

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Jocelyn J. Newman, Circuit Court Judge

JAMES R. FRADY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001817

APPENDIX

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1 A Well, as far as me going by my friend's house. Now,
2 as far as me going to the gas station and stopping at the
3 grocery store for a brief period, no, I don't know of
4 anybody that I could point out that could say, yes, at
5 this particular time, Mike Harper was here getting gas
6 and, at this particular time, Mike Harper was in the
7 grocery store.

8 But the time I was at my friend's house, yes, there
9 is more than one person that can account for me being
10 there up until the point that I left there and went to my
11 house around 11:30 or 11:45. That could be done, yes.

12 Q And, at the time in question, again, you had a
13 strained relationship with James and Barry Frady and you
14 also had a strained relationship with Randy Frady; isn't
15 that right?

16 A That's correct. But I was still associating with Jim
17 and Barry, I just wasn't with Randy.

18 MR. ALLEN: Thank you, sir.

19 That's all the questions I have of this witness.

20 MS. HERVEY: Just briefly, Your Honor.

21 REDIRECT EXAMINATION

22 BY MS. HERVEY:

23 Q Mr. Allen asked you about at that time about whether
24 or not you were welcome at Jim and Barry's house. Do you
25 have any firsthand knowledge that at or around that same

1 time whether or not Randy Frady was welcome at that house?

2 MR. ALLEN: Objection, without a foundation being
3 laid.

4 MS. HERVEY: I asked him --

5 THE COURT: She asked if it was firsthand knowledge.
6 Objection is overruled.

7 You can answer the question if you know of your own
8 knowledge.

9 THE WITNESS: Yes.

10 BY MS. HERVEY:

11 Q You have knowledge?

12 A I have knowledge, yes.

13 Q And based on your firsthand knowledge, do you know
14 whether or not he was welcome at that house either?

15 A He was not.

16 Q And you stated that you had moved -- helped him move
17 into that trailer at [REDACTED]?

18 A Well, he didn't really have anything to move except
19 for a 13-inch color TV and the clothes he had. All the
20 furniture and everything else was mine. But, yes, I did
21 help him move into the [REDACTED] residence, yes.

22 Q And was that move in any way related to him not being
23 welcome at Jim and Barry's house?

24 A That would be correct, yes.

25 MS. HERVEY: Nothing further.

1 THE COURT: Recross limited to redirect?

2 MR. ALLEN: Nothing further.

3 THE COURT: As to this witness?

4 MS. HERVEY: He may be excused.

5 THE COURT: Any objection?

6 (There was no response.)

7 THE COURT: Counsel, approach.

8 MS. HERVEY: I mean, if he wants to keep him under
9 subpoena, I have no --

10 THE COURT: Come up here.

11 (WHEREUPON, a bench conference was held.)

12 THE COURT: You may step down and you are excused.

13 THE WITNESS: Thank you, sir.

14 Here is your picture.

15 MS. HERVEY: Thank you.

16 Just leave it on the stand, please.

17 THE COURT: Ladies and gentlemen, I told you at the
18 outset of the trial that you must base your decision
19 solely upon evidence during the trial of the case. And I
20 defined for you that there are three types of evidence.
21 We define it in different ways. But for purposes of my
22 opening remarks to you, I told you it would be -- that
23 testimony from the witness stand would be evidence.
24 You've heard me also refer to exhibits, which have been
25 introduced as evidence. The third source of evidence is

1 what the law calls a stipulation.

2 As the name implies, a stipulation is, basically, an
3 agreement between the parties. That is between the
4 parties before the Court, the State and the Defendant, as
5 to the existence of a certain fact so that it will not be
6 necessary to put up testimony in light of the stipulation.
7 You would be required, ladies and gentlemen, as to any
8 stipulation to accept that stipulation as conclusively
9 determined as a fact for purposes of this trial without
10 the necessity of any additional evidence.

11 All right. Ladies and gentlemen, now, I understand
12 there will be a stipulation, I'm advised by Counsel, which
13 will be published to you at this time.

14 MS. HERVEY: May it please the Court, Your Honor?

15 THE COURT: Yes, ma'am.

16 MS. HERVEY: The stipulation is signed by Mr. Allen
17 and myself in this case as to DNA evidence and
18 examination. The following items were examined by
19 Cecil -- Special Agent Cecil Bradstreet and evaluated
20 whether samples were appropriate for examination by the
21 DNA forensic analyst. Swabs of SLED Items 13, 14, 15, and
22 16 were examined and sent to the DNA lab for further
23 examination and testing. Item 22, a bag containing 22.1,
24 a pair of khaki shorts; 22.2, a cap; 22.3, a pair of
25 jeans; 22.5, a T-shirt; 22.6, a T-shirt; 22.7, a towel;

1 22.8, a towel; 22.9, a towel; 22.10, a towel; 22.11, a
2 sweatshirt; 22.12, a pair of socks; 22.13, a sock; 22.14,
3 a sock; and Item 28, a pair of gloves were examined and no
4 blood was detected, nor any other sample detected that
5 would be appropriate for DNA analysis.

6 The following items were tested by Senior Agent
7 Manuel J. Ortuno with the follow results: Item 11, swab
8 from living room matches a known sample from the victim,
9 Barry Frady. The probability of selecting an unrelated
10 individual at random having the same DNA profile matching
11 this item is one in 210 million. Item 12, a swab from the
12 bed beside victim matches a known blood sample from
13 victim, James Frady. The probability of selecting an
14 unrelated individual at random having a DNA sample of this
15 nature is approximately one in 25 million. Item 21,
16 sufficient DNA could not be extracted from cuttings from
17 the bed sheet from the Defendant's residence to make a
18 scientifically reliable identification. Items 13, 14, 15,
19 and 16 were determined to be inappropriate for DNA
20 analysis and no analysis was performed.

21 Thank you, Your Honor.

22 Do you want to make this an exhibit?

23 THE COURT: Any objection, Counsel?

24 MR. ALLEN: No, sir. That's the stipulation as
25 agreed upon.

1 THE COURT: No objection to making it an exhibit?

2 MR. ALLEN: No, sir, no objection.

3 THE COURT: State's Exhibit No. 35 in evidence
4 without objection.

5 (WHEREUPON, State's Exhibit No. 35 was marked for
6 identification and admitted into evidence.)

7 MS. HERVEY: The State calls Ira Parnell, Your Honor.

8 THE CLERK: Raise your right hand and place your left
9 hand on the Bible.

10 WHEREUPON,

11 IRA BYRD PARNELL,

12 after first having been duly sworn, testified as follows:

13 THE CLERK: Please go around and have a seat.

14 THE COURT: Have a seat and slide forward. You can
15 pull the microphone up and down. He'll get you a cup of
16 water, if you need it.

17 Start by stating your full name and spell your last
18 name for the court reporter.

19 THE WITNESS: My name is Ira Byrd Parnell,

20 P-A-R-N-E-L-L.

21 THE COURT: Your witness, Counsel.

22 MS. HERVEY: May it please the Court, Your Honor?

23 DIRECT EXAMINATION

24 BY MS. HERVEY:

25 Q Mr. Parnell, with whom are you employed?

1 A I'm employed by the South Carolina Law Enforcement
2 Division, also known as SLED.

3 Q And what do you do for SLED?

4 A I'm a supervisor of the firearm and tool mark
5 identification laboratory at SLED headquarters in
6 Columbia, South Carolina.

7 Q How long have you been so employed?

8 A I've been employed with SLED for 34 years and
9 assigned to the firearms department for 33.

10 Q And other than doing that for the SLED forensic
11 laboratory, do you have any other duties and
12 responsibilities with SLED?

13 A Basically, I'm assigned to the firearms department
14 where I supervise nine examiners and also examine evidence
15 myself and do case work.

16 Q And are you in any way associated with the SWAT team
17 or the snipers that work for SLED?

18 A Yes, ma'am, I am.

19 Q And how are you associated with them?

20 A I'm the supervisor of the SLED sniper team.

21 Q So guns are your specialty?

22 A Yes, ma'am.

23 Q And they have been your specialty for 30 some odd
24 years?

25 A Yes, ma'am. That's correct.

1 Q And during your tenure with SLED and prior to that,
2 what type of special training and education have you
3 received as it relates to firearms and firearms
4 identification?

5 A I did an intensive three-year internship program
6 under three court-qualified firearms examiners. At that
7 time, there was no college degree program or advanced
8 study program available other than learning from another
9 examiner. So, at the time, we had three court-qualified
10 examiners who trained me.

11 Q And, just briefly, during your tenure, have you
12 continued to go through other schools and updates as
13 science has developed over those 30 some odd years?

14 A Yes, ma'am. I'm a member of the Association of
15 Firearm and Tool Mark Examiners, which is an international
16 organization of examiners who meet once a year for a week
17 to discuss the latest developments in firearm and tool
18 mark identification. I graduated from the FBI National
19 Academy, our State Academy, and numerous other advanced
20 courses at the FBI Academy in Quantico, Virginia. I
21 frequently have lectured at our State Academy and the
22 district attorneys college in Columbia on firearms and
23 firearms-related evidence.

24 Q And you use the term "tool mark identification," what
25 does that term mean to you?

1 A Firearms identification is the subset of actual tool
2 marks. The firearm being the tool and the fired bullets
3 or cartridge casings been the objects on which tool marks
4 are left.

5 Q All right. And in your analysis of firearms, just
6 briefly, what does your training and experience permit you
7 to do in examining fire marks and doing that tool mark
8 identification, just generally in your field?

9 A Generally, the results that can be reached by
10 examining firearms and fired components are a positive
11 conclusion, which is fired by or associated with a
12 particular gun, not fired by, differences noted.

13 Inconclusive, which is maybe some similarities noted,
14 but due to damage or inconsistencies noted on a firearm,
15 you just can't tell whether a particular component was or
16 was not associated. Or unsuitable, which is too badly
17 damaged.

18 Q And have you testified in courts in this state before
19 regarding firearm examination and tool mark
20 identification?

21 A Yes, ma'am, approximately 550 times, as well as
22 federal court and North Carolina state court.

23 MS. HERVEY: Your Honor, at this time, we would
24 proffer Ira Parnell as an expert in firearm examination
25 and tool mark identification.

1 THE COURT: Any objection?

2 MR. ALLEN: No objection.

3 THE COURT: So qualified without objection.

4 Ladies and gentlemen of the jury, remembering my
5 earlier instruction to you concerning expert testimony.

6 Counsel, you may proceed. The witness is qualified
7 without objection.

8 BY MS. HERVEY:

9 Q And just briefly, a little bit more, you state you're
10 the supervisor over the snipers or the SWAT team. Have
11 you ever been a sniper with SLED?

12 A Yes, ma'am, for 32 years.

13 Q So not only are you an expert on examining and
14 analyzing them, you're pretty much an expert on firing
15 them as well, would that be fair to say?

16 A Yes, ma'am.

17 Q And as it relates to this case, were several items
18 submitted to you for identification?

19 A Yes, they were.

20 Q Let me show you -- and we put the sticker on the bag
21 so it's been previously marked and admitted as State's
22 Exhibit No. 18. And, first, I ask you to look at just the
23 packaging here. Does it bear any identifying marks that
24 indicate you would have repackaged that weapon in that
25 bag?

1 A Yes, ma'am, it does. The evidence tape has my
2 writing on it with my initials and the date of sealing, as
3 well as other markings on the package that indicate that I
4 did seal this package up.

5 Q With that gun in it?

6 A Yes, ma'am.

7 Q And how do you know that's the gun you put in that
8 bag? Do you mark on the gun?

9 A Yes, ma'am. My initials, case number, and specimen
10 number are scribed on the firearm in the area just above
11 the trigger guard.

12 Q And just for the purposes of clarification -- we
13 tried to get Special Agent Curtis to do it earlier and,
14 finally, got Mr. Wagner to contribute to this case -- has
15 that item been -- or has that weapon been secured in some
16 way to prevent it from being fired?

17 A Yes, ma'am. The slide is locked back.

18 Q And that isn't how it was presented to you
19 originally?

20 A No, ma'am.

21 Q What kind of gun is it? What are we looking at?

22 A We're looking at a J.C. Higgins Model 20,
23 twelve-gauge two and three-quarter inch shotgun.

24 Q Was does the J.C. Higgins model tell you? What kind
25 of gun is that? I've never heard of that before.

1 A J.C. Higgins is associated with Sears. And it's
2 possibly a Mossburg manufacture.

3 Q Mossburg would have manufactured it for Sears under
4 that different name?

5 A For Sears for J.C. Higgins.

6 Q Are you able to say how old that gun is?

7 A There's no serial number on this firearm, so it's
8 potentially prior to 1968. I don't know.

9 Q And why do you say "prior to 1968" if it doesn't have
10 a serial number?

11 A Because they're required to have a serial number
12 after 1968.

13 Q But nothing on that gun indicates to you that those
14 serial numbers have been removed or anything to that
15 effect?

16 A No, ma'am.

17 Q What kind of condition is it in?

18 A It's in very good condition. It's used, but in good
19 condition.

20 Q And by "good condition," do you mean well maintained,
21 or rarely used, or what?

22 A It has been well used based on the lack of bluing in
23 certain areas. But there's no rust. It functions very
24 smoothly without the cable guard in it and has been
25 apparently well maintained.

1 Q All right. You said it's a J.C. Higgins Model 20,
2 that's just the model number. As with different models of
3 cars, you have different models of guns, is that fair to
4 say?

5 A Yes, ma'am.

6 Q A pump shotgun. Describe to the jury, who might not
7 be familiar with shotguns, if you could, using a shotgun
8 what pump -- what does pump action mean?

9 A It's hard to demonstrate with the slide lock back.
10 However, basically, pump action can be called slide
11 action. Those of you who have fired shotguns before are
12 familiar with a slide action. For maybe some of you
13 ladies who have not, once the shell is introduced into the
14 chamber, either by singly loading or putting one in the
15 magazine, pumping the fore end backwards to pick up the
16 shell out of the magazine and forward it and load it into
17 the chamber.

18 Once the gun is loaded and the trigger is pulled, the
19 gun does nothing by itself after that point. The shooter
20 has to manually pump or pull the fore end back to extract
21 the fired shell casing from the barrel.

22 At that time, a fresh round is brought down out of
23 the magazine over to the lifter and the fore end goes
24 forward. It picks that new shell up and loads it into
25 that chamber. It's, basically, a manually operated

1 shotgun. It's not like a semi-auto or another type of
2 action -- bolt action. This is a slide action or a pump
3 where the fore end is used to slide back and forward to
4 make the gun function.

5 Q And that pipe, for lack of a better word, because I
6 don't want to call it a barrel. But that black tubular
7 thing that slides up and down, does that serve some other
8 purpose? Is that also the magazine?

9 A It is. It's the magazine tube. And in this
10 particular firearm, it will hold five unfired shells in
11 the magazine with one in the barrel, the total capacity of
12 six shells.

13 Q And so if you put a shell in there and chamber back
14 into the actual firing chamber going down the barrel, you
15 could get six actual shells in there before you would have
16 to reload?

17 A You could fire six times without reloading, yes,
18 ma'am.

19 Q You stated it was a 12-gauge two and three-quarter
20 inch chamber. What does that mean?

21 A It means the maximum length of shells that will
22 safely fire -- what's the State's Exhibit number of this
23 one?

24 Q State's Exhibit No. 18. I'm sorry.

25 A State's Exhibit No. 18, the maximum length of a shell

1 that will safely fire in State's Exhibit 1 No. 8 is two and
2 three-quarter inches. And that's simply a length
3 designation that is put on ammunition by the manufacturer
4 so that an individual will know what size shells to buy
5 for their shotgun. This is strictly two and three-quarter
6 inches. Others shoot three-inch shells. Still others
7 shoot three and a half inch shells. This particular one
8 is two and three-quarter inch and are the shortest
9 12-gauge shells.

10 Q So "12-gauge" meaning the width or the diameter of
11 the shell. Would that be fair to say?

12 A What we're talking about here, that's correct. But,
13 actually, a 12-gauge, actually, means that there's 12 lead
14 balls in the diameter of the bore of this weapon to make a
15 pound. It's an old English designation for gauge. But,
16 yes, that's, basically, what we're talking about here is
17 the diameter of the barrel.

18 Q All right. So you examined that gun -- for what
19 purpose do you oil a gun?

20 A To preserve it, to keep it from rusting, and to make
21 it operate smoothly.

22 Q When you examined this gun from that sealed bag,
23 could you detect the presence of any oil on the gun?

24 A Yes, I did. It had, apparently, been wiped with an
25 oily rag, or a silicone cloth, or some mechanism to

1 maintain it so it wouldn't rust.

2 Q Had the bore been cleaned out?

3 A I could not tell if the bore had been cleaned since
4 it was last fired. There was some light residue present.
5 So the bore had not been swabbed out with a patch or
6 anything.

7 Q It had not, at least, been thoroughly cleaned, you
8 could say that?

9 A It had been wiped off, apparently, is what it looked
10 like to me.

11 Q And the bore, itself, you said hadn't been thoroughly
12 cleaned because there was still a light residue there?

13 A That's correct.

14 Q Were you able to quantify that amount of residue to
15 say how many shots or anything had been recently fired out
16 of that bore?

17 A No, ma'am.

18 Q Other than that, did you do anything else just in the
19 general examination and identification of this particular
20 weapon?

21 A Nothing other than to determine that it was safe to
22 shoot. And I test fired similar shells of those that were
23 submitted for comparison.

24 Q Before I start dropping stuff, let's look at State's
25 Exhibit No. 17. And I ask you to look at the exterior

1 packaging of this item and whether or not the items
2 contained therein were examined by you as part of your
3 ballistic examination?

4 A Yes, ma'am. State's Exhibit No. 17, the packaging
5 exhibits the date that I sealed it, and my initials, and
6 other indications of how many packages were to be returned
7 at this same time.

8 Q And, just generally, what is contained within State's
9 Exhibit No. 17? Without removing it, just can you look in
10 there and tell, generally, or from your own labeling and
11 using SLED items?

12 A It's a partial box of unfired 12-gauge shotgun
13 ammunition and three fired shotgun shell cases that I
14 fired for tests in State's Exhibit No. 18.

15 Q And does that relate originally to your SLED Item #19?

16 A Yes, ma'am.

17 Q And did you take those shells out and examine them
18 and were they part of your comparison purposes?

19 A Yes, ma'am.

20 MS. HERVEY: Your Honor, at this time, we would
21 move -- I'm getting my numbers confused.

22 What number was that bag?

23 THE WITNESS: State's Exhibit No. 17.

24 MS. HERVEY: I move State's Exhibit No. 17 into
25 evidence.

1 THE COURT: As to State's Exhibit No. 17, Counsel?

2 MR. ALLEN: No objection.

3 THE COURT: Ladies and gentlemen of the jury, State's
4 Exhibit No. 17 will be admitted into evidence without
5 objection. State's No. 17 in evidence.

6 (WHEREUPON, State's Exhibit No. 17 was admitted into
7 evidence.)

8 BY MS. HERVEY:

9 Q If you could, just remove those items now that
10 they've been entered into evidence. And go into a little
11 bit more detail as to what's contained in that bag.

12 A State's Exhibit No. 17, collectively, contains a
13 Remington express long range 12-gauge shotgun shell box,
14 which had mixed ammunition in it, all two and
15 three-quarter inch 12-gauge size. There was one federal
16 brand #6 birdshot low brass shell in it. There were 20, I
17 believe, #6 high brass two and three-quarter inch
18 Remington shells in it. And the rest were buckshot, all
19 of Remington variety. The only difference was the federal
20 brand shell.

21 And State's Exhibit -- now, the three fired shotgun
22 shells that I fired for test in State's Exhibit No. 18 out
23 of this shotgun are here as well as one of the unfired
24 shells from the original box that I just cut open to view
25 the components that were inside of the shell, the pellets,

1 the powder, the wadding column, and the shell casing
2 itself.

3 Q And before we go any further, did you repackage those
4 components separately?

5 A I did. I repackaged these for accountability
6 purposes to go with the original box.

7 Q Would you give me that component bag? I'm going to
8 cross my fingers and hope that this thing works for a
9 little while longer.

10 You sealed this bag back up?

11 A I probably did.

12 Q Did I leave you some scissors?

13 A I've got something to cut it with.

14 Q I'm sure you do.

15 A Do you need for me to open them for you?

16 Q Yes, please.

17 Because I would like to show the jury those
18 components before we go further with your testimony so
19 they understand those component parts as we go through the
20 testimony.

21 Thank you, Mr. Parnell.

22 A Yes, ma'am.

23 Q What are we looking at here, this breakdown of
24 State's Exhibit No. 18?

25 A We're looking at the unfired shell casing, the

1 plastic part of the outside of the shotgun shell that I
2 cut open to review the internal components.

3 Q And that -- this metal lettering, what is that there?

4 A That's my item number, initials, and case number in
5 my handwriting that I wrote on there when I did it.

6 Q And this black marking, is that more along the lines
7 of things put there by the manufacturer?

8 A Yes, ma'am. That indicates the loading of the shell
9 as it was manufactured. And so three and three-quarter
10 drams of powder, which is a powder designation or a power
11 destination by the manufacturer, an ounce and a quarter of
12 pellets in #6 is the size of the shot pellets that are
13 loaded into the shell.

14 Q #6 pellets are what size? Buckshot? Birdshot? What
15 are we talking about?

16 A Medium large birdshot.

17 Q All right. I'm going to kind of turn it on its end a
18 little. What are we looking at looking from this end of
19 the shell casing, the empty shell casing?

20 A You're looking into the unfired shell casing body.
21 In the very bottom, if you turn to the right just right,
22 you can see the primer, which is -- actually, initiates
23 the ignition when it's struck by the firing pin. It makes
24 the powder burn, which, in turn, creates gas and blows the
25 powder and the wadding out of the barrel.

1 Q And is that -- look there. Do you see that now, the
2 gold item that appears to be showing at the bottom?

3 A Yes, ma'am. That's the primer.

4 Q And you would have just cut this cap part off here?

5 A Yes, ma'am. I carefully cut through the plastic and
6 slid the components out.

7 Q All right. I'm going to flip it on its other end or,
8 at least, try to.

9 What are we looking at?

10 A We're looking at the case head. The primer is the
11 smaller circle in the middle with the copper-colored
12 circle around it. It's showing you the head stamp, which
13 is the writing on it, which tells you it's a Remington
14 brand and the gauge is 12. The primer has not been
15 struck, which indicates it's still got priming compound
16 that's available to be used if it's struck properly.

17 Q And let me show you what's in -- I've got -- hold on.
18 Let me show you this item here. And it may be necessary
19 that I turn it on its side, at least, initially.

20 What are we looking at here? How does that relate to
21 the exterior shell casing that we just saw?

22 A That is what we call a wad column. Its purpose is to
23 hold the pellets in the right hand end as we're viewing
24 it. And the lower portion, which has the elongated holes
25 in it, is designed to cushion the effect of the firing

1 mechanism. When a gun is fired, there's immediate recoil
2 to the shooter, as well as push to the shot charge. This
3 wad column is designed to cushion the pellets so that they
4 will remain round and stay together.

5 And y'all that hunt know that the further away and
6 have a tighter pattern, the more effective your load is
7 going to be. And that's what that's for.

8 And, ladies, that's so that the pellets don't deform,
9 that they stay rounder, and they will go farther and
10 straighter. It's meant to cushion. It's a one piece.
11 It's known as a power piston. That's Remington's
12 designation of that wad type. It's very characteristic of
13 shells that were manufactured by Remington.

14 Q This clear plastic one, that would have slipped back
15 down into the exterior green plastic casing?

16 A Yes, ma'am. With the powder going in first and then
17 that component going in on top of the powder and the
18 pellets being loaded into the slotted portion on the
19 right-hand end as we were looking at it before the crimp
20 was, actually, applied.

21 Q I don't necessarily want to remove them from this bag
22 and have them go everywhere. But, if you can, did this
23 also come from the same shell casing as you were breaking
24 it down? And what is the jury looking at here?

25 A I believe that's the flake powder that came out of

1 the shell.

2 Q And what would that flake powder do? How would that
3 attribute to the execution of that shell?

4 A That's what makes it, actually, shoot the wadding and
5 the shot out of the barrel. The primer ignites by the
6 firing pin hitting it, which, in turn, makes the powder
7 burn. It's designed to burn at a specific burning rate,
8 which keeps the pressure at a manageable level. And all
9 of that combined pushes the shot out of the barrel
10 surrounded by the wadding until the wadding reaches a
11 certain point away from the barrel, at which time, it
12 peels away and the shot carries on down range.

13 Q And, finally, I believe this is the last component
14 part, at least, of this shell casing. What are we looking
15 at here?

16 A Those are the actual pellets. Those are what you
17 would call the projectiles that, actually, come out of the
18 barrel. These are #6 size pellets, which is a size and
19 weight designation that's used to differentiate this size
20 pellets from larger pellets, say, buck size pellets, which
21 are very large, and then smaller birdshot pellets, which
22 are, actually, smaller than these.

23 Q All right. Let me see one of the test fired shell
24 casings that you have. Just so -- the jury doesn't
25 necessarily know what you do, you just don't go out in the

1 woods and shoot one of these things, do you?

2 A Ma'am?

3 Q You don't just shoot one of these into the woods and
4 hope that you find it, do you?

5 A Shoot what?

6 Q The shell casing. Do you shoot it under a more
7 controlled environment?

8 A Me?

9 Q Yes, you.

10 A Oh, I test fire it in a very controlled environment.
11 I have a tunnel that we fire it into that it can't get out
12 of.

13 Q And is that something that is maintained by SLED and
14 you all use to test fire weapons?

15 A Yes, ma'am.

16 Q And is that tunnel also used so that once it comes
17 out the other end of that gun or is ejected from that
18 shotgun, it's not damaged or altered in any way beyond the
19 firing?

20 A Yes, ma'am. We pump -- a pump action shotgun such as
21 State's Exhibit No. 18, it's quite easy not to damage or
22 lose a fired shot shell casing because it's -- until I
23 pump the fore end, it stays in the barrel. And I can just
24 pump it right into my hand and put it in my pocket.

25 Q And you handed me one of the ones that you test fired

1 under that controlled environment?

2 A Yes, ma'am.

3 Q If you could, do you have one of the unfired bullets?

4 Let me see if I can get that back while you're
5 opening that up. I want to put these side by side so you
6 can explain to the jury the difference in appearance from
7 a fired shell casing and an unfired shell casing.

8 And, if you could, there's a yardstick there. We're
9 very sophisticated here in Oconee County, up here. Use
10 that to explain to the jury the difference between the
11 appearance of an unfired and fired shell casing.

12 THE COURT: Speak up, you haven't got a microphone,
13 so they can hear you down on the end of the jury box.

14 THE WITNESS: All right, sir.

15 The primer on the right has, obviously, been hit by
16 something. It's got a firing pin impression. It looks
17 like a big dimple from here. That causes the material
18 that's inside the primer initially to explode. It
19 ignites, which sets the powder that we saw up here on
20 fire, which, in turn, pushes out the shot and the pellets.
21 This one on the right has been fired. It has the dimple
22 of the firing pin impression and is roughly in the center.
23 That's unfired and does have the dimple.

24 BY MS. HERVEY:

25 Q And that firing pin, how does that effect or

1 contribute to your tool mark identification?

2 A The firing pin is one of the areas that can be
3 examined and, potentially, identified on a fired shell
4 casing. There are five general areas: Firing pin, breach
5 space, the extractor, the ejector, and chamber marks. The
6 firing pin is only one. But it really initiates the whole
7 firing process and causes the rest of the marks to be
8 made.

9 Q And that firing pin, that mark it leaves as it
10 strikes the primer, are you able to say that that is
11 peculiar to any particular gun or type of gun?

12 A It can be, yes, ma'am.

13 Q Some may appear similar, but some may be in
14 particular; is that correct?

15 A That's correct.

16 Q And this gun, did it strike that primer in any
17 particular way that would lead to and/or contribute to
18 your identification in this case?

19 A As I recall, the firing pin on State's Exhibit No. 18
20 was relatively smooth. And I think my identifications or
21 my examinations were limited mainly to the breach face
22 area or --

23 THE WITNESS: If I may, Your Honor?

24 (There was no response.)

25 BY MS. HERVEY:

1 Q Please explain to the jury what "breach face" means,
2 what we're looking at in terms of the shell casing?

3 A The breach on State's Exhibit No. 18 --

4 May I approach?

5 -- is the area around where the firing pin comes out.
6 I don't want to point that at anybody. But there's a
7 silver circle in the circle here and a little hole in the
8 middle. That's where the firing pin comes out. And when
9 this gun is fired, any of you who have seen or fired a gun
10 know that the recoil against your shoulder is noticeable.
11 And when that recoil happens, right here in the center of
12 this bolt that's down inside to hold the middle of the
13 firing pin, and in the area around where the firing pin
14 comes out is, actually, what I'm referring to as the
15 breach space area. And the circle down here, the hole in
16 the middle, is where the firing pin comes from.

17 THE COURT: Mr. Parnell, if you would, show it to
18 Defense Counsel, please.

19 MR. ALLEN: Yes, sir.

20 THE WITNESS: The firing pin comes out of the hole in
21 the middle and the area around is the breech space.

22 BY MS. HERVEY:

23 Q And does that breach space leave any telltale
24 markings on any particular area of the shell casing when
25 it's fired?

1 A Yes, ma'am, it does. The area around the firing pin
2 impression is marked by the breach space. In recoil, when
3 the gun fires and it kicks into the shooter's shoulder,
4 the impression of the breach of the firearm that's being
5 shot is impressed onto the primer area of the shell that's
6 being fired. Marks are microscopic in nature. And they
7 are identifiable to a specific firearm in certain
8 circumstances.

9 Q And no matter how much I zoom in, I'm not going to
10 see those markings; is that correct?

11 A No, ma'am. They're microscopic.

12 Q You've got to have an actual microscope with a little
13 bit more zoom power than mine? This has been very faulty
14 equipment so far in this trial.

15 A Yes, ma'am.

16 Q And is the marks limited to there where that firing
17 pin hits the primer cap or are there any other marks there
18 on that end of the projectile, perhaps, where it says
19 "Remington" and "12GA"?

20 A In certain circumstances, there can be extraneous
21 marks outside of the primer area. Marks anywhere on the
22 case head can be associated with a particular firearm if
23 the gun repeats and marks each one in the same way.

24 Q And when firing this weapon and after examining those
25 test fired rounds, those three test fired rounds that you

1 did, were you able to determine whether or not this gun
2 left a telltale marking on the breach face of the shell
3 casings fired by it?

4 A Yes, ma'am, I was.

5 Q And, if you could, just describe to the jury that
6 type of pattern. You have heard fingerprints have rings,
7 and whirls, and those types things. Breach face markings,
8 what do we, typically, see -- or what are we seeing in
9 this particular gun?

10 A In State's Exhibit No. 18, the breach face pattern is
11 what we call parallel markings. In other words, they go
12 across the primer. And they're roughly lines that run
13 parallel to each other across the face of the breach.
14 These marks are left, actually, in State's Exhibit No.
15 18 -- or were left in State's Exhibit No. 18 by a process
16 at the manufacturer.

17 It was not intentional by the manufacturer to leave
18 these markings. It was not something they controlled or
19 did on purpose. They're totally random. And they will be
20 different from one shotgun to the next. You could have
21 the gun that was fired -- or made right behind State's
22 Exhibit No. 18 and the one that was made right before it
23 and the chances are very great that the breach face
24 markings in each of those shotguns would be unique enough
25 to where a trained examiner could differentiate between

1 the three guns even made that close together.

2 Q And did you see those same type of breach face
3 markings in all three of your test fired shell casings?

4 A Yes, ma'am, I did, and others, too.

5 Q And just going back to that box of shotgun shells
6 that you used, you stated that there was various types of
7 shotgun shells within that box; correct?

8 A Yes, ma'am.

9 Q And, if you could, just briefly explain to the
10 jury -- you talked about the 20 -- the example one that we
11 saw, that birdshot type one.

12 A Yes, ma'am.

13 Q What other types of shell casings were in that box?

14 A There were five two and three-quarter inch Magnum .00
15 size buckshot shells also included in the box from State's
16 Exhibit No. 17.

17 Q Before you go any further, let me stop you right
18 there. What is Magnum .00 buckshot? What does that mean?

19 A Buckshot is a much larger lead pellet. And in the
20 shells that I'm telling you about, the five two and
21 three-quarter inch Magnum buckshot pellets, there are 12
22 pellets. In the #6's, there are a couple hundred. So
23 these pellets are much larger.

24 As the name implies, they're used to hunt deer or to
25 shoot bucks. They're big pellets. And in the Magnum

1 designation, there are 12 pellets within that shell. In a
2 non-magnum shell, to differentiate, there are nine
3 pellets. So this has an extra three pellets over and
4 above the standard nine-pellet load.

5 Q All right. And you stated that there was kind of one
6 random shell, one red-headed stepchild of the box. What
7 was it?

8 A One random federal #6 birdshot, which was not a high
9 brass load, but a low brass load. All the other shells in
10 the box were green. This one was red. It was just
11 different. I had no other evidence that was federal brand
12 or anything to examine.

13 MR. ALLEN: Your Honor, could we approach?

14 THE COURT: Counsel, approach.

15 (WHEREUPON, a bench conference was held.)

16 THE COURT: Proceed.

17 BY MS. HERVEY:

18 Q I'll show you State's Exhibit Nos. 12 and 11, and ask
19 you whether or not these items similarly were examined by
20 you in this particular case?

21 A Yes, ma'am. State's Exhibit No. 11 bears my case
22 number, specimen number, initials, and date of sealing.
23 And I examined -- in fact, it's still sealed, I believe.
24 At least, I sealed these items. And State's Exhibit No.
25 12 also bears my writing, sealing date, case number,

1 specimen number, and initials on the side of the box here.

2 Q And do State's Exhibit Nos. 11 and 12 relate to
3 SLED's #13, #14, #15, and #16?

4 A Yes, ma'am. State's Exhibit No. 12 is marked Item
5 #14, #15, and #16. And State's Exhibit No. 11 is marked
6 Item #13. This is my designation for my examination
7 purposes.

8 Q And your Item #13 was labeled as shell casing and
9 wadding from the back bedroom floor; is that correct?
10 That's how that was submitted as being labeled?

11 A That's correct, yes, ma'am.

12 MS. HERVEY: Your Honor, at this time, we would move
13 State's Exhibit Nos. 13, 14, 15, and 16 into evidence to
14 allow Mr. Parnell to testify as to results of examination
15 of those items.

16 THE COURT: Any objection?

17 MR. ALLEN: No objection.

18 THE COURT: Ladies and gentlemen of the jury, State's
19 Exhibit Nos. 13, 14, 15, and 16 will be admitted into
20 evidence without objection.

21 MS. HERVEY: I apologize, Your Honor. State's
22 Exhibit Nos. 11 and 12, that would be his Item #13, #14,
23 #15, and #16. And I confused you. I apologize for that,
24 Your Honor.

25 THE COURT: Hold on, Counsel. Give me the exhibit

1 numbers again.

2 MS. HERVEY: State's Exhibit Nos. 11 and 12.

3 THE COURT: Come approach, Counsel.

4 (WHEREUPON, a bench conference was held.)

5 THE COURT: Any objection to State's Exhibit Nos. 11
6 and 12 from the Defendant?

7 MR. ALLEN: No, Your Honor.

8 THE COURT: Ladies and gentlemen of the jury, State's
9 Exhibit Nos. 11 and 12 will be admitted into evidence
10 without objection. State's Exhibit Nos. 11 and 12 in
11 evidence.

12 You may publish to the jury and proceed, Counsel.

13 (WHEREUPON, State's Exhibit Nos. 11 and 12 were
14 admitted into evidence.)

15 BY MS. HERVEY:

16 Q Let's start first with State's Exhibit No. 11, which,
17 I believe, is your SLED Item #13. What was in SLED item
18 #13 when you opened the sealed package? What did you find
19 contained there?

20 A I found one fired 12-gauge two and three-quarter inch
21 shell casing, an empty shell casing, and one green
22 Remington-style over-powder wad.

23 Q What's the difference between an over-powder wad and
24 an under-powder wad? Is there an under-powder wad? I may
25 be showing my gender here.

1 A No. There's no under-powder wad. But the
2 over-powder wad is consistent with a buckshot style shell
3 loading. The power piston that we saw on the big screen,
4 the one piece clear plastic, is more typical of the
5 numerous small pellets. And buckshot is typically loaded
6 with a green over-powder wad, which sits on top of the
7 powder to seal it off so when it's fired that gas does not
8 escape around it. It, actually, seals the barrel and
9 keeps all that pressure behind the shot so that they
10 achieve their maximum velocity.

11 In addition to the over-powder wad, there are
12 typically cardboard wads that sit between the over-powder
13 and the buckshot pellets themselves. It's just a
14 difference in the style of loading, different purposes for
15 different shells.

16 Q The wad that you got, the green over-powder wad, can
17 you offer an opinion as to whether or not that came from
18 or is consistent with the spent shell, which also is part
19 of Item #13?

20 A It, certainly, could have came out of the shell that
21 was received in the same package. It's a Remington-style
22 wad and it's a Remington fired shell casing. But there's
23 no way to microscopically say that this wad came out of
24 this shell and no other shell. I can't say that.

25 Q But it's consistent with it, both in type and how

1 they manufacture that, that type wadding is found in that
2 type shell casing?

3 A Absolutely.

4 Q All right. Let's move you on to -- did you examine
5 the breach space of Item #13?

6 A Yes, ma'am, I did.

7 Q And did you compare it to those test fired rounds
8 that you have?

9 A I did.

10 Q And were you able to offer an opinion as to whether
11 or not Item #13 was shot out of that J.C. Higgins model
12 shotgun?

13 A Yes, ma'am, I was.

14 Q And what was your opinion as to that?

15 A Based on microscopic comparisons that I conducted on
16 the fired shell casing from State's Exhibit No. 11 and the
17 test that I fired out of State's Exhibit No. 18, this
18 shotgun -- it is my opinion that the fired shell casing
19 from State's Exhibit No. 11, my Item #13, was fired in
20 this shotgun, State's Exhibit No. 18, and in no other gun.

21 Q So that shell casing labeled to you as being found
22 from the bedroom floor was fired out of that gun?

23 A In my opinion, yes, ma'am.

24 Q You cannot offer an opinion as to when it was fired,
25 but you just know at some point it came out of there?

1 A That's correct.

2 Q And moving to State's Exhibit Nos. 14, 15 [sic], and
3 16 [sic], which was submitted and labeled as being Zion
4 Road at Highway 28, were they different in any substantial
5 way from Item #13?

6 A They were different in that they were designated as
7 having been loaded with buckshot pellets. And the writing
8 that we saw on the shell that we looked at earlier, the
9 three and three-quarter, one and a quarter #6's that the
10 manufacturer puts on to let you know what kind of shot and
11 everything is in the shell that you're buying, on the
12 shells that came from State's Exhibit No. 12, my items
13 #14, #15, and #16, they were designated as being buckshot
14 and double zero size, which indicates they weigh
15 approximately 53 to 54 grains each. And that's just a
16 size designation, the double 0 part of it.

17 Q So Item #13, was that buckshot as well?

18 A No, ma'am. Item #13 was designated by the
19 manufacturer as having been loaded with #6 birdshot.

20 Q So the three from the road, though, they were
21 buckshot?

22 A That's what was written on them, yes, ma'am.

23 Q And were those type of ammunition -- those type of
24 shell casings, were they found in the box of shell casings
25 that was submitted to you that you used as part of your

1 test firing?

2 A The one from Item #11 [sic], my Item #13, the #6 was
3 the exact same loading and same appearance and same
4 writing and everything as 20 of the shells from State's
5 Exhibit No. 17, the box here. In fact, I fired three of
6 those same ones for test. The ones from State's Exhibit
7 No. 12 from Zion Road, I marked as having been recovered
8 from Zion Road, were .00 buckshot, not Magnum .00
9 buckshot, but just plain .00 buckshot, which indicates by
10 the manufacturer, it's own designation, it was a
11 nine-pellet load instead of a 12-pellet load like the
12 Magnum was that was in State's Exhibit No. 17.

13 Q So you didn't find any of those just general .00 buck
14 nine-pellet loads in that box of mixed ammunition you used
15 as a comparison?

16 A That's correct, I did not.

17 Q All right. Well, tell us, did you -- nonetheless,
18 were you able to compare that -- them even though that's a
19 different ammunition -- we're not talking about
20 birdshot -- does the fact that we talk about a different
21 type of shell casing, bird versus buck or Magnum, is the
22 markings on the breach face, the primer, of all these
23 three types of ammunition, is that the same?

24 A Yes, ma'am. The shell casing itself, if it had no
25 writing on it, I couldn't tell the difference between the

1 two. The only difference in the appearance of the fired
2 shell casing from State's Exhibit No. 11, my Item #13, and
3 the other three from Zion Road was the writing on them.
4 They're -- all four of them are high brass, two and
5 three-quarter Remington fired shot shells. That means
6 that the approximate powder loading is going to be roughly
7 the same. The recoil is going to be about the same and
8 the breach face markings are going to be about the same.

9 So for intent purposes, the markings are going to be
10 the same. The only difference is that the ones from Item
11 #12 -- or State's Exhibit No. 12, rather, are marked as
12 being buckshot and the one from Item -- State's Exhibit
13 No. 11 is marked as being a birdshot pellet uploaded.

14 Q Were you able to render an opinion, as to a
15 reasonable degree of scientific certainty, whether your
16 Items #14, #15, and #16 contained within State's Exhibit
17 No. 12 was similarly fired from that J.C. Higgins model
18 shotgun?

19 A Yes, ma'am. Based on my microscopic comparisons and
20 the tests that I conducted on State's Exhibit No. 18, this
21 shotgun right here, it would be my opinion that the three
22 fired 12-gauge shell casings marked as having been
23 recovered on Zion Road and contained in State's Exhibit
24 No. 12 were all fired from State's Exhibit No. 18, this
25 shotgun, and by no other gun.

1 Q Let me see all that. You can leave that there.

2 Let me show what's been marked as State's Exhibit No.
3 25, and ask you if you can similarly identify these items,
4 which have been previously testified as items removed from
5 the two victims at the autopsy?

6 A Yes, ma'am. The envelope contained in State's
7 Exhibit No. 25 also has my writing, my case number, my
8 specimen number, and my initials as sealing it on the
9 outside of it.

10 Q And are you generally -- just generally, can you
11 tell -- can you match shot, bird, buck, whatever to a
12 particular gun? And if so, why or why not?

13 A Generally, no.

14 Q Why is that?

15 A The reason being is that when you have a single
16 projectile such as a bullet going down a rifle barrel, it
17 only has one projectile going down one rifle barrel. And
18 it fills up the barrel and it acquires all the
19 characteristics of the inside of the barrel. When you've
20 got multiple pellets, they're rolling down the barrel
21 under high pressure and moving around. They're not
22 staying straight together. I mean, they're moving around
23 and bumping into each other and there's nothing on the
24 inside of a smooth bore shotgun barrel to leave any
25 striking markings on a pellet. So to answer your

1 question, no.

2 Q So the buckshot and birdshot that was retrieved from
3 the two victims, you're not able to say to a reasonable
4 degree of scientific certainty whether they came out or
5 were shot out of that gun?

6 A That's correct.

7 Q However, were you able to examine them just in terms
8 of their physical characteristics and determine whether or
9 not they're consistent with the type of ammunition found
10 at Zion Road and found in the back bedroom floor?

11 A Yes, ma'am. The buckshot pellets are consistent with
12 shells such as the ones in State's Exhibit No. 12, the
13 ones from Zion Road. Buckshot pellets are buckshot
14 pellets. And they could have, certainly, been fired from
15 those shells or other shells like them. The #6 pellets
16 that were submitted could have been fired out of the shell
17 contained in State's Exhibit No. 11, my Item #13, or from
18 another similar shell. There's no way to determine if the
19 actual pellets themselves were fired from a particular
20 gun.

21 THE COURT: Just a moment, Counsel.

22 Ladies and gentlemen, I'm going to let you go to your
23 jury room briefly. I received a note from one of my
24 jurors that you need to take a break.

25 Madam Foreperson, while in the jury room -- I

1 anticipate that we would like to go ahead and finish this
2 witness today. So make sure the jury -- that there's no
3 problem with that if we stayed a little longer just to
4 complete this, which would shorten the time tomorrow. And
5 let me know when you come back.

6 We'll take five minutes.

7 Please do not discuss the case.

8 You may retire to your jury room.

9 (WHEREUPON, the jury was excused from open court at
10 approximately 5:27 p.m.)

11 THE COURT: Counsel, approach.

12 (WHEREUPON, a bench conference was held.)

13 THE COURT: Any objection to making the juror's note
14 a Court's exhibit from the State?

15 MS. HERVEY: No, Your Honor.

16 THE COURT: From the Defendant?

17 MR. ALLEN: No, sir, not at all.

18 THE COURT: It will be Court's Exhibit No. 3.

19 We'll take five minutes.

20 Ira, you're in the middle of your testimony, please,
21 don't discuss it. Feel free to walk around the courtroom
22 and use the restroom.

23 (WHEREUPON, a break was taken.)

24 (WHEREUPON, Court's Exhibit No. 3 was marked for
25 identification and admitted into evidence.)

1 THE COURT: Bring the jury in, please.

2 (WHEREUPON, the jury came into open court at
3 approximately 5:37 p.m.)

4 THE COURT: Would Counsel approach?

5 (WHEREUPON, a bench conference was held.)

6 BY MS. HERVEY:

7 Q I know we moved on to a new exhibit. Let's go back
8 and just clarify the record.

9 Those three shotgun shells, which are your #14, #15,
10 and #16, State's Exhibit No. 12 --

11 A Yes, ma'am.

12 Q -- can you state to a reasonable degree of scientific
13 certainty if those shotgun shells from Zion Road were
14 fired from that gun?

15 A Yes, ma'am. In my opinion, those three fired shell
16 casings contained in State's Exhibit No. 12, my Item #14,
17 #15, and #16, were all fired from this shotgun, State's
18 Exhibit 18.

19 Q And moving to State's Exhibit No. 25, were those
20 component parts taken from the bodies at the autopsy?

21 A Yes, ma'am.

22 Q You were explaining to the jury that those pellets,
23 those type things, you can't make a similar type -- known
24 that they were fired from that gun conclusion about the
25 shot itself?

1 A That's correct.

2 Q However, are you able to offer an opinion -- and
3 let's start with your Item #29 contained within that
4 greater State's Exhibit No. 25 that you had labeled as two
5 pieces of plastic shot shell wadding from Barry Frady's
6 neck. Is that wadding consistent with the ammunition you
7 examined from that box of shells and the spent shell
8 casings that you examined and were collected?

9 A Yes, ma'am. The two sections of opaque or clear
10 plastic wadding material is consistent with power piston
11 style wad components manufactured by Remington.

12 Q And that shotgun shell that you broke down, did you
13 retrieve a similar type opaque wadding from it?

14 A Yes, ma'am, I did.

15 Q And, if you could, just show that to the jury. Is
16 that similar to the wadding pulled from Barry's neck?

17 A The only difference between the one from Mr. Frady's
18 body was that it was in two pieces. This one is still in
19 one piece. In other words, the other one was split right
20 between the open section at the bottom and this shot cut
21 portion at the top.

22 Q And would that type of damage to that wadding occur
23 if that wadding is encountering any foreign object once it
24 leaves the barrel of the gun?

25 A Yes, ma'am. It's very likely and most consistent

1 with it having hit something after being fired. It
2 doesn't normally occur just by firing.

3 Q SLED #30, which is contained within State's Exhibit
4 No. 25, is two pieces of shot wad material, one cardboard
5 and one plastic from the chest cavity of Barry Frady. So
6 now we have not only that opaque plastic wadding that you
7 were talking about, but we're also now talking about a
8 different type of wadding?

9 A That's correct. The opaque broken in half piece of
10 wadding that we talked about just a moment ago all from
11 State's Exhibit No. 25 is more consistent with a birdshot
12 load. The cardboard and plastic wadding material in my
13 Item #30, which is also contained in State's Exhibit No.
14 25, is more consistent with the wad styles that are loaded
15 into the buckshot shells.

16 Q And, if you could, just explain to the jury why they
17 use different wadding with birdshot versus buckshot.

18 A The one piece shot column here, typically, utilized
19 in birdshot is used to hold all of those small pellets
20 together. They don't run around loose inside the shell.
21 They're kind of contained in the wadding itself. And
22 whenever it's fired, after a short distance, this wadding
23 will, actually, peel away from the shot charged, leaving
24 only the lead pellets going forward and the wad simply
25 falling to the ground.

1 In the buckshot shells, we've got the over-powder
2 wad, which is a one piece plastic wad, then the cardboard
3 wad, which kind of cushions those pellets. And, here
4 again, this is a manufacturing ploy that the people who
5 make shells research and figure out that if they use a
6 certain style of wads that it allows their pellets to stay
7 round longer and better and go farther and straighter than
8 anybody else. But it's, basically, to cushion -- the
9 cardboard wad cushions the buckshot pellets. And since
10 they're so much bigger, they require a little more
11 cushion.

12 In addition to the cardboard, there's very frequently
13 white granular buffering material which further keeps the
14 pellets from rubbing into each other or getting flat spots
15 which causes them to veer off course.

16 Q And is that what was found in Item #32 that was
17 submitted to you as white particles taken from Barry Frady
18 at his autopsy?

19 A Yes, ma'am. These -- the granules in my Item #32,
20 State's Exhibit No. 25, were consistent in appearance and
21 in all physical characteristics to this type of packing or
22 cushioning material.

23 Q That you would find with buckshot?

24 A Yes, ma'am.

25 Q All right. And that is consistent also with how you

1 know Remington to package their buckshot?

2 A Yes. Remington and other people do, too. But
3 Remington, particularly, does.

4 Q And the presence of these white particles in the
5 body, what does that indicate to you as to the range of
6 the weapon when it was fired in proximity to the body?

7 A Based on the lightness, the physical light weight of
8 these white particles, normally, they don't follow the
9 shot charge but just a very short distance. So it would
10 indicate a closer range than farther.

11 Q Moving you to Item #34 labeled as three lead buckshot
12 pellets from Barry Frady's left back. Again, although you
13 can't make a comparison that the buckshot was fired out of
14 that gun, are you able to offer an opinion, again, as to
15 whether this is consistent or inconsistent with the box of
16 shotgun shells retrieved from the Defendant's bedroom?

17 A The size of the pellets in my Item #34 from State's
18 Exhibit 25 are consistent with .00 size buckshot pellets
19 just like the other buckshot pellets in here, and five of
20 the shells from that box were marked .00 buck as were the
21 ones from State's Exhibit No. 12, my Item #14, #15, and
22 #16.

23 Q Moving you to your Item #35 contained within State's
24 Exhibit No. 25, which is listed as eight pieces of shot
25 shell wad material from James Frady's abdomen. This

1 wadding material, is this similar to what was found in
2 Barry as far as the cardboard and the plastic?

3 A Yes, ma'am. According to my notes, I'm indicating
4 one plastic over-powder and seven pieces of cardboard
5 wadding. These are not seven rounds of pretty pieces of
6 wadding. They're seven fragments of wadding, which could
7 have at one time been one or two pieces of wadding
8 initially. But there were seven fragments in one plastic
9 over-powder received in this package.

10 Q Over-powder what?

11 A Over-powder wad.

12 Q All right. And moving you to Item #36 and #37, two
13 lead buckshot pellets from James Frady back and other
14 areas. Again, is -- this buckshot in Item #36 and #37,
15 which is contained within State's Exhibit No. 25, is that
16 consistent, again, with the type of ammunition you found
17 in that box or just generally there?

18 A Yes, ma'am. It was a .00 size buckshot pellets.

19 Q And you only found the premier -- or the Magnum load.
20 But a regular buckshot casing would have been similar in
21 size and characteristics as to that?

22 A Yes. I couldn't differentiate between the physical
23 characteristics of a .00 size pellet that came from a
24 standard load or from a Magnum load. They're all
25 physically the same individual pellet-wise.

1 Q So it's consistent with those fired shell casings
2 from the bedroom -- or from Zion Road? The buckshot shell
3 casings were found at -- were labeled Zion Church Road; is
4 that correct?

5 A That's correct.

6 Q So the buckshot found in James Frady is consistent
7 with those shell casings?

8 A In size, yes, ma'am.

9 Q You found no reason to believe that they weren't
10 fired out of there. However, you can't state to a
11 reasonable degree of scientific certainty that they
12 were?

13 A I can't make any determination as to what they were
14 fired from. They were just simply .00 buckshot pellets
15 consistent in size with what the shells from Zion Road
16 were marked in State's Exhibit No. 12.

17 Q And you stated as to that white filament being found
18 in Barry Frady that that indicated to you, as well as with
19 the wadding, that those were both close-range shots; is
20 that correct?

21 A Closer than farther. And I hedge that by saying that
22 the -- in the absence of a crosswind or any distance at
23 all, that little white powder material weighs absolutely
24 nothing. I mean, it's very, very light weight. And any
25 ambient wind or any atmospheric influence is going to make

1 that little buffering material blow completely out of the
2 pellets real quick. So, normally, that's not seen
3 unless it's a close-range wound -- or close-range shot,
4 rather.

5 Q If it was in a house, you, again, would not expect
6 those atmospheric disturbances?

7 A Correct.

8 Q And I may be oversimplifying it. But the buckshot,
9 the birdshot, and the wadding found in State's Exhibit No.
10 25 -- and you had that broken down to individual SLED
11 numbers -- those are consistent with the spent shell
12 casings found at Zion Church Road and the one found in the
13 bedroom? You can't say they came from there, but they are
14 consistent?

15 A That's correct.

16 Q That is very popular ammunition. But you found no
17 reason to believe they didn't come from those spent shell
18 casings?

19 A That's correct, too.

20 Q However, you can say that the three spent casings
21 found on Zion Road and the one on the bedroom floor --

22 MR. ALLEN: Objection. That's been asked and
23 answered several times.

24 THE COURT: Overruled.

25 I'll let her summarize.

1 MS. HERVEY: Thank you, Your Honor.

2 BY MS. HERVEY:

3 Q Those three spent shell casings at Zion Road and the
4 one found in the bedroom, you can state to a reasonable
5 degree of scientific certainty that those were fired out
6 of that gun?

7 A That's correct.

8 Q And that, again, is based on that microscopic
9 examination of that primer head?

10 A Based on my experience and training and the
11 microscopic comparison of the tests from State's Exhibit
12 No. 18 and the fire shell casings from the scene, I was
13 able to conclude that they were all fired from this gun
14 and no other gun.

15 MS. HERVEY: Thank you.

16 Thank you, Your Honor.

17 Nothing else.

18 MR. ALLEN: May it please the Court?

19 THE COURT: Cross-examination?

20 MR. ALLEN: Mr. Parnell, bear with me.

21 I'm going to do a little bit of review, Your Honor,
22 not to be unduly repetitive, but just to --

23 THE COURT: Proceed.

24 MR. ALLEN: -- clarify that we're all on the same
25 page, so to speak.

CROSS-EXAMINATION

BY MR. ALLEN:

Q Mr. Parnell, this is a 12-gauge Model 20 J.C. Higgins two and three-quarter inch shotgun; is that right?

A Correct, yes, sir.

Q That's a very common gun, 12-gauge shotgun; right?

A Yes, sir, it is.

Q Very common?

A Lots of them made.

Q Lots of them possessed in these parts, to your knowledge?

A Very likely.

Q And that was most probably made before 1968 because it has no serial number?

A Very likely.

Q In 1968, the Congress required -- or after 1968, the Congress required that serial numbers be put on shotguns; is that right?

A Yes, sir.

Q And who was J.C. Higgins?

A I have no clue who J.C. Higgins was.

Q Wasn't J.C. Higgins a gun sold by Sears and Roebuck; right?

A That's correct.

Q Wasn't J.C. Higgins a fellow that worked for Sears

1 and Roebuck a long time and they named that gun after him?

2 MS. HERVEY: Your Honor, I'm going to object. He
3 just said he didn't know. Counsel is trying to testify --

4 MR. ALLEN: Your Honor, I --

5 THE COURT: Just a moment, Counsel. We don't need
6 any argument on that.

7 Objection sustained.

8 Let's move along.

9 MS. HERVEY: Your Honor --

10 THE COURT: I've ruled.

11 Sit down, Counsel.

12 Move along.

13 MR. ALLEN: Yes, sir.

14 BY MR. ALLEN:

15 Q And Remington shells -- 12-gauge Remington shells are
16 very common, too; right?

17 A Yes, sir.

18 Q In fact, Remington is -- is Remington the lead
19 manufacturer of shotgun shells?

20 A I don't know whether they're still in the lead or
21 not, but they're at the top of the manufacturer's scale.

22 Q So, again, that's a very common shotgun shell itself?

23 A Yes, sir.

24 Q And I'm going to ask you to refer to your March 14th,
25 2005, report, please, sir.

1 A Okay.

2 Q And let's go to Page 2. And the second paragraph --
3 excuse me, after "Results of Examination," do you see that
4 about halfway down?

5 A I do.

6 Q And the second paragraph there -- did you generate
7 this report? Let me ask you that.

8 A I did.

9 Q Okay. Would you read the second paragraph there
10 below your results of the examination?

11 A It says, The fired plastic wad -- excuse me -- In
12 Item #13, the two pieces of wadding in Item #29, plastic
13 wad in Item #30, and the plastic wad in #35 were all most
14 consistent with 12-gauge Remington Petersband wad
15 components. None of these wad components were suitable
16 for identification with a particular shotgun barrel.

17 Q Okay. So that couldn't be identified with this
18 particular shotgun?

19 A That's correct.

20 Q Okay. Would you read the next paragraph, please,
21 sir?

22 A Cardboard wadding materials received in Item #30 and
23 #35 were fragmented and a gauge or particular manufacturer
24 could not be determined. They could not be identified
25 with a particular shotgun barrel.

1 Q And, thus, could not be identified with this shotgun?

2 A Correct.

3 Q Or by this shotgun -- I mean, the shotgun that's been
4 identified and put in evidence?

5 A State's Exhibit No. 18.

6 Q Yes, sir.

7 Thank you.

8 Next paragraph, please, sir.

9 A Seven birdshot pellets in Item #31 were most
10 consistent with #6 lead birdshot pellets. There were no
11 markings on these pellets to associate them with a
12 particular shotgun barrel.

13 Q So they couldn't be associated with State's Exhibit
14 No. 18?

15 A Correct.

16 Q Okay. Next paragraph, please, sir.

17 A The buckshot pellets in Item #33, #34, #36, and #37
18 were all most consistent with .00 buckshot pellets and
19 exhibited no markings to associate them with a particular
20 shotgun barrel.

21 Q And, thus, could not be identified to State's Exhibit
22 No. 18?

23 A Correct.

24 Q Is that correct?

25 A Yes, sir.

1 Q Next paragraph, please, sir.

2 A The white particles in Item #32 were physically
3 consistent with granulated plastic shot buffer found
4 loaded in some shotgun shells. These particles could not
5 be associated with a particular shell or shotgun.

6 Q Thus, they could not be associated or identified to
7 State's Exhibit No. 18?

8 A Correct.

9 Q All right. If you would, please, sir, go to your
10 second page.

11 A I'm on the second page.

12 Q Excuse me, third page. I beg your pardon. Page 3.

13 A Got you.

14 Q And read your second paragraph there, please, sir.

15 A #6 birdshot pellets from Item #31 and the wad
16 components from Item #29 could have been fired from Item
17 #13, from a similarly loaded shell or from different
18 shells of similar manufacturing construction.

19 Q So it could not be particularly identified with
20 State's Exhibit No. 18?

21 A That's correct, the pellets themselves.

22 Q And let me ask you a little bit about birdshot and
23 buckshot.

24 MS. HERVEY: Your Honor, could we approach at this
25 time?

1 THE COURT: Yes, ma'am.

2 (WHEREUPON, a bench conference was held.)

3 THE COURT: Let's proceed.

4 MR. ALLEN: May it please the Court?

5 BY MR. ALLEN:

6 Q I think I was asking you, Mr. Parnell, about birdshot
7 and -- I hadn't asked you about buckshot. But birdshot,
8 these shells were number -- as I understand, were #6
9 birdshot?

10 A Yes, most consistent with #6 birdshot.

11 Q And Remington makes various sizes of birdshot; is
12 that correct?

13 A That is correct, yes, sir.

14 Q But out of the various birdshots that they make, #6
15 birdshot is the most common birdshot you would see -- or
16 let me rephrase. It's a common birdshot?

17 A It's a common birdshot, yes, sir.

18 Q And in regard to the buckshot, the buckshot was .00
19 buckshot?

20 A Yes, sir.

21 Q And that's very common buckshot?

22 A It is.

23 Q And suffice it to say, I was asking you about your
24 report earlier and I think you've been asked and answered
25 this, but I'm going to ask you again just for

1 clarification. Isn't it true that no projectile that was
2 recovered from the scene -- I'm talking about
3 projectile -- that was recovered from the scene that
4 caused the death of the two victims, none of those
5 projectiles could be identified with State's Exhibit No.
6 18?

7 A Correct.

8 Q Because shotguns are unlike, say, a rifle, for
9 example, that when that rifle fires a bullet, if the
10 bullet can be located and found and analyzed, it can be
11 identified directly to that particular rifle?

12 A If it's in good enough condition, that's a true
13 statement.

14 Q But you cannot do that with shotguns?

15 A That's correct.

16 Q And, in fact, a handgun, the same is true as with a
17 rifle, that if you can recover the bullet in relatively
18 good condition, you can identify the bullet to the
19 particular handgun?

20 A That is correct, yes, sir.

21 Q And, again, that cannot be done with a shotgun?

22 A That's correct.

23 Q And along the lines of a shotgun shell, there can be
24 no determination, as far as your opinion or an expert's
25 opinion -- but your opinion, as to how long a shotgun

1 shell had been in the place it was retrieved from?

2 A The only thing I can comment on would be if it had
3 been weathered, or tarnished, or rusted, or, obviously,
4 exposed to weather. Without those determining factors,
5 then it's very difficult to determine how long an item has
6 been exposed to the weather.

7 Q So, in other words, again, that question, you can't
8 ascertain how long a shell casing has been in a particular
9 location?

10 A In the absence of other circumstances, no, sir.

11 Q And in terms of a shotgun shell -- okay. A shotgun
12 shell is expended from the chamber on a pump model like
13 this?

14 A Yes, sir.

15 Q And I think you said earlier that the firing process
16 is the firing pin goes forward into the primer?

17 A Correct.

18 Q And when it hits the primer, that starts the process
19 and it eventually fires?

20 A Yes, sir.

21 Q It ignites the compounds within the shell itself?

22 A And pushes the shot and pellets out, yes, sir.

23 Q And there are no -- to your knowledge, there are no
24 universal standards as to how many identifying
25 characteristics there has to be to make a positive

1 identification of a shotgun shell, is there?

2 A Not to my knowledge.

3 Q There's no source or authority that says you've got
4 to find this, this, and this to form an opinion as to
5 whether shotgun casings match one another?

6 A That's correct. It's based on the experience and
7 training of the examiner and the consistency of the gun
8 being examined.

9 Q It's strictly an opinion, number one?

10 A Based on tests, yes, sir.

11 Q And it's strictly the opinion of the examiner?

12 A In our laboratory, we have 100 percent peer review,
13 so it's, actually, two examiners. But, yes, based on the
14 examiner's opinion.

15 Q And characteristics -- identifying characteristics of
16 a shotgun shell, there's firing pin indentions or
17 impressions?

18 A Yes, sir.

19 Q There's extractor marks?

20 A Yes, sir.

21 Q There's ejector marks?

22 A Correct.

23 Q There's chamber marks?

24 A Right.

25 Q And there's one other one?

1 A Breach face.

2 Q Breach face. And isn't it true that every time a
3 shotgun such as this discharges a shell, there's
4 differences in every shell?

5 A There could be some slight differences, but the
6 overall appearance is not going to change that much.

7 Q Well, but, in fact, there's always differences?

8 A You're not going to find them to be identical on
9 anything.

10 Q So there's always differences?

11 A Exactly. However, based on my experience and
12 training, the amount of similarity is what the conclusion
13 is based on.

14 Q Did you take photographs of what -- of the
15 comparisons you did?

16 A I did.

17 Q Do you have that in your file?

18 A I do.

19 Q Could you tell me how many photographs you have?

20 A Totally or photo micrographs?

21 Q I'm sorry?

22 A I have some documentation photos which are just of
23 the evidence specimens that we've been looking at.

24 Q Of the actual comparisons. Do you have six, maybe?

25 A At least, six. A lot of them are of the same

1 comparison with just a little different lighting or
2 whatever. I have eight here.

3 Q You have eight of the comparisons?

4 A I have eight individual photos here.

5 Q And back to the characteristics now. There's --
6 again, there's no set rule out there that you have to find
7 this, this, and this on a breached face, this on a firing
8 pin indention or impression, this from a chamber mark,
9 this on the extractor marks, ejector marks, there's no
10 rule out there that says to find this, this, and this to
11 form that opinion, is there?

12 A No, sir.

13 Q So that varies -- to your understanding, that can
14 vary from examiner to examiner?

15 A There could be some variance in the examiner's
16 opinions. However, I wouldn't expect there to be a
17 difference between a positive and a negative. There may
18 be some differences in two examiners. One might like
19 these marks better than the others. And then there may be
20 some slight difference of opinion. But, normally, you're
21 not going to have two examiners that totally disagree with
22 each other.

23 Q But there's differences of opinion?

24 A To a degree.

25 Q From examiner to examiner?

1 A To a degree.

2 Q And probably from jurisdiction to jurisdiction?

3 A I would hope not.

4 Q And you did no analysis of the firing pin impression;
5 is that correct?

6 A I looked at the firing pin.

7 Q But you did no microscopic comparison; is that
8 correct?

9 A Sure, I did.

10 Q But you didn't reach conclusions on that -- or did
11 you?

12 A It was smooth to the point to where I saw nothing
13 unique in it. And I went on to the next area, which was
14 breach face.

15 Q So you formed no opinion based on the firing pin
16 impression?

17 A It was consistent in that there were no marks there.

18 Q There were no extraction marks?

19 A To be honest with you, when I matched the breach face
20 marks, I went no farther.

21 Q So that is an identifying characteristic, extractor
22 mark?

23 A It could be, yes, sir.

24 Q I mean, that's recognized?

25 A Uh-huh. It's one of the five areas.

1 Q That was not done in this case?

2 A I didn't need to, but, no.

3 Q Well, that's a matter of opinion; correct? And then
4 ejector marks --

5 MS. HERVEY: Your Honor --

6 THE COURT: Yes, ma'am.

7 MS. HERVEY: He just asked an opinion. "That's a
8 matter of opinion; correct?"

9 I would like for Mr. Parnell to answer the question
10 whether or not that's a matter of opinion or not, to
11 explain his answer.

12 THE COURT: You may answer the question.

13 THE WITNESS: Basically, I have a certain protocol
14 that I follow in making comparisons. In cartridge cases
15 such as the ones we're looking at here in State's Exhibit
16 Nos. 11 and 12, I go first to firing pin, then to breach
17 face. And if I don't find similarities in the firing pin,
18 then I go to the breach face. If I don't find
19 similarities in the breach face or the gun is not marking
20 consistently, then I will go to the extractor, the
21 ejector, or chamber. But there's no need to double
22 identify past the breach face here.

23 BY MR. ALLEN:

24 Q So it's correct to say, in this case and in this
25 analysis, two of the five identifying characteristics were

1 used; isn't that a correct statement?

2 A I looked at the firing pin and I looked at the breach
3 face. And they were the two areas that I did examine.

4 Q The question is --

5 A To use your words, yes.

6 Q Excuse me?

7 A To use your words, yes, I used two areas of
8 comparison.

9 Q Of the five?

10 A Of the potential five, yes.

11 MR. ALLEN: Could I approach the witness, Your Honor?

12 THE COURT: Yes, you may.

13 BY MR. ALLEN:

14 Q Could I see your photographs on the comparisons?
15 There were eight that you mentioned.

16 A As long as I can have them back.

17 Q I beg your pardon?

18 A As long as I can have them back.

19 MR. ALLEN: Can we approach?

20 THE COURT: Counsel, approach.

21 (WHEREUPON, a bench conference was held.)

22 THE COURT: All right. Counsel, let's move along.

23 MR. ALLEN: That's all the questions I have of this
24 witness, Your Honor.

25 THE COURT: Redirect?

1 MS. HERVEY: Just briefly, Your Honor.

2 REDIRECT EXAMINATION

3 BY MS. HERVEY:

4 Q Mr. Allen asked you to read several paragraphs from
5 your report focusing on buckshot, birdshot, and the
6 wadding retrieved from the bodies that you couldn't tie to
7 that gun; is that correct?

8 A That's correct.

9 Q Were you able to say whether or not it's consistent
10 or inconsistent with ammunition used in that weapon?

11 A It would be consistent in gauge and in size with the
12 evidence that was found and submitted. The items from
13 Item #17, I believe it is, the box here, are consistent in
14 brand and style with the wads and pellets and other
15 components that were found.

16 Q And could you read the first paragraph under the
17 "Results of Examination" that Mr. Allen skipped over?

18 A Item #20 was examined, test fired, and found to be in
19 working order. Test shot shells fired by Item #20, which
20 would be State's Exhibit No. 18, were microscopically
21 compared with Item #13, #14, #15, and #16. Matching
22 individual identifying characteristics were found and it
23 was concluded that the fired shot shells in my Item #13,
24 #14, #15, and #16 were fired by Item #20, State's Exhibit
25 18, this shotgun.

1 Q State's Exhibit Nos. 11 and 12 came out of that
2 shotgun?

3 A Correct.

4 Q You've been doing this for 30 some odd years; is that
5 correct?

6 A Yes, ma'am.

7 Q How many firearm examinations and tool mark
8 identifications have you done in your tenure --

9 MR. ALLEN: Objection. That's part of his
10 qualifications, Your Honor.

11 MS. HERVEY: He's called into question his
12 credibility, Your Honor.

13 THE COURT: Counsel, approach.

14 (WHEREUPON, a bench conference was held.)

15 BY MS. HERVEY:

16 Q How many of these type examinations have you done?

17 A Many thousands. I would be hard pressed to give you
18 an accurate approximation.

19 Q And Mr. Allen stated that just going into the -- you
20 first looked at the firing pin, and then you looked at the
21 breach face, and then you would have moved on. Is there a
22 reason why people go in that order in your field?

23 A It's normally the quickest and the ones that are most
24 impacted by the firing of the gun itself. You can have
25 extractor injector marks without the shell being fired in

1 the gun. It would simply be cycled through. The firing
2 of the shell itself is caused by the firing pin and the
3 resulting recoils that gives you breach face marks.

4 That's why I hesitate to go to those first.

5 Q Would it be fair to say that those, the firing pin
6 marks and the breach face marks, are the more reliable
7 marks used in that five span?

8 MR. ALLEN: Objection, leading.

9 THE COURT: Sustained.

10 Rephrase your question, Counsel.

11 BY MS. HERVEY:

12 Q Are they more reliable or less reliable than the
13 other three?

14 A All the marks are reliable. My results would have to
15 be could have fired in when we were talking about
16 extractor and injector unless the gun does not leave
17 marks, like on my test, unless it's fired. If that's
18 clear.

19 The firing pin and the breach face always occur
20 during firing and always are associated with firing. The
21 extractor, ejector, and sometimes chamber are more
22 associated with loaded into and fired from -- or ejected
23 from. Sometimes can mean firing, sometimes can just mean
24 loaded through.

25 Q So the firing pin and breach face are the only way to

1 talk about, actually, being fired from that gun --

2 MR. ALLEN: Objection, leading.

3 THE COURT: Sustained.

4 Rephrase your question, Counsel.

5 It's redirect examination. Let's move along.

6 BY MS. HERVEY:

7 Q The firing pin and the breach face marks, are they
8 the only ones which you can then state that shell was
9 fired from that gun?

10 A Unless the other marks only occur during firing. And
11 I won't know that until I test the gun. But, normally,
12 what -- your statement is true, the firing pin and the
13 breach face are the most reliable ways of determining
14 fired by status of a shell casing.

15 Q And that stopping at the firing pin and the breach
16 face that you testified to, is that done across the nation
17 in your field?

18 A Just about all examiners that I talk to in my travels
19 around do a similar type of exam. I mean, I don't know
20 that it's universal, but it's just commonly done.

21 Q And it meets your protocols that you use through
22 SLED?

23 A Yes, ma'am.

24 Q And you stated that someone else did it, another --
25 you had peer review, one other firearms examiner went over

1 your results to verify them?

2 A Yes, ma'am.

3 Q The shells you examined, #13, #14, #15, and #16, your
4 numbers, State's Exhibit No. 12, did they appear to be
5 weathered in any way?

6 A The only damage -- to answer your question, they
7 didn't appear to be weathered.

8 Q All right.

9 A My definition of weathering is tarnished and
10 dirty-looking, spotted worn. One of them had some dents
11 in it like it may have been stepped on or run over. But
12 as far as weathering, I wouldn't characterize their
13 condition as looking weathered.

14 MS. HERVEY: Nothing further from this witness.

15 THE COURT: Recross limited to redirect?

16 RECROSS-EXAMINATION

17 BY MR. ALLEN:

18 Q Well, of course, Item #13 in your report, you
19 wouldn't expect something to be weathered that was inside
20 the home, would you?

21 A No, sir, I would not.

22 Q Okay. So you couldn't conclude anything on Item #13
23 from the fact that it wasn't weathered because it was
24 inside as far as the age of the casing?

25 A True.

1 Q And all of this, no matter what standards are used,
2 whether you use breach face markings, extractor marks,
3 ejector marks, chamber marks, or firing pin impression,
4 all that varies from examiner to examiner; isn't that
5 correct?

6 A It can, yes, sir.

7 Q And all of it, no matter what it is, whether it's a
8 casing, the birdshot, the buckshot, the wadding, all of
9 that is an opinion, is it not?

10 A Yes.

11 Q And an opinion, your opinion, could be mistaken?

12 A I haven't been wrong yet. And it's an opinion based
13 on scientific experimentation that's been peer reviewed at
14 our laboratory.

15 MR. ALLEN: Thank you, sir.

16 That's all the questions I have of this witness, Your
17 Honor.

18 THE COURT: As to this witness?

19 MS. HERVEY: Nothing. He can be excused.

20 THE COURT: Any objection?

21 MR. ALLEN: No objection.

22 THE COURT: Mr. Parnell, you may step down and you
23 are excused.

24 If you would, put the exhibits back and give them to
25 the court reporter.

1 Counsel, approach.

2 (WHEREUPON, a bench conference was held.)

3 THE COURT: Madam Foreperson, and, ladies and
4 gentlemen of the jury, thank you for your patience tonight
5 in staying a little later. I feel, from conferring with
6 Counsel, that we can probably complete the trial possibly
7 tomorrow. So I'm going to give you a little extra time.
8 I know I've been getting you to come in a little early
9 because I wanted to make sure I utilized the time
10 effectively. I appreciate your patience and your
11 willingness to listen.

12 We'll start in the morning at 9:30 a.m. So I'm going
13 to let you have an extra 30 minutes. Please be here --
14 report to your jury room at 9:15 a.m.

15 As I've instructed you throughout this trial, I don't
16 know if there will be anything on television, radio, in
17 the newspaper, but, please, do not read such. Please do
18 not watch such. Please do not listen to such. Please do
19 not discuss this case amongst yourselves or with anyone
20 else.

21 And, as I've told you throughout the trial, if
22 somebody wants to talk -- I know people are naturally
23 curious and they may know that you're on the jury. Just
24 tell them, I'm on the jury and the Judge said I can't talk
25 about it. And, as I've told you throughout this trial, if

1 they persist because they're naturally curious, you let me
2 handle that problem for you. You just get their name.
3 I'll take care of it for you.

4 I hope all of you have a pleasant evening. And I'll
5 look forward to seeing you in your jury room by 9:15 in
6 the morning. You may leave at this time.

7 Thank you very much.

8 (WHEREUPON, the jury was excused from open court at
9 approximately 6:21 p.m.)

10 THE COURT: Anything on the record outside the
11 presence of the jury from the State of South Carolina
12 before we adjourn for the evening?

13 MS. HERVEY: Your Honor, it's come to our attention
14 that Item #25 is not in evidence. We can move it into --

15 THE COURT: Not Item #25, proposed State's Exhibit
16 No. 25. Y'all have interchanged those numbers this
17 afternoon to the point that I'm scared that the record is
18 a little bit confusing. And I know it's hard when you're
19 dealing with item numbers from SLED.

20 But you're referring to a proposed State's Exhibit;
21 right.

22 MS. HERVEY: Yes, Your Honor.

23 THE COURT: And does the Defense have any objection
24 as to moving it into evidence or do we need to recall the
25 witness?

1 It's my understanding that Mr. Allen doesn't need you
2 to recall the witness in order to formally introduce it.
3 But it hasn't been entered into evidence in my record and
4 I made both of you aware of that at the bench.

5 Do you have any objection?

6 MR. ALLEN: No, no objection. No, sir.

7 THE COURT: These were the things that were -- as I
8 understand, Counsel, State's Exhibit No. 25 includes the
9 pellets that were retrieved from the body of the two
10 decedents?

11 MS. HERVEY: The body and the wadding, yes, sir.

12 MR. ALLEN: No objection.

13 (WHEREUPON, State's Exhibit No. 25 was admitted into
14 evidence.)

15 THE COURT: If you will, tomorrow, so that it is in
16 the presence of the jury since State's Exhibit No. 25 has
17 not been entered into evidence, make yourself a note and
18 we'll formally do it in the presence of the jury in the
19 morning at 9:30.

20 Anything else on the record from the State?

21 MS. HERVEY: Just to clarify, we had this bench
22 conference about them putting an exhibit up there, which
23 at the bench conference, he said he was moving into
24 evidence, which never, actually, happened. Probably
25 because Your Honor pointed it out to him, but --

1 THE COURT: I'll point out that you called it to my
2 attention, which you should have. I recognize that an
3 employee in Counsel's office in an attempt to assist
4 Counsel went to the easel located on the wall on the other
5 side of the courtroom and in front of the jury placed an
6 8 X 10 type size Xerox copy photograph on the easel.

7 I could not tell what was on the photograph. But
8 then, I wear glasses. And I'm not going to base what the
9 jury could see on what the Judge could see, but I'm closer
10 than what the jury would be. You came to the bench to
11 remind me that had been done. Counsel said he was
12 considering the introduction of the exhibit. We had the
13 employee of his office turn the easel around so it
14 couldn't be viewed by the jury. And it was, ultimately,
15 not placed into evidence. And it is my opinion, for the
16 record, that the jury could not see that document from the
17 jury box sufficient to cause any prejudice to either party
18 in this case.

19 Do you disagree, Ms. Hervey?

20 MS. HERVEY: No, Your Honor.

21 I just wanted to make sure there would be no further
22 reference to that item.

23 THE COURT: It is not in evidence and there's not
24 going to be any reference to it in closing argument.

25 MR. ALLEN: Could I --

1 THE COURT: Anything else from the State on the
2 record before we adjourn for the evening?

3 MS. HERVEY: Nothing from the State.

4 THE COURT: I'm going to need your request to charge.

5 Yes, sir, Mr. Allen.

6 Anything on the record from the Defendant before we
7 adjourn for the evening outside the presence of the jury?

8 MR. ALLEN: Yes, sir. May it please the Court?

9 I apologize to the Court and to opposing Counsel.
10 And I take responsibility for that. I'm in charge of this
11 operation here. And it happened over here at my side of
12 the --

13 THE COURT: Well, I was -- and I'll also say, on the
14 record, in fairness to you, Mr. Allen, that you had your
15 back to your employee when that was done on the easel.
16 And I don't know that you, actually, knew what was going
17 on. But Ms. Hervey could see at Counsel table that it was
18 going on. And she rightfully brought it to the Court's
19 attention. And it's been corrected now. And I don't
20 believe there's any prejudice to either party from that.

21 We'll call that, at this point, if y'all will agree,
22 harmless error.

23 MS. HERVEY: And, Your Honor, I didn't ascribe any
24 impropriety on his part. I knew that it was that way. I
25 just wanted to correct it before it went any further.

1 THE COURT: I appreciate both of you treating each
2 other with such courtesy.

3 Anything else for the record from the Defendant?

4 MR. ALLEN: No, sir.

5 THE COURT: All right. I need you both to hand up
6 your request for charge. And I need you for two minutes.
7 This Court stands adjourned until 9:30 tomorrow morning.

8 (WHEREUPON, the proceedings were concluded at
9 approximately 6:25 p.m., to be reconvened on
10 Thursday, August 31, 2006.)
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1 THURSDAY, AUGUST 31, 2006

2

3 THE COURT: All right. Counsel, do you want to check

4 on -- my understanding from the court reporter and I want

5 to make sure, Mr. Allen, with you and Ms. Waldrep so you

6 can advise your client -- my understanding from the court

7 reporter, she advises me that State's Exhibit No. 19 is in

8 evidence. My notes had reflected that it was marked first

9 for identification. And the Solicitor agrees State's

10 Exhibit No. 19, it was put in according to the testimony,

11 I believe, according to the court reporter, of Dr. Woodard

12 Is that right?

13 THE COURT REPORTER: I didn't mark who the witness

14 was.

15 THE COURT: State's Exhibit No. 3, which was lighter

16 fluid, is not in evidence. And State's Exhibit --

17 State's Exhibit No. 30 what, Hollie?

18 THE COURT REPORTER: State's Exhibit No. 33.

19 THE COURT: State's Exhibit No. 33, which was a

20 diagram used early on in the trial to orient a location,

21 is also not in evidence.

22 So State's Exhibit Nos. 3 and 33 are not in evidence.

23 My understanding is you've conferred. And when I bring

24 the jury back this morning, it is my understanding from

25 yesterday that the State is going to offer State's Exhibit

1 No. 25 into evidence without objection.

2 Is that right, Mr. Allen?

3 MR. ALLEN: That's correct, Your Honor.

4 THE COURT: All right. My further understanding from
5 meeting with Counsel is the Defendant has advised me --
6 and I will advise the Defendant that, at this time, the
7 Defendant believes he may not be presenting any testimony
8 and the State, after putting in that exhibit, intends to
9 rest.

10 Is that correct, Ms. Hervey?

11 MS. HERVEY: Yes, Your Honor.

12 THE COURT: I've just been advised by the bailiff
13 that the juror that I advised you about that called the
14 Clerk this morning on the way to the hospital is not here.

15 So it is my intention to use the first alternate
16 juror --

17 MR. ALLEN: Could we get a name and number on him or
18 her, Your Honor?

19 THE COURT: Yes. I'll get it for you right now.

20 THE CLERK: The juror that called in sick is #24,
21 Joanna Collins. And alternate #1 will be Richard A. Cox,
22 #27.

23 MR. ALLEN: Thank you.

24 THE COURT: The first alternate juror is Mr. Cox.

25 The juror who has called in ill on the way to the hospital

1 is #24, Ms. Collins. Mr. Cox will be taking Ms. Collins'
2 place on the jury.

3 Anything further from the Staté before I bring the
4 jury in?

5 MS. HERVEY: Pardon me. I'm sorry. Mr. Reed was
6 talking to me.

7 THE COURT: I understand.

8 Anything further from the State before I bring in the
9 jury?

10 MS. HERVEY: No, Your Honor.

11 THE COURT: Anything further from the Defendant
12 before I bring in the jury?

13 MR. ALLEN: No, sir, Your Honor.

14 THE COURT: Bring the jury in.

15 (WHEREUPON, the jury came into open court at
16 approximately 10:03 a.m.)

17 THE COURT: Madam Foreperson, and, ladies and
18 gentlemen of the jury, I was advised this morning -- and I
19 know you're probably not aware of it, but one of my
20 jurors, Ms. Collins, has become ill. She's en route for
21 medical assistance and called the Clerk's Office, which is
22 exactly what I want you to do.

23 Therefore, Mr. Cox, you are my first alternate juror.
24 You will take her place on the jury. You are now on the
25 jury as the first alternate.

1 And thank you for being on time this morning.

2 Ladies and gentlemen, we'll now continue with the
3 testimony in the trial of this case.

4 You may call your next witness, Solicitor.

5 MS. HERVEY: Your Honor, at this time, the State
6 would move State's Exhibit No. 25 into evidence, I
7 believe, without objection from Defense Counsel.

8 MR. ALLEN: That's correct. There's no objection,
9 Your Honor.

10 THE COURT: Do you want to identify what it is, since
11 there's no objection, for the record?

12 MS. HERVEY: Your Honor, State's Exhibit No. 25 would
13 be the buckshot and other materials removed from the body
14 of James Frady in comparison to State's Exhibit No. 19,
15 which would be that from Barry. So State's Exhibit No. 25
16 is from James, State's Exhibit No. 19 would be from Barry.

17 THE COURT: Without objection; is that correct,
18 Mr. Allen?

19 MR. ALLEN: That's correct, Your Honor.

20 THE COURT: Ladies and gentlemen of the jury, State's
21 Exhibit No. 25 will be admitted into evidence without
22 objection. State's Exhibit No. 25 in evidence.

23 You will have all of the exhibits available to you
24 for your consideration in your jury room once
25 deliberations begin.

1 (WHEREUPON, State's Exhibit No. 25 was admitted into
2 evidence.)

3 THE COURT: Call your next witness, Solicitor.

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

6 THE COURT: All right. Ladies and gentlemen of the
7 jury, you've heard the evidence from the State of South
8 Carolina. There's some matters of law that I must take up
9 at this time. So I'm going to ask you if you would,
10 please, retire to the jury room. I will not be long. We
11 will come back and conclude the trial in just a few
12 moments.

13 You may retire to your jury room at this time.

14 (WHEREUPON, the jury was excused from open court at
15 approximately 10:05 a.m.)

16 THE COURT: All right. Mr. Allen, before I inquire
17 of your client, are there any matters of law at the close
18 of the State's case that you would like to take up with
19 the Court at this time?

20 MR. ALLEN: May it please the Court, Your Honor?

21 THE COURT: Yes, sir.

22 MOTIONS

23 MR. ALLEN: At this time, the Defense would move for
24 a directed verdict on all counts due to the fact that the
25 record is completely absent of any substantial

1 circumstantial evidence. This is entirely a
2 circumstantial evidence case. There is no substantial --
3 after cross-examination of all the witnesses, there is no
4 substantial circumstantial evidence in the record at this
5 time.

6 In particular, with regard to the grand larceny
7 indictment, there is no circumstantial evidence. There's
8 no fingerprints. In fact, the fingerprints on the van
9 belonged to an unknown third party. There's no trace
10 evidence of any type. There was no witness putting
11 Mr. Frady inside the van at any time.

12 And I would submit, in particular, with regard to the
13 indictment for grand jury [sic], there is no evidence --

14 THE COURT: Do you mean grand larceny?

15 MR. ALLEN: Grand larceny, excuse me.

16 With regard to the grand larceny indictment, there is
17 no evidence. The record is void of any evidence of grand
18 larceny. I would particularly focus on that indictment,
19 but the motion itself goes to all indictments.

20 THE COURT: Solicitor, I'll be happy to hear from
21 you.

22 As I recall, the indictment for grand larceny alleges
23 the grand larceny of a 1990 Astro Chevy van; isn't that
24 correct.

25 MS. HERVEY: Yes, Your Honor.

1 THE COURT: Belonging to Mike Harper?

2 MS. HERVEY: Yes, Your Honor.

3 THE COURT: All right.

4 MS. HERVEY: Your Honor, just briefly, in response to
5 the motion for directed verdict, I call the Court's
6 attention to State v. Burns, which states when ruling on a
7 motion for directed verdict, the Court is concerned with
8 the existence of evidence and not it's weight.

9 So you do not go into how substantial it might be or
10 those type things, but whether or not there is any
11 evidence in which a jury could reasonably infer the
12 Defendant's guilt. And granted, it is a circumstantial
13 evidence case. However, there's an overwhelming amount of
14 circumstantial evidence in this case. And while you may
15 view one piece by itself and may not give you that same
16 factor, when all these pieces are viewed in its totality,
17 that gives you the existence of the Defendant's guilt.

18 As to the grand larceny, there's the statement that
19 Mr. Harper had not been speaking to him in several months,
20 had not given him permission to take that van, that he
21 took it without his permission, and that he set it on fire
22 intending to deprive that owner permanently. Now, he
23 wasn't successful in that regard, but that doesn't matter.
24 Certainly, that fire near and the gasoline contained
25 within are evidence of that intent to permanently deprive

1 the owner of that property.

2 On the other counts of murder, there's the other
3 ballistic evidence and other circumstantial evidence,
4 which puts the Defendant near the crime having prior
5 expressions of malice and designs to kill the victims
6 prior to this event. The State feels based on that, the
7 Defendant's motion for a directed verdict should be
8 denied.

9 THE COURT: I would also point out to you, Solicitor,
10 and, Mr. Allen, that I believe the testimony, if believed
11 by the jury, from Mr. Harper was that the Defendant was
12 one of only three people that knew how to enter the van.
13 And there's an inference from that when he says that the
14 van was stolen, if that testimony is to be believed. And
15 I have to take it, for the purposes of standard of
16 directed verdict, in the light most favorable to the
17 non-moving party, that he was one of the people that could
18 enter the van.

19 And, therefore, there is an inference that the jury
20 could draw, albeit circumstantial -- I don't think the
21 lack of fingerprint evidence, which, certainly, is
22 arguable by you to the jury as an advocate for your
23 client, is sufficient for me to grant your motion for
24 directed verdict. Therefore, your motion for directed
25 verdict is respectfully denied.

1 MR. ALLEN: Yes, Your Honor.

2 THE COURT: Mr. Allen, would you and your client come
3 around?

4 And, Madam Clerk, would you, please, swear Mr. Frady?

5 THE CLERK: Mr. Frady, come up here, please.

6 Put your left hand on the Bible and raise your right.

7 WHEREUPON,

8 JAMES RANDOLPH FRADY,

9 after first having been duly sworn, testified as follows:

10 MR. ALLEN: Is this okay right here, Your Honor?

11 THE COURT: That's fine.

12 Would you state your full name for the record,
13 please, sir?

14 DEFENDANT FRADY: James Randy Frady.

15 THE COURT: Mr. Frady, at this time, I'm going to
16 explain to you certain rights. If you do not understand
17 anything that I say, please, let me know. I want to make
18 sure you understand what I'm telling you.

19 DEFENDANT FRADY: Yes, sir.

20 THE COURT: If you want me to explain anything in
21 further detail, please, let me know.

22 Do you understand?

23 DEFENDANT FRADY: Yes, sir.

24 THE COURT: Very good.

25 We've now reached the stage of the trial, Mr. Frady,

1 where you may present your defense. You have the right,
2 Mr. Frady, to testify on your own behalf. However, no one
3 can make you testify. In the event you have any criminal
4 record for any conviction involving dishonesty, or false
5 statement, or for a crime punishable by imprisonment for
6 more than one year, and this Court, as a matter of law,
7 determines that the probative value of admitting this
8 evidence outweighs its prejudicial effect to you, the
9 Solicitor would be able to introduce your prior criminal
10 record for impeachment purposes. That is as to your
11 credibility or believability, to attack your credibility
12 or believability, if admitted into evidence.

13 If you elect not to take the witness stand,
14 Mr. Frady, I will charge the jury that they are not to
15 give the fact that you did not testify in this case any
16 consideration whatsoever. And there is to be absolutely
17 no prejudice to you because you did not testify.

18 Now, this decision as to whether or not you testify
19 will be left entirely up to you. I can't emphasize that
20 enough. It is your decision whether or not you testify.
21 You may, certainly, confer with your attorneys, you may
22 talk with them. But the ultimate decision will be left
23 entirely up to you.

24 Do you understand that?

25 DEFENDANT FRADY: Yes, sir.

1 THE COURT: Very well.

2 Do you need a moment, Mr. Allen, or are you ready?

3 Mr. Frady, are you ready to go forward and give me an
4 answer or would you like to talk with your attorneys?

5 MR. ALLEN: May I speak, Your Honor?

6 We have talked about it repeatedly on several
7 different occasions, and I think we're ready to respond.

8 THE COURT: Is that correct, Mr. Frady?

9 DEFENDANT FRADY: Yes, sir, Your Honor.

10 THE COURT: And is what you're about to tell me your
11 decision and not anyone else's?

12 DEFENDANT FRADY: It's my decision.

13 THE COURT: And you feel like you've had sufficient
14 time to talk with your lawyers?

15 DEFENDANT FRADY: Yes, sir, I have.

16 THE COURT: And your decision as to whether or not
17 you testify is what, Mr. Frady?

18 DEFENDANT FRADY: I do not wish to testify.

19 THE COURT: And that is your decision?

20 DEFENDANT FRADY: Respectfully, yes.

21 THE COURT: Very well. You may return to your seat.
22 Thank you very much.

23 All right. Mr. Allen, is it your intention when I
24 bring the jury back -- I'm assuming -- you've made the
25 motion for directed verdict at the close of the State's

1 case. Is it your intention -- in light of your client's
2 decision that he's just advised me under oath, is it your
3 decision to present any other evidence?

4 If not, I would allow you to renew your same motions
5 as if made at the conclusion of all the evidence at this
6 time.

7 MR. ALLEN: Yes, sir.

8 We will not be presenting other witnesses. And I
9 would renew that motion.

10 THE COURT: Very well. And for the same reasons I
11 earlier stated, your motions are respectfully denied. But
12 they're noted for the record.

13 Solicitor, it is my further understanding that since
14 they are not presenting any evidence, the Defendant will
15 have closing argument. You will argue first followed by
16 the Defendant. It's my understanding that you both feel
17 you can do it somewhere in the neighborhood of 30 to 45
18 minutes each.

19 Is that correct from the State?

20 MS. HERVEY: That's correct.

21 THE COURT: Is that correct, Mr. Allen?

22 MR. ALLEN: That's correct.

23 THE COURT: Very well. I would like the record to
24 also reflect that I have shown Counsel, in chambers, my
25 verdict forms.

1 I do not send the indictments into the jury, Madam
2 Clerk.

3 My law clerk's job will be to remind the Judge to get
4 the Foreperson of the Jury to sign the indictments.

5 They have approved the verdict forms; is that correct
6 from the State.

7 MS. HERVEY: Correct from the State.

8 THE COURT: Correct from the Defendant?

9 MR. ALLEN: That's correct.

10 THE COURT: As amended?

11 MR. ALLEN: Correct, Your Honor.

12 THE COURT: It is also my further understanding that
13 this morning Counsel for the Defendant, having looked at
14 matters that they wish the Court to charge, has reviewed
15 with me the case of State v. Cherry, which is found at 606
16 SE2d 475. It is a 2004 case. Counsel for the Defendant,
17 having read that case, has asked the Court to charge
18 language from Chief Justice Toal's dissent in the Cherry
19 case.

20 The specific language that is being requested that I
21 charge is as follows: "The traditional circumstantial
22 evidence charge provides that when the State relies on
23 circumstantial evidence to prove its case, a jury may not
24 convict a defendant unless every circumstance relied upon
25 by the State has been proven beyond a reasonable doubt and

1 all of the circumstances so proven are consistent with
2 each other and taken together point conclusively to the
3 guilt of the accused to the exclusion of every other
4 reasonable hypothesis." Now, that's a direct quote from
5 the second paragraph of Chief Justice's dissent in State
6 v. Cherry.

7 As I advised Counsel in chambers, the Cherry case
8 holds that the only charge, in my opinion, that is proper
9 for circumstantial evidence is the charge that the Court
10 approved in State v. Grippon.

11 I respectfully decline your request to charge the
12 language from the dissent in Cherry. But that issue is
13 preserved for review for the Court and you have made it.
14 So I wanted to put that also on the record.

15 MS. WALDREP: Thank you, Your Honor.

16 THE COURT: Anything further from the State before I
17 bring the jury back?

18 MS. HERVEY: I'm sorry, nothing, Your Honor.

19 THE COURT: Anything further from the Defendant
20 before I bring the jury back?

21 MR. ALLEN: No, sir, Your Honor.

22 THE COURT: Very well. Would you bring us the jury
23 in, please, sir.

24 Please tell the jury -- I'm going to offer you the
25 opportunity to tell them you're not presenting any

1 evidence. And then we'll proceed to argue.

2 MR. ALLEN: Yes, sir.

3 (WHEREUPON, the jury came into open court at
4 approximately 10:17 a.m.)

5 THE COURT: Ladies and gentlemen of the jury, you
6 have heard the evidence from the State of South Carolina.
7 We will now hear from the Defendant.

8 Mr. Allen.

9 MR. ALLEN: May it please the Court, Your Honor?
10 At this time, we wish to move to closing arguments.

11 THE COURT: The Defendant wishes not to present any
12 evidence; is that correct?

13 MR. ALLEN: Yes, sir. That's right.

14 THE COURT: Well, ladies and gentlemen of the jury,
15 you have now heard all the evidence in the case. We will
16 now hear the closing arguments of the attorneys followed
17 by my charge to you on the law. I ask you to give the
18 attorneys your careful consideration.

19 Solicitor.

20 CLOSING ARGUMENTS

21 MS. HERVEY: May it please the Court, Your Honor?

22 Good morning, ladies and gentlemen of the jury.

23 I know that we've been through a difficult and
24 somewhat long few days here together. But I think now
25 that you've kind of been through this experience for the

1 first time, you understand exactly how important jury
2 service is and how integral your role is to the criminal
3 justice system.

4 I want to take this opportunity to thank you on
5 behalf of the State of South Carolina and on behalf of
6 Mr. Allen and the Defendant. Because I know they
7 appreciate it as well for your time, for your patience,
8 and for your service. Because we do appreciate that we
9 are taking you away from your families, and your jobs, and
10 your lives. And we realize that that is a sacrifice. But
11 it's only with you that this system works.

12 And we have been watching you as we went along and
13 making careful note that you were paying attention to
14 witnesses. And we know you probably can't remain glued
15 and riveted to them the entire time that you're here. But
16 you still have been a very conscientious jury. And we
17 appreciate that service here today.

18 We also realize that we are asking you to perform a
19 very extraordinary task. We are asking you to convict a
20 man of murder, and not just one, but two. And we know
21 that we are taking you out of your comfort zones, that
22 this isn't something you do every day. This isn't
23 something that you contemplate every day.

24 Most of you have now become much more intimately
25 aware of what is, actually, involved in a violent crime of

1 this nature and it occurring in your own county. And we
2 appreciate that. But the reason we have done that and
3 selected you in that regard is because we believe you are
4 a fair and impartial jury, that you have no friends to
5 reward and no enemies to punish.

6 We are about to get to your role. You guys have kind
7 of been sitting here the whole time and paying attention.
8 But the real bulk of your work begins after Mr. Allen and
9 I finish and the Judge charges you on the law. You'll be
10 asked to go back into your jury room and deliberate and to
11 reach a verdict, a unanimous one, about whether or not the
12 Defendant is guilty of the crimes for which he is charged.
13 And that is your role.

14 We ask that you be thorough, that you look at the
15 evidence, that you discuss it. You all have been a very
16 captive audience. Normally, when we watch TV, we might
17 turn to our husband or our children and go, what do you
18 think about that, or can you believe he did that. And I
19 can't believe I saw that. And you all, unfortunately,
20 have not had that opportunity.

21 So we realize you all will go back there and just
22 begin discussing and reviewing all the things that you
23 have seen and heard over the last few days. We ask that
24 you do that. And we know that you may be reluctant to do
25 this. We know that what we are asking you to do is maybe

1 not something you are wanting to do or excited about. We
2 know that asking you to perform this extraordinary task,
3 you may just have this gut reaction that this is an
4 extraordinary task put upon me.

5 But that hesitation to do that, that is not what they
6 talk about when they talk about a reasonable doubt being a
7 hesitation to act. That hesitation comes after
8 deliberations, after you've talked to everybody and
9 reviewed the evidence and still being thorough and
10 deliberate, that's when it comes. But you must deliberate
11 and you must go through that process. That's the oath
12 that you swore to do.

13 It is now time for closing arguments. And I will
14 speak to you first, and Mr. Allen will speak to you last.
15 I, being the one that has the burden of proof, I get to go
16 first. And they have to assign some sort of order of
17 things. And based on that, I will not be able, after
18 Mr. Allen speaks, to get back up here and tell you the
19 things that I don't agree with about what he says. But we
20 feel that for the most part after three days, y'all pretty
21 much know what's going on.

22 This is our opportunity to get up here and put all
23 the pieces of the puzzle together, or in Mr. Allen's
24 position, more than likely, to take all the pieces of the
25 puzzle apart. But, remember, I was not out there on

1 September 23rd, 2004, that night, and neither was
2 Mr. Allen. And we are not witnesses. And we do not know
3 what happened any more than the witnesses who, actually,
4 were involved.

5 The Judge will tell you that you must take the
6 evidence as it was put before you, as the witnesses told
7 you. And if someone asked a question and somebody said,
8 no, weren't you wearing a pink shirt that day, no, then
9 there's no evidence before you that somebody was. So
10 that's why you need to focus truly on what the witnesses
11 either affirmed or denied in your presence.

12 The Defendant is charged with six indictments. And
13 you will be asked to reach a unanimous verdict, all 12 of
14 you must agree, on each and every indictment. The first
15 indictment being grand larceny, that he stole Mike
16 Harper's van. The second being burglary first degree,
17 that he entered the Frady home, Jimmy and Barry's home,
18 without consent with the intent to commit a crime there.
19 Arson second degree, that he set fire to that house. And,
20 finally, murder of Jimmy and Barry Frady. And then the
21 possession of a weapon during the commission of a violent
22 crime.

23 The Judge will instruct you that for five of those
24 indictments, you can find the Defendant guilty on one,
25 guilty on two, guilty on three, four or five, that you

1 have the option of picking and choosing which ones you
2 think the State has met their burden on. The only one
3 that is different is possession of a weapon during the
4 commission of a violent crime. You, obviously, first have
5 to decide he committed a violent crime first.

6 So only once you determine whether the Defendant is
7 guilty of arson, burglary, or the two counts of murder --
8 those are all violent crimes, stealing a car is not --
9 once you've done that, then and only then can you consider
10 the possession of a weapon charge. But other than that,
11 everything else, you must individually decide on each
12 indictment.

13 We must prove the Defendant guilty beyond a
14 reasonable doubt. And I told you at the beginning that
15 that has been defined as a doubt that would give a
16 reasonable person a hesitation to act. But it is, again,
17 not beyond all doubt, beyond any shadow of a doubt, beyond
18 any doubt. It is beyond a reasonable doubt. So what you
19 have to look at is, do you truly have a reason, a thought
20 out logical conclusion to doubt the Defendant's guilt? It
21 must be a reasonable doubt. There are few things that you
22 will know beyond all doubt.

23 Even if we put a camera in a room hoping to catch
24 someone commit a crime, it's only going to be focused on
25 one part. And, inevitably, things might happen on the

1 side that we can't see. But the State does feel firmly
2 that if you look at the evidence and you put it -- the
3 puzzle pieces only go together one way. And that is that
4 the Defendant is guilty on all six indictments.

5 Mr. Allen and the Judge will both talk to you about
6 the difference between circumstantial evidence and direct
7 evidence. Direct evidence being eyewitnesses like
8 Mr. William Floyd White. He saw the van parked out there
9 at about 11:00 to 11:15 that night on his way home.
10 That's direct evidence. It doesn't necessarily say who
11 stole the van, or if anybody stole the van, or who
12 committed the murder. But that direct evidence, that
13 eyewitness testimony, that's what we're talking.

14 Circumstantial evidence is things more like
15 Mr. Harper saying that only three people knew how to get
16 into his van. And he knew where he and his son were that
17 night. And they weren't stealing it and setting it on
18 fire. He doesn't know -- he didn't see Randy Frady steal
19 his van. But knowing that those three people could only
20 get into the van or, perhaps, if there were only three
21 people that had keys and it had been hot wired, that's
22 more along the lines of circumstantial evidence.

23 The Judge is going to charge you, however, that there
24 is no difference between direct evidence and
25 circumstantial evidence. And circumstantial evidence

1 alone is sufficient to prove a defendant's guilt beyond a
2 reasonable doubt. And most cases involve circumstantial
3 evidence. Because, rarely, do we kill two people in front
4 of six witnesses. Rarely, do we commit a murder of this
5 nature with people standing there on the corner taking
6 notes. That's why circumstantial evidence is enough.
7 It's because we don't let criminals benefit from the fact
8 they commit crimes in the dark of night when no one can
9 see, and then try and cover their tracks. Circumstantial
10 evidence is enough. And there is substantial and
11 overwhelming circumstantial evidence in this case.

12 Now, if you look at each one piece in particular, you
13 might not feel that way. But I think as we go through it,
14 you'll see how it all interconnects and relates to one
15 another.

16 The Defense attorney when he got up here in closing
17 argument [sic] said, there's no DNA. There was. We
18 stipulated to it. Now, Randy Frady did not leave DNA at
19 the crime scene. That's true. But we did look for DNA.
20 They looked at the items in the washing machine. They
21 weren't able to extract DNA out of them. So there was DNA
22 examination. They just couldn't find anything.

23 Mr. Allen said, well, there's no boot prints. You
24 heard from the officers. They saw marks, but a shoe print
25 has got to be pretty dead on tread inflection. If you

1 slip or fall, it smudges, just like a fingerprint. If you
2 touch it, it leaves a print. If you swipe it, you smear
3 it. There's no blood. There was. It was the victims
4 blood. They had been shot. Randy Frady had not.

5 So all about what he told you there's not, there's
6 not, there's not, there's not -- do you remember Steven
7 Curtis testifying? He got here about 11:00 that day and
8 didn't leave until midnight that night. He was in Oconee
9 County for 12 hours processing crime scenes. If we didn't
10 find evidence, it wasn't for lack of trying. And you also
11 heard Steven Curtis say washing clothes could have removed
12 the DNA. It could still be there, but could have removed
13 it. The fire would have covered any fingerprints. The
14 soot, you can't lift them. So the only reason there's not
15 all of those things is because the Defendant covered his
16 tracks.

17 Let's back up and put the whole chronology together.
18 We know that on September 22nd, Randy Frady went to work.
19 Douglas Blackwell said they were at work that day. They
20 discussed they were going to the funeral home for Chris
21 Kelley's grandfather later on. Douglas Blackwell said, I
22 didn't take him home, but I did agree to pick him up and
23 take him to the funeral home. He said that he would have
24 done that about an hour and a half later. They went to
25 the funeral home that day. And he said he was home -- at

1 home, after dropping Randy off with a pint of liquor, by
2 dark. Around September, we're home before 9:00. We know
3 that pretty much to be true. Douglas Blackwell didn't
4 have any reason to come in here and lie.

5 We know that Mike Harper that same night goes to work
6 and gets home a little bit later than Randy Frady,
7 perhaps, even after he's already left with
8 Douglas Blackwell. We know that his car doesn't have gas
9 in it. He sits there with his friends and he hangs out
10 for a while until his wife comes home from the salon. He
11 gets money from her. Because she's working as a
12 hairdresser and bringing in cash every day, more than
13 likely, and that he leaves. And he goes to a friend's
14 house and he has a couple of beers. Then he goes to the
15 grocery store, the Ingles. And then he goes to the Circle
16 K to get gas in a plastic gas can to go put in his van.
17 And then he goes home.

18 We know that his wife, in the meantime, has heard the
19 van crank up and leave and just assumed it was her husband
20 coming home to get the van to go put gas in it. And you
21 know that when he gets home at about 11:30, the van is
22 gone. And they try and figure out where the van is and
23 can't understand why it's gone. And they know that the
24 son hasn't taken it. And he then drives back to the gas
25 station and calls 911 at 11:41. That on the way back --

1 And Tim Hunnicutt says he arrives at the Harper
2 residence about 11:45, 11:44. So in those four minutes of
3 driving back, he finds his van. He goes up to it. He
4 looks at it. He stomps out the fire. He looks around.
5 He realizes he can't see anybody. So he goes to get the
6 officer. His house is not that far way. You can look at
7 the map and the scale, the triangle between Mr. Harper's
8 house and Frady's house in that corner of that cemetery,
9 you're looking at maybe three or four-tenths of a mile one
10 way or the other. Then he goes back and he gets Deputy
11 Hunnicutt. They go back to the van. The backup is being
12 called.

13 Joe Hamilton, he testifies that sometime between
14 11:45 and midnight, he goes to Randy Frady's house. No
15 lights. No sound. He drives up and cuts off his car.
16 Nothing. Nobody there. No sign of movement. Nothing.
17 He goes and gets Tim Hunnicutt. And they decide to go
18 back to his house. This time when they go back, lights
19 are on, the washing machine is running. And Randy Frady
20 is taking a shower. They knock on the door. Where have
21 you been? He says, I just got out of the shower. I
22 haven't been home long. I went to the funeral home.
23 Douglas Blackwell says he's been home since 9:00, at
24 least. Where has he been in that two and half hours? Why
25 are we lying? What do we have to hide? And they see the

1 muddy boots. But he doesn't want them to take the boots.
2 They don't have enough to just grab them away from him at
3 that point. So they let him go and turn it over to the
4 investigators.

5 Mr. Harper, we've recovered your stolen van, we're
6 going to give it back to you. The investigators may talk
7 to you the next day. If we had found Randy Frady's prints
8 in the van, they would be telling you they were there when
9 he was there before. So the lack of presence of prints --
10 the presence of prints in and of itself doesn't really
11 help you decide or determine that.

12 But Mike Harper doesn't wipe it clean. It's still in
13 the crazy locksmith condition it was the night before when
14 Steven Curtis viewed it the next day at the impound lot.
15 And Tim Hunnicutt and Joe Hamilton then leave. We found
16 the car and we gave it back to the guy. Job well done.
17 They have no idea at that point that the van is in any way
18 related to a double homicide on the other side of
19 Walhalla.

20 The next day, Mr. Jim Frady gets up that morning and
21 goes and takes Randy Frady to work. He takes Randy Frady
22 to work. He takes him to work, drops him off. And then
23 he's feeling sick and he wants to go home. Douglas
24 Blackwell, who doesn't have enough gas in his car, says,
25 well, I'll take you home, but I don't have gas. They stop

1 at the Bountyland and get some gas. And then he says, I'm
2 going to go straight into Walhalla and pick up 28 to take
3 Randy home. But Randy doesn't want him to go home that
4 way. Because that would take him back to the crime scene,
5 that would take him back to the Frady house on [REDACTED]
6 [REDACTED].

7 Why wouldn't he want to go home the quickest way?
8 What are you trying to avoid? Because you know that his
9 grandfather has gone home. And by this time, the dog is
10 hungry. And the door is still open. And maybe your
11 grandfather or the neighbors have started to realize
12 something is not right. And that Mr. Frady goes over
13 there to tell them to put up the dog, to feed the dog, and
14 finds his grandson and his only son shot and killed.

15 He calls 911. And law enforcement arrives. Based on
16 the prior assault warrants where he's threatened to do
17 them harm, Randy Frady, they decide that he might be a
18 suspect. They go over there and they ask him -- they
19 arrest him just on the assault warrants and say, do you
20 got any guns, anybody else in the house, just for officer
21 safety. And he says there's a shotgun in the house.

22 They go into the house. They make sure that
23 everybody is -- there's nothing in there, there's nothing
24 wrong, that no one is in there that's a threat to the
25 officers. They come back outside and Mirandize him. And

1 they ask him, where did you get the shotgun? Got it two
2 or three weeks ago. And we know he's telling the truth on
3 that because Chris Kelly told you he sold it to him about
4 the first weekend in September. And he hasn't seen his
5 family in a few months.

6 That's what we know as to the chronology leading up
7 to it. Those are the facts. That's the evidence at hand.
8 What do you know about what happened that night at the
9 Frady house? You know that the van is parked out behind
10 the garage. We don't pull up in the driveway. We're not
11 there to visit. We park behind the garage. That we go
12 in. That the dog doesn't bark because the dog knows us.
13 Because up until two months ago, I lived next door. That
14 you go into the house. That Barry Frady is unconscious
15 from drinking, but, certainly, not a threat to anybody at
16 that point. He is shot once in the neck and once in the
17 gut. Both fatal wounds instantly incapacitating him.
18 That his father, asleep in the bedroom, also drinking,
19 slow to respond, either because of his drinking or because
20 he was 63 and getting up there in years. He is trying to
21 get out of bed and has one leg on the floor. And Randy,
22 in this small house, goes in there, shoots him once in the
23 gut and then in his arm, perhaps in a defensive measure,
24 and he gets shot in the chest again. That he then takes
25 lighter fluid and pours it on the pool table and sets it

1 on fire and leaves. Back in the van.

2 You know that the shots are fired at 11:30 that
3 night. Julia Ford, the little girl across the street, who
4 takes care of the dogs still, has no reason to lie. She
5 said, I heard something at 11:30 that night. And I looked
6 at my computer to see what time it was, how late it was
7 getting.

8 Annette Burney tells you about the same thing. She
9 tells you after midnight when she goes home, the door is
10 open still, the front door, the windows, all designed to
11 give the fire more oxygen and more fuel. He does this and
12 sets it on fire and disables the smoke detectors. These
13 houses aren't that far away. He doesn't want anybody
14 finding it. He let's the dog out so he doesn't bark about
15 seeing the flames, or getting scared, or getting into the
16 house. It's all designed to cover his tracks.

17 Well, he can't take the van back to Harper now
18 because he knows Harper is going to be mad. Harper has
19 been mad at him for a couple of months. So he ditches it.
20 But he's still got to get back to his house. If anybody
21 else stole that van, they would have ditched it a long way
22 away from where they stole it. If I steal a van, I'm not
23 going to joy ride around in it and you know what, I'll
24 bring it back. I can't bring it back to his house, but
25 I'll get close enough so he can find it. The only reason

1 that van goes back and gets ditched where it does on
2 Cemetery Road is because Randy Frady has got to get back
3 home.

4 So you have from 11:30, when shots are fired, a very
5 limited time frame for which Randy Frady has got to get
6 back and ditch that van after 11:41 when it's discovered
7 stolen or shortly thereafter when they find it coming back
8 from calling 911. You've got a very limited window of
9 opportunity.

10 Grand larceny. He stole the van with the intent to
11 permanently deprive the owner of the property. If you set
12 it on fire, you don't want them to get it back. You might
13 not be very good at it. You weren't very good at it at
14 the house either. But you, certainly, didn't want him to
15 get it back. There's only three people that knew how to
16 get in the van.

17 And it was out of gas. And I'm sure Mr. Allen will
18 suggest to you, well, because it was out of gas, it
19 couldn't have been stolen. Who would steal a van out of
20 gas? Let's see, probably not kids, they would move on to
21 the next car that did have gas. But maybe Randy Frady,
22 who knew how to get in and how to start it.

23 And based on what Mike Harper told you about the way
24 he lived -- and even Douglas Blackwell, they're not
25 filling their tank every time. They're putting \$5 and \$10

1 and however much cash they have in their car. And that's
2 fine.

3 So Randy Frady probably growing up with them knew
4 that Mike Harper never drove around with a full tank of
5 gas. Or maybe he had gone out there to steal it earlier
6 and heard him talking on the back porch. But he's got gas
7 because he's going to set everything on fire. So that's
8 really not a problem for Randy Frady, is it? He steals
9 the van.

10 Mr. Allen will say there's no Frady prints in the
11 car. There was a glove and they looked at that. They
12 couldn't get DNA off of it. There's no prints at the
13 house either. They couldn't get some of those because of
14 the sooting. But no fingerprints doesn't necessarily mean
15 nobody did it. It just means, perhaps, we're being smart
16 about how we're covering our tracks.

17 There was an unmatched print on the hood of the car.
18 But you know what? It's the hood of the car. Anybody
19 walking by the car might have leaned up against it and
20 left their palm print there, too. But you know what?
21 It's not wiped clean. Mr. Harper is not trying to destroy
22 evidence that night when they return it back to him. And
23 they try to get prints off of it. Steve Curtis tells you
24 about that. The seat inside of a car is not a very good
25 surface. And there was gasoline everywhere. And that

1 gasoline would have destroyed any fingerprints left
2 behind.

3 No one else would have stolen that van and taken it
4 and used it in such a peculiar pattern. Only the person
5 who killed Jim and Barry Frady stole that van. And the
6 only person that the evidence suggests did that is Randy
7 Frady.

8 Burglary first degree. He entered the house without
9 consent with the intent to commit a crime therein and then
10 harmed the people inside. You don't have to bust down the
11 door, you don't have to jimmy the lock, and you don't have
12 to break a window.

13 Without consent. If you're coming to kill me, you
14 don't have consent. And Mike Harper told you neither one
15 of them were supposed to be around there for the past two
16 months, not since the assault charges when he was over
17 there threatening to harm them. He's moved out to the
18 trailer on [REDACTED]. He doesn't have consent to go
19 into that house.

20 Intent to commit a crime therein. What's the intent
21 to commit a crime? We've gone over there with a gun.
22 We're going to kill somebody or, at lest, go hurt them
23 real bad. We're not going to steal anything, though.
24 It's not a theft burglary. We're not breaking into the
25 house to steal things and things go awry. There's a safe

1 you can easily carry away. There's a book of checks.
2 There's TV's. We don't steal anything in that house.
3 This isn't about theft. It's not about robbery. This is
4 about malice, meanness, evilness, people who are mad at
5 people.

6 He caused injury to the two of them. He killed them.
7 There are other circumstances of aggravation. Sometimes
8 you can do it armed with a deadly weapon, during the hours
9 of darkness, those two things. The thing before you that
10 makes it burglary first degree is that he caused injury to
11 a person inside.

12 Arson second degree. Willful, malicious, intentional
13 burning that causes damage to the structure. Damage
14 includes discoloration, sooting, those type of things. We
15 don't require that you're really good at the arson and
16 you, actually, burn the house down before we convict you
17 of it. You do a good enough job, the fire gets set,
18 damage gets done, smoke goes everywhere, we call that
19 enough. You wanted to burn that house down.

20 Who would have wanted to burn that house down? Who's
21 got to cover their tracks? The person that just killed
22 those bodies. Nobody else said, oh, you know, I think I
23 just heard some gunshots, I bet Jimmy and Barry are dead,
24 I'll bet I could go set their house on fire just for
25 kicks. The only person that set that house on fire is the

1 person who killed those two bodies. And the State's
2 evidence suggest that the only person that did that is
3 Randy Frady.

4 Let's talk about the real reason why you're here.
5 And that's murder. Murder. Because that's really why
6 we're here. The van, the arson, the burglary, it's all
7 part of the puzzle. But the real reason why we're here,
8 and the reason you're here, and we've taken two days out
9 of your life is because two people are dead. Two people
10 are dead. One guy, who worked his whole life and came
11 back to Walhalla to take care of his daddy. The other guy
12 was working at the Blue Herron. These two people, Jimmy
13 and Barry Frady, that night, not bothering anyone, asleep
14 in their own house were shot and killed. That's why we're
15 here. Two people's lives ended on September 23rd, 2004.

16 And what is murder? Murder is that you kill someone
17 with malice aforethought. And that's a big legal word
18 that lawyers like to use. But the Judge will define it
19 for you that it means meanness, evil, a heart bent on
20 mischief, a heart depraved of social duty, hatred. That's
21 what malice aforethought is. It's such meanness that you
22 can take a J.C. Higgins shotgun, go in there, load it with
23 ammunition, drive across town, walk into that house, see
24 your brother laying there in the chair, boom, boom. You
25 walk in there and kill your daddy and shoot him twice.

1 That's meanness. That's evil. And that's malice.

2 And the only person who had that much meanness and
3 evil and hatred in their heart is Randy Frady, the son
4 that they never got along with, so much so that they sent
5 him back to his granddaddy to go to school here. It's not
6 the son that we took on vacation all the time, not the son
7 we lived with and went out drinking with, not that son,
8 but the other son. The son jealous of his brother who got
9 all the attention. The son jealous of his brother who got
10 all the breaks. And the son who always was jealous that
11 the father gave the other one more attention, more love,
12 more money, more anything. It's that love turned wrong,
13 that jealousy turned back. That's what it takes in your
14 heart to take a shotgun and kill two people. This ain't a
15 we ain't getting along, so I reckon I'll just kill you.
16 No. This is meanness, the likes of which you only see in
17 murder.

18 And not only is shooting them enough, we're going to
19 burn them down. And then maybe any sign they were ever in
20 this world will go away. Guess what? That way I get
21 granddaddy's house. Because that's what he tells Kevin
22 Comer. Yeah, it's one thing to sit there and say, you
23 know what, my father, he's just frustrating me. I'm just
24 going to kill him. It's another to go, how much LSD do
25 you reckon it takes for it to do it before it becomes

1 traceable. I mean, that's a whole other level of
2 conversation.

3 Well, Kevin Comer, you know, he's got a bad record.
4 Well, you know, I don't think I'd be going to church and
5 talking with the deacon about how to kill my daddy. I
6 reckon if I wanted to do it, I'd try to figure out
7 somebody who might know how that's done. And that ain't
8 the deacon at the church. That's going to be somebody
9 else like you, somebody else with a heart depraved of
10 social duty that thinks they can take whatever they want
11 when they need it and they don't really care what that
12 does to other people, including lives.

13 You heard a lot of testimony yesterday afternoon
14 about a shotgun, wadding, filler, probably more about
15 shotguns than you ever wanted to know or ever will learn
16 again in your life. But it becomes important because it's
17 part of the evidence in this case. Because it is the
18 trail of evidence left behind.

19 You see, Randy Frady didn't just kill them in a fit
20 of rage. He was very calculated when he did it. Not only
21 in disabling the smoke detectors and setting the house on
22 fire, he picked up every shell, except one he couldn't
23 find behind some clothes. He shoots Barry Frady first,
24 the birdshot, the last shot. He walks in and kills dad.
25 He pulls it back, ejects the birdshot shell and shoots

1 daddy twice with buckshot. He finds those two shells and
2 finds the first one from Barry, but he can't find the
3 birdshot.

4 I'll refer now -- and Mr. Allen suggests it's only
5 his opinion. But this man has been testifying about guns
6 almost as long as I've been alive, 500 and some times,
7 10,000 examinations or more. And he's the lead sniper for
8 the SWAT team. If anybody knows guns in the State of
9 South Carolina, it's Ira Parnell. And if you're going to
10 rely on anybody's opinion about a gun, it's going to be
11 his. Those four shotgun shells, to a reasonable degree of
12 scientific certainty, were fired from Randy Frady's
13 shotgun. No doubt about it. That's his gun. Chris
14 Kelly, I sold it to him. Douglas Blackwell, it was there
15 the night before. Randy Frady, it's in the house. No
16 doubt about it. That's the shotgun that shot those three
17 shells.

18 He can't say, well, I was over there shooting it and
19 I just dropped the shell earlier. And that's just a
20 coincidence that you found one that I shot in that bedroom
21 with my daddy. I haven't been there for months and only
22 bought the gun two or three weeks ago.

23 You would have to believe that somebody broke into
24 that house, stole Randy Frady's gun, went over there,
25 killed them, came back, dumped the four shells in the

1 house, and planted the gun in his house. And that's just
2 not reasonable doubt. His gun, those four shells.

3 Now, Mr. Allen will say, well, buckshot can't be
4 compared. And because of that, you just don't know. But
5 not only are those four shells all from that gun, they're
6 all similar to a box of ammunition found in his bedroom.
7 Now, granted, it's Remington ammunition. Wal-Mart has
8 probably got cases of it. But that's quite a coincidence.
9 Because not only birdshot and buckshot, the shells used in
10 the murder, they're there, too. There's not just one type
11 of ammunition, we've got a little assortment of it. And
12 guess what? It's the same assortment used in the murders.
13 Now, that's just really an unfortunate coincidence.
14 Mr. Randy Frady is just an unlucky man.

15 The buckshot with the bodies, the buckshot from the
16 bodies, the wadding from the bodies, the filler from the
17 bodies, it's all consistent with those four shells. Can
18 we say it came out of those four shells? No. But it's
19 all consistent. That's just an unlucky consistency for
20 Randy Frady, I guess. I mean, my goodness, why did they
21 have to pick his type of ammunition to kill his brother
22 and daddy? Because it's not just an unlucky consistency
23 and it's not just an unlucky coincidence. It is strong
24 circumstantial evidence. But we don't stop there.

25 I think it's most telling that we got four shots and

1 four shells. The one in the house and the three on the
2 side of the road. Now, I know Mr. Randy Frady just bought
3 the shotgun, and maybe he went out into the woods and shot
4 it. But did you stand there at the corner of the cemetery
5 and shoot the shotgun across the street from the church?
6 Is that just how it happened those three shells got to be
7 there? You ain't standing out on Highway 28 shooting
8 shotgun shells near the cemetery. Those are there. They
9 were left there by the murderer like a trail of bread that
10 comes back to his house. He's not unlucky. He's not just
11 unlucky that the birdshot or buckshot or the shells all
12 match and the numbers match and everything else. He's not
13 just the unluckiest individual to ever set foot in Oconee
14 County. He's guilty of the murders of two people.

15 Mr. Allen is going to talk to you about no DNA and
16 there's no shoes. I'm sure you're going to hear a song
17 and dance and say Kevin Comer is a thug and Mr. Harper was
18 out drinking that night and he don't know what he's
19 talking about.

20 And, you know, if you just looked at Mike Harper and
21 took what he said, maybe that's not enough, maybe that's
22 not beyond a reasonable doubt. If you just took Kevin
23 Comer, maybe that's not, maybe that's not reasonable
24 doubt. But you've got William Floyd White, he works at
25 the hospital. He's driving home that night. It's not

1 like he's going out of his way to find the van. Little
2 Julia Ford across the street, she takes care of their dog.
3 Do you think she liked coming in here and testifying about
4 that? Shotgun shells. Ira Parnell. Buckshot, birdshot,
5 everything. Who stole the van?

6 It's a very difficult puzzle, but the pieces only go
7 together one way. And there's not a lot of his whole DNA,
8 or blood and fingerprints, and whatnot. That's just
9 because Randy Frady is really trying to cover his tracks.
10 We set the house on fire, we wear gloves, we do all these
11 kind of things. We're trying to be smart about it. We're
12 just not very good at setting fires, otherwise we would
13 have been a lot smarter about it and wouldn't have dropped
14 the shotgun shells on the side of the road as we're
15 running back to our house.

16 Murder. And that's what you need to focus on, that
17 meanness and that malice and that evilness. And who had
18 threatened them so much that they called 911? Not
19 somebody going, I'm going to kill you. I mean, they
20 called 911. Your brother and your daddy call 911. They
21 called the police because you had threatened to kill them.
22 You threatened to harm them. You threatened to do some
23 type of injury to them --

24 MR. ALLEN: Objection, Your Honor.

25 THE COURT: Counsel, approach.

1 (WHEREUPON, a bench conference was held.)

2 THE COURT: Objection overruled.

3 Proceed.

4 MS. HERVEY: Who threatened them and who's talking to
5 Kevin Cromer about how to kill them in an untraceable way?
6 Who's got that much meanness in their heart? Because it
7 takes a certain level of meanness to kill your brother and
8 kill your daddy and still let granddaddy take you to work
9 the next morning. That takes a certain level of meanness.
10 And the only person with that much evil jealous hate in
11 his heart is Randy Frady. And he's the only one guilty of
12 these crimes.

13 He's not unlucky. And because of the lack of CSI
14 evidence, you do not let him benefit from his efforts to
15 cover his tracks. You do not let him benefit. And you
16 hold him accountable for the clues that escaped his
17 notice. And you convict him of the murder of James Frady,
18 his daddy, of Barry Frady, his brother, of going into that
19 house and shooting somebody in their own house in their
20 own bed, because that takes a certain level of meanness,
21 too. You're going to shoot your daddy dead asleep in his
22 bed. He don't have a fighting chance. He don't have a
23 fighting chance to defend himself. Murder of the both of
24 them, burglary, arson, setting the house on fire and
25 trying to cover your tracks and steal Mike Harper's van to

1 do it, you hold him accountable for his evil deeds.

2 Find him guilty of these crimes. Find him guilty of
3 murdering Jimmy and Barry Frady. That's what the evidence
4 proves beyond a reasonable doubt.

5 THE COURT: Mr. Allen.

6 MR. ALLEN: May it please the Court, Your Honor?

7 THE COURT: Yes, sir.

8 MR. ALLEN: Could we approach before I begin?

9 THE COURT: Yes, sir.

10 (WHEREUPON, a bench conference was held.)

11 MR. ALLEN: May it please the Court, Your Honor?

12 THE COURT: Yes, sir.

13 MR. ALLEN: Good morning, ladies and gentlemen of the
14 jury. I hope you had a good evening.

15 And we have come to, basically, the conclusion of
16 this trial. And before I start commenting on the case
17 itself, first of all, I want to say to you and talk to you
18 about several things. I want to say to you that this
19 puzzle has never fit together. It didn't fit together
20 from day one. And it still doesn't fit together. There's
21 been a lot of efforts to make this puzzle that doesn't fit
22 together fit together, but it still doesn't.

23 But I want to talk to you about some things that I
24 mentioned to you in my opening statement. One, this is a
25 criminal case. We all know that. The chief difference

1 between a criminal and civil case -- and I think the Judge
2 will tell you this in his charge -- is that the burden of
3 proof is different.

4 The burden of proof in a civil case is a little more
5 likely than not. That's all you have to do in a civil
6 case between two private parties. When there's a
7 prosecution in a criminal case, the burden of proof rises,
8 for good reason, and that was decided many, many years
9 ago, centuries ago. And the burden of proof when it's a
10 criminal case and it's a prosecuting authority, who is a
11 moving party, the burden of proof is beyond a reasonable
12 doubt as we hear and hear and hear. And you're going to
13 hear more of that, beyond a reasonable doubt.

14 Well, in years past, there was substantial, I would
15 submit to you, discussion and debate and differences
16 about, well, what is a reasonable doubt? What is a
17 reasonable doubt? Well, in this state, we got a
18 definition a few years ago, which I would submit to you
19 greatly simplified that issue. And I think the Court will
20 charge this to you and read this to you when he reads the
21 law. And it will say that a reasonable doubt is the kind
22 of doubt that would cause a reasonable person to hesitate
23 to act. I'm going to say that again because that's a
24 little bit wordy. That's the way legal stuff is
25 sometimes. A reasonable doubt is the kind of doubt that

1 would cause a reasonable person to hesitate to act.

2 Now, we know you're all reasonable people because you
3 showed up for jury duty. Not everyone showed up, you may
4 have noticed that. So that sets that aside. So we can
5 cut it down to one simple thing, hesitation. Is there
6 hesitation? Is there reservation? Do you hesitate with
7 what you heard from the witness stand after
8 cross-examination? Was the witness hesitant? But after
9 cross-examination and you consider all the testimony, is
10 there hesitation?

11 And, remember, just as the Judge told you in opening
12 statement -- and this is a criminal case of the most
13 serious kind. But every element of every charge in this
14 case must be proven beyond a reasonable doubt. There must
15 be no hesitation, none. Because when there is -- and I
16 submit to you, there's a lot in this puzzle that doesn't
17 fit together -- the appropriate thing, the correct thing
18 and what is required is an acquittal. That is the way our
19 system works.

20 Now, let me also reiterate to you -- and I, nor Randy
21 Frady, have anything to do with all these witnesses. I
22 don't know if there was 22 or 25. I told you in my
23 opening statement that they might call 10, they might call
24 20, they might call 50, they might call 80, but no
25 matter -- and they might testify for 30 minutes. They

1 might testify for an hour. It might be longer than that.
2 But never, through all of that, in almost four days, would
3 there be any DNA match. And it is what it is or it's not
4 what it's not. And whatever happened happened.

5 As far as the testing, and get this sample, and get
6 these clothes, and get that, there's no DNA match. That's
7 the bottom line. I told you that in my opening statement.
8 There's no fingerprint match. Well, we're done. There's
9 no fingerprint match, not at all. In fact, the
10 fingerprints that were usable both in the Frady's
11 residence, Jim and Barry Frady, belonged to an unknown
12 third party, an unknown third party inside the residence.

13 The only fingerprints, other than that, was one on
14 the front of the van which belonged to Mike Harper, which
15 no one has ever been able to put Randy Frady in the van as
16 far as evidence. But the fingerprints there on the top of
17 the van belonged to an unknown third party, who today, we
18 don't know who it is. And, furthermore, the fingerprints
19 inside the van belonged to an unknown third party. Not
20 Randy Frady, an unknown third party.

21 And about the van, while I'm on it, you know, it was
22 strange to me how someone could steal a van that's out of
23 gas unless they've got some kind of extra sensory
24 perception, which we know they don't, to come and bring
25 gas with them. I mean, how would somebody know that?

1 People don't steal vehicles that are out of gas.

2 Furthermore, there was never anything said -- there
3 was a lot about the handle on the driver's side. Nobody
4 ever said, well, were the keys in the van? How was it
5 started? It hasn't got any gas in it, number one. Was it
6 hot wired? Were there keys in it? And, you know what, if
7 there were keys in it, there would have been fingerprints
8 on those keys if the van hadn't been turned back over to
9 Michael Harper right in the middle of all this. Nobody
10 knew there was a homicide when Michael Harper claimed he
11 saw it, and found it, and claimed he went home earlier,
12 and then went back to Circle K or wherever and called
13 somebody.

14 There's no -- these are facts, now. You're the fact
15 finder. These are facts. There's no footprint match. I
16 mean, they talked a little bit about, well, there's
17 something on the side of that cemetery here, which
18 probably, I would submit to you, is probably closer to
19 Michael Harper's residence than Randy Frady's residence if
20 you look at that map. And you'll have it in the jury
21 room.

22 And, you know, they talked about mud and, you know,
23 well, there's mud -- it looked like there was mud on those
24 boots. Nobody said if it was raining that night. I guess
25 it was or I don't know. I wasn't there. Like the

1 skillful prosecutor pointed out, we weren't there. No
2 footprint match, that's a fact. And we're talking about
3 conviction beyond a reasonable doubt of double homicide.
4 We're not talking about some middle of the road garden
5 variety criminal offense. We're talking about the most
6 serious.

7 There's no blood type match. There's blood. There's
8 blow back, as Dr. Woodard testified. And they got -- and
9 the clothes were taken. And you can't wash blood out of
10 clothes with soap and water, you can't. There's no blood
11 match. There's no palm print match. That's -- no
12 evidence of that effect. No human hair match. I mean,
13 hair falls out of the human body all the time. No fiber
14 match. It comes off your clothes or something, you match
15 that up. None of that. That's a fact. Is there
16 hesitation? You better believe it. You better believe
17 there's a bunch of hesitation.

18 And here's something that really is peculiar to me,
19 just as a kind of side here. If this is some preplanned
20 scheme that you get a van out of gas, and nobody knows how
21 you start it, and you go over there and then you go to
22 this trouble, as the Solicitor argues, to cover the
23 tracks, I think was the language, well, why would you take
24 the shotgun? Why would you take the shotgun home and put
25 it in your bedroom and as soon as law enforcement asks you

1 about it, you say, yeah, I've got a shotgun in the house?
2 That defies all of it. That defies all of it.

3 And the evidence is -- the evidence is that Mike
4 Harper had a strained relationship with James and Barry
5 Frady. He didn't really want to talk about that. He
6 wanted to talk about 10, 20, 30 years ago about how good
7 it was. But at the time in question, it was so strained
8 that he had been made to understand that he wasn't to be
9 on that property anywhere, any time. That's a fact.
10 That's a fact.

11 And then there's -- of course, there's no
12 eyewitnesses. But in terms of the van -- and another
13 thing about the van, as I mentioned earlier, if the van --
14 if it was grand larceny of the van, why would you give it
15 back to Michael Harper? Maybe they questioned the claim
16 it was stolen. Is that why they did it? Maybe it wasn't
17 stolen. Because law enforcement sure gave it back to him.
18 And it was the subject matter of a crime. At least,
19 that's what he claimed. That's what he claimed.

20 And then as far as the 12-gauge shotgun -- and all
21 this, please, bear in mind, everything is viewed with the
22 idea that it must be proven beyond a reasonable doubt,
23 every element of every charge. Remington shells,
24 Remington 12-gauge shells, there's probably thousands of
25 those in Oconee County. I mean, thousands. Thousands.

1 #6 birdshot, just as the testimony was, is the most common
2 birdshot they make. There are probably thousands of those
3 shells. .00 buck by Remington, thousands, thousands of
4 them. Thousands of them.

5 And then the projectile -- and after all this effort,
6 then the last thing was an opinion. Now, let me submit to
7 you, you're the fact finder. But then it switched when it
8 went to the last witness from fact to opinion. It went
9 from fact to opinion. In fact, nobody, none of those
10 witnesses ever said -- from that witness stand under oath,
11 no witness ever said that for a fact they knew Randy Frady
12 committed the charged crimes. Nobody ever said that, not
13 a single one of them, not one of them. And then they had
14 a little -- some opinion here, some opinion there, and
15 then some opinion.

16 But they want a jury to say as a fact that something
17 happened that nobody from the witness stand can say for a
18 fact. That fails the burden of proof. That fails. That
19 totally fails. Total failure. When the -- not one of the
20 25 witnesses can say what this prosecuting authority is
21 asking a jury to say. Is that hesitation? Is that
22 reservation? And, you know, the burden of proof -- and
23 this is kind of a coincidental thing because there's a
24 hurricane on the coast.

25 But the burden of proof, there is to be no

1 hesitation. If you compared it to wind speed, it would
2 have the sustained winds of a hurricane. It wouldn't just
3 blow. It would be a gust of wind every now and then.
4 Like this thing kind of sputters and this kind of sputters
5 like this. But it would be sustained, sustained strong
6 wind. If it was a car engine, it would be high
7 revolution, sustained revolution. That's how strong it
8 would be for someone not to have a hesitation.

9 And then on these common shells, 12-gauge .00 buck,
10 12-gauge birdshot, number one, here's another thing no
11 witness could say, not even the last witness. No one
12 could say that the projectiles that caused the death of
13 James and Barry Frady -- as Dr. Woodard testified, not a
14 single witness could say those projectiles caused the
15 death of James and Barry Frady. Nobody could say that.
16 Not a single one. They couldn't even give an opinion on
17 that. In fact, we went through the whole list. It can't
18 be associated with State's Exhibit No -- I think it was
19 State's Exhibit No. 18. It can't be associated with
20 State's Exhibit No. 18. They couldn't do it. Time after
21 time after time, nobody ever said that.

22 And then on the shell, a shell is not like a rifle,
23 just like the testimony said. Bear in mind, you're
24 viewing everything in terms of beyond a reasonable doubt.
25 A rifle, you can identify it directly to the rifle and you

1 can identify it directly to a handgun. And so the intent
2 is have an opinion where this violence goes on in this
3 chamber and spits out the leftover. And then we're going
4 to have an opinion to say -- to try to put this puzzle
5 together that doesn't fit. We're going to finally put
6 that on top of it and try to make it work.

7 Well, let me submit something to you. It's just like
8 the other gentleman testified, there are recognized
9 standards. There's five identifying features that are
10 used by ballistics experts, extractor marks, ejector
11 marks, chamber marks, breach face marks, and firing pin
12 impression, five standards.

13 Now, if you want an opinion, at least, you want a
14 hard opinion. You would want five -- I would submit to
15 you that you would want five out of five. If we're
16 talking about murder, two counts of murder, you would want
17 five out of five. In fact, I would submit to you, I would
18 want the photographs put up there so everybody could look
19 at it. But we didn't have five out of five.

20 And also, reluctantly and hesitantly, that same
21 witness admitted that they always have differences, the
22 shells do. But there's five identifying features, two
23 were used. What's two out of five? If I calculate that
24 right, that's 40 percent. 40 percent fails. And on top
25 of that, it's an opinion. It's not a fact. 40 percent.

1 And that was the final effort to put a puzzle together
2 that's never fit. And it still doesn't fit. You can say
3 that without even considering the burden of proof.
4 Especially, when you consider that, you have to look at it
5 in a way that everything, every element of every charge
6 must be established beyond a reasonable doubt to the point
7 there's no hesitation. My goodness. We're talking about
8 taking a leap nobody -- none of those witnesses could say
9 from the stand for a fact that it happened. And then
10 let's try to put an opinion of 40 percent on top of it and
11 leap over and ask a jury to say what they can't say.
12 That's the bottom line, ladies and gentlemen. That's the
13 bottom line.

14 And I say to you, the rules and the process were
15 designed a long time ago. And that's the way we do it in
16 America. And let me tell you, the burden of proof and
17 reasonable doubt, it's not suspicion or guilt. I submit
18 to you, it's not a suspicion. It's not a likelihood.
19 It's not even a probability. It's beyond a reasonable
20 doubt where there's no hesitation. That's the way we
21 operate. That's the way we do it. And that's why we're
22 envied by a lot of systems that don't do it that way. And
23 we do it that way for good reason.

24 And I submit to you -- and I'll sit down. But I
25 submit to you, once again, that the case has failed from

1 the very start. And I don't suggest any improper
2 motivation on anybody's part. I've got the greatest
3 respect. But it never fit together. Particularly, when
4 you look at it from beyond a reasonable doubt. No
5 hesitation.

6 You cannot -- you just -- I submit to you, you cannot
7 come to these conclusions without great reservation and
8 great hesitation. And that happens sometimes. And I
9 submit to you when a case fails, when the evidence fails,
10 the noble thing to do is to acquit. It's noble. That's
11 the way we do it in this country. And that's the way we
12 do it in this case, as I said in my opening statement. It
13 will be done in the next case next week and the next case
14 next month. Those same rules apply. The next state over,
15 the states out west, midwest, that's the way we do it.
16 We're proud to do it that way. That's what makes it the
17 American system because we do it that way.

18 And, again, it's not suspicion, it's not likelihood,
19 it's not probabilities. Any hesitation must be an
20 acquittal, I submit to you. I appreciate your attention
21 this morning.

22 Good day to you.

23 Thank you, Your Honor.

24 THE COURT: Madam Foreperson, and, ladies and
25 gentlemen, I'm going to ask you to step to your jury room

1 before I charge you to give you your break so you can
2 stretch your legs and use the restroom.

3 Do not discuss this case. I'll be right with you.

4 You may retire to your jury room.

5 (WHEREUPON, the jury was excused from open court at
6 approximately 11:20 p.m.)

7 THE COURT: Let the record reflect that during the
8 closing arguments of the Solicitor, Counsel for the
9 Defendant approached the bench and told me they had an
10 objection to the argument by the Solicitor.

11 It's my understanding, Mr. Allen, that your objection
12 was based on the Solicitor's argument that Randy Frady,
13 your client, went to this dwelling of the victims with the
14 intent to kill; is that right?

15 MR. ALLEN: Threatened --

16 THE COURT: Did I summarize it?

17 MR. ALLEN: Threatened to kill.

18 THE COURT: Threatened --

19 MR. ALLEN: Yes, sir.

20 THE COURT: -- to kill?

21 I overruled the objection on the basis that an
22 element of murder is malice. There's been testimony in
23 this case that there was a disagreement between one of
24 the -- or both victims and the Defendant. The Solicitor
25 was arguing evil mind or maliciousness at the time. And I

1 felt it was proper argument. But I'll be happy to hear
2 argument from both of you.

3 Is there anything you want to say in addition as to
4 why you thought it was inappropriate, Mr. Allen, before I
5 hear from the Solicitor?

6 MR. ALLEN: Well, may it please the Court, Your
7 Honor?

8 And the motion, at this time, is for a mistrial. I
9 think you mentioned that.

10 Just the statement was that he had threatened to
11 kill. That was not in the record. What was in the record
12 was the definition. She asked the officer what the
13 definition of assault was. Was it the offer to do bodily
14 harm? And there has been much -- that has been kind of a
15 contentious issue. And that is not in the record. That's
16 outside the record. So I made the objection.

17 THE COURT: Do you not recall the Solicitor
18 arguing -- I can have the court reporter, if she's
19 taping --

20 You're taping, aren't you, Hollie?

21 THE COURT REPORTER: Yes, sir.

22 THE COURT: I can have her play it back. I don't
23 recall the Solicitor stating that another person testified
24 in this trial that your client threatened to kill. She
25 was arguing malice at the time and talking about the

1 threat to kill. With the intent to go there and kill is
2 what I understood the argument to be. But I'll be glad to
3 listen to it.

4 Do you believe you heard her say that there was
5 testimony in this case that Randy Frady threatened to
6 kill?

7 MR. ALLEN: Not testimony. That he had gone there
8 before and threatened to kill. Not gone there before
9 based on the warrant and offered to do bodily harm, but
10 had gone there and threatened to kill. And I do believe
11 that would be in the audio.

12 THE COURT: All right. Solicitor, I'll be happy to
13 hear from you.

14 MS. HERVEY: The assault was defined as an offer to
15 do bodily harm. There's no person on this jury that
16 believes Randy Frady went to that house and said, I offer
17 to do you bodily harm. They knew what assault was. That
18 was a reasonable inference from those facts. It could
19 have been a threat of harm of any kind, including that
20 threat.

21 So a reasonable deduction of that threat based on the
22 fact that contemporaneously, he is discussing how to kill
23 him with Kevin Comer. And the State feels that is a
24 reasonable inference based on those two facts put
25 together. And Kevin Davis never said that Randy Frady

1 offered -- stated, I offered to do you bodily harm. He
2 charged him with assault. And that's how it's define.
3 That's a reasonable inference from those facts. And I'm
4 allowed to argue it. It's no different than Mike Harper
5 saying his van was missing and I could argue it was
6 stolen.

7 THE COURT: What I'm asking you is, Solicitor, in
8 your argument -- because at the time it was made -- and I
9 overruled the objection. Did you state to the jury that
10 Randy Frady previous to this incident threatened to kill
11 the victims? Did you say that or do I need to listen to
12 it?

13 MS. HERVEY: No. I said that he -- I didn't say a
14 witness said that. But I said he had been over there
15 threatening to kill.

16 THE COURT: You said what now?

17 MS. HERVEY: That he had been over there threatening
18 to kill them and threatening to harm them.

19 THE COURT: Find me that point in her argument and
20 let me hear it.

21 THE COURT REPORTER: Yes, sir.

22 THE COURT: We'll take five minutes.

23 MS. HERVEY: Your Honor, can I put something on the
24 record, too?

25 THE COURT: Yes, ma'am.

1 MS. HERVEY: We had -- and I was very cordial about a
2 little hearing yesterday about his paralegal putting
3 photographs from Ira Parnell up on that thing. And it was
4 all, well, we're going to admit it later, so no harm, no
5 foul. And then ten minutes later, we don't admit it.

6 And, now, he's up there going, well, you never saw
7 those photographs, which would be one thing if the jury
8 had never seen them, but he put them up there. And I
9 think that that's improper.

10 Now, I didn't object because it isn't an argument
11 about the photographs. But I do think it creates a whole
12 different level of impropriety on the part of Defense
13 Counsel to put photographs up on a wall the jury can see
14 and then suggest that the Prosecution was somehow hiding
15 from them when that was their evidence. And it casts a
16 different light on it. Yesterday, that was fine. But
17 when you argue in closing argument, it puts a whole
18 different --

19 THE COURT: What relief are you asking this Court to
20 give you, Solicitor, by making this argument?

21 MS. HERVEY: Well, Your Honor --

22 THE COURT: You're objecting to it after the fact.
23 We discussed this yesterday.

24 Are you objecting that his argument was improper?

25 MS. HERVEY: No. I'm saying that his conduct

1 yesterday becomes improper when he argues that to the
2 jury.

3 THE COURT: I think that's fair argument. That
4 objection is overruled.

5 Anything further?

6 MS. HERVEY: Nothing, Your Honor.

7 THE COURT: I want to hear the part of the
8 Solicitor's argument.

9 We'll take five minutes.

10 (WHEREUPON, a break was taken.)

11 THE COURT: Let the record reflect that I have
12 listened now to the tape from the court reporter
13 concerning the arguments of the Solicitor.

14 My understanding of that tape -- and I played it for
15 both lawyers in chambers. My understanding is that the
16 Solicitor made an argument that there was a 911 call made
17 in which the Defendant -- or in which the victims -- or it
18 was inferable that the victim stated the Defendant had
19 threatened to kill them. And that was the reason for
20 Mr. Allen's objection. I understood the objection at the
21 time to be that the Solicitor was arguing just general
22 threat. I thought she was arguing it under maliciousness.

23 There is no evidence in this case of a 911 call.
24 And, specifically, I ruled in chambers during the course
25 of this trial that the substance of the assault warrants,

1 which contained -- the warrant itself contained a threat
2 to kill -- was not admissible as hearsay because the
3 people that provided the information to the officers are
4 deceased and not available for cross-examination. The
5 Counsel for Defendant has advised me in chambers that they
6 want to object on the basis that the Solicitor's argument
7 went outside the bound of evidence that was admitted to
8 the jury. I sustain that objection. I change my ruling
9 and sustain it.

10 I have offered Counsel for the Defendant a curative
11 instruction, which he consents to. And that instruction
12 being that I will bring the jury back before my charge and
13 tell the jury that to the extent that any argument
14 concerning a 911 call by the Solicitor is not in evidence
15 and they are to disregard that argument.

16 Previously, Counsel for the Defendant moved for a
17 mistrial on that basis. I denied that motion. And I
18 continue to deny the motion for a mistrial. And my reason
19 is that there is evidence from Mr. Comer of a previous
20 inference to do bodily harm to the victims in this case.
21 I think that's proper argument. I don't think it rises to
22 the level of prejudice that would require this Court to
23 grant a mistrial. I decline to grant a mistrial. But I
24 will give a curative instruction.

25 MR. ALLEN: Yes, sir.

1 THE COURT: Have I accurately set forth what we
2 discussed in chambers insofar as the State is concerned?

3 MS. HERVEY: Yes. And I thank you for not playing
4 the tape.

5 THE COURT: Pardon?

6 MS. HERVEY: I said, yes, and I thank you for not
7 playing the tape.

8 THE COURT: Have I accurately set forth what we
9 discussed in chambers from Counsel for the Defendant?

10 MR. ALLEN: You have, Your Honor.

11 THE COURT: Very well.

12 Sir, would you bring us the jury, please, sir?

13 (WHEREUPON, the jury came into open court at
14 approximately 11:53 a.m.)

15 CHARGE ON THE LAW

16 THE COURT: Madam Foreperson, and, ladies and
17 gentlemen of the jury, as I told you at the outset of the
18 trial, what the attorneys tell you in closing argument is
19 not evidence. They've worked real hard to prepare the
20 case for their respective clients and I, certainly, want
21 you to listen very carefully to them. But what the
22 attorneys tell you in closing argument or opening
23 statement is not evidence.

24 During the course of the argument, an objection was
25 made to an argument by the State being made outside the

1 scope of the evidence. To the extent that any argument by
2 the State concerning a 911 call was made by the State's
3 Counsel during closing argument, I instruct you not to --
4 to disregard that and not consider that in any way in your
5 deliberations in connection with this case.

6 Ladies and gentlemen of the jury, it is now my duty
7 to charge you on the law of this case. As you know, the
8 State has charged the Defendant, James Randolph Frady, on
9 six indictments with six different and specific crimes.
10 The indictments in this case charge the Defendant, James
11 Randolph Frady, with two counts of murder, one indictment
12 for first degree burglary, one for possession of a weapon
13 during the commission of a violent crime, grand larceny,
14 and arson in the second degree.

15 I remind you that the fact that the Defendant was
16 arrested, the fact that the Defendant was charged, the
17 fact that the Defendant was indicted in this case with
18 each of the six indictments is not evidence in this case,
19 nor does it create any presumption or inference of guilt.
20 The indictments, these documents, are simply the formal
21 written instruments which contain the charges made against
22 the Defendant. They are the formal documents by which the
23 case is brought into this Court.

24 To these six indictments, the Defendant has pled not
25 guilty. And that plea of not guilty puts the burden on

1 the State of South Carolina to prove the Defendant guilty
2 beyond a reasonable doubt. A person charged with
3 committing a criminal offense in South Carolina is never
4 required to prove himself or herself innocent. I charge
5 you, ladies and gentlemen of the jury, that it is an
6 important rule of the law that the Defendant in a criminal
7 trial, no matter what the seriousness of the charge may
8 be, will always be presumed to be innocent of the crime
9 for which the indictment was issued unless guilt has been
10 proven by evidence satisfying you of that guilt beyond a
11 reasonable doubt.

12 This presumption of innocence, ladies and gentlemen
13 of the jury, does not end when you begin your
14 deliberations. But it accompanies the Defendant
15 throughout the trial until you, as a jury, reach a verdict
16 of guilt based on evidence satisfying you of that guilt
17 beyond a reasonable doubt. The presumption of innocence
18 is not a mere legal theory. It is not just a legal
19 phrase. It is a substantial right to which every
20 defendant is entitled unless you, the jury, are satisfied
21 from the evidence of the Defendant's guilt beyond a
22 reasonable doubt.

23 What is a reasonable doubt in the law? A reasonable
24 doubt is the kind of doubt that would cause a reasonable
25 person to hesitate to act. The State has the burden of

1 proving the Defendant guilty beyond a reasonable doubt.

2 Some of you may have served as jurors in civil cases where
3 you were told that it is only, in a civil case, necessary
4 to prove that a fact is more likely true than not true.

5 Such as by what we call the greater weight of the evidence
6 or the preponderance of the evidence in a civil case. In
7 a criminal case, like this case, ladies and gentlemen, the
8 State's proof must be more than that. It must be beyond a
9 reasonable doubt.

10 I remind you that during this trial, you and I have
11 had certain duties to perform. As the trial judge, it has
12 been my responsibility to preside over the trial of this
13 case. And I also have the duty to rule on the
14 admissibility of the evidence offered during this trial.
15 You are to consider, ladies and gentlemen of the jury,
16 only the competent evidence before you. If there was any
17 testimony ordered stricken from the record or any argument
18 ordered stricken from the record during this trial, you
19 must disregard that testimony or argument. You are to
20 consider only the testimony which has been presented from
21 the witness stand, any exhibits which have been made a
22 part of the record in this case, and any stipulations of
23 Counsel which have been published to you during the trial
24 of this case.

25 I have the additional duty, ladies and gentlemen, to

1 charge you the law applicable to this case. As the
2 presiding judge, as I told you at the outset of the trial,
3 I'm the sole judge of the law of the case. And it is your
4 duty, as jurors, to accept and apply the law exactly as I
5 now state it to you. If any of you have any idea as to
6 what you think the law is or what you may feel the law
7 ought to be and it does not now agree with what I now tell
8 you the law is, you must abandon your preconceived ideas
9 or opinions. Because you are, as jurors, sworn under the
10 oath, which each of you took, to accept the law and apply
11 the law exactly as I now state it to you.

12 In every case tried in this courtroom before a jury,
13 the jury becomes the sole and the exclusive judge of the
14 facts in the case. A trial judge, such as myself, cannot
15 intimate, state, comment on, or make any comment or
16 statement to a trial jury, such as you, ladies and
17 gentlemen, about the facts in a case. Since you, the
18 jury, in this case are the sole judges of the facts in
19 this case, you are not to infer from what I've said during
20 the progress of this trial in ruling upon the
21 admissibility of evidence, or otherwise, or anything that
22 I say to you now during the course of this final charge to
23 you on the law that I have any opinion whatsoever about
24 the facts in this case. The law does not allow me to have
25 an opinion about the facts in this case. This is a matter

1 solely for you, the jury, to determine.

2 As jurors, ladies and gentlemen, it is your duty to
3 determine the effect, the value, the weight, and the truth
4 of any evidence offered during the trial of this case.
5 Because you and you alone are the sole judges of the facts
6 in this case. And no one else but you will be permitted
7 to weigh the evidence, to consider the evidence, and
8 render a verdict based solely upon the evidence which is
9 introduced during the trial of this case.

10 There are two types of evidence which are generally
11 presented during a trial. We have names for those types
12 of evidence, ladies and gentlemen. We call the types of
13 evidence direct evidence and circumstantial evidence.

14 Direct evidence is testimony of a person who claims
15 to have actual knowledge of a fact, such as an eyewitness.
16 Direct evidence is evidence which immediately establishes
17 the main fact to be proved.

18 Circumstantial evidence, as contrasted with direct
19 evidence, is proof of a chain of facts and circumstances
20 indicating the existence of a fact. Circumstantial
21 evidence is evidence which immediately establishes
22 collateral facts from which the main fact may or may not
23 be inferred. Circumstantial evidence is based on
24 inference and not on personal knowledge or personal
25 observation.

1 The law makes absolutely no distinction between the
2 weight or value to be given to either direct evidence or
3 circumstantial evidence. Nor is a greater degree of
4 certainty required of circumstantial evidence than of
5 direct evidence.

6 You should, as a jury, ladies and gentlemen, weigh
7 all the evidence in this case, consider all the evidence
8 in this case. After weighing and considering all the
9 evidence in this case, if you are not convinced of the
10 guilt of the Defendant beyond a reasonable doubt, you must
11 find the Defendant not guilty. On the other hand, after
12 weighing and considering all the evidence in this case, if
13 you're convinced of the guilt of the Defendant beyond a
14 reasonable doubt, you must find the Defendant guilty.

15 Necessarily, ladies and gentlemen, you must, as a
16 jury, determine the credibility or believability of the
17 witnesses who have testified during the trial of the case.
18 Credibility simply means believability, ladies and
19 gentlemen. It becomes your duty, as jurors, to analyze
20 and to evaluate the evidence and determine which evidence
21 convinces you of its truth.

22 In determining the believability of the witnesses who
23 have testified in this case, you may believe one witness
24 over several witnesses or you may believe several
25 witnesses over one witness. You may believe a part of the

1 testimony of a witness and reject the remaining part of
2 the testimony of that same witness. You may believe a
3 witness in its entirety. You may reject a witness'
4 testimony in its entirety. You may believe part and
5 reject the remaining part. You may consider, also in
6 determining the believability or credibility of the
7 witness, whether any witness has exhibited to you any
8 interest, any bias, any prejudice, or other motive in this
9 case. You may also even consider the appearance and
10 manner of the witness while the witness was on the witness
11 stand. We refer to that as the demeanor of the witness.

12 I charge you, ladies and gentlemen, that the rules of
13 evidence ordinarily do not permit witnesses to give
14 testimony as to opinions or conclusions. An exception to
15 our opinion rule exists for witnesses we call expert
16 witnesses.

17 A witness who by some education, training, or
18 experience has become an expert in some art, science,
19 profession, or calling, if qualified to do so by the
20 Court, may state an opinion as to relevant and material
21 matter in which the witness claims to be an expert and may
22 also state the reasons for his or her opinion, if
23 qualified as an exception to our opinion rule.

24 You should consider any expert opinion received in
25 evidence in this case, and like any other evidence, give

1 it the weight, ladies and gentlemen, you think it
2 deserves. If you decide that the opinion of an expert
3 witness is not based on sufficient education, training, or
4 experience, or if you conclude that the reasons given in
5 support of an expert's opinion are not sound or that the
6 opinion is outweighed by other evidence, you may disregard
7 the expert opinion entirely. An expert witness' testimony
8 is to be given no greater weight than that of other
9 witnesses simply because the witness is an expert. You're
10 not required to accept an expert's opinion even though it
11 is not contradicted.

12 I charge you, ladies and gentlemen, that a statement
13 alleged to have been made by the Defendant has been
14 admitted into evidence in this case. While the Court has
15 determined that a statement is admissible, as a matter of
16 law, I instruct you that you make the ultimate decision,
17 ladies and gentlemen of the jury, of whether or not the
18 Defendant made any statement. That is up to you based on
19 evidence introduced during the trial of the case.

20 If the Defendant did make a statement, you must
21 determine also whether the statement was made by the
22 Defendant voluntarily and of his own free will. This
23 means that the statement was not caused by pressure, or
24 force, or fear, or threats, or coercion, or intimidation,
25 or by hope or promise of leniency or reward of any kind.

1 In determining whether the statement was voluntary,
2 you should consider both the characteristics of the
3 Defendant and the details of the question. Some of the
4 factors that you may consider, if supported by evidence
5 introduced during the trial of this case, are the age of
6 the Defendant, the Defendant's education or lack of
7 education, the Defendant's mental ability or capacity, the
8 Defendant's intelligence, the Defendant's background and
9 environment, the place and length of detention, the nature
10 of the questioning, and the advice or lack thereof to the
11 Defendant of his Constitutional rights, including, but not
12 limited to, the right to remain silent, that any statement
13 could be used against him in a court of law, the right to
14 have a lawyer present, that if he could not afford a
15 lawyer, a lawyer would be appointed to represent him
16 without any cost and that he could stop making a statement
17 at any time.

18 You must carefully consider all of the surrounding
19 circumstances before you give any weight to any alleged
20 statement based on evidence introduced during the trial of
21 the case. The State has the burden of proving beyond a
22 reasonable doubt that the alleged statement was made and
23 was voluntary. If you determine it was, you may give the
24 statement any further consideration that you deem proper.
25 You must decide, as a jury, what weight, if any, should be

1 given to the alleged statement. If you determine that the
2 alleged statement having been made was not the free and
3 voluntary statement of the Defendant, you should not
4 consider the statement at all.

5 I instruct you, ladies and gentlemen of the jury, and
6 emphasize to you that the fact that the Defendant did not
7 testify in this case is not a factor to be considered by
8 you in any way in your deliberations and in your
9 consideration on the question of the guilt or innocence of
10 the Defendant. It must not be considered by you in any
11 manner whatsoever.

12 A Defendant has the Constitutional right to remain
13 silent. And the assertion of this right must not be
14 considered by you in your deliberations. I repeat, under
15 the oath which each of you took as jurors, you're to draw
16 no conclusion whatsoever from the fact that the Defendant
17 in this case did not testify. The fact that the Defendant
18 did not testify should not even be discussed in your jury
19 room. The burden of proof, as I've stated to you, is on
20 the State. The Defendant is not required to prove his or
21 her innocence. The burden of proof remains on the State
22 to prove guilt beyond a reasonable doubt.

23 Now, in order to establish criminal liability,
24 criminal intent is required. For example, the mental
25 state required to be proven by the State for a particular

1 crime might be, by way of example, purpose, or intent, or
2 knowledge, or recklessness, or malice, or even, by some
3 examples, what we call criminal negligence. Criminal
4 intent must be proven by the State beyond a reasonable
5 doubt. Criminal intent is always a matter that must be
6 determined by the jury from the circumstances surrounding
7 the situation based on evidence introduced during the
8 trial of a case.

9 There is no way, ladies and gentlemen of the jury, to
10 prove intent to a mathematical certainty. There is no way
11 medical science can dissect a person's brain and determine
12 what the person had in mind. So the law says that
13 criminal intent may be inferred from the circumstances
14 shown to have existed based on evidence introduced during
15 the trial of this case.

16 This is how, ladies and gentlemen of the jury, you
17 make a determination of whether or not any element in a
18 particular crime requiring intent was present. It is not
19 necessary, ladies and gentlemen, for you to establish or
20 for the State to establish intent by direct and positive
21 evidence. But intent may be established by inference in
22 the same way as any other fact by taking into
23 consideration the acts of the parties and all the facts
24 and circumstances of the case based on evidence introduced
25 during the trial of the case.

1 Criminal intent is a mental state, a conscious
2 wrongdoing. It is up to you, as a jury, from evidence
3 introduced during the trial of the case to determine what
4 the Defendant intended to do based on the circumstances
5 shown to have existed from evidence in the trial of the
6 case. Criminal intent can arise from an action or a
7 failure to act. It may arise from negligence,
8 recklessness, or an indifference to duty, or to
9 consequences that are considered, by the law, to be the
10 equivalent of criminal intent.

11 I charge you, ladies and gentlemen of the jury, that
12 the indictments in this case -- and there are six --
13 allege several different offenses against the Defendant.
14 The charges are indictment number one, arson second
15 degree; indictment number two, grand larceny; indictment
16 number three, the murder of James C. Frady, Jr.;
17 indictment number four, the murder of Barry Frady;
18 indictment number five, possession of a weapon during the
19 commission of a violent crime; and indictment number six,
20 burglary first degree.

21 You will be asked, ladies and gentlemen, by this
22 Court, as a jury, to write a separate verdict of guilty or
23 not guilty for each indictment. I charge you, however,
24 that in order to find the Defendant guilty of possession
25 of a weapon during the commission of a violent crime, you

1 must first find the Defendant guilty of committing a
2 violent crime. I charge you, ladies and gentlemen of the
3 jury, that murder, burglary in the first degree, and arson
4 in the second degree, are violent crimes under the laws of
5 the State of South Carolina.

6 As to the first indictment, arson second degree. In
7 order to prove second degree arson, the State must prove
8 beyond a reasonable doubt that the Defendant willfully and
9 maliciously caused an explosion, set fire to, burned,
10 caused to be burned, aided, counseled or procured the
11 burning that results in damage to a dwelling house.

12 Under this indictment, the word willfully means that
13 it was not done by accident, but was done knowingly or
14 intentionally. It must be shown that the burning was by
15 the willful act of some person and not as a result of a
16 natural or accidental cause.

17 Maliciously, for purposes of arson in the second
18 degree, means with hatred, ill will, or hostility towards
19 another person. A person who intentionally does a
20 wrongful act without legal justification or excuse does
21 the act maliciously. A malicious burning is an act done
22 with a condition of mind that shows a heart bent on
23 mischief, showing a design to do an intentional wrong act
24 toward another or toward the public without any legal
25 justification or without any legal excuse. This malice

1 that I'm talking about need not be expressed, but may be
2 implied. And I will define that for you in a moment.

3 For purposes of arson in the second degree, damage
4 means an application of fire or explosive that results in
5 burning, charring, blistering, scorching, smoking,
6 singeing, discoloring, or changing the fiber or
7 composition of a structure. Next for arson in the second
8 degree, the State must prove beyond a reasonable doubt
9 that the property which was burned was a dwelling house.
10 I charge you that a dwelling house is a building in which
11 a person ordinarily sleeps.

12 Grand larceny. The Defendant is also charged in an
13 indictment for grand larceny. The State must prove beyond
14 a reasonable doubt that the Defendant took and carried
15 away the property of another against the will or without
16 the consent of the other person. Grand larceny is the
17 taking and carrying away of the property of another
18 against the will or without the consent of the other
19 person with the intent to permanently deprive the owner of
20 the property.

21 To be grand larceny, ladies and gentlemen of the
22 jury, the State must prove beyond a reasonable doubt that
23 the value of the property taken must have been \$1,000 or
24 more. The slightest removal of the property or the
25 complete possession of the property, even for an instant

1 by the Defendant, is enough to show a taking and carrying
2 away of the property. The State must prove beyond a
3 reasonable doubt that the Defendant intended to
4 permanently deprive the owner of the property. The State
5 must prove beyond a reasonable doubt that the value of the
6 thing taken was \$1,000 or more for purposes of the
7 indictment or offense for grand larceny.

8 First degree burglary. The Defendant is charged in
9 an indictment with first degree burglary. The State must
10 prove beyond a reasonable doubt that the Defendant entered
11 a dwelling without consent. A dwelling is any building or
12 portion of a building in which a person ordinarily sleeps.
13 A building constructed as a dwelling that has never been
14 occupied cannot be considered a dwelling for purposes of
15 burglary. But a building is a dwelling even if the
16 residents are temporarily absent from the building, or a
17 dwelling is a building in which a person ordinarily
18 sleeps.

19 In order to prove that the Defendant entered the
20 dwelling, the State does not have to show that Defendant's
21 entire body entered the dwelling. The smallest entry is
22 sufficient. It may be any part of the body, such as a
23 hand, or foot, or even an instrument. In addition, the
24 State does not have to prove that force was used to gain
25 entry for purposes of burglary. If a person enters a

1 building by using deception, or trick, or
2 misrepresentation to get consent to enter, this is an
3 entry without consent.

4 Next, for the offense of burglary, the State must
5 prove beyond a reasonable doubt that the Defendant
6 intended to commit a crime, either a felony or
7 misdemeanor, at the time of the entry. The mere entry
8 into a dwelling without consent is not burglary. If the
9 intent to commit a crime is formed after the entry, it is
10 not burglary.

11 On the other hand, if the Defendant intended to
12 commit a crime at the time of the entry, it is burglary,
13 even if the intent was abandoned after the entry. It does
14 not matter that the intended crime was not completed.
15 Intent may be shown, as I instructed you earlier, by the
16 acts and the conduct of the Defendant and other
17 circumstances from which you may naturally and reasonably
18 infer intent based on evidence introduced during the trial
19 of the case.

20 Finally, for burglary, the State must prove beyond a
21 reasonable doubt that when entering, while in the dwelling
22 or when fleeing, the Defendant caused physical injury to
23 anyone not participating in the crime of burglary.

24 Possession of a weapon during the commission of a
25 violent crime. The Defendant is charged in an indictment

1 with possession of a weapon during the commission of a
2 violent crime. For this offense, the State must prove
3 beyond a reasonable doubt that the Defendant was in
4 possession of a weapon during the commission of a violent
5 crime. A weapon would include any machine gun, rifle,
6 revolver, pistol, or any weapon which will or is designed
7 to or may be readily converted to expel a projectile.

8 In order to find the Defendant guilty of possession
9 of a weapon during the commission of a violent crime, you
10 must first find the Defendant guilty of committing a
11 violent crime. I charge you again, ladies and gentlemen
12 of the jury, that murder, second degree arson, and first
13 degree burglary are violent crimes under the laws of the
14 State of South Carolina.

15 Murder. The Defendant is charged in two indictments
16 in this case for the offense of murder. The State must
17 prove for the offense of murder beyond a reasonable doubt
18 that the Defendant killed another person with malice
19 aforethought. Malice is hatred, ill will, or hostility
20 towards another person. It is the intentional doing of a
21 wrongful act without just cause or excuse and with an
22 intent to inflict an injury or under circumstances that
23 the law will infer an evil intent.

24 Malice aforethought does not require that the malice
25 exist for any particular time before the act is committed.

1 But malice must exist in the mind of the Defendant just
2 before and at the time of the act. Therefore, there must
3 be a combination of the previous evil intent and the act.

4 Malice aforethought may be expressed or implied.
5 These terms expressed and implied do not mean different
6 kinds of malice, but merely the manner in which malice may
7 be shown to exist. That is either by direct evidence or
8 by an inference from the facts and circumstances which are
9 proved based on evidence introduced during the trial of
10 the case.

11 Expressed malice is shown when a person speaks words
12 which express hatred or ill will for another, or when the
13 person prepared beforehand to do the act which was later
14 accomplished. For example, lying in wait for a person or
15 any other acts of preparation going to show that the deed
16 was within the Defendant's mind would be expressed malice.
17 Malice may be inferred from conduct showing a total
18 disregard for human life. Inferred malice may arise when
19 the deed is done with a deadly weapon. A deadly weapon is
20 any article, instrument, or substance which is likely to
21 cause death or great bodily harm. Whether an instrument
22 has been used as a deadly weapon depends on the facts and
23 circumstances of each case.

24 Ladies and gentlemen of the jury, I have now charged
25 you on the law in order to help you and guide you to a

1 fair and a just result in this case. You are, ladies and
2 gentlemen, the judges of the facts in this case. And so
3 based on your determination of the facts in this case and
4 the law as I've explained it to you, you will soon begin
5 your deliberations.

6 You have been selected, ladies and gentlemen, as fair
7 and impartial jurors. You were sworn to fairly and
8 impartially try and determine the facts of this case. And
9 when you comply with your oath to do so, no one can
10 criticize your verdict. You are to decide this case
11 solely upon the evidence and testimony in this case that
12 you have heard, that is from the sworn witnesses who have
13 testified before you, along with all the other evidence,
14 exhibits that may have been presented to you, which you
15 will have with you, and any stipulations that were entered
16 into and nothing else.

17 You must decide the issues in this proceeding without
18 any bias and without any prejudice toward either party.
19 You cannot allow yourself to be governed by prejudice for
20 or against any person by public opinion or any other
21 arbitrary factor not found in the evidence. Both the
22 Defendant and the State of South Carolina have the right
23 to expect that each of you will carefully and impartially
24 consider all the evidence in this case, and that you will
25 follow the law as I've instructed it to you in reaching

1 your verdict in this case,

2 Now, Madam Foreperson, I told you I would give you
3 instructions about how to write the jury's verdict.

4 Pay absolutely no attention, ladies and gentlemen of
5 the jury, to the order in which I wrote the verdict on the
6 verdict forms. We, obviously, had to write one before the
7 other. And the order has no significance whatsoever.

8 I have six verdict forms for you, Madam Foreperson.
9 And I'll start with the first one because each one has a
10 similar title with a different case number.

11 At the top of each verdict form, you will see the
12 words "State of South Carolina, County of Oconee," then
13 you will see to the right "Court of General Sessions,"
14 which I told you means criminal court in South Carolina.
15 And underneath, it has an indictment number, which
16 identifies the indictment number. Then it has in the
17 caption at the top on each verdict form, "the State of
18 South Carolina v. James Randolph Frady, Defendant." And
19 to the right, it has the words "Verdict."

20 Underneath that caption, I have placed the words for
21 you, "We, the jury, by unanimous consent, find the
22 Defendant, James Randolph Frady," and the first form of
23 verdict on this indictment, which happens to be the
24 indictment number for arson in the second degree, it would
25 be "guilty of arson in the second degree." If that be

1 your form of verdict, Madam Foreperson, you would check on
2 the line beside "guilty of arson in the second degree."

3 Under the words, "We, the jury, by unanimous consent
4 find the Defendant, James Randolph Frady," the second form
5 of verdict on this indictment would be "not guilty of
6 arson in the second degree." If that be your form of
7 verdict, you would check, Madam Foreperson, on the line
8 beside "not guilty of arson in the second degree."

9 You must find one form of verdict or the other, you
10 cannot find both. When you have reached a verdict on that
11 indictment, you would check one line or the other, sign
12 your name on the line where it says "Foreperson" and fill
13 in today's date, which is the 31st of August. I missed
14 the date. You would put in the date in the blank and sign
15 your name.

16 Now, as to the indictment for grand larceny, same
17 caption, under the words, "We, the jury, by unanimous
18 consent find the Defendant, James Randolph Frady," the
19 first form of verdict would be "guilty of grand larceny."
20 The second form of verdict would be "not guilty of grand
21 larceny." You would check one form of verdict or the
22 other, sign your name on the verdict form where it says
23 "Foreperson" and fill in today's date being August 31st,
24 2006.

25 As to the verdict form for the murder of James C.

1 Frady, Jr., the verdict form under the words, "We, the
2 jury, by unanimous consent, find the Defendant, James
3 Randolph Frady," the forms of verdict would be guilty of
4 the murder of James C. Frady, Sr. or not guilty of the
5 murder of James C. Frady Jr. You would check one form of
6 the verdict or the other, not both. Sign your name where
7 it says "Foreperson" and fill in today's date.

8 As to the indictment for the murder of Barry Frady,
9 under the words, "We, the jury, by unanimous consent find
10 the Defendant, James Randolph Frady," the forms of verdict
11 would be either guilty of the murder of Barry Frady or not
12 guilty of the murder of Barry Frady. You must find one
13 verdict form or the other. You would check on the line
14 beside the form, sign your name as foreperson and fill in
15 the date.

16 As to the indictment for possession of a weapon
17 during the commission of a violent crime. I remind you of
18 my instructions earlier concerning this offense, you
19 cannot find the Defendant guilty of possession of a weapon
20 during the commission of a violent crime unless you have
21 found the Defendant guilty of committing a violent crime.
22 I charge you that murder, burglary first degree, and arson
23 second degree are violent crimes under the laws of the
24 State of South Carolina.

25 On this indictment for the offense of possession of a

1 weapon during the commission of a violent crime, under the
2 words, "We, the jury, by unanimous consent find the
3 Defendant, James Randolph Frady," are the two forms of
4 verdict, guilty of possession of a weapon during the
5 commission of a violent crime or not guilty of possession
6 of a weapon during the commission of a violent crime.
7 Bearing in mind, ladies and gentlemen, my earlier
8 instructions, you must find one form of verdict or the
9 other, not both. Sign your name, Madam Foreperson, and
10 date it.

11 Finally, for the indictment for burglary in the first
12 degree, same caption, different indictment number,
13 different offense, under the words, "We, the jury, by
14 unanimous consent find the Defendant, James Randolph
15 Frady," either guilty of burglary in the first degree or
16 not guilty of burglary in the first degree. You must find
17 one form of verdict or the other. You cannot find both on
18 each of these verdict forms. And you would check one or
19 the other, not both on the verdict form, sign your name
20 where it says "Foreperson" and fill in the date.

21 When you have reached a verdict, Madam Foreperson,
22 you will --after you have filled out the verdict form,
23 signed your name, dated it, and checked the appropriate
24 form of verdict, you will knock on the jury room door and
25 inform the bailiff you've reached a verdict. And we will

1 then receive you back into the courtroom in order to
2 publish your verdict.

3 Ladies and gentlemen of the jury, I charge you that
4 your verdict must be unanimous. That is, it must be the
5 verdict of each and every one of you.

6 Now, at this time, ladies and gentlemen, I'm going to
7 ask you to retire to your jury room. Please do not begin
8 your deliberations. It may be necessary for me to bring
9 you back in the courtroom for some brief additional
10 instructions.

11 When it is time for you to begin your deliberations,
12 I will send the verdict forms into you, Madam Foreperson,
13 with the bailiff, along with all the exhibits which have
14 been introduced into evidence during the trial of the case
15 and have the bailiff inform you that you may then commence
16 your deliberations. I ask you to retire to your jury room
17 at this time.

18 Would my two alternate jurors, please, remain in the
19 courtroom with me.

20 The rest of the jury may retire to the jury room.

21 (WHEREUPON, the jury was excused from open court at
22 approximately 12:36 p.m.)

23 THE COURT: First of all, on behalf of Oconee County,
24 I want to thank both of you. I watched you during the
25 trial. All a judge can ask of a juror is that you listen,

1 be patient, and listen carefully. Both of you did that.
2 No one else became ill. We did have one that had to go
3 get medical treatment this morning or for some reason
4 could not continue to serve in this case. So this
5 concludes your service in this case. And I am happy to
6 tell both of you, it also concludes your service for the
7 balance of the week. So, at this time, I get to excuse
8 you.

9 Do both of you have your belongings out of the jury
10 room?

11 (Both jurors indicated yes.)

12 THE COURT: Well, at this time, with my blessing and
13 thanks, I'm going to excuse you. If you listened
14 carefully, you now know you're both exempt, if you choose
15 to claim your exemption from jury service, for three
16 years. You're disqualified from serving. And you may
17 never be chosen again. But on behalf of this county and
18 this Court, I thank you for your service. Without you,
19 justice can't ever be accomplished. And I appreciate your
20 willingness to serve. You're excused.

21 I'd like to tell you that I have a check for you, but
22 I'm going to tell you the Clerk is going to tell you that
23 your check is in the mail. I know you've heard that
24 before. We'll be sending that to you at the address you
25 provided us. You may leave the courtroom. I ask that you

1 not go back in the jury room, but leave the courtroom at
2 this time.

3 Thank you very much.

4 (WHEREUPON, the alternate jurors were excused.)

5 THE COURT: Any exceptions our additions to the
6 charge from the State of South Carolina?

7 MS. HERVEY: None.

8 THE COURT: Any exceptions or additions to the charge
9 from the Defendant?

10 MR. ALLEN: No exceptions, Your Honor.

11 We just renew the previous requests.

12 THE COURT: I placed on the record earlier your
13 request to charge the dissent in State v. Cherry and that
14 request is respectfully denied. You've renewed it now at
15 the close of my charge and you're protected for the
16 record.

17 I'd ask that Counsel come forward, both of you, and
18 certify on the record you're satisfied that the court
19 reporter has all the exhibits, and you have no objection
20 to the bailiff taking the exhibits and the verdict forms
21 into the jury, and the bailiff informing the jury they may
22 now commence their deliberations.

23 Do you want to look at the verdict forms again,
24 Counsel, in light of your request that I amend them?

25 MS. WALDREP: No, sir.

1 THE COURT: Thank you so much.

2 Hold on one second. Just one minute, ma'am.

3 Solicitor, are you satisfied that the court reporter
4 has all the exhibits?

5 MS. HERVEY: Yes, Your Honor.

6 THE COURT: And you have no objection to the bailiff
7 taking the exhibits and verdict forms into the jury and
8 the bailiff telling the jury they may commence
9 deliberations?

10 MS. HERVEY: No. There's more left here and I'm sure
11 they'll be back for them.

12 THE COURT: Are you satisfied that the court reporter
13 has all the exhibits, Counsel for the Defendant?

14 MR. ALLEN: Yes, sir.

15 THE COURT: Do you have any objection to the bailiff,
16 taking the exhibits in two trips, as well the verdict
17 forms, into the jury and telling the jury they may
18 commence their deliberations?

19 MR. ALLEN: No, sir. I don't have an objection.

20 THE COURT: Very well. Go ahead.

21 We'll be at ease while we await the jury's verdict.

22 (WHEREUPON, the proceedings were recessed at
23 approximately 12:42 p.m.)

24 THE COURT: I'm going to ask Counsel in the Frady
25 case to approach the bench.

1 It's my understanding the jury has reached a verdict.

2 (WHEREUPON, a bench conference was held.)

3 THE COURT: Ladies and gentlemen, I understand that
4 in the case we've been trying, which is the State v. James
5 Randolph Frady, that the jury has reached a verdict.

6 For those of you that are here, I ask that you,
7 please, don't permit any type of outburst of emotion. If
8 you do not think you can control your emotions at the
9 publishing of the verdict, I ask you to leave the
10 courtroom at this time. Because I won't tolerate any such
11 outbursts. And I would appreciate it if you would take
12 the time to get up and walk out of the courtroom if you
13 feel you cannot do so at this time.

14 Very well. Anything further from the State before we
15 publish the verdict?

16 MS. HERVEY: Nothing from the State.

17 THE COURT: From the Defendant?

18 MR. ALLEN: No, sir, Your Honor.

19 THE COURT: Bring the jury in, please.

20 (WHEREUPON, the jury came into open court at
21 approximately 3:30 p.m.)

22 THE COURT: Madam Foreperson, has the jury reached a
23 verdict?

24 THE FOREPERSON: Yes, sir.

25 THE COURT: If you'll give it to my bailiff, please.

1 You may publish the verdict.

2 THE CLERK: 2004-GS-37 --

3 THE COURT: If the Defendant will, please, rise.

4 VERDICT

5 THE CLERK: 2004-GS-37-2071, the State of South
6 Carolina v. James Randolph Frady, we, the jury, by
7 unanimous consent find the Defendant, James Randolph
8 Frady, guilty of grand larceny.

9 In 2004-GS-37-2078, we, the jury, by unanimous
10 consent find the Defendant, James Randolph Frady, guilty
11 of burglary first degree.

12 2004-GS-37-2070, we, the jury, by unanimous consent,
13 find the Defendant guilty of arson second degree.

14 2004-GS-37-2072, we, the jury, by unanimous consent
15 find the Defendant, James Randolph Frady, guilty of the
16 murder of James C. Frady, Jr.

17 2004-GS-37-2073, we, the jury, by unanimous consent
18 find the Defendant, James Randolph Frady, guilty of the
19 murder of Barry Frady.

20 2004-GS-37-2074, we, the jury, find the Defendant,
21 James Randolph Frady, guilty of possession of a weapon
22 during the commission of a violent crime.

23 Ladies and gentlemen of the jury, if this was your
24 verdict and is still your verdict, please, signify by
25 raising your right hand.

1 (All jurors raised their right hand.)

2 THE CLERK: And the record will reflect that all 12
3 jurors raised their hand.

4 THE COURT: You may be seated.

5 Anything further from the State before I excuse the
6 jury?

7 MS. HERVEY: Nothing from the State, Your Honor.

8 THE COURT: Anything further from the Defendant
9 before I excuse the jury?

10 MR. ALLEN: No, sir, Your Honor.

11 THE COURT: Madam Foreperson, would you come around
12 for me and take the witness stand?

13 Have a seat right there. I need you to sign your
14 name on the indictments before I excuse the jury.

15 Let me tell you what I want you to do. I'm going to
16 give you the pen and under each one, I want you to write
17 your verdict. And I want you to sign your name as
18 foreperson of the jury and date it just like you did on
19 each one of these.

20 THE FOREPERSON: Guilty right here?

21 THE COURT: We'll start with the first one, guilty of
22 arson, sign your name right here and date it.

23 THE FOREPERSON: Okay.

24 THE COURT: Ladies and gentlemen of the jury, so
25 you'll know what I'm doing, this is a housekeeping matter.

1 But I'm having the foreperson confirm the verdicts on the
2 face of the indictments that were published to us.

3 Ladies and gentlemen of the jury, first of all, on
4 behalf of Oconee County and this Court, I want to thank
5 you for your service in the trial of this case. Your
6 service as a juror for this week has now been concluded.

7 Let me tell you, first of all, that you have the
8 absolute right to either refuse to discuss the verdict
9 you've rendered or to discuss the verdict to the extent
10 you so desire. If you choose to discuss the verdict,
11 you're free to terminate such discussions at any point.
12 If the person with whom you're speaking continues to
13 pursue a discussion of the verdict after you have
14 communicated to that person the desire to terminate the
15 discussion, or if a person continues to harass you after
16 you have refused to discuss the verdict, you should report
17 that person to the Clerk of Court, who will contact me.
18 And, as I told you, ladies and gentlemen, I'll take care
19 of that matter for you. So you have the right to discuss
20 it or not as you deem fit. And I wanted you to know that
21 before I excuse you.

22 You know, all the Court can ask, ladies and
23 gentlemen, is that a jury listen. And, as I told my
24 alternate jurors before I excused them today, I watched
25 each of you during the trial and you paid close attention

1 to the evidence. Without you, ladies and gentlemen,
2 justice can never be accomplished in a courtroom.

3 On behalf of Oconee County and this Court, I thank
4 you for that service. This concludes your service for the
5 balance of the week. You're now excused from jury
6 service. And you may leave the courtroom at this time.

7 Thank you very much.

8 (WHEREUPON, the jury was dismissed at approximately
9 3:37 p.m.)

10 THE COURT: All right. Counsel, if you have the
11 sheets prepared, would the Defendant and Counsel, as well
12 as the Solicitor, come around for sentencing?

13 MS. HERVEY: Thank you, Your Honor.

14 Here are the sentencing sheets.

15 THE COURT: All right. Mr. Allen, I've heard the
16 evidence in this case. The jury has spoken. The verdict
17 has been returned. I'll be happy to hear from you.

18 MR. ALLEN: May it please the Court, Your Honor?

19 Just briefly, Randy is 42 years old. Randy is a high
20 school graduate, Your Honor. He is single and he has no
21 children. The only family I know of that he has are his
22 grandparents, Jim and Irene Frady. And that would be it,
23 Your Honor.

24 And he's -- excuse me. He has been in custody since
25 September the 23rd of 2004.

1 THE COURT: Well, Solicitor, before I turn to you.

2 Mr. Frady, is there anything you would like to tell
3 me before sentencing?

4 DEFENDANT FRADY: No, sir.

5 THE COURT: Solicitor, any prior record?

6 MS. HERVEY: Yes, Your Honor.

7 He does have a prior record that dates back to 1983.
8 A lot of it is for magistrate level assaults and things
9 you heard about during the trial, those type things, but
10 he was, actually, convicted of those.

11 He's also been convicted of criminal mischief, of
12 eluding officers, of obstructing justice, Your Honor. He
13 has some traffic, a possession of drug paraphernalia, Your
14 Honor. And I apologize, but it's not all South Carolina,
15 Your Honor. His record is also from Florida.

16 He has a conviction for shooting at or within or into
17 a building in 2003 in Florida. He has that simple assault
18 here in Oconee County as well, a malicious damage to
19 personal property, carrying a pistol, driving under the
20 influence, an open container. And he had a 2004 driving
21 under the influence, unlawful turning, and possession of
22 marijuana. And he was convicted of those in early 2004,
23 Your Honor, as to his prior record.

24 And if I could be heard just briefly before
25 sentencing. Your Honor, this is a double homicide. This

1 tore apart a family that's been a member of the Oconee
2 County community. As Mr. Frady told you, he's lived here
3 all of his life. That's about some 90 odd years. This
4 individual killed his son and took his other grandson.
5 And he did this, not only as an insult to those people,
6 but an insult to the grandfather who had taken care of him
7 most of his life.

8 And, Your Honor, this is a horrible crime that left
9 this community turned on end. We feel that the maximum
10 sentence ought to be imposed on each count.

11 THE COURT: Anything further from the Defendant,
12 Mr. Allen?

13 MR. ALLEN: No, sir, Your Honor.

14 THE COURT: Anything further the State?

15 MS. HERVEY: Nothing, Your Honor.

16 SENTENCING

17 THE COURT: On indictment 2004-GS-37-2072, the State
18 v. James Randolph Frady, indictment for murder, the
19 sentence of this Court is the Defendant is committed to
20 the State Department of Corrections for a term of life
21 imprisonment.

22 On indictment 2004-GS-37-2073, the State v. James
23 Randolph Frady, the sentence of this Court is the
24 Defendant is committed to the State Department of
25 Corrections for a term of life imprisonment.

1 On indictment 2004-GS-37-2070, arson second degree,
2 the sentence of this Court is the Defendant is committed
3 to the State Department of Corrections for a term of 25
4 years.

5 On indictment 2004-GS-37-2071, the State v. James
6 Randolph Frady, grand larceny. The sentence of this Court
7 is the Defendant is committed to the State Department of
8 Corrections for a term of five years.

9 On indictment 2004-GS-37-2074, the State v. James
10 Randolph Frady, possession of a weapon during the
11 commission of a violent crime, the sentence of this Court
12 is the Defendant is committed to the State Department of
13 Corrections for a term of five years.

14 Finally, on indictment 2004-GS-37-2078, the State v.
15 James Randolph Frady, indictment for burglary first
16 degree, the sentence of this Court is the Defendant is
17 committed to the State Department of Corrections for a
18 term of 30 years.

19 Those sentences will run concurrent to each other.

20 This Court stands adjourned as to this case.

21 *****END OF TRANSCRIPT OF RECORD*****
22
23
24
25

CERTIFICATE OF REPORTER

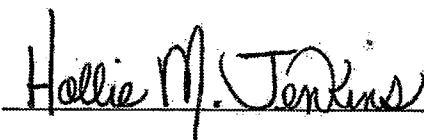
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Oconee County, South Carolina, on the 29th, 30th, and 31st days of August, 2006.

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

February 5, 2007

A handwritten signature in cursive script that reads "Hollie M. Jenkins". The signature is written in dark ink and is positioned above a horizontal line.

Hollie M. Jenkins, Court Reporter

My Commission Expires: 11-17-10

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES RANDOLPH FRADY,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

JOSEPH L. SAVITZ, III
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES**Cases**

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<i>State v. Gregory</i> , 198 S.C. 98, 16 S.E.2d 532 (1941)	5

STATEMENT OF ISSUE ON APPEAL

The trial judge committed reversible error by precluding the defense from introducing evidence of, and arguing, third-party guilt, as his ruling violated both *Holmes v. South Carolina*, 547 U.S. 319 (2006), and *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941).

STATEMENT OF FACTS

On August 28 through 31, 2006, James Randolph Frady stood trial in Oconee County, before Judge Perry M. Buckner and a jury, on indictments charging him with two counts of murder, first-degree burglary, grand larceny, second-degree arson and possession of a weapon during the commission of a violent crime. The victims were Frady's father and brother, who were both killed with a shotgun that belonged to Frady. ROA p. 497, lines 19-22; ROA p. 728, lines 10-23; ROA p. 731, lines 14-25. The judge prevented Frady from pursuing a defense of third-party guilt. (That error forms the basis of this appeal.) Frady himself did not testify. The jury found him guilty as charged, and the judge sentenced him to concurrent terms of life imprisonment for murder, thirty years for burglary, twenty-five years for arson and five years for both grand larceny and possession of a weapon during the commission of a violent crime.

ARGUMENT

The trial judge committed reversible error by precluding the defense from introducing evidence of, and arguing, third-party guilt, as his ruling violated both *Holmes v. South Carolina*, 547 U.S. 319 (2006), and *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941).

The judge granted the Assistant Solicitor's motion to preclude the defense from introducing evidence of, and arguing, third-party guilt. ROA p. 638, line 17 – p. 646, line 7. Specifically, the defense would have argued that an individual named Michael Harper was the likely perpetrator of the crimes for which Frady was on trial. After all, Harper's van was seen near the victim's residence about the time the fatal shots were fired. ROA p. 254, lines 8-13; ROA p. 265, line 11 – p. 266, line 24. Harper reported it stolen shortly thereafter, but told the officer who responded minutes later that he found it on his own. ROA p. 270, line 15 – p. 272, line 4.

The judge prevented the defense from introducing evidence that Harper had a financial motive for wishing the victims ill and had been barred from their property. ROA p. 630, line 12 – p. 637, line 2. The judge ruled that this evidence raised only a suspicion that Harper was the perpetrator. ROA p. 646, lines 14-18. He also held that defense counsel had sufficiently preserved the record for appellate review. ROA p. 646, lines 19-21.

The leading case on third-party guilt in South Carolina remains *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). There, the Supreme Court articulated:

[E]vidence which can have [no] other effect than to cast a
~~(bare suspicion upon another, or to raise a conjectural~~
 inference as to the commission of the crime by another is not
 admissible [B]efore such testimony can be received,
 there must be such proof of connection with it, such a train of
 facts or circumstances, as tends clearly to point out such other

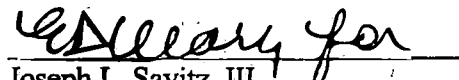
person is the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proof for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

16 S.E.2d at 534-35. In *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006), the United States Supreme Court rejected "the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak." See, also, *State v. Rice*, S.C. Ct. App. Opinion No. 4300, filed October 5, 2007.

Harper had both the motive and the opportunity to murder the victims. The fact that Frady owned the shotgun – the method – that most likely caused their deaths was not a sufficient ground to exclude evidence and argument that Harper was the guilty party. *Holmes v. South Carolina*.

For this reason, the Court should reverse Randy Frady's convictions and remand for a new trial.

Respectfully submitted,


 Joseph L. Savitz, III
 Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of November, 2007.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County
Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES RANDOLPH FRADY,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for James Randolph Frady states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Perry M. Buckner, which was held on 8-28 - 31-06, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for James Randolph Frady.

Respectfully submitted,


Joseph L. Savitz, III
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of November, 2007.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

November 29, 2007


Joseph L. Savitz, III
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, SC 29211-1589
803) 734-1343
Attorney for Appellant

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

James Randolph Frady,

Appellant.

Appeal From Oconee County
Perry M. Buckner, Circuit Court Judge

Unpublished Opinion No. 2008-UP-634
Submitted November 3, 2008 – Filed November 12, 2008

APPEAL DISMISSED

Chief Appellate Defender Joseph L. Savitz, III, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W. Elliott,

and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Christina T. Adams, of Anderson, for Respondent.

PER CURIAM: Frady appeals his convictions for grand larceny, first-degree burglary, arson, possession of a weapon during the commission of a violent crime, and two counts of murder, arguing the trial court erred by precluding Frady from introducing evidence of third party guilt. After a thorough review of the record and counsel's brief pursuant to Anders v. California, 386 U.S. 738 (1967) and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss¹ Frady's appeal and grant counsel's motion to be relieved.

APPEAL DISMISSED.

ANDERSON, HUFF, and THOMAS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

06-5172



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The South Carolina Court of Appeals

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December 3, 2008

REMITTITUR

The Honorable Sallie C. Smith
205 W Main St
PO Box 678
Walhalla, SC 29691-0678

Re: The State v. Frady, James Randolph
2004-GS-37-02071 2004-GS-37-02072 2004-GS-37-02073
2004-GS-37-02074 2004-GS-37-02075 2004-GS-37-02076
2004-GS-37-02077 2004-GS-37-02078

Dear Ms. Smith:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

A handwritten signature in cursive script, appearing to read "Renee S. Johnson".

Renee S. Johnson
Administrative Specialist

VK
KAR/tj

cc: Chief Attorney Joseph L. Savitz, III
James Randolph Frady #317328
Assistant Deputy Attorney General Donald J. Zelenka
Christina Theos Adams, Esquire

STATE OF SOUTH CAROLINA)

County of Oconee)James R. Frady, #317328,)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2009-CP-37-451

APPLICATION FOR

POST-CONVICTION RELIEF

2009 APR 13 1:20 PM

FILED OCONEE, SC
RECEIVED H. H. H. H. H.
CLERK OF COURT**INSTRUCTIONS - READ CAREFULLY**

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

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

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

1. Place of detention Broad River Correctional Inst., 4460 Broad River Road,
Columbia, SC 29210
2. Name and location of Court which imposed sentence General Sessions Court,
Oconee County, South Carolina
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) See Page 1 (A), attached.
(b) _____

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

- (a) 2004-GS-37-2070; Arson, second degree.
- (b) 2004-GS-37-2071; Grand larceny.
- (c) 2004-GS-37-2072; Murder.
- (d) 2004-GS-37-2073; Murder.
- (e) 2004-GS-37-2074; Possession of weapon during violent crime.
- (f) 2004-GS-37-2078; Burglary, first degree.

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) See Page 2 (A), attached
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
- Yes
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction affirmed, appeal dismissed.
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. November 12, 2008
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Feady, Unpublished Opinion No.: 2008-UP-634
- ii. _____
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) N/A

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

- (a) August 31, 2006; 25 years imprisonment.
- (b) August 31, 2006; 5 years imprisonment.
- (c) August 31, 2006; Life without parole.
- (d) August 31, 2006; Life without parole.
- (e) August 31, 2006; 5 years imprisonment.
- (f) August 31, 2006; 30 years imprisonment.

- (b) _____
 (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 (a) See Page 3 (A)
 (b) _____
 (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) See Pages 3(A), 3(B), 3(C), and 3(D), attached.
 (b) _____
 (c) _____
12. Prior to this application have you filed with respect to this conviction:
 (a) any petition in a State Court under South Carolina Law? No.
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
 (d) any other petitions, motions or applications in this or any other Court? No.
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
 (a) the specific nature thereof:
 i. N/A
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. N/A
 ii. _____
 iii. _____

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

(a) The applicant was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution.

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) The applicant was provided with deficient representation by his attorney in that the conduct of his attorney was objectively unreasonable under the circumstances of Applicant's case. Strickland v. Washington, 466 U.S. 668 (1984). The outcome of Applicant's proceeding was prejudiced and it is reasonably probable that the outcome would have been different had counsel's performance not been deficient. Strickland, 466 U.S. at 694. Defense Counsel was ineffective based on one or more of the following:

1. Defense counsel failed to conscientiously discharge his professional responsibilities while handling Applicant's case.
2. Defense counsel failed to effectively challenge the arrest and seizure of Applicant.
3. Defense counsel failed to act as Applicant's diligent, conscientious advocate.
4. Defense counsel failed to properly prepare and investigate Applicant's case prior to the trial of the case.
5. Defense counsel failed to do the necessary legal research to

adequately argue a Miranda violation in the applicant's case.

6. Defense counsel failed to pursue plea negotiations that may have proven advantageous to the applicant.
7. Defense counsel failed to properly consult with the applicant or keep the applicant informed about the status of the case.
8. Defense counsel failed to explain to the applicant or discuss with him any kind of defense strategy.
9. Defense counsel failed to explain to Applicant or discuss with him any of the tactical choices that were available or that counsel was planning on using.
10. Defense counsel, knowing that Applicant was uninformed in legal matters, dictated to the applicant exactly how the case was going to be handled, offered no alternative options, and convinced Applicant to relinquish his right to testify on his own behalf.
11. Defense counsel failed to properly acquaint themselves with the law and facts surrounding Applicant's case, and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts.
12. Defense counsel failed to put forward any argument at all for a minimum sentence at Applicant's sentencing.
13. Defense counsel failed to adequately challenge a statement made by state's witness Harper on the basis that the statement was sheer speculation. At trial, witness Harper

testified that due to a defect in the door handles of his van, he, his son, and the applicant were the only people who knew how to open the doors to get inside. The statement left the jury with the clear impression that the applicant more likely than not stole the van, which was in turn connected to the murders.

14. Defense counsel failed to challenge the admission of evidence in the case that had been withheld from the applicant in violation of Rule 5 and Brady v. Maryland.
15. Defense counsel failed to adequately investigate and pursue fingerprint evidence that indicated someone other than the applicant stole the van and committed the murders.
16. Defense counsel failed to challenge the admission of evidence at trial on the basis that the chain of custody had been broken, and that he had not been given an opportunity to examine the evidence.
17. Defense counsel failed to adequately object and press for a better curative instruction from the judge when the solicitor argued during closing arguments that Applicant had threatened to kill the victims prior to their actual murders.
18. Defense counsel failed to do the necessary legal research to adequately argue for a change of venue in Applicant's case.
19. Defense counsel failed to do legal research necessary for him to adequately argue for the suppression of evidence, and withdrew a potentially meritorious Motion to Suppress.
20. Defense counsel failed to call alibi witnesses that would have proven Applicant's innocence.

For the foregoing reasons, Applicant asserts that defense counsel's representation was not within the range and scope of competence demanded by Strickland and its progeny. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show first that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland v. Washington, supra. Applicant asserts he was deprived of a fair trial because of counsel's ineffectiveness.

- iv. _____
- (c) the disposition thereof:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- (d) the date of each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____

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

No.

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

- (a) which grounds have been presented:
 - i. N/A
 - ii. _____
 - iii. _____
- (b) the proceedings in which each ground was raised:
 - i. N/A
 - 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) None of the grounds in this application have been presented to
 - (b) any other court because post-conviction relief application is
 - (c) the proper forum for claim of ineffective assistance of counsel.
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Donald Allen, Esq. P.O. Box 2861, Anderson, South Carolina
C. Elizabeth Waldrep, Esq., Address unknown.
 - ii. Joseph Savitz, III, Esq., P.O. Box 11589, Columbia, South Carolina
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial
Trial
 - ii. Direct Appeal
 - iii. _____

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

Reverse, remand, or vacate sentence. Any other or further relief the
Court deems just.

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

No.

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Richland)

I, James R. Frady, #317328, 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.

James R Frady

SWORN to and subscribed before me this 27
 day of March, 2009.

Carolyn G. King (L.S.)
 Notary Public

My Commission Expires: Oct 1, 2018

FILED DOONEE, SC
 JIMMY H. WHITFIELD
 CLERK OF COURT
 2009 APR 13 10 38 09

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

I, James R. Frady, #317328, 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.

James R. Frady
Applicant

SWORN or affirmed to and subscribed before me this

27 day of March, 2009.

Carolyn King
Notary Public

My Commission Expires: Oct 1, 2018

2009 APR 13 PM 3:10

FILED O'CONNOR, SC
SEVERLY H. WHITFIELD
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

James R. Prady	)	C/A No: 2009-CP-37-451
Petitioner,	)	
	)	
-VS-	)	MOTION TO AMEND P.C.R.
	)	
State Of South Carolina	)	
Respondent.	)	

COMES NOW the Petitioner, pursuant to the S.C.R.C.P. and the Statutory Laws of this state hereby moves before this Honorable Court to make an amendment of his application for post-conviction relief, to include the grounds of Prosecutorial Misconduct by Assistant Solicitor Ms. Mindy Hervey Lipinski.

In determining whether certain offensive comments made by the Prosecutor and directed toward the defendant during the course of the trial, rendered the trial fundamentally unfair, the relevant question "is whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.." Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464 (1986).

The appropriate standard of review for a claim that prejudicial comments made by the prosecutor during the trial denied the defendant of a fair trial, "is the narrow standard of due process."

In the Petitioner's case, the prosecutor repeatedly made offensive remarks directed toward the Petitioner which certainly infected the jury with prejudice feelings toward him. This misconduct rendered the proceedings unfair and denied the Petitioner his right to a fair trial.

A prosecutor's remarks which include both inflammatory comments and erroneous statement of law, amount to misconduct and render the proceedings fundamentally unfair. Floyd v. Meachum, 907 F.2d 347 (2nd Cir.1990).

The standard that must be applied when analyzing claims of prosecutorial misconduct is whether the conduct was so egregious as to render the entire trial fundamentally unfair, denying the defendant due process. Draughn v. Jabe, 803 F.Supp. 70 (E.D.Mich.1992).

"To find prosecutorial misconduct, a two-pronged test must be met: (1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant. U.S. v. Eyster, 948 F.2d 1196 (11th Cir.1991).

s/ James R. Frady

Date: 7-26, 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT
	)	
	)	2009-CP-37-0451
	)	
James Randolph Frady, #317328	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the Application for Post-Conviction Relief filed April 13, 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. The Applicant was indicted at the December 2004 term of the Oconee County Grand Jury for one (1) count of Arson, Second Degree (04-GS-37-2070), one (1) count of Grand Larceny (04-GS-37-2071), two (2) counts of murder (04-GS-37-2072, 2073), one (1) count of Possession of A Weapon During Commission of a Violent Crime (04-GS-37-2074), and one (1) count of Burglary, First Degree (04-GS-37-2078). The Applicant was represented at trial by Donald Allen, Esquire. On August 29, 2006, the Applicant proceeded to trial and was found guilty and sentenced on August 31, 2006. The Honorable Perry M. Buckner sentenced the Applicant to confinement for a period of five (5) years for Grand Larceny (04-GS-37-2071), five (5) years for Possession of a Weapon During Commission of a Violent Crime (06-GS-37-2074), twenty five (25) years for

Arson, Second Degree (04-GS-37-2070), thirty (30) years for Burglary First Degree (06-GS-37-2078), and for a term of life for each murder (06-GS-37-2073, 20720), all to be served concurrently. The Applicant then filed a timely notice of appeal.

The South Carolina Court of Appeals dismissed his appeal by written order filed November 12, 2008. State v. Frady, Op. No. 2008-UP-634 (S.C. Ct. App. Filed November 12, 2008). The case was returned to the lower court by Remittitur dated December 3, 2008.

Attached herewith and incorporated herein by reference are the records of the Oconee County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the Applicant's trial transcript, and documents concerning the Applicant's Direct Appeal.

II.

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

1. "Ineffective Assistance of Counsel"
 - a. "Defense counsel failed to conscientiously discharge his professional responsibilities while handling Applicant's case;"
 - b. "Defense counsel failed to effectively challenge the arrest and seizure of Applicant;"
 - c. "Defense counsel failed to act as Applicant's diligent, conscientious advocate;"
 - d. "Defense counsel failed to properly prepare and investigate Applicant's case prior to the trial of the case;"
 - e. "Defense counsel failed to do the necessary legal research to adequately argue a Miranda violation in the Applicant's case;"

- f. "Defense counsel failed to pursue plea negotiations that may have proven advantageous to the applicant;"
- g. "Defense Counsel failed to properly consult with the applicant or keep the applicant informed about the status of the case;"
- h. "Defense counsel failed to explain to the applicant or discuss with him any kind of defense strategy;"
- i. "Defense counsel failed to explain to Applicant or discuss with him any of the tactical choices that were available or that counsel was planning on using;"
- j. "Defense counsel, knowing that Applicant was uninformed in legal matters, dictated to the applicant exactly how the case was going to be handled, offered no alternative options, and convinced Applicant to relinquish his right to testify on his own behalf;"
- k. "Defense counsel failed to properly acquaint themselves with the law and facts surrounding Applicant's case, and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts;"
- l. "Defense counsel failed to put forward any argument at all for a minimum sentence at Applicant's sentencing;"
- m. "Defense counsel failed to adequately challenge a statement made by state's witness on the basis that the statement was sheer speculation;"
- n. "Defense counsel failed to challenge the admission of evidence in the case that had been withheld from the applicant in violation of Rule 5;"
- o. "Defense counsel failed to adequately investigate and pursue fingerprint evidence that indicated someone other than the applicant stole the van and committed the murders;"
- p. "Defense counsel failed to challenge the admission of evidence at trial on the

basis that the chain of custody had been broken, and that he had not been given an opportunity to examine the evidence;"

- q. "Defense counsel failed to adequately object and press for a better curative instruction from the judge when the solicitor argued during closing arguments that Applicant had threatened to kill the victims prior to their actual murders;"
- r. "Defense counsel failed to do the necessary legal research to adequately argue for a change of venue in Applicant's case;"
- s. "Defense counsel failed to do legal research necessary for him to adequately argue for the suppression of evidence, and withdrew a potentially meritorious Motion to Suppress;"
- t. "Defense Counsel failed to call alibi witnesses that would have proven Applicant's innocence."

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in

the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

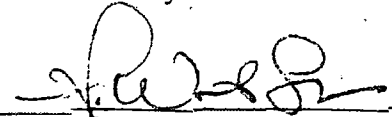
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

A. WEST LEE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

Oct. 19, 2009.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 James Frady #317328,)
)
 Applicant,)
)
 vs)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS

2009-CP-37-00451

PROOF OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND

Personally appeared before me, Lisa A. Suber, who being first duly sworn, states:

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

Kirby Mitchell, Esquire
 701 S. Main Street
 Greenville, South Carolina 29601

DATED this 19th day of October, 2009


 LISA A. SUBER

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT
	)	
	)	2009-CP-37-0451
	)	
James Randolph Frady, #317328	)	
	)	
Applicant,	)	
	)	AMENDED
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Amended Return to the Application for Post-Conviction Relief filed April 13, 2009, would respectfully show this Court:

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- i. "Defense counsel failed to explain to Applicant or discuss with him any of the tactical choices that were available or that counsel was planning on using;"
- j. "Defense counsel, knowing that Applicant was uninformed in legal matters, dictated to the applicant exactly how the case was going to be handled, offered no alternative options, and convinced Applicant to relinquish his right to testify on his own behalf;"
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basis that the chain of custody had been broken, and that he had not been given an opportunity to examine the evidence;"

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The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in

the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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

IV.

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

V.

WHEREFORE, having made its Amended Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAELOE E. MAY
Assistant Attorney General

By: Kaelon May
ATTORNEYS FOR RESPONDENT

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

June 13, 2011.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	
	)	
	)	2009-CP-37-0451
	)	
JAMES RANDOLPH FRADY, #317328	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Joseph Bruce Schumpert, Jr., Esquire
431 Coneross Ave.
Seneca, SC 29678

DATED this 13th Day of June, 2011



 Lena Pelishenko, Legal Assistant
 For Respondent

**Renee H. Tollison**

Circuit Court Reporter

PO. Box 4321
Anderson, SC 29622

Fax: (864) 934-6279

Loriene French, Legal Assistant
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, S C 29211-1589

March 13, 2012

RE: James Randolph Frady v. State

Dear Ms. French:

Enclosed is the partial transcript in the above referenced case. As stated in my email to you on March 3, 2012, I've run into a problem on this transcript. My recording from my primary recorder has a roar on it and is inaudible, and my backup starts in the middle of the hearing. I had installed new software on my computer at the end of August that was supposed to back up my primary and didn't realize it was causing a problem. I apologize for the inconvenience this may cause.

Sincerely,

A handwritten signature in cursive script that reads "Renee H. Tollison".

Renee H. Tollison
Circuit Court Reporter

cc: SC Court Administration

RECEIVED

MAR 16 2012

SC OFFICE OF
APPELLATE DEFENSE

State of South Carolina

County of Oconee

In the Court of Common Pleas

James Randolph Frady,

Applicant,

-vs-

State of South Carolina,

Respondent.

2009-CP-37-0451

October 3, 2011

Transcript of Record

BEFORE:

The Honorable J. Cordell Maddox, Jr., Judge

APPEARANCES:

Rodney W. Richey, Esquire
Attorney for the Applicant

Kaelon E. May, Esquire
Attorney the State

Renee H. Tollison
Circuit Court Reporter

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Michael Harper				
Richey				
Tammy Harper				
Richey				
James Randolph Frady				
Richey				
May				
D. Chuck Allen				
Richey				
May			3	
Elizabeth Waldrep				
May	5			
Richey		8		
James Randolph Frady				
Richey	10			

<< -- >>

Certificate of Reporter

PAGE
12

EXHIBITS

No	DESCRIPTION	ID	EV
<i>No exhibits were presented during the hearing</i>			

1 (WHEREUPON, court convened with all parties present
2 and the following proceedings were had commencing at
3 approximately 10:36 a.m.)

4 (Due to equipment malfunction, the record of the
5 first 44 minutes of this hearing were not
6 preserved.)

7 **CHUCK ALLEN,**

8 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

9 CROSS-EXAMINATION

10 BY MS. MAY:

11 A. Page 50?

12 Q. Yes.

13 A. Okay.

14 Q. Just do you recall challenging the arrest and
15 seizure of Mr. Frady in those pages?

16 A. I don't see an objection. You can refer my
17 attention to it maybe.

18 Q. I'll refer you to page 59.

19 A. 59?

20 Q. Yes. It's at the very bottom, line 23 and onwards.

21 A. Okay. I see.

22 Q. I just wanted to refresh your recollection. So you
23 recall challenging the arrest and seizure of Mr. Frady?

24 A. Yeah. I see one objection here to maybe something
25 he said when they were -- seems like that was maybe when

James Randolph Frady v. State of South Carolina 2009-CP-04-0451
Chuck Allen - Redirect by Mr. Richey

4

1 they restrained him when they went to his home and did
2 the search. Maybe that was it. I'm not absolutely
3 certain. But yeah, I see an objection there on the Fifth
4 Amendment, yes. That he had not been Mirandized, yeah, I
5 see that.

6 MS. MAY: Beg the Court's indulgence, Your
7 Honor.

8 (Pause)

9 MS. MAY: Those are all the questions I have.

10 MR. RICHEY: Just a couple more.

11 REDIRECT EXAMINATION

12 BY MR. RICHEY:

13 Q. Mr. Allen, do you recall if there was DNA found on
14 that shells? Do you recall any DNA evidence?

15 A. I recall the absence of DNA as far as the
16 investigation. That's what I'm saying. The only
17 forensics was the -- that one shell.

18 Q. And on the night that the murder was supposed to
19 have happened, do you recall that Mr. Harvey was not at
20 home, that he found out the car -- the van was stolen
21 when he got back home? Do you remember that being the
22 case?

23 A. Yeah, but I'd be willing to have my recollection
24 refreshed. But yeah, they had been somewhere and then
25 they came home. Maybe so, maybe so.

1 Q. Thank you.

2 THE COURT: Thank you, sir. You can step down.

3 MR. RICHEY: No other witnesses.

4 Ms. MAY: Your Honor, the State would like to
5 call Ms. Waldrep.

6 THE COURT: Okay.

7 THE WITNESS: My name is Caroline Elizabeth
8 Waldrep.

9 Ms. MAY: May it please the Court.

10 **CAROLINE ELIZABETH WALDREP,**

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MS. MAY:

14 Q. Ms. Waldrep, do you recall when you became involved
15 with Mr. Frady's case?

16 A. Yes. Shortly after Mr. Allen was appointed, he was
17 running into problems that I think so many defense
18 attorneys have in trying to get a case together. You
19 know, the defendant is so seriously disadvantaged by the
20 resources that the State has at its disposal. And so Mr.
21 Allen knew that I had previously for a brief period of
22 time worked for Indigent Defense in Columbia and asked me
23 if I could help him with putting this case together. He
24 knew it was going to trial, and he asked me if I could
25 help him secure an investigator and experts that would be

James Randolph Frady v. State of South Carolina 2009-CP-04-0451
Caroline Elizabeth Waldrep - Direct Examination by Ms. May

6

1 necessary for the trial of this case.. And that's when I
2 became involved and began preparing motions for the judge
3 to approve and for Indigent Defense to approve because
4 that's an arduous process in and of itself trying to get
5 any money out of Indigent Defense.

6 Q. And were you successful in getting money?

7 A. Yes, we were successful. I believe that the money
8 that we requested was cut somewhat, but we were
9 successful in getting money for Jody McCurley to go out
10 and interview witnesses, to go to the crime scene, to do
11 background checks, to run phone records, and also to hire
12 Kelly Fike from Atlanta to do a ballistics evaluation of
13 the shotgun shell that was recovered from the crime
14 scene.

15 Q. Okay. And did you help -- did you conduct any
16 research, any case law research, for the case?

17 A. Yes, I did. There was -- we did some research, and
18 we also -- I helped Chuck with some motions. That was
19 one of the things that we were very concerned about the
20 venue, the change of venue. And I know that Randy was
21 very concerned about that as well because, you know, we
22 did believe that this case had received a fair amount of
23 publicity up here. And Judge Buckner went through one-
24 by-one and interviewed the witness -- pardon me -- the
25 potential jurors and asked them very specifically about

1 what they had read or heard about this case.

2 Q. And did you have a chance to meet with Mr. Frady?

3 A. Yes, on several occasions. He was always very
4 helpful, very involved in the case and very forthcoming,
5 I believed, you know, about his wishes and how it was to
6 be tried. And we talked to people that he wanted us to
7 talk to, and he was always very pleasant to deal with.

8 Q. And do you recall at the meetings that you were
9 present for, what was discussed or what the meetings were
10 about?

11 A. The meetings were largely about, you know, trial
12 strategy and going over with Randy the people that we
13 knew were going to testify. For instance, I knew that
14 the issue of the van and the recovery of the van and the
15 possibility that the evidence had been tainted in some
16 way because it was returned to Mr. and Mrs. Harper was a
17 very big issue for Randy, and we were concerned about
18 that. We were concerned about the whole case since it
19 was circumstantial, but we talked about that. And that's
20 why Chuck and Jody actually went out to the -- you know,
21 to talk to the Harpers. And also the time line was
22 something that was discussed a lot about when the van was
23 recovered, when the van burned and that we had put up
24 basically the case that he would not have had time to go
25 on foot, you know, home when -- it was basically a time

1 line issue that we discussed a lot.

2 Q. And did -- during those discussions, did Mr. Frady
3 understand, seem to understand, or was he engaged in
4 those discussions?

5 A. Yes, he was. We were very, you know -- it was a
6 circumstantial case, and I understand that the jury did
7 its job. But you know, we had -- you know, I know that
8 he believed -- it was my opinion that he believed that
9 there was just not enough evidence to convict him. In
10 fact, I believe the State was concerned about that as
11 well because Mindy Hervey, who was the assistant
12 solicitor who prosecuted the case for Chrissy Adams -- I
13 believe in her opening statement she went through the
14 speech that so many prosecutors give at this time about
15 this is not CSI, they're -- you know, we're -- there's --
16 you know, it's not on videotape. There's not, you know,
17 the blood experts. And I believe they were concerned
18 about that as well as the lack of anything other than
19 circumstantial evidence.

20 Q. No further questions. Please answer any questions
21 Mr. Richey has.

22 CROSS-EXAMINATION

23 BY MR. RICHEY:

24 Q. Ms. Waldrep, were you there during the time where
25 the discussion was made whether he was going to testify

1 or not?

2 A. There were several discussions about that, Mr.

3 Richey. I believe that -- like I said, I believe that he

4 was concerned about cross-examination, and he didn't, I

5 don't believe, want to say anything wrong that would make

6 him look bad to the jury. And you know, it was -- I can

7 tell you with absolute certainty that there was never any

8 sort of discussion where he was saying, I want to

9 testify, and Mr. Allen was saying, no, please don't.

10 That never -- or no, you're not going to. It's going to

11 hurt you. It's in your -- you know, I do not recall that

12 at all. I do not recall a time at which he ever said

13 wanted to testify.

14 Q. So your testimony is in direct conflict with Mr.

15 Frady's? You understand Mr. Frady testified ---

16 A. Yes, sir, I'm afraid so.

17 Q. Okay. So it's your testimony that you all -- he

18 basically said, I don't want to testify?

19 A. That is what I recall.

20 Q. No more questions.

21 THE COURT: Thank you, ma'am.

22 Anything in rebuttal?

23 MR. RICHEY: We want to recall one witness real

24 brief, Mr. Frady, for one or two questions.

25 THE COURT: All right.

~~17 A. Not to my knowledge, no.~~

18 Q. Okay. Do you have any reason why they would come in

19 here to say that, I mean, at all?

20 A. That's the way I was instructed to conduct myself at

21 this time.

22 Q. Okay. Thank you, sir.

23 THE COURT: All right. Thank you, sir. You.

24 can step down.

25 (WHEREUPON, the witness stepped down from the

1 or not?

2 A. There were several discussions about that, Mr.
3 Richey. I believe that -- like I said, I believe that he
4 was concerned about cross-examination, and he didn't, I
5 don't believe, want to say anything wrong that would make
6 him look bad to the jury. And you know, it was -- I can
7 tell you with absolute certainty that there was never any
8 sort of discussion where he was saying, I want to
9 testify, and Mr. Allen was saying, no, please don't.
10 That never -- or no, you're not going to. It's going to
11 hurt you. It's in your -- you know, I do not recall that
12 at all. I do not recall a time at which he ever said
13 wanted to testify.

14 Q. So your testimony is in direct conflict with Mr.
15 Frady's? You understand Mr. Frady testified ---

16 A. Yes, sir, I'm afraid so.

17 Q. Okay. So it's your testimony that you all -- he
18 basically said, I don't want to testify?

19 A. That is what I recall.

20 Q. No more questions.

21 THE COURT: Thank you, ma'am.

22 Anything in rebuttal?

23 MR. RICHEY: We want to recall one witness real
24 brief, Mr. Frady, for one or two questions.

25 THE COURT: All right.

1 Come around. Mr. Frady, you're still under oath.

2 **JAMES RANDOLPH FRADY,**

3 BEING PREVIOUSLY SWORN, TESTIFIED AS FOLLOWS:

4 DIRECT EXAMINATION

5 BY MR. RICHEY:

6 Q. Mr. Frady, you've been in the courtroom and you've
7 heard the testimony surrounding your testifying at trial
8 where Ms. Waldrep has said that you emphatically did not
9 want to testify. Do you understand? I mean ...

10 A. I understand. The only reason I didn't testify is
11 because they asked me not to.

12 Q. You did not emphatically tell them you did not want
13 to testify?

14 A. No.

15 Q. Did you say anything to make them believe you didn't
16 want to testify?

17 A. Not to my knowledge, no.

18 Q. Okay. Do you have any reason why they would come in
19 here to say that, I mean, at all?

20 A. That's the way I was instructed to conduct myself at
21 this time.

22 Q. Okay. Thank you, sir.

23 THE COURT: All right. Thank you, sir. You
24 can step down.

25 (WHEREUPON, the witness stepped down from the

James Randolph Frady v. State of South Carolina 2009-CP-04-0451
James Randolph Frady - Direct Examination by Mr. Richey

11

1 witness stand.)

2 THE COURT: Nothing else?

3 MR. RICHEY: Yes, sir.

4 THE COURT: All right. I'll take it under
5 advisement and let you know next week.

6 MR. RICHEY: Thank you, sir.

7 (WHEREUPON, the hearing ended at approximately 11:32
8 a.m.)

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

1 CERTIFICATE OF REPORTER

2 I, the undersigned Renee H. Tollison, Official Court
3 Reporter for the Tenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the
7 trial/hearing of the captioned case, relative to appeal,
8 in the Circuit Court for Oconee County, South Carolina,
9 on the 3rd day of October 2011.

10 This transcript may contain quoted material. Such
11 material is reproduced as read by the speaker.

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

14 March 13, 2012

15 Renee H. Tollison
16

17 Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2009-CP-37-0451

James Randolph Frady, #317328

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JAN 11 AM 11:57

COPY

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed April 13, 2009. Respondent made its Return and Amended Return on October 19, 2009 and June 13, 2011, respectively. An evidentiary hearing into the matter was convened on October 3, 2011 at the Oconee County Courthouse. The Applicant was present at the hearing and was represented by Rodney Richey, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Additionally, Applicant offered the testimony of Michael Harper (Mr. Harper) and Tammy Harper (Ms. Harper). The State offered the testimony of Donald Allen, Esquire (Mr. Allen) and Elizabeth Waldrep, Esquire (Ms. Waldrep), Applicant's trial counsels. This Court also had before it the records of the Oconee County Clerk of Court, the transcript of the proceedings against the Applicant, the Applicant's records from the South Carolina Department of Corrections, and the records from Applicant's prior appeal proceeding.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. The Applicant was indicted at the December 2004 term of the Oconee County Grand Jury for one (1) count of Arson, Second Degree (04-GS-37-2070), one (1) count of Grand Larceny (04-GS-37-2071), two (2) counts of murder (04-GS-37-2072, 2073), one (1) count of Possession of A Weapon During Commission of a Violent Crime (04-GS-37-2074), and one (1) count of Burglary, First Degree (04-GS-37-2078). The Applicant was represented at trial by Donald Allen, Esquire. On August 29, 2006, the Applicant proceeded to trial and was found guilty and sentenced on August 31, 2006. The Honorable Perry M. Buckner sentenced the Applicant to confinement for a period of five (5) years for Grand Larceny (04-GS-37-2071), five (5) years for Possession of a Weapon During Commission of a Violent Crime (04-GS-37-2074), twenty five (25) years for Arson, Second Degree (04-GS-37-2070), thirty (30) years for Burglary First Degree (04-GS-37-2078), and for a term of life for each murder (04-GS-37-2073, 20720), all to be served concurrently. The Applicant then filed a timely notice of appeal.

The South Carolina Court of Appeals dismissed his appeal by written order filed November 12, 2008. State v. Frady, Op. No. 2008-UP-634 (S.C. Ct. App. Filed November 12, 2008). The case was returned to the lower court by Remittitur dated December 3, 2008.

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

1. "Ineffective Assistance of Counsel"

- a. "Defense counsel failed to conscientiously discharge his professional responsibilities while handling Applicant's case;"
- b. "Defense counsel failed to effectively challenge the arrest and seizure of Applicant;"
- c. "Defense counsel failed to act as Applicant's diligent, conscientious advocate;"
- d. "Defense counsel failed to properly prepare and investigate Applicant's case prior to the trial of the case;"
- e. "Defense counsel failed to do the necessary legal research to adequately argue a Miranda violation in the Applicant's case;"
- f. "Defense counsel failed to pursue plea negotiations that may have proven advantageous to the applicant;"
- g. "Defense Counsel failed to properly consult with the applicant or keep the applicant informed about the status of the case;"
- h. "Defense counsel failed to explain to the applicant or discuss with him any kind of defense strategy;"
- i. "Defense counsel failed to explain to Applicant or discuss with him any of the tactical choices that were available or that counsel was planning on using;"
- j. "Defense counsel, knowing that Applicant was uninformed in legal matters, dictated to the applicant exactly how the case was going to be handled, offered no alternative options, and convinced Applicant to relinquish his right to testify on his own behalf;"
- k. "Defense counsel failed to properly acquaint themselves with the law and facts surrounding Applicant's case, and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts;"
- l. "Defense counsel failed to put forward any argument at all for a minimum sentence at Applicant's sentencing;"
- m. "Defense counsel failed to adequately challenge a statement made by state's witness on the basis that the statement was sheer speculation;"
- n. "Defense counsel failed to challenge the admission of evidence in the case that had been withheld from the applicant in violation of Rule 5;"
- o. "Defense counsel failed to adequately investigate and pursue fingerprint evidence that indicated someone other than the applicant stole the van and committed the murders;"
- p. "Defense counsel failed to challenge the admission of evidence at trial on the basis that the chain of custody had been broken, and that he had not been given an opportunity to examine the evidence;"
- q. "Defense counsel failed to adequately object and press for a better curative instruction from the judge when the solicitor argued during closing arguments that Applicant had threatened to kill the victims prior to their actual murders;"
- r. "Defense counsel failed to do the necessary legal research to adequately argue for a change of venue in Applicant's case;"

- s. "Defense counsel failed to do legal research necessary for him to adequately argue for the suppression of evidence, and withdrew a potentially meritorious Motion to Suppress;"
- t. "Defense Counsel failed to call alibi witnesses that would have proven Applicant's innocence."
- 2. Prosecutorial Misconduct
 - a. "Prosecutor's remarks which include both inflammatory comments and erroneous statements of law, amount to misconduct and the proceedings fundamentally unfair."

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Mr. Harper's Testimony

At the PCR hearing Mr. Harper testified that he testified at the Applicant's trial and that he was the owner of the vehicle that was used as evidence at the Applicant's trial. Mr. Harper testified that he found out about the murder on September 23, 2004 and that the police seized Mr. Harper's van thereafter. Mr. Harper testified that he drove the van to work prior to the police seizing the vehicle and that he did not miss any time from work.

Ms. Harper's Testimony

At the PCR hearing Ms. Harper testified that she is married to Michael Harper (Mr. Harper) and that she recalled the van that her husband owned being part of the Applicant's case. Ms. Harper testified that the van was stolen out of the Harper's yard and that they reported the van stolen on the night of September 22, 2004, which was the night the murders were committed. Ms. Harper testified that the van was found later the night of September 22, 2004 and that a gas can was found with the van. Ms. Harper testified that the police had Mr. Harper drive the van home the night of September 22,

2004, after finding the van. Ms. Harper testified that the police took the van into custody for about one week.

Applicant's Testimony

At the PCR hearing Applicant testified that there were pre-trial investigation issues, that he was aware an investigator was hired to work on his case, but that the investigator only ran phone records. Applicant testified that the investigator did not review any of the evidence that was eventually presented at trial, that there were unidentified fingerprints found at the scene but that Applicant's trial counsel did not investigate the fingerprints nor discuss the fingerprints with Applicant. Applicant testified that his counsel prepared a motion to change venue but that the motion was never heard and that Applicant's trial counsel informed Applicant that counsel could beat the case in Oconee County just as well as anywhere else in the state. Applicant testified that Oconee County is small, that everyone knows what is going on, and that there was no way a jury could be selected with persons who had not been subjected to the publicity that surrounded the case.

Applicant testified that the ballistics involved in the case were not tested by trial counsel, that Applicant knew about the shotgun shell, and that Applicant's counsel did hire Kelly Fite to test the ballistics but that Applicant never received a report from Kelly Fite's testing. Applicant testified that he did not know about Mr. Fite's investigation until the trial. Applicant testified that there was a plea offer of thirty (30) years for the murder charges. Applicant testified that his grandfather is a victim because it was his son and grandson that were killed. Applicant testified that he spoke with his grandfather during the trial and that his grandfather did not testify at Applicant's trial. Applicant testified

that he did not put up any evidence at trial in order to have the last argument and that Applicant did not know what to think and trusted his attorney's advice. Applicant testified that he wanted to testify at trial in his own defense because Applicant could refute the testimony presented during the trial. Applicant testified that his attorney should have refuted Kelly Cromer's testimony that Applicant asked how much LSD it would take to kill someone, because more than one person would have heard this conversation.

Applicant testified that prior to trial he was not informed of any discovery and what testimony might be presented at trial. Applicant testified that his trial counsel advised Applicant not to testify and that Applicant recalled the trial judge questioning Applicant about his right to testify and not testify. Applicant testified that he never informed counsel or Ms. Waldrep that he did not want to testify, and that Applicant was instructed not to testify by counsel. Applicant testified that counsel should have investigated the fingerprint evidence, that counsel should have presented the pre-trial motion concerning the search and seizure and change of venue issues. Applicant testified that his trial should not have been held in Oconee County. Applicant testified that he was not waiving any grounds in his Application and that if Applicant's counsel had represented Applicant properly that the outcome of Applicant's trial would have been different.

Mr. Allen's Testimony

At the PCR hearing counsel testified that he has been practicing law since 1987 and that approximately one-third to eighty percent of his practice is in criminal law. Counsel testified that he was the third attorney appointed to represent Applicant and that his representation began in August 2006. Counsel testified that Applicant's previous

attorneys provided counsel with all materials pertinent to Applicant's case. Counsel testified that he filed a pre-trial motion regarding the publicity surrounding the case and that counsel discussed the motion with Applicant. Counsel testified that the trial judge examined each juror about the extent of pre-trial publicity they had been exposed to and reached the conclusion that the pre-trial publicity would not hinder Applicant's right to a fair trial. Counsel testified that he did not move forward with the motion regarding pre-trial media because of the judge's findings and that counsel discussed this decision with Applicant.

Counsel testified that he hired a private investigator, Jody McCurley, and that Elizabeth Waldrep (Ms. Waldrep) worked as an associate on the Applicant's case. Counsel testified that the investigation revealed that the van used in the incident had fingerprints of a third-party, that this was a circumstantial case, and that there were no forensics except for one shotgun shell. Counsel testified that he informed the jury that there were no fingerprints, no footprints, no hair, and no blood evidence in Applicant's case. Counsel testified that the third-party fingerprints found in the van could go toward third-party liability for the crimes. Counsel testified that he visited the Harper's home and investigated the theft of the van and that counsel hired Kelly Fite to test and/or review the ballistics evidence and to refute that state's evidence. Counsel testified that Kelly Fite's conclusion was consistent with the state's experts. Counsel testified that he met with Applicant approximately six to seven times and that counsel discussed Kelly Fite's analysis with Applicant.

Counsel testified that by the time he began representing Applicant, Applicant did not want to plead guilty and that the case qualified for the death penalty. Counsel testified

that he met with Applicant's grandfather three times and that Applicant always maintained his innocence. Counsel testified that the police returned Mr. Harper's van to Mr. Harper within a matter of days, maybe within one week. Counsel testified that the Sheriff took custody of the van but that the chain of custody for the van was not properly preserved. Counsel testified that he investigated the 'jail-house' snitch and cross-examined the 'jail-house' snitch at trial.

Counsel testified that he filed a discovery motion and received the discovery materials from the state, which included but was not limited to police reports, warrants, and investigator notes. Counsel testified that he reviewed the discovery materials with Applicant and that the only forensics in the case was a single shotgun shell. Counsel testified that he reviewed the results from his and Jody McCurley's investigation and that there was not anything tangible. Counsel testified that he had tried murder cases prior to Applicant's trial and was familiar with the legal issues involved in murder cases. Counsel testified that he asked Ms. Waldrep to assist him with Applicant's case. Counsel testified that he discussed the state's evidence with Applicant prior to trial. Counsel testified that he discussed possible defenses with Applicant but that Applicant did not present counsel with any defenses.

Counsel testified that as the shotgun shell testimony and evidence developed at trial, Applicant's testimony became critically important. Counsel testified that he discussed the shotgun shell testimony with Applicant and that Applicant did not want to testify at trial. Counsel testified that the trial strategy developed with Applicant consisted of a lack of evidence, Applicant's from at the scene, and poking holes in the state's case. Counsel testified that Applicant agreed with the trial strategy that counsel and Applicant

developed. Counsel testified that he discussed Applicant's right to testify and not testify as a part of the trial strategy. Counsel testified that Applicant made the decision not to testify. Counsel testified that when it came time for Applicant to make the decision to testify or not testify during the trial, that counsel and Applicant again discussed Applicant's right to testify or not testify. Counsel testified that Applicant ultimately decided not to testify.

Counsel testified that he was sufficiently able to confer with Applicant before and during the trial. Counsel testified that he had ample time to prepare for Applicant's trial and conduct the necessary research.

Ms. Waldrep's Testimony

At the PCR hearing Ms. Waldrep testified that she became involved in the Applicant's case shortly after Mr. Allen was appointed to represent Applicant. Ms. Waldrep testified that prior to Applicant's trial she was employed by the Office of Indigent Defense in Columbia and that at Indigent Defense she prepared motions and was familiar with the procedures for obtaining money from Indigent Defense to assist with investigations. Ms. Waldrep testified that she was able to obtain money for Applicant's case and investigation, including background checks, prior records, and expert analysis. Ms. Waldrep testified that she conducted case law research for the various pre-trial and trial motions, including the motion for change of venue. Ms. Waldrep testified that the trial judge questioned each juror regarding the amount of publicity they had been exposed to.

Ms. Waldrep testified that she met with Applicant on several occasions, that Applicant was very forthcoming and helpful with his case, and that Applicant provided

Ms. Waldrep and counsel with the names of witnesses. Ms. Waldrep testified that she spoke with the people whom Applicant informed her and counsel of. Ms. Waldrep testified that she and counsel discussed trial strategy with Applicant and reviewed testimony with Applicant. Ms. Waldrep testified that there was an issue with the van and that the defense could argue the evidence had been tainted. Ms. Waldrep testified that investigator McCurley and counsel spoke with the Harpers and that the timeline was an important issue because Applicant would not have had the time to commit the crimes if Applicant was on foot. Ms. Waldrep testified that Applicant was very engaged in all their discussions and that the state was concerned with the lack of evidence. Ms. Waldrep testified that she was present during counsel's discussion with Applicant concerning Applicant's right to testify or not testify, and that Applicant was concerned about cross-examination, that Applicant did not want to say anything wrong and look bad for the jury. Ms. Waldrep testified that Applicant never informed counsel that Applicant wanted to testify and that counsel never told Applicant he could not testify.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

1. Failure to Adequately Represent Applicant

The Applicant asserts that trial counsel was ineffective for failing to discharge his professional responsibilities while handling Applicant's case; failing to act as Applicant's advocate; failing to pursue plea negotiations that may have proven advantageous to Applicant; failing to properly consult with Applicant and keep Applicant informed of the status of his case; failing to discuss any kind of defense strategy with Applicant; and for failing to explain or discuss with Applicant the tactical choices that were available or that counsel planned on using. This Court finds that these allegations are without merit. This Court finds Applicant's testimony is not credible. Thus Court further finds counsel and Ms. Waldrep to be credible. Counsel testified that he met with Applicant six to seven times and that counsel and Applicant extensively discussed Applicant's case. Counsel testified that he met with Applicant to discuss the state's evidence, Applicant's version of events, the results of Kelly Fite's ballistics investigation, the results of Jody McCurley's investigation, possible defenses, and trial strategy. Ms. Waldrep also testified that she met with Applicant several times to discuss the case as well as Applicant's right to testify or not testify and that Applicant was very informative and helpful in forming his defense. Counsel testified that when he was appointed to represent the Applicant, Applicant did not want to plead guilty and wanted to proceed to trial.

The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from

counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters counsel failed to discover or discuss with Applicant which would have likely caused the outcome of Applicant's trial to be different. This Court finds that counsel and Ms. Waldrep met with Applicant multiple times and kept Applicant informed of the status of his and that Applicant was actively involved in preparing his defense. This Court finds that prior to counsel's representation there may have been a plea offer on the table, however when counsel began to represent Applicant, Applicant had made the decision to proceed to trial and did not want to plead guilty. This Court finds that Applicant has failed to show that counsel's representation was deficient and any resulting prejudice; therefore, this Court finds that these allegations are denied and dismissed.

2. Failure to Investigate

The Applicant alleges that trial counsel was ineffective for failing to prepare and investigate Applicant's case prior to trial; failing to conduct legal research regarding Miranda violations, suppression motion, and motion for change of venue; and for failing to adequately investigate and pursue fingerprint evidence. This Court finds that these allegations are without merit. At the PCR counsel testified that he hired a private investigator, Jody McCurley, to assist with Applicant's case. Counsel testified that he obtained funds for Kelly Fite to review the ballistics in Applicant's case. The results of both investigations were discussed with Applicant by counsel and Ms. Waldrep. Ms. Waldrep testified that she conducted legal research concerning the motion to change venue and counsel testified that he filed a written motion to change venue. Counsel explained that he decided to withdraw the motion to change venue after the trial judge

questioned each individual juror concerning pre-trial publicity. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). The record reflects that the trial judge extensively questioned each juror about the amount of pre-trial publicity they had been exposed to. The trial judge found that the jurors selected could put aside the media and decide the case solely upon the evidence presented at trial. It was after the trial judge's finding that counsel withdrew his motion to change venue. This Court finds that counsel articulated valid strategic reasons for withdrawing the motion. Additionally, this Court finds that even if counsel proceeded with his motion, the motion would have been denied based on the trial judge's findings in the record. Moreover, the record reflects that Applicant agreed with the decision to withdraw the motion. The Applicant has not shown counsel was deficient in that choice of tactics. This Court also finds that Ms. Waldrep adequately researched change of venue. Applicant has not shown counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

With regard to Applicant's allegation that trial counsel failed to research and argue the motion to suppress based on a Miranda violation, Applicant has failed to meet his burden of proof. Ms. Waldrep testified that she conducted legal research regarding the motion presented at the pre-trial hearing. The record reflects counsel presented the motion to suppress and argued the motion at the pre-trial hearing. Counsel presented case

law in support of his argument; however the trial court overruled counsel's objections and denied the motion to suppress. The Applicant did not present any evidence or testimony concerning a more adequate argument for the motion to suppress, nor did Applicant present any case law to support his allegation. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds and the record reflects that counsel articulated valid strategic reasons for his strategy in arguing the motion to suppress. The Applicant has not shown counsel was deficient in that choice of tactics. This Court finds the necessary legal research was done and the motion properly presented and argued at trial. The Applicant failed to show any resulting prejudice; therefore this allegation is denied and dismissed.

As to Applicant's claim that counsel failed to investigate the fingerprint evidence, Counsel testified that the prints found on the van did not belong to the Applicant. Counsel testified that the absence of Applicant's fingerprints and the presence of a third-party's fingerprints was something that counsel brought out during trial. The record reflects that counsel cross-examined Mr. Steven Curtis regarding the fact that the Applicant's fingerprints were not found and that the van had evidence of someone else's fingerprints. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Applicant did not present a fingerprint analysis or any type of evidence concerning the lack of a fingerprint

investigation at the PCR hearing. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

3. Failure to Properly Advise of Right to Testify and Not Testify

Applicant asserts that trial counsel was ineffective for failing to properly advise Applicant of his right to testify or not testify and coerced Applicant to relinquish his right to testify on his own behalf. This Court finds that this allegation is without merit. Counsel testified that he and Applicant discussed Applicant's right to testify or not testify prior to trial and during trial. Counsel testified that he wanted Applicant to testify at trial in order to refute the state's evidence and testimony. Counsel testified that Applicant made the decision not to testify. Ms. Waldrep testified as well that Applicant never informed counsel that he wanted to testify and counsel never told Applicant he could not testify. Ms. Waldrep testified that Applicant was concerned about being cross-examined and did not want to look bad for the jury. The record reflects the trial judge discussed Applicant's right to testify or not testify and the Applicant indicated that he understood his rights. (Tr. p.585). The trial judge asked Applicant if the decision was Applicant's and not anyone else's, and the Applicant indicated that it was his decision alone. (Tr. p.585, lines10-12). Applicant informed the trial court that it was his decision not to testify. (Tr. p.585, lines16-20). This Court finds that Applicant was adequately advised of his right to testify or not testify by both counsel and Ms. Waldrep as well as by the trial judge on the record. Applicant testified under oath that it was his decision not to testify at trial. This Court finds that Applicant has failed to show that counsel's performance was deficient or that counsel coerced Applicant into not testifying. This Court finds that Applicant cannot

show any resulting prejudice as he informed the trial judge that he did not want to testify; therefore, this allegation is denied and dismissed.

4. Failure to Effectively Challenge the State's Case

The Applicant asserts that trial counsel was ineffective for failing to effectively challenge the search and seizure issue; failing to adequately challenge a statement made by a witness for the state; failing to challenge the admission of evidence that had been withheld from the defense in violation of Rule 5; and for failing to challenge the admission of evidence based on a broken chain of custody. This Court finds that these allegations are without merit. This Court has already found that trial counsel was not ineffective in researching and arguing the motion to suppress based on a Miranda violation. The record reflects that counsel filed a motion to suppress the search warrant based on a violation of S.C. Code §17-13-140. (Aug. 28, 2006 Tr. p.24, lines5-13). The record reflects that counsel filed this motion out of an abundance of caution and that counsel discussed this issue with Applicant. (Id. p.31, lines16-22). The record further reflects that counsel explained his reasons for withdrawing the motion to suppress. (Id. p.31, line23 – p. 32, line25).

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that counsel articulated valid strategic reasons for withdrawing the motion to suppress the search warrants. Applicant did not provide an alternative argument that

counsel should have argued in the motion to suppress, nor did Applicant provide any additional support that counsel failed to present in the motion. This Court finds that Applicant has not shown counsel was deficient in that choice of tactics. This Court also finds that Applicant has not shown resulting prejudice from counsel's alleged deficiency; therefore this allegation is denied and dismissed.

Applicant alleges that trial counsel was ineffective for failing to challenge Mr. Harper's testimony at trial that was sheer speculation. Applicant directs this Court's attention to Mr. Harper's testimony "that due to a defect in the door handle of the van, that he, his son, and Applicant were the only people who knew how to open the doors to get in the van." (Tr. p.473-475). A review of the record reflects that counsel objected to the testimony and a bench conference was held. (Tr. p.473, line25 - p. 474, line3). Additionally, Mr. Harper's testimony at the PCR hearing did not differ from Mr. Harper's testimony at trial. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. This Court finds that Applicant failed to show counsel's

performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

Next, Applicant alleges trial counsel was ineffective for failing to challenge admission of evidence that was withheld from the defense in violation of Rule 5. At the PCR hearing counsel testified that he filed a discovery motion and received the discovery materials from the state. Applicant does not point any specific evidence that was withheld. Applicant did not present any testimony or introduce into evidence at the PCR hearing the alleged evidence that had been withheld. This Court notes and the record reflects that counsel made a motion to produce certain photographs at the pre-trial motion hearing and that the defense was provided with the photographs. (Aug. 28, 2006 Tr. p.34-36). In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. This Court finds that Applicant failed to show that any evidence was suppressed. Applicant is unable to show that counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

As to Applicant's allegation that trial counsel was ineffective for failing to challenge the admission of evidence based on a broken chain of custody, this Court finds

Applicant has failed to meet his burden of proof. Applicant generally asserts counsel failed to make a challenge to the evidence on the basis that the chain of custody was broken. Applicant does not specify what evidence counsel should have directed his objection at, nor does Applicant provide this Court with arguments that counsel should have made. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

5. Failure to Adequately Defend

Applicant alleges that trial counsel was ineffective for failing to put forth any argument for a minimum sentence at Applicant's sentencing; failing to adequately object and request a better curative instruction when the solicitor stated in closing argument that Applicant had threatened to kill the victims prior to the actual murders; and for failing to call alibi witnesses that would have proven Applicant's innocence. This Court finds that these allegations are without merit. As to Applicant's claim that trial counsel failed to argue for the minimum sentence, this Court finds that Applicant has not met his burden of proof. This Court notes that Applicant was found guilty of multiple violent and most serious crimes. The record reflects that the trial judge gave Applicant the opportunity to speak during sentencing and the Applicant declined to address the court. (Tr. p.668, lines 1-4). The Applicant has failed to show what argument counsel should have made for a minimum sentence. This Court finds that when given the opportunity, Applicant did not request and/or argue for a minimum sentence on his own behalf. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

Applicant alleges that trial counsel was ineffective for failing to object and request a better curative instruction when the solicitor stated in closing argument that Applicant had threatened to kill the victims prior to the actual murders. The record reflects counsel made an objection to the solicitor's comment regarding a prior threat made by Applicant towards the victims. (Tr. p.614, line24 – p.615, line2; p.628-635). Counsel's objection was sustained by the trial court. (Tr. p.634, lines4-9). The record further reflects that the trial court gave the jury a curative instruction. (Tr. p.635, line16 – p.636, line5). This Court finds that contrary to Applicant's assertion, counsel did object to the solicitor's comment and that this objection was sustained by the trial court. Additionally, this Court finds that Applicant failed to show how the curative instruction was insufficient and what instruction counsel should have requested. Applicant has failed to show counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

The Applicant further alleges counsel was ineffective for failing to call alibi witnesses that would have proven Applicant's innocence. At the PCR hearing Ms. Waldrep testified that Applicant provided the names of witnesses for his defense and that those witnesses were contacted. This Court finds that Applicant did not present any alibi witnesses at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness'

failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Accordingly, Applicant has failed to show resulting prejudice and cannot meet his burden of proof that trial counsel was ineffective. This Court finds that this allegation is denied and dismissed.

Prosecutorial Misconduct

Applicant alleges that the prosecutor's closing remarks to the jury were both inflammatory and erroneous statements of law, and that this amounted to misconduct rendering the proceedings fundamentally unfair. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). After reviewing the entire record, this Court does not find any comments by the solicitor so infected the trial that a new trial is warranted. This Court is not convinced that the solicitor's arguments even reach the level of being improper, but certainly there is no evidence that Applicant was prejudiced. This Court finds that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

V. CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court

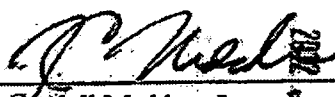
to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

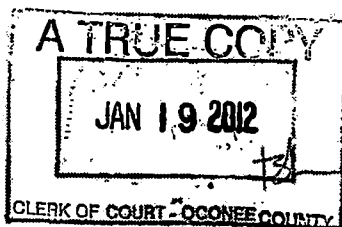
AND IT IS SO ORDERED this 4th day of January, 2012


J. Cordell Maddox, Jr.
Presiding Judge
Tenth Judicial Circuit

FILED OCOONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2012 JAN 19 PM 2:57

Anderson, South Carolina



THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

JAMES RANDOLPH FRADY,

PETITIONER,

V.

THE STATE,

RESPONDENT.

MOTION TO REMAND
FOR RECORD RECONSTRUCTION

Petitioner James R. Frady respectfully moves this Court for an Order remanding this case to the Oconee County Court of Common Pleas for a reconstruction hearing of the October 3, 2011, post-conviction relief hearing in this matter, and for appointment of counsel to represent Petitioner for the reconstruction hearing. In support of this motion, Petitioner alleges the following:

- (1) That on August 31, 2006, Petitioner was convicted of possession of a weapon during the commission of a violent crime, grand larceny, second-degree arson, first-degree burglary, and two counts of murder. The trial court imposed concurrent sentences of life imprisonment without possibility of parole for each count of murder, thirty years for first-degree

burglary, twenty-five years for second-degree arson, five years for grand larceny, and five years for possession of a weapon during the commission of a violent crime. See Exhibit A (Indictments and Sentence Sheets).

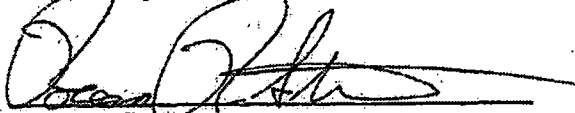
- (2) That Petitioner appealed his convictions, which were subsequently dismissed by the South Carolina Court of Appeals on November 12, 2008, in State v. Frady, Op. No. 2008-UP-634 (SC Ct. App. filed Nov. 12, 2008) pursuant to Anders v. California, 386 U.S. 738 (1967). He was represented on direct appeal by Joseph L. Savitz, III. The case was remitted on December 3, 2008. See Exhibit B (Opinion and Remittitur).
- (3) That Petitioner filed his application for post-conviction relief (PCR) (case number 2009-CP-37-0451) on April 13, 2009, asserting multiple grounds of ineffective assistance of counsel, as well as prosecutorial misconduct. See Exhibit C (PCR Application). An evidentiary hearing was held before the Honorable J. Cordell Maddox, Jr., on October 3, 2011. Petitioner was represented by Rodney W. Richey, while the State was represented by Kaelon E. May. The PCR court filed the Order of Dismissal on January 19, 2012. See Exhibit D (Order of Dismissal).
- (4) That the certified court reporter, Ms. Renee H. Tollison, experienced malfunctions in her primary recording system such that it was inaudible, and her backup software only began to function in the middle of the hearing. See Exhibit E (Letter from Renee H. Tollison, 03/13/2012). The index of the partial transcript produced Ms. Tollison indicates testimony from three of six witnesses is completely missing, as well as the direct

testimony of a fourth witness. See Exhibit F (Partial Transcript of October 3, 2011 Hearing).

- (5) That this Court has the authority to remand a case for a reconstruction hearing where a transcript has been lost or destroyed. Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968). Remand for record reconstruction is appropriate in instances where "a reconstructed record on appeal would allow for meaningful appellate review." State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 274 (Ct. App. 2007) (internal quotations omitted).
- (6) That a full and complete transcript of the October 3, 2011 PCR hearing is necessary in Petitioner's case to allow for meaningful appellate review.

Accordingly, in order to allow meaningful appellate review, Petitioner respectfully requests that this Court remand his case to the Oconee County Court of Common Pleas for reconstruction of the October 3, 2011, post-conviction relief evidentiary hearing, and that counsel be appointed to represent Petitioner for the reconstruction hearing.

Respectfully submitted,



Breen R. Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

July 12, 2012

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

JAMES RANDOLPH FRADY,

PETITIONER,

V.

THE STATE,

RESPONDENT.

CERTIFICATE OF SERVICE

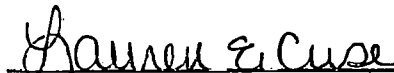
I hereby certify that a true copy of the Motion to Remand for Record Reconstruction in the above case has been served upon Kaelon E. May, Esquire, this 12th day of July, 2012.



Breen R. Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of July, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014

Exhibit A

WITNESSES
OCSD/REED

Mike Carlow

ARREST WARRANT NO. H-652426

ACTION OF GRAND JURY

Julie Bell
12-14-04

[Signature]
Foreman of Grand Jury

VERDICT

guilty

Angela N. Broome
Foreman of Petit Jury

Date: *08-31-06*

2004-0012
The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

DECEMBER TERM 2004

SSR THE STATE

vs.

JAMES RANDOLPH FRADY

Indictment for

MURDER

16-03-0010

[0116]

SUSAN REESE, ASSISTANT SOLICITOR

Bu

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

STATE v JAMES RANDOLPH FRADY

AKA:

Race/Sex: W M Age: 42

DOB: SSN:

Address: JR

City, State, Zip WALTHALLA SC 29691

DL# SID

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE #

2004-GS-37-2072

A/W#: H652425

Date of Offense: 09/22/04

S.C. Code: 16-03-0010 CDR Code #: 116

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 (16-3-10) of the S.C. Code of Laws, bearing CDR Code #: 011116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

Plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Mindy Helver

Solicitor

Defendant

Attorney for Defendant

Donald Allen

WHEREFORE, the Defendant is committed to the State Department of Corrections.

☐ County Detention Center, for a determinate term of LIFE 10/121 days/months/years or

☐ under the Youthful Offender Act not to exceed _____ years and/or 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 of South Carolina Department of Probation.

Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 2004-GS-37-2023; 2020; 2021

☐ The Defendant is given credit for time served pursuant to S.C. Code 24-13-40 to be calculated and applied 2024; 2 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 \$	<u>100.00</u>
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 \$	<u>25.00</u>
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% County (If paid in Installments)	\$	_____
TOTAL	\$	<u>125.00</u>

Sallie C. Smith

Clerk of Court/Deputy Clerk
SCCA/217(7/2003)

PTUP _____ time served pursuant to S.C. Code 24-13-40
_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be paid in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

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

Presiding Judge _____

Judge Code: 011222

Sentence Date 8/31/06

Court Reporter Hollie Jenkins Code #: 1111

Copied
Quentin
Solis

WITNESSES
OCSD/REED

Mila Carter

ARREST WARRANT NO. H-652427

ACTION OF GRAND JURY

John Bell
12-14-4

[Signature]
Foreman of Grand Jury

Indictment for

VERDICT

guilty

Angela N. Brune 08-31-06
Foreman of Petit Jury Date:

DOCKET NO. 08-70
The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

DECEMBER TERM 2004

SSR

THE STATE

vs.

JAMES RANDOLPH FRADY

Indictment for

MURDER

16-03-0010

[0116]

SUSAN REESE, ASSISTANT SOLICITOR

BW

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

STATE v JAMES RANDOLPH FRADY

AKA:

Race/Sex: W M Age: 42

DOB: SSN

Address: 1.

City, State, Zip WALHALLA SC 29691

DLA SID: SC00403344

) IN THE COURT OF GENERAL SESSIONS
) INDICTMENT/CASE #

2004-GS-37-2073

) A/W#: H652427

) Date of Offense: 09/22/04

) S.C Code: 16-03-0010 CDR Code #: 116

) 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 #: 011116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

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

[Signature] Solicitor [Signature] Defendant [Signature] Attorney for Defendant Donald Allen
WHEREFORE, the Defendant is committed to the State Department of Corrections
☐ County Detention Center, for a determinate term of LIFE IN PRISON years or
☐ under the Youthful Offender Act not to exceed _____ years and/or 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 of South Carolina Department of Probation.
Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 2004-GS-37-2070; 2071; 2074;
☐ The Defendant is given credit for time served pursuant to S.C. Code 24-13-40 to be calculated and applied 2078; 20
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	\$ <u>100.00</u>
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	\$ <u>25.00</u>
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% County (if paid in Installments)	\$	_____
TOTAL	\$	<u>125.00</u>

Sallie C. Smith

Clerk of Court Deputy Clerk
SCCA/217(7/2003)

PTUP _____ time served pursuant to S.C. Code 24-13-40
_____ days/hours Public Service Employment

Obtain GED

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be paid in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

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

Presiding Judge [Signature]

Judge Code: 011121

Sentence Date 8/31/06

Court Reporter Hollie Jenkins Code #: 111

Copy to
Sallie C. Smith
Deputy Clerk

WITNESSES
OCSD/REED

M. C. Reed

ARREST WARRANT NO. H-652429

ACTION OF GRAND JURY

12-19-4
True Bill

[Signature]
Foreman of Grand Jury

VERDICT

guilty

Angela N. Brown 08-31-04
Foreman of Petit Jury Date:

The State of South Carolina,
OCONEE

County of _____

COURT OF GENERAL SESSIONS
DECEMBER TERM 2004

SSR THE STATE

vs.

JAMES RANDOLPH FRADY

Indictment for

BURGLARY - 1ST DEGREE

16-11-0311

[0079]

SUSAN REESE, ASSISTANT SOLICITOR

[Signature]

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
STATE v JAMES RANDOLPH FRADY
AKA: _____

Race/Sex: W M Age: 42

DOB _____ SSN: _____

Address: _____

City, State, Zip WALHALLA SC 29691

DL# _____ SID: SC00403344

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE #

2004-GS-372078

AW#: H652429

Date of Offense: 09/22/04

S.C. Code: 16-11-0311 CDR Code #: 79

CASE RESTORED ☐

SENTENCE ☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO:

Burglary 1st Degree

in violation of 16-11-311 of the S.C. Code of Laws, bearing CDR Code #: 0101719

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser included Offense, ☐ Defendant Waives Presentment to Grand Jury.

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

ATTEST:

Mindy Harvey
Solicitor

Defendant

Donal
Attorney for Defendant Alk

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections,

☐ County Detention Center, for a determinate term of 30 days/months/years or

☐ under the Youthful Offender Act not to exceed _____ years and/or 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 of South Carolina Department of Probation.

Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 2004-GS-37-2074; 2073; 2071;

☐ The Defendant is given credit for time served pursuant to S.C. Code 24-13-40 to be calculated and applied 2070 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	<u>100.00</u>
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	<u>25.00</u>
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% County (if paid in installments)	\$	\$
TOTAL	\$	<u>125.00</u>

Sallie C. Smith

Clerk of Court/Deputy Clerk
SCCA/217(7/2003)

PTUP _____ time served pursuant to S.C. Code 24-13-4
_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be paid in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other: _____

☐ Appointed PD or other counsel, 35.13 TP
Requires \$500.00 paid to Clerk during probation.

Presiding Judge

Judge Code: 0112121

Sentence Date 8/31/06

Court Reporter Hollie Jenkins Code #: 1111

C. n / 1

WITNESSES
OCSD/REED

Mike Carson

ARREST WARRANT NO. H-652432

ACTION OF GRAND JURY

Joe Bell
12-14-04

Ron J.
Foreman of Grand Jury

VERDICT

guilty

Anzela N. Broom 08-31-06
Foreman of Petit Jury Date:

The State of South Carolina,
OCONEE

County of _____

COURT OF GENERAL SESSIONS
DECEMBER TERM 2004

SSR THE STATE

vs.

JAMES RANDOLPH FRADY

Indictment for

ARSON
2ND DEGREE

16-11-0110(B)

[2551]

SUSAN REESE, ASSISTANT SOLICITOR

BW

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

STATE v JAMES RANDOLPH FRADY

AKA:

Race/Sex: W M Age: 42

DOB:

SSN:

Address:

City, State, Zip WALHALLA SC 29691

DL:

SID: SC00403344

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE #

2004-GS-372070

A/W#: H652432

Date of Offense: 09/22/04

S.C. Code: 16-11-0110 CDR Code #: 2551

CASE RESTORED ☐

SENTENCE ☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO:

Arson 2nd Degree

In violation of 16-11-110(B) of the S.C. Code of Laws, bearing CDR Code #: 2551

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

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

ATTEST:

[Signature]
Solicitor

[Signature]
Defendant

[Signature]
Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections,
☐ County Detention Center, for a determinate term of 25 days/month/years or
☐ under the Youthful Offender Act not to exceed _____ years and/or 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.
Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 2004-GS-37-2071; 2074; 2078; 2073
☐ The Defendant is 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% County(if paid in Installments)	\$	\$
TOTAL	\$	\$125.00

Sallie C. Smith

Clerk of Court/Deputy Clerk
SCCA/217(7/2003)

PTUP _____ time served pursuant to S.C. Code 24-13-40
_____ days/hours Public Service Employment

Obtain GED

Attend Voc Rehab, or Job Corps _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be paid in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund.

Other:

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

[Signature]
Presiding Judge

Judge Code: 91212

Sentence Date 8/31/06

Court Reporter Hollie Jenkins Side #: 111

[Signature]

WITNESSES

OCSD/REED

*Mike Cochran*ARREST WARRANT NO. H-652431

ACTION OF GRAND JURY

*12-14-04**[Signature]*
Foreman of Grand Jury

VERDICT

*guilty**Angela N. Brown* *08-31-06*
Foreman of Petit Jury Date:

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

DECEMBER TERM 2004

THE STATE

SSR

vs.

JAMES RANDOLPH FRADY

Indictment for

GRAND LARCENY

16-13-0030(B)(2)

[0479]

SUSAN REESE, ASSISTANT SOLICITOR*[Signature]*

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

STATE V JAMES RANDOLPH FRADY

AKA:

Race/Sex: W M Age: 42

DOB: SSN:

Address:

City, State, Zip WALHALLA SC 29691

OLA SID: SC00403344

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE #

20 04 -GS-37-2071

AW#: H652431

Date of Offense: 09/22/04

S.C. Code: 16-13-0030 CDR Code #: 479

CASE RESTORED ☐

SENTENCE ☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO:

Grand Larceny > \$1,000 < \$5,000

In violation of 16-13-30(B)(2) of the S.C. Code of Laws, bearing CDR Code #: 01479

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

Charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

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

ATTEST:

Mindy Hensley
Solicitor

Defendant

Attorney for Defendant

Donald Allen

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 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 of South Carolina Department of Probation.
Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 2004-GS-37-2073; 2074; 2075
☐ The Defendant is given credit for time served pursuant to S.C. Code 24-13-40 to be calculated and applied 2072; 207
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% County (if paid in installments) \$ _____
TOTAL \$ 125.00

Sallie C. Smith

Clerk of Court/Deputy Clerk
SCCA/217(7/2003)

PTUP: _____ time served pursuant to S.C. Code 24-13-40
_____ days/hours Public Service Employment

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

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

Presiding Judge

Judge Code: 011221

Sentence Date 8/31/06

Court Reporter Hollie Jenkins Code #: _____

WITNESSES
OCSD/REED

Mike Conner

ARREST WARRANT NO. H-652430

ACTION OF GRAND JURY

Phil Bill
12-14-4

Don
Foreman of Grand Jury

VERDICT

guilty

Angela N. Brooke *08-31-06*
Foreman of Petit Jury Date:

SECRET NO. 2014

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

DECEMBER TERM 2004

SSR THE STATE

vs.

JAMES RANDOLPH FRADY

Indictment for

POSSESSION OF A WEAPON DURING
THE COMMISSION OF A VIOLENT CRIME

16-23-0490

[0549]

SUSAN REESE, ASSISTANT SOLICITOR

34

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
STATE v JAMES RANDOLPH FRADY
AKA _____
Race/Sex: W M Age: 42

DOB: _____ SSN: _____
Add res: _____
City, State, Zip WALHALLA SC 29691
DL: _____ SID: SC00403344

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE #

2004-GS-37-2074

AW#: H652430
Date of Offense: 09/22/04
S.C. Code: 16-23-0490 CDR Code #: 549
CASE RESTORED ☐

SENTENCE ☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO:

Possession of a Weapon During Common Law Violation
in violation of 16.23.490 of the S.C. Code of Laws, bearing CDR Code #: 0151419

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45

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

Mindy Harvey
Solicitor

Defendant

Attorney for Defendant Donald Allen

WHEREFORE, the Defendant is committed to the State Department of Corrections,
☐ County Detention Center, for a determinate term of 5 days/month/years or
☐ under the Youthful Offender Act not to exceed _____ years and/or 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 of South Carolina Department of Probation.
Pardon & Parole Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentences on: 2004-GS-37-2078; 2073; 207
☐ The Defendant is given credit for time served pursuant to S.C. Code 24-13-40 to be calculated and applied 2072; 20;
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% County (if paid in installments)	\$	_____
TOTAL	\$	125.00

Sallie C. Smith

Clerk of Court/Deputy Clerk
SCCA/217(7/2003)

PTUP _____ time served pursuant to S.C. Code 24-13-41
_____ days/hours Public Service Employment

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

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

Presiding Judge _____ Judge Code: 011221

Sentence Date 8/31/06

Court Reporter Hollie Jenkins Code #: _____

Exhibit B

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

James Randolph Frady,

Appellant.

Appeal From Oconee County
Perry M. Buckner, Circuit Court Judge

Unpublished Opinion No. 2008-UP-634
Submitted November 3, 2008 – Filed November 12, 2008

APPEAL DISMISSED

Chief Appellate Defender Joseph L. Savitz, III, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W. Elliott,



ATTORNEY GENERAL'S OFFICE
RECEIVED 12-3-08

21K408

LEEN
012

The South Carolina Court of Appeals

KENNETH A. RICHSLAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 1629
COLUMBIA, SOUTH CAROLINA 29211
15 SUMMIT STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 744-1890
FAX (803) 744-4237
WWW.SCCOURTS.ORG

Cose

December 3, 2008

REMITTITUR

The Honorable Sallie C. Smith
205 W Main St
PO Box 678
Walhalla, SC 29691-0678

Re: The State v. Frady, James Randolph
2004-GS-37-02071 2004-GS-37-02072 2004-GS-37-02073
2004-GS-37-02074 2004-GS-37-02075 2004-GS-37-02076
2004-GS-37-02077 2004-GS-37-02078

Dear Ms. Smith:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely, cereley,

Renee S. Johnson
Administrative Specialist

VK
KAR/rj

cc: Chief Attorney Joseph L. Savitz, III
James Randolph Frady #317328
Assistant Deputy Attorney General Donald J. Zelenka
Christina Theos Adams, Esquire

Exhibit C

FORM 5

STATE OF SOUTH CAROLINA)

County of Oconee)James R. Frady, #317328,)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2009-CP-37-451

APPLICATION FOR

POST-CONVICTION RELIEF

2009 APR 13 12 30 09

FILED OCONEE, SC
SEVERLY H. WHITEFIELD
CLERK OF COURTINSTRUCTIONS - 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 Broad River Correctional Inst., 4460 Broad River Road,
Columbia, SC 29210
2. Name and location of Court which imposed sentence General Sessions Court,
Oconee County, South Carolina
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) See Page 1 (A), attached.
(b) _____

copy to attorney
Frady

ENTERED
COMPUTER

4. The indictment number or numbers (if Known) upon which and the offenses for which sentence was imposed:
- (a) 2004-GS-37-2070; Arson, second degree.
 - (b) 2004-GS-37-2071; Grand larceny.
 - (c) 2004-GS-37-2072; Murder.
 - (d) 2004-GS-37-2073; Murder.
 - (e) 2004-GS-37-2074; Possession of weapon during violent crime.
 - (f) 2004-GS-37-2078; Burglary, first degree.

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) See Page 2 (A), attached
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction affirmed, appeal dismissed.
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. November 12, 2008
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Fardy, Unpublished Opinion No. 2008-LP-634
- ii. _____
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) N/A

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

- (a) August 31, 2006; 25 years imprisonment.
- (b) August 31, 2006; 5 years imprisonment.
- (c) August 31, 2006; Life without parole.
- (d) August 31, 2006; Life without parole.
- (e) August 31, 2006; 5 years imprisonment.
- (f) August 31, 2006; 30 years imprisonment.

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See Page 3 (A)
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Pages 3(A), 3(B), 3(C), and 3(D), attached.
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
- (d) any other petitions, motions or applications in this or any other Court? No.
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____

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

(a) The applicant was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution.

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) The applicant was provided with deficient representation by his attorney in that the conduct of his attorney was objectively unreasonable under the circumstances of Applicant's case. Strickland v. Washington, 466 U.S. 668 (1984). The outcome of Applicant's proceeding was prejudiced and it is reasonably probable that the outcome would have been different had counsel's performance not been deficient. Strickland, 466 U.S. at 694. Defense Counsel was ineffective based on one or more of the following:

1. Defense counsel failed to conscientiously discharge his professional responsibilities while handling Applicant's case.
2. Defense counsel failed to effectively challenge the arrest and seizure of Applicant.
3. Defense counsel failed to act as Applicant's diligent, conscientious advocate.
4. Defense counsel failed to properly prepare and investigate Applicant's case prior to the trial of the case.
5. Defense counsel failed to do the necessary legal research to

adequately argue a Miranda violation in the applicant's case.

6. Defense counsel failed to pursue plea negotiations that may have proven advantageous to the applicant.
7. Defense counsel failed to properly consult with the applicant or keep the applicant informed about the status of the case.
8. Defense counsel failed to explain to the applicant or discuss with him any kind of defense strategy.
9. Defense counsel failed to explain to Applicant or discuss with him any of the tactical choices that were available or that counsel was planning on using.
10. Defense counsel, knowing that Applicant was uninformed in legal matters, dictated to the applicant exactly how the case was going to be handled, offered no alternative options, and convinced Applicant to relinquish his right to testify on his own behalf.
11. Defense counsel failed to properly acquaint themselves with the law and facts surrounding Applicant's case, and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts.
12. Defense counsel failed to put forward any argument at all for a minimum sentence at Applicant's sentencing.
13. Defense counsel failed to adequately challenge a statement made by state's witness Harper on the basis that the statement was sheer speculation. At trial, witness Harper

testified that due to a defect in the door handles of his van, he, his son, and the applicant were the only people who knew how to open the doors to get inside. The statement left the jury with the clear impression that the applicant more likely than not stole the van, which was in turn connected to the murders.

14. Defense counsel failed to challenge the admission of evidence in the case that had been withheld from the applicant in violation of Rule 5 and Brady v. Maryland.
15. Defense counsel failed to adequately investigate and pursue fingerprint evidence that indicated someone other than the applicant stole the van and committed the murders.
16. Defense counsel failed to challenge the admission of evidence at trial on the basis that the chain of custody had been broken, and that he had not been given an opportunity to examine the evidence.
17. Defense counsel failed to adequately object and press for a better curative instruction from the judge when the solicitor argued during closing arguments that Applicant had threatened to kill the victims prior to their actual murders.
18. Defense counsel failed to do the necessary legal research to adequately argue for a change of venue in Applicant's case.
19. Defense counsel failed to do legal research necessary for him to adequately argue for the suppression of evidence, and withdrew a potentially meritorious Motion to Suppress.
20. Defense counsel failed to call alibi witnesses that would have proven Applicant's innocence.

For the foregoing reasons, Applicant asserts that defense counsel's representation was not within the range and scope of competence demanded by Strickland and its progeny. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show first that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland v. Washington, supra. Applicant asserts he was deprived of a fair trial because of counsel's ineffectiveness.

- iv. _____
- (c) the disposition thereof:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- (d) the date of each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____

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

No.

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

- (a) which grounds have been presented:
 - i. N/A
 - ii. _____
 - iii. _____
- (b) the proceedings in which each ground was raised:
 - i. N/A
 - 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) None of the grounds in this application have been presented to
 - (b) any other court because post-conviction relief application is
 - (c) the proper forum for claim of ineffective assistance of counsel.
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Donald Allen, Esq. P.O. Box 2861, Anderson, South Carolina
C. Elizabeth Waldrep, Esq., Address unknown.
 - ii. Joseph Savitz, III, Esq., P.O. Box 11589, Columbia, South Carolina
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial
Trial
 - ii. Direct Appeal
 - iii. _____

19. State clearly the relief you seek in filing this application:
Reverse, remand, or vacate sentence. Any other or further relief the
Court deems just.
20. Are you now under sentence from any other court that you have not challenged?
No.

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Richland)

I, James R. Frady, #317328, 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.

James R. Frady

SWORN to and subscribed before me this 27
 day of March, 2009.

Barbara H. King (L.S.)
 Notary Public

My Commission Expires: Oct 1, 2018

FILED O'CONNOR, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 2009 APR 13 PM 3:09

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

I, James R. Frady, #317328, 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.

James R. Frady
Applicant

SWORN or affirmed to and subscribed before me this

27 day of March, 2009.

Carolyn G. King
Notary Public

My Commission Expires: Oct 6, 2018

FILED OCOBEE, SC
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2009 APR 13 P 3:09

Exhibit D

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

2009-CP-37-0451

James Randolph Frady, #317328

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED OCONEE, SC
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PM 2:57

COPY

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed April 13, 2009. Respondent made its Return and Amended Return on October 19, 2009 and June 13, 2011, respectively. An evidentiary hearing into the matter was convened on October 3, 2011 at the Oconee County Courthouse. The Applicant was present at the hearing and was represented by Rodney Richey, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Additionally, Applicant offered the testimony of Michael Harper (Mr. Harper) and Tammy Harper (Ms. Harper). The State offered the testimony of Donald Allen, Esquire (Mr. Allen) and Elizabeth Waldrep, Esquire (Ms. Waldrep), Applicant's trial counsels. This Court also had before it the records of the Oconee County Clerk of Court, the transcript of the proceedings against the Applicant, the Applicant's records from the South Carolina Department of Corrections, and the records from Applicant's prior appeal proceeding.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. The Applicant was indicted at the December 2004 term of the Oconee County Grand Jury for one (1) count of Arson, Second Degree (04-GS-37-2070), one (1) count of Grand Larceny (04-GS-37-2071), two (2) counts of murder (04-GS-37-2072, 2073), one (1) count of Possession of A Weapon During Commission of a Violent Crime (04-GS-37-2074), and one (1) count of Burglary, First Degree (04-GS-37-2078). The Applicant was represented at trial by Donald Allen, Esquire. On August 29, 2006, the Applicant proceeded to trial and was found guilty and sentenced on August 31, 2006. The Honorable Perry M. Buckner sentenced the Applicant to confinement for a period of five (5) years for Grand Larceny (04-GS-37-2071), five (5) years for Possession of a Weapon During Commission of a Violent Crime (04-GS-37-2074), twenty five (25) years for Arson, Second Degree (04-GS-37-2070), thirty (30) years for Burglary First Degree (04-GS-37-2078), and for a term of life for each murder (04-GS-37-2073, 20720), all to be served concurrently. The Applicant then filed a timely notice of appeal.

The South Carolina Court of Appeals dismissed his appeal by written order filed November 12, 2008. State v. Frady, Op. No. 2008-UP-634 (S.C. Ct. App. Filed November 12, 2008). The case was returned to the lower court by Remittitur dated December 3, 2008.

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

1. "Ineffective Assistance of Counsel"

- a. "Defense counsel failed to conscientiously discharge his professional responsibilities while handling Applicant's case;"
- b. "Defense counsel failed to effectively challenge the arrest and seizure of Applicant;"
- c. "Defense counsel failed to act as Applicant's diligent, conscientious advocate;"
- d. "Defense counsel failed to properly prepare and investigate Applicant's case prior to the trial of the case;"
- e. "Defense counsel failed to do the necessary legal research to adequately argue a Miranda violation in the Applicant's case;"
- f. "Defense counsel failed to pursue plea negotiations that may have proven advantageous to the applicant;"
- g. "Defense Counsel failed to properly consult with the applicant or keep the applicant informed about the status of the case;"
- h. "Defense counsel failed to explain to the applicant or discuss with him any kind of defense strategy;"
- i. "Defense counsel failed to explain to Applicant or discuss with him any of the tactical choices that were available or that counsel was planning on using;"
- j. "Defense counsel, knowing that Applicant was uninformed in legal matters, dictated to the applicant exactly how the case was going to be handled, offered no alternative options, and convinced Applicant to relinquish his right to testify on his own behalf;"
- k. "Defense counsel failed to properly acquaint themselves with the law and facts surrounding Applicant's case, and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts;"
- l. "Defense counsel failed to put forward any argument at all for a minimum sentence at Applicant's sentencing;"
- m. "Defense counsel failed to adequately challenge a statement made by state's witness on the basis that the statement was sheer speculation;"
- n. "Defense counsel failed to challenge the admission of evidence in the case that had been withheld from the applicant in violation of Rule 5;"
- o. "Defense counsel failed to adequately investigate and pursue fingerprint evidence that indicated someone other than the applicant stole the van and committed the murders;"
- p. "Defense counsel failed to challenge the admission of evidence at trial on the basis that the chain of custody had been broken, and that he had not been given an opportunity to examine the evidence;"
- q. "Defense counsel failed to adequately object and press for a better curative instruction from the judge when the solicitor argued during closing arguments that Applicant had threatened to kill the victims prior to their actual murders;"
- r. "Defense counsel failed to do the necessary legal research to adequately argue for a change of venue in Applicant's case;"

- s. "Defense counsel failed to do legal research necessary for him to adequately argue for the suppression of evidence, and withdrew a potentially meritorious Motion to Suppress;"
 - t. "Defense Counsel failed to call alibi witnesses that would have proven Applicant's innocence."
2. Prosecutorial Misconduct
- a. "Prosecutor's remarks which include both inflammatory comments and erroneous statements of law, amount to misconduct and the proceedings fundamentally unfair."

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Mr. Harper's Testimony

At the PCR hearing Mr. Harper testified that he testified at the Applicant's trial and that he was the owner of the vehicle that was used as evidence at the Applicant's trial. Mr. Harper testified that he found out about the murder on September 23, 2004 and that the police seized Mr. Harper's van thereafter. Mr. Harper testified that he drove the van to work prior to the police seizing the vehicle and that he did not miss any time from work.

Ms. Harper's Testimony

At the PCR hearing Ms. Harper testified that she is married to Michael Harper (Mr. Harper) and that she recalled the van that her husband owned being part of the Applicant's case. Ms. Harper testified that the van was stolen out of the Harper's yard and that they reported the van stolen on the night of September 22, 2004, which was the night the murders were committed. Ms. Harper testified that the van was found later the night of September 22, 2004 and that a gas can was found with the van. Ms. Harper testified that the police had Mr. Harper drive the van home the night of September 22,

2004, after finding the van. Ms. Harper testified that the police took the van into custody for about one week.

Applicant's Testimony

At the PCR hearing Applicant testified that there were pre-trial investigation issues, that he was aware an investigator was hired to work on his case, but that the investigator only ran phone records. Applicant testified that the investigator did not review any of the evidence that was eventually presented at trial, that there were unidentified fingerprints found at the scene but that Applicant's trial counsel did not investigate the fingerprints nor discuss the fingerprints with Applicant. Applicant testified that his counsel prepared a motion to change venue but that the motion was never heard and that Applicant's trial counsel informed Applicant that counsel could beat the case in Oconee County just as well as anywhere else in the state. Applicant testified that Oconee County is small, that everyone knows what is going on, and that there was no way a jury could be selected with persons who had not been subjected to the publicity that surrounded the case.

Applicant testified that the ballistics involved in the case were not tested by trial counsel, that Applicant knew about the shotgun shell, and that Applicant's counsel did hire Kelly Fite to test the ballistics but that Applicant never received a report from Kelly Fite's testing. Applicant testified that he did not know about Mr. Fite's investigation until the trial. Applicant testified that there was a plea offer of thirty (30) years for the murder charges. Applicant testified that his grandfather is a victim because it was his son and grandson that were killed. Applicant testified that he spoke with his grandfather during the trial and that his grandfather did not testify at Applicant's trial. Applicant testified

that he did not put up any evidence at trial in order to have the last argument and that Applicant did not know what to think and trusted his attorney's advice. Applicant testified that he wanted to testify at trial in his own defense because Applicant could refute the testimony presented during the trial. Applicant testified that his attorney should have refuted Kelly Cromer's testimony that Applicant asked how much LSD it would take to kill someone, because more than one person would have heard this conversation.

Applicant testified that prior to trial he was not informed of any discovery and what testimony might be presented at trial. Applicant testified that his trial counsel advised Applicant not to testify and that Applicant recalled the trial judge questioning Applicant about his right to testify and not testify. Applicant testified that he never informed counsel or Ms. Waldrep that he did not want to testify, and that Applicant was instructed not to testify by counsel. Applicant testified that counsel should have investigated the fingerprint evidence, that counsel should have presented the pre-trial motion concerning the search and seizure and change of venue issues. Applicant testified that his trial should not have been held in Oconee County. Applicant testified that he was not waiving any grounds in his Application and that if Applicant's counsel had represented Applicant properly that the outcome of Applicant's trial would have been different.

Mr. Allen's Testimony

At the PCR hearing counsel testified that he has been practicing law since 1987 and that approximately one-third to eighty percent of his practice is in criminal law. Counsel testified that he was the third attorney appointed to represent Applicant and that his representation began in August 2006. Counsel testified that Applicant's previous

attorneys provided counsel with all materials pertinent to Applicant's case. Counsel testified that he filed a pre-trial motion regarding the publicity surrounding the case and that counsel discussed the motion with Applicant. Counsel testified that the trial judge examined each juror about the extent of pre-trial publicity they had been exposed to and reached the conclusion that the pre-trial publicity would not hinder Applicant's right to a fair trial. Counsel testified that he did not move forward with the motion regarding pre-trial media because of the judge's findings and that counsel discussed this decision with Applicant.

Counsel testified that he hired a private investigator, Jody McCurley, and that Elizabeth Waldrep (Ms. Waldrep) worked as an associate on the Applicant's case. Counsel testified that the investigation revealed that the van used in the incident had fingerprints of a third-party, that this was a circumstantial case, and that there were no forensics except for one shotgun shell. Counsel testified that he informed the jury that there were no fingerprints, no footprints, no hair, and no blood evidence in Applicant's case. Counsel testified that the third-party fingerprints found in the van could go toward third-party liability for the crimes. Counsel testified that he visited the Harper's home and investigated the theft the van and that counsel hired Kelly Fite to test and/or review the ballistics evidence and to refute that state's evidence. Counsel testified that Kelly Fite's conclusion was consistent with the state's experts. Counsel testified that he met with Applicant approximately six to seven times and that counsel discussed Kelly Fite's analysis with Applicant.

Counsel testified that by the time he began representing Applicant, Applicant did not want to plead guilty and that the case qualified for the death penalty. Counsel testified

that he met with Applicant's grandfather three times and that Applicant always maintained his innocence. Counsel testified that the police returned Mr. Harper's van to Mr. Harper within a matter of days, maybe within one week. Counsel testified that the Sheriff took custody of the van but that the chain of custody for the van was not properly preserved. Counsel testified that he investigated the 'jail-house' snitch and cross-examined the 'jail-house' snitch at trial.

Counsel testified that he filed a discovery motion and received the discovery materials from the state, which included but was not limited to police reports, warrants, and investigator notes. Counsel testified that he reviewed the discovery materials with Applicant and that the only forensics in the case was a single shotgun shell. Counsel testified that he reviewed the results from his and Jody McCurley's investigation and that there was not anything tangible. Counsel testified that he had tried murder cases prior to Applicant's trial and was familiar with the legal issues involved in murder cases. Counsel testified that he asked Ms. Waldrep to assist him with Applicant's case. Counsel testified that he discussed the state's evidence with Applicant prior to trial. Counsel testified that he discussed possible defenses with Applicant but that Applicant did not present counsel with any defenses.

Counsel testified that as the shotgun shell testimony and evidence developed at trial, Applicant's testimony became critically important. Counsel testified that he discussed the shotgun shell testimony with Applicant and that Applicant did not want to testify at trial. Counsel testified that the trial strategy developed with Applicant consisted of a lack of evidence, Applicant's from at the scene, and poking holes in the state's case. Counsel testified that Applicant agreed with the trial strategy that counsel and Applicant

developed. Counsel testified that he discussed Applicant's right to testify and not testify as a part of the trial strategy. Counsel testified that Applicant made the decision not to testify. Counsel testified that when it came time for Applicant to make the decision to testify or not testify during the trial, that counsel and Applicant again discussed Applicant's right to testify or not testify. Counsel testified that Applicant ultimately decided not to testify.

Counsel testified that he was sufficiently able to confer with Applicant before and during the trial. Counsel testified that he had ample time to prepare for Applicant's trial and conduct the necessary research.

Ms. Waldrep's Testimony

At the PCR hearing Ms. Waldrep testified that she became involved in the Applicant's case shortly after Mr. Allen was appointed to represent Applicant. Ms. Waldrep testified that prior to Applicant's trial she was employed by the Office of Indigent Defense in Columbia and that at Indigent Defense she prepared motions and was familiar with the procedures for obtaining money from Indigent Defense to assist with investigations. Ms. Waldrep testified that she was able to obtain money for Applicant's case and investigation, including background checks, prior records, and expert analysis. Ms. Waldrep testified that she conducted case law research for the various pre-trial and trial motions, including the motion for change of venue. Ms. Waldrep testified that the trial judge questioned each juror regarding the amount of publicity they had been exposed to.

Ms. Waldrep testified that she met with Applicant on several occasions, that Applicant was very forthcoming and helpful with his case, and that Applicant provided

Ms. Waldrep and counsel with the names of witnesses. Ms. Waldrep testified that she spoke with the people whom Applicant informed her and counsel of. Ms. Waldrep testified that she and counsel discussed trial strategy with Applicant and reviewed testimony with Applicant. Ms. Waldrep testified that there was an issue with the van and that the defense could argue the evidence had been tainted. Ms. Waldrep testified that investigator McCurley and counsel spoke with the Harpers and that the timeline was an important issue because Applicant would not have had the time to commit the crimes if Applicant was on foot. Ms. Waldrep testified that Applicant was very engaged in all their discussions and that the state was concerned with the lack of evidence. Ms. Waldrep testified that she was present during counsel's discussion with Applicant concerning Applicant's right to testify or not testify, and that Applicant was concerned about cross-examination, that Applicant did not want to say anything wrong and look bad for the jury. Ms. Waldrep testified that Applicant never informed counsel that Applicant wanted to testify and that counsel never told Applicant he could not testify.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

1. Failure to Adequately Represent Applicant

The Applicant asserts that trial counsel was ineffective for failing to discharge his professional responsibilities while handling Applicant's case; failing to act as Applicant's advocate; failing to pursue plea negotiations that may have proven advantageous to Applicant; failing to properly consult with Applicant and keep Applicant informed of the status of his case; failing to discuss any kind of defense strategy with Applicant; and for failing to explain or discuss with Applicant the tactical choices that were available or that counsel planned on using. This Court finds that these allegations are without merit. This Court finds Applicant's testimony is not credible. Thus Court further finds counsel and Ms. Waldrep to be credible. Counsel testified that he met with Applicant six to seven times and that counsel and Applicant extensively discussed Applicant's case. Counsel testified that he met with Applicant to discuss the state's evidence, Applicant's version of events, the results of Kelly Fite's ballistics investigation, the results of Jody McCurley's investigation, possible defenses, and trial strategy. Ms. Waldrep also testified that she met with Applicant several times to discuss the case as well as Applicant's right to testify or not testify and that Applicant was very informative and helpful in forming his defense. Counsel testified that when he was appointed to represent the Applicant, Applicant did not want to plead guilty and wanted to proceed to trial.

The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from

counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters counsel failed to discover or discuss with Applicant which would have likely caused the outcome of Applicant's trial to be different. This Court finds that counsel and Ms. Waldrep met with Applicant multiple times and kept Applicant informed of the status of his and that Applicant was actively involved in preparing his defense. This Court finds that prior to counsel's representation there may have a plea offer on the table, however when counsel began to represent Applicant, Applicant had made the decision to proceed trial and did not want to plead guilty. This Court finds that Applicant has failed to show that counsel's representation was deficient and any resulting prejudice; therefore, this Court finds that these allegations are denied and dismissed.

2. Failure to Investigate

The Applicant alleges that trial counsel was ineffective for failing to prepare and investigate Applicant's case prior to trial; failing to conduct legal research regarding Miranda violations, suppression motion, and motion for change of venue; and for failing to adequately investigate and pursue fingerprint evidence. This Court finds that these allegations are without merit. At the PCR counsel testified that he hired a private investigator, Jody McCurley, to assist with Applicant's case. Counsel testified that he obtained funds for Kelly Fite to review the ballistics in Applicant's case. The results of both investigations were discussed with Applicant by counsel and Ms. Waldrep. Ms. Waldrep testified that she conducted legal research concerning the motion to change venue and counsel testified that he filed a written motion to change venue. Counsel explained that he decided to withdraw the motion to change venue after the trial judge

questioned each individual juror concerning pre-trial publicity. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). The record reflects that the trial judge extensively questioned each juror about the amount of pre-trial publicity they had been exposed to. The trial judge found that the jurors selected could put aside the media and decide the case solely upon the evidence presented at trial. It was after the trial judge's finding that counsel withdrew his motion to change venue. This Court finds that counsel articulated valid strategic reasons for withdrawing the motion. Additionally, this Court finds that even if counsel proceeded with his motion, the motion would have been denied based on the trial judge's findings in the record. Moreover, the record reflects that Applicant agreed with the decision to withdraw the motion. The Applicant has not shown counsel was deficient in that choice of tactics. This Court also finds that Ms. Waldrep adequately researched change of venue. Applicant has not shown counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

With regard to Applicant's allegation that trial counsel failed to research and argue the motion to suppress based on a Miranda violation, Applicant has failed to meet his burden of proof. Ms. Waldrep testified that she conducted legal research regarding the motion presented at the pre-trial hearing. The record reflects counsel presented the motion to suppress and argued the motion at the pre-trial hearing. Counsel presented case

law in support of his argument; however the trial court overruled counsel's objections and denied the motion to suppress. The Applicant did not present any evidence or testimony concerning a more adequate argument for the motion to suppress, nor did Applicant present any case law to support his allegation. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds and the record reflects that counsel articulated valid strategic reasons for his strategy in arguing the motion to suppress. The Applicant has not shown counsel was deficient in that choice of tactics. This Court finds the necessary legal research was done and the motion properly presented and argued at trial. The Applicant failed to show any resulting prejudice; therefore this allegation is denied and dismissed.

As to Applicant's claim that counsel failed to investigate the fingerprint evidence, Counsel testified that the prints found on the van did not belong to the Applicant. Counsel testified that the absence of Applicant's fingerprints and the presence of a third-party's fingerprints was something that counsel brought out during trial. The record reflects that counsel cross-examined Mr. Steven Curtis regarding the fact that the Applicant's fingerprints were not found and that the van had evidence of someone else's fingerprints. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998). Applicant did not present a fingerprint analysis or any type of evidence concerning the lack of a fingerprint

investigation at the PCR hearing. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

3. Failure to Properly Advise of Right to Testify and Not Testify

Applicant asserts that trial counsel was ineffective for failing to properly advise Applicant of his right to testify or not testify and coerced Applicant to relinquish his right to testify on his own behalf. This Court finds that this allegation is without merit. Counsel testified that he and Applicant discussed Applicant's right to testify or not testify prior to trial and during trial. Counsel testified that he wanted Applicant to testify at trial in order to refute the state's evidence and testimony. Counsel testified that Applicant made the decision not to testify. Ms. Waldrep testified as well that Applicant never informed counsel that he wanted to testify and counsel never told Applicant he could not testify. Ms. Waldrep testified that Applicant was concerned about being cross-examined and did not want to look bad for the jury. The record reflects the trial judge discussed Applicant's right to testify or not testify and the Applicant indicated that he understood his rights. (Tr. p.585). The trial judge asked Applicant if the decision was Applicant's and not anyone else's, and the Applicant indicated that it was his decision alone. (Tr. p.585, lines10-12). Applicant informed the trial court that it was his decision not to testify. (Tr. p.585, lines16-20). This Court finds that Applicant was adequately advised of his right to testify or not testify by both counsel and Ms. Waldrep as well as by the trial judge on the record. Applicant testified under oath that it was his decision not to testify at trial. This Court finds that Applicant has failed to show that counsel's performance was deficient or that counsel coerced Applicant into not testifying. This Court finds that Applicant cannot

show any resulting prejudice as he informed the trial judge that he did not want to testify; therefore, this allegation is denied and dismissed.

4. Failure to Effectively Challenge the State's Case

The Applicant asserts that trial counsel was ineffective for failing to effectively challenge the search and seizure issue; failing to adequately challenge a statement made by a witness for the state; failing to challenge the admission of evidence that had been withheld from the defense in violation of Rule 5; and for failing to challenge the admission of evidence based on a broken chain of custody. This Court finds that these allegations are without merit. This Court has already found that trial counsel was not ineffective in researching and arguing the motion to suppress based on a Miranda violation. The record reflects that counsel filed a motion to suppress the search warrant based on a violation of S.C. Code §17-13-140. (Aug. 28, 2006 Tr. p.24, lines5-13). The record reflects that counsel filed this motion out of an abundance of caution and that counsel discussed this issue with Applicant. (Id. p.31, lines16-22). The record further reflects that counsel explained his reasons for withdrawing the motion to suppress. (Id. p.31, line23 – p. 32, line25).

Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that counsel articulated valid strategic reasons for withdrawing the motion to suppress the search warrants. Applicant did not provide an alternative argument that

counsel should have argued in the motion to suppress, nor did Applicant provide any additional support that counsel failed to present in the motion. This Court finds that Applicant has not shown counsel was deficient in that choice of tactics. This Court also finds that Applicant has not shown resulting prejudice from counsel's alleged deficiency; therefore this allegation is denied and dismissed.

Applicant alleges that trial counsel was ineffective for failing to challenge Mr. Harper's testimony at trial that was sheer speculation. Applicant directs this Court's attention to Mr. Harper's testimony "that due to a defect in the door handle of the van, that he, his son, and Applicant were the only people who knew how to open the doors to get in the van." (Tr. p.473-475). A review of the record reflects that counsel objected to the testimony and a bench conference was held. (Tr. p.473, line25 – p. 474, line3). Additionally, Mr. Harper's testimony at the PCR hearing did not differ from Mr. Harper's testimony at trial. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. This Court finds that Applicant failed to show counsel's

performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

Next, Applicant alleges trial counsel was ineffective for failing to challenge admission of evidence that was withheld from the defense in violation of Rule 5. At the PCR hearing counsel testified that he filed a discovery motion and received the discovery materials from the state. Applicant does not point any specific evidence that was withheld. Applicant did not present any testimony or introduce into evidence at the PCR hearing the alleged evidence that had been withheld. This Court notes and the record reflects that counsel made a motion to produce certain photographs at the pre-trial motion hearing and that the defense was provided with the photographs. (Aug. 28, 2006 Tr. p.34-36). In evaluating post-trial Brady claims, the Applicant must show that (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., 434 S.E.2d at 268. This Court finds that Applicant failed to show that any evidence was suppressed. Applicant is unable to show that counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

As to Applicant's allegation that trial counsel was ineffective for failing to challenge the admission of evidence based on a broken chain of custody, this Court finds

Applicant has failed to meet his burden of proof. Applicant generally asserts counsel failed to make a challenge to the evidence on the basis that the chain of custody was broken. Applicant does not specify what evidence counsel should have directed his objection at, nor does Applicant provide this Court with arguments that counsel should have made. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore this allegation is denied and dismissed.

5. Failure to Adequately Defend

Applicant alleges that trial counsel was ineffective for failing to put forth any argument for a minimum sentence at Applicant's sentencing; failing to adequately object and request a better curative instruction when the solicitor stated in closing argument that Applicant had threatened to kill the victims prior to the actual murders; and for failing to call alibi witnesses that would have proven Applicant's innocence. This Court finds that these allegations are without merit. As to Applicant's claim that trial counsel failed to argue for the minimum sentence, this Court finds that Applicant has not met his burden of proof. This Court notes that Applicant was found guilty of multiple violent and most serious crimes. The record reflects that the trial judge gave Applicant the opportunity to speak during sentencing and the Applicant declined to address the court. (Tr. p.668, lines1-4). The Applicant has failed to show what argument counsel should have made for a minimum sentence. This Court finds that when given the opportunity, Applicant did not request and/or argue for a minimum sentence on his own behalf. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

Applicant alleges that trial counsel was ineffective for failing to object and request a better curative instruction when the solicitor stated in closing argument that Applicant had threatened to kill the victims prior to the actual murders. The record reflects counsel made an objection to the solicitor's comment regarding a prior threat made by Applicant towards the victims. (Tr. p.614, line24 – p.615, line2; p.628-635). Counsel's objection was sustained by the trial court. (Tr. p.634, lines4-9). The record further reflects that the trial court gave the jury a curative instruction. (Tr. p.635, line16 – p.636, line5). This Court finds that contrary to Applicant's assertion, counsel did object to the solicitor's comment and that this objection was sustained by the trial court. Additionally, this Court finds that Applicant failed to show how the curative instruction was insufficient and what instruction counsel should have requested. Applicant has failed to show counsel's performance was deficient and any resulting prejudice. This Court finds that this allegation is denied and dismissed.

The Applicant further alleges counsel was ineffective for failing to call alibi witnesses that would have proven Applicant's innocence. At the PCR hearing Ms. Waldrep testified that Applicant provided the names of witnesses for his defense and that those witnesses were contacted. This Court finds that Applicant did not present any alibi witnesses at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness'

failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Accordingly, Applicant has failed to show resulting prejudice and cannot meet his burden of proof that trial counsel was ineffective. This Court finds that this allegation is denied and dismissed.

Prosecutorial Misconduct

Applicant alleges that the prosecutor's closing remarks to the jury were both inflammatory and erroneous statements of law, and that this amounted to misconduct rendering the proceedings fundamentally unfair. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). After reviewing the entire record, this Court does not find any comments by the solicitor so infected the trial that a new trial is warranted. This Court is not convinced that the solicitor's arguments even reach the level of being improper, but certainly there is no evidence that Applicant was prejudiced. This Court finds that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

V. CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court

to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 4th day of January, 2012


J. Cardell Maddox, Jr.
Presiding Judge
Tenth Judicial Circuit

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
JAN 19 PM 2 57

Anderson, South Carolina

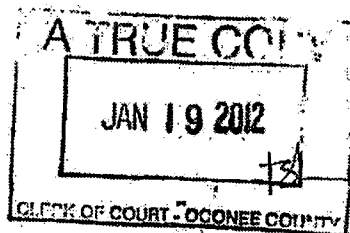


Exhibit E

**Renee H. Tollison**

Circuit Court Reporter

P.O. Box 4321
Anderson, SC 29622

Fax: (864) 934-6279

Lorlene French, Legal Assistant
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, S C 29211-1589

March 13, 2012

RE: James Randolph Frady v. State

Dear Ms. French:

Enclosed is the partial transcript in the above referenced case. As stated in my email to you on March 3, 2012, I've run into a problem on this transcript. My recording from my primary recorder has a roar on it and is inaudible, and my backup starts in the middle of the hearing. I had installed new software on my computer at the end of August that was supposed to back up my primary and didn't realize it was causing a problem. I apologize for the inconvenience this may cause.

Sincerely,

A handwritten signature in cursive script that reads "Renee H. Tollison".

Renee H. Tollison
Circuit Court Reporter

cc: SC Court Administration

RECEIVED

MAR 16 2012

SC OFFICE OF
APPELLATE DEFENSE

Exhibit F

State of South Carolina

County of Oconee

In the Court of Common Pleas

James Randolph Frady,

Applicant,

-vs-

State of South Carolina,

Respondent.

2009-CP-37-0451

October 3, 2011

Transcript of Record

BEFORE:

The Honorable J. Cordell Maddox, Jr., Judge

APPEARANCES:

Rodney W. Richey, Esquire
Attorney for the Applicant

Kaelon E. May, Esquire
Attorney the State

Renee H. Tollison
Circuit Court Reporter

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Michael Harper				
Richey				
Tammy Harper				
Richey				
James Randolph Frady				
Richey				
May				
D. Chuck Allen				
Richey				
May			3	
Elizabeth Waldrep				
May	5			
Richey			8	
James Randolph Frady				
Richey	10			

<< -- >>

Certificate of Reporter

PAGE
12

EXHIBITS

No	DESCRIPTION	ID	EV
<i>No exhibits were presented during the hearing</i>			

James Randolph Frady v. State of South Carolina 2009-CP-04-0451
Chuck Allen - Cross-examination by Ms. May

3

1 (WHEREUPON, court convened with all parties present
2 and the following proceedings were had commencing at
3 approximately 10:36 a.m.)

4 (Due to equipment malfunction, the record of the
5 first 44 minutes of this hearing were not
6 preserved.)

7 **CHUCK ALLEN,**

8 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

9 CROSS-EXAMINATION

10 BY MS. MAY:

11 A. Page 50?

12 Q. Yes.

13 A. Okay.

14 Q. Just do you recall challenging the arrest and
15 seizure of Mr. Frady in those pages?

16 A. I don't see an objection. You can refer my
17 attention to it maybe.

18 Q. I'll refer you to page 59.

19 A. 59?

20 Q. Yes. It's at the very bottom, line 23 and onwards.

21 A. Okay. I see.

22 Q. I just wanted to refresh your recollection. So you
23 recall challenging the arrest and seizure of Mr. Frady?

24 A. Yeah. I see one objection here to maybe something

25 he said when they were -- seems like that was maybe when

1 they restrained him when they went to his home and did
2 the search. Maybe that was it. I'm not absolutely
3 certain. But yeah, I see an objection there on the Fifth
4 Amendment, yes. That he had not been Mirandized, yeah, I
5 see that.

6 MS. MAY: Beg the Court's indulgence, Your
7 Honor.

8 (Pause)

9 MS. MAY: Those are all the questions I have.

10 MR. RICHEY: Just a couple more.

11 REDIRECT EXAMINATION

12 BY MR. RICHEY:

13 Q. Mr. Allen, do you recall if there was DNA found on
14 that shells? Do you recall any DNA evidence?

15 A. I recall the absence of DNA as far as the
16 investigation. That's what I'm saying. The only
17 forensics was the -- that one shell.

18 Q. And on the night that the murder was supposed to
19 have happened, do you recall that Mr. Harvey was not at
20 home, that he found out the car -- the van was stolen
21 when he got back home? Do you remember that being the
22 case?

23 A. Yeah, but I'd be willing to have my recollection
24 refreshed. But yeah, they had been somewhere and then
25 they came home. Maybe so, maybe so.

**James Randolph Frady v. State of South Carolina 2009-CP-04-0451*
Caroline Elizabeth Waldrep - Direct Examination by Ms. May.

5

1 Q. Thank you.

2 THE COURT: Thank you, sir. You can step down.

3 MR. RICHEY: No other witnesses.

4 Ms. MAY: Your Honor, the State would like to
5 call Ms. Waldrep.

6 THE COURT: Okay.

7 THE WITNESS: My name is Caroline Elizabeth
8 Waldrep.

9 Ms. MAY: May it please the Court.

10 **CAROLINE ELIZABETH WALDREP,**

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MS. MAY:

14 Q. Ms. Waldrep, do you recall when you became involved
15 with Mr. Frady's case?

16 A. Yes. Shortly after Mr. Allen was appointed, he was
17 running into problems that I think so many defense
18 attorneys have in trying to get a case together. You
19 know, the defendant is so seriously disadvantaged by the
20 resources that the State has at its disposal. And so Mr.
21 Allen knew that I had previously for a brief period of
22 time worked for Indigent Defense in Columbia and asked me
23 if I could help him with putting this case together. He
24 knew it was going to trial, and he asked me if I could
25 help him secure an investigator and experts that would be

1 necessary for the trial of this case. And that's when I
2 became involved and began preparing motions for the judge
3 to approve and for Indigent Defense to approve because
4 that's an arduous process in and of itself trying to get
5 any money out of Indigent Defense.

6 Q. And were you successful in getting money?

7 A. Yes, we were successful. I believe that the money
8 that we requested was cut somewhat, but we were
9 successful in getting money for Jody McCurley to go out
10 and interview witnesses, to go to the crime scene, to do
11 background checks, to run phone records, and also to hire
12 Kelly Fike from Atlanta to do a ballistics evaluation of
13 the shotgun shell that was recovered from the crime
14 scene.

15 Q. Okay. And did you help -- did you conduct any
16 research, any case law research, for the case?

17 A. Yes, I did. There was -- we did some research, and
18 we also -- I helped Chuck with some motions. That was
19 one of the things that we were very concerned about the
20 venue, the change of venue. And I know that Randy was
21 very concerned about that as well because, you know, we
22 did believe that this case had received a fair amount of
23 publicity up here. And Judge Buckner went through one-
24 by-one and interviewed the witness -- pardon me -- the
25 potential jurors and asked them very specifically about

*"James Randolph Frady v. State of South Carolina 2009-CP-04-0451
Caroline Elizabeth Waldrep - Direct Examination by Ms. May*

7

1 what they had read or heard about this case.

2 Q. And did you have a chance to meet with Mr. Frady?

3 A. Yes, on several occasions. He was always very
4 helpful, very involved in the case and very forthcoming,
5 I believed; you know, about his wishes and how it was to
6 be tried. And we talked to people that he wanted us to
7 talk to, and he was always very pleasant to deal with.

8 Q. And do you recall at the meetings that you were
9 present for, what was discussed or what the meetings were
10 about?

11 A. The meetings were largely about, you know, trial
12 strategy and going over with Randy the people that we
13 knew were going to testify. For instance, I knew that
14 the issue of the van and the recovery of the van and the
15 possibility that the evidence had been tainted in some
16 way because it was returned to Mr. and Mrs. Harper was a
17 very big issue for Randy, and we were concerned about
18 that. We were concerned about the whole case since it
19 was circumstantial, but we talked about that. And that's
20 why Chuck and Jody actually went out to the -- you know,
21 to talk to the Harpers. And also the time line was
22 something that was discussed a lot about when the van was
23 recovered, when the van burned and that we had put up
24 basically the case that he would not have had time to go
25 on foot, you know, home when -- it was basically a time

1 line issue that we discussed a lot.

2 Q. And did -- during those discussions, did Mr. Frady
3 understand, seem to understand, or was he engaged in
4 those discussions?

5 A. Yes, he was. We were very, you know -- it was a
6 circumstantial case, and I understand that the jury did
7 its job. But you know, we had -- you know, I know that
8 he believed -- it was my opinion that he believed that
9 there was just not enough evidence to convict him. In
10 fact, I believe the State was concerned about that as
11 well because Mindy Hervey, who was the assistant
12 solicitor who prosecuted the case for Chrissy Adams -- I
13 believe in her opening statement she went through the
14 speech that so many prosecutors give at this time about
15 this is not CSI, they're -- you know, we're -- there's --
16 you know, it's not on videotape. There's not, you know,
17 the blood experts. And I believe they were concerned
18 about that as well as the lack of anything other than
19 circumstantial evidence.

20 Q. No further questions. Please answer any questions
21 Mr. Richey has.

22 CROSS-EXAMINATION

23 BY MR. RICHEY:

24 Q. Ms. Waldrep, were you there during the time where
25 the discussion was made whether he was going to testify

James Randolph Frady v. State of South Carolina 2009-CP-04-0451
Caroline Elizabeth Waldrep - Cross-examination by Mr. Richey

9

1 or not?

2 A. There were several discussions about that, Mr.

3 Richey. I believe that -- like I said, I believe that he

4 was concerned about cross-examination, and he didn't, I

5 don't believe, want to say anything wrong that would make

6 him look bad to the jury. And you know, it was -- I can

7 tell you with absolute certainty that there was never any

8 sort of discussion where he was saying, I want to

9 testify, and Mr. Allen was saying, no, please don't.

10 That never -- or no, you're not going to. It's going to

11 hurt you. It's in your -- you know, I do not recall that

12 at all. I do not recall a time at which he ever said

13 wanted to testify.

14 Q. So your testimony is in direct conflict with Mr.

15 Frady's? You understand Mr. Frady testified ---

16 A. Yes, sir, I'm afraid so.

17 Q. Okay. So it's your testimony that you all -- he

18 basically said, I don't want to testify?

19 A. That is what I recall.

20 Q. No more questions.

21 THE COURT: Thank you, ma'am.

22 Anything in rebuttal?

23 MR. RICHEY: We want to recall one witness real

24 brief, Mr. Frady, for one or two questions.

25 THE COURT: All right.

1 Come around. Mr. Frady, you're still under oath.

2 JAMES RANDOLPH FRADY,

3 BEING PREVIOUSLY SWORN, TESTIFIED AS FOLLOWS:

4 DIRECT EXAMINATION

5 BY MR. RICHEY:

6 Q. Mr. Frady, you've been in the courtroom and you've
7 heard the testimony surrounding your testifying at trial
8 where Ms. Waldrep has said that you emphatically did not
9 want to testify. Do you understand? I mean ...

10 A. I understand. The only reason I didn't testify is
11 because they asked me not to.

12 Q. You did not emphatically tell them you did not want
13 to testify?

14 A. No.

15 Q. Did you say anything to make them believe you didn't
16 want to testify?

17 A. Not to my knowledge, no.

18 Q. Okay. Do you have any reason why they would come in
19 here to say that, I mean, at all?

20 A. That's the way I was instructed to conduct myself at
21 this time.

22 Q. Okay. Thank you, sir.

23 THE COURT: All right. Thank you, sir. You
24 can step down.

25 (WHEREUPON, the witness stepped down from the

James Randolph Frady v. State of South Carolina 2009-CP-04-0451
James Randolph Frady - Direct Examination by Mr. Richey

11

1 witness stand.)

2 THE COURT: Nothing else?

3 MR. RICHEY: Yes, sir.

4 THE COURT: All right. I'll take it under
5 advisement and let you know next week.

6 MR. RICHEY: Thank you, sir.

7 (WHEREUPON, the hearing ended at approximately 11:32
8 a.m.)

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

1

CERTIFICATE OF REPORTER

2

I, the undersigned Renee H. Tollison, Official Court
Reporter for the Tenth Judicial Circuit of the State of
South Carolina, do hereby certify that the foregoing is a
true, accurate, and complete transcript of record of all
the proceedings had and evidence introduced in the
trial/hearing of the captioned case, relative to appeal,
in the Circuit Court for Oconee County, South Carolina,
on the 3rd day of October 2011.

10

This transcript may contain quoted material. Such
material is reproduced as read by the speaker.

12

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

14

March 13, 2012

15

16



17

Circuit Court Reporter

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO OCONEE COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2009-CP-37-0451
Appellate Case No. 2012-207126

JAMES RANDOLPH FRADY, 317328,.....Petitioner,

v.

STATE OF SOUTH CAROLINA,.....Respondent.

**RETURN TO MOTION TO REMAND
FOR RECORD RECONSTRUCTION**

In response to Petitioner's Motion to Remand for a Reconstruction hearing of the October 3, 2011, post-conviction relief hearing in this matter, and for appointment of counsel to represent Petitioner for the reconstruction hearing, the Respondent respectfully submits the following:

1. The Respondent adopts the facts set forth by Petitioner in the Motion to Remand for Record Reconstruction.
2. The Respondent opposes Petitioner's Motion to Remand for Record Reconstruction.
3. The Order of Dismissal (Petitioner's Exhibit D) contains detailed summaries

of the testimony presented by each witness at the post-conviction relief hearing on October 3, 2011.

4. The Petitioner's allegations were extensively addressed and ruled upon in the in the Order of Dismissal.

5. The Respondent submits that the findings of fact in the Order of Dismissal are specific and complete on every issue; evidenced by the fact that Petitioner did not identify or complain of any omissions in the Order of Dismissal prior to or after issuance of the Order of Dismissal by Judge Maddox.

6. The Respondent submits that the Order of Dismissal is the best evidence of the October 3, 2011, post-conviction relief evidentiary hearing.

7. The Petitioner fails to identify any issues that cannot be reviewed absent a full development of the record. See Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

8. The Respondent submits that Petitioner fails to show why a meaningful review cannot be given to Petitioner's case in the absence of part of the post-conviction relief hearing transcript, when the Order of Dismissal contains the testimony presented at the hearing and the required findings of fact and conclusions of law.

9. The Respondent submits that a reconstruction of the October 3, 2011, post-conviction relief hearing is not warranted.

10. In the event this Court grants Petitioner's motion to remand for reconstruction, Respondent would submit that only a reconstruction of the missing part of the post-conviction relief hearing transcript is necessary.

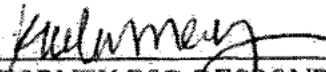
CONCLUSION

For the foregoing reasons, the Respondent opposes Petitioner's Motion to Remand for a Reconstruction of the record of Petitioner's October 3, 2011 post-conviction relief hearing and respectfully requests Petitioner's Motion be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

KAELOE E. MAY
Bar No. 80469
Assistant Attorney General

By: 
ATTORNEY FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

July 16, 2012

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

JAMES RANDOLPH FRADY,

PETITIONER,

V.

THE STATE,

RESPONDENT.

REPLY TO RETURN
TO MOTION FOR REMAND
FOR RECORD RECONSTRUCTION

Petitioner James R. Frady respectfully submits that, contrary to the argument advanced by the State, an Order remanding this case to the Oconee County Court of Common Pleas for a reconstruction hearing of the October 3, 2011, post-conviction relief evidentiary (PCR) hearing in this matter is necessary. In support of this motion, Petitioner alleges the following:

- (1) The State's assertion that a reconstruction hearing is unnecessary because "the findings of fact in the Order of Dismissal are specific and complete on every issue" is misplaced (Respondent's Return to Motion to Remand for Record Reconstruction, paragraph 5), as it overlooks the standard of review Petitioner will have to meet when challenging the PCR court's

Order of Dismissal: when challenging the findings of the PCR court, Petitioner will have to show that no “evidence of probative value in the record exists to support the findings of the PCR court.” See, e.g., Narciso v. State, 397 S.C. 24, 29, 723 S.E.2d 369, 371 (2012).

- (2) That Petitioner can only show the PCR court’s factual findings are without evidentiary support in the record on a given issue if the actual record exists for review.
- (3) That the certified court reporter, Ms. Renee H. Tollison, experienced malfunctions in her primary recording system such that it was inaudible, and her backup software only began to function in the middle of the hearing. The index of the partial transcript produced Ms. Tollison indicates testimony from three of six witnesses is completely missing, as well as the direct testimony of a fourth witness. Notably, the missing testimony is from witnesses produced by Petitioner in support of his numerous claims.
- (4) That in the interests of fundamental fairness, remand for record reconstruction of the October 3, 2011 PCR evidentiary hearing is necessary in this instance because “the incomplete nature of this transcript prevents the appellate court from conducting a meaningful appellate review.” State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 274 (Ct. App. 2007) (internal quotations omitted); see also Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002).

Accordingly, in order to allow meaningful appellate review, Petitioner respectfully requests that this Court remand his case to the Oconee County Court of Common Pleas for reconstruction of the October 3, 2011, post-conviction relief evidentiary hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen R. Stevens", is written over a horizontal line.

Breen R. Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

July 20, 2012

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

JAMES RANDOLPH FRADY,

PETITIONER,

V.

THE STATE,

RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Motion to Remand for Record Reconstruction in the above case has been served upon Kaelon E. May, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of July, 2012.



Breen R. Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of July, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

The Supreme Court of South Carolina

James Randolph Frady, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-207126

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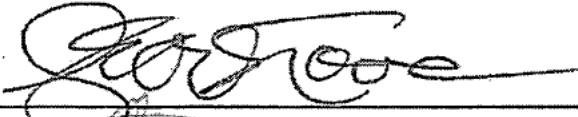
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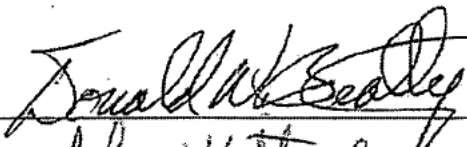
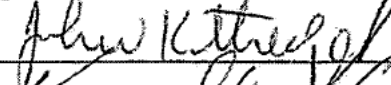
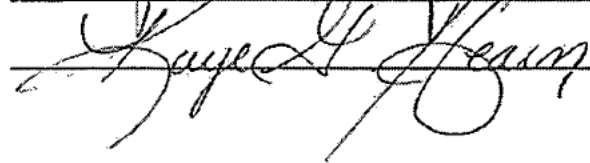
SC OFFICE OF
APPELLATE DEFENSE

ORDER

This matter is before the Court by way of a notice of appeal from an order denying petitioner's application for post-conviction relief (PCR). Petitioner now moves the Court to remand the matter to the circuit court for reconstruction of the record because a portion of the recording of the PCR hearing is inaudible and cannot be transcribed. Petitioner also requests the Court appoint counsel to represent petitioner at the reconstruction hearing. The State opposes the motion.

We hereby grant the motion and remand this matter to the Honorable J. Cordell Maddox, Jr., to reconstruct the missing portion of the record in this matter. See *Koon v. State*, 358 S.C. 359, 595 S.E.2d 456 (2004), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002); *China v. Parrott*, 251 S.C. 329, 162 S.E.2d 276 (1968); *State v. Ladson*, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007). A hearing to reconstruct the record should be held within 45 days of the date of this order. If Judge Maddox determines reconstruction is not possible, he shall notify this Court and the parties within 15 days of the reconstruction hearing. If the record is reconstructed, the parties shall notify this Court and the matter will proceed upon petitioner's receipt of the transcript from the reconstruction hearing. Rodney Wade Richey is appointed to represent petitioner at the reconstruction hearing.

 C.J.
 J.


J.

J.

J.

Columbia, South Carolina

August 10, 2012

cc:

Kaelon Elizabeth May

~~Breen Richard Stevens~~

James Randolph Frady #317328

Rodney Richey

The Honorable J. Cordell Maddox, Jr.



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MAR 07 2013

OFFICE OF
CHIEF JUSTICE

State of South Carolina
The Circuit Court of the Tenth Judicial Circuit
S.C. SUPREME COURT

J. Cordell Maddox, Jr.
Judge

Post Office Box 8002
Anderson, SC 29622
Phone: (864) 260-4636
Fax: (864) 260-6348
cmaddoxj@sccourts.org

February 28, 2013

Re: James Randolph Frady v. State of South Carolina, Appellate Case No. 2012-207126

Dear Chief Justice Jean Hofer Toal;

This matter came before the court by way of an Order of the Supreme Court of South Carolina dated August 10, 2012, to reconstruct the missing portion of the record from the PCR hearing.

In accord with the order, I held a hearing on February 25, 2013 in Oconee County. Present at the hearing was Karen C. Ratigan of the Attorney General's Office, Rodney Richey, counsel for petitioner, petitioner, and witness Chuck Allen. Upon review of the transcript and consideration of issues presented at the hearing, I have determined that the record could not be reconstructed adequately.

The missing portion of the record contained all or portions the direct and cross examination of the petitioner and two witnesses, as well as the direct examination of witness Chuck Allen. The State presented extensive notes taken by Kaelon E. May, formerly of the Attorney General's Office, at the original hearing. The State asked the court to admit the notes as the best evidence of the record, as a means to reconstruct the record. Mr. Richey objected to this manner of reconstruction as potentially biased.

Although Chuck Allen and the petitioner were present and prepared to re-testify, the two additional witnesses whose testimony was absent from the original record, Michael and Tammy Harper, were not present.

Given these issues, as well as the gravity of the charge and the potential sentence, it is my conclusion that the record could not be sufficiently reconstructed at this hearing.

J. Cordell Maddox, Jr.

Walhalla, South Carolina
February 27, 2013

cc:

Justice Costa M. Pleicones
Justice Donald W. Beatty
Justice John W. Kittredge
Justice Kaye G. Hearn
Beverly Whitfield
Karen C. Ratigan
Rodney Richey
James Randolph Frady #317328



The Supreme Court of South Carolina

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CLERK OF COURT

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March 18, 2013

Mr. Breen Richard Stevens
Division of Appellate Defense
1330 Lady St., Ste. 401
Columbia SC 29201

RECEIVED

MAR 19 2013

OFFICE OF
APPELLATE COUNSEL

Re: James Randolph Frady v. The State
Appellate Case No. 2012-207126

Dear Counsel:

By letter dated February 28, 2013, the Honorable J. Cordell Maddox, Jr., advised this Court that the missing portions of the transcript of the PCR hearing could not be adequately reconstructed. Therefore, since you are already in possession of all of PCR transcript that will be available, the petition for writ of certiorari and appendix must be served and filed within thirty (30) days of the date of this letter.

Very truly yours,

CLERK

cc: John Walter Whitmire, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

James Randolph Frady, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-207126

Lower Court Case No. 2009-CP-37-00451

ON WRIT OF CERTIORARI

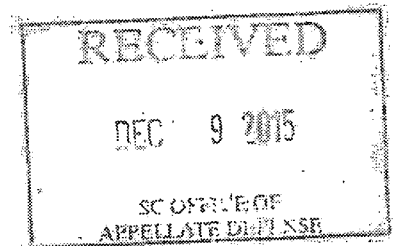
Appeal from Oconee County

The Honorable Perry M. Buckner, III, Circuit Court Judge
The Honorable J. Cordell Maddox, Jr., Post-Conviction Judge

Memorandum Opinion No. 2015-MO-073
Submitted November 20, 2015 – Filed December 9, 2015

**AFFIRMED IN PART, VACATED IN PART, AND
REMANDED**

Appellate Defender Benjamin John Tripp, of Columbia,
for Petitioner.



Attorney General Alan McCrory Wilson and Assistant Attorney General Patrick Lowell Schmeckpeper, of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the denial of his application for post-conviction relief (PCR). We grant the petition for a writ of certiorari as to petitioner's Question II, dispense with further briefing, affirm in part, vacate in part, and remand to the circuit court for consideration in accordance with this opinion. We deny the petition for a writ of certiorari as to petitioner's Question I.

Petitioner was convicted of grand larceny, first-degree burglary, second-degree arson, possession of a weapon during the commission of a violent crime, and two counts of murder. Petitioner's direct appeal was dismissed pursuant to *Anders v. California*, 386 U.S. 738 (1967). Petitioner then filed an application for post-conviction relief (PCR), which was denied after a hearing.

In preparing to appeal the PCR judge's order, petitioner became aware that, due to a malfunction of the court reporter's equipment, the first forty-four minutes of petitioner's fifty-five-minute PCR hearing were not recorded and could not be transcribed. Accordingly, the nine-page transcript of the PCR hearing contained none of petitioner's case and only a portion of the State's case.

Petitioner filed a motion to reconstruct the PCR hearing, and it was granted. After an attempt to reconstruct the hearing, the PCR judge sent a letter to this Court indicating the record could not be sufficiently reconstructed. Petitioner then filed a petition for a writ of certiorari, requesting a new PCR hearing.¹ Petitioner asserts the incomplete nature of the PCR transcript precludes meaningful appellate review of the denial of his PCR application.

After examining the entire record, including the transcript of petitioner's trial and the partial transcript of the PCR hearing, we find there is evidence of probative value in the record to support the PCR judge's denial of relief on fifteen of the grounds raised by petitioner in his PCR application. Accordingly, we affirm the

¹ Initially, we note the proper procedure for requesting a new PCR hearing after the PCR judge determines the record cannot be reconstructed is to file a motion for a new hearing. However, in the interest of justice, we will address petitioner's request for a new hearing.

PCR judge's order as to those rulings. *See Narciso v. State*, 397 S.C. 24, 723 S.E.2d 369 (2012) (stating this Court will affirm the PCR judge's findings if any evidence of probative value in the record exists to support those findings).

However, we find we cannot meaningfully review the PCR judge's rulings on six of petitioner's grounds for relief. Accordingly, we vacate the PCR judge's order as to these six rulings and remand petitioner's case to the circuit court for a new PCR hearing, limited to the allegations from petitioner's PCR application listed below:

- I. Defense counsel failed to conscientiously discharge his professional responsibilities while handling petitioner's case.
- II. Defense counsel failed to effectively challenge the arrest and seizure of petitioner.
- III. Defense counsel failed to pursue plea negotiations that may have proven advantageous to petitioner.
- IV. Defense counsel failed to put forward any argument for a minimum sentence at petitioner's sentencing.
- V. Defense counsel failed to challenge the admission of evidence at trial on the basis that the chain of custody had been broken, and that he had not been given an opportunity to examine the evidence.
- VI. Defense counsel withdrew a potentially meritorious motion to suppress.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**

1 State of South Carolina
2 County of Oconee In the Court of General Sessions

3
4 James R. Frady,)
5 Applicant,) 2009-CP-37-00451
6 -vs-) June 26, 2017
7 State of South Carolina,)
8 Respondent.)
9 _____) Transcript of Record

10

11

B E F O R E:

12

The Honorable Jocelyn Newman, Judge

13

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

14

15 Robert Mills Ariail, Jr., Esquire
Attorney for Applicant

16

17 Lindsey Ann McCallister, Esquire
South Carolina Attorney General's Office
Attorney for the State

18

19

20

21

Reported by:
Diane L. Marcengill, RPR, CRR, CRC
Circuit Court Reporter

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I N D E X

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E x h i b i t s

For the Applicant:

Marked	Description	I.D.	Admitted
1	Motion to produce evidence; motion for discovery & inspection; supplemental answer to requests for discovery	13	
2	Motion for change of venue with attachments	18	
3	Schmerber order	29	
4	Motion to suppress	32	

For the Respondent:

Marked	Description	I.D.	Admitted
1	Letter from Mr. Frady to his attorney dated 10/31/05	46	

1 (WHEREUPON, court convened with all parties
2 present and the following proceedings were had
3 commencing at 10:58 a.m.)

4 MS. McCALLISTER: May it please the Court, Your
5 Honor. This is James Randal Frady versus the State of
6 South Carolina, 2009-CP-37-0451.

7 Mr. Frady originally filed a PCR application on
8 April 13, 2009. This case has kind of a long
9 procedural history, Your Honor, so if you will bear
10 with me, I'm going to try to get this right.

11 He was indicted in December 2004 by the Oconee
12 County Grand Jury for two counts of murder, one count
13 of arson in the second degree, one count of grand
14 larceny, one count of possession of a weapon during the
15 commission of a violent crime, and one count of
16 burglary first degree.

17 He proceeded to trial on August 29th through 31st,
18 2016, before Judge Buckner, and he was represented at
19 trial by Chuck Allen and Elizabeth Waldrep. He was
20 convicted as indicted, and he was sentenced to five
21 years each for the grand larceny and the possession of
22 a weapon charge; 25 years for the arson; 30 years on
23 the burglary first degree, and two life without parole
24 sentences for murder.

25 He did have an appeal that was perfected by the

1 South Carolina Office of Appellate Defense. The
2 conviction and sentences were affirmed, and the appeal
3 was dismissed on November 12, 2008.

4 Mr. Frady then had a PCR evidentiary hearing which
5 was held on October 3, 2011. He filed that first
6 application on April 13, 2009, and then an amendment,
7 so he had a hearing on 21 grounds, all of which were
8 denied.

9 When the PCR appeal was being prepared, however,
10 it was discovered that only a few minutes of the
11 hearing had been preserved. It was sent back to try to
12 reconstruct the hearing, but eventually that was
13 unsuccessful, and eventually the supreme court ruled
14 that there was enough evidence in the record to decide
15 15 of the 21 grounds, and those grounds were affirmed.

16 However, the order was vacated and remanded for a
17 new hearing on six issues, and that is what we're here
18 on today, Your Honor.

19 And I believe there should be a copy of the order
20 detailing what those six issues are in your packet. If
21 not, I can hand you up a copy.

22 THE COURT: I don't see it. If you just hand me a
23 copy, please.

24 MS. McCALLISTER: And Mr. Frady is present today,
25 Your Honor, and he is represented by Mills Ariail.

1 THE COURT: Mr. Ariail.

2 MR. ARIAIL: Yes, Your Honor. May it please the
3 Court. We're ready to proceed. I think the -- from my
4 understanding, the order from the court of appeals,
5 actually the supreme court, has specifically said there
6 are six items that can be addressed. I've explained
7 that to Mr. Frady.

8 From my understanding, what I've explained to him,
9 it appears that the counts or, I guess, the sections he
10 can go through in regards to his PCR are Count 1, Count
11 2, Count 6, Count 12, Count 16, and Count 19. I have
12 explained to him we have to concentrate on those areas
13 because the Court, I guess, has issued an order in
14 regards to the other 15. As a result, we're just going
15 to concentrate on those today.

16 We're ready to proceed, and I call him as my first
17 witness, Your Honor.

18 THE COURT: Yes, sir.

19 Mr. Frady, come forward and be sworn.

20 MR. ARIAIL: Your Honor, he's got some documents,
21 and we can't take his handcuffs off because of security
22 issues. He might have to stand up some during his
23 testimony.

24 Is that going to be okay?

25 THE COURT: That's fine.

1 JAMES R. FRADY,
2 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

3 DIRECT EXAMINATION

4 BY MR. ARIAIL:

5 Q Mr. Frady, how are you doing today?

6 A Good. How are you?

7 Q Good. Doing good.

8 And as I've explained -- we have kind of talked
9 about this -- we've got six grounds that we can go
10 through today based upon the supreme court's decision.
11 So I want to kind of take you through those. And I
12 know you've got some documents that you might want to
13 submit during this time.

14 A Yes.

15 Q If I raise those or you have anything that you
16 want me to submit at that time, you can just let me
17 know --

18 A I can set them over here as I look at them.

19 Q -- and I'll look at them, and I'll make them a
20 Court's exhibit or let the attorney general take a look
21 at these.

22 A I would like to ask the Court to make copies
23 because I had a lot of trouble getting these documents.
24 The institute I'm at is locked down for gang warfare.
25 It's difficult to get things done.

1 THE COURT: Assuming it's not too too much stuff
2 here, we can make photocopies.

3 MR. ARIAIL: We can do that at the end after I
4 mark them, if that will be okay, Your Honor.

5 Q Now, the things we're allowed to go through, I'm
6 going to start off with what we say is Count 1 in your
7 PCR application. That is: Defense counsel failed to
8 conscientiously discharge his professional
9 responsibilities while handling petitioner's case.

10 Now, we discussed this, and I want to kind of
11 break down exactly what you believe, and you have sent
12 me a letter in regards to it, of what you think should
13 have been done.

14 There was -- you had a discussion with Mr. Allen
15 and Ms. Waldrep in regards to a change of venue motion?

16 A Yes.

17 Q That was one of the grounds that you raised. What
18 issues did you have in regards to that, because it was
19 ultimately withdrawn?

20 A Oh, I had they failed to challenge the statement
21 made by Mr. Harper based on the statement was sheer
22 speculation. Harper testified at trial that his 1991
23 Chevy van that I supposedly stole was used to commit
24 all the crimes.

25 He also testified that only three people in Oconee

1 County could open that van -- myself, him, and his son.
2 It was -- it was a broken door handle, just as easy as
3 putting your finger in and pushing a little button
4 down.

5 Furthermore, that time of year, the windows were
6 always down. But most importantly, the van was not in
7 the answer for the motion of discovery or the
8 supplemental motion for discovery. So it was in
9 violation of Rule 5 of criminal court for them to use
10 that against me.

11 Q Okay. So you're going off on a different subject,
12 and we'll start with that since that's the one you want
13 to start with.

14 MS. McCALLISTER: Your Honor, I'm going to object
15 to this. This issue of a Rule 5 violation was raised
16 in his first PCR, and it was, I believe, one of those
17 15 counts that was ruled upon and affirmed. So the
18 State objects to any questions on that issue.

19 THE COURT: Overruled.

20 You can continue.

21 BY MR. ARIAIL:

22 Q Now, in regards to the, I guess, the Harpers, your
23 issue is a Rule 5 violation.

24 Exactly what are you saying the Rule 5 violation
25 was?

1 A The van was not in the answer to motion for
2 discovery. Motion to produce evidence, which is
3 there's this motion for discovery, and this is the
4 motion to produce evidence.

5 Q Let me kind of work through this and see if I can
6 do it the right way.

7 A Here is the State's answer right there.

8 Q Right here?

9 A Yeah.

10 Q So what I'm understanding is your attorneys,
11 Mr. Allen and Ms. Waldrep, filed for a Rule 5 Brady
12 motion for discovery?

13 A Yes.

14 Q And you're saying that, in the answer to discovery
15 and the supplemental answer, there was no listing of
16 the van for the Harpers?

17 A No.

18 Q Okay. So --

19 A Furthermore, the van was given back to him three
20 days later, so it was not in the custodial possession
21 of the arresting entity.

22 Q Okay. So how are you saying that is a Rule 5
23 violation if they gave it back --

24 A Well, Rule 5, they didn't have it -- there was no
25 way that my counsel or their hired private detective

1 could have examined this van to check on the door
2 handles to see what they were saying was true or not.

3 Q Okay.

4 A But according to the rules of court, it should not
5 have been used against me. Without this, they couldn't
6 have tied me to anything. That's supposedly what I
7 stole and went to go do these things with.

8 Q And you're saying that them not being able to
9 investigate or have the van to be able to
10 investigate --

11 A It's a Brady violation, yes.

12 Q A Brady violation, but it also was the only thing
13 that tied you to the murders?

14 A Yes.

15 Q Okay. So how would having access to the van and
16 being able to go through it, how would that have helped
17 your case?

18 A They could have determined that anybody could have
19 opened that van, just sticking your finger in the hole.
20 But I guess my main point is the van shouldn't have
21 been used. It wasn't in discovery.

22 Q Okay. So there should have been some motion to
23 suppress that van --

24 A Uh-huh.

25 Q -- in discovery --

1 A Yes.

2 Q -- because it was not -- I mean, what you're
3 saying is there was no reference made in the answers or
4 supplemental answers to the van?

5 A No. No.

6 Q And this is what I'm trying to understand. The
7 focal point of the investigation in the beginning was
8 the van, correct?

9 A Yes.

10 Q Okay. So --

11 A That was the focal point of the whole --

12 Q -- you don't have knowledge that the van was a
13 part of the investigation, correct?

14 A I didn't, no. It wasn't in the motion for
15 discovery.

16 Q But when you went over it with Mr. Allen and
17 Ms. Waldrep, did y'all discuss the van?

18 A I don't recall discussing the van, no.

19 Q Okay. So you're saying when you got to trial, you
20 didn't know --

21 A I didn't know they were going to use it. I
22 thought that it was done away with because they had
23 given it back.

24 Q Okay. So you weren't prepared or didn't have --
25 hadn't discussed the van with them, is what you're

1 saying?

2 A I don't recall that, no.

3 Q Okay.

4 A At all.

5 Q So anything --

6 A I mean, it wasn't in the discovery. It shouldn't
7 have even been brought up in the trial. If it wasn't
8 in the motion for discovery, it's not supposed to be
9 used against me.

10 Q So any evidence you think would have come out of
11 that van should have been suppressed because it was a
12 Rule 5 Brady violation?

13 A Yes. They also both testified that the van was
14 totally out of gas. Mr. Harper testified to this on
15 page 679 through 681. Ms. Harper testified to this on
16 page 327.

17 Now, in order to -- if I would have gotten this
18 van, I would have had to have ran six miles into town
19 with a five-gallon can, fill it up with gas, come back,
20 put it in the van, then drive another seven to
21 eight miles to commit the crimes, then be back at my
22 house right at midnight when Officers Joseph Hamilton
23 and Honeycutt came to ask me about the van.

24 Q All right. Wait just one second.

25 MR. ARIAIL: Your Honor, if I -- I'm going to move

1 these into evidence. This is a motion to produce
2 evidence, motion for discovery and inspection, and
3 supplemental answer to requests for discovery. I'm
4 going to show it to the attorney general.

5 MS. McCALLISTER: No objection.

6 THE COURT: I'm sorry. Any objection?

7 MS. McCALLISTER: No, Your Honor.

8 THE COURT: Admitted without objection.

9 MR. ARIAIL: I'll do these as probably Applicant's
10 1, probably be the easiest way to do that.

11 (WHEREUPON, Applicant's Exhibit Number 1 was
12 marked for identification and received in evidence.)

13 THE WITNESS: As I've testified to --

14 BY MR. ARIAIL:

15 Q Okay.

16 A Okay. Like I said, from my last hearing, my
17 father and brother's neighbor said -- Julia Ford said
18 she heard the gunshots at 11:30. This can be found on
19 trial transcript page 413.

20 There was no way that I could have done all this
21 and been back at my house at midnight when Honeycutt
22 and Hamilton came to question me. I mean, to run that
23 far, to go that far and, I mean, to go into town, they
24 pulled the surveillance film from the only gas station
25 open in town, and I was not in it because I was not

1 there.

2 Q Let me stop you, try to understand what the issue
3 is with this.

4 Are you saying that your counsel did not re-create
5 a timeline or do what they needed to do in regards to
6 the timing of the murders?

7 A Yes. It wasn't investigated. I mean, if anybody
8 would have looked at it, there's no way that I could
9 have done that.

10 Q Did you discuss that with Mr. Allen and
11 Ms. Waldrep?

12 A Yes, I did.

13 Q Did they hire a private eye?

14 A They hired Jody McCurly.

15 Q What were you informed of that Jody went into?

16 A All that I got from Mr. McCurly was phone records
17 from my brother and father, from their house phone.
18 That was it.

19 Q Did anybody discuss with you the timing and
20 whether or not they agreed or disagreed with your
21 position about "there's no way I could have done this"?

22 A I'm almost certain they did, but once again,
23 there's so much time has gone by since that happened
24 and since my first PCR that, you know, memories fade.
25 Even, like, Mrs. Harper, whom I wanted to subpoena

1 today, has died. I mean, so much time has gone by,
2 it's really impossible to get a meaningful review.

3 Q Maybe I can re-create it this way: What do you
4 think should have been done to evaluate the timing
5 issue that you're saying existed?

6 A I think it should have been looked at. I mean,
7 there's no way I could have done all this. The van
8 shouldn't have been used to begin with because it
9 wasn't in discovery. But being that it was used, I'm
10 just demonstrating that it would have been impossible
11 for me to do all this in the time frame and be at my
12 house when Honeycutt and Hamilton came to ask me -- to
13 ask me about the van that night.

14 Q And do you also have any type of physical
15 injuries?

16 A Yes, I do. I have a really bad right knee. I had
17 a motorcycle wreck when I was about 16.

18 Q Was that affecting you at the time of all this?

19 A Yeah. I haven't been able to run across the room
20 since I was 16 years old.

21 Q Did you let your attorneys know about that
22 physical limitation?

23 A Yes, I did.

24 Q So you thought that there should have been more
25 investigation in regards to the timing and when certain

1 things were done in the case?

2 A Yes.

3 Q Okay. We've gone -- now I want to take you back,
4 because you kind of got off on a couple of tangents
5 there that I was probably going to get into later, but
6 the change of venue motion was one thing that you
7 raised with me, and I want to try to go down through
8 that.

9 It was withdrawn during the trial, correct?

10 A Right before the trial.

11 Q Before the trial, after the jury --

12 A Yes.

13 Q -- was qualified?

14 A No. We hadn't qualified the jury yet.

15 MS. McCALLISTER: Your Honor, I'm sorry. I have
16 another objection. This was raised in his original
17 application and is one of the 15 that was ruled upon by
18 the previous -- at the previous hearing, so I object.

19 THE COURT: I understand. Overruled.

20 BY MR. ARIAIL:

21 Q If you can just tell us a little bit about that
22 because it was withdrawn.

23 A I have the change of venue motion right here.

24 Q Okay.

25 A And I also have all I could get on the pretrial

1 publicity, which is quite a bit. There was quite a bit
2 of it.

3 Q If I'm not mistaken, some of this was submitted by
4 Mr. Allen and Ms. Waldrep in regards to the motion to
5 change venue, correct?

6 A No. I got all that on my own.

7 Q Okay.

8 A That was submitted with the motion, not the
9 actual --

10 Q Are you saying this was not attached to the
11 motion?

12 A No, no, no. That's what I got myself.

13 Q Okay.

14 A When the solicitor -- oh, I'm sorry.

15 MS. WALDREP: Beg the Court's indulgence. Just
16 trying to make sure we have a correct --

17 THE COURT: Absolutely.

18 MR. ARIAIL: Your Honor, the motion that I have
19 received from the attorney general's office and
20 Mr. Allen and Ms. Waldrep, it's a motion to change
21 venue, had some attachments to it which were identical
22 to the ones that Mr. Frady had provided me, so I'm
23 going to submit this all as Exhibit Number 2.

24 THE COURT: Any objection?

25 MS. McCALLISTER: No, Your Honor.

1 THE COURT: All right. It's admitted without
2 objection.

3 (WHEREUPON, Applicant's Exhibit Number 2 was
4 marked for identification and received in evidence.)
5 BY MR. ARIAIL:

6 Q So the way the motion -- there was a motion for
7 change of venue that was filed and had attachments to
8 it. You got to trial, pretrial, picking, qualifying
9 the jury?

10 A It was withdrawn before we picked the jury.

11 Q Okay. Correct. After the jury was qualified,
12 motion for change of venue was withdrawn.

13 What was the reason it was withdrawn?

14 A I do not know.

15 Q Did you discuss --

16 A Oh, yeah, I do. Yes, I do. They told me that
17 this could be just as easily beat in Ocone as anywhere
18 else.

19 Q Did you raise concerns to them about the number of
20 jurors that knew, I guess --

21 A Well, we hadn't picked the jury yet, so no, I did
22 not.

23 Q Hold on. I don't mean to cut you off. Let me
24 finish my question before you start because she can't
25 take all this down, and we want to have a record

1 because we didn't have one last time.

2 At any time did you discuss with them or bring to
3 their attention or have a discussion with them about
4 the number of jurors that had knowledge about the case?

5 A Not in the courtroom, no.

6 Q Okay. Well, not in the courtroom. Did you have
7 it any time after?

8 A No, we didn't -- we didn't talk after the trial.
9 I never saw them again. That was it.

10 Q Maybe I'm saying it the wrong way.

11 Did you have any discussions with them outside the
12 courtroom prior to the motion for change of venue being
13 withdrawn?

14 A Before we went in -- this was in the bottom of the
15 jail -- they told me they wanted to withdraw the motion
16 because it could be thrown out of court here just as
17 easy as anywhere else that it would have been tried.

18 Q Okay. What was your position in regards to that?

19 A I didn't want to do it.

20 Q So did you tell them no?

21 A Yeah, I told them I didn't want to throw it out.

22 Q From my understanding in reviewing the transcript,
23 you weren't questioned on the record about that?

24 A I never took the stand.

25 Q Okay. But were you asked in court whether or not

1 you agreed to dismissing or withdrawing any motion for
2 change of venue?

3 A I don't remember. It's been so long ago.

4 Q Okay.

5 A All I remember was, and what I've looked through
6 the transcript, it was when the State answered the
7 response, they quoted *State vs. Patterson* at 42 S.C.
8 2d (sic) where Judge Pleicones ruled that a change of
9 venue was not needed because all but five potential
10 jurors had not been subjected to pretrial publicity.

11 And I think he also quoted *Sheppard vs. State* at
12 S.C. 2d 462, and it states that mere exposure does not
13 warrant a venue change.

14 But out of the 71-person jury pool I had to pick
15 from, when asked by the judge in the voir dire, all 71
16 said they had heard about my case on radio, TV, and
17 newspaper, and the Internet. More than half of them
18 said that they had heard about it that morning on the
19 radio in their cars or vehicles coming to the
20 courtroom.

21 By any standard this is not mere exposure. South
22 Carolina Constitution Section 23, Article 5 states that
23 it should be the duty of the General Assembly --

24 MS. McCALLISTER: Objection, Your Honor. I mean,
25 I think he's getting into what the law is and drawing

1 some legal conclusions that I don't think he's
2 qualified to testify to.

3 THE COURT: Sustained.

4 BY MR. ARIAIL:

5 Q Okay. Let's just state strictly what your
6 understanding is and what happened at that time. Don't
7 be getting into the code sections and statutes and all
8 that. Because I want to put on the record it appears
9 to me that you didn't agree to this withdrawing of the
10 motion for change of venue.

11 A No.

12 Q Okay. And you thought there were issues after the
13 jury was qualified with the number of people that knew
14 about your case?

15 A Yeah. See, I had a previous trial of 20 years
16 earlier for a gunfight that happened on the mountain,
17 which I was acquitted of on the basis of self-defense.
18 And I knew this was going to be a problem. And they
19 brought it up in the newspaper articles like it just
20 happened last week. So I knew this was going to be an
21 issue. That's why I wanted the venue changed to
22 somewhere out of this viewing area.

23 Q Okay. The next one I want to go through is the
24 impeachment of a witness named Kevin Cromer. You said
25 there was some issues in regards to, I think, his

1 testimony was that you had asked him how to remove or
2 to dispose of somebody after they're --

3 A Well, no. Kevin Cromer testified that while he
4 and I were in Oconee County jail two years earlier,
5 that I had asked him how much LSD it would take to kill
6 someone. This is on transcript page 617.

7 Mr. Allen and Ms. Waldrep failed to impeach Cromer
8 on the grounds that he was not a credible witness. At
9 the time of his testimony, he was on probation in
10 Georgia, first-degree burglary. He was also convicted
11 of a hit-and-run felony with property damage, leaving
12 the scene of the accident.

13 MS. McCALLISTER: Objection, Your Honor. I don't
14 know how he knows this. There's been no foundation
15 laid. It's hearsay --

16 THE WITNESS: It's on page 618 of the trial
17 transcript.

18 MS. McCALLISTER: If you can point me to the cite.
19 I'm sorry.

20 THE COURT: Overruled.

21 MS. McCALLISTER: I'm sorry. Which page?

22 THE COURT: 618.

23 MS. McCALLISTER: Thank you.

24 THE COURT: Overruled. You can continue, sir.

25 MR. ALLEN: Could I interject something? I'm

1 sorry. I know I'm not the attorney, I'm the witness,
2 but the page numbers, I don't find that in my
3 transcript page number that's been cited.

4 THE COURT: You don't find it at all, or you don't
5 find that what he says is there is there?

6 MR. ALLEN: Well, I thought he said 618.

7 THE DEFENDANT: 618. One is on 617 and then it's
8 on 618, and also there's some on 621 and 623.

9 MR. ARIAIL: I'll represent to the Court I've got
10 617. He raises -- excuse me. 615, it says, "Who
11 threatened them and who's talking to Kevin Cromer about
12 how to kill them in an untraceable way?" That's the
13 only statement I got about Kevin Cromer, and that's on
14 615.

15 I think what Mr. Allen is saying, I got a record
16 on appeal that's got a different number on the top.
17 This one is 615 of the transcript. That was the
18 initial one. That's the comment I've got.

19 THE DEFENDANT: I have the original. These are
20 the numbers from the original transcript, Your Honor.

21 BY MR. ARIAIL:

22 Q Well, then, that 615 that I have for Mr. Cromer,
23 you're saying there is a statement on 617 also?

24 A Uh-huh. 618 and 621.

25 MS. McCALLISTER: Your Honor, I do see a reference

1 to Kevin Cromer on page 615, but I do not see a
2 reference to his record and all of that stuff that he
3 was testifying about, so that's --

4 THE COURT: I understand.

5 MS. McCALLISTER: -- my objection. I don't see
6 that as part of --

7 THE COURT: I understand. The objection is
8 sustained.

9 The record -- I mean, I know you want to point out
10 some pages in the record, and that might be helpful,
11 and I don't have any problem, sir, with you telling me
12 page numbers. And they may be correct, and they may
13 not be correct. We may disagree as to what the court
14 should glean from those page citations.

15 You can go on and keep telling me page
16 numbers, but you don't have to tell me exactly what it
17 says because, you know, the record speaks for itself,
18 is what I'm trying to get at. Okay?

19 MR. ALLEN: Those are closing arguments on those
20 pages, just for information.

21 THE COURT: Yes, sir.

22 BY MR. ARIAIL:

23 Q Mr. Frady, I'll get into that in regards to when I
24 talk with Mr. Allen and Ms. Waldrep about the history
25 about Mr. Cromer.

1 Just my understanding is you believed that they
2 should have done more in regards to impeachment of him
3 based upon his criminal record; is that correct?

4 A Yes, because he was so extensive. I mean, you
5 know, failure to stop for a blue light here in Oconee
6 County --

7 MS. McCALLISTER: Your Honor, objection. Again,
8 same objection.

9 THE COURT: Overruled.

10 BY MR. ARIAIL:

11 Q And I'm going to get into what he crossed him on
12 in regards to that, but you think there should have
13 been more done in regards to that impeachment by
14 Mr. Allen and Ms. Waldrep?

15 A I think he should not have been allowed to testify
16 against me with a bad record. It states plainly in the
17 rules of court the credibility of a witness can be
18 attacked due to felonious activity.

19 Q Did you understand that, even if he has a bad
20 history and a bad criminal record, did they explain to
21 you that he could still testify against you in a court?

22 A No.

23 Q You weren't aware that he could testify, but then
24 he can impeach him on that criminal history? Are you
25 aware --

1 A Yeah. Yeah. He shouldn't have been allowed to
2 testify. I mean, that's what I gathered when I started
3 researching all this. I mean, what it did is his
4 testimony led the jury to believe that I was wanting to
5 know how to kill someone.

6 But what wasn't investigated also was the fact
7 that we were in a room half the size of this one in the
8 old county jail, and there was probably 40 people in
9 that room and yet nobody heard me say this to him but
10 him. I guess what I'm getting at is the man is
11 dishonest.

12 Q If you're saying that other people heard it, did
13 you discuss that with Mr. Allen about, "I can call
14 these other three or four people who can say it didn't
15 happen the way he's saying it happened"?

16 A No, I didn't do that. I told him I didn't know
17 who those people were, but his investigator could have
18 pulled the roster from the A cell unit at the Oconee
19 County jail and found out who they were.

20 Q Did y'all discuss, "Hey, look, we got this problem
21 coming up with this testimony. It's a lie" -- let me
22 finish -- "it's a lie and I need to find witnesses to
23 be able to counteract, to go against that"?

24 A Yes, I did.

25 Q Okay. And --

1 A That I remember.

2 Q Do you remember what their response was in regards
3 to that?

4 A I do not. I think his response was, "I have a
5 private investigator that's going to look into this.
6 He's supposed to be coming to see you."

7 As I said before, it was such a long time ago.
8 You know, memories fade, things are lost, you forget
9 things. It was a long time ago.

10 Q I understand.

11 Now, we went through and you've given me some
12 information in regards to a palm print analysis that
13 was exculpatory to you.

14 My understanding, at the trial -- maybe if you can
15 correct me if I'm wrong on this -- the transcript shows
16 that there was no definitive match in regards to a palm
17 print that was found, correct?

18 MS. McCALLISTER: Your Honor --

19 THE DEFENDANT: It was a Schmerber order --

20 MS. McCALLISTER: I have an objection. I'm sorry.

21 Same objection as before. This is in Allegations
22 N and O in his original application, and those were
23 raised and ruled upon at the first hearing.

24 THE COURT: Okay. I guess to some extent it's
25 helping give me some context. I want you to focus,

1 though, on these six things --

2 THE DEFENDANT: Yes.

3 THE COURT: -- Mr. Frady, that --

4 THE DEFENDANT: Well, this is one of the things
5 that was not investigated.

6 THE COURT: Okay.

7 THE DEFENDANT: I have here the original Schmerber
8 order ordered by Judge -- I think it was Judge
9 Nicholson.

10 But they wanted to -- Dallas Shirley took me into
11 the room, and she says, "Randy, we want palm prints.
12 They found" --

13 MS. McCALLISTER: Your Honor, objection to the
14 hearsay.

15 MR. ARIAIL: Don't testify to what others are
16 telling you.

17 Sorry, Your Honor.

18 THE COURT: Sustained.

19 THE DEFENDANT: I was told to give palm prints so
20 they can be compared with palm prints found at the
21 murder scene. But then nothing else was ever said
22 about it. So that leads me to believe that my palm
23 prints didn't match. If they would have matched, I
24 would have known about it. They would have surely
25 brought it up.

1 BY MR. ARIAIL:

2 Q Wasn't there testimony that the palm prints didn't
3 have any identifiable match during the trial?

4 A This was never brought up in trial. It was never
5 mentioned.

6 Q There's not part of the transcript in regards to
7 where they get into the evaluation of the fingerprints
8 and palm prints and not matching that up?

9 A They get into fingerprints, but they never mention
10 the palm prints.

11 Q So you think it's -- you were never told whether
12 or not these palm prints were exculpatory or if they
13 matched somebody else?

14 A Precisely.

15 What I'm saying is they were exculpatory evidence
16 that was deliberately concealed by the state prosecutor
17 and my attorneys.

18 MR. ARIAIL: Your Honor, I've got the Schmerber
19 order, if I could mark it as Applicant's Number 3.

20 THE COURT: Any objection?

21 MS. McCALLISTER: No objection, Your Honor.

22 THE COURT: Without objection.

23 (WHEREUPON, Applicant's Exhibit Number 3 was
24 marked for identification and received in evidence.)

25 BY MR. ARIAIL:

1 Q Okay. Now I want to move on a little bit to -- I
2 think we got into -- that covers a lot of your grounds
3 in the Count 1 aspect of it. Some of them have also
4 been ruled upon previously, so I'm going to move on to
5 Count 2, which was defense counsel failed to
6 effectively challenge the arrest and seizure.

7 This gets into your search warrant issue that we
8 discussed here.

9 A Yes.

10 Q Tell me, and I've got a copy of the search
11 warrants. Tell me how you believe your counsel didn't
12 handle these search warrants or a motion to suppress in
13 regards to them appropriately?

14 A Well, the motion to suppress evidence that was
15 taken from my residence was withdrawn when the change
16 of venue was withdrawn in the pretrial hearing.

17 They were in my house without -- they just walked
18 up. I was outside. They arrested me. I never went
19 back inside, but they were inside. And they were
20 asking questions without Mirandizing me, and they took
21 evidence out of my house that was used against me prior
22 to getting a search warrant.

23 Q Okay. And Mr. Allen addressed this at some point
24 during the trial and argued that for a time, correct?

25 A I don't believe he did, because he withdrew the

1 motion.

2 Q Okay.

3 A At the very beginning. Which I have a copy of.

4 Q I understand he had a motion to suppress in the
5 beginning, and I'm trying to get you to remember back
6 to this transcript because I just read it this weekend.

7 There was an argument in regards to that motion to
8 suppress for a while. I mean, there was some issues
9 raised before the Court and it was argued, correct?

10 A In the very beginning. Before the trial.

11 Q Correct.

12 A This is pretrial activity.

13 Q But then he withdrew it at some point in time?

14 A He withdrew it, yes.

15 Q Did you discuss that with him or have any
16 discussions with him about --

17 A I never had a chance to. It was right -- we went
18 right into the trial. It was just ---

19 Q You believe it should not have been withdrawn?

20 A No. I have a copy of it right here, a true copy.

21 Q What's that?

22 A Of the motion to suppress.

23 Q I'm going to put that in. I think I've got a copy
24 too.

25 MR. ARIAIL: Your Honor, I have the motion to

1 suppress that was filed by Mr. Allen August 23rd, 2016.

2 I would like to move it in evidence as Applicant's 4.

3 THE COURT: Any objection?

4 MS. McCALLISTER: No objection.

5 THE COURT: All right.

6 (WHEREUPON, Applicant's Exhibit Number 4 was
7 marked for identification and received in evidence.)

8 BY MR. ARIAIL:

9 Q Now, from my understanding, there was -- this
10 motion was filed on August 23rd. There was another one
11 that had been previously filed on August 3rd.

12 Do you remember that?

13 A No. I don't have a copy of it. I don't remember
14 that.

15 Q So there was an amended motion that was filed
16 August 23rd, and you're saying you didn't agree to
17 having that withdrawn?

18 A No, not at all.

19 Q And you weren't given specifics as to why he
20 withdrew it?

21 A No.

22 Q Okay. Tell me why you believe that you needed --
23 he needed to go forward with that motion to suppress
24 and how it prejudiced you.

25 A Well, he needed to go through with that motion

1 because evidence that they took from my house without a
2 search warrant shouldn't have been used against me, but
3 it was used against me anyway.

4 Due to the fact that he withdrew the motion, it
5 gave them a free rein to just basically do as they
6 pleased.

7 Q So the key pieces that were taken from the house
8 which you believe should have been suppressed were the
9 shotgun and shells?

10 A Yes.

11 Q And, I guess, it would be your clothing, but there
12 was no DNA found on that?

13 A There was no gunshot residue, anything. The gun
14 had never been shot. It was clean, and it was -- I
15 mean, it hadn't been used recently.

16 Q So the gun and the shells were the key items that
17 you think should have been suppressed?

18 A Yes.

19 Q Okay. And you think, based on those coming in
20 and, clearly, the way they were used at trial with the
21 gun and matching with the shells that were found on the
22 road and in the house, you believe that prejudiced you?

23 A Yes.

24 Q Because it tied everything together?

25 A Yeah.

1 Q Okay. So you would want him to go forward with
2 that motion to see whether or not he was going to win
3 or lose it?

4 A Yes.

5 Q Okay. Now, you had a section that we discussed:
6 Failure to pursue plea negotiations. That's what the
7 supreme court has let come back.

8 Tell me what in that aspect you wanted him to do
9 more of or if he had any plea offers on the table for
10 you.

11 A Well, they came to me with a 30-year plea deal,
12 but Ms. Waldrep and Mr. Allen told me that, "They don't
13 have anything on you," you know. They never told --
14 they told me that, you know, "You're going to beat
15 this."

16 They also didn't inform me that if I didn't take
17 the plea deal, that I would receive the maximum
18 sentence. And they didn't have a written refusal for
19 me to sign saying, you know, that I wouldn't take this.

20 Q All right.

21 A Excuse me. That was to not testify. Pardon me.

22 If I would have a written contract and it had been
23 explained to me that if I didn't pursue a plea deal,
24 that I would receive the life sentence that I have now,
25 I would have taken this into consideration. I would

1 have definitely acted differently.

2 Q Okay. Let me start it this way.

3 When they brought you the 30-year plea offer, did
4 they explain to you that if you did not take this,
5 you're looking at life without parole?

6 A No.

7 Q Did they explain to you that you could be looking
8 at life consecutive with life?

9 A No.

10 Q Did they explain to you anything in regards to --
11 I guess they didn't go into any of the maximum
12 sentences that you could have, is what you're saying?

13 A No.

14 Q Okay.

15 A The only thing I was told was that they didn't
16 have any evidence on me, that I would beat this easily.
17 So none of this that you just mentioned was ever
18 brought up.

19 Q But you were aware that you had a 30-year plea
20 offer on the table?

21 A Yes.

22 Q Okay. And you turned that down?

23 A I didn't sign it. This was down in the bottom of
24 the jail. It was never presented to me in front of a
25 sitting judge or on the record, and I was not going to

1 sign anything down there. It was just one piece of
2 paper that they slid across the table.

3 I'm like, you know, there's something wrong with
4 this. If it would have been in front of a judge, and I
5 would have asked the judge, "Are you going to accept
6 this plea or reject this plea?" I would have known his
7 answer, then I would have known how to respond.
8 Because, naturally, if the judge tells you, "Well, I'm
9 not bound to honor this plea," then I wouldn't have
10 presented it.

11 Q Here is another question I've got. When they
12 presented you this 30-year plea offer, did they say,
13 "This is a recommendation," or, "This is a negotiated
14 plea," or, "This is all you can get"?

15 A All they told me was, "This is what the State is
16 offering you."

17 Q Okay.

18 A That's really all I remember about that.

19 Once again, it was so long ago and it's so hard to
20 remember, but I remember them showing me the one piece
21 of paper and saying, "This is what the State offered
22 you." And I said, "I'm not going to accept that."

23 First of all, I wasn't guilty. But like I said
24 before, it had not been explained to me that, "You're
25 going to get a life sentence and you're never going to

1 get out of prison," and I would have reacted
2 differently if I had known.

3 Q If you would have known you were getting life,
4 then you would have --

5 A Oh, yes, most certainly.

6 Q Now, with a 30-year sentence, did you say to them,
7 "Well, okay. Here's the plea offer. If you're telling
8 me I'm going to get 30 years, I'll take that, but I
9 need to know I'm definitely getting that"? I mean, did
10 you have a discussion with them?

11 A I had discussions with them, but I can't swear
12 under oath exactly what every word was I said. But I
13 remember telling them I wasn't going to sign anything
14 in the basement of the jail having to do with a plea,
15 that I wanted to be in front of a judge.

16 Actually, I told them I wasn't going to sign it at
17 all. I was not accepting the plea, not at that time,
18 not at that place.

19 Q So you just weren't going to take a 30-year plea
20 at that time?

21 A No, not in the bottom of that jail. Had I been
22 told that I was going to receive the maximum sentence,
23 which I did, I would have acted differently. I would
24 have got all this in front of a judge on the record,
25 and I would have made sure that he would accept my

1 plea. And I can almost assuredly tell you that I would
2 have took the plea.

3 Q Now --

4 A Even though I was innocent. But, you know, when
5 it's put to you in plain layman's terms, life or
6 30 years, you take the 30.

7 Q Now, you say one of the grounds we're allowed to
8 go back into is that there was an argument that there
9 was no minimum sentence at petitioner's sentencing.

10 Are you saying that they didn't raise anything or
11 ask anything on your behalf for a minimum sentence at
12 sentencing?

13 A The judge asked Mr. Allen and Ms. Waldrep, "Do you
14 have anything before sentencing?" and "no" was all they
15 said.

16 Q Okay. So you believe that they should have put
17 something on the record to ask for the minimum
18 sentence?

19 A Yes. The State solicitor, Ms. Hervy, said, "I
20 want the maximum." And my attorney said nothing. "No,
21 we don't have anything to say."

22 Q I think the last item we have is: Defense counsel
23 failed to challenge the admission of evidence at trial
24 on the basis that the chain of custody had been broken;
25 he had not been given an opportunity to examine the

1 evidence.

2 Tell me what you mean by that.

3 A I mean by that, that was the fact that the van was
4 given back to Harper that night after they found it.
5 Then the next day, when they realized that it may be
6 connected to some murders, they took it away from him,
7 and then three days later, gave it back to him again.
8 So that -- I mean, that violates all the chain of
9 custody. It could be --

10 Q That goes hand in hand with your motion to
11 suppress or Brady issue in regards to the vehicle?

12 A Yes, it does.

13 Q I mean, because it's all --

14 A See, what I'm saying -- excuse me. They shouldn't
15 have used the van, but being as how they did, it was
16 erroneous the way it was brought up. It was tainted.
17 Anything could have happened to that van.

18 Q So you're saying the key piece that should have
19 been argued in your case was trying to keep any type of
20 information out about the van?

21 A About the van.

22 Q Okay.

23 A Because they took it, they gave it back, they took
24 it, and they gave it back again.

25 Q Mr. Frady, I've tried -- I've gone through and

1 I've done what I can based on what the supreme court
2 has allowed me to do. I know I've covered most of the
3 grounds, and I'm going to -- you know, if there are
4 things I've left out, just let me know, but I think
5 I've covered the items that we're allowed to do.

6 Are you good with everything that we submitted
7 today?

8 A No. I have one other thing I would like to
9 submit.

10 Q Okay.

11 A When Judge Buckner charged the jury on page 848,
12 he said that, "Inferred malice may arise because the
13 deed was done with a deadly weapon."

14 Now, supposedly, you know, malice, it's essential
15 that the State prove malice because the burden of proof
16 is on them. When he charged the jury that they could
17 infer malice for the use of a deadly weapon but did not
18 tell them that they could accept or reject the
19 inference of malice for the use of a deadly weapon,
20 that the underlying there implicated -- implication,
21 rather, resulted in the mandatory presumption, which
22 unconstitutionally shifted the burden of proof over to
23 me.

24 In other words, because a deadly weapon was used,
25 he didn't tell them, "You don't have to assume that;

1 you don't have to use that." It automatically made me
2 guilty because there was a deadly weapon involved.

3 Q We can go to the charge and look at that.

4 Mr. Frady, that's all I have for you, and if you
5 can answer any questions from the attorney general.

6 A Okay.

7 CROSS-EXAMINATION

8 BY MS. McCALLISTER:

9 Q I'm going to take these out of order, but let's
10 start with the issue that you raised about the argument
11 for a minimum sentence.

12 Do you recall the judge asking you if you had
13 anything to say on your own behalf as to that?

14 A No, I don't.

15 Q Okay.

16 A It's so long ago, you know, it's impossible for me
17 to remember. I don't know.

18 Q Did you speak to the judge at all and say anything
19 on your behalf?

20 A No. I don't remember saying anything to the
21 judge, no.

22 Q So you didn't take the opportunity to speak when
23 the judge gave it to you?

24 A No. I was kind of flabbergasted at the time. I
25 was --

1 Q Okay. Your issue that you've raised, then, about
2 the arrest, your arrest and the search warrant and the
3 items that were taken from your house, do you recall
4 whether at the time of your arrest, what were you
5 actually arrested for?

6 A I believe I was arrested for a violation of
7 probation in Florida.

8 Q Okay. So you didn't have outstanding warrants at
9 the time?

10 A For a violation of probation in Florida.

11 Q Okay. You didn't have outstanding warrants from
12 Oconee County at the time?

13 A No.

14 Q Okay. So it's not your understanding that you
15 were arrested on outstanding warrants for assault in
16 Oconee County?

17 A No. That was never brought up.

18 Q Okay.

19 A I didn't have any -- I didn't know I had any
20 warrants. Nobody came to me and told me anything about
21 it. Everybody knew where I was, where I worked. My
22 probation officer knew where I was. I had probation
23 transferred from Florida up here, and it was never
24 mentioned, so I had no knowledge of it.

25 Q Do you recall the officer, one of the officers who

1 was present for your arrest who testified at trial, do
2 you remember some testimony about what happened and how
3 they arrested you?

4 A Yes..

5 Q Okay. And do you recall on page -- I believe it
6 starts on page 188, he said -- the officer's testimony
7 is that you were arrested on outstanding warrants?

8 A I don't remember that, no.

9 Q Okay.

10 A No.

11 Q And do you see on page 195 and 197 where he
12 describes the arrest?

13 A I don't have 195 and 197 with me.

14 Q Okay.

15 A I was outside my house when they arrested me.

16 Q So you were arrested in your yard, then?

17 A In my yard, yes.

18 Q And do you understand -- do you recall them being
19 questioned about what they asked you and the
20 questioning, because I think you said that they
21 questioned you without Mirandizing you, is one of your
22 allegations, right?

23 A Yes. Uh-huh.

24 Q Do you recall what questions they asked you?

25 A Not right offhand, no. But I know I was in

1 handcuffs and being questioned, and all of a sudden,
2 one of them looked at the other and said, "We need to
3 Mirandize him."

4 Q Do you recall being questioned about if there was
5 anyone else in the residence with you?

6 A Yes. They asked me was anyone. I said, "No one
7 lives here but me." I mean, there was --

8 Q They asked you if you had any weapons; is that
9 correct?

10 A Yeah. They asked me all that before I was
11 Mirandized.

12 Q They asked you those two questions before you were
13 Mirandized?

14 A Yes.

15 Q Do you recall them asking you any other specific
16 questions before you were Mirandized?

17 A I'm -- not right offhand, no.

18 Q You've raised the issue of the chain of custody
19 regarding the van, correct?

20 A Yes.

21 Q Do you recall -- do you recall your attorney
22 questioning the State's witnesses on that issue, about
23 the chain of custody of the van?

24 A I think he did, but like I say, I can't recall
25 exactly what he said or what he asked.

1 Q But you do recall there was some testimony on that
2 issue?

3 A Not right off the top of my head, no, I don't.

4 Q And the issue of a plea negotiation --

5 MS. McCALLISTER: May I approach, Your Honor?

6 THE COURT: Yes.

7 BY MS. McCALLISTER:

8 Q I'm handing you a letter. Do you recognize, is
9 that your signature there?

10 A Yes.

11 Q Okay. This is a letter that you wrote to your
12 attorney then, on October 31st, 2005; does that look
13 right?

14 A That looks like it, yeah.

15 Q And do you see -- do you see in here where it
16 says -- can you read to me what it says starting right
17 there?

18 A Oh, that I will not plea?

19 Q Yes.

20 A Uh-huh.

21 Q Okay.

22 MS. McCALLISTER: Your Honor, I would submit
23 this -- mark this as State's 1.

24 THE COURT: Any objection?

25 MR. ARIAIL: No objection.

1 (WHEREUPON, State's Exhibit Number 1 was marked
2 for identification and received in evidence.)

3 BY MS. McCALLISTER:

4 Q And you agree with me, Mr. Frady, that this letter
5 is yours that you wrote to your attorney, Mr. Allen,
6 correct?

7 A Yes.

8 Q And you say in here, "I still will not plead,"
9 correct?

10 A Yes.

11 Q Okay. And, "There's nothing to lose"?

12 A What's the date on that?

13 Q It's October 31st, 2005. Would you like to see
14 it?

15 A Yeah. Well, there was a lot more time went by
16 before my trial. My attitude changed as the
17 investigation and everything went on.

18 Q Okay.

19 A See, I was in the county jail for 23 months. My
20 whole idea of the whole thing changed. It grew. When
21 I was first arrested, I was like, "I didn't do this and
22 I'm not going to plead to it."

23 Q Okay. Can you tell me in relation -- you
24 discussed with Mr. Ariail a plea offer that was given
25 to you down in the bottom of the jail, you said. Do

1 you recall when that was?

2 A No.

3 Q Was that before or after you wrote that letter?

4 A I don't remember. I don't know.

5 Q Okay.

6 MS. McCALLISTER: Beg the Court's indulgence for
7 just a moment.

8 THE COURT: Yes, ma'am.

9 BY MS. McCALLISTER:

10 Q Your issue that you raised about this motion to
11 change the venue, was that done -- I want to get the
12 timeline right. Was that done before your trial or was
13 that done --

14 A Before. I remember that. That was withdrawn
15 before my trial started. Before I picked a jury.
16 Before anything.

17 Q Before the jury was picked?

18 A Yes.

19 Q So was it the day before or was it a week before
20 or --

21 A This whole thing took three days. It was the very
22 first thing that happened, so I'm going to say it was
23 the day before. It may have been -- we may have picked
24 the jury later on that day, but I do remember that it
25 was before the jury was picked.

1 Q Okay. And is it your -- is it your allegation
2 that, because I think you said that some of the jurors
3 were -- the jurors were asked some questions about
4 their exposure to publicity; is that correct?

5 A Every single one was. All 71.

6 Q They were all asked about it, correct?

7 A Yes.

8 Q Okay. So after the jurors were asked some
9 questions, then the motion was withdrawn?

10 A No. The motion was withdrawn before we picked the
11 jury.

12 Q Okay. You've also raised this issue about the
13 palm prints, and I believe your allegation is that it
14 should not have been brought up at trial; is that
15 correct?

16 A No, it should have been brought up.

17 Q You wanted it brought up at trial?

18 A Yes. They was never mentioned. They took palm
19 prints from me and compared them to palm prints, I'm
20 assuming at the crime scene, because the woman who took
21 the prints from me said, "They found prints at the
22 scene." But then nothing else was ever said about it.

23 Q So your contention is they took your palm print to
24 compare to some other palm print, and then you never
25 heard anything about it?

1 A Exactly. This was exculpatory evidence that was
2 deliberately concealed.

3 Q So it's your contention that there was no
4 testimony at trial about there being palm prints or
5 fingerprints that did not match you?

6 A There was fingerprints but not palm prints.

7 Q So your issue was that it was the palm --

8 A It's the Schmerber order which is to obtain palm
9 prints. And I was told that if I did not -- I said,
10 "Well, what if I don't want to give the palm prints?"
11 And she goes, "We will take you to the hospital and
12 give you a shot, and when you wake up, we will have
13 those prints."

14 Q Okay. Okay. So your contention -- you're making
15 a distinction between the palm prints and the
16 fingerprints themselves?

17 A Yes. The fingerprints were brought up in the
18 trial, and it was established that they did not match
19 me. These were fingerprints found in the van and at
20 the crime scene.

21 Q So you don't recall your attorneys arguing about
22 the fact that the palm print didn't match?

23 A No.

24 Q You don't recall any arguments that they made
25 about that?

1 A No. No.

2 Q Okay.

3 A I've looked over the transcripts. It wasn't
4 brought up. It was never mentioned again.

5 MS. McCALLISTER: I think that's all I have, Your
6 Honor.

7 THE COURT: Any redirect?

8 MR. ARIAIL: No, your Honor.

9 THE COURT: Thank you, sir. You may go back and
10 sit next to your lawyer.

11 MR. ARIAIL: Your Honor, that is our case.

12 THE COURT: Okay.

13 Ms. McCallister.

14 MS. McCALLISTER: Thank you, Your Honor. I would
15 call Mr. Allen in just a second.

16 THE COURT: Okay. Give Mr. Frady just a second to
17 gather his belongings.

18 While we're doing that, is there a transcript with
19 the jury selection -- of the jury selection? I don't
20 see it.

21 MS. WALDREP: There is, Your Honor.

22 I apologize. I'm just so used to doing this.

23 There is, Your Honor. It is on page...

24 MR. ARIAIL: I've got it as...

25 THE COURT: I have the transcript of record, not

1 the record on appeal, from August 29th, 30th, and 31st,
2 which is all of the testimony, sentencing, mitigation,
3 all of that, but not voir dire.

4 MR. ARIAIL: I've got the voir dire, and it looks
5 like it begins on 75.

6 MS. McCALLISTER: I believe it's part of the
7 pretrial transcript.

8 THE COURT: I don't have that.

9 If you will e-mail that to me, unless you happen
10 to have an extra copy with you.

11 MS. McCALLISTER: I may.

12 CHUCK ALLEN,

13 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

14 DIRECT EXAMINATION

15 BY MS. McCALLISTER:

16 Q Mr. Allen, I just have some quick preliminary
17 questions.

18 A Hold on just a minute, please. I'm trying to -- I
19 feel like I'm sitting on a pedestal. I'm 6 feet
20 4 inches tall, and I feel a lever, but I'm not -- okay.

21 I'll just sit on the pedestal.

22 Q Okay.

23 Mr. Allen, how long have you been practicing law?

24 A I was sworn in in 1987.

25 Q And how much of your practice has been criminal,

1 criminal law focused?

2 A You know, it varies year to year, but probably a
3 minimum of 25 percent to a third, probably. You know,
4 there's different ways you can gauge that, but I'd say
5 25 percent to a third, maybe a little more.

6 Q And how did you come to be involved in this case?
7 Were you appointed or were you retained?

8 A I was court-appointed, and according to my files,
9 the engagement of the order was dated June of 2005.

10 Q Okay.

11 A And can I point something out as well? From my
12 recollection, and I will -- I want to make it clear
13 that I'm going to have the same difficulty and
14 disadvantage that Mr. Frady had because this was over a
15 decade ago, so my recollection is going to be -- it's
16 going to be difficult to remember some of these things.

17 But my recollection, as far as the engagement
18 itself, was that I was the third attorney to be
19 appointed to the case. I do believe that's correct.

20 Q Okay.

21 A So I point that out as well to, you know, kind of
22 suggest that some of these things may have gone on with
23 the previous attorneys, but we'll have to see as you
24 ask me the questions.

25 Q Let me ask you about Ms. Waldrep. How did she

1 become to be involved in this case? Did she work for
2 you, or did you just have --

3 A She did not. At the time, I was a sole
4 practitioner, and when I received the court-ordered
5 appointment, I didn't want to do this case. I knew
6 there was some difficulty, as I just mentioned, with
7 prior attorneys and some issues with attorney-client
8 issues. And it was a double homicide, of course, very
9 serious case, and I was a sole practitioner, and so I
10 sought the assistance of Elizabeth Waldrep.

11 Q Okay. And how did that dynamic work? Was she
12 just kind of doing research for you, or was she helping
13 you with the investigation, or was she involved in
14 trial strategy, or what was that like?

15 A She did a number of things. I hope she will not
16 be offended, but I think that it was probably best
17 characterized as of the second chair role, as lawyers
18 refer to. I was the first chair; she was the second
19 chair.

20 She did a variety of things. She did research.
21 She wrote -- I think she prepared the motion to change
22 venue. She also -- she accompanied me in going to the
23 home of the Harpers, I think. And we went to --
24 Mr. Frady's grandfather was still living then, and he
25 had some involvement. I think she accompanied me to

1 the grandfather's home. And, of course, we had
2 dialogue about trial strategy.

3 I think she also accompanied me to the Oconee
4 County jail on a time or two to see Mr. Frady, but she
5 did a number of things very ably.

6 Q Okay. I'm just going to go through this list of
7 Mr. Frady's allegations here starting, I guess, with
8 the issue of -- well, you said she did the change of
9 venue.

10 What do you recall about the change of venue
11 motion and that being argued?

12 A Well, I do remember it had some notoriety in this
13 community. This is a small community, relatively
14 speaking. There's probably -- the population of Oconee
15 County is probably 75- to 80,000 people. And there was
16 some notoriety there, and so we were initially
17 concerned about that.

18 So we -- and I do believe that Elizabeth did that,
19 I think, almost exclusively. Because she gathered some
20 of the attachments that were attached to the motion.
21 Of course, I signed the motion, but I think Elizabeth
22 found the attachments. And she may have done that in
23 cooperation or collaboration with Mr. Frady, I'm not
24 sure, but...

25 Q What do you recall about that change of venue

1 motion being argued or withdrawn? Do you recall that?

2 He's alleging that you withdrew it.

3 A I think what actually occurred was that, you know,
4 we had Judge Perry Buckner, and he was a very thorough
5 and able judge. And I don't believe -- now, again, you
6 know, I'm basing this on purely my recollection, but I
7 did read the pretrial transcript. I don't think it was
8 formally withdrawn.

9 I think after we did voir dire with the jury, and
10 there was extensive voir dire done with the jury. In
11 fact, there was a number -- not every juror stood up
12 and stated that they had seen, heard, or knew something
13 about the case from media reports.

14 Q I'm sorry. I hate to interrupt you. Did you say
15 not every juror?

16 A Not every juror.

17 Q Not every juror.

18 A Not every juror that was alleged in the earlier
19 testimony. Not every juror, but there was a
20 substantial number.

21 And Judge Buckner, in response, he went through a
22 dialogue with each juror inquiring as to what they had
23 seen, when they saw it; in spite of that, could they
24 put that aside, and then, finally, could they consider
25 only the evidence and give both the State and the

1 defendant a fair trial, and every one of them answered
2 in the affirmative that they could do that.

3 Q Okay. And was that -- those questions were -- the
4 jurors at that time were under oath when the judge
5 questioned them?

6 A Correct. So at that point, we proceeded to
7 complete the pretrial sequence of events, and it was
8 not argued so -- that may be quibbling. I mean, it was
9 not argued. I just don't have a recollection that it
10 was formally withdrawn.

11 Q So is it your recollection that the issues that
12 you were concerned about that led you to file that
13 motion had been addressed by the judge?

14 A I mean, it had been thoroughly addressed by Judge
15 Buckner.

16 Q Okay. Do you recall the witness, Kevin Cromer,
17 and his testimony? Do you recall him testifying at
18 trial at all?

19 A I do not. I do not.

20 Q Do you recall the testimony about Mr. Frady asking
21 Mr. Cromer about LSD and how to kill someone with LSD
22 and be untraceable? Do you recall that testimony at
23 all?

24 A I really don't. There was something said in
25 closing argument that was prejudicial, and I think it

1 was about Kevin Cromer. And I objected based on
2 prejudicial comment. And I think the objection was
3 sustained, and I think I even moved for a mistrial and
4 that was denied, but a curative instruction was issued
5 to the jury, if my recollection is correct.

6 Q Okay. And you may be correct on that.

7 Are you sure that was about Kevin Cromer, or was
8 that about the 911 call, do you remember?

9 A Well, there may have been another objection as
10 well, but I recall one or two objections based on
11 prejudicial comment by the solicitor and being
12 sustained.

13 Q What is your usual practice if the State puts a
14 witness on the stand with a criminal history? How do
15 you usually handle that?

16 A Well, if there's convictions that allow for
17 impeachment, we impeach the testimony of the witness.
18 And I did notice in my trial notebook, I had rap sheets
19 on every witness they called. Of course, I mean, that
20 would be -- I would consider that standard procedure.
21 I had rap sheets on all the witnesses.

22 Q Could I hand you your notebook and see if you have
23 one on Mr. Cromer? Do you know if it's this one?

24 A I think it's in that bigger one.

25 They're out of order, and I don't see it. I'm

1 sorry.

2 Q Okay. But it's your testimony that -- that's
3 something you would normally do, you would check a
4 witness' criminal history?

5 A Yeah, sure.

6 Q Do you recall Mr. Frady ever telling you that
7 that -- do you recall discussing that testimony with
8 Mr. Frady, what Mr. Cromer was going to say?

9 A I don't. I don't. I recall some things and some
10 things I don't. I don't recall that.

11 Q So you don't recall if he ever gave any witnesses
12 who could contradict that story that Mr. Cromer was
13 going to tell from the jail?

14 A I don't recall. I don't recall. We utilized the
15 services of a private detective that was mentioned
16 earlier, and that was Jody McCurly, but I don't have a
17 specific recollection of that. I can't say honestly
18 that I have a specific recollection of that.

19 Q Okay. I'm sorry. Going back to the change of
20 venue motion for a minute, did you ever tell Mr. Frady
21 that you should withdraw it because he could beat these
22 charges in Oconee County because there was no evidence
23 against him?

24 A Well, I mean, that's not the way lawyers talk.
25 I'm sure you understand. No, I would have never -- I

1 didn't say something like that. I thought it was a
2 triable case. And it was a triable case because it was
3 entirely circumstantial. And I thought it was a
4 triable case, but, no, I didn't say something to that
5 effect.

6 Q Okay. This issue of your handling of the timeline
7 between when the van was discovered and was run out of
8 gas and the murders happening around that same time, do
9 you recall some issues about that, about how to
10 establish a timeline for that?

11 A My recollection of that was that Mr. Frady did
12 make that contention, and we kind of tested it through
13 and with our private detective. And the results we
14 received from the private detective was that that was
15 not the case, that it was doable within the time frame.
16 That's -- that's the best I recall.

17 Q So you do recall that issue, that Mr. Frady raised
18 that as a potential defense, and you had it
19 investigated?

20 A Yes, I think so. I think so.

21 Q Okay. And it was your judgment that it was not
22 helpful or exculpatory for him?

23 A After conferring with the private detective, I did
24 not think it was exculpatory or helpful. And bear in
25 mind this was within, these locations, the murder scene

1 and where the van was found, the van was found near the
2 cemetery, and either the Harpers' home and Mr. Frady's
3 home were all within just a few -- I mean, two or
4 three miles from one another. I mean, we weren't
5 talking about a vast distance.

6 Q And the issue of the chain of custody of the van,
7 do you recall anything about that, discussing that
8 issue with Mr. Frady or raising objections to that?

9 A Well, I remember and recollect to some degree that
10 at the time the van was recovered, Randy was not a
11 suspect yet. And for some reason, because of the
12 sequence of events, the van was returned to the owner,
13 and so that would have been very early on.

14 And, again, I didn't become involved until June
15 the 5th. I think my first interview with Randy --
16 Mr. Frady was when I went to the jail, was even August.

17 Q Okay. He's raised the issue that the van wasn't
18 listed in the discovery and all of that. Were you
19 aware of the van and that the State was planning to
20 use --

21 A Yeah.

22 Q -- evidence of the van and from the van at trial?

23 A Yes. We were very much aware of that. In fact,
24 we used some of the evidence or lack of evidence, I
25 guess both evidence, some evidence and some lack of

1 evidence, with Mr. Harper to lay a foundation for
2 third-party guilty.

3 And, in my opinion, I thought we had a reasonable
4 defense with third-party guilt. However, the law is,
5 you know, somewhat particular about third-party guilt,
6 and the solicitor objected when I went into that and
7 the judge sustained the objection; however, I did -- we
8 did proffer the testimony of the witness. It was
9 Mr. Harper who was the van owner, I do believe. We
10 proffered testimony from Mr. Harper about third-party
11 guilt.

12 Q So the jury wasn't allowed to hear that, but you
13 did attempt to get that testimony in?

14 A Correct.

15 Q And that testimony would have involved the van and
16 the fingerprints in the van; is that correct?

17 A Or the inconsistency in fingerprints or lack of
18 Mr. Frady's fingerprints. Yeah. Like I say, we viewed
19 that or I viewed that as beneficial to us, so I was --
20 yeah, I was very aware of it. Like I say, I mean, we
21 were trying part of the case based on that.

22 Q Okay. So was there any time at trial that you
23 felt like the State was using evidence that you did not
24 know about?

25 A No. I don't recall any surprises, no.

1 Q Okay. Do you recall -- Mr. Frady, I believe, has
2 raised the issue of the judge's charge of malice.

3 Do you recall anything about that issue at the
4 time from trial? Do you recall the judge giving that
5 charge?

6 A I don't. I don't. Of course, it certainly would
7 be in the record.

8 Q Have you reviewed the transcript or that part of
9 the transcript?

10 A I didn't review 900 pages. I reviewed some of it
11 but not all 900 pages.

12 Q So you haven't reviewed the judge's charge on
13 malice, then?

14 A I did not do that, no, ma'am.

15 Q Mr. Frady has also raised issues regarding his
16 arrest.

17 Do you recall discussing that issue with him?

18 A You know, I don't recollect that, and that could
19 have -- you know, that could have preceded my
20 professional engagement in the case, but I don't
21 recollect that.

22 Q Do you --

23 A I mean, I think -- I think they arrested him on
24 existing warrants. That was assault -- not assault and
25 battery, but I think it was assault against his dad and

1 his brother, who were the victims, and the warrants
2 allege that he had threatened to kill them. And that
3 he was actually arrested on the 23rd or September 23rd,
4 24th, whatever the date of arrest was. Those arrest
5 warrants were what he was arrested for, I believe.

6 Q Okay. But your recollection is when he was taken
7 into custody, it was actually on the warrants, on
8 valid, active warrants that were outstanding?

9 A I think so, yeah.

10 Q So you did at least review some of the evidence
11 regarding his arrest and seizure. Do you recall --

12 A Excuse me.

13 Q -- arrest warrants?

14 A I reviewed it because it was very prejudicial. I
15 think there was a pretty good gap in time between, you
16 know, the allegation that he had threatened to kill his
17 dad and his brother and when, you know, the day in
18 question occurred, there was some time there between
19 the two, I do believe.

20 Q Okay.

21 A Some substantial time.

22 Q There was a substantial amount of time between the
23 date of the incident that gave rise to the assault
24 warrants --

25 A Correct.

1 Q -- and then the murders; is that correct?

2 A Correct, yes.

3 Q Okay. I guess, kind of what I'm getting at is:
4 Did you see from your review of the file and the
5 documents relating to his arrest, did you see any
6 reason to challenge that arrest?

7 A Oh, no, not challenge the arrest. And I failed to
8 finish that previously. Yeah, I think I objected to
9 reference to the alleged assault because of the
10 prejudicial -- obvious prejudicial effect. That's what
11 I was getting to earlier.

12 Q Okay. After --

13 A And that was overruled, and I think that was
14 admitted into evidence. But I don't -- yeah, any
15 issues of legality of the arrest, no, I don't recall
16 any issue about that.

17 Q So you objected to the State bringing up what the
18 warrants contained or what they were for?

19 A Yeah, the fact that I think they just -- I think
20 it was just brought up in the State's case, you know,
21 purely in the sense that he had threatened to kill
22 them, at least allegedly. And I objected to that
23 because of -- and I don't recall the time between the
24 two exactly, but, you know, because of the prejudicial
25 effect and the lack of probativeness because of time

1 that had elapsed, I think.

2 Q Okay. But from your review, you did not see any
3 reason to challenge the probable cause to arrest?

4 A No.

5 Q The issue of the motion to suppress --

6 A No.

7 Q -- that was withdrawn, what do you recall about
8 that motion?

9 A I recall that we went through some pretrial
10 testimony. And after hearing the pretrial testimony
11 and reviewing the search warrant and the return,
12 everything was in order.

13 Q Okay.

14 A And it complied with the statute, and I saw no
15 basis to object at that point.

16 Q Okay. So you filed -- you filed the motion before
17 you had a chance to hear the testimony of the State's
18 witnesses or review full documentation related to that?

19 A Yeah. You know, any time there's contraband or
20 incriminating evidence, seizure and search, I just do
21 that routinely. And that's probably why it wasn't as
22 real, real specific. And I think we filed an amended
23 motion to suppress with a little more specificity, I
24 think.

25 However, like I say, in due course, after

1 reviewing the search warrant and the return fully and
2 hearing the testimony of the officer in the pretrial, I
3 mean, it was clear -- I mean, it was clear to me that
4 everything was in order.

5 Q Okay.

6 A Or it complied with the statute. If we could have
7 kept that out, that was basically the whole case.

8 Q Okay. The issue that Mr. Frady has raised
9 regarding an argument for a minimum sentence, do you
10 recall discussing with Mr. Frady what his potential
11 sentence is and what his exposure was on these charges,
12 do you recall that?

13 A Well, again, being the third lawyer involved in
14 the case, the first impression I had, under the death
15 penalty statute, it qualified as an aggravating
16 circumstance, the fact that two people were killed,
17 murdered, in one course of conduct. That was a first
18 impression I had.

19 And I don't recall having any conversation with
20 him about pleas because I don't recall the solicitor
21 offering anything. Like I say, I mean, I kind of had
22 the impression that, "Hey, he's lucky it's not a death
23 penalty case because it could be." And I think one of
24 the reasons it wasn't was because his granddad was
25 involved and didn't, you know, didn't want that to

1 occur.

2 But I don't recall -- I don't recall any offers
3 that the solicitor made to us. We may have talked
4 about the potential of him pleading to something, he
5 and I, and, thus, the letter he wrote in October of
6 2005. I mean, that would be logical and make some
7 sense, but I don't recall ever having any offer from
8 the solicitor on it.

9 Q Okay. In terms of your role once he was
10 convicted, going into the sentencing, did you have
11 anything that you felt like you could present in
12 mitigation on his behalf?

13 A There wasn't much to say. I hate to put that it
14 way. There wasn't much to be said at that point. I
15 mean, it was brutal, you know. He was found guilty on
16 every count.

17 I mean, I recall making some comments, but it was
18 a very brief sentencing hearing, if that's what you
19 want to call it. It was very brief.

20 Q Did you at any point talk to -- did he have family
21 members? You said he had a grandfather. Did you talk
22 to them potentially about helping in mitigation?

23 A I remember speaking with the grandfather who, I
24 think I mentioned earlier, is now deceased. And he --
25 the impression I got, once it was not death penalty,

1 that was -- he was -- he was not going to be engaged in
2 anything further. I guess that's the best way to put
3 it.

4 In mitigation or prosecution, once that was
5 established, he just kind of removed himself from it.
6 He came to trial every day, but I think that was kind
7 of the context we were in.

8 Q And was there any other family involved or do you
9 recall?

10 A Well, I don't think Mr. Frady -- I think he was
11 single, and I don't think he had children. I don't
12 have any recollection. And, you know, his brother and
13 father were deceased. And I didn't know of any other
14 family.

15 Q So you don't recall him telling you there was
16 somebody he wanted to speak on his behalf or anything
17 like that?

18 A No, I don't recall it.

19 MS. McCALLISTER: Beg the Court's indulgence, Your
20 Honor.

21 THE COURT: Yes, ma'am.

22 BY MS. McCALLISTER:

23 Q The issue of the palm print analysis, do you
24 recall an issue specifically regarding palm prints
25 versus fingerprints?

1 A I recall generally there being, you know, other
2 fingerprints, palm prints inside the van. And I
3 think -- I think we -- I think I discussed that or
4 questioned the witnesses or witness on it during
5 cross-examination.

6 Q Okay. The fact that they didn't match Mr. Frady's
7 prints?

8 A Yeah.

9 Q So you were aware that the prints did not match
10 him?

11 A Yes. And that was, you know, I think, once again,
12 that was consistent with third-party guilt, that what
13 allegedly, you know, the killer had used for
14 transportation had identifying factors of other people
15 other than Mr. Frady.

16 And, again, we were kind of setting up the defense
17 of third-party guilt. So I remember that was a pretty
18 significant issue.

19 Q Okay. And you have no reason to believe that you
20 weren't given everything that they had on that, because
21 you were aware that it didn't match him?

22 A Well, as far as the trial of the case, I mean, as
23 I said earlier, I don't recall being surprised by
24 anything. You know, anything and everything that ever
25 came across, it's difficult for a defense counsel to

1 know all that. But I don't recall being surprised by
2 anything in the course of the trial.

3 Q Jody McCurly did investigate the timeline,
4 correct, you said?

5 A That's my recollection, yes, ma'am.

6 Q Okay. Regarding the van, right?

7 A Yes, ma'am.

8 Q Okay. Was there any time -- I know you said you
9 weren't surprised by anything. Was there any time
10 where you felt like, during the course of the trial,
11 that the State had not established a proper chain of
12 custody for some evidence? Do you recall having any
13 issues with that?

14 A I don't recall that.

15 Q What's your normal practice regarding chain of
16 custody when you are questioning witnesses?

17 A Well, I mean, I put them to the test of proof the
18 best I can, you know. I mean, whatever you can do by
19 way of defense and cross-examination.

20 Q So that's an area that you would probe in terms of
21 a State's witness is chain of custody?

22 A Yes. But, now, you know, and I don't recall
23 specifically, but, you know, the van was turned back
24 over to those people. I think it was the Harpers.

25 Q Okay. And your recollection is that you attempted

1 to address that on cross-examination?

2 A I'm sure I did. I'm sure I did. I'm sure I did.
3 You know, in the instance of preservation of evidence,
4 I'm sure I went into that.

5 MS. McCALLISTER: Your Honor, I think that's all
6 the questions I have.

7 THE COURT: Cross-examination.

8 MR. ARIAIL: Thank you. May it please the Court.

9 THE COURT: Yes, sir.

10 CROSS-EXAMINATION

11 BY MR. ARIAIL:

12 Q Mr. Allen, how you doing today?

13 A All right. How are you?

14 Q I'm doing good. Doing good.

15 To start off with the van, the van was pretty much
16 the focal point of the case, I guess, along with the
17 shotgun?

18 A Yeah.

19 Q Did you see any other way that you could try to
20 keep that van out based upon, I guess, the police
21 releasing it to the Harpers? It kind of got convoluted
22 in there. Did you see any way you could have kept that
23 out?

24 A Well, the primary part of the case, in my opinion,
25 was the ballistics expert who matched the shotgun

1 shells, the spent shotgun shells, with the shotgun that
2 was in Mr. Frady's home. I thought that was the
3 primary, you know, piece of evidence in the case.

4 Q I guess you had one shotgun shell, did a test of
5 those shotgun shells. There was one in the house that
6 matched that shotgun, and then there were three that
7 were found, I guess, near the van?

8 A Yeah, I think so.

9 Q So, I guess, tied in those three shotgun shells
10 would be tied into the van, and then he's been alleged
11 to have stolen the van. Did you see any way to kind of
12 separate him or to keep that van --

13 A Well, we went so far, and I was about to get to
14 that. I just wanted to clarify the primary piece of
15 evidence was the shotgun. The ballistics was the
16 primary evidence.

17 But, yeah, we went so far as to interviewing
18 Mr. Harper. I think Mr. McCurly went to the -- seems
19 like they may have lived in a mobile home park.
20 Mr. McCurly went there. We interviewed him. We set up
21 some kind of motive he would have had -- I'm speaking
22 of Mr. Harper -- as far as ill will between he and the
23 two decedents. And so we were really pleased to kind
24 of utilize that. But it was done in the context,
25 again, of third-party guilt, and, of course, we had our

1 hands tied on that when Judge Buckner said no, you
2 can't do that.

3 Q Right. I guess during the trial, when you tried
4 to bring that up and you were limited in what you could
5 get into with third-party guilt with Mr. Harper, I
6 guess you were trying to get into that ill will and
7 problems they had had. I think there was a scooter
8 issue or some other things that they had?

9 A Yeah.

10 Q Did that change, I guess -- I mean, I guess, going
11 into it, you're thinking, "I'm going to try to get in
12 this third-party guilt. If I don't get into this, how
13 is that going to change my strategy"?

14 A I think -- I think -- now, again, this is
15 recollection. I think we kind of approached it in two
16 different ways. One was that this is unreliable
17 evidence. You know, the evidence wasn't preserved, you
18 know, thus, it's unreliable, so discredit that piece of
19 evidence in front of the jury.

20 But also we were -- you know, we were using the
21 other issue as well on third-party guilt. I mean, I
22 don't want to say I'm sure because that was 11 years
23 ago, but I'm relatively confident that I recall
24 attacking all that in cross-examination.

25 Q I guess what he is concerned about was -- I mean

1 his concern is Rule 5 Brady. They're saying, We never
2 told you about the van; we never told you anything
3 about that; therefore, it should be excluded
4 completely. You didn't see any way to do that --

5 A No.

6 Q -- to be able to keep that out?

7 I think you said in your direct you had knowledge
8 of the van being a focal point of the case?

9 A Yeah. I mean, I was aware of that pretty early.

10 Q Okay.

11 A And I thought that was significant, you know.
12 I -- and I will say to this day that was significant.

13 Q Right.

14 A But for us, for me and Elizabeth, it was
15 significant in two ways. And, again, one was
16 third-party guilt, and the other was there's no
17 credibility in this evidence because of lack of
18 preservation.

19 Q Right. Did you, in going through all this -- I
20 know you're explaining you and Elizabeth were working
21 on this. Did you go and tell Mr. Frady, "Here is how
22 all this is going to potentially play out, and here is
23 what we're going to have to do with that"?

24 A Well, I don't know if, you know, every part of the
25 trial strategy, I don't know that we did that, but I

1 recall that a lot of -- he knew the Harpers, and I
2 think he knew the Harpers well. And I think Mr. Frady
3 was the basis of our -- of most of our understanding
4 and information and knowledge of that van and the
5 history of that van. And Mr. Harper would leave that
6 van unlocked; he would leave the windows down. I think
7 he shared that with us, and that was where we got most
8 of our information about that part of our defense was
9 from Mr. Frady.

10 Q So he -- I guess that goes to my next question.
11 He was aware that this van was a part of -- did y'all
12 discuss that with him?

13 A I think he brought it to my attention. I think it
14 was that fundamental and that basis as far as
15 attorney-client communication, I think he informed me
16 of most of that. Again, because he's partly been
17 through preparation of his defense not only with
18 another lawyer but two other lawyers. So when I get
19 the case, this case is developed a little bit. And I
20 recall being kind of impressed and pleased with the
21 information he was providing me about the van.

22 Q Okay. Now, the change of venue, we went through
23 that a little bit, and at some point, I guess, my
24 question with regards to that, there were numerous
25 jurors that had knowledge of the case?

1 A There was.

2 Q And you think Judge Buckner went through and
3 basically got them -- they agreed they could be fair
4 and impartial in the case?

5 A Uh-huh.

6 Q My question: And even if they're saying that, do
7 you think there were issues that still potentially
8 existed based upon their knowledge of the case and
9 exposure to the case that warranted you continuing with
10 that change of venue?

11 A Well, I couldn't answer that, of course, because
12 that goes to the state of mind of other people, so I
13 have no way to answer that credibly. But I will tell
14 you this, that change of venue goes to sound discretion
15 of the trial judge, and I had the distinct impression
16 after voir dire where that was headed, so I didn't
17 argue the motion.

18 Q Nobody raised and said, "I can't be fair and
19 impartial to this" or create any issue that you saw?

20 A Right. And there's case law that says even though
21 they have been exposed to it, it's still in the sound
22 discretion of the trial judge after voir dire, and the
23 trial judge is there, so there's great deference given
24 to the trial judge on that. And I just said that.

25 So we went through individually with each one of

1 them. I was hoping for some equivocation. And none of
2 them -- and I was really a little surprised there was
3 no equivocation. When any of them would answer him, it
4 was not like, "No, I won't be affected by that," and,
5 "Yes, I can give a fair trial," but it was like rapid
6 fire, one after another. And that surprised me a
7 little, but that was the case.

8 Q You withdrew that. And the same thing kind of
9 with the motion to suppress. You filed that motion to
10 suppress, sounds like, out of an abundance of caution
11 until you saw what the evidence was?

12 A Saw and heard.

13 Q And you got in there, and I guess y'all had your
14 motion to suppress hearing, had the officer come in,
15 and you withdrew it at some point in time?

16 A Yeah. I actually withdrew that. I don't think I
17 withdrew the -- I stand to be corrected. I don't think
18 I withdrew the -- and it doesn't matter. I don't think
19 I withdrew the change of venue motion. I just think it
20 just didn't get argued, which is, you know, is a waiver
21 of it, so it's the same effect. It's just a technical
22 distinction, I guess, you might say.

23 Q And that motion to suppress, going through it, it
24 really dealt with, the motion you had filed, was the
25 search of his residence. And it would have been, I

1 guess, tied in with when he was arrested for those
2 outstanding warrants. I guess it was some statements
3 he made and then also what they found in the house?

4 A Well, the statement he made, because they went to
5 his place a couple of times, maybe three, but a couple
6 times I know. And on one occasion -- I think this
7 preceded the search warrant. I think it did -- they
8 approached him, and he was right, they put handcuffs on
9 him, and asked him a couple of questions. The second
10 one, "Do you have any weapons?" And he said, "Yeah,
11 there is a shotgun in my house" or "in my home." And I
12 made a Fifth Amendment objection to that.

13 Q Right.

14 A And that was not sustained. But I remember that
15 part, okay.

16 Q Okay.

17 A And then subsequently, I think, or maybe during
18 the same time but subsequently, a search warrant, a
19 formal search warrant under the statute was sought and
20 issued by the magistrate. And they went back with a
21 search warrant and seized a number of items inside his
22 home, one of them being a shotgun.

23 And so that's after I heard the testimony from
24 that witness in pretrial after reviewing the search
25 warrant itself, of course, and the return, as I said

1 earlier, and hearing the testimony, I did withdraw that
2 motion because it complied.

3 Q Okay. You just made that -- did you discuss that
4 with him or let him know why you were doing that, do
5 you remember?

6 A I don't think that we had -- I discussed that with
7 him, I don't think so.

8 Q But based on your review of all the evidence that
9 was submitted and the information provided, you didn't
10 think it was a viable motion?

11 A At that point, I thought it might be a little
12 frivolous maybe.

13 Q Now, I think we went through a little bit about
14 the timeline. You said your investigator went out and
15 reviewed the information Mr. Frady provided to see if
16 the timeline of where the van was when the alleged
17 shooting took place and then to his residence to see
18 whether or not he could have done that?

19 A Physically done it, yeah.

20 Q And you didn't -- that -- your investigator, I
21 guess, said it was possible that it could have happened
22 during the time frame?

23 A Yeah. And that's a little sketchy, okay. Some I
24 have better recollection than others, issues. And
25 that's a little sketchy. But I believe that what I

1 said earlier in my testimony was the case, that he
2 tested that out, and it came back with a different
3 conclusion.

4 In fact, there were a number of things I would
5 send out with the private investigator to test, and I
6 was hoping he would come back with a favorable report,
7 and it was never favorable.

8 Q So it was looked at, to the best of your
9 knowledge?

10 A Yeah.

11 Q The timing?

12 A Yeah.

13 Q And it just didn't -- I guess the other question
14 would be: If you had found something that had helped
15 in regards to the timing, you would have presented it
16 at trial?

17 A Yes. But I will say this, now: There were -- I
18 mean, as I said earlier, I thought it was -- again, I
19 was the third lawyer. I thought it was a triable case.
20 I mean, I went through and I was looking at my notes on
21 opening statement, and I went through a whole sequence
22 of evidence that they didn't have.

23 Q Right.

24 A I mean, I just -- I just --

25 Q I mean, it was all circumstantial?

1 A Yeah. I just iterated, iterated, iterated the
2 evidence they didn't have. But, apparently, the jury
3 thought the shotgun -- the ballistics was enough.

4 Q Okay. Now, the minimum sentence, did you think
5 there was anything you could have said after he was
6 found guilty that would have reduced or done anything
7 in regards to the sentence that he received?

8 A I hate to answer that, you know, because that's --
9 you know, it's a terrible, tragic situation, but I'll
10 just say this. It was a brutal killing. Or two brutal
11 killings. I mean brutal. I don't know if you saw
12 photographs, but it was brutal.

13 It was a shotgun, a 12-gauge shotgun at close
14 range when both of them were asleep. And, you know, he
15 was on probation, according to his testimony, and I
16 don't think that came in. I don't think that came in
17 at the sentencing hearing. And, I mean, I just, you
18 know, I was just kind of at a loss, you know, at that
19 point.

20 Q The plea, he represented during his testimony that
21 he received or understood there was a 30-year plea
22 offer. Do you remember -- I don't think -- did you say
23 you weren't aware of that?

24 A No. And like I say, again, that may have occurred
25 between one of my predecessors, but the impression I

1 had was, "Hey, man, he's lucky it's not death penalty."
2 So I don't recall ever having any offer from the
3 solicitor. And as I said earlier in response to direct
4 examination, I may have said something to him along the
5 way like, "Well, would you accept something if they
6 offered it?" And, thus, that prompted the letter where
7 he said he wouldn't take anything more than 20 years.
8 Or there's some kind of reference to 20 years in that
9 letter.

10 Q So to the best of your knowledge, he wasn't going
11 to plead to anything based on that letter?

12 A Well, I mean, that was the impression I had from
13 him the whole while. I mean, the whole way. There was
14 never any question about that, but, you know, that
15 letter kind of corroborates that.

16 Q Now, he said that letter was early on in the
17 process. I guess October 31st, 2005. Do you remember,
18 any time after that letter, him coming to you and
19 saying, "Well, I'll take 30 years," or, "I'll take
20 something if you will get it on the table for me"?

21 A No. But, of course, our communication was
22 somewhat limited because he was in custody the whole
23 time, as he said earlier, but he did -- I probably saw
24 him six or eight times or so, but I don't have any
25 recollection of any offers made by the solicitor's

1 office.

2 Q Okay. There's also an allegation in regards to
3 this palm print analysis that was exculpatory being
4 withheld.

5 Do you remember having anything going back -- I
6 know we had the fingerprints?

7 A Yeah.

8 Q We had the Schmerber order for the palm print.

9 Do you remember it being withheld from you or any
10 issues that you remember in regards to that?

11 A No. What I recall about that is there were either
12 fingerprints and/or palm prints inside that van that
13 weren't Mr. Frady's.

14 Q Okay.

15 A Just in those general terms, that's my
16 recollection. To specifically say it's a palm print, I
17 can't testify to that.

18 Q I guess, starting out in your opening, you said
19 there will be no fingerprints. I don't know if you
20 said palm prints, but nothing would match Mr. Frady,
21 correct?

22 A You know what, you mention that. I may have said
23 palm prints in that opening because I think I had it in
24 the notes I had. Because I reviewed those.

25 If you want to go ahead, I'll continue to look.

1 Q That's fine. You can keep on. I think that's
2 about it. I'm going back over my notes to see if I've
3 got anything else.

4 So in regards to the van and the shotgun, the two
5 key pieces of evidence in this, you didn't see any
6 other means to suppress those or keep those out from
7 being shown to the jury or presented at trial?

8 A No. The star witness was the ballistics expert.
9 That was, you know, much more so than the van. The van
10 was significant, but the star witness was the
11 ballistics expert. And, apparently, you know, the
12 shotgun shell casings and shotguns, you know, they're
13 not as distinct as far as characteristics as rifles,
14 and I just thought, you know, I thought it was a
15 triable case, as I said earlier, but the determining
16 evidence was the shotgun and the spent shells.

17 MR. ARIAIL: Your Honor, I have no further
18 questions.

19 THE COURT: Any redirect?

20 MS. McCALLISTER: Just briefly, Your Honor.

21 REDIRECT EXAMINATION

22 BY MS. McCALLISTER:

23 Q Going back to the issue of Mr. Frady's arrest, I
24 believe what you said was that there were kind of two
25 different issues that you were challenging, the

1 statement that he made in response to an officer's
2 question.

3 So do you recall when that -- was there testimony
4 at trial as to what the officers did and the questions
5 that they asked him when they first detained him?

6 A I know we covered it in pretrial.

7 Q Okay. So at some point there was testimony from
8 the officers as to what questions were asked and when?

9 A Yes.

10 Q Okay. And after hearing that testimony, you felt
11 like there was no further way to challenge that
12 evidence?

13 A Well, I did challenge that.

14 Q Okay.

15 A That was the investigatory questions. When they
16 put him in handcuffs and, you know, asked, "Anybody
17 else here? Do you have any weapons?" And I did object
18 to that and maintained that objection. And that
19 objection was not sustained because the judge held that
20 it was preliminary in nature, and it was basically a
21 protective sweep of the area, so that was denied.

22 Q Okay.

23 A When I didn't argue the motion to -- the written
24 motion to suppress was after, again, reviewing
25 everything, the search warrant and the return, but

1 probably more importantly hearing the live testimony
2 from the officer who had sought the search warrant and
3 executed it. After hearing his testimony, that's when
4 it was withdrawn.

5 Q Okay. And let me ask you a little bit more about
6 the plea offer that Mr. Frady alleges he was given.

7 And you've reviewed your file in preparation for
8 this case today; is that correct?

9 A Well, parts of it.

10 Q Okay. And the parts that you reviewed and in your
11 recollection from the time of the representation, the
12 State never made an offer while you were the attorney?

13 A No. I mean, I just -- no, I don't have the -- I
14 have no recollection of that. I don't think that
15 happened.

16 Q Okay.

17 A It was just like I said early on, I won't belabor
18 that point, but it was a horrible situation.

19 Q If the State had made an offer, would you have
20 conveyed it to Mr. Frady?

21 A Certainly. Certainly.

22 Q What's your normal practice there when you get
23 offers?

24 A Well, if I -- in a situation like that, and he was
25 in custody, and if I had had an offer, I would have

1 personally gone and seen him personally.

2 Q Okay.

3 A And I would have probably put it in the form of an
4 affidavit that he was declining something had they
5 offered it, but there weren't any offers.

6 Q But there were no offers?

7 A No.

8 Q And you didn't have any evidence of an affidavit
9 or anything like that in your file?

10 A No..

11 Q And you would have gone personally to do that?

12 A I didn't do that personally. It's kind of hard to
13 prove a negative, as they say, there but was never any
14 offers on the table.

15 MS. McCALLISTER: That's all I have, Your Honor.

16 THE COURT: Okay. Thank you, sir.

17 THE WITNESS: Yes, ma'am.

18 THE COURT: Ms. McCallister, call your next
19 witness.

20 MS. McCALLISTER: Your Honor, that's the State's
21 case.

22 THE COURT: All right. Any argument?

23 MR. ARIAIL: If I can, I think I've put it on
24 there, if I can just call him for a limited reply in
25 regards to the testimony about the plea offer. I just

1 want to make sure the transcript is clear in regards to
2 what he said was received by him from Mr. Allen.

3 MS. McCALLISTER: Your Honor, I would object to
4 that. First of all, I think the testimony about the
5 plea offer has already gone farther than what's in this
6 order. It's failure to pursue plea negotiations that
7 may have proven advantageous to petitioner.

8 The first time he ever said anything about him
9 getting a 30-year plea offer, as far as I'm aware, is
10 today on the stand. So I think that's highly
11 prejudicial to the State, Your Honor, for him to have
12 another chance to come up here and testify. I mean, he
13 brought it up, and we have responded to it.

14 THE COURT: Frankly, I think the record is clear.
15 I mean, I don't misunderstand anything that your client
16 said. I know that Mr. Allen testified that he doesn't
17 recall any plea offers during his representation.
18 Obviously, your client has a different recollection
19 that happened in the basement of the jail. I mean, I
20 think all of that is clear. And I think it does to
21 some extent exceed the scope of what this Court is to
22 be reviewing.

23 MR. ARIAIL: That's fine. I think we'll just --
24 we're satisfied where it is, and we have no reply.

25 THE COURT: Okay.

1 MR. ARIAIL: I think we'll just stand on the
2 record for your review, and no argument is needed from
3 us.

4 THE COURT: All right. Good enough for me.

5 MS. McCALLISTER: Thank you.

6 THE COURT: I'll let y'all know something -- I
7 will let you know, too, if that pretrial transcript
8 never made it to my office. I assume that it did, but
9 if not, then I'll e-mail you and let you know.

10 MS. McCALLISTER: I can have my legal assistant
11 e-mail it to your chambers. She's got a weird program.
12 It's too big for me to send as an attachment, so she'll
13 have to do it, but I'll ask her to do that.

14 THE COURT: Good enough. Also I want all of these
15 exhibits -- can we make two copies of them, one for me
16 and one for Mr. Frady to take with him before he
17 leaves?

18 (WHEREUPON, proceedings adjourned at 12:51 p.m.)
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TELEPHONE SC
SALLY C. SMITH
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN GENERAL SESSIONS COURT

2005 NOV 23 A 9:12

State of South Carolina,)
v.)
James Randolph Frady,)
Defendant.)

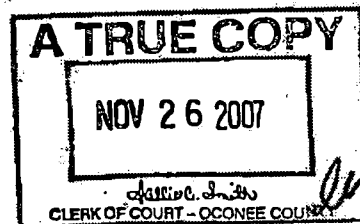
**MOTION TO PRODUCE
EVIDENCE**

Indictment No.: 2004-GS-37-2071;
2004-GS-37-2072; 2004-GS-37-2073;
2004-GS-37-2074; 2004-GS-37-2075;
2004-GS-37-2076; 2004-GS-37-2077
and 2004-GS-37-2078

TO: CRISSY ADAMS, SOLICITOR FOR OCONEE COUNTY:

The Defendant hereby requests and moves that the State disclose, and in the case of tangible items, produce for inspection and copying, all evidence in the possession and control of the State, or others, which may be favorable to the Defendant and material to the issue of guilt or punishment, or which will reasonably weaken or affect any evidence proposed to be used against the Defendant, or which is relevant to the subject matter of the indictment, or which in any manner may aid Defendant in ascertainment of the truth. This request and Motion is made pursuant to the requirements of Brady v. Maryland, 373 U.S. 83 (1963). The disclosure and production should be made without regard to whether the evidence to be disclosed and produced should specifically include, but is not limited to, the following:

- a) Any statements, written or oral, made by prospective witnesses for the State, regardless of to whom made, which are in any way inconsistent with the anticipated testimony of such witness or with the anticipated testimony of any other State witness.
- b) Any statements, written or oral, made by any other person, regardless of the identity of such person and regardless of to whom such statements were made, which are in



possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution;

d) All books, papers, documents, photographs, tangible objects, building or places, or copies or portions thereof, which are within the possession, custody, or control of the prosecution, and which are material to the defense, or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the Defendant;

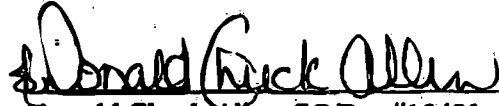
e) All results or reports of physical or metal examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial; and

f) The statement of any witness or prospective prosecution witness, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution.

~~The Defendant further moves that compliance with the foregoing request be made within ten (10) days from the service of this motion, and upon failure of the prosecution to so comply, the Defendant will move before the Presiding Judge of this Circuit, by Notice and Motion, for an Order prohibiting the prosecution from introducing at the trial evidence not disclosed, and if the foregoing is denied, an Order permitting the discovery and inspection requested, or a continuance of the trial, or such orders as the court in its discretion deems just under the circumstances.~~

For purposes of this motion, the Defendant asserts that any item requested in Paragraphs a, b, c, d, e, and f above is material to the preparation of the defense in this case.

THE ALLEN LAW FIRM



Donald Chuck Allen, SC Bar #10421

Attorney for Defendant

PO BOX 2861
Anderson, SC 29622
864-226-6184

November 21, 2005
Anderson, South Carolina

Rule 5

933

FILED OCONEE CO
SALLIE C. SMITH
CLERK OF COURT

STATE OF SOUTH CAROLINA)

IN GENERAL SESSIONS COURT

COUNTY OF OCONEE)

1. 2005 NOV. 23 A 9:42

State of South Carolina,)

**MOTION FOR DISCOVERY
AND INSPECTION**

v.)

Indictment No.: 2004-GS-37-2071;

James Randolph Frady,)

2004-GS-37-2072; 2004-GS-37-2073;

2004-GS-37-2074; 2004-GS-37-2075;

Defendant.)

2004-GS-37-2076; 2004-GS-37-2077

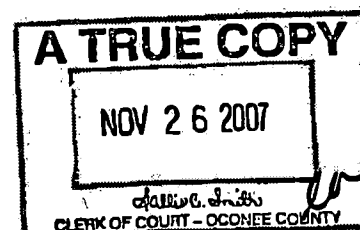
and 2004-GS-37-2078

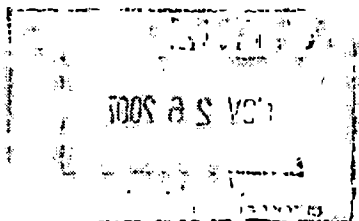
TO: CHRISSY ADAMS, SOLICITOR FOR OCONEE COUNTY:

NOW COMES the Defendant, James Randolph Frady, by and through his undersigned counsel of record, pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure, and moves the prosecution to permit the Defendant to inspect and copy or photograph, including, but not limited to, the following, with the express provision that the duty of disclosure be a continuing one in the event that any such materials come into existence or become available after the initial disclosures:

- a) Any written or recorded statements made by the Defendant, or copies thereof, within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution;
- b) The substance of any oral statement which the prosecution intends to offer into evidence at the trial made by the Defendant, whether before or after arrest, in response to interrogation by any person then known to the Defendant to be a prosecution agent;
- c) A copy of the Defendant's prior criminal record, if any, as is within the

-1-





possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution;

d) All books, papers, documents, ~~photographs, tangible objects,~~ building or places, or copies or portions thereof, which are within the possession, custody, or control of the prosecution, and which are material to the defense, or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the Defendant;

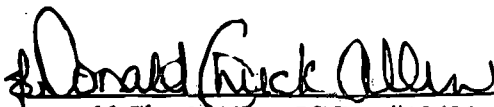
e) All results or reports of physical or metal examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial; and

f) The statement of any witness or prospective prosecution witness, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution.

~~The Defendant further moves that compliance with the foregoing request be made within ten (10) days from the service of this motion, and upon failure of the prosecution to so comply, the Defendant will move before the Presiding Judge of this Circuit, by Notice and Motion, for an Order prohibiting the prosecution from introducing at the trial evidence not disclosed, and if the foregoing is denied, an Order permitting the discovery and inspection requested, or a continuance of the trial, or such orders as the court in its discretion deems just under the circumstances.~~

For purposes of this motion, the Defendant asserts that any item requested in Paragraphs a, b, c, d, e, and f above is material to the preparation of the defense in this case.

THE ALLEN LAW FIRM



Donald Chuck Allen, SC Bar #10421

Attorney for Defendant

PO BOX 2861

Anderson, SC 29622

864-226-6184

November 21, 2005
Anderson, South Carolina

STATE OF SOUTH CAROLINA

FILED O'CONNOR SC
SALVIE C. SMITH
CLERK OF COURT

THE COURT OF GENERAL SESSIONS

COUNTY OF O'CONNOR

2005 DEC 30 P 4:29

THE STATE OF SOUTH CAROLINA,

SUPPLEMENTAL ANSWER TO
REQUEST FOR DISCOVERY

vs.

INDICTMENTS #04-GS-37-2070 thru 2074

JAMES RANDOLPH FRADY,

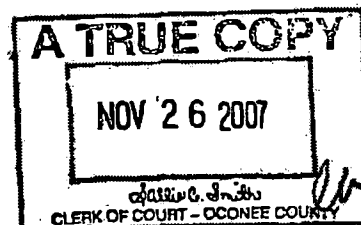
#04-GS-37-2078

DEFENDANT.

TO: DONALD CHUCK ALLEN, ATTORNEY FOR DEFENDANT:

The State would supplement its answer the defendant's request for discovery as follows:

1. Copy of Autopsy Rpt. on Barry Frady by Dr. Brett Woodard, dated 9-27-04 (7 pgs.);
2. Copy of Autopsy Report on James Cleveland Frady by Dr. Brett Woodard, dated 9-27-04 (7 pgs.);
3. Copy of handwritten OCSD Incident Report of Hunnicutt, dated 9-23-04, case #0404510 (2 pgs.);
4. Copy of Search Warrant/subpoena by Sgt. McGowan of Cingular phone records of #864-247-3769 and #864-247-1986, dated 9-23-04 (11 pgs.);
5. Copy of OCSD Consent to Search by Tammy and Michael Harper of 1990 Chevy Astro Van, dated 9-23-04 (1 pg.);
6. Copy of OCSD Crime Scene Log, case #0404512, dated 9-23-04 (3 pgs.);
7. Copy of Search Warrant by Sgt. McGowan of [REDACTED], Westminster, SC, dated 9-23-04 (4 pgs.);
8. Copy of Search Warrant by Sgt. McGowan of [REDACTED], Walhalla, SC, dated 9-23-04, with Affidavit of Service, dated 9-27-04 (7 pgs.);
9. Copy of Consent to Search by Randy Frady of [REDACTED], Walhalla, SC, dated 9-23-04 (1 pg.);
10. Copy of Search Warrant by Sgt. McGowan of [REDACTED], Walhalla, SC, dated 9-24-04 (6 pgs.);



11. Copy of handwritten OCSD Supplemental Report of Vickery, dated 9-23-04, case #0402720 (1 pg.);

12. Copy of typed OCSD Supplemental Report of Washington, dated 9-23-04, case #0404512 (1 pg.);

13. Copy of typed OCSD Supplemental Report of Seger, dated 9-24-04, case #0404512 (1 pg.);

14. Copy of typed OCSD Supplemental Report of Seger, dated 9-27-04, case #0404512 (1 pg.);

15. Copy of typed OCSD Supplemental Report of Reed, dated 9-27-04, case #0404512 (2 pgs.);

16. Copy of typed OCSD Notes of T. Hunnicutt, dated 9-23-04 (1 pg.);

17. Copy of typed OCSD Notes of J. Underwood, dated 9-23-04 (2 pgs.);

18. Copy of OCSD Record of Interview of James C. Frady, Sr., dated 9-23-04 (1 pg.);

19. Copy of OCSD Officers on Scene of arrest at [REDACTED], Walhalla, SC, dated 9-23-04 (1 pg.);

20. Copy of Voluntary Statement of Julia Ford, dated 9-23-04 (1 pg.);

21. Copy of Notes from interviews of Elsie Williams and Roxie Telley (1 pg.);

22. Copy of Polygraph results of Michael Harper by Lark & Associates, dated 9-23-04 (4 pgs.);

23. Copy of Voluntary Statement of Michael Harold Harper, dated 9-23-04 (2 pgs.);

24. Copy of Voluntary Statement of Tammy Pitts Harper, dated 9-23-04 (2 pgs.);

25. Copy of Voluntary Statement of Steve Smith, dated 9-23-04, with Record of Interview (2 pgs.);

26. Copy of Voluntary Statement of Jackie Harper, dated 9-23-04 (1 pg.);

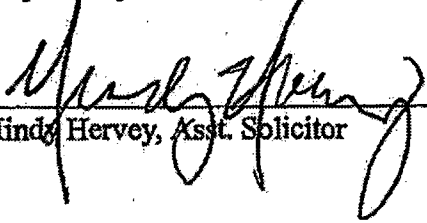
27. Copy of Voluntary Statement of Joseph Adam Hamilton, dated 9-23-04 at 12:20 p.m. (1 pg.);

28. Copy of Voluntary Statement of Joseph Adam Hamilton, dated 9-23-04 at 12:30 p.m. (2 pgs.);

29. Copy of Voluntary Statement of Douglas Lowell Blackwell, dated 9-23-04 (1 pg.);
30. Copy of Voluntary Statement of Douglas L. Blackwell, dated 9-24-04, with Record of Interview (3 pgs.);
31. Copy of officer's notes of statement of Douglas Blackwell (3 pgs.);
32. Copy of Voluntary Statement of Joseph S. McCarthy, Jr., dated 9-23-04 (1 pg.);
33. Copy of Voluntary Statement of William Floyd White, dated 9-23-04, with Record of Interview (2 pgs.);
34. Copy of Voluntary Statement of Richard Lanter, dated 9-22-04 (1 pg.);
35. Copy of Voluntary Statement of Todd Lanter, dated 9-24-04 (1 pg.);
36. Copy of Voluntary Statement of James Lockwood, dated 9-23-04, with Record of Interview (4 pgs.);
37. Copies of Voluntary Statements of Barry Frady and James C. Frady, dated 6-12-04 (2 pgs.);
38. Copy of Voluntary Statement of Kevin Cromer, dated 9-24-04 (1 pg.);
39. Copy of Record of Interview of Tim Chastain by Mike Crenshaw (1 pg.);
40. Copy of Voluntary Statement of Chris Kelley, dated 9-24-04, with Record of Interview and officer notes (3 pgs.);
41. Copy of Voluntary Statement of Annette Burney, dated 9-23-04 (1 pg.);
42. Copy of Walhalla PD Incident Report, dated 3-3-88, case #88-0072 (2 pgs.);
43. Copy of Property Receipt/Release Form by Dick Lanter, dated 9-24-04 (1 pg.);
44. Copies of Indictments #04-GS-37-2070,2071,2072,2073,2074,2075, 2076,2077,2078 (front/back);
45. Copy of Defendant's Rap Sheet, run date 10-29-05 (14 pgs.);
46. Copy of SLED Report of Ira Parnell (3pgs.);
47. Copy of SLED Laboratory Evidence Inventory Sheet (3 pgs.);
48. Copy of SLED Report of Stephen Curtis (4 pgs.);

49. Copy of SLED Report of Alex Layton (2 pgs.);
50. Copy of SLED Report of Ila Simmons (2pgs.);
51. Copy of SLED Report of Cecil Bradstreet (4 pgs)

Respectfully submitted,


Mindy Hervey, Asst. Solicitor

Walhalla, South Carolina
Dated: 12/30/05

STATE OF SOUTH CAROLINA)

IN GENERAL SESSIONS COURT

COUNTY OF OCONEE)

State of South Carolina,)

Plaintiff,)

MOTION TO CHANGE VENUE

vs.)

2004-GS-37-2071-2078

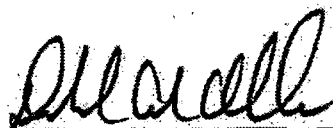
James Randolph Frady,)

Defendant.)

TO: THE HONORABLE CHRISSY ADAMS, SOLICITOR, TENTH JUDICIAL CIRCUIT:

YOU WILL PLEASE TAKE NOTICE that the Defendant herein, by and through his undersigned attorney, will move before this Court as soon as this matter can be heard, for a change of venue from the Tenth Judicial Circuit on the grounds that extensive pre-trial publicity including extensive television and news media coverage (see attached), and community attitudes regarding the charges will prevent the Defendant from obtaining a fair and impartial trial.

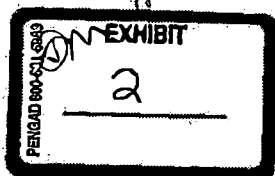
Respectfully submitted,



Donald Chuck Allen, SC Bar, #10421
Attorney for the Defendant

Dated: August 3, 2006
Anderson, South Carolina

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2006 AUG - 3 P 3:12





PRESS RELEASE
For Immediate Release
September 27, 2004

Contact: Sgt. Travis C. Tilson
(864) 638-4117
travis@oconeelaw.com

(WALHALLA, SC) – Investigators file additional charges on murder suspect.

On Monday, September 27, 2004, Sheriff's officials served additional warrants on James Randolph (Randy) Frady. In addition to two charges of murder, Frady is now charged with 1st Degree Burglary, 2nd Degree Arson, Grand Larceny, and Possession of a Weapon During Commission of a Violent Crime.

Frady was originally charged on Friday with two counts of murder in the shooting deaths of his father, James C. Frady, Jr., and brother, Barry P. Frady.

Frady is being held at the Oconee County Detention Center.

###



300 South Church Street-Walhalla, SC 29691

PRESS RELEASE

For Immediate Release

September 24, 2004

Contact: Sgt. Travis C. Tilson

(864) 638-4117

travis@oconee.law.com

(WALHALLA, SC) – The Oconee County Sheriff's Office has made one arrest in connection with a homicide reported Thursday at [REDACTED], Walhalla SC.

James Randolph (Randy) Frady, age 40, of [REDACTED], Walhalla, has been arrested and is charged with two counts of murder in connection with the deaths of his father, James brother, Barry P. Frady.

Randy Frady is currently incarcerated at the Oconee County Detention Center. The case is continuing.

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Man charged in Oconee double killing

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By Heidi Coryell Williams
STAFF WRITER

hwilliams@greenvillenews.com

WESTMINSTER - A 25-year-old Westminster man has been charged in the shooting deaths of an 82-year-old woman and her nephew, who were found dead inside a Virginia Drive home last week.

Arrest warrants say that Gregory Khali Johnson of [REDACTED] in Westminster has been charged with two counts of murder and one count of armed robbery in the deaths of Virginia Jones, 82, and Philip Kilpatrick Johnson, 31.

Friends of the two told police they stopped by the home at 192 Virginia Drive on Dec. 6 to pick up a Chevrolet Impala, but discovered it missing. Jones and Johnson were found dead inside the house.

The car was found two days later at the Holiday Inn on Interstate Boulevard in Anderson.

According to Westminster Police Chief Scott Bannister, Johnson has been held in the Oconee County Detention Center since the day of the shootings on unrelated charges. No additional information was being released Monday, Bannister said.

This marks the second double homicide in Oconee County this year.

In September, a father and son were found dead inside their home on [REDACTED], shot to death. James Randolph Frady has been charged in the deaths of his father, James C. Frady Jr. and brother, Barry P. Frady, according to warrants.

Staff writer Heidi Coryell Williams can be reached at 306-3302.

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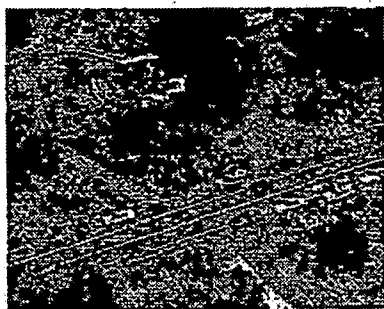
Man Arrested In Death Of Father, Brother In Oconee County

Two Men Found Dead Inside Home

POSTED: 11:34 am EDT September 23, 2004

UPDATED: 5:28 pm EDT September 24, 2004

WALHALLA, S.C. -- Oconee County detectives have made an arrest in a double homicide near Walhalla.



Crime tape surrounds a home on Westminster Highway near Walhalla as investigators look for clues to solve an apparent double homicide.

Sgt. Travis Tilson said deputies were called to a home in the [REDACTED] at about 9 a.m. Thursday.

When deputies arrived, they found the bodies of two men inside the home, Jimmy Frady, 63, and his son Barry, 37.

Investigators said the two men had been shot. Neighbors reported hearing the gunshots.

"They go to my church. I used to go over there and care for their little dog, sit and talk to them for a while," Julia Ford said. "I jump on the trampoline and I used to see Barry outside, and now I won't see him outside anymore."

Tilson said Friday that Jimmy Frady's son, James Randolph Frady, 40, is charged with two counts of murder in connection with the deaths. Frady is being held at the Oconee County Detention Center.

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WYFF4.com

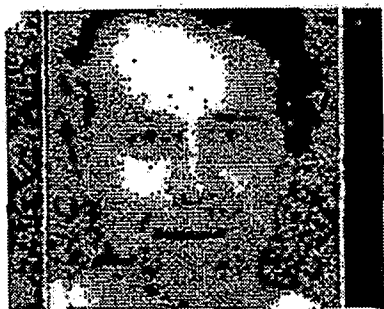
Man Accused Of Killing Father, Brother To Get New Lawyer

Men Found Shot To Death In September 2004

POSTED: 2:28 pm EDT June 29, 2005

UPDATED: 4:52 pm EDT June 29, 2005

WALHALLA, S.C. -- A man accused of killing his brother and father last year was in court Wednesday.



James Randolph Frady

James Randolph Frady, 40, asked an Oconee County judge for a new attorney, saying his current counsel was incompetent.

Frady was arrested in September 2004 a day after Jimmy and Barry Frady were found shot to death in the family's home outside Walhalla.

The judge granted Frady's request.

Frady was previously charged in a shooting death in Oconee County. He was cleared in 1986 after a jury ruled it was self defense.

Previous Stories:

- September 24, 2004: [Man Arrested In Death Of Father, Brother In Oconee County](#)

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[<<Back](#)

Walhalla man requests new lawyer in slayings of brother, father

(Walhalla-AP) June 29, 2005 - A Walhalla man accused of killing his brother and father requested a new attorney during a court appearance on Wednesday.

Forty-year-old James Randolph Frady told an Oconee County judge his current counsel is incompetent. The judge has granted Frady's request.

Frady was arrested in September 2004 after family members found the bodies of 63-year-old James Cleveland Frady Junior, and 36-year-old Barry Patrick Frady shot to death in the family's home outside Walhalla.

James Frady was previously charged in a shooting death in Oconee County. He was cleared in 1986 after a jury ruled it was self defense.

Posted 4:44pm by [BrettWitt](#)



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948

Man is charged in shooting deaths of father and brother

A Waltham man was charged Friday with murder in the shooting deaths of his father and brother whose bodies were found Thursday morning inside their home on the Westminster Highway just outside of Waltham.

The bodies of James Cleveland "Jimmy" Frady, Jr., 63, and Barry Patrick Frady, 36, were found by relatives shortly after 9 a.m. Thursday in their home at [REDACTED]. Coroner Karl Addis ruled that their deaths resulted from shotgun wounds.

Charged with two counts of murder was James Randolph "Randy" Frady, 40, of Yohlanda Drive, Waltham. He had been arrested Thursday morning at his home on an outstanding charge of assault, and was questioned about the murder of his father and brother.

Warrants were issued on June 12, 2004 for assault when Randy Frady threatened to kill his father, Jimmy and his brother, Barry. On June 20th, an incident report states that Randy called Barry and threatened "to kill him and the rest of his family".

Investigators searched Randy Frady's home for evidence, and also searched the area for a weapon that might have been used in the shootings. They concentrated their search along the sides of Highway 28 leading north out of Waltham, in the direction of Randy Frady's home.

According to reports, Barry Frady was found seated in a chair in the living room, and Jimmy Frady was in a bed.

The Oconee County Sheriff's Department was joined

in the investigation by forensic technicians from the State Law Enforcement Division who were called from Columbia to process the murder scene for evidence. They arrived shortly before noon Thursday.

Fourteen-year-old Julia Ford, who lives across the road from the murder scene, said she heard what might have been gunshots between 11 and 11:30 p.m. Wednesday, but at the time she thought the sounds could be fireworks.

On Monday, Sheriff's officials served additional warrants on James Randolph (Randy) Frady. In addition to two charges of murder, Frady is now charged with 1st Degree Burglary, 2nd Degree Assault, Grand Larceny, and Possession of a Weapon During Commission of a Violent Crime.

Frady was originally charged on Friday with two counts of murder in the shooting deaths of his father, James C. Frady, Jr., and brother, Barry P. Frady.

Frady is also wanted in Florida for a violation of probation. He being held at the Oconee County Detention Center.

THIS IS THE HOUSE at 2211 Westminster Highway, Waltham, where the bodies of two men were found Thursday morning. (See story)



James Randolph "Randy" Frady

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

THE STATE OF SOUTH CAROLINA,)

VS..)

James Randall Frady,)

DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS

SCHMERBER ORDER

04-GS-37-2071, 2072, 2073

04-GS-37-2074, 2075, 2076

2077, 2078, 2070

2006 JAN 24 A 10:14

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SALLIE G. SMITH
CLERK OF COURT

It appears unto this Court that certain physical evidence is needed from the person of the Defendant in order to have said case prepared for trial.

THEREFORE, Based upon the Plaintiff's Motion,

IT IS HEREBY ORDERED:

That the above-named Defendant who is currently in the custody of the Oconee County Sheriff's Department submit to a printing of his palms.

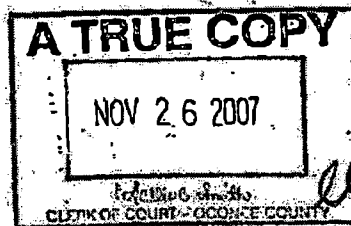
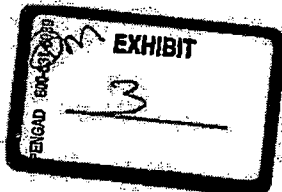
IT IS SO ORDERED.

[Signature]
PRESIDING JUDGE
TENTH JUDICIAL CIRCUIT

Oconee, South Carolina
Dated: 1/24/06

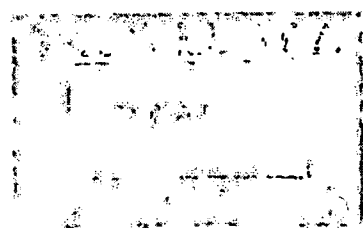
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[Signature]
Mindy Hervey
Assistant Solicitor



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STATE OF SOUTH CAROLINA)

) IN THE COURT OF GENERAL SESSIONS

COUNTY OF OCONEE)

The State,)

vs.)

MOTION TO SUPPRESS

James Randolph Frady,)

Indictment Nos.: 2004-GS-37-2070 - 2074

2004-GS-37-2078

Defendant.)

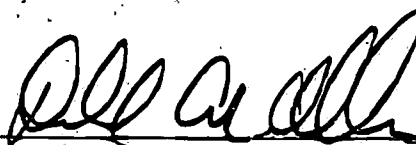
2004-GS-37-2073

TO: Mindy Hervey, Assistant Solicitor

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Defendant, will move before the Presiding Judge of the Oconee County General Sessions Court, on the tenth (10th) day after service hereof, or at such other time as the Court may direct for an Order suppressing any and all evidence seized during a search(s) of the residence located at [REDACTED], Walhalla, SC. This motion is based upon the fact that the search conducted violated the law of the State of South Carolina in the following particulars to-wit:

That said search(s) warrants issued to authorize said search(s) violated S.C. Code Section 17-13-140 as amended in that said warrants did not comply with the statutory mandates required by said code section.

THE ALLEN LAW FIRM



Donald Chuck Allen, SC Bar #10421

Attorney for the Defendant

P.O. Box 2861

Anderson, SC 29622

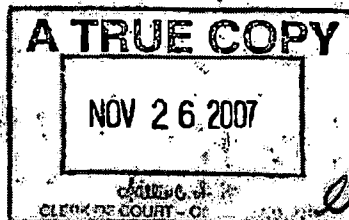
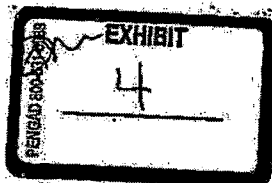
864-226-6184

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2006 AUG 28 A 9:07

August 23, 2006

Anderson, South Carolina



STATE OF SOUTH CAROLINA)
) GENERAL SESSIONS COURT
 COUNTY OF OCONEE)

The State,)

Plaintiff,)

vs.)

James Randolph Frady,)

Defendant.)

AFFIDAVIT OF SERVICE
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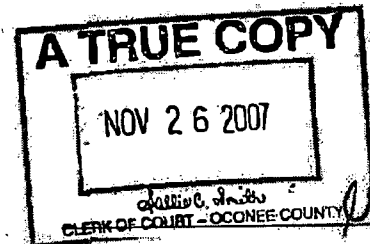
Indictment Nos.:

2004-GS-37-2070- 2074

2004-GS-37-2078

This will certify that the Motion to Suppress in the above matter was
 mailed to the below named Solicitor, by depositing in the United States
 Mail, postage paid, addressed as follows on the 8th day of August, 2006.

Mindy Hervey, Assistant Solicitor
 Oconee County Solicitor's Office
 415 South Pine Street
 Walhalla, SC 29691



Delores B. Phuleyan

SWORN TO BEFORE ME THIS
8 DAY OF August, 2006.

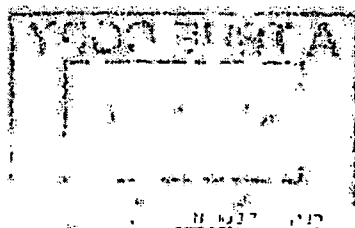
Londella G. Stokes

NOTARY PUBLIC FOR SOUTH CAROLINA
 MY COMMISSION EXPIRES: 1-26-2010



2006 AUG - 9 P 3:00

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 SALLIE G. SMITH
 CLERK OF COURT



From: James R Frady

10-31-05

Dear Chuck:

I didn't think to ask you in our meeting the other day. I've never had a complete discovery sent to me. Another duty Mr. Lavery neglected. Could you have your secretary run off a full and complete copy and have it sent to me? Also you asked me if I thought you could be ready by the next court term. Please forgive me for saying yes. I do not and will not rush you. I've got my whole future riding on this. After you speak to the solicitor let me know how it went. I still will not plea. If I plea there going to give me 20 years or more so there is nothing to loose. Plus to think that I could have done this to my only brother and father is ludicrous. Also when you send the copy of my discovery include your fax number. I would like to meet again with you the 3rd week in November. This time I'll be more prepared and bring my notes.

Thank You for Your Time

James R Frady



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

James R. Frady (SCDC #317328),

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

FOR THE TENTH JUDICIAL CIRCUIT

Civil Action No. 2009-CP-37-00451

ORDER OF DISMISSAL

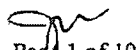
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2009 SEP 20 A 11:37

This matter comes before the Court upon Application for Post-Conviction Relief (PCR) filed by James R. Frady ("Applicant") on April 13, 2009. The State of South Carolina (Respondent) filed a Return on October 19, 2009. On June 26, 2017, an evidentiary hearing was conducted at the Oconee County Courthouse. Applicant was represented by his counsel, R. Mills Ariail, Esquire. Assistant Attorney General Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented the State of South Carolina.

For the reasons set forth below, the Applicant for Post-Conviction Relief is DENIED, and this matter is DISMISSED WITH PREJUDICE.

FACTUAL AND PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to the Oconee County Clerk of Court's orders of commitment. During the December 2004 term, the Oconee County Grand Jury indicated Applicant for Second-Degree Arson (2004-GS-37-2070), Grand Larceny (2004-GS-37-2071), First-Degree Burglary (2004-GS-37-2078), Possession of a Weapon During the Commission of a Violent Crime (2004-GS-37-2074), and two counts of Murder (2004-GS-37-2072 and -2073).


Page 1 of 19

Order of Dismissal

James R. Frady (SCDC#317328) v. State of South Carolina, 2009-CP-37-00451

Applicant was represented by Donald Allen, Esquire ("trial counsel"), and Elizabeth Waldrep, Esquire. On August 29-31, 2006, Applicant proceeded to a jury trial before the Honorable Perry M. Buckner. He was found guilty as indicted. On August 31, 2006, Judge Buckner sentenced Applicant to terms of imprisonment of five years each for Possession of a Weapon During a the Commission of a Violent Crime and Grand Larceny, twenty-five years for Second-Degree Arson, thirty years for First-Degree Burglary, and life without parole for each count of Murder, all to be served concurrently.

Applicant filed a timely notice of appeal. An appeal was perfected by Joseph Savitz, Esquire, of the South Carolina Office of Indigent Defense – Division of Appellate Defense, pursuant to the procedure set forth in Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction on November 12, 2008. State v. Frady, Op. No. 2008-UP-634 (S.C. Ct. App. filed November 12, 2008). The Remittitur was returned on December 3, 2008.

Applicant then timely filed this application for post-conviction relief on April 13, 2009. An evidentiary hearing was convened on October 3, 2011, before the Honorable J. Cordell Maddox, Jr. Applicant was present at that hearing and represented by Rodney Richey, Esquire. Respondent was represented by Kaelon May, Esquire. Following the hearing, Judge Maddox issued an Order, filed January 19, 2012, denying and dismissing the application with prejudice. Applicant filed a notice of appeal. While preparing the petition for writ of certiorari, the parties discovered that due to a malfunction with the court reporter's equipment, only the last eleven minutes of the evidentiary hearing had been recorded and were available to be transcribed.

Applicant then filed a motion to reconstruct the record, which was granted; however, after a hearing, Judge Maddox sent a letter to the South Carolina Supreme Court stating the record could


Page 2 of 19

Order of Dismissal

James R. Frady (SCDC#317328) v. State of South Carolina, 2009-CP-37-00451

not be sufficiently reconstructed. Applicant then filed a petition for writ of certiorari requesting a new trial. By Order filed December 9, 2015, the Supreme Court affirmed the PCR court's denial of relief in part, but vacated the court's findings as to six of Applicant's allegations, finding there was not enough evidence in the record to meaningfully review the court's findings. Frady v. State, Op. No. 2015-MO-073 (S.C. Sup. Ct. filed December 9, 2015). The Supreme Court then remanded Applicant's PCR for a new hearing, limited solely to those six grounds. Id.

SUMMARY OF FACTS ADDUCED AT TRIAL

At trial, Officer Timothy Hunnicutt testified he was dispatched to respond to an incident on the night of September 22, 2004, which involved a report of a stolen van. After a brief investigation, Officer Hunnicutt and the van's owner located the van, and Officer Hunnicutt went to Applicant's residence to question him. Applicant relayed that he had just returned home from a funeral.¹ Officer Hunnicutt noticed Applicant's muddy boots and asked Applicant if he could photograph them. Applicant initially consented before changing his mind. He was not under arrest at that time. Since officers had located the van, they released it back to the owner that night, and no forensic processing or evidence collection was done. Officer Hunnicutt testified that officers were unaware of the connection to the murder at that time.

On September 23, 2004, Patrol Officer Phillip Bryant, of the Oconee County Sheriff's Office, responded to a 911 call at a residence on [REDACTED] in Walhalla. Upon arrival, Officer Bryant looked into the home through the open front door and observed a man slumped over in a chair. He also noticed a burnt smell in the air. Additional officers arrived and conducted a protective sweep of the home, at which time the officers discovered the two victims, Jim and

¹ The friend who drove Applicant to the funeral home that night testified for the State; and, according to him, he and Applicant stayed only approximately 45 minutes and returned to Applicant's house well before dark.

Barry Frady, dead from apparent gunshot wounds. A neighbor reported hearing two gunshots around 11:30 p.m. the night before.

Applicant was deemed a suspect when officer learned he had two outstanding arrest warrants for assault on each victim.² As a result, Officers Jenkins, Reed, and Bryant were instructed to locate and serve the arrest warrants on Applicant. Officer Jenkins testified he made contact with Applicant in the backyard of Applicant's residence. He was immediately detained and asked if there were any undisclosed persons or weapons on the property. Applicant told Officer Jenkins that he had a shotgun in his home. Applicant then made the following voluntary, post-Miranda statement to Officer Jenkins:

[Applicant] was asked about the shotgun in the residence. And he stated he had bought it from a friend previously. And he was asked when was the last time he had seen his family. And his response was that he hadn't seen his folks in two to three months.

Later that day, officers searched the area where the van had been found the night before and discovered two twelve-gauge shotgun shells. The shells were collected by the South Carolina Law Enforcement Division ("SLED") and processed for DNA. SLED also processed the van for fingerprints and located prints on the exterior hood of the van and the interior passenger window. None of the prints could be matched to Applicant.

ALLEGATIONS RAISED

Pursuant to the South Carolina Supreme Court's order remanding for an evidentiary hearing, Applicant's allegations are limited to the following six grounds:

1. "Defense counsel failed to conscientiously discharge his professional responsibilities while handling [Applicant's] case;

² Officer Kevin Davis testified he issued the arrest warrants after a June 11, 2004, incident during which Applicant threatened to harm both victims.

2. Defense counsel failed to effectively challenge the arrest and seizure of [Applicant];
3. Defense counsel failed to pursue plea negotiations that may have proven advantageous to [Applicant];
4. Defense counsel failed to put forward any argument for a minimum sentence at [Applicant's] sentencing;
5. Defense counsel failed to object to the admission of evidence at trial on the basis that the chain of custody had been broken, and that he had not been given an opportunity to examine the evidence;
6. Defense counsel withdrew a potentially meritorious motion to suppress."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court had before it the records of the Oconee County Clerk of Court regarding Applicant's conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the application, Respondent's Return, and the trial transcript. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility. This Court has reviewed the trial court record and has heard the testimony of both Applicant and trial counsel. This Court has therefore weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17-27-80 (2003).

In a post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "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, 286 S.C. at 443, 334 S.E.2d at 814. The proper measure of performance is whether

the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. A PCR applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688). 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." Id. at 117-18, 386 S.E.2d at 625.

I. FAILURE TO DISCHARGE PROFESSIONAL RESPONSIBILITIES

Applicant's first allegation was that trial counsel failed to conscientiously discharge his professional duties. Applicant contends palm print evidence and evidence from the getaway van was withheld from him. Further, Applicant claims trial counsel failed to appropriately investigate the timeline regarding the theft of the van and the murders, failed to properly argue the motion for a change of venue, failed to impeach the witness Kevin Cromer, and failed to object to the judge's improper jury instruction regarding malice.

Respondent objected to any testimony regarding the change of venue motion and evidence of the van and palm print being withheld as those allegations were specifically raised in Applicant's original application and have already been ruled upon. However, this Court allowed Applicant to raise the issues over Respondent's objections.

A. PALM PRINT EVIDENCE AND EVIDENCE FROM GETAWAY VAN WITHHELD

Applicant testified he did not recall discussing the van or evidence obtained from it (the palm print) with his attorneys and did not know the State would use it at trial. Applicant testified he believed the State improperly withheld that evidence because the van was not listed in the State's response to trial counsel's Rule 5 discovery motion. Applicant further testified trial counsel did not investigate the van in any way or object to testimony regarding the van coming in at trial. Applicant testified he felt the van should have been kept out because it was turned back over to the owner and not kept in police custody, thereby creating a chain-of-custody issue.

Trial counsel testified he was aware that evidence of the van itself and evidence of prints collected from it would be introduced at trial. Trial counsel testified he felt he had two ways to approach the van evidence; first, by arguing it was unreliable because it was not preserved, and second, that it was evidence of third-party guilt. However, trial counsel testified he had no way to keep the van evidence out completely. He also testified he raised the chain-of-custody issue in cross examination because the police returned the van to the owner before realizing it was connected to the murders. Trial counsel further testified he proffered the testimony of the van owner at trial, although the trial court did not allow him to present that testimony to the jury. He also testified he used evidence of the palm and fingerprints in the van as part of his theory of third-party guilt.

B. INVESTIGATION OF TIMELINE

Applicant testified he told his attorneys the timeline for the theft of the van, running out of gas, perpetrating the murders, and returning to his home did not add up. Applicant stated he asked them to investigate the issue, but the defense investigator did nothing except obtain phone records.



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Trial counsel testified the location where the van was found, Applicant's home, and the crime scene were all within two to three miles of each other. Trial counsel agreed Applicant raised the issue of the van and the timeline with him, and he stated most of his knowledge regarding that issue came from Applicant himself. However, trial counsel testified he hired an investigator to test Applicant's contention regarding the timeline, and the investigator concluded it was possible within the timeframe. Further, trial counsel testified he did not contest the timeline because it was not exculpatory or helpful to Applicant.

Therefore, this Court finds trial counsel was not deficient in his handling of evidence regarding the getaway van and items of evidence found inside of it. Further, this Court finds trial counsel conducted an appropriate investigation of the timeline dispute as he hired an investigator to attempt to discredit the timing, but the effort was unsuccessful. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (citation omitted). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Finally, trial counsel testified he was aware of all the evidence the State introduced prior to trial, and he did not see any way to exclude such evidence. Therefore, this Court finds there was no violation of Rule 5, and trial counsel was not deficient in his professional responsibilities because he had no meritorious objection to make to the introduction of such evidence. Additionally, Applicant offered no evidence, except his speculation to support his contention that



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trial counsel failed to investigate or that the State's timeline was demonstrably infeasible. Thus, Applicant's PCR application is denied as to these allegations.

C. CHANGE OF VENUE MOTION

Applicant testified the change of venue motion was made due to concerns about the notoriety of the case and exposure of jurors to pre-trial publicity. Applicant testified every juror indicated during *voir dire* they had heard something about the case, and half of the jurors had heard something on the radio that morning. Applicant stated his attorneys told him the motion was being withdrawn because the charges "could be beat in Oconee County" just as easily as anywhere else. Applicant further testified he told his attorneys he did not want the motion withdrawn.

Trial counsel testified he never made a statement that the charges "could be beat," and the motion was never formally withdrawn. Trial counsel testified some jurors did stand up when asked if they had any prior knowledge of the case, but the judge engaged in extensive *voir dire* with each one, and all unequivocally stated they could put their previous knowledge aside and decide the case only on the evidence presented. Trial counsel stated he felt the issues raised in the motion were addressed by the judge's colloquy with the jurors, and he felt it was fruitless to press it further since case law gives great deference to the trial judge's decision on that issue.

Thus, having weighed the credibility of the testifying witnesses and having considered the admissions and explanations offered, this Court finds trial counsel rendered effective assistance of counsel and Applicant was not prejudiced by trial counsel's decision to forego the motion at the conclusion of jury selection. In addition, this Court determines trial counsel credibly testified he felt the trial judge addressed all of the issues raised in the motion through *voir dire*, and the jurors unequivocally testified to their own impartiality. This Court also notes any motion to change venue would have been premature until the trial court failed to qualify a jury, which never became

an issue in Applicant's case. See State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997) (noting the best practice "is to attempt to seat a jury prior to ruling on a motion to change venue based on pretrial publicity"). Further, it is clear trial counsel made a reasonable decision not to pursue the motion, and that the decision was made based on strategy rather than neglect. See Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective.").

"An 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 establish prejudice, Applicant is required to show "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.

Here, Applicant did not present any evidence that he was prejudiced by trial counsel's performance at trial. Moreover, Applicant did not call any jurors as witnesses or present any evidence that the jury was impartial due to the trial venue and/or the pre-trial publicity. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .). Therefore, Applicant's PCR application is denied as to these allegations.

D. IMPEACHMENT OF KEVIN COMER

Applicant testified trial counsel failed to impeach the witness Kevin Comer's testimony regarding Applicant's questions about using LSD to kill someone. Applicant stated Comer had a criminal record, and Applicant was not aware Comer would be allowed to testify against him.

Applicant further testified Comer's testimony was untrue, and there were other inmates who witnessed the conversation in question between Comer and Applicant. However, Applicant stated he never gave his attorneys the names of such inmates, although he did tell them Comer's version was false.

Trial counsel testified it was his practice to pull criminal records of all witnesses, and he would have impeached the witness if he had any qualifying convictions. Further, the transcript reflects trial counsel did question the witness on cross-examination regarding both his criminal history and the conversation about LSD.

Therefore, this Court finds trial counsel was not deficient in his handling of the cross-examination of Kevin Comer. This Court notes Applicant's testimony is flatly contradicted by the record, and trial counsel did indeed cross-examine Comer as to his criminal record and the alleged conversation about LSD. Consequently, Applicant's PCR application is denied as to these allegations.

E. JURY INSTRUCTION ON MALICE

Applicant objects to the Court's charge that implied malice is inferred from the use of a deadly weapon. This Court has reviewed the jury charge and finds no issue with the Court's charge. The trial judge charged the jury as follows:

"Malice aforethought may be expressed or implied. These terms expressed and implied do not mean different kinds of malice, but merely the manner in which malice may be shown to exist. That is either by direct evidence or by an inference from the facts and circumstances which are proved based on evidence introduced during the trial of the case. . . ."

"[Implied] malice may arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case."


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(emphasis added). Although the trial court did not specifically instruct the jury it could reject an inference of implied malice, the Court's language clearly conveyed the permissive nature of the inference. Further, the trial court's charge also instructed the jurors as to their "duty to determine the effect, the value, the weight, and the truth of any evidence offered during the trial of this case. . ." and that they were "to weigh the evidence, to consider the evidence, and render a verdict based solely upon the evidence" introduced during trial.

This Court has reviewed the jury instruction on implied malice and finds the instruction was legally correct and unobjectionable. "A charge is sufficient if, when considered as a whole, it covers the law applicable to the case." State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996). "The substance of the law is what must be charged to the jury, not any particular verbiage." State v. Adkins, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003). "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

This Court does not find trial counsel failed to identify an error during jury instruction. Therefore, the PCR application is denied as to these allegations as well.

II. FAILURE TO EFFECTIVELY CHALLENGE APPLICANT'S ARREST AND SEIZURE/ WITHDRAWAL OF MOTION TO SUPPRESS

Applicant testified trial counsel filed a motion to suppress, but then withdrew the motion without consulting Applicant. Applicant testified he did not want the motion withdrawn. Applicant further testified he believed the shotgun, shells, and clothing were taken from his residence improperly without a warrant.



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Trial counsel testified the basis of Applicant's arrest was two prior arrest warrants that had been issued against Applicant for threatening to assault his father and brother. Counsel testified he saw no reason to challenge the arrest, although he did argue to exclude any mention of the threats or assault at trial. Trial counsel further testified he filed a motion to suppress the shotgun, shells, and clothing, but after hearing the testimony of the officers during the pretrial hearing and reviewing the search warrant, he felt the State could establish compliance with the statute, and he no longer had a meritorious argument for suppression. Trial counsel testified, in his opinion, the search warrant used to collect the shotgun, shells, and clothing was a valid warrant based on statements made by Applicant during his arrest. Trial counsel noted he challenged the statements on Fifth Amendment grounds, but was overruled.

Decisions primarily involving trial strategy and tactics may be made by trial counsel. Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014). Examples of such decisions include "which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, *whether to object to the admission of evidence*, [and] whether and how a witness should be cross-examined." Id. (emphasis added). Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). In this instance, trial counsel made a conscious, strategic choice not to pursue the suppression motion after hearing the pre-trial testimony and determining the State would be able to meet its burden as to the validity of the warrants. Therefore, Applicant's PCR application is denied as to this allegation.



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III. FAILURE TO PURSUE PLEA NEGOTIATIONS

Applicant testified he rejected a thirty-year plea offer because his attorneys told him he would "beat [the charges] because there was no evidence." According to Applicant, he told his attorneys he would not accept an offer at that time. Applicant stated he was never told he could get consecutive sentences on top of a maximum sentence or that a life sentence without parole would be mandatory if he was convicted. Applicant testified he would have "almost assuredly" accepted the plea offer if he had been properly informed.

Trial counsel testified unequivocally there was never a plea offer extended from the State. Trial counsel stated his usual practice with plea offers was to put the plea offer in writing and personally take the written offer to his client; however, trial counsel stated he did not do that in this case because no plea offer was ever made. Additionally, trial counsel testified his impression was that Applicant would not plead guilty, regardless, and Applicant never gave him a specific number of years or range that he would agree to plea to. Trial counsel further testified the only discussions he had with Applicant regarding a plea were hypothetical. Trial counsel testified these were brutal killings, and Applicant was fortunate the State agreed not to pursue the death penalty against him.

"[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999). However, a defendant has no constitutional right to a plea bargain. Id. at 685, 511 S.E.2d at 401. The decision whether to offer a plea bargain is within the solicitor's discretion. State v. Whipple, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996) (citing State v. Chisolm, 312 S.C. 235, 439 S.E.2d 850 (1996)). Further, in Davie v. State, the South Carolina Supreme Court held the standard to be successful on a claim that counsel failed to convey a

favorable plea offer requires Applicant to prove that: (1) Counsel's failure to communicate the State's initial plea offer constituted deficient performance, and (2) Applicant was prejudiced by the deficient performance, or there was a reasonable probability that but for this deficient performance, he would have accepted he original plea offer. 381 S.C. 601, 608, 675 S.E. 416, 420 (2009).³

Having considered the admissions and explanations offered, this Court finds trial counsel's testimony on this issue to be credible, while also specifically finding Applicant's testimony not credible. This Court finds no plea offer ever existed, and Applicant never indicated any interest in pleading guilty; therefore, trial counsel was not deficient in any manner. In any event, Applicant's testimony at the evidentiary hearing that he would have "almost assuredly" accepted the alleged thirty-year offer if he had known the consequences of proceeding to trial is insufficient to meet his burden under Davie. This allegation is therefore denied under the PCR application.

IV. FAILURE TO PUT FORTH ARGUMENT FOR MINIMUM SENTENCE

Applicant testified trial counsel made no argument in mitigation during his sentencing, and Applicant believed he should have. However, Applicant offered no such evidence or testimony himself, and Applicant has not challenged or raised any allegations regarding the State's notice of its intention to seek life without parole upon conviction. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .). Therefore, Applicant cannot establish prejudice, even if trial counsel's performance was somehow deficient.

³ Although Davie was decided in 2009, after Applicant's trial, the decision relied on precedent stretching back to the 1980s.

Trial counsel testified he felt the State could establish aggravating factors qualifying Applicant for the death penalty, and Applicant was fortunate the State agreed not to pursue death. Trial counsel further testified he did speak to Applicant's family members, particularly Applicant's grandfather, but their only interest and involvement in the case was to help get the death penalty off the table. Once that was accomplished, according to trial counsel, the family members were no longer interested in assisting further with mitigation. Given the nature of the crimes and the State's notice of life without parole, which was not challenged at trial or in this action, this Court finds trial counsel rendered effective assistance in mitigating Applicant's sentence in that he was able to keep the State from seeking death. Once Applicant was convicted at trial, the trial court had no discretion in sentencing Applicant to life imprisonment, and any mitigation witnesses or evidence from Applicant would have been fruitless in any event. Therefore, Applicant has failed to prove either deficiency or prejudice, and this allegation is denied under the PCR application.

V. FAILURE TO OBJECT TO ADMISSION OF EVIDENCE ON THE BASIS OF CHAIN-OF-CUSTODY ISSUES AND COUNSEL'S INABILITY TO VIEW EVIDENCE PRIOR TO TRIAL

Finally, Applicant testified all evidence regarding the van should have been excluded because the van was released back to the owner before law enforcement realized it was involved in the murders. According to Applicant, this broke the chain of custody and tainted evidence. Applicant also alleges trial counsel should have objected because he was not able to review the van evidence prior to trial.

Trial counsel opined that this was a triable case, primarily because the evidence was all circumstantial, and the State could not fill in every hole in the timeline. Trial counsel testified he was well aware prior to trial of the van, the State's contentions regarding the timeline of the murders, and the evidence of fingerprints in the van. Trial counsel testified he felt the van was a significant piece of evidence, and there was no way to keep it out completely. However, he

testified he was able to cross-examine the officers and argue to the jury the van was unreliable evidence because of the chain-of-custody issues and that, if anything, the van supported Applicant's third-party guilt defense because the fingerprints and palm print found in the van were not Applicant's. Trial counsel also testified he proffered the testimony of the van's owner, Michael Harper, at trial in support of counsel's contention of ill will between Harper and the victims that went towards the third-party guilt theory, although ultimately the trial court declined to allow the testimony to go in front of the jury.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that trial counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). No particular set of detailed rules for trial counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of trial counsel's performance must be highly deferential. Id. at 689.

"Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed



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ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Trial counsel testified he was aware of the contested evidence prior to trial, and a review of the transcript shows he prepared and employed a variety of strategies to cast doubt on the evidence and use it to Applicant's advantage. Applicant has presented no evidence or argument, other than his conclusory assertions, to show this Court that there was a valid objection trial counsel could have made. Trial counsel articulated a reasonable strategy for dealing with this evidence, which included cross-examination of the State's witnesses on the chain-of-custody issues. Thus, Applicant has failed to prove either deficiency or prejudice, and this allegation is denied under the PCR application.

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Trial counsel was not deficient, nor was Applicant prejudiced by trial counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from 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


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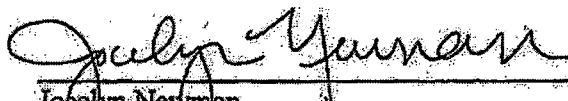
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right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, Applicant must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED that the Application for Post-Conviction relief is DENIED and DISMISSED with prejudice.

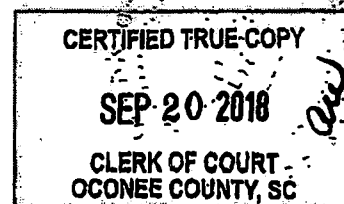
IT IS FURTHER ORDERED that Applicant James R. Frady be REMANDED to the custody of the State of South Carolina.

AND IT IS SO ORDERED.


Jocelyn Newman
Presiding Judge

September 5, 2018
Columbia, South Carolina.

FILED OCOONEE COUNTY, SC
CLERK OF COURT
2018 SEP 20 A 11:37



WITNESSES
OCSD/REED

Mike Carlow

ARREST WARRANT NO. H-652432

ACTION OF GRAND JURY

Joe Bell
12-14-4

Dan J.
Foreman of Grand Jury

VERDICT

guilty

Angela W. Browne *08-31-06*

Foreman of Petit Jury

Date:

DOCKET NO. 2004-00-01 2010

The State of South Carolina,
OCONEE

County of _____

COURT OF GENERAL SESSIONS
DECEMBER TERM 2004

SSR THE STATE

vs.

JAMES RANDOLPH FRADY

Indictment for

ARSON
2ND DEGREE

16-11-0110(B)

[2551]

SUSAN REESE, ASSISTANT SOLICITOR

321

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR
ARSON, 2ND DEGREE
16-11-0110(B) [2551]

At a Court of General Sessions, convened on DECEMBER 14, 2004,
the Grand Jurors of OCONEE County present upon their oath:

THAT JAMES RANDOLPH FRADY DID IN OCONEE COUNTY ON OR ABOUT **SEPTEMBER 22, 2004**, WILFULLY, MALICIOUSLY, FELONIOUSLY AND INTENTIONALLY, SET FIRE TO OR CAUSED TO BE BURNED, A DWELLING HOUSE, TO WIT: THE RESIDENCE OF JAMES C. FRADY, JR. AND BARRY FRADY.

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


SOLICITOR

WITNESSES

OCSD/REED

Miles Carson

ARREST WARRANT NO. H-652431

ACTION OF GRAND JURY

12-14-14

Foreman of Grand Jury

VERDICT

*guilty**Angela N. Boone* 08-31-06
Foreman of Petit Jury

Date:

DOCKET NO. 2004-GS-37- *2011*

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

DECEMBER TERM 2004

THE STATE

SSR

vs.

JAMES RANDOLPH FRADY

Indictment for

GRAND LARCENY

16-13-0030(B)(2)

[0479]

SUSAN REESE, ASSISTANT SOLICITOR

BW

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR

GRAND LARCENY
16-13-0030(B)(2) [0479]

At a Court of General Sessions, convened on DECEMBER 14, 2004,
the Grand Jurors of OCONEE County present upon their oath:

THAT JAMES RANDOLPH FRADY DID IN OCONEE COUNTY ON OR ABOUT **SEPTEMBER 22, 2004** FELONIOUSLY TAKE AND CARRY AWAY THE PROPERTY OF MIKE HARPER OF WALHALLA, SOUTH CAROLINA, TO WIT: A 1990 CHEVY ASTRO VAN VALUED AT MORE THAN ONE THOUSAND DOLLARS BUT LESS THAN FIVE THOUSAND DOLLARS, WITH INTENT TO DEPRIVE THE OWNER PERMANENTLY OF THE PROPERTY. ALL IN VIOLATION OF 16-13-30, CODE OF LAWS OF SOUTH CAROLINA (1976), AS AMENDED.

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


SOLICITOR

WITNESSES

OCSD/REED

*Mike Carson*ARREST WARRANT NO. H-652426

ACTION OF GRAND JURY

True Bill
*12-14-11**[Signature]*
Foreman of Grand Jury

VERDICT

*guilty**Angela N. Boone* *08-31-02*
Foreman of Petit Jury Date:DOCKET NO. 2004-GS-37- 2012

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

DECEMBER TERM 2004

THE STATE

SSR

vs.

JAMES RANDOLPH FRADY

Indictment for

MURDER

16-03-0010

[0116]

SUSAN REESE, ASSISTANT SOLICITOR*[Signature]*

FORM 32 (12/87)

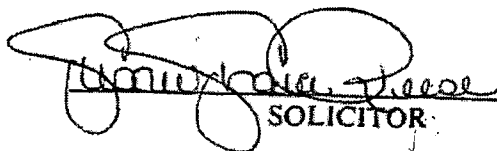
STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR
MURDER
16-03-0010 [116]

At a Court of General Sessions, convened on DECEMBER 14, 2004,
the Grand Jurors of OCONEE County present upon their oath:

THAT **JAMES RANDOLPH FRADY** DID IN OCONEE COUNTY ON OR ABOUT **SEPTEMBER 22, 2004**, FELONIOUSLY, WILLFULLY AND WITH MALICE AFORETHOUGHT, KILL ONE **JAMES C. FRADY, JR.** BY SHOOTING THE VICTIM WITH A SHOTGUN AND THAT SAID VICTIM DIED AS A PROXIMATE RESULT THEREOF.

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


SOLICITOR

WITNESSES
OCSD/REED

Mike Cushman

DOCKET NO. 2004-0001-2010

The State of South Carolina,

OCONEE

County of _____

COURT OF GENERAL SESSIONS

DECEMBER

TERM 2004

SSR

THE STATE

vs.

JAMES RANDOLPH FRADY

ARREST WARRANT NO. H-652427

ACTION OF GRAND JURY

John Bell
12-14-4

Foreman of Grand Jury

Indictment for

VERDICT

guilty

Indictment for

MURDER

16-03-0010

[0116]

Angela N. Broome 08-31-06
Foreman of Petit Jury Date:

SUSAN REESE, ASSISTANT SOLICITOR

BW

FORM 32 (12/87)

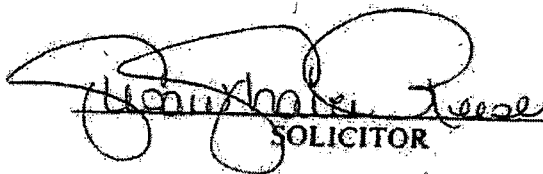
STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR
MURDER
16-03-0010 [116]

At a Court of General Sessions, convened on DECEMBER 14, 2004,
the Grand Jurors of OCONEE County present upon their oath:

THAT JAMES RANDOLPH FRADY DID IN OCONEE COUNTY ON OR ABOUT SEPTEMBER 22, 2004, FELONIOUSLY, WILLFULLY AND WITH MALICE AFORETHOUGHT, KILL ONE BARRY FRADY BY SHOOTING THE VICTIM WITH A SHOTGUN AND THAT SAID VICTIM DIED AS A PROXIMATE RESULT THEREOF.

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


SOLICITOR

DOCKET NO. 2004-GS-31-2074

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

DECEMBER TERM 2004

SSR THE STATE

vs.

JAMES RANDOLPH FRADY

Indictment for

POSSESSION OF A WEAPON DURING
THE COMMISSION OF A VIOLENT CRIME

16-23-0490

[0549]

SUSAN REESE, ASSISTANT SOLICITOR

WITNESSES

OCSD/REED

Mike Canahan

ARREST WARRANT NO. H-652430

ACTION OF GRAND JURY

Will Bill
12-14-4

[Signature]
Foreman of Grand Jury

VERDICT

guilty

Angela N. Broome 08-31-06
Foreman of Petit Jury Date:

[Signature]

FORM 32 (12/87)

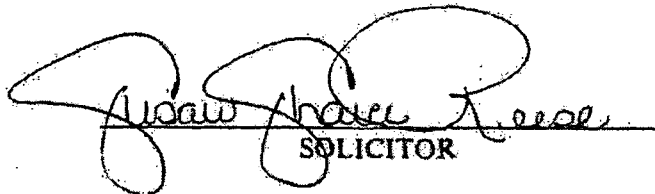
STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR
POSSESSION OF A WEAPON DURING
COMMISSION OF A VIOLENT CRIME
16-23-0490 [0549]

At a Court of General Sessions, convened on DECEMBER 14, 2004,
the Grand Jurors of OCONEE County present upon their oath:

THAT JAMES RANDOLPH FRADY DID IN OCONEE COUNTY ON OR ABOUT SEPTEMBER 22, 2004 DISPLAY AND/OR POSSESS A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME, TO WIT: THE DEFENDANT DID POSSESS A SHOTGUN WHILE COMMITTING THE CRIME OF MURDER.

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


SOLICITOR

WITNESSES
OCSD/REED

Mike Canham

DOCKET NO. 2070

The State of South Carolina,
OCONEE

County of _____

COURT OF GENERAL SESSIONS
DECEMBER TERM 2004

SSR THE STATE

vs.

JAMES RANDOLPH FRADY

ARREST WARRANT NO. H-652429

ACTION OF GRAND JURY

12-14-04

True Bill

Dana 14
Foreman of Grand Jury

VERDICT

guilty

Indictment for

BURGLARY - 1ST DEGREE

16-11-0311

[0079]

SUSAN REESE, ASSISTANT SOLICITOR

Angela N. Broome *08-31-04*
Foreman of Petit Jury Date:

BW

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
 OCONEE)
COUNTY OF _____)

INDICTMENT FOR
BURGLARY - FIRST DEGREE
16-11-0311 [0079]

At a Court of General Sessions, convened on DECEMBER 14, 2004,
 OCONEE
the Grand Jurors of _____ County present upon their oath:

THAT JAMES RANDOLPH FRADY DID IN OCONEE COUNTY ON OR ABOUT **SEPTEMBER 22, 2004** ENTER THE DWELLING OF JAMES C. FRADY, JR. AND BARRY FRADY WITHOUT CONSENT AND WITH THE INTENT TO COMMIT A CRIME THEREIN AND THAT THE DEFENDANT, WHILE EFFECTING ENTRY AND/OR WHILE IN THE DWELLING AND/OR IN IMMEDIATE FLIGHT, DID SHOOT AND KILL BOTH JAMES C. FRADY, JR. AND BARRY FRADY.

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


SOLICITOR