote and substantially similar enough to be prejudicial. Those were never argued. The issue here is a question -- is somewhat of a legal

question, I suppose, because I think the State's position as his question implied, was that there's no case law on this fact. Case law talks about prior convictions that are either similar or identical to the charged offenses. My argument is that just because that's not the exact crime charged, when the facts are the same. The facts in this case that were elicited from the victim's daughter gave rise to facts that could result in a burglary charge, a larceny charge. There are other -- there's other testimony in the trial regarding larceny as well. That was all a part of this crime as a whole and before the jury, so prior convictions of similar acts would be just as -- it would be the same situation I guess I'll argue.

THE COURT: Okay.

MS. GOLDBERG: That was never argued at trial. It was never preserved for appeal.

Failed to get a ruling that Mr. Southerland couldn't testify. As discussed in the testimony, trial counsel did agree to keep out Mr. Cooper's prior armed robbery convictions because he was on trial for armed robbery and those are substantially similar, but prior to that even happening Mr. Southerland had testified that Mr. Cooper had prior armed robbery convictions. That should have never come up. It was not allowed. It should not have been allowed. Given the nature in this particular case,

I think it is probably quite unusual that a co-defendant in a current trial is testifying and was the same co-defendant on the Defendant's prior convictions. That's probably pretty rare, but in that particular rare circumstance I think it is incumbent on any attorney to do a motion in limine to make sure that that witness is instructed that they can and cannot say certain things regarding the past. I think that the defense team was ineffective in not requesting that and not ensuring that information did not come out. I believe Mr. Bruck testified he just didn't foresee it would happen, but that he should have.

THE COURT: And this is what he blurted out without response to a question?

MS. GOLDBERG: Correct. Well, the question, I believe, was Mr. Bruck was asking the co-defendant about his own -- Mr. Southerland about his own criminal convictions, so it's kind of apparent that he could easily have mentioned that Tony Cooper was his co-defendant. It wasn't unrelated to the question.

THE COURT: Okay.

MS. GOLDBERG: Allegation E, as I said before, was withdrawn.

Allegation F regarding the speculative testimony without any factual basis or foundation regarding the log,

you know, I believe the State's position based on their questioning was the fact that it was challenged after the fact. I believe it was a missed objection on Mr. Bruck's part. There was an objection to be had.

Allegation G is withdrawn.

Allegation F, facts not in evidence that were stated during the closing argument, those facts were clearly not in evidence. I don't think the State contested that at all. The State claimed that Tony's wife claimed that Bo came to the house to use the phone all the time and she wouldn't ever let him in and she didn't like that. It was not true. It directly impeached or went against Tony's trial testimony. That's why it was crucial. Because any time the State attempts to discredit the Defendant's own testimony, it's important. That was a missed objection.

Allegation I, I'm actually gonna withdraw that one as well.

THE COURT: Oh, okay.

MS. GOLDBERG: I forgot to mention that previously.

Allegation J regarding Investigator Hite, so that the record is clear, the case that was mentioned previously in the court is the State of South Carolina -- well, it's actually called In the matter of Donald V. Myers. It is a state Supreme Court ethics opinion, private reprimand and letter of caution, Opinion Number 2567, filed May 5, 2013.

It was a disciplinary order -- opinion regarding Donald Myers. Within the facts of that case, the Court in the way the -- in the Court's rendition of the facts states that Investigator Hite had been aware of law enforcement intentionally recording a secret conversation between counsel and --

THE COURT: Yeah, I remember that.

MS. GOLDBERG: Right.

THE COURT: Yeah.

MS. GOLDBERG: Investigator Hite did not do that. His involvement was that he was aware of it, present for it, wrote up an investigative report for that day, did not include that information in the report, so intentionally omitted information. Mr. Bruck's strategy in cross-examining him in this case was that his record of his conversation with Mr. Cooper was inaccurate, that it was not complete and that it -- so it very clearly should have been used, especially when the defense team was aware of this situation. It should have been used in cross-examination and would have been extremely powerful, I believe. And I do want to point out, again, that the jury did while deliberating ask to rehear the testimony of Investigator Hite. That was the only witness they asked to rehear the testimony of. And, again, Mr. Bruck testified that he had forgotten about that in its entirety,

wasn't prepared to cross-examine. Also didn't prepare accordingly with his client.

Regarding the failure to recuse, the testimony -- I think that was fully testified to. I don't really have much to add, but then I also did assert an allegation here for the cumulative nature of the evidence. I want to point out to the Court that in South Carolina it's still unclear whether cumulative errors can result in a PCR. All of the cases that I've seen state -- have been from cases where each -- the errors by themselves aren't -- none of them are sufficient enough for the Court --

THE COURT: Right.

MS. GOLDBERG: -- so it is still possible for a court to find that errors and the -- their cumulation are important enough and affect at trial enough. In this case, we've got only three real witnesses that incriminated or had knowledge as to Mr. Cooper's involvement or lack of involvement. All of the other witnesses in trial just testified as to what happened as in finding the victim and the aftereffect, what the victim had done earlier in the day, that sort of information, but the only ones that had any direct information regarding Mr. Cooper's involvement or lack of involvement were Red Farmer and Bo Southerland and Tony Cooper.

All of the allegations that I've presented for today

really affect those testimonies. That's why I believe in their cumulative nature they have a greater effect. They do call into question whether the trial produced a just result, and that is our case, Your Honor.

THE COURT: Okay. Thank you very much.

Anything -- just, I mean, obviously it is what it is. I've got to read through this.

MR. SALTER: Yes, sir.

Would you like for me to respond to that or --

THE COURT: If you want to, yeah. I mean, I've got my notes, but I'll be happy to hear from you.

MR. SALTER: All right.

Just briefly with respect to Ground A, the failure to request a continuance, I think it was established before Your Honor that there were at least two valid strategic reasons for not requesting a continuance, one of which being that his client had previously asserted his right to a speedy trial and this would have delayed the trial even further.

And then in the record itself there was Mr. Bruck's argument that there was potential for prejudice because we have a jury that's not sequestered and if they're out for a week they may forget facts, they may be exposed to prejudicial publicity. We think both of those grounds support the decision not to request a continuance.

With respect to the use of the impeachment evidence that was used, I think Mr. Bruck -- his testimony makes clear that in hindsight some of this may not have been something he would have done, particularly a Ms. Turner, however, we don't judge counsel's performance by hindsight. Under Strickland, you judge it from the time performance was rendered. He made a strategic decision that all of this information needed to be presented in order to adequately impeach the witness because using the 1991 transcript solely -- the cross-examination at that time solely wouldn't present an adequate picture of what kind of person Mr. Farmer was. And I think if you read through the record you will see exactly and precisely how counsel was able to use that; basically suggesting to the jurors that Mr. Farmer's a sociopath and a narcicisstic who will do anything that benefits Mr. Farmer and doesn't really know what the truth is. He's capable of saying anything that benefits him. The fact someone else may have tried the case differently doesn't show ineffectiveness on the part of counsel.

With respect to the failure to argue against the housebreaking and grand larceny charges, they were -- it was argued that they were too remote. In fact, the remoteness issue went up to the state Supreme Court, which ultimately dismissed cert as improperly granted. The

Court of Appeals finding that the housebreaking and grand larceny crimes were not too remote. My point on my examination of Mr. Bruck was there is no -- there was no case law in 2006, and I'm not aware of any right now, that would say that armed robbery and murder are so similar to housebreaking and the grand larceny issue and not be allowed to use those convictions.

Mr. Cooper attacks the failure to argue. Well, the facts was -- were such that it could be a -- you know, it could have been a burglary, well, that wasn't the charge and because it wasn't the charge, then the housebreaking isn't similar -- isn't too similar to use.

I think that Mr. Southerland's testimony about the armed robbery as being -- the armed robbery convictions, I think the judge's jury instructions, I think, cured any possible prejudice whatsoever. I don't think that counsel was in the least bit deficient in his performance because it was not responsive to his question and counsel later used the evasiveness by Mr. Southerland on cross-examination and it's a reason not to trust his testimony. But the judge gave a limiting instruction that evidence of prior crimes and criminal activity could not be considered as anything other than impeachment evidence.

The testimony concerning the log, that was simply the person's factual observation. Mr. Bruck thoroughly

cross-examined him and impeached his testimony. Not only did he impeach him on cross-examination, but he impeached him with the testimony of another witness, Lieutenant Springs. Again, the fact that someone else may do things differently doesn't show ineffectiveness on the part of trial counsel.

With respect to the failure to object to facts not in evidence in the argument -- of the closing argument by the solicitor, it would be our position that you can't show any conceivable prejudice from counsel's failure to object. The standard is whether or not those comments were such to deprive Mr. Cooper of a fundamentally fair trial. We submit that they were not. We have the -- both the eyewitness testimony of Mr. Southerland and we have Mr. Farmer's prior recorded testimony in addition to the circumstantial evidence and the little bits and pieces that were put together from the other witnesses.

I believe that Mr. Bruck has fully explained his failure to recuse himself. I think that that's pretty straightforward.

And with respect to the claim of cumulative error, Ms. Goldberg is correct our state Supreme Court has not adopted that standard, the United States Supreme Court has not adopted that standard. We submit to you that in a case such as this where the claims are divergent, there

are two claims related to Red Farmer, okay, those may be considered together; however, you don't consider a failure to object to the closing argument and you can't accumulate that with the failure to move for a continuance or a failure to object to certain testimony. They're just -- they're just unrelated and it's always been our position that as long as there's no prejudice on any individual claim, you can't get to a situation where we accumulate the number of claims and then show prejudice because you can't add zero, zero, zero and zero and zero and get one, you get zero, and in a nutshell that's our position.

THE COURT: Okay.

MS. GOLDBERG: Your Honor, if I can just address one thing that was brought up new?

THE COURT: Sure.

MS. GOLDBERG: In Mr. Cooper's Court of Appeal's case as a result of this trial, this is 386 South Carolina 210, Mr. Salter is correct that the Court of Appeals did address the housebreaking and grand larceny. At trial it had only been argued that they were too remote. That's what the appellate court was reviewing. And then specifically I'm gonna quote from this opinion. It says additionally, Cooper's attorney conceded that the crimes of housebreaking and larceny were not so similar to the charge in this case to be prejudicial. Our argument here is that they should

have argued that they were similar. They missed that argument completely, therefore, it wasn't -- so I just wanted to make sure the Court was aware even though that issue was on appeal, that particular question regarding that issue was not on appeal.

THE COURT: Okay. Was there something else you wanted to add?

MR. SALTER: Just one thing, Your Honor. Yes, sir. I omitted Mr. Hite's testimony --

THE COURT: Oh, okay.

MR. SALTER: -- and it is our position that Mr. Hite could not be impeached with his participation in the videotaping in Quattlebaum because in Quattlebaum itself the Supreme Court ruled that the officers could not be impeached with that -- that same testimony. Also, he was thoroughly impeached by the other matters that I pointed out on examination of Mr. Bruck, both through cross-examination and in closing argument.

And I think that's it, Your Honor.

THE COURT: Okay.

All right. Well, I've got 1200 pages to read. I'll take it home and I'll be reading it. Like I told the other group, because of health issues with my father and mother, don't expect to hear from me before January 1st. I mean, I'm just telling you.

MS. GOLDBERG: Yes, sir.

THE COURT: Thank y'all. Thanks everybody for waiting.

MS. GOLDBERG: Thank you, Your Honor.

(Whereupon, the proceedings were concluded at 5:04 P.M.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 11th day of December, 2017.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

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

March 17, 2018

/S/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	
Gene Tony Cooper, # 084279,	2013-CP-32-1929
Applicant,	
v.	**ORDER OF DISMISSAL**
State of South Carolina,	
Respondent.	

This matter is before the Court by way of a Post-Conviction Relief (PCR) Application filed on June 5, 2013, an Amended Application, and a November 29, 2017 Second Amended Application. The Court held an evidentiary hearing into the matter on December 11, 2017, at the Lexington County Courthouse. Applicant was present at the hearing and Kristy Goldberg, Esquire, represented him. Senior Assistant Attorney General William Edgar Salter, III, represented Respondent.

Lead trial counsel, David I. Bruck, was the only witness at the hearing. The Court had before it a copy of the Record on Appeal filed in connection with Applicant's appeal from his conviction and sentence; the records of the Lexington County Clerk of Court regarding Applicant's convictions; Applicant's South Carolina Department of Corrections (SCDC) records; and the pleadings in this action. The Court now denies relief and makes the following findings:

I. PROCEDURAL HISTORY

Applicant is presently confined in McCormick Correctional Institution, of the South Carolina Department of Corrections, as the result of his Lexington County conviction and sentence. The Lexington County Grand jury indicted him in January 1990 for murder,

kidnapping, armed robbery, forgery (1990-GS-32-0083), and conspiracy to commit those offenses. (1990-GS-32-0084). ***R. pp. 1561-65.*** The State sought the death penalty. Following a February 11-22, 1991 jury trial, Applicant was found guilty of murder, kidnapping, armed robbery, forgery and conspiracy to commit armed robbery. He received a sentence of death for murder. On direct appeal, the South Carolina Supreme Court reversed his murder conviction and vacated his death sentence, but affirmed his remaining convictions. *State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994) (*Cooper I*), *overruled on other grounds*, *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001).

On September 4, 1995, Applicant filed a PCR Application as to the remaining charges. The PCR court granted relief, finding that his attorneys were ineffective in failing to properly advise Applicant of his right to address the guilt phase. Respondent appealed the PCR court's ruling. However, the South Carolina Supreme Court upheld the PCR judge's decision on August 12, 2002. It thereafter remanded the matter to Circuit Court. *Cooper v. Moore*, 351 S.C. 207, 569 S.E.2d 330 (2002) (*Cooper II*).

Applicant filed an Amended Demand for a Speedy Trial motion dated July 11, 2009. On August 18, 2003, the Honorable Marc H. Westbrook heard this motion. Applicant was represented by David I. Bruck, Esquire, and Robert Lominack, Esquire. Judge Westbrook took the matter under advisement. ***R. pp. 5-15.*** The Honorable William P. Keesley held a second speedy trial hearing on February 15, 2005. Mr. Bruck represented Applicant. ***R. pp. 22-27.*** Judge Keesley filed an Order for Speedy Trial on April 25, 2005, in which he directed the Eleventh Circuit Solicitor's Office to speak with the trial judge assigned to the case as well as "the Chief Judge for Administrative Purposes and select a firm date for the commencement of the trial, which shall begin in 2005." ***R. p. 29.***

Applicant subsequently filed another motion for speedy trial and moved to dismiss the charges against him. The Eleventh Circuit Solicitor's Office filed a May 18, 2005 motion seeking to disqualify Applicant's trial counsel because of Mr. Bruck's improper contact with Southerland that resulted in a statement exculpating Applicant. The Solicitor's Office also moved to be recused because of a conflict of interest arising from the Office's employment of the original trial judge's law clerk. Judge Keesley held a hearing into these motions on July 12, 2005. Messrs. Bruck, Andrews and Duncan represented Applicant. Solicitor Myers represented the State. ***R. pp. 30-71.*** Judge Keesley filed an Order dated July 12, 2005, denying the motion to dismiss for failure to have a speedy trial, the request for bail and the motion to disqualify trial counsel. He granted the Solicitor's motion to be recused. ***R. pp. 76-79.***

The prosecution of the case was thereafter assigned to First Circuit Solicitor David Michael Pascoe, Jr. On December 29, 2005, Applicant filed a Notice of Motion and Renewed Motion to Dismiss All Charges for Lack of a Speedy Trial, Or in the Alternative for Release on Bail. ***R. pp. 81-85.*** In response, the State filed the "State's Response to Defendant's Motion for Speedy trial and/or Granting Bail" (***R. pp. 86-90***), and Applicant filed a reply to that pleading. ***R. pp. 91-100.*** The Honorable Daniel F. Pieper held a hearing on Applicant's motions February 8, 2006. Messrs. Bruck, Andrews and Duncan represented him at the hearing. Senior Assistant First Circuit Solicitor B. Harrison Bell represented the State. Judge Piper denied both of Applicant's motions in a lengthy Order dated April 21, 2006. ***R. pp. 328-344.***[1]

Applicant then received a jury trial before Judge Pieper on May 22 - June 1, 2006. Messrs. Bruck, Andrews and Duncan represented him. Mr. Bell and Assistant Fifth Circuit Solicitor Theodore Nichols Lupton represented the State. The jury convicted Applicant of each

[1] The First Circuit Solicitor's Office abandoned the State's intention to seek the death penalty.

of the charged offenses. Judge Pieper sentenced him to life imprisonment for murder, twenty-five years for armed robbery and five years for the conspiracy count.[2]

Applicant timely served and filed a notice of appeal. Following briefing by the parties and oral argument, the South Carolina Court of Appeals affirmed Applicant's convictions and sentence. *State v. Cooper*, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009) (*Cooper III*). On January 12, 201, the South Carolina Supreme Court granted a petition for writ of certiorari on Applicant's claim that he was denied his right to a speedy trial. However, the Court later filed a November 7, 2012 Order dismissing certiorari as improvidently granted. *State v. Cooper*, 400 S.C. 256, 734 S.E.2d 166 (2012) (*Cooper IV*). The Remittitur was issued on November 27, 2012.

Applicant then filed a Petition for Writ of Certiorari in the United States Supreme Court. The United States Supreme Court denied certiorari on May 13, 2013. *Cooper v. South Carolina*, 569 U.S. 976 (2013).

Applicant raised the following claims in his June 5, 2013 Application:

1. Ineffective Assistance of Counsel:
2. Due Process Violations of US Constitution, in that:
    a. "Sixth Amendment violation for speedy trial."
    b. "Fourteenth Amendment violation of due process of law."
    c. "Eighth Amendment violation for cruel and unusual punishment."
    d. "Article III, Section 3 violation for prosecution knowingly paying Robert Bo Southerland for is testimony, and Chief Justice Toal appointing Judge Pieper was a conflict of interest."

[2] Because of the murder sentence, Judge Pieper did not impose a sentence for kidnapping. *See* S.C. Code Ann. § 16-3-910 (Supp. 2008).

The State filed its Return on December 9, 2013. On November 16, 2017, Applicant filed an Amended Application, with counsel's assistance. He raised the following claims in his Amended Application:

(a) Ineffective assistance of trial counsel for failing to request a continuance to ensure the attendance of witness Red Farmer as an in-person trial witness.

(b) Ineffective assistance of trial counsel for failing to request that the Court exclude testimonial evidence from Red Farmer.

(c) Ineffective assistance of trial counsel for failing to object and conceding to allowance of the Applicant's prior housebreaking and grand larceny convictions and introducing information regarding the Applicant's sentence on those prior convictions.

(d) Ineffective assistance of counsel for failure effectively challenge the testimony regarding the photo identification by Dana Harley.

(e) Ineffective assistance of counsel for failure to object to the speculative statement when witness Rick McDermott testified that the log was "too heavy for one person to lift alone," which the state was then allowed to address in closing argument over objection. Tr. 1103 and 1146.

(f) Ineffective assistance for failure to assist in having the Applicant submit his DNA for comparison to the available DNA evidence in this matter.

(g) Ineffective assistance of counsel for failure to object when the State argued facts not in evidence. Tr. 1204.

(h) Ineffective assistance of counsel for allowing the jurors to be aware of prior trial proceedings.

(i) Ineffective assistance of counsel for failure to call Applicant to the witness a second time to provide context and substance regarding his interview with Investigator Edward Hite as suggested by the Court. Tr. 1043.

(j) Ineffective assistance of counsel for failure to object when an out-of-court statement by the Applicant's mother was elicited for the truth of the matter and no hearsay objection was raised. Tr. 1061.

(k) Ineffective assistance for failure to effectively cross-examine Investigator Hite.

(l) Ineffective assistance of counsel for failure to recuse himself from representation of the Defendant when he became interjected as a witness in the trial.

(m) The cumulative effect of trial counsel's errors constitutes ineffective assistance of counsel.

Applicant thereafter filed his Second Amended Application on November 29, 2017.

STATEMENT OF FACTS

The evidence presented at trial, viewed in the light most favorable to the State, proved that the Applicant Cooper kidnapped, robbed and murdered the victim (Kimberly Ann Quinn) as the result of a premeditated and sinister plot that originated with a state prison inmate and Cooper conspiring to rob Kim of an insurance settlement check from a car wreck. Cooper and Robert H. "Bo" Southerland carried out the crimes, with the aid and assistance of Brenda McLauren (Cooper's niece), even after they were aware that Kim did not have the insurance check. Cooper netted $ 149.00 for his maliciously brutal crimes. Although Southerland was the chief prosecution witness, much of his testimony was corroborated by other witnesses, including two who saw him and Cooper casing Kim's house on the day of the murder.[3]

Southerland testified that he had been convicted of murder, armed robbery, forgery and conspiracy to commit robbery in this case, and that Cooper was with him when these crimes were committed. Cooper "came by my trailer and woke me up Thursday morning about 8:30 and asked me if I'd help rob this gal, kill her." After he agreed, Cooper explained that "Red" Farmer had called and told him that she was getting an insurance check for $2800.00, and that "she wanted to buy half a pound of reefer." Southerland did not know either Farmer or Kim Quinn. *Tr. pp. 413-14; 418.*

[3] As will be seen, only one witness identified both men. The other witness identified only Southerland.

The men went down to where Cooper's niece, McLauren, was working "because he didn't know where [Kim] lived .... And when he walked in, she told him that Red wanted him to call ... him, so she gave him a phone number." Cooper called Farmer and had a conversation. Cooper went back into the store and McLauren wrote down the instructions where she lived. Next, the men went down to Platt Springs Road.[4] There was only one house fitting the description that McLauren had given, and it was "right across from some apartments." Southerland told Cooper that people would notice the car, so he pulled into the apartment complex, parked and waited for several minutes. ***Tr. pp. 418-20.***

Next, Cooper drove to NAPA Auto Parts right off Charleston Highway and used the phone to call her house. After he got an answering machine, he got back into the car, and they drove back and forth for a period before pulling into the parking lot of the apartment complex again. Cooper got out and told Southerland to go to a pay phone and call Kim. Southerland did as he was instructed. When Kim picked up the phone, he acted as if he had the wrong number by asking for someone else. Next, he drove back and picked up Cooper. He also told Cooper that she had answered the phone. ***Tr. pp. 420-22.***

Cooper got into the car and began driving up and down the road again. He then pulled back into the apartment complex and "sat there for a while." Next, he drove to a pay phone and called Kim. Again, he got the answering machine. It was before 3:00 p.m. Afterwards, Cooper drove to the apartment complex, backed the car into a space and they sat there. A blonde haired lady that lived across from where they were parked "[came] out and was looking at the car." ***Tr. pp. 422-23.***

[4] They were riding in Cooper's Mercury Cougar. (State's Ex. 17). Cooper was driving, even though Southerland admitted he had been driving this car for a couple of weeks. ***Tr. p. 419.***

They left the apartments, and Cooper drove to the store where McLauren worked. Cooper instructed her to go to Kim's house, and see if she had the money and if she still wanted the marijuana. They followed McLauren to Kim's house in their car and stopped about a half block away. After they saw her pull up to the house, they realized that this was not the house they had previously been watching. McLauren came out roughly fifteen minutes later, and they followed her to the West Columbia Post Office. Cooper "blew up" when McLauren told him that Kim didn't have the money, that she wouldn't be getting the check until that Tuesday, and that the check she had was only for $240.00. Cooper told her that she lied to him. He then leaned into the car, and spoke to her. After that, he said, "Damn the money, I'm going to kill the bitch." ***Tr. pp. 423-26.***

This happened between 3:00 and 4:00 p.m. McLauren went home and Cooper took Southerland back to the South Congaree trailer park where he was living.[5] Cooper said that he would come pick him up at eight, and that they would go to a bar on Platt Springs Rd., near Kim's house, and drink some beer. Southerland went to Donnie Shumpert's house around 6:30 or 7:00 p.m., where he smoked marijuana[6] and he waited for Cooper, in a trailer belonging to Shumpert's nephew, located on the same property. When Cooper arrived, he was in his green truck. They then went to a "beer joint" off of Platt Springs Rd. and had a few beers. ***Tr. pp. 425-29.***

From there, they went to a store in "Triangle City," where Cooper used the telephone to call his wife at 9:00 p.m. As they passed Kim's house on their way to the store, a flatbed truck was sitting in the driveway. Farmer had told Cooper that Kim had a boyfriend and they figured

[5] Southerland knew a few people in the trailer park and he knew that Mr. Cooper, who is Applicant's father, lived on Greenwood Drive.

[6] Southerland had bought a half ounce of marijuana so that Kim could smoke it to see if she wanted to buy a half pound of it.

that was him. After Cooper called his wife, they rode by Kim's house and saw that the truck was still there. So, they returned to the bar and shot a game of pool. ***Tr. pp. 429-30.***

When they later rode past Kim's house again, they saw a man saying goodbye to her. So, they "rode back down and turned around and come back, went to the club and we sat there just a bit. And we rode back down there and the truck was gone." ***Tr. pp. 429-30.*** After Cooper stopped at a store to buy a six pack of Budweiser, they went Kim's house and pulled into her driveway. It was after 10:00 p.m. Cooper got out, walked up to the door and went inside with Kim when she answered the door. A few minutes later, Cooper came to the screen door and motioned for Sutherland to come in the house. Southerland grabbed the six-pack and went into the house. Kim's daughter, Amanda, was sleeping in the front part of the house. ***Tr. pp. 430-31.***

Cooper told Kim that he heard that she wanted to buy some marijuana and that Southerland had some for her to sample. Southerland "rolled a joint" and smoked it with her, and she said it was good. She told him that she had been on morphine and felt bad, but that this calmed her down. Kim refused Cooper's offer of a beer. She said that she wanted a Coke and something to eat. So, Cooper offered to drive her while Southerland would babysit. Kim agreed and she left with Cooper. ***Tr. pp. 430-31.***

Southerland was finishing his third beer when Cooper came into the house, saying "we got to go, we got to go." When Southerland asked where Kim was, Cooper told him that she was at "the pond." Southerland knew that the pond to which Cooper was referring was a pond off Beckman Drive, in South Congaree, which they had visited a couple of times. After Cooper told Southerland where he had parked the truck (a short distance from Kim's house), Southerland went and sat in it. Cooper walked up about ten minutes later, carrying a black plastic bag. In response to Southerland's inquiry, he said a leather jacket was in it. As they headed to the pond,

Southerland asked what Cooper was going to do, and Cooper said that "he was going to kill her." *Tr. pp. 431-32.*

They arrived at the abandoned house near the pond, and Cooper got out with a pump shotgun that came from a trailer Cooper and Southerland had broken into a few weeks earlier.[7] Kim was tied to the door inside the house. Her hands were handcuffed behind her, with a stick run through it, and she was "tied in" with strips from a curtain that had apparently been hanging in the house. Cooper untied her. As soon as Cooper took a gag out of her mouth, she asked Southerland for help. However, he did not do anything because Cooper was armed and Southerland could not help her. Kim told Southerland that Cooper had beaten her with a stick, and after Cooper pulled her pants down and shined his flashlight, Southerland could see "the stripes on her bottom where he had beat her." Cooper told Kim that he wanted to know the names of the people for whom she worked, and whether they had drugs or money. *Tr. pp. 432-34.*

Then, Cooper pulled her outside and told her that he was going to kill her. He shot her even though she begged for him not to kill her, and she fell over on her left side. Realizing that she was still breathing, Cooper said, "She ain't dead" and he shot her again in the neck. He shot her two more times, until all of the shells were gone. Afraid that authorities might recognize the handcuffs he had used had been stolen from C.C.I., Cooper got his ax from the gun rack of his truck and chopped off both of Kim's hands. *Tr. pp. 434-35.*

Following Cooper's orders, Southerland chopped off her feet. Because her pants made this difficult, Cooper removed her pants and threw them in the pond. Cooper dragged her body closer to the pond and put limbs on it. At Cooper's direction, Southerland retrieved a chair from

[7] Southerland had fired off a round in this weapon at Donnie Shumpert's house on the previous night. *Tr. p. 433.*

near the steps to the house and he set it on her. Cooper said "that's her seat in Hell." He then got a gas can from his truck, poured gas on her and lit it. As her body was burning, Cooper took the rings from her severed hand and threw them in the pond. He gathered her hands, her feet and the handcuffs, and Southerland picked up the gun, the ax and the gas can. Then, they left. ***Tr. pp. 435-36.***

Their next stop was the Congaree Creek Bridge on 302. Cooper had placed Kim's hands and feet in a plastic shopping bag and they threw them into the water along with the ax. After these grizzly events, Cooper drove to the Crown Store, bought two hot dogs and ate them. Finally, they went to Cooper's trailer and washed the clothes that they had been wearing. Southerland took a shower and slept on the couch. They buried the murder weapon the next morning in some woods near Cooper's trailer. ***Tr. pp. 437-38.***

Later, the men went to a bank in Cayce, where Cooper used Kim's state I.D. card and cashed the check he had stolen from her purse. They drove around for some time. Then, Cooper went to a car wash, where he washed and vacuumed the truck. Southerland went to Cooper's trailer later Saturday night, and he saw Cooper painting parts of the cab of the truck, a tool box and the rear window black. ***Tr. pp. 437; 439-40.***

On Sunday, Southerland was driving down 302 into West Columbia and he ran into Cooper near the residence of Cooper's father, where Cooper had picked up a camper that he kept there. Cooper told him that "they must have found the body because you could see the cars going down the dirt road." Southerland followed Cooper back to Pelion.[8] The camper had a T.V. and Cooper wanted to watch the news to see if there was any coverage about the murder. He also wanted to get a newspaper to see if it was in there as well. ***Tr. pp. 440-41.***

[8] Cooper told him that he could rent the camper for $50.00 a week. ***Tr. p. 441.***

The remaining evidence offered by the prosecution, including testimony from a number of witnesses without any involvement in the murder, corroborated many aspects of Southerland's testimony. This evidence proved that Kim and her six-year-old daughter, Amanda, lived in a West Columbia, South Carolina home in October 1989. She was unemployed and received a monthly AFDC check of $149.00. The check was mailed so that she received it by October 1st. At the time of her murder, Kim's boyfriend, Eugene Carter, was incarcerated at C.C.I. Carter was friends with Philip "Red" Farmer, another inmate who was also friends with Cooper and Cooper's niece, Brenda McLauren. ***Tr. pp. 156-57; 165-68; 173-74; 371-72; 695-704.***[9]

Farmer was housed in Cell Block 3 (CB-3), from where he was able to make collect telephone calls. Also, Farmer worked in C.C.I.'s educational department, located in the Stoney Building, which gave him access to additional State telephones. On Tuesday, October 3, 1989, Carter told Farmer that Kim was supposed to be receiving an insurance check for $2,800.00, as settlement of a claim against an automobile insurance carrier.[10] The following day, October 4, Farmer received a visit from McLauren, (Cooper's niece and co-defendant), who routinely visited him. During this visit, Farmer instructed her to have Cooper contact him. Farmer called Cooper at his home around 7:30 p.m. ***Tr. pp. 704-09.***[11]

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[9] The trial judge ruled that Farmer was an unavailable witness. The State published his 1991 testimony on direct examination over objection. ***Tr. pp. 694-715.***

[10] Farmer testified that he, Kim, Gerald Legrand and two other people were engaged in an ongoing conspiracy to smuggle drugs into C.C.I. ***Tr. pp. 727-28.*** Legrand's testimony corroborated this. ***Tr. pp. 676-65; 688-90.***

Also, the parties stipulated that Kim had been involved in an accident in January 1989. She had settled a claim against the insurance carrier for $7,750.00. Of this amount, she was to receive $2,831.18. The rest was to cover her expenses. The money was not to be paid until October 10, 1989. ***Tr. pp. 370-71. See also Tr. pp. 174-75.***

[11] Mr. Blake Taylor, who was Director of S.C.D.C.'s Internal Affairs and Audits, testified that there were no records of local calls from the educational unit. However, McLauren's visit was logged in S.C.D.C. records. ***Tr. pp. 766-77***; State's Exhibit 41.

Farmer told Cooper that Kim was "receiving an insurance check for $2,800.00. I also told him it would be a good opportunity to rob her." Cooper "... said he didn't see any problem with it." Also, Cooper "[t]old me that he didn't have any respect for the bitch." For his part in the robbery scheme, Farmer was supposed to receive $500.00. Following this conversation around 9:30 p.m., Cooper called Kim at her home. ***Tr. pp. 709-10.***

On the morning of Thursday October 5, 1989, Mr. Dana Harley was working as the maintenance man at Lynn Gate Apartments, across the street from Kim's residence. He identified Cooper and Southerland as occupants of a white Mercury Cougar. They drove into the complex's parking lot around 9:30 a.m., and they backed into a space from which they could easily watch Kim's house. They left after roughly fifteen minutes. They returned about forty-five minutes later, and the passenger, whom Hartley identified as Cooper, walked up to and sat on the steps of the apartment that Hartley was cleaning.[12] Again, Cooper was positioned so that he could watch Kim's house on Platt Springs Road. Ten or fifteen minutes later, the Cougar returned, picked up Cooper and left. ***Tr. pp. 214-21; 224-26; 231-36.***

Harley saw Cooper and Southerland pull back into the parking lot sometime "around 3:00 [p.m.] or so." Again, they backed into the same space and sat for a few minutes before leaving. Hartley got the license tag number of the Cougar (State's Ex. 17) on this occasion. The car left roughly around 3:30 p.m., but returned around 4:00 p.m. This last time, however, the car did not stop in the lot. ***Tr. pp. 222-27.***

The State also published the prior testimony of Mrs. Sharon Freeman Counts. She had testified in 1991 that she was a resident of Lynn Gate. She saw the car parked near her apartment

[12] Hartley paid attention to the men because they were suspicious. Also, he kept the apartment he was cleaning dark when they were present. While he watched Cooper through a peephole on the second visit, but otherwise watched both men through the apartment window. ***Tr. pp. 241-43.***

between 2:30 and 3:30 p.m. on October 5, 1989. There were two white males in it, and she identified Southerland as the passenger. She thought this was suspicious, since "... the parking lot is always empty at that time." Her description of the passenger fit Southerland, and she testified that he had boldly stared at her. ***Tr. pp. 229-38; 248-58.***

On Friday, October 6th, both Harley and Mrs. Freeman told police what they had seen on the previous day and they described the two men (Cooper and Southerland). Mrs. Freeman's description of the two occupants was virtually identical to Harley's, and she selected Southerland as one of the men she had seen, from a photographic lineup. The only difference between her account and that given by Mr. Harley is that she stated Southerland was a passenger, whereas Mr. Harley remembered Cooper as the passenger. Harley selected both Cooper and Southerland out of a pre-trial photographic lineup, and he positively identified Cooper at trial. ***Tr. pp. 258-64.***

At roughly the same time that Cooper and Southerland were arriving near Kim's residence on the afternoon of October 5, Elizabeth Griffin - a good friend of Kim who drove Amanda and her own son to and from school - saw McLauren entering Kim's house as Ms. Griffin was leaving. Ms. Griffin last spoke to Kim around 11:00 p.m. on the 5th. Kim did not feel well, but was feeling better than she had earlier that evening. ***Tr. pp. 172-78; 186.***

Amanda testified that Kim was home, alone with her, when she went to sleep on Thursday night. Amanda had previously been in a fire and Kim was very protective of her. So, Amanda slept in the living room. Amanda later awoke to the sound of someone knocking at the door. Kim answered it. Two men came into the house although Kim did not want them to enter. "It was mean loud" and too loud for then-six year old Amanda to go back to sleep. "I had rolled over and someone told me to roll back over or they [were] going to do to me what they were doing to my mother." ***Tr. pp. 156-59.***

Amanda awakened early the following morning, only to discover that her mother was missing. This was unusual for Kim, and the police were called. Neither friends nor law enforcement could find Kim on Friday, October 6th, and her $149.00 AFDC check was missing. Although her purse was found on the ground outside the house, her State I.D. card and all of the money was missing. Her rings, which she wore each day, were also missing, and there were some Budweiser beer cans in Kim's house. ***Tr. pp. 159-64; 166-69; 178-83; 188.***

The parties stipulated that someone other than Kim cashed Kim's AFDC check (State's Ex. 14) at a drive-through window of the Knox Abbott Drive branch of South Carolina National Bank around 9:17 a.m. Friday. The check was forged by someone who simulated Kim's signature and presented a South Carolina Department of Highways and Public Transportation identification card that had belonged to Kim. ***Tr. pp. 371-74.***

Meanwhile, Farmer had a conversation with Eugene Carter on Friday morning and apparently learned that Kim was missing. Farmer thereafter went to the education department and he received a telephone call from Cooper around 10:00 a.m.[13] Cooper told Farmer in a coded conversation "[t]hat my intelligence was wrong; that she did not have the twenty-eight hundred; that he completed the construction job that he was working on; ... that he had burned the excess material[;] and [that he] was real pleased with the job and didn't see any complication." Farmer explained this meant "[t]hat the robbery had been completed, ... that [Cooper] had killed Kim Quinn, ... [and] that he had burned the body." ***Tr. pp. 710-15.***

In October 1989, Teresa Shumpert Dunn was married to Donnie Shumpert. They lived in a mobile home on Glenwood Drive. Lee Chavis, Ms. Dunn's nephew, lived next door. Both witnesses knew Southerland and Cooper. Southerland would frequently stop by the Shumpert's

[13] There would not be any telephone record for a local call to this State telephone.

residence and Cooper would come over to see him. ***Tr. pp. 653-56; 666-85.*** Chavis testified that they seemed to be "good friends." ***Tr. p. 669.*** Cooper appeared to be the leader between the two men, and Ms. Dunn testified that Southerland was not as friendly when Cooper was present. ***Tr. pp. 656-57.***

On the evening of Tuesday, October 3, 1989, Cooper and Southerland returned an air compressor that they had borrowed from Mr. Shumpert. They were in Cooper's green pickup truck. (State's Exhibit 30). Cooper also owned a Mercury Cougar (State's Exhibit 17), but he allowed Southerland to drive it. When Cooper and Southerland arrived on Tuesday evening, Southerland got out of the truck, pointed a shotgun in the air and fired it. Mr. Shumpert told him to put the weapon up because the children were outside, and Southerland put the shotgun back in Cooper's truck. Cooper and Southerland later left in the truck. ***Tr. pp. 657-59.***

On Thursday, October 5th, Southerland came over to Mr. Shumpert's shop, which was behind their residence. He asked what time it was and someone told him 10:30 p.m. He said that he had to go somewhere at 10:30. He walked out of the shop and Ms. Dunn did not see him again that night. The Cougar was parked in the yard after he left, and it was still parked at the Shumpert residence when Chavis left for work at 7:00 a.m., on Friday, October 6. ***Tr. pp. 659-61; 669-71.***

Authorities did not discover Kim on Friday or Saturday, October 7th. However, early Friday afternoon, Forest Ranger Mike Hutchins, with the South Carolina Forestry Commission, was dispatched to a fire in some woods near Beckham Road. This is also near the residence of Cooper's father. By the time he arrived, the fire was contained in a relatively small area and he did not further investigate, since there were no obvious signs of damage to an unoccupied building in the area. ***Tr. pp. 189-98.***

Two boys discovered Kim's burned and mutilated body on Sunday, October 8th, and led their father to it. Their father then notified law enforcement. ***Tr. pp. 199-213.*** Her body was discovered in a condition very consistent with Cooper's statements to Farmer. Her brains had literally been blown out of her skull by a shotgun blast; a large amount of brain matter was discovered some distance away from her body; her hands and feet had been severed; and a fire, started by gasoline, had badly burned her body and the debris which had been piled on top of it. Again, Budweiser beer cans were found at the scene. Her jeans were found in the nearby pond. ***Tr. pp. 281-89; 343-45; 349-67; 388-90, 691.***

Divers from the Lexington County Sheriff's Department retrieved Kim's severed feet and her left hand from the Congaree Creek, near a bridge on Highway 302, in South Congaree. Also, Cooper's ax (State's Exhibit 22) was found near one of the feet. ***Tr. pp. 293-303.*** Even though the ax had been in the creek for several days, there were three separate spots which tested positive for human blood. ***Tr. pp. 381-82.*** When law enforcement examined Cooper's truck, they did not find any blood. However, the truck's cab had recently been painted black, including the floorboard, a tool box, the rear window and the area behind the seats. This made it difficult to accurately test for the presence of blood. Yet, samples of paint chips from the ax matched those taken from the cab. ***Tr. pp. 383-86; 399-411.***

Marsha Burroughs Crane testified that she was married to Cooper in October 1989. They lived in Pelion, South Carolina at the time. She testified that Cooper kept all of their vehicles clean and that he would wash them several times a week. ***Tr. p. 645.*** She last saw the ax that was introduced at trial when Southerland returned it on September 30th. ***Tr. p. 649.*** Cooper's parents lived on Greenwood Dr., in West Columbia. Their house was near the pond where Kim was murdered, and Ms. Crane had been there with Cooper. ***Tr. pp. 632-34.***

Ms. Crane also knew Southerland. She described him as a "business acquaintance" of Cooper, but she admitted that she did not know what else the two men did together. Southerland came to their trailer on Wednesday October 4, 1989, around 9:00 p.m. She worked on Thursday night. ***Tr. pp. 649-51.***

On the Sunday after Kim's murder, October 8th, 1989, she and Cooper went to his parents' home and picked up Cooper's camper. Consistent with Southerland's account, she testified that they saw Southerland in "his" car on their way home. They pulled off of the road when he waived them down. After Cooper and Southerland exited their vehicles and had a conversation, the Coopers went home. ***Tr. pp. 634-36.*** Later Sunday evening, Cooper, Ms. Crane and her two boys went to the home of Cooper's sister in Wagner, South Carolina. Southerland and McLauren were also there. At some point, Cooper had a private conversation with his sister, McLauren (his niece) and Southerland. Ms. Crane did not hear the substance of that conversation. ***Tr. pp. 636-37.***

Finally, an autopsy by Dr. Joel Sexton -- who identified the body through medical records -- revealed that there had been three gunshot wounds. The wound to the head would have been immediately fatal and was listed as the cause of death. A wound to her back, near the shoulder blade, was fired before the head wound and caused extensive damage to about three-fourths of Kim's chest cavity. The remaining wound, to Kim's neck, would also have been fatal. Dr. Sexton opined that the post-mortem amputation of Kim's hands and feet were consistent with being caused by Cooper's ax. ***Tr. pp. 310-36.*** Dr. Sexton recovered buckshot, birdshot and wadding from the wounds. The buckshot was recovered from her neck, while the birdshot was found in the head wound. ***Tr. pp. 320-21.***

III. ALLEGATIONS

Applicant alleges the following grounds for relief in his Second Amended Application:

a. Counsel was ineffective in failing to request a continuance to ensure the attendance of witness Red Farmer as an in-person trial witness;

b. Counsel was ineffective by unreasonably admitting impeachment evidence against Red Farmer which was more harmful to the Applicant's case than helpful;

c. Counsel was ineffective in conceding to allowance of the Applicant's prior housebreaking and grand larceny convictions and failing to object based upon the fact that they were overly prejudicial in that they are similar to the facts underlying the charges at issue in trial. Further, counsel was ineffective in that he unreasonably introduced information regarding the Applicant's sentence on those prior convictions including the fact that he had spent time in prison, all of which was unnecessarily prejudicial;

d. Counsel was ineffective in failing to obtain an instruction from the Court that witness Robert Southerland should not be allowed provide testimony introducing evidence regarding the Applicant's prior Armed Robbery convictions which were inadmissible and prejudicial;

e. Counsel was ineffective by failing to properly and effectively challenge the testimony regarding the photo identification by Dana Harley;

f. Counsel was ineffective in failing to object to the speculative testimony by Rick McDermott that the log was "too heavy for one person to lift alone," which the state was then allowed to address in closing argument over objection. Tr. 1103. And 1146;

g. Ineffective assistance for failure to assist in having the Applicant submit his DNA for comparison to the available DNA evidence in this matter;

h. Counsel was ineffective in failing to object when the State argued facts not in evidence. Tr. 1204, lines 4-6;

i. Counsel was ineffective in failing to call the Applicant as a rebuttal witness to provide context and substance regarding his interview with Investigator Edward Hite as suggested by the Court. Tr. 1043;

j. Ineffective assistance for failure to effectively prepare for the direct examination of the Applicant and the cross-examination of Investigator Hite;

k. Ineffective assistance of counsel for failure to recuse himself from representation of the Defendant as he was a necessary witness in the trial; and

l. The cumulative effect of trial counsel's errors constitutes ineffective assistance of counsel.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe Mr. Bruck's lengthy testimony at the hearing, and to closely pass upon his credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Ineffective Assistance of Trial Counsel.

In a PCR action, the 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, the applicant must make a twofold showing. First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (Citation omitted).[14]

Even if the Applicant proves deficient performance, he must also prove that he was prejudiced by his attorneys' ineffectiveness because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. To show prejudice, he must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. It is insufficient to prove "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Instead, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 687).

Applying this standard to the claims raised by Applicant, the Court finds that he has not met his burden of proof.

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[14] The Supreme Court explained in *Harrington v. Richter*, 562 U.S. 86 (2011), that:

> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; see also *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Richter, 562 U.S. at 105, 131 S.Ct. at 788.

1. Counsel was not ineffective for failing to request a continuance to ensure the attendance of witness Phillip "Red" Farmer as a witness.

Applicant first claims (Ground a) that trial counsel was ineffective for not requesting a continuance to ensure the attendance of witness Phillip "Red" Farmer as a witness at trial. The Court finds that he has not proven either deficient performance or resulting prejudice under *Strickland.*

Mr. Bruck testified that he was lead counsel in the case, and that he was assisted by Stuart Andrews, Esquire, and Assistant Lexington County Public Defender John Earl "Jack" Duncan, Esquire. Mr. Bruck detailed his prior experience in criminal trial and appellate practice, at length.[15] He estimated that he had tried between fifteen and twenty capital trials and another ten noncapital trials. Also, he had tried other major felony cases while working in the Richland County Public Defender's Office. ***PCR Tr. pp. 42-45.***

Applicant's retrial differed from most typical cases because Mr. Bruck had represented Applicant for roughly fifteen years by the time of the 2006 retrial, including the direct appeal, the original PCR proceedings, and the PCR appeal in *Cooper II.* Further, counsel had transcripts of both Applicant's original trial and Southerland's trial, and counsel were aware of how the prosecution's witnesses had testified. ***PCR Tr. pp. 6-8; 45-46.***

While Mr. Bruck did not recall how many times he had met with Applicant, Applicant was cooperative with counsel and Mr. Bruck felt that they had met frequently enough for him and co-counsel to represent Applicant. Applicant has consistently denied involvement in Kim Quinn's murder. Additionally, counsel had thoroughly investigated Farmer's background and

[15] Among his many jobs, he was an Assistant Richland County Public Defender for over three years, eventually specializing in capital trials; he was the Richland County Public Defender for a year; he handled "the bulk of the South Carolina Office of Appellate Defense's death penalty appeals on a contract basis from 1980 through 1987 and was the Chief Attorney of that Office for three and one-half years; he has been the Federal Death Penalty Resource Counsel, since 1992; and he has taught a death penalty trial clinic at Washington and Lee Law School since 2004.

had a witness who had taken a statement from him (***Tr. pp. 879-93; PCR Tr. pp. 12; 16-17***); counsel looked for some witnesses who were not called at trial; and counsel asked for some DNA analysis to be done, but this was not fruitful because the samples were too badly degraded. Counsel had an investigator to assist them in their efforts. ***PCR Tr. pp. 13; 46-49.*** Applicant's defense at trial was that he was completely innocent. Therefore, counsel relied upon a "reasonable doubt" defense, and tried to expose the credibility problems with the prosecution's main witnesses. *See* ***PCR Tr. pp. 13; 49-50.***

The Court finds that counsel's investigation, both generally, and of Farmer, was more than constitutionally adequate. *See Strickland,* 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. 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").

Further, whether Farmer was an unavailable witness and the State should therefore be permitted to publish his prior testimony from the 1991 trial was thoroughly litigated at trial. Counsel argued that the State's showing was "inadequate on its face;" that Farmer was "a classic unreliable witness," who ended up receiving a five year sentence in exchange for his testimony, when he was facing a life sentence; that the State had not requested a continuance to obtain Farmer's presence and had not taken timely and adequate measures to obtain Farmer's presence at trial; that the prior transcript of Farmer's testimony was not adequate to confront him, since Applicant had been unable to cross-examine Farmer about Farmer's subsequent criminal activity, which occurred after the 1991 trial; that Applicant was being denied the right to "face-to-face" confrontation; that Farmer had also given a statement to counsel's investigator to the effect that

he would not testify at Applicant's retrial, and that his earlier testimony had resulted from physical coercion by police; that Applicant had since taken another statement from him; and that the State had not needed Farmer's testimony to convict Southerland. Ultimately, the trial judge ruled that Farmer was an unavailable witness[16] and that the State would be allowed to publish his prior sworn testimony. The trial judge gave trial counsel overnight to consider whether or not counsel wanted a continuance. ***Tr. pp. 73-125; 588-618.***

Counsel declined this offer. ***Tr. pp. 623-24; 627-28.*** However, counsel was allowed to present additional impeaching evidence. ***See Tr. pp. 744-65; 879-93.*** ***See also*** Ground (b), *infra.* The Court of Appeals affirmed the trial judge's ruling on direct appeal. *See Cooper III*, 386 S.C. at 218-21, 687 S.E.2d at 67-69.

Mr. Bruck's assessment was that Farmer was an important prosecution witness because he was only witness to provide direct evidence of Applicant's involvement in the conspiracy to rob the victim, and he was the person who put the conspiracy to rob the victim in motion. Yet, Mr. Bruck felt that there were problems with Farmer's credibility. Although Mr. Bruck could not remember every detail of his representation because the case was tried eleven years before the hearing, he testified that he denied the trial judge's offer for a continuance because Applicant "was asserting his right to a speedy trial ... and we had been fighting for a speedy trial for quite some time and finally we had the trial." It became a question of which Sixth Amendment right to assert: the right to a speedy trial or the right to confrontation. In short, Applicant and counsel were unwilling to let the trial be disrupted by a continuance. ***PCR Tr. pp. 10-12; 47-48; 50.*** He explained that:

> We felt that it was the State's responsibility to have the witnesses there and that they had not used reasonable efforts to obtain his testimony and that the prior

[16] See Rule 804(a)(5), SCRE.

> testimony was inadmissible and ... we hoped that if there was another conviction that the appellate courts would agree.

PCR Tr. pp. 11-12.

He also testified on cross-examination, after his memory was refreshed by the trial transcript (***see Tr. 628, lines 2-16***), that he had been concerned with the potential of prejudice on jurors that might occur if a continuance was granted because a juror(s) might be exposed to publicity about the trial, or the juror(s) might forget certain facts. All of the reasons he stated were considered and the trial judge had allowed him to consider them overnight. ***PCR Tr. pp. 50-51.*** When Applicant's PCR attorney asked him whether he could have considered a gag order, he replied, "Well, yes, but ... we had been conducting a public trial so there would have been publicity that couldn't have been gagged." ***PCR Tr. p. 74.***

The Court finds that Applicant has not proven deficient performance. Rather, all that he has proven is that another attorney may have handled the decision of whether to delay the trial in order to obtain Farmer's physical presence at trial differently. The Supreme Court in *Strickland* admonished that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

The Court finds that counsel has years of criminal trial and appellate experience, and that he would have consulted with co-counsel on major strategic decisions. The Sixth Amendment does not provide a basis for disappointed clients to launch after-the-fact attacks on the objectively reasonable strategic decisions of their trial attorneys." *United States v. Dehlinger*, 740 F.3d 315, 325 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 98 (2014). *See also United States v. Orr*, 636 F.3d 944, 952 (8th Cir. 2011) ("[W]e generally entrust ... matters of trial strategy[ ] to the professional discretion of counsel") (internal citation and quotation marks omitted), *cert.*

denied, 565 U.S. 1063 (2011); *Blake v. United States*, 723 F.3d 870, 879 (7th Cir. 2013) ("counsel's performance is to be evaluated in light of the discretion properly accorded an attorney to develop appropriate trial strategies according to the attorney's independent judgment, given the facts of the case, at least some of which may not be reflected in the trial record). Here, the Court finds that the decision not to request a continuance to secure Farmer's presence was objectively reasonable under *Strickland*, since Applicant had finally been given the trial he had requested in his four Speedy Trial motions and it was the State's burden to secure Farmer's presence or establish his unavailability despite of reasonable efforts to obtain his presence. While the trial judge overruled his objection to the State's efforts to have Farmer declared unavailable under Rule 804(a), SCRE, and the Court of Appeals affirmed that ruling, the Court finds that counsel could have reasonably concluded that there was merit to their objection.[17] Moreover, any continuance - even one lasting only five days or so, ***see PCR Tr. p. 74*** – would, quite obviously, further delay the resolution of the trial that Applicant strongly desired for almost four years.

The Court likewise finds that it was objectively reasonable for counsel to conclude that there was the possibility that one or more un-sequestered jurors might either be exposed to prejudicial publicity about the trial or forget some details of counsel's efforts to discredit the prosecution's circumstantial evidence. The Court finds that counsel reasonably assessed that a gag order would not be sufficient to prevent the possibility of jurors being exposed to prejudicial information about the case, since it had been a public trial.

[17] Counsel had vigorously asserted that the State had failed to make reasonable efforts to obtain Farmer's presence and that the trial judge should not allow it to introduce his prior testimony. Counsel also extensively and successfully argued that the 1991 cross-examination was inadequate to impeach his credibility because of events that occurred after the original trial. Once the trial judge had ruled that the State could publish Farmer's 1991 trial testimony was successfully convinced the trial judge that he should be permitted to present the post-1991 impeachment information to the jury. *See* Ground (b), *infra*.

The Court further finds that Applicant has failed to prove that he was prejudiced by counsel's failure to secure Farmer's physical presence. A criminal defendant does not have the right to have jurors assess a witness' testimonial demeanor. Accord Rule 804(a), SCRE; *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness"), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004).[18] Also, counsel argued in closing that the State had the burden of presenting Farmer as a witness and that the failure to produce him suggested that there was a reason the State did not want jurors to view his demeanor. ***Tr. pp. 1157-58.*** *See State v. Hammond*, 270 S.C. 347, 356, 242 S.E.2d 411, 415 (1978) ("it is always proper for an attorney in argument to the jury to point out the failure of a party to call a witness"); *State v. Bamberg*, 270 S.C. 77, 240 S.E.2d 639 (1977) (comment on a party's failure to produce a witness is permissible); *In re Gonzalez*, 409 S.C. 621, 631, 763 S.E.2d 210, 215 (2014) ("Generally, the [missing witness] rule is applied when the uncalled witness is an agent, employee, relation, or associate of the party failing to call him, or *within some degree of control of said party*") (emphasis in original); *Davis v. Sparks*, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959) ("a party is not to be prejudiced by his failure to call a witness who is equally available to the other party").

Moreover, counsel's cross-examination and the additional impeachment evidence that was introduced fully set forth enough information so that the jury could properly assess Farmer's credibility and counsel could demonstrate the supposed lack of it, which counsel did in his closing argument. ***Tr. pp. 1157-74.*** *See Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (the

[18] A contrary rule would negate the reason for Rule 804(a) and is contrary to the United States Supreme Court's authority recognizing a limited exception to the confrontation requirement for the prior testimony of a witness who is unavailable at the defendant's trial. *See Roberts, supra*; *Barber v. Page*, 390 U.S. 719, 723-25 (1968); *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *California v. Green*, 399 U.S. 149, 161-62, 165, 167 n. 16 (1968).

Confrontation Clause is generally satisfied where the defense had a full and fair opportunity to expose a witness' "forgetfulness, confusion or evasion," thereby calling to the attention of the fact-finder reasons to discredit the witness's testimony); *Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998) (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable").[19]

While Farmer was an important witness for many of the reasons argued by the State in the lower court, the Court finds that he was not the State's main witness. Rather, Southerland was the primary witness because he gave graphic, detailed eyewitness testimony as to all of the offenses, including the conspiracy, kidnapping, armed robbery and, of greatest importance, the murder of Kim Quinn. Second, much of Farmer's testimony was cumulative to Southerland's, although he provided more details concerning the conspiracy to rob her. Third, many of the material points in Farmer's testimony were corroborated, either by Southerland's testimony or by the circumstantial evidence discussed at length in the "Statement of Facts." Finally, there was overwhelming evidence of Applicant's guilt, separate and apart from Farmer's testimony. Southerland put the murder weapon in Applicant's hands. He also established Applicant's intent to commit the murder and robbery even after he knew that he would get less than two hundred dollars for the crime. The macabre and gruesome facts to which Southerland testified – including the use of an ax to chop off her hands (by Cooper) and feet (by Southerland at Cooper's direction) demonstrate as much malice as one could possibly imagine. And, once he had finished the murder and disposed of the victim's hands and feet and his ax, he ate two hotdogs before

[19] It is virtually impossible to imagine how the trial judge could have been any more lenient in his rulings on what counsel could use to impeach Farmer's 1991 testimony.

washing either himself or his clothing. The bottom line is that, in order to have found Applicant not guilty, the jury would have had to accept that virtually every single prosecution fact witness either lied or was mistaken. Therefore, Applicant has not shown either deficient performance or prejudice under *See Strickland*, 466 U.S. at 696 ("... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

2. Counsel was not ineffective for allowing jurors to hear prejudicial evidence presented as part of counsel's efforts to impeach the credibility of Red Farmer's 1991 testimony.

As discussed, the trial judge ruled that counsel could impeach Farmer's 1991 testimony with additional evidence that arose after the 1991 trial. For instance, counsel published to the jury that several arrest warrants were issued in Aiken County but that Farmer was never prosecuted on those charges, and a bench warrant was issued when he failed to show. One warrant was destroyed but one was still pending at the time of trial. ***Tr. p. 744-45***. Counsel also published Farmer's two Texas convictions from 2001 for manufacturing methamphetamine and possession of methamphetamine, for which he received two life sentences. ***Tr. p. 745***. Additionally, counsel was permitted to publish portions of Farmer's testimony at his Texas sentencing hearing (***Tr. pp. 746-54***), and a statement that Farmer had given to Kimberly Turner on May 5, 2006. ***Tr. pp. 879-88***.

In Ground (b), Applicant alleges that counsel was ineffective for allowing jurors to hear prejudicial evidence from the Texas sentencing proceeding and from the statement that he gave to Ms. Turner. The Court finds that he has not proven either that counsel's performance was deficient or that counsel's presentation of this evidence was prejudicial under *Strickland*.

Mr. Bruck testified that the defense had prepared their case as if Farmer would testify in person at the 2006 trial. "... [W]e'd investigated his life since 1989 and gathered a fair amount of ... documentary evidence, about his very colorful history since then, which ... we thought shed a great deal of adverse light on his credibility, including a different version of his own involvement in the crime that he gave during his own sentencing hearing in a Texas criminal trial where he ultimately received a life sentence for drug trafficking, and so ... he had told a different version of this crime under oath, and we had that." Also, counsel had circumstantial evidence that Farmer had been an informant for the Aiken County Sheriff's Department because he was allowed to stay out on bond for three years following his arrest, and he had fled the jurisdiction while out on bond for charges there. This all occurred after Farmer had received a very light sentence for his involvement in Kimberly Quinn's murder. ***PCR Tr. p. 12; 52.***

Mr. Bruck explained Farmer's motive to lie as follows:

> Well, he would have been culpable for the murder if -- if he had helped to set it up, no matter who actually committed it, and so his motive -- I mean, what I argued to the jury at the second trial was that ... he had an obvious motive to cooperate with the State in order to get leniency, and he got an extraordinarily lenient deal, but he also had a motive not to -- well, we argued that there was a second person that wasn't Tony Cooper with Southerland who committed this crime and that he had a motive to -- not to name that person because that person could flip back on him, and also he appeared to have a motive or a reason for a grudge against Tony Cooper having to do with a history of drug trafficking at CCI and that Cooper, after he had gotten out, had run afoul of this drug trafficking ring or whatever by refusing to lend them money or words to that effect.

App. pp. 18-19. See also Tr. pp. 1146; 1154; 1157-74 (counsel's closing argument).

When questioned about why counsel published the Texas sentencing transcript when Farmer still blamed Applicant for the murder, mentioned that Applicant was on parole after serving seventeen years in prison and had been in a maximum security prison (***see Tr. p. 753-54***), Mr. Bruck explained that:

> ... [Farmer] is omitting his own culpability. Basically makes it sound like he had just overheard this whole transaction and that he had only plead guilty -- that he wasn't guilty of anything, that he'd only pled guilty because it had absolutely no effect. And, in fact, said something about just to satisfy me, they gave him a charge which made it sound as though this was sort of part of his cover or something. I mean, it was just a – it was a very distorted and dishonest account of his own prior testimony, which actually involved his being the prime mover in this crime and then having gotten an extraordinarily sweet deal in exchange for his testimony.

PCR Tr. pp. 13-15. See also ***PCR Tr. p. 16.***

Mr. Bruck conceded that the only benefit to Applicant for the jury to hear these details about his past was that Farmer's account at the Texas sentencing impeached Farmer's 1991 trial testimony. ***PCR Tr. p. 16.*** Also, Mr. Bruck would have weighed the prejudice to Applicant from jurors learning this adverse information against the necessity for offering further evidence to impeach Farmer's testimony before he presented this evidence to the jury. Mr. Bruck testified that he must have thought that the benefit to Applicant's case by offering this evidence outweighed any prejudice because he offered the evidence, and that he "would imagine" that this was a matter he would have discussed with co-counsel. ***PCR Tr. pp. 52-53.***

Applicant likewise questioned Mr. Bruck about the decision to present evidence of Ms. Turner's May 2006 interview of Farmer, since it showed that he still claimed that Applicant had murdered the victim. *See* ***Tr. pp. 884-85.*** Mr. Bruck testified that he had asked an attorney who was his acquaintance to interview Farmer. Ms. Turner was present for the interview. He conceded that the statement to which Ms. Turner testified was not "fundamentally different from Farmer's earlier statements. Mr. Bruck also conceded that, in hindsight, he thought that presenting Ms. Turner was a mistake because "I think we lost more than we gained by calling her." He added, "There were things that we got from her that we wanted, but I think on balance it probably set us back." ***PCR Tr. pp. 16-19; 53-54.***

On cross-examination, he conceded that presenting Ms. Turner was "a mixed bag," and that he would not have presented her testimony if he had thought at that it was a mistake to do so at the time of Applicant's trial. After his memory was refreshed, Mr. Bruck recalled that Farmer had claimed in the statement to Ms. Turner that someone had helped him put a spin on his trial testimony and that it made Applicant look bad. The obvious inference from that statement was that law enforcement or the prosecution had helped him. ***PCR Tr. pp. 53-54. See also Tr. p. 886, lines 13-17.*** Mr. Bruck did not remember whether or not he and co-counsel considered simply publishing the cross-examination of Farmer from 1991, but emphasized that "we found a lot of additional impeachment" and "thought that without that [Farmer's] testimony would be unchallenged." ***PCR Tr. p. 19.***

Again, the Court finds that Applicant has not proven that counsel's performance was deficient. "Defense counsel are allowed a considerable breadth of discretion in choosing their trial strategies." *Fleming v. Kemp*, 748 F.2d 1435, 1451 (11th Cir. 1984). An attack on the effectiveness of counsel's cross-examination of a witness is a matter generally entrusted to the professional discretion of counsel. *See Strickland*, 466 U.S. at 690 (where a defendant focuses on counsel's "strategic choices made after thorough investigation of law and facts," such choices "are virtually unchallengeable"); *United States v. Nersesian*, 824 F.2d 1294, 1321 (2nd Cir. 1987) ("Decisions whether to engage in cross-examination and if so to what extent and in what manner, are ... strategic in nature" and will not support an ineffective assistance claim"); *Yarrington v. Davies*, 779 F.Supp. 1304, 1308 (D. Kan. 1991), *aff'd*, 992 F.2d 1077 (10th Cir. 1993) (The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel); *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978) (*Marzullo v. Maryland* standard was not intended to promote judicial second-guessing on questions of

strategy as basic as handling of a witness). The Court finds that counsel's decision to present the additional impeachment evidence from Farmer's Texas sentencing proceeding and from the May 6, 2006, interview was objectively reasonable, even though it exposed the jury to prejudicial information about Applicant that it might not have otherwise heard.

The Court finds that the prosecution's theory of the case was such that information concerning Applicant's prior incarceration was inescapable, even if some of the details mentioned by Farmer were not. *See* Grounds (c) and (d), *infra*. Also, Farmer was an important prosecution witness and, as counsel noted at the 2006 retrial, the South Carolina Supreme Court had concluded on direct appeal that the trial judge erroneously restricted Applicant's cross-examination of Farmer regarding his drug smuggling activities, even though it found the error harmless. *Cooper I*, 312 S.C. at 92, 439 S.E.2d at 277.

The Court further finds that in assessing the reasonableness of counsel's decision of how to best impeach Farmer's testimony, all of the impeaching evidence must be considered collectively, rather than parsed. When so viewed, it is clear that counsel's performance was reasonable. It was based upon a constitutionally adequate investigation. *See Strickland*, 466 U.S. at 690-91 Also, the defense's impeachment evidence portrayed Farmer as a con artist and a liar who consistently minimized his own culpability in the offenses with which he was charged,[20] was a drug trafficker who frequently cooperated with – or at least feigned cooperation with - law enforcement when he thought that it was to his benefit, consistently shifted blame to others when it was possible for him to do so, and lied about his past. Also, Farmer told Ms. Turner that someone had helped him put a spin on his prior testimony to make Applicant look guilty but claimed that he would testify truthfully if called in 2006. Based upon the additional impeachment

[20] For instance, Farmer's Texas sentencing testimony minimized his involvement both in the murder and in the Texas drug charges for he was convicted and was to be sentenced. *See Tr. p. 753-58.*

evidence that was presented, counsel adroitly pointed to these reasons, the fact he had not been physically present for trial, and other reasons for the jury not to believe Farmer's 1991 testimony. ***Tr. pp. 1157-74.***

Again, the fact that another attorney may have handled the impeachment of Farmer differently does not show that counsel, who had extensive criminal trial and appellate experience, was deficient in the manner he chose to impeach this witness. *Strickland*, 466 U.S. at 689 ("[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way"). Likewise, counsel's hindsight assessment of the decision to present Ms. Turner does not show deficient performance. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time").

Nor has Applicant proven that he was prejudiced by counsel's decision to present the additional impeachment evidence. Although Framer consistently identified Applicant as the person who murdered the victim, each of his subsequent statements about the conspiracy and murder was inconsistent with his 1991 testimony in some of the details provided, and all of his statements minimized his role. Thus, the statements impeached the credibility of his 1991 testimony.[21] Also, a clear inference from Farmer's claim to Ms. Turner that someone helped him put a "spin" on his 1991 testimony is that he wanted her to believe that law enforcement had done this but if Applicant called him as a witness, he would testify truthfully. Additionally, the

[21] Further, counsel could not cherry-pick portions of these statements. Once counsel decided to use a portion of Farmer's Texas sentencing testimony or the statement to which Ms. Turner testified, the State had the right to introduce the entire statement under Rule 106, SCRE. See also *State v. Patterson*, 367 S.C. 219, 227-28, 625 S.E.2d 239, 243 (Ct. App. 2006).

trial judge instructed jurors that they could not consider any of Applicant's prior legal proceedings in their deliberations (***Tr. p. 1221, line 2-13***) and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility. ***Tr. p. 1242, lines 13-25***. Because Applicant testified at trial, the Court finds that these instructions prevented jurors from considering any past misconduct by him on the question of his guilt or innocence. Further, as more fully discussed in connection with Ground (c), no limiting instruction was required for evidence of Applicant's prior incarceration because this evidence was admissible as part of the *res gestae* of the charged crimes. See *State v. Johnson*, 306 S.C. 119, 127, 410 S.E.2d 547, 552 (1991) (where the evidence of prior murder formed part of the *res gestae* and was directly related to murder for which defendant was being tried, the failure to give a limiting instruction did not constitute reversible error); *State v. Nix*, 288 S.C. 492, 497-98, 343 S.E.2d 627, 630 (Ct.App.1986) (a limiting instruction is unnecessary when evidence of the other crime is admissible on the main issue or the evidence is admitted to show motive or intent and the prior bad acts may have been committed in furtherance of such motive or intent).

Moreover and as previously found in connection with Ground (a), Farmer was an important witness. However, Southerland was the primary witness. Southerland gave graphic, detailed eyewitness testimony as to all of the offenses, including the conspiracy, kidnapping, armed robbery and, of greatest importance, the murder of the victim. Also, much of Farmer's testimony was cumulative to Southerland's, although he provided more details concerning the conspiracy to rob her. And, many of the material points in Farmer's testimony were corroborated, either by Southerland's testimony or by the circumstantial evidence discussed at length in the "Statement of Facts." Finally, there was overwhelming evidence of Applicant's guilt, separate and apart from Farmer's testimony, as discussed. Again in order to have found

Applicant not guilty, the jury would have had to accept that virtually every single prosecution fact witness either lied or was mistaken. Therefore, Applicant has not shown either deficient performance or prejudice under *Strickland*.

3. Counsel was not ineffective in the manner in which he handled the admission of Applicant's prior convictions for housebreaking and grand larceny, or for introducing evidence of Applicant's sentence on those prior convictions.

In Ground (c), Applicant asserts that counsel was ineffective for conceding that Applicant could be impeached with his prior convictions for housebreaking and grand larceny when he should have made the objection that they were overly prejudicial because they are similar to the facts underlying the charges for which he was on trial. He further asserts that counsel was ineffective in that counsel unreasonably introduced information regarding the Applicant's sentence on those prior convictions including the fact that Applicant had spent time in prison, which he asserts was unnecessarily prejudicial. The Court disagrees and finds that Applicant has not proven either deficient performance or prejudice from the manner in which counsel handled the admissibility of his prior convictions and sentence.

In his opening statement, Mr. Bruck told jurors that:

> One of the things lawyers often object to is anything that shows about the prior record of their client, they don't want the jury to know about that. Well, y'all need to know everything and we are not going to object to the warrants and the things in Tony Cooper's background that are relevant to your job. So, we're not going to object. And we want you to know and we'll tell you right now that when Bo [Southerland] was a career criminal in his early 30's, he committed a long series of crimes and he had along with him a 17-year-old kid named Tony Cooper. And they both went to prison together. And they both got out in 1988. And thereafter, Tony married and had an instant family of four children, his wife's children, working as a contractor doing roofing and different types of jobs like that trying to get a new start in life.
>
> But he had his buddy. Bo [Southerland]. He allowed Bo [Southerland] to have his car, which was a Cougar, I think, a 1979 I believe. There will be pictures of it in evidence. And so Bo [Southerland] was driving the car that was registered to

> Tony Cooper. And they were together a lot. They had known each other in prison and they still knew each other and they did some work together.
>
> And that is where this involvement of Tony Cooper really begins because on the day before Kimberly Quinn was abducted in the middle of the night, someone saw the Cougar with Bo [Southerland] in it.

Tr. p. 147, line 20 – p. 148, line 25.

Before Applicant testified at trial, the trial judge addressed the admissibility of Applicant's prior convictions *in camera*. In response to the trial judge's statement that he thought that the parties had reached an agreement about which of his previous convictions could be used for impeachment purposes, trial counsel argued that his entire record was too remote. The State then indicated that it intended to impeach Applicant with his armed robbery convictions from February and March 1977, as well as his September 1977 convictions for housebreaking and larceny. Counsel maintained that these convictions were too remote under Rule 609(b), SCRE, because more than ten years had passed between the convictions and his testimony. ***Tr. pp. 700-01***. The State argued that counsel's opening statement had waived any objection. The State also argued that Applicant was not released from custody on the prior convictions until 1988, and that the "they're close in time to the date" of the October 1989 offenses for which Applicant was being retried. ***Tr. pp. 782-84***. Counsel argued that he had not waived an objection to introduction of the offenses and he asserted that the similarity of the armed robberies to the present charges made their use more prejudicial. Yet, he admitted that the same argument did not apply to the convictions for housebreaking and larceny. ***Tr. pp. 784-85***.

The trial judge was concerned about the introduction of the armed robbery convictions, and he ruled that they were inadmissible. However, he ruled that the convictions for housebreaking and larceny were admissible. ***Tr. p. 785***. Counsel elicited evidence of the 1977 convictions at issue on direct examination of Applicant. ***Tr. p. 938, lines 13-20***. The State did not

mention the convictions on its cross-examination of Applicant (***Tr. pp. 1004-15***), and neither prosecutor referenced them in closing argument. ***Tr. pp. 1099-1106; 1198-1238.***

Mr. Bruck explained at the PCR hearing that he had conceded in opening statement that Applicant had previously been incarcerated with Southland because he knew that Southland would testify and "it was so preposterous to me that Bo Southerland had been intimidated into clearing Tony Cooper while they were both on death row given the actual relationship between them and that Southerland was an older and more experienced criminal and ... a very tough guy and so I wanted the jury to have the background for that." Also, in light of the State's theory of how the crimes originated, it was impossible to keep out evidence of the prior incarceration ***PCR Tr. p. 55.*** Mr. Bruck further testified that he believed that "If you think something's coming in anyway, you might as well be the first to tell the jury about it and ... put it in the proper context if you can, so I assume that's what I was trying to do." ***PCR Tr. p. 56.*** Also, his decision to introduce the housebreaking and grand larceny convictions on direct examination of his client was consistent with this reasoning. ***PCR Tr. pp. 57-58.*** He admitted that he had never thought about whether the State's case could have been tried so that the jury only aware that Applicant and Southerland were associates who knew each other and who both knew individuals in prison. However, he observed that he was unsure that the trial judge would have required the prosecution to edit its case to fit such a scenario. ***PCR Tr. pp. 24-25.***

Mr. Bruck testified that he had argued that the prior convictions for armed robbery were inadmissible because were too similar to the charges for which Applicant was being tried and were therefore prejudicial. *See* Rule 609(a), SCRE; *Green v. State*, 338 S.C. 428, 433–34, 527 S.E.2d 98, 101 (2000) (stating the five factors that a trial judge should consider before allowing impeachment with similar prior conviction(s)). He did not did not make the same argument with

respect to the housebreaking and larceny convictions. Although he testified on direct examination that he believed the State's evidence would have supported a charge of burglary, he candidly admitted on cross-examination that Applicant had not been arrested or indicted for burglary. So, that charge was not before the jury. And, he was unable to name any South Carolina appellate decision that would have supported an objection that prior convictions should be excluded on the basis urged by Applicant[22]: *i.e.*, because the convictions are similar to facts presented by the prosecution that might support an indictment for a similar offense but where there is no indictment for the offense. ***PCR Tr. pp. 19-25; 56-57.***

The Court finds that Applicant has failed to prove that counsel's performance was deficient. The Court finds that counsel reasonably understood that evidence of Applicant's prior incarceration under Rule 404(b), SCRE, to establish identity and other exceptions. It is also admissible because it was part of the *res gestae* of the crimes for which he was on trial because it "furnishe[d] part of the context of the crime" and was necessary to a "full presentation" of the case. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent"); *State v. Wiles*, 383 S.C. 151, 158–59, 679 S.E.2d 172, 176 (2009) (evidence of petitioner's escape from prison a week before incident where he was charged with assault and battery with intent to kill (ABIK), failure to stop for a blue light, and failure to stop for blue light was logically relevant to show motive for fleeing from police on the failure to stop for a blue light charge and his intent on the ABIK charge. "Finally, this evidence was also admissible under the *res gestae* theory"); *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366,

[22] See counsel's argument in support of this claim. ***PCR Tr. p. 77-78.***

370-71 (1996). *See also State v. Owens*, 346 S.C. 637, 552 S.E.2d 745 (2001); *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980); *United States v. Kimball*, 73 F.3d 269, 272 (10th Cir. 1995) (evidence of defendant's recent release from prison, including evidence that his inmate number was found on coffee pot in motel room along with tablet containing imprint of robbery demand note and that his clothing worn at time of his release from prison was identical to clothing of robber, was admissible as part of *res gestae* in bank robbery prosecution); *United States v. Champion*, 813 F.2d 1154, 172-73 (11th Cir. 1987).

Because the evidence of Applicant's prior incarceration was admissible, the Court finds that counsel's decision to address it in opening in an effort to put this evidence "in proper context" was reasonable under *Strickland*. *See Wheeler v. Simpson*, 852 F.3d 509, 515 (6th Cir.), *reh'g denied* (Apr. 12, 2017), *cert. denied*, 138 S.Ct. 357 (2017) (state court's rejection of claim that trial counsel was ineffective for introducing testimony that he had received furloughs during his previous incarceration was not contrary to or an unreasonable application of Supreme Court precedent, where introduction of this evidence was a strategic attempt to show that petitioner had previously been such a model prisoner that he received two furloughs); *Campbell v. Bradshaw*, 674 F.3d 578, 588 (6th Cir. 2012) (trial counsel was not ineffective for introducing petitioner's entire incarceration record during the penalty phase of trial because it was "part of a strategic effort to be candid with the jury about Campbell's past in an effort to gain credibility and, ultimately, obtain a life sentence for Campbell"); *State v. Groves*, 2014-Ohio-4337, ¶ 14, 2014 WL 4823883, *4 (Oh. Ct.App. 2014) ("It is clear from our review of the record that trial counsel made an apparent strategic decision in eliciting such testimony from Ms. Warren. This court must presume counsel's conduct falls within the wide range of reasonable professional assistance and is the product of sound trial strategy"). By following this strategy, counsel lessened the

impact of this evidence that would be introduced in the State's case-in-chief because he was able to place Applicant's relationship in proper context from the defense's perspective and to present Applicant as someone who was not going to hide anything from his jury. This gave counsel and Applicant more credibility with the jury.

Similarly, the Court finds that counsel's decision to elicit the housebreaking and larceny convictions on direct examination was reasonable under *Strickland*, since he knew that the trial judge had ruled that Applicant could be impeached with these convictions. Again, this presented Applicant as someone who was not going to hide anything from his jury, and it gave counsel and Applicant more credibility with the jury. *E.g.*, *Ohler v. United States*, 529 U.S. 753, 757-58 (2000) (recognizing that "[a] defendant has a ... choice to make if she decides to testify, notwithstanding a prior conviction. The defendant must choose whether to introduce the conviction on direct examination and remove the sting or to take her chances with the prosecutor's possible elicitation of the conviction on cross-examination"); *Taylor v. State*, 258 S.C. 369, 377, 188 S.E.2d 850, 854 (1972) (finding that "[t]he voluntary elicitation of the information that appellant had a record was obviously intended to soften the impact of what was certain to follow. The specification [of ineffective assistance of counsel] is hypocritical"); *Rodriguez v. State*, 129 S.W.3d 551, 558–59 (Tex.App. 2003, pet. ref'd) (eliciting testimony from a defendant about his own prior convictions can be a sound trial strategy, provided that those prior convictions are admissible).

The Court also finds that counsel was not deficient for failing to argue that the housebreaking and larceny convictions should have been excluded because they are similar to the crime of burglary, a crime for which Applicant was never arrested or indicted. The Court rejects Applicant's claim that counsel should have argued that these convictions should have

been excluded because the facts here could have possibly supported a burglary indictment. The Court is unaware of any appellate court authority from South Carolina that would have supported such an argument at the time of Applicant's 2006 trial, or at present. It is a fundamental tenet in the evaluation of ineffective assistance of counsel claims that there must be a contemporary assessment of counsel's performance: *i.e.*, counsel's acts are to be judged as of the time counsel was required to act. *Strickland*, 466 U.S. at 690. As a result, counsel is not ineffective in failing to anticipate a change in the law that may or may not occur. *See Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial") (citing *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993)); *Cartrette v. State*, 323 S.C. 15, 448 S.E.2d 553 (1994); *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995); *United States v. McNamara*, 74 F.3d 514, 515-17 (4th Cir. 1996) (counsel cannot be considered ineffective for failing to anticipate changes in law). Also, counsel is not ineffective for not anticipating how a state appellate court will rule on a novel question of law. *E.g.*, *Richardson v. Branker*, 668 F.3d 128, 141-43 (4th Cir. 2012).

The Court further finds that Applicant has not proven that he was prejudiced by counsel's performance. First, counsel's decision to acknowledge the existence of Applicant's prior incarceration in his opening statement and to present evidence of Applicant's prior convictions on direct examination, allowed counsel to put these matters in what he reasonably viewed as a proper context. It also allowed him to portray Applicant as someone who was not going to hide anything from is jury, and it gave counsel and Applicant more credibility with the jury. Second, this evidence was going to be presented by the prosecution if counsel had not done so. Third, the trial judge instructed jurors that they could not consider any of Applicant's prior legal

proceedings in their deliberations (***Tr. p. 1221, line 2-13***) and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility. ***Tr. p. 1242, lines 13-25.***[23] "[It is] the almost invariable assumption of the law that jurors follow their instructions," *United States v. Olano*, 507 U.S. 725, 740 (1993) (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)); *see also Strickland*, 466 U.S. at 694 ("a court should presume ... that the judge or jury acted according to law"). The Court finds that these instructions precluded the consideration of his previous incarceration or his prior convictions on the question of his guilt or innocence, even though no limiting instruction was necessary with respect to evidence of Applicant's prior incarceration because it was properly admitted as part of the *res gestae* of the charged offenses. See *Johnson*, 306 S.C. at 127, 410 S.E.2d at 552; *Nix*, 288 S.C. at 497-98, 343 S.E.2d at 630. Fourth, Applicant has not presented the Court with any appellate court authority from South Carolina that would have supported such an argument at the time of Applicant's 2006 trial. Finally, there cannot be any conceivable prejudice resulting to Applicant because any conceivable prejudice from counsel's argument and introduction of the prior convictions by trial counsel pales in comparison to the State's evidence of the grisly murder and other crimes in this case. *See* Statement of Facts, *supra*. The prosecution's evidence showed that this was a premeditated robbery, which Applicant quickly escalated to murder when made aware that he would receive less than $200.00 for the crimes. He carried out the crimes and post-mortem efforts to conceal the victim's identity in a brutally macabre fashion and, once he had finished the murder and disposed of the victim's hands and feet and his ax, he ate two hotdogs before washing either himself or his clothing. Again, in order to have found Applicant not guilty, the

[23] These instructions were given as a result of counsel's request. ***See Tr. pp. 908-10.***

jury would have had to accept that virtually every single prosecution fact witness either lied or was mistaken. *See Strickland*, 466 U.S. at 696. Therefore, Applicant is not entitled to relief.

4. **Counsel was not ineffective in failing to obtain an *in limine* instruction from the trial judge that Southerland should not be allowed to provide testimony referring to Applicant's prior armed robbery convictions.**

Applicant claims in Ground (d) that counsel was ineffective in failing to obtain an *in limine* instruction from the trial judge that Southerland should not be allowed provide testimony referring to Applicant's prior armed robbery convictions. See ***PCR Tr. pp. 78-79***. The Court does not need to address *Strickland*'s performance prong, since the Court finds that he has failed to prove Sixth Amendment prejudice.

The trial transcript reflects that Southerland was often evasive and argumentative on Mr. Bruck's cross-examination of him. ***E.g., Tr. pp. 447-471; 473-546***. At one point when Mr. Bruck was questioning him about his prior armed robbery convictions, the following exchange occurred:

> Q So if the records show that you were convicted and got an 18 year sentence, the records must be wrong?
>
> A I caught, let's see, 15 -- 15, 18 and 18, Dorchester, Berkeley and Clarendon County, 15, 18, and 18. That's all the --
>
> Q All armed robberies? .
>
> A Yes, sir.
>
> Q You were committed and convicted of three separate armed robberies in three separate counties?
>
> A Yes, sir. Your client, Tony Cooper, was my codefendant.
>
> Q Excuse me, I'm asking about your record, if you don't mind.
>
> A Yes, sir. Well, I'm explaining to you who my codefendant was.
>
> MR. BELL: Your Honor, he's allowed to explain his answer.

THE COURT: No. He's asking a question about his record.
Go ahead.

Tr. p. 495, lines 13-25.

Mr. Bruck testified that he was aware that Applicant and Southerland were co-defendants in the armed robberies for which Applicant had been previously convicted, and that he had anticipated Southerland would be a difficult witness before Southerland testified. In an unresponsive answer to counsel's question, Southerland "blurted out unresponsively" that Applicant was his co-defendant in the armed robberies. Mr. Bruck did not think of making a motion *in limine* to prohibit Southerland from mentioning Applicant's convictions or requesting a curative instruction because he did not foresee that Southerland would "volunteer that information unresponsively to a question" even though "I probably should have foreseen that." ***PCR Tr. pp. 21-22; 58-59.*** However, he agreed that Southerland was constantly evasive on cross-examination and had repeatedly attempted to interject Applicant's involvement in the murder, as opposed to answering the questions being asked of him by Mr. Bruck. Also, Mr. Bruck later used this evasiveness in closing argument as one of the reason jurors should find that Southerland was not credible. ***PCR Tr. p. 59.***

In *Strickland,* the Court explained, "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. It is unnecessary for this Court to address whether counsel's performance was deficient as to this allegation because it is clear that there was absolutely no

resulting prejudice.[24] The remarks by Southerland were unresponsive to the question posed and it is clear the trial judge found that his response was not proper. Also, the trial judge instructions that jurors could not consider any of Applicant's prior legal proceedings in their deliberations (***Tr. p. 1221, line 2-13***) and that they only consider evidence of another crime or misconduct by a witness on the limited issue of credibility (***Tr. p. 1242, lines 13-25***) precluded jurors from considering this remark on the question of Applicant's guilt or innocence. *Olano*, 507 U.S. at 740; *see also Strickland*, 466 U.S. at 694.

Further, counsel thoroughly cross-examined Southerland concerning the details of the crimes to which he had testified on direct examination; his activities in the days immediately before and after the murder; his claim that he had only used the phone at the Cooper residence once; his claim that he had never spoken to Red Farmer; the various different statements that he had made about the murder;[25] that his picture is in the photographic lineup introduced as State's Ex. 2; his claim that he had given a statement accepting full responsibility for the murder because Applicant had communicated a threat to him through three death row inmates, who had since been executed and could not be cross-examined; his claim that Applicant had told him what to say in that statement; that when his attorneys got a restraining order prohibiting Mr. Bruck from having further contact with him, he wrote Judge Keesley, stated he did not agree with his attorneys, and attempted to have Judge Keesley deny his attorneys' request; that he had given a similar statement to *The State* newspaper and repeated a similar story to "[a]nybody and everybody;" that he had given similar statements to death row inmate Norman Starnes and to two

[24] The Court does not find that counsel's performance was deficient, only that the clear absence of any possible prejudice makes it unnecessary to address that prong.

[25] For instance, he admittedly lied to SLED when questioned about the crime on October 10, 1989, when he told officers he was at the apartment complex on the afternoon before the murder but did not know anything about the murder. ***Tr. pp. 449-52; 491***. Also, he gave two statements to Mr. Bruck following his 1992 death sentence, and he did not want his own attorney to know that he had done so. He took full responsibility for the murder in these statements and exonerated Applicant ***Tr. pp. 462-72; 475-84.***

women who were church volunteers at the prison, Ms. Betts Davis and Ms. Naida Knotts; that he had continued to claim full responsibility for the crimes until 2006; that he had spent over thirty years in prison; his remaining criminal history in addition to the armed robbery convictions; that the State had dropped the death penalty in exchange for his testimony against Applicant; and, counsel even cross-examined him about his claim that he had cried after the murder, the fact no one witnessed this and that the only other time he acknowledged crying was when his mother died.

Additionally, counsel introduced the two statements that Southerland had given to counsel as Defendant's Exs. 1 and 2 and he published these to the jury. Counsel also presented Starnes, Ms. Bessie "Betts" Davis, and Ms. Knotts as witnesses. They testified about the admissions that Southerland had made to each of them and that there was no apparent tension between Southerland and Applicant. ***Tr. pp. 790-99*** (Starnes); ***Tr. pp. 802-11*** (Ms. Davis); ***Tr. pp. 815-24*** (Ms. Knotts). Counsel later used this impeaching information in his closing argument to assail Southerland's credibility. ***See Tr. pp. 1121-33; 1139-56.*** Included in counsel's attack on Southerland's credibility were the following comments about his evasiveness on cross-examination:

> And unlike Mr. Farmer, who you have yet to lay eyes on, Mr. Sutherland at least shuffled in here with that expression that none of you will probably ever forget and you got to see how he dodged and weaved and played games with me. He was willing to answer the State's questions, but when it came for cross-examination, forget it.

Tr. p. 1122, lines 11-17.

In light of the trial judge's limiting instructions, counsel's thorough impeachment of Southerland's credibility and the overwhelming evidence of guilt, the Court finds that there was no prejudice from counsel's failure to either request an *in limine* instruction before Southerland

testified or a curative instruction after he made the unresponsive comment that Applicant was his co-defendant in the armed robberies.

5. Applicant has expressly abandoned grounds (e), (g) and (i) at the hearing.

Applicant abandoned Grounds (e) and (g) at the outset of his PCR hearing. ***PCR Tr. p. 5.*** He abandoned Ground (i) at the conclusion of the hearing. ***PCR Tr. p. 80.***

6. Counsel was not ineffective for failing to object to Agent Rick McDermott's testimony regarding the weight of the log found on the victim's body.

SLED Agent Rick McDermott went to the crime scene on Sunday, October 8, 1989, along with other SLED Agents and he saw the victim's body with debris stacked on it. He immediately asked for the crime scene unit to be sent to the scene. ***Tr. pp. 340-41.*** One piece of debris that he saw on the body was a log. ***Tr. pp. 342-43.*** In Ground (f), Applicant alleges that counsel was ineffective for not objecting to the following exchange as speculative:

> Q And how big a log would you say that you observed?
>
> A It was a pretty good size log, pretty good size log, but I couldn't speculate as far as how big it was, but it was a pretty good size log. I think one person couldn't move it.

Tr. p. 343, lines 7-12.

Applicant claims that counsel's failure to object was prejudicial because Agent McDermott's testimony was the only physical evidence at the scene that suggested the involvement of two people in the murder and because the State relied on this testimony in closing (*see* ***Tr. p. 1103***) as proof that two people were involved in the murder. See ***PCR Tr. pp. 25-26; 79-80.***

On direct examination, Mr. Bruck did not recall why he did not object and conceded that the testimony was objectionable. However, he pointed out that he dealt with this testimony on cross-examination by pointing out that there was no foundation for Agent McDermott's assertion

as to the weight. ***PCR Tr. pp. 25-27.*** On cross-examination, he conceded that the State had merely asked McDermott what McDermott had factually observed, and he noted that he had established on cross-examination (***Tr. p. 346, line 24 – p. 347, line 11***) that Agent McDermott did not lift the log and did not know how much it weighed.[26] Mr. Bruck also addressed this testimony in closing argument. ***PCR Tr. pp. 61-63.*** His closing referred to SLED Lt. Springs' testimony that the log was "rotted" (***Tr. p. 356, lines 3-4***) and suggested that:

> We all know a rotten log can be eight feet long, but it hardly weighs anything because it's mostly air inside. It's been eaten out by termites or whatever. That was the famous log that would have required two people. It sounds very much like everything on this scene is consistent with one person.

Tr. p. 1147, lines 7-19.

The Court finds that counsel's performance was not deficient. First, the fact another attorney may have attempted to argue that the testimony was speculative does not establish deficient performance. *See Strickland*, 466 U.S. at 689. Secondly, the Court disagrees with Applicant's description of the testimony as speculative. Rather, the witness was merely being asked to state his factual observation of the log's size. There is no suggestion that the witness did not observe the log. As such, there was no basis for counsel to successfully argue that the answer to that question was speculative. *See In re Thomas S.*, 402 S.C. 373, 379, 741 S.E.2d 27, 30 (2013) ("a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training") (citing Rules 602 and 701, SCRE); *State v. Williams*, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996) ("The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of

[26] The record reflects that Mr. Bruck also elicited that Agent McDermott did not even touch the log or see anyone else lift it. ***Tr. p. 347, lines 1-7.***

the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge").

Moreover, counsel attacked every weakness in Agent McDermott's testimony on cross-examination and through closing argument. He pointed out that Agent McDermott neither touched the log nor saw anyone lift it, and he contrasted it with Lt. Springs's testimony that the log was "rotted," which counsel used to support the conclusion the log would not have been so heavy that it required two people to lift it. As a result, the Court finds that counsel's failure to object did not constitute deficient performance.

The Court further finds that Applicant has not proven any prejudice resulting from counsel's failure to object. Because counsel's cross-examination and argument fully exposed the weaknesses in McDermott's testimony, such that the jury could readily assess the weight it felt his testimony deserved, Applicant cannot show any prejudice from its introduction. Also, even a successful objection would not have impacted the credibility of either Southerland or Farmer, the two principle witnesses against Applicant. Their testimony provided overwhelming, direct and detailed evidence of Applicant's guilt of the murder, kidnaping, armed robbery, and conspiracy. Accordingly, there cannot be any prejudice from counsel's failure to object. *See Strickland*, 466 U.S. at 696 ("... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

7. Counsel was not ineffective for failing to object to the State's closing argument.

Applicant's Ground (h) is that counsel was ineffective for failing to object to the following comments in the State's closing argument because the State was arguing facts that were not in evidence:

> There's nobody else there, according to the defendant's wife. She said that it was me, Tony and the kids. And she never testified, she was asked about three phones, if you remember, I think the defense asked her about the three phones, she never said anything about the phone being out in the middle of the yard for everybody in the world. She said that Bo usually came by to use the phone and would never let him in. She didn't like that. Why would he have to come inside rather than if there's a phone out in the middle?

Tr. 1203, line 21 – p. 1204, line 6.

The Court finds that Applicant has failed to prove either deficient performance or prejudice from counsel's failure to object to these remarks because these extremely brief comments did not deprive him of a fair trial.

Mr. Bruck testified that the Solicitor remarks were made because there was a dispute as to whether Applicant or Southerland had answered the phone when Farmer called. The defense contended that Southerland answered it, and that he had conspired with Farmer and someone other than Applicant to rob the victim. Mr. Bruck did not remember whether Ms. Crane testified consistent with the State's comments but said that he should have objected if she did not. ***PCR Tr. pp. 27-28.***

A review of the trial transcript reflects that Applicant's wife, Marsha Crane, did not testify that she would never let Southerland into her residence to use the phone. She testified that it was common for other people whom the Coopers knew to use their phone, including Southerland and Brenda McLauren (Applicant's niece who first passed information from Framer to Applicant about the victim's insurance settlement). She also testified that it was possible that Southerland used the Cooper's phone on the night of October 4, 1989. ***Tr. pp. 640-43; 649-50.*** With the exception of Applicant's claim that the family kept one phone outside of the residence, Ms. Crane's testimony that Southerland could have used the phone at her house on October 4th is consistent with Applicant's trial testimony. ***See Tr. pp. 948-49; 964-67. PCR Tr. p. 63.*** Yet, she

did testify that there were three phones in her residence and she did not claim that one of these was kept outside.

The record also reflects that Southerland testified on cross-examination that he never used the telephone at the Cooper residence because "Tony Cooper wasn't going to let me make no long distance phone calls from his house." He quickly corrected himself and stated that he had made a telephone call from the Cooper residence after Ms. Crane had left the residence. ***Tr. pp. 487-89.***

Closing arguments "must be confined to evidence in the record and reasonable inferences therefrom, although failure to do so will not automatically result in reversal." *State v. Tubbs*, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-44, 647-48 (1974)). The standard in *Donnelly* is a very high standard for a defendant to meet. " '[I]t is not enough that the remarks were undesirable or even universally condemned.' " *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). *See also Parker v. Matthews*, 567 U.S. 37, 47 (2012). "In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." *United States v. Young*, 470 U.S. 1, 12 (1985).[27]

Here, the Court finds that Applicant has not proven that the challenged comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Tubbs*, 333 S.C. at 321, 509 S.E.2d at 818; *Donnelly*, 416 U.S. at 643-44. Applicant contends

[27] As the Supreme Court explained in *United States v. Robinson*, 485 U.S. 25, 33 n. 5 (1988): "[i]n *United States v. Young* and *Darden v. Wainwright*, we concluded that statements by the prosecutor which inflamed the jury, vouched for the credibility of witnesses, or offered the prosecutor's personal opinion as to the defendant's guilt were improper, but we held that, in context, those statements did not necessitate reversal." Rather, in both cases, the Court held that the accused must prove that the remarks deprived him of due process. *Robinson*, 485 U.S. at 33 n. 5.

that the remarks were prejudicial because "[i]t directly impeached or went against [Applicant's] trial testimony." ***PCR Tr. p. 80.*** However, the comment was very brief and made in the course of a very lengthy closing argument. Further, and regardless of Ms. Crane's testimony, the testimony from Farmer and Southerland supports the conclusion that Applicant is the one with whom Farmer spoke. And, the Court finds that the challenged comment was nothing more than an innocent misstatement. *See Donnelly*, 416 U.S. at 647 (reviewing courts "should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning"). Also, trial counsel presented argument to the contrary. ***See Tr. pp. 1177-78. See also Young***, 470 U.S. at 12. Further, the trial judge instructed jurors before the parties' closing arguments that:

> At this point in the case, it's your opportunity to hear the closing statements or closing arguments of counsel. This is an opportunity for counsel to summarize the evidence from their respective points of view, to put the pieces of the puzzle together so to speak. Please remember these closing arguments are not to be considered as evidence.

Tr. p. 1092, lines 5-12.

Because jurors are presumed to follow the trial judge's instructions, *Olano*, 507 U.S. at 740; *see also Strickland*, 466 U.S. at 694, this admonition precluded jurors from considering the closing arguments as evidence. Finally and as discussed throughout this Order, there was overwhelming evidence of guilt, such that Applicant could not have been prejudiced in any manner by the challenged remarks. *See Strickland*, 466 U.S. at 696.

8. Counsel was not ineffective for failing to "effectively prepare for the direct examination of Applicant and the cross-examination of Investigator Eddie Hite.

The Court finds that Applicant is not entitled to relief on his claim (Ground (j)) that counsel was ineffective for not effectively preparing for the direct examination of Applicant and the cross-examination of Investigator Eddie Hite.

Applicant testified to an alibi at trial. He testified that he went to his mother's house around 10:00 a.m. on Thursday, October 5th and finished cleaning her yard of debris caused by Hurricane Hugo. After he cleaned the yard and hauled away the trash, he returned to his mother's shortly after 12:00 p.m. and worked on a camper that his father was giving to him. He worked on the camper until 5:00 p.m. Then, he went home and saw his wife before she left for work. ***Tr. pp. 971-80.***

He stayed at his residence for several hours and did not leave until roughly 11:00 p.m. After he unsuccessfully tried to call his wife but the long distance call to Irmo did not go through, he drove his truck to the intersection of Hwy. 106 and Hwy. 302 because there were several phones there and a call to Irmo would not be long distance. ***Tr. pp. 981-84.*** As he neared that intersection, his truck began to overheat. So, he decided to drive to his parents' house because he was in a rural area, their house was closer than his residence in Pelion, and he knew that his father was frequently awake at all hours of the night. ***Tr. pp. 985-87.***

Once he reached their residence, he looked under the hood of his truck to see what was wrong, and discovered that a rubber hose had a leak in it. He added water and patched the hole with thick tape. By the time he finished, his father had come outside, and they talked. Applicant told his father that he had to return to Pelion. His father then followed him to his residence and they arrived there after midnight. His father turned around and drove home, and Applicant went to bed.[28] ***Tr. pp. 987-93.***

Of particular relevance to the present claim, Applicant denied on cross-examination that he had gone to Donnie Shumpert's residence that night. He also denied that he had been "riding around drinking beer" that night because he does not ride around drinking beer. ***Tr. pp. 1012-13.***

[28] He did not attempt to call his wife again because it was so late.

Following his testimony, the State called Mr. Eddie Hite as a reply witness. Counsel requested a hearing on the voluntariness of the statement that Mr. Hite and Sheriff Metts had taken from Applicant because the defense had anticipated that the State would simply publish Mr. Hite's testimony from Applicant's 1991 trial to impeach alibi testimony from Applicant's mother, and that Hite would not be a live witness. The State agreed that it had originally planned to publish Mr. Hite's prior testimony, but it changed its strategy in light of Applicant's testimony. The State also noted that it had previously served a copy off the statement on the defense. ***Tr. pp. 1028-30.***

The trial judge then heard Mr. Hite's prior testimony about the circumstances surrounding the taking of the statement *in camera*. ***Tr. pp. 1031-38.*** The trial judge found that Mr. Hite's testimony concerning the statement was generally admissible. ***Tr. p. 1048.*** However, based upon counsel's arguments (***Tr. pp. 1038-39***), the trial judge excluded Applicant's response to the question of whether he had ever seen Southerland with a shotgun. Applicant's response was that he could not answer that question because it would bury him. ***Tr. pp. 1034, lines 3-9.*** Implicitly, the trial judge also accepted counsel's position that Applicant's statement was an invocation of his right to remain silent and excluded it. ***Tr. pp. 1039-40.*** The trial judge even ruled that the *Miranda*[29] form was inadmissible because it contained information that Applicant had specifically requested to see Sheriff Metts before he would speak with law enforcement. ***Tr. p. 1046, lines 7-9.***

At the conclusion of the *Jackson v. Denno*, 378 U.S. 368 (1964), hearing, the trial judge granted counsel permission to question Mr. Hite about whether he was fired or forced to resign because of his role in the taping of Mr. Duncan's conversation with the defendant, without their

[29] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

knowledge, by members of the Lexington County Sheriff Department's in *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000). Mr. Hite testified that he was neither fired nor forced to resign. Rather, he resigned from the Sheriff's Department "the moment I took the position of the Chief Deputy Coroner of Lexington County." ***Tr. pp. 1049-50***. This occurred in March 1997 and it was after the taping in *Quattlebaum* but before the taping became public knowledge. He admitted that he was one of the officers who had witnessed the taping as it had occurred. ***Tr. pp. 1050-51***.

Someone had brought Mr. Hite into the room while the taping was occurring, and he immediately "got my Lieutenant and [Deputy Solicitor] Fran Humphries." He then alerted them to the taping. ***Tr. pp. 1051-52***. He admitted that he had testified at a preliminary hearing in *Quattlebaum* that the defendant had been taped. However, he explained, as he had in the *Quattlebaum* trial, that he had been referring to the statement he had taken from the defendant. And, he answered the question that he thought was being asked of him. ***Tr. pp. 1052-53***. Following this in camera testimony, Mr. Bruck stated, "That takes care of that matter." He explained that he would not examine Mr. Hite about his role in *Quattlebaum*, unless different facts were presented because "we have to take what we're told." ***Tr. pp. 1053-54***.

Mr. Hite testified before the jury that when Applicant had been interviewed on the afternoon of October 12, 1989, he said that "he was out driving around in his pick-up truck drinking beer, said he got home at, approximately ... 11:00 p.m." ***Tr. p. 1059, lines 22-25***. He also said that he had been to Donnie Shumpert's shop that night and that he had "stopped at Don's Place on Highway 302 near Pelion." Although he said that he had stopped by his parents' house that night to check on his mobile home, he did not claim that he had spent most of the day there. ***Tr. p. 1060, lines 2-15***.

Although Mr. Bruck testified at the PCR hearing that he had met with Applicant enough times to prepare for the trial (***PCR Tr. p. 46***), he claimed that he had forgotten about Applicant's inconsistent alibi in his October 12th statement. He explained that the statement had not been used in the first trial and that it "just got a little lost in the shuffle in our trial preparation and when the State pulled that out to impeach Tony and then proved it later, I'd just forgotten about it, ... so we were surprised by that." He did not address this statement with Applicant pretrial, and felt that it was a problem for Applicant's case. He added, "I can't say what impact it had on the jury, but it was not helpful that a law enforcement officer recounted an alibi that Tony had given that was not the same as the alibi that he testified to." ***PCR Tr. pp. 29-30; 63-64.***

Additionally, Mr. Bruck was aware that Mr. Hite was involved in the *Quattlebaum* case, but he was unaware that Mr. Hite had written a lengthy incident report that omitted the taping. He had attempted to demonstrate the inaccuracy of the recordation of Applicant's statement and the inaccuracy of Hite's notes of that statement on his cross-examination of Hite. He did not examine Mr. Hite about the inaccuracy of the incident report prepared in *Quattlebaum* because he did not "notice the fact that Hite had specifically been tagged with having filed ... an incomplete or materially incomplete incident report." He would have attempted to cross-examine Mr. Hite about that report if he had recalled it. He candidly admitted that he did not know whether such cross-examination would have been permitted. ***PCR Tr. pp. 30-33.***

Mr. Bruck admitted on cross-examination that there had been no need for him to prepare to cross-examine Mr. Hite until the State announced that it was calling him as a reply witness, since the parties had previously agreed that Mr. Hite's 1991 testimony would be published to the jury and Mr. Hite did not testify about Applicant's statement in 1991. Also, Applicant wanted to testify and counsel agreed with his decision because "I thought that the jury needed to hear Tony

denying this as he had denied it for so many years. He hadn't testified at the first trial and that had not been a successful strategy and it just seemed like a better approach." Counsel admitted that he had known about Mr. Hite's role in this case, and that the State had provided the October 12th statement to him. Counsel also conceded that he had convinced the trial judge to exclude the *Miranda* form and Applicant's response that he could not answer whether he had ever seen Southerland with a shotgun. Mr. Bruck also conceded that he could not impeach Mr. Hite's denial of being fired or forced to resign because of involvement in *Quattlebaum*. ***PCR Tr. pp. 64-67.***

Applicant has failed to prove deficient performance. First, the Court agrees with counsel's assessment that it was unnecessary for counsel to prepare for cross-examination of Mr. Hite pretrial because the State had indicated that it would publish Mr. Hite's 1991 testimony, instead of calling him as a witness. This only changed after Applicant testified to an alibi. Because the State had not previously indicated that Mr. Hite would testify and because he did not testify to the contrary alibi in his 1991 testimony, the Court finds that it was reasonable for counsel to focus on other matters in pretrial preparation. *See Strickland*, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). Further, Applicant wanted to testify and counsel agreed with his decision because counsel felt that it was important for the jury to hear Applicant "denying this as he had denied it for so many years," and because Applicant's first trial, in which he did not testify, resulted in his conviction on the charges against him. The Court finds that these stated reasons for recommending that Applicant testify were objectively reasonable under *Strickland*.

Additionally, the Court finds that it was necessary for Applicant to testify in order to receive an alibi instruction, since he was the only person who could testify about his whereabouts the entire night of October 5th. His mother's testimony from 1991 was published to the jury. She testified, in pertinent part, that Applicant came by her house around 10:00 a.m. on October 5th and was there until 11:30 a.m. He returned around 12:30 p.m. and worked on a "motor home" his father was giving him. He did not leave again until 5:00 or 5:30 p.m. Her husband came home at 4:00 p.m. and should have seen Applicant there. ***Tr. pp. 895-99.***

His father testified that Applicant was at the house when he got home around 4:00 p.m., but Applicant did not eat supper with him and he did not know where Applicant was at the time. He did not see Applicant again until roughly 11:15 or 11:20 p.m. He confirmed Applicant's subsequent testimony about problems with the truck overheating and that he followed Applicant to Applicant's residence in Pelion. The timeframes he gave were consistent with those to which Applicant testified. ***Tr. pp. 923-28.***

In order to receive an alibi instruction, there must be facts from which it may be concluded that it was physically impossible for the accused to have committed the offense. See *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) ("[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all"); *see also Walker v. State*, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012); *State v. Robbins*, 75 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) ("Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission"). Because his neither of parents

could account for his whereabouts from the late afternoon until roughly 11:15 p.m. on the night of October 5th, Applicant would not have been entitled to an alibi charge if he had not testified.

The Court finds that counsel was not deficient in failing to better prepare Applicant's direct examination. Underlying this claim is the implication that Applicant could have changed his testimony on direct, so as to avoid having to answer the prosecution's question of him that was predicated on his October 12th statement. However, the United States Supreme Court has clearly stated that "no right whatever-constitutional or otherwise" to testify falsely or to "use false evidence." *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). *See also Harris v. New York*, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury"). Also, counsel and Applicant were both aware that the alibi to which he would and did testify was contradicted by Southerland's eyewitness testimony and the admissions Farmer testified that Applicant had made to him. Nevertheless, Applicant testified and counsel agreed with his decision to do so.

The Court further finds that counsel's cross-examination of Mr. Hite was more than constitutionally adequate. *See Nersesian*, 824 F.2d at 1321 ("Decisions whether to engage in cross-examination and if so to what extent and in what manner, are ... strategic in nature" and will not support an ineffective assistance claim"); *Yarrington*, 779 F.Supp. at 1308 (The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel). Counsel's cross-examination elicited that Mr. Hite only had a vague recollection of the interview and did not remember the details of it. ***Tr. p. 1052, lines 10-13.*** Rather, he had just looked back on how he testified in 1991 and he was merely telling the jury what he had said at that time. ***Tr. p. 1052, lines 14-19.*** Counsel also established that Mr. Hite was testifying in 1991

from his notes that he had made even earlier, he did not have those notes with him at the 2006 trial; and he argued in closing that a clerk could have read his testimony because he did not add anything. ***Tr. p. 1052, lines 20-25; p. 1182, 11-23.*** He likewise argued to the jury that Applicant had asked to be interviewed by the Sheriff, which does not sound like a guilty man. ***Tr. p. 1181, lines 3-15.*** Further, counsel successfully convinced the trial judge to exclude the most damaging statement Applicant made in the statement: *i.e.*, that he could not answer the question of whether he had ever seen Southerland with a shotgun because it would bury him. Accordingly, the Court finds that Applicant failed to prove deficient performance. *See, e.g., State v. Roberts*, 49 N.C. App. 52, 58, 270 S.E.2d 559, 562 (1980) (counsel's efforts to negate the effect of the State's rebuttal witness through cross-examination did not amount to ineffective assistance of counsel); *State v. Hicks*, 2003-Ohio-4968, ¶ 28, 2003 WL 22149614, * 5 (Oh. Ct.App. 2003) (Defense counsel's decisions in assault trial to call alibi witness who was rebutted and to not request continuance when presented with state's rebuttal witness did not amount to deficient performance and, thus, did not constitute ineffective assistance of counsel; record did not indicate that continuance was necessary, counsel thoroughly cross-examined rebuttal witness, and counsel's decision to call alibi witness was matter of trial strategy) (unpublished). *Cf. State v. Harris*, 540 So.2d 1226, 1230 (La.App. 1989), *writ. denied*, 550 So.2d 626 (La.1989) ("Effective assistance of counsel does not ... mandate errorless counsel or counsel which might be judged ineffective only in hindsight").

Further, Applicant has not proven that he was prejudiced by counsel's performance. As discussed, Applicant could not have received an alibi instruction without his testimony. Also, both counsel and Applicant were aware that Applicant's alibi testimony was inconsistent with the testimony of Southerland and Farmer. Applicant did not testify at the PCR hearing. As a

result, he did not offer evidence as to how counsel could have better prepared him for his testimony, so as to avoid additional impeachment with the October 12th statement. Thus, he cannot meet his burden of proving that he was prejudiced by counsel's failure to adequately prepare him for his testimony. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing *Pauling v. State*, 31 S.C. 606, 503 S.E.2d 468 (1998); *Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540.

Applicant's chief complaint regarding counsel's handling of Mr. Hite is that counsel did not cross-examine him about his preparation of the incident report in *Quattlebaum*. Specifically, he points to the Supreme Court's decision in *In re Myers*, 355 S.C. 1, 5, 584 S.E.2d 357, 359 (2003), where the Court stated ,"On June 2, 1995, Detective Hite submitted his eleven-page Investigative Report about the murder for which Quattlebaum was charged. The highly detailed report failed to include an account of the eavesdropped confidential conversation, nor did the report disclose that the conversation was recorded on videotape." However, Applicant did not present Mr. Hite as a witness at the PCR hearing. As a result, the Court is left to speculate as to whether he would admit that he intentionally prepared an inaccurate incident report, or whether he would deny it and offer an explanation for inaccuracies in the report.[30] Thus, he has not established prejudice based upon counsel's failure to engage in this line of examination. *See Bannister*, 333 S.C. at 303, 509 S.E.2d at 809; *Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540.

Moreover, the Court finds that Hite's preparation of the incident report in *Quattlebaum* was a collateral matter and was not relevant to any trial issue in this case.

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[30] If Hite denied it, counsel could not impeach him with extrinsic evidence. *State v. Outlaw*, 307 S.C. 177, 414 S.E.2d 147 (1992); comments to Rule 608, SCRE; *Fiyar v. Curtis*, 485 F.3d 179, 184 (1st Cir. 2007) ("A matter is considered collateral if the matter itself is not relevant in the litigation to establish a fact of consequence, i.e., not relevant for a purpose other than mere contradiction of the in-court testimony of the witness. Stated another way, extrinsic evidence to disprove a fact testified to by a witness is admissible when it satisfies the Rule 403 balancing test and is not barred by any other rule of evidence.").

> Under Rule 608(b), SCRE, specific instances of a witness's misconduct may be inquired into on cross-examination if probative of the witness's character for truthfulness or untruthfulness. The inquiry under Rule 608(b) is limited to those specific instances of misconduct which are clearly probative of truthfulness or untruthfulness such as forgery, bribery, false pretenses, and embezzlement. *State v. Kelsey*, 331 S.C. 50, 75, 502 S.E.2d 63, 75 (1998) (citing Weinstein's Federal Evidence, Character and Conduct of Witness § 608.12(4)(a–b) (1998)).

Quattlebaum, 338 S.C. at 450, 527 S.E.2d at 109.

The Court finds that the preparation of the incident report in *Quattlebaum* is not admissible under Rule 608(b), SCRE because it is not a specific instance of misconduct that is "clearly probative of truthfulness or untruthfulness." Indeed, as Respondent pointed out at the PCR hearing, the Court in *Quattlebaum* affirmed the trial judge's ruling that the defendant could not impeach law enforcement witnesses with their participation in the videotaping of his conversation with his attorney. *Id.* Further, the preparation of the incident report in *Quattlebaum* is not admissible under Rule 608(c), SCRE and that even if it was admissible under Rule 608, it would be inadmissible under Rule 403, SCRE, because this is purely a collateral matter that might confuse jurors. *See* 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6096 ("The danger of allowing impeachment via a collateral matter is that when the fact to be impeached is not material, "the trier of fact may become confused by the attention directed at an unimportant fact. As a result, the trier of fact may attach undue importance to extraneous matters").

Moreover, counsel's cross-examination of Mr. Hite more than adequately exposed the problems with his credibility. See *Fensterer*, 474 U.S. 15, 22 (1985) (the Confrontation Clause is generally satisfied where the defense had a full and fair opportunity to expose a witness' "forgetfulness, confusion or evasion," thereby calling to the attention of the fact-finder reasons to discredit the witness's testimony); *Mills*, 161 F.3d at 1288 (defendant's Sixth Amendment right

to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable"). Finally, the Court finds that there is no prejudice in light of the overwhelming evidence of guilt.

9. Counsel was not ineffective for not recusing himself from representation of Applicant because he was not a necessary witness.

The Court finds that Applicant is not entitled to relief on his claim that counsel was ineffective for failing to recuse himself from representation of Applicant because Applicant has failed to prove that Mr. Bruck was a necessary witness at trial.

At trial, Southerland admitted that Mr. Bruck had told him that he needed to speak with his lawyers before giving a statement and that Mr. Bruck had warned him not to give a statement. ***Tr. pp. 462-63***. Otherwise, he was flippant and evasive when Mr. Bruck questioned him about the details of the statement. For instance, he claimed that Mr. Bruck had him change his original statement because Mr. Bruck did not "want Tony Cooper's name involved with Red telling him about any money." ***See Tr. p. 465, line 5 – p. 468, line 25. See also Tr. pp. 469-71.*** Later, counsel elicited that, for years, Southerland would ask him, either in person or on the phone, when they were going to court because he wanted to give a statement on Applicant's behalf. Mr. Bruck, however, would tell him that Mr. Bruck could not speak to him. ***Tr. pp. 504-507.***

On redirect examination, the State first established that Mr. Bruck did not have any problems talking to when taking the statement but thereafter told Southerland that he could not speak. ***Tr. pp. 546-47.*** Mr. Bruck objected and the trial judge heard the objection outside of the jury's presence. ***Tr. p. 547.*** Mr. Bruck explained that:

> ... [T]he reason I did not speak with Mr. Sutherland thereafter concerns the ethical rule against contacting a represented party. And, in fact, a grievance was filed against me for contacting Mr. Sutherland, or at least for agreeing to talk to Mr. Sutherland when he contacted me in the first instance. Although no disciplinary action was ultimately taken, I did receive a letter of caution about this whole episode. That's the reason.
>
> *****
>
> I made a mistake. I didn't make it twice and that's why I told him that I couldn't talk to him anymore. And it's very unfair to create the impression that I was avoiding him for reasons like I didn't want to hear what he had to say, which is exactly the purpose of this line of redirect. So I object to that. I think it's irrelevant and prejudicial under 403.

Tr. 548.

After the trial judge listened to the State's argument (***Tr. p. 549***), Mr. Bruck further explained that when he was trying to have Southerland testify at Applicant's 1997 PCR hearing, Southerland's attorneys obtained an injunction prohibiting Mr. Bruck from having further contact with Southerland. ***Tr. pp. 550-51.*** Ultimately, the trial judge told counsel that he could instruct jurors that court rules prohibit attorneys from speaking to an individual represented by counsel without the other attorney's consent. Trial agreed that this solution was acceptable. ***Tr. pp. 552-53.***

Following the State's redirect of Southerland, the trial judge instructed jurors that "Ladies and gentlemen, as a matter of law, under our court rules, an attorney cannot speak with an individual represented by counsel without consent of that counsel." ***Tr. pp. 557-58.***

Mr. Bruck testified that he did not have a relationship with Southerland. However, at the time he took the statements from Southerland, he and several other attorneys who represented death row inmates "were really allowed sort of the run of the place. On a day when he was visiting clients, a correctional officer told him that Southerland wanted to speak to him. "I don't remember if I went up to his cell door then ... communicated through the officer, but [I]

determined that [Southerland] was bound and determined to talk to me about Tony, that he wanted to clear Tony, and he didn't want his own lawyers to know anything about this." At the time, Southerland was appealing his own convictions and death sentence stemming from Kim Quinn's murder. Mr. Bruck ultimately took the statement introduced at trial as Defendant's Ex. 2. ***Tr. pp. 33-34.***[31] Mr. Bruck testified that he memorialized the statement by taking notes as he spoke with Southerland, and later typing the statement from those notes. He thereafter had Southerland sign it. ***PCR Tr. p. 35.***

Mr. Bruck acknowledged that Southerland had repeatedly accused him of telling Southerland to omit information from his statement, and that he was the only person witness to Southerland's statement. ***PCR Tr. pp. 36-37; 39.*** He added that:

> I think I should have foreseen that something like that would happen. I was a little taken in by [Southerland]. He was so persuasive when he initially went down this road and he stuck to it for many, many years and then at the last minute did a one-eighty and said that none of this was true and he had been forced to do it by a group of people, including Tony Cooper and three other inmates who very conveniently had all been executed, so I couldn't interview any of them. He picked his coconspirators carefully.

PCR Tr. p. 38.

On direct examination he testified that he did not specifically recall why he did not recuse himself and become a witness and he deferred to the trial transcript. ***PCR Tr. pp. 39-40.*** On cross-examination, however, he testified that he discussed important strategic matters, and that this would have included whether or not he should have recused himself. ***PCR Tr. p. 47.*** He also reluctantly agreed that although the better practice is to have another person to witness the statement other than the attorney, lawyers are often put in situations where they take a person's statement even though the lawyer is the only person who witnessed that statement. ***PCR Tr. pp.***

[31] Defendant's Ex. 1 was the first page of that statement.

71-72. And, he was unaware of any matters that he felt necessitated him testifying to further impeach Southerland's testimony. He would have testified had he been aware of any. Finally, he conceded that he had tried to impeach Southerland's testimony at length and that he had devoted a significant portion of his closing argument to pointing to reasons for jurors not to believe Southerland's version of events. ***PCR Tr. pp. 72-73.***

As an initial matter the Court finds that the two-pronged test set forth in *Strickland* applies as opposed to the test established for dealing with conflicts of interest based upon a conflict of interest arising out of an attorney's multiple representation of more than one defendant or party, either simultaneously or in succession, in the same or related matters. *See Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978). The North Carolina Supreme Court addressed a similar claim in *State v. Phillips*, 365 N.C. 103, 711 S.E.2d 122 (2011). In *Phillips*, the defendant argued that his attorney was ineffective for not withdrawing and testifying when the attorney realized that a trial witness previously made statements to the attorney that the witness did not recall making while testifying at trial. *Id.* at 116-17, 711 S.E.2d at 134. The defendant in *Phillips* argued that the *Sullivan* test applied based in part on Rule 3.7(a) of the North Carolina Rules of Professional Conduct, which is identical to Rule 3.7(a), of Rule 407, SCACR, and provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." See *Phillips*, 365 N.C. at 121, 711 S.E.2d at 137.

The North Carolina Supreme Court in *Phillips* rejected the defendant's argument and applied *Strickland* to the defendant's claim. *Phillips*, 365 N.C. at 121-22, 711 S.E.2d at 137. In so doing, the Court stated that:

> We find that *Strickland* provides the correct basis for our analysis. The Supreme Court observed in *Holloway* that defense counsel is in the best position to

> determine whether a conflict exists. 435 U.S. at 485–86, 98 S.Ct. at 1179, 55 L.Ed.2d at 435. Attorney Cunningham apparently concluded no conflict existed, and defendant does not identify any conflicting interest of attorney Cunningham created by or arising from attorney Cunningham's continuing representation of defendant. Rather, defendant argues that his lead defense attorney violated Rule 3.7(a) of the North Carolina Rules of Professional Conduct[] ....
>
> *****
>
> The applicability of the *Sullivan* line of cases has been carefully cabined by the United States Supreme Court. "The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland* ... is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens*, 535 U.S. at 176, 122 S.Ct. at 1246, 152 L.Ed.2d at 307. Here, unlike the circumstances posited in *Holloway* where counsel has been effectively silenced and any resulting harm difficult to measure, defendant has identified the single matter to which attorney Cunningham could have testified had he withdrawn as counsel. Because the facts do not make it impractical to determine whether defendant suffered prejudice, we conclude that *Strickland*'s framework is adequate to analyze defendant's issue.

Phillips, 365 N.C. at 121, 711 S.E.2d at 137. *See also State v. Cunningham*, 2013 UT App 277, ¶¶ 19-25, 316 P.3d 963, 968–69 (Utah Ct.App. 2013).[32]

Applying the *Strickland* standard to the facts here, the Court finds that Applicant has failed to prove deficient performance. This is not a situation where counsel's failure to withdraw resulted in impeaching evidence not being presented to Applicant's jury. To the contrary,

[32] The Court recognizes that a conflict of interest can arise where an attorney learns of exculpatory information that transforms the advocate into a material witness for his client. *See, e.g.*, Comments to Rule 3.7(a) of Rule 407, SCACR ("Combining the roles of advocate and witness can... involve a conflict of interest between the lawyer and client."). However, the Court finds that the framework for evaluating joint or dual representation conflict-of-interest claims should not be expanded to apply where a defendant claims there was ineffective assistance of counsel based upon a conflict of interest owing to his attorney's failure to withdraw and testify when the attorney is privy to possible exculpatory information. *See Phillips*, 365 N.C. at 121, 711 S.E.2d at 137. *See also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911-13 (2017) (holding that when a defendant raises a violation of the right to a public trial, which is itself a structural error, through a claim of ineffective assistance of counsel, prejudice on the ineffective assistance claim is not shown automatically; rather, the burden is on the defendant to show a reasonable probability of a different outcome in his or her case).

counsel introduced the statement that he had taken from Southerland as Defendant's Ex. 2. Also, the Court finds that counsel discussed the decision of whether or not he should withdraw from representation of Applicant with his co-counsel before continuing with his representation. Although the trial judge stated that his ruling did not foreclose the possibility of counsel testifying, this Court finds credible Mr. Bruck's testimony that he was unaware of any matters that he felt necessitated him testifying to further impeach Southerland's testimony, and that he would have testified had he been aware of any. Based upon this testimony, the Court finds that there was no further impeaching evidence that counsel had to offer the jury. The Court further finds that Applicant did not present any evidence as to how a decision by counsel to testify could have further counsel. Under these circumstances, the Court finds that this is merely a conclusory allegation that does not warrant relief. *See Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980) ("[m]ere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequate representation"); *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337, 339 (1986) ("Allegations which are conclusory are not grounds for post conviction relief, nor do they require the court to grant an evidentiary hearing"); *Nickerson v. Lee*, 971 F.2d 1125, 1136 (4th Cir. 1992) ("Unsupported conclusory allegations do not entitle a habeas petitioner to an evidentiary hearing"), *abrogated on other grounds*, *Trest v. Cain*, 522 U.S. 87 (1997).

The Court further finds that Applicant has not proven any prejudice from counsel's failure to withdraw from representing him so that counsel could testify to impeach Southerland. As discussed, Applicant has not proffered any impeaching evidence that was not before to the jury that counsel's testimony could have presented, much less proven that there is a reasonable probability of a different result but for counsel's failure to testify. Second, as the discussion of Ground (d) makes clear, counsel thoroughly impeached Southerland's credibility through

lengthy cross-examination and closing argument. This cross-examination and argument enabled Applicant's jury to properly assess Southerland's credibility and counsel could demonstrate the supposed lack of it. *See Fensterer*, 474 U.S. at 22 (the Confrontation Clause is generally satisfied where the defense had a full and fair opportunity to expose a witness' "forgetfulness, confusion or evasion," thereby calling to the attention of the fact-finder reasons to discredit the witness's testimony); *Mills*, 161 F.3d at 1288 (defendant's Sixth Amendment right to confront witnesses is satisfied where the cross-examination permitted exposes the jury to facts sufficient to evaluate the witness' credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable"). Finally, there cannot be any prejudice in light of the overwhelming evidence of guilt.

10. The alleged "cumulative effect of trial counsel's errors."

Finally, the Court finds that Applicant is not entitled to relief based upon the supposed "cumulative effect of trial counsel's errors." The Court finds that a cumulative error or cumulative prejudice analysis is improper under *Strickland* because it would obviate the necessity of demonstrating that an applicant was actually prejudiced by any specific error. *Contra Strickland*, 466 U.S. at 687; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application").

Also, the South Carolina Supreme Court has declined to hold that separate and unrelated ineffectiveness claims can be aggregated, so as to find that counsel's representation was prejudicial under *Strickland*, when there is no Sixth Amendment prejudice on any individual claim. *See Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002) (expressly declining to address the novel question of whether a PCR applicant is entitled to relief based

upon the supposed cumulative effect of trial counsel's alleged errors); *Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (same); *Lorenzen v. State*, 376 S.C. 521, 527, 657 S.E.2d 771, 775 (2008) (finding that PCR judge erred by relying upon *Nance v. Frederick*, 358 S.C. 480, 596 S.E.2d 62 (2004) and concluding that "[w]hile no individual failure alone would be a ground for granting this PCR, the cumulative neglect is severe"). This Court finds that such an analysis is not constitutionally required and should not be employed.

"The Supreme Court has not held that distinct constitutional claims can be cumulated to grant [collateral] relief." *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002). This Court finds that several decisions of federal circuit courts of appeals rejecting a cumulate error or cumulative prejudice analysis are legally correct. *See id.*; *United States v. Stewart*, 20 F.3d 911, 917-18 (8th Cir. 1994); *Meuller v. Angelone*, 181 F.3d 557, 586 n. 22 (4th Cir. 1999); *Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th Cir. 1998) ("Having just determined that none of counsel's actions could be considered constitutional error, ... it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under *Strickland*").

To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in *Strickland* and would permit an inmate to circumvent his burden of proof. *See Strickland*, 466 U.S. at 687 ("Unless a defendant makes both showings [- *i.e.*, both deficient performance and prejudice –] it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable"). *See also Cronic*, 466 U.S. 648, 658 (1984) ("... the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged

conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated"); *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) ("we have held that, post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief"); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996).[33]

Further, the Court finds that Applicant has failed to meet his burden of proof, even under a cumulative error analysis. This Court has not found that counsel's performance was deficient, in any respect. Although the Court did not address *Strickland*'s first prong in connection with Ground (d), the Court did not find that his performance was deficient. Even assuming *arguendo* that the Court had found counsel performed deficiently in those efforts, there are no other errors with which to aggregate that supposed error. Therefore, this allegation lacks merit.

Accordingly, the Court denies relief on each of Applicant's claims. The Court notes that Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt 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), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR

[33] It is perfectly logical to consider the cumulative effect of failing to disclose evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), since the determination to be made is whether non-disclosure of evidence deprived the defendant of due process. *See Kyles v. Wheatly*, 514 U.S. 419, 441-44 (1985). However, the same is not true when addressing ineffective assistance of trial counsel claims. Alleged errors, which are not unconstitutional, individually, simply cannot be added together to create a constitutional violation. Following a cumulative error or cumulative prejudice analysis would result in a PCR applicant obtaining relief, even though no one alleged constitutional violation was prejudicial to her, simply by raising a large number of allegations. Obviously, this is a ludicrous result that is not mandated by *Strickland* or any other decision of the South Carolina Supreme Court or the United States Supreme Court. *See Hunt v. Smith*, 856 F.Supp. 251, 258 (D. Md. 1994) ("The fact that many claims of counsel error are pressed does not alter fundamental math - a string of zeros still adds up to zero").

counsel must serve and file a notice of appeal on his behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 15 day of May, 2018.

J. CORDELL MADDOX, JR.
Presiding Circuit Court Judge

5/15/18, South Carolina

WITNESSES

Hamer, LCSD

ARREST WARRANT NO. C560955,
C546057

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury 1/8/90

VERDICT

Foreman of Petit Jury *Date:*

DOCKET NO. 90-GS-32 -0083

The State of South Carolina,

County of LEXINGTON

COURT OF GENERAL SESSIONS

January TERM 1990

THE STATE

vs.

GENE TONY COOPER, JR.

CDR #116, 095, 137, 070

Indictment for

MURDER AND KIDNAPPING
AND ARMED ROBBERY AND
FORGERY

Donald V. Myers, Solicitor

1784

FORM 32 (12/87)

STATE OF SOUTH CAROLINA) COUNTY OF LEXINGTON)	INDICTMENT FOR MURDER AND KIDNAPPING AND ARMED ROBBERY AND FORGERY

At a Court of General Sessions, convened on the 8th day of January, 1990, the Grand Jurors of Lexington County present upon their oath:

COUNT ONE - MURDER

That GENE TONY COOPER, JR. did in Lexington County on or about the 5th and 6th days of October, 1989, feloniously, wilfully and intentionally and with malice aforethought kill one Kimberly Ann Quinn by means of shooting the victim's head, neck and back with a shotgun, and that the said Kimberly Ann Quinn did die in Lexington County as a proximate result thereof on or about the 6th day of October, 1989.

COUNT TWO - KIDNAPPING

That GENE TONY COOPER, JR. did in Lexington County on or about the 5th and 6th days of October, 1989, unlawfully seize, and confine, inveigle, decoy, kidnap, abduct, or carry away one Kimberly Ann Quinn without authority of law and without her consent, in violation of Section 16-3-910 of the 1976 South Carolina Code of Laws, as amended.

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

SOLICITOR

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

INDICTMENT FOR

MURDER AND KIDNAPPING AND ARMED ROBBERY AND FORGERY

At a Court of General Sessions, convened on the 8th day of January, 1990, the Grand Jurors of Lexington County present upon their oath:

COUNT THREE - ARMED ROBBERY

That GENE TONY COOPER, JR.

did in Lexington County on or about the 5th and 6th days of October, 19 89, while armed with a deadly weapon, to wit: a shotgun, feloniously take from the person or presence of Kimberly A. Quinn by means of force or intimidation goods or monies of the said Kimberly A. Quinn, such goods or monies being described as: assorted rings, check made payable to Kimberly Quinn, U.S. currency, and a South Carolina Indentification Card.

COUNT FOUR - FORGERY

That GENE TONY COOPER, JR.

did in Lexington County on or about the 6th. day of October, 19 89, with intent to defraud, falsely make, forge, counterfeit, cause or procure to be falsely made, forged, or counterfeited, utter and publish as true, or wilfully act or assist in any of the foregoing, in regard to an instrument of writing, to wit: check #307084226 made payable to Kimberly Quinn, [redacted], West Columbia, dated September 25, 1989, in the amount of One Hundred Forty-Nine ($149.00) Dollars, drawn on the S.C. National Bank from the Office of State Treasurer.

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

SOLICITOR

WITNESSES

Salters, WCPD

ARREST WARRANT NO. C545962,
C546055

ACTION OF GRAND JURY

TRUE BILL

Steven P Brown 1/8/90

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury *Date:*

DOCKET NO. 90-GS-32 0084

The State of South Carolina,

County of LEXINGTON

COURT OF GENERAL SESSIONS

January TERM 1990

THE STATE

vs.

GENE TONY COOPER, JR.

CDR #049

Indictment for

CONSPIRACY TO COMMIT KIDNAPPING,
ROBBERY WITH A DEADLY WEAPON,
MURDER ~~AND/OR OTHER CRIMES~~
SRB

Donald V. Myers, Solicitor

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

INDICTMENT FOR

CONSPIRACY TO COMMIT KIDNAPPING, ROBBERY WITH A DEADLY WEAPON, MURDER ~~AND/OR OTHER CRIMES~~

At a Court of General Sessions, convened on the 8th day of January, 1990,

the Grand Jurors of Lexington County present upon their oath:

That GENE TONY COOPER, JR.

did in Lexington County and other places, on or about the 5th day of October, 1989, and on other dates, unlawfully, wilfully, knowingly and wickedly unite, combine, agree, confederate, ban together or conspire with Robert H. Sutherland, Brenda Jean McLaurin or Phillip Gary Farmer or any combination thereof and have a tacit understanding with one another, each other and among themselves for the purpose of committing robbery with a deadly weapon of Kimberly A. Quinn; and/or to unlawfully kidnap Kimberly A. Quinn and the said Gene Tony Cooper, Jr., Robert H. Southerland, Brenda Jean McLaurin and/or Phillip Gary Farmer did any overt act(s) towards carrying out such unlawful agreement, confederation or conspiracy in violation of Section 16-3-920 of the Code of Laws of South Carolina, as amended; and/or to murder the said Kimberly A. Quinn in pursuance of said agreement and conspiracy all against the peace and dignity of the State and contrary to the statute in such cases made and provided.

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

Deputy SOLICITOR