THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Circuit Court Judge

Appellate Case Number: 2021-000946

RECEIVED
Feb 18 2022
S.C. SUPREME COURT

Arthur W. Macon ..... Petitioner,

v.

State of South Carolina, ... Respondent.

Appendix Volume II of III

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Petitioner Arthur W. Macon

Alan Wilson
Attorney General

Yasmeen Klein
Assistant Attorney General

S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211
(803) 734-3737

Attorneys for Respondent State of South Carolina

INDEX

Volume I

Sentencing Sheet 1

Indictment 2

Arrest Warrant 4

Trial Transcript 6

Volume II

Trial Transcript (cont.) 501

Final Brief of Appellant 513

Final Brief of Respondent 534

State v. Macon, Unpublished Op. No. 2018-UP-031 (January 17, 2018) 557

Petition for Rehearing 560

Order Denying Petition for Rehearing 566

Petition for Writ of Certiorari 568

Return to Petition for Writ of Certiorari 591

Order Denying Petition for Writ of Certiorari 610

Remittitur 611

Application for Post-Conviction Relief 612

Petition for Writ of Mandamus 627

Amended Application for Post-Conviction Relief 644

Motion for Order Allowing Discovery 655

Return to Application for Post-Conviction Relief 667

Order Authorizing Discovery 681

Substitution of Counsel for State 682

PCR Hearing Transcript.....687

Applicant's PCR Exhibits

Exhibit 1 (Jury Note) 851

Exhibit 2 (Jury Note) 852

Exhibit 3 (Jury Note) 853

Exhibit 4 (Jury Note) 854

Exhibit 5 (Jury Note) 855

Exhibit 6 (Jury Note) 856

Exhibit 7 (Jury Note) 857

Exhibit 8 (Jury Note) 858

Exhibit 9 (Jury Note) 859

Exhibit 10 (Order Substitution Counsel) 860

Exhibit 11 (SCCID Records) 861

Exhibit 12 (Indictment).....867

Exhibit 13 (Indictment).....869

Exhibit 14 (Emails).....873

Order of Dismissal 875

Rule 59(e), SCRCP Motion 908

Return to Rule 59(e), SCRCP Motion 982

Volume III

Return to Rule 59(e), SCRCP Motion (cont.).....1001

Reply to State's Return to Rule 59(e), SCRCP Motion.....1002

Order Denying Rule 59(e), SCRCP Motion 1007

P

probation... [1] 467/4
probative [1] 340/4
problem [14] 9/14 187/19 190/3 191/20 236/21 262/3 268/10 347/23 380/15 388/19 431/22 437/7 444/10 467/2
problems [1] 445/25
procedure [1] 124/16
proceed [5] 46/13 59/8 63/13 423/17 424/10
proceeded [1] 382/8
proceedings [2] 469/23 471/12
process [7] 78/3 84/10 103/8 103/9 103/19 104/23 441/1
produce [1] 345/2
produced [4] 107/15 350/9 382/16 441/8
product [2] 52/16 402/23
productive [1] 465/1
proffer [6] 68/23 69/14 69/19 286/7 287/10 290/24
proffering [1] 292/1
program [1] 93/22
progress [3] 394/2 426/7 429/22
Project [1] 33/7
promise [2] 397/8 456/21
promises [4] 109/11 120/21 322/13 406/19
promotion [2] 32/1 464/2
pronounced [4] 287/22 287/23 300/24 325/16
proof [21] 345/4 360/21 360/22 361/2 361/4 361/5 391/14 392/3 392/5 394/20 401/10 401/13 401/13 401/17 403/23 411/19 411/21 421/6 421/7 421/8 421/12
proper [3] 102/4 278/5 398/10
properly [2] 15/23 125/19
property [15] 17/11 54/2 132/25 382/23 404/12 404/14 404/18 404/20 404/22 404/22 404/24 404/25 405/2 405/3 405/5
proposed [2] 352/1 352/3
Prosecutor [2] 371/19 380/19
prosecutors [2] 138/3 370/23
protections [2] 339/12 340/12
Protective [1] 39/6
prove [27] 136/25 137/3 137/12 137/21 294/15 360/18 360/19 360/23 371/12 392/2 399/23 399/25 401/7 404/9 404/10 404/19 405/6 406/5 407/3 408/17 409/21 410/7 411/21 411/22 421/3 428/14 429/18
proved [5] 361/10 394/19 410/3 412/16 412/17
proven [2] 400/7 409/25
proves [2] 373/19 373/19
provide [4] 9/6 158/6 407/10 442/13
provided [7] 8/12 65/20 79/24 83/6 333/9 355/21 359/22
Providence [1] 55/25
provides [1] 32/6
province [1] 380/2
proving [6] 125/7 398/6 401/4 402/3 404/1 420/25
proximity [5] 418/6 418/9 418/18 419/20 420/1
psychiatrist [1] 33/23
Public [1] 32/22
publish [9] 147/24 150/8 153/13 155/12 156/23 203/12 250/8 267/21 452/19
published [7] 148/2 150/11 153/17 155/14 157/3 176/8 267/24
pull [18] 71/21 85/5 154/4 168/21 168/24 215/18 216/20 227/21 233/7 245/9 268/7 338/2 366/24 376/1 376/5 382/21 424/15 442/25
pulled [42] 71/8 72/22 72/23 75/5 80/18 80/20 84/7 86/3 107/9 115/25 115/25 116/1 132/1 134/24 135/3 135/7 148/6 154/7 163/4 163/6 165/9 215/13 216/22 220/13 221/18 223/15 224/2 227/8 227/21 228/5 230/10 231/23 231/25 232/7 234/8 234/18 234/19 256/15 263/10 382/20 389/3 442/16
pulling [4] 78/10 86/4 255/15 255/16
pulls [2] 375/21 375/22
punishable [1] 340/3
punishment [1] 464/23
purpose [9] 102/17 125/12 294/12 360/4 407/1 407/12 407/21 410/1 427/18
purposes [11] 63/5 68/9 117/1 121/3 188/17 256/25 317/8 342/1 350/10 412/12 465/25
pursuant [2] 409/14 429/11
pursuit [3] 196/15 248/7 248/8
put [56] 9/5 67/14 68/20 89/18 93/1 94/2 106/22 110/17 116/3 116/4 118/15 118/18 134/17 141/19 141/25 151/20 151/21 152/6 154/19 161/12 174/12 175/12 176/16 177/12 177/17 178/19 178/23 187/9 210/4 241/18 252/22 277/13 281/22 317/12 317/23 323/8 330/18 331/1 332/4 332/8 333/4 345/9 369/4 369/11 385/10 389/3 389/8 414/7 419/17 420/11 426/13 435/9 442/10 444/13 444/15 462/7
puts [1] 399/22
putting [5] 142/8 224/24 353/12 361/10 405/4

Q

Quadrey [2] 12/1 41/6
question [58] 7/4 7/5 7/6 7/7 7/9 7/10 7/11 7/13 7/14 19/18 19/23 107/12 129/2 139/16 163/12 190/11 190/16 190/19 191/8 191/18 197/14 230/15 274/19 283/12 283/14 320/21 333/23 335/5 335/21 336/4 337/9 337/16 353/14 353/15 383/11 383/13 384/14 406/2 411/8 412/4 412/9 418/10 419/22 419/24 420/3 420/18 423/9 423/18 427/10 429/21 431/2 432/17 440/16 441/23 447/2 448/16 449/10 452/10
questioned [1] 109/15
questioning [7] 108/14 108/17 143/4 321/20 321/22 397/13 397/20
questions [93] 16/6 19/11 19/12 46/4 77/25 82/23 89/25 90/15 96/16 96/18 100/23 101/2 108/7 108/13 108/19 109/2 109/9 114/8 115/21 117/7 117/17 119/18 160/16 160/17 164/22 165/15 165/16 169/10 169/10 171/5 178/12 183/14 183/19 198/4 199/17 200/12 200/13 203/16 205/1 210/19 210/21 213/6 213/13 229/23 240/22 240/24 242/7 242/8 252/7 258/7 258/13 263/20 263/22 267/20 268/1 268/25 273/2 273/4 280/1 285/2 285/16 290/21 291/20 302/21 303/24 313/4 313/5 315/6 316/7 321/13 321/19 321/24 322/11 322/24 326/25 327/3 328/2 330/4 338/5 341/1 369/9 369/10 369/16 370/1 380/20 418/15 419/11 420/4 430/22 436/24 437/10 440/24 454/9
quick [6] 121/9 121/17 187/15 194/14 246/10 251/7
quickly [6] 62/24 179/11 226/22 284/6 342/7 357/14
quiet [1] 154/14
quit [1] 116/8
quite [6] 144/15 239/15 357/6 420/10 445/4 456/15
quote [8] 111/14 114/16 326/20 327/1 327/16 334/16 334/21 336/2

R

Rabon [2] 76/12 194/6
radio [34] 93/12 93/18 93/19 93/21 94/1 106/17 116/4 127/18 194/23 196/16 197/25 199/22 249/7 249/18 249/18 249/20 251/17 251/18 252/16 253/1 253/10 257/22 272/2 320/12 356/16 359/13 361/8 371/4 371/5 374/19 390/15 390/15 390/20 390/22
railroad [11] 74/13 75/18 87/19 95/5 196/19 209/1 209/14 220/22 237/19 248/5 254/25
raise [24] 70/4 90/24 97/2 105/9 123/12 140/23 166/4 171/16 180/13 192/18 201/5 205/19 211/10 214/1 242/24 259/17 264/5 269/15 273/12 286/24 300/1 304/12 319/5 338/23
raised [1] 168/16
raises [1] 350/1
Ralph [1] 12/11
ran [16] 72/21 73/22 73/22 75/18 84/17 133/12 196/13 209/2 209/6 216/25 231/9 233/19 233/19 234/21 254/3 357/9
range [1] 151/14
ranking [1] 281/5
rape [1] 42/7
raped [2] 40/14 43/10
rate [5] 198/3 324/6 363/21 363/25 368/5
rates [1] 367/22
rather [5] 280/15 426/22 444/8 444/17 469/10
Rawls [1] 14/3
razor [2] 17/13 405/22
re [4] 426/6 426/14 440/13 440/16
re-evaluate [1] 440/13
re-examine [1] 440/16
re-explain [1] 426/6
re-read [1] 426/14
reach [4] 400/11 404/15 439/21 444/6
reached [7] 339/9 413/13 413/15 415/6 434/9 439/20 451/24
reaches [1] 413/9
reacted [1] 77/23
reacts [1] 69/12
read [48] 16/18 17/3 17/24 18/25 31/5 31/8 33/17 75/11 78/19 107/13 107/18 108/24 109/4 109/7 110/6 110/17 120/9 120/16 127/15 127/19 137/14 137/16 276/10 276/11 283/8 298/20 320/22 320/24 321/3 322/9 353/1 359/17 419/1 419/2 420/20 421/21 421/22 421/23 426/14 426/16 426/17 427/7 427/9 431/8 431/12 431/22 439/9 439/10
reading [1] 238/18
reads [5] 17/23 321/12 350/5 413/18 445/1
ready [18] 69/18 121/7 121/11 192/1 192/2 192/3 318/9 318/13 354/4 354/6 354/7 354/8 366/24 422/14 424/23 433/15 448/5 457/9
real [14] 52/17 187/15 279/15 306/20 357/14 357/24 358/2 358/3 359/22 379/3 401/22 406/1 421/17 460/13
realize [1] 77/23
realized [1] 226/19
realizing [1] 99/15
really [30] 72/1 80/12 100/12 110/20 143/13 145/21 152/21 155/22 176/11 190/3 224/9 225/9 225/17 230/18 232/22 263/1 275/4 279/15 326/17 328/22 334/8 337/10 360/14 362/5 375/5 380/22 389/13 389/15 426/8 429/22
rear [3] 96/13 96/14 251/21
rearview [4] 75/5 99/14 220/15 263/3
reason [31] 9/18 45/21 69/10 81/21 93/20 103/19 115/7 129/8 186/17 255/8 257/18

R

reason... [20] 280/18 293/24 327/25 334/2 345/10 350/2 357/11 361/23 361/23 362/2 362/3 362/9 373/17 379/17 385/3 407/13 436/2 441/4 459/11 469/5
reasonable [68] 7/12 121/5 125/8 137/4 137/21 137/22 138/1 334/10 360/19 360/21 361/2 361/4 371/17 371/21 371/21 371/25 372/8 385/20 391/25 392/5 395/10 398/7 400/8 400/13 400/19 400/25 401/1 401/2 401/3 401/5 401/12 401/13 402/4 402/5 404/1 404/5 404/11 404/19 405/7 406/6 407/5 408/17 409/22 410/4 411/23 412/8 412/13 412/17 418/11 418/24 420/19 420/21 420/21 420/22 420/23 420/25 421/7 421/8 428/14 429/19 439/21 441/11 442/14 442/16 443/4 447/2 447/6 447/12
reasonableness [1] 440/14
reasonably [4] 133/2 405/12 409/20 429/17
reasons [1] 104/21
reassure [1] 100/16
recall [14] 70/20 97/25 98/2 98/7 98/12 118/21 154/19 167/22 177/13 178/7 207/4 266/10 305/18 311/20
Receipt [1] 6/16
receive [1] 461/21
received [21] 61/11 127/24 184/20 188/7 197/25 200/25 203/4 203/9 212/8 267/3 267/5 279/3 415/9 424/8 439/8 443/18 444/24 448/1 459/25 461/22 464/2
receivers [1] 159/22
recently [4] 15/13 185/25 289/25 464/2
Recharge [1] 426/20
recharged [1] 432/6
recklessly [1] 381/12
recklessness [2] 410/2 411/1
recognize [17] 149/14 158/24 159/4 159/7 181/25 182/4 196/6 202/14 204/1 204/3 249/14 249/22 249/24 277/21 308/18 310/5 456/14
recognized [3] 89/5 89/14 236/14
recollection [1] 402/23
reconcile [2] 375/19 379/15
record [57] 1/6 8/19 15/19 15/20 15/23 65/17 66/5 67/14 70/12 91/7 105/18 112/4 118/13 124/2 124/7 130/10 141/9 166/12 171/25 180/22 187/9 201/13 206/2 211/18 214/9 243/7 259/25 264/13 264/18 269/23 273/20 277/6 287/7 287/12 287/14 304/20 312/25 319/13 340/7 341/14 342/3 344/11 393/2 393/7 435/8 435/9 442/11 444/13 444/15 444/17 459/22 461/15 461/18 463/25 466/11 466/17 471/11
recorded [2] 117/21 202/7
recording [2] 202/8 204/6
recordings [1] 204/3
records [4] 25/1 25/5 281/9 382/11
recover [1] 155/2
recovered [2] 159/20 266/7
Recross [2] 4/14 316/11
RECROSS-EXAMINATION [1] 316/11
recruitment [1] 57/11
Red [1] 465/6
Redirect [16] 2/5 2/16 2/23 3/15 3/19 4/4 4/13 4/18 90/3 164/23 179/9 240/25 258/9 285/5 315/8 337/25
redoes [1] 280/11
reduce [1] 463/6
reduced [1] 468/5
Reese [4] 13/8 55/23 55/24 56/1
Reeves [2] 12/1 41/6
refer [1] 434/3
reference [2] 91/25 106/16
referring [1] 72/2
reflect [4] 124/2 124/7 277/7 312/25
refresh [4] 72/10 92/8 244/14 258/19
refreshments [1] 444/2
regard [1] 346/23
regarding [19] 46/3 61/8 61/23 62/25 65/22 68/10 104/15 125/15 126/24 131/4 191/8 191/15 295/4 299/5 341/2 430/21 434/1 454/9 458/5
regardless [1] 387/9
regards [1] 347/5
Region [10] 193/19 198/14 198/14 278/16 278/19 356/16 359/13 366/13 366/18 366/18
Registered [1] 59/23
regive [1] 418/23
regular [1] 464/9
reiterate [1] 90/2
reject [3] 395/22 395/25 396/19
related [10] 20/20 20/23 20/24 25/8 27/18 29/23 30/4 68/11 300/23 305/16
relationship [9] 21/3 21/3 21/23 25/11 27/23 113/7 115/10 287/18 292/3
relative [1] 471/13
relatively [2] 103/1 381/4
release [5] 60/9 184/5 184/10 184/23 465/1
released [3] 256/22 456/19 462/10
relevance [3] 293/12 294/16 458/2
relevant [4] 68/19 332/4 339/25 385/11
reliability [3] 9/6 103/21 403/9
reliable [2] 104/23 403/20
rely [1] 392/5
relying [1] 110/8
remain [8] 9/2 46/23 108/9 321/15 387/12 397/23 411/12 457/6
remainder [1] 292/17
remained [1] 87/7
remaining [3] 60/9 60/23 395/23
remains [2] 400/16 411/22
remarks [1] 124/12
remember [29] 86/13 86/15 86/17 98/2 102/14 162/25 174/13 182/2 182/21 184/13 194/16 225/15 226/4 244/9 258/22 260/16 260/16 261/9 261/20 267/12 278/9 294/23 305/7 305/21 312/15 363/22 365/15 419/21 448/19
remembering [1] 385/9
remind [3] 298/18 392/19 398/17
remote [1] 374/15
removal [1] 404/23
remove [2] 406/23 407/2
removed [1] 95/14
render [3] 126/13 130/22 138/17
rendition [2] 325/5 325/10
renew [6] 301/15 457/24 458/1 458/4 458/7 459/5
renewal [2] 65/14 65/17
renewing [1] 65/13
rent [1] 25/23
repeat [3] 22/10 335/21 411/14
repeated [1] 225/6
repeating [1] 225/8
repetitive [1] 100/13
rephrase [1] 86/14
report [34] 65/22 92/6 92/8 93/1 110/1 110/11 110/14 111/9 115/20 117/14 186/8 244/13 245/2 256/24 283/7 329/13 329/16 330/15 330/25 331/23 332/22 333/4 333/7 333/8 333/10 336/6 336/11 336/14 343/9 345/11 385/7 385/11 391/17 430/8
reported [2] 10/1 186/2
reporter [17] 1/25 15/17 124/1 197/2 245/20 245/24 420/7 422/21 425/7 435/10 437/15 437/19 443/9 443/13 471/4 471/8 471/24
reporting [1] 362/12
reports [3] 66/1 66/10 127/16
Repositions [1] 195/13
represent [3] 35/24 398/1 463/15
representation [3] 17/15 149/23 405/10
representations [1] 406/19
representative [5] 54/2 67/8 145/3 167/11 167/13
represented [2] 28/4 463/21
request [5] 204/12 246/25 424/17 458/8 464/15
requested [9] 204/6 204/7 204/8 246/23 282/14 422/24 425/10 437/16 443/10
require [2] 401/17 421/12
required [10] 128/15 137/3 137/20 330/25 339/17 395/5 399/25 409/24 409/25 411/20
requires [3] 350/20 350/20 413/5
requiring [1] 410/14
research [4] 127/16 430/13 430/21 448/20
reserve [1] 66/4
resided [1] 301/10
resignation [1] 141/19
resigned [1] 166/22
respect [1] 440/12
respectful [1] 463/14
respectfully [1] 464/15
respond [9] 8/25 97/19 194/1 194/11 260/11 274/10 274/12 320/12 468/22
responded [6] 78/2 195/15 196/10 196/12 198/17 336/25
responding [1] 265/4
response [22] 21/1 21/25 27/21 29/21 31/4 31/10 31/13 31/18 31/23 33/9 33/15 33/19 45/19 46/1 46/6 97/22 114/2 124/6 204/12 300/15 326/23 352/1
responses [1] 139/7
responsibility [5] 128/2 129/23 373/21 392/18 392/21
responsible [8] 10/10 10/14 62/15 187/5 187/10 360/1 407/18 427/15
rest [4] 62/11 341/23 342/3 344/11
Restaurant [1] 53/3
rested [4] 338/11 338/19 344/19 346/9
restful [5] 192/10 346/1 430/20 433/21 448/18
restrict [1] 406/16
restroom [1] 121/9
rests [1] 344/23
result [7] 295/11 408/13 409/16 428/11 429/13 440/6 463/5
results [1] 15/14
resumed [3] 437/20 443/14 449/6
retire [2] 124/15 448/5
retired [6] 49/10 49/11 51/20 53/14 58/23 193/14
retires [10] 185/15 259/1 286/1 338/16 415/21 422/6 423/4 425/17 434/17 441/13
retrieved [2] 271/9 277/15
return [7] 9/18 10/15 63/14 184/12 272/21 434/8 441/9
returned [2] 190/25 451/14
returns [5] 191/14 198/6 234/4 248/21 446/24
reveal [1] 67/10
reviewing [1] 120/14
revisit [2] 187/7 188/15
revoked [1] 460/6
reward [1] 397/9
RF [2] 271/19 272/1

R

RICHARD [4] 1/17 8/16 27/5 59/13
Richburg's [1] 204/4
RICHLAND [62] 1/2 15/8 17/4 17/24 18/8 18/17 19/1 23/4 23/5 23/7 23/11 23/12 23/14 23/18 23/19 23/21 23/25 24/3 24/6 24/8 24/12 24/14 24/17 24/21 24/24 27/11 27/17 34/25 35/2 35/19 37/1 37/20 38/14 49/10 60/20 91/14 91/20 105/25 193/2 194/5 199/4 201/22 209/22 243/15 243/19 260/2 264/21 270/5 271/6 277/17 278/9 278/10 278/12 278/15 278/17 319/21 320/4 321/10 413/19 452/24 471/5 471/14
Ricky [9] 22/23 286/15 287/8 287/15 299/22 300/7 300/10 300/11 300/19
rid [3] 67/21 314/17 314/19
ride [8] 114/16 133/17 309/25 327/16 328/6 362/21 378/19 378/21
ride-by [1] 328/6
ridiculous [1] 423/23
riding [2] 327/2 336/9
rifle [1] 405/20
right-hand [2] 88/9 215/9
righteousness [1] 400/15
rightly [1] 330/20
rights [52] 6/17 32/2 33/6 65/24 66/12 66/14 107/13 107/15 107/19 107/21 108/8 109/5 109/7 109/8 110/6 110/15 110/18 110/18 116/19 116/19 118/2 120/2 120/3 120/8 120/17 120/17 131/6 276/10 276/11 283/8 320/22 320/24 320/25 321/2 321/12 321/14 322/6 322/9 322/10 322/20 329/5 329/7 329/17 339/4 341/16 368/17 383/10 397/22 418/2 418/25 419/2 419/14
Riley [3] 13/20 53/13 53/14
Rita [3] 12/17 59/22 59/23
RN [1] 58/23
road [86] 71/6 76/11 76/12 80/11 80/19 81/25 87/3 87/25 88/1 90/12 91/24 92/4 92/19 93/6 93/7 93/13 95/7 106/9 111/7 112/17 113/3 114/20 131/22 135/9 193/21 193/21 193/24 194/5 194/8 198/3 198/13 199/4 208/17 212/1 212/22 212/24 215/9 215/11 222/16 224/4 227/15 227/22 228/4 228/5 234/7 234/23 244/5 245/9 245/18 246/1 246/6 246/10 246/14 246/15 246/16 246/22 247/15 247/15 247/19 247/21 247/24 248/4 261/6 261/9 262/22 262/23 263/11 264/24 271/6 272/19 272/20 278/11 278/16 320/4 320/17 324/20 327/19 333/2 333/25 375/22 375/22 376/13 376/19 390/9 390/24 464/10
Road-ish [1] 91/24
roads [1] 380/25
rob [13] 115/1 131/25 132/13 314/1 316/1 327/22 327/23 336/18 371/6 373/8 373/11 386/3 387/4
robbed [18] 40/7 41/7 43/16 44/20 77/3 114/24 158/8 175/13 270/18 326/22 350/23 351/3 353/9 353/10 353/11 359/4 388/2 460/15
robber [8] 200/2 346/18 348/11 348/23 363/5 363/15 365/12 377/20
robberies [4] 461/17 465/13 465/17 468/5
robbery [127] 17/2 17/5 17/17 39/15 70/21 70/22 92/1 92/21 93/23 97/19 106/8 106/16 107/13 111/2 112/4 113/22 113/25 119/5 121/16 124/23 132/15 132/17 132/24 133/11 133/11 134/25 136/5 136/8 139/15 139/16 139/18 142/16 142/16 150/22 151/2 151/5 158/9 161/6 162/13 181/20 182/8 182/25 183/2 186/14 194/4 199/21 220/2 240/19 244/5 248/16 252/19 255/17 255/24 257/20 260/11 264/22 270/7 270/16 274/4 274/7 274/9 282/7 295/15 311/4 314/17 314/25 320/3 320/12 327/7 328/1 331/16 334/19 346/13 346/15 347/5 347/10 348/7 348/24 349/6 349/12 349/21 350/4 351/6 356/3 356/4 356/6 356/8 356/10 357/13 357/14 357/19 358/5 358/9 361/19 362/4 362/7 364/15 370/12 371/2 371/9 373/15 373/18 373/20 374/6 374/21 380/11 386/5 389/6 398/16 399/4 404/9 405/8 405/12 414/3 452/25 458/11 458/18 458/21 459/23 459/24 460/9 460/10 461/21 462/2 465/4 467/14 468/6
robbing [2] 314/11 327/24
robe [1] 400/14
Robinson's [1] 276/7
robs [1] 364/17
rode [1] 384/22
rolling [1] 94/14
Roof [1] 465/7
room [45] 53/15 61/6 61/6 107/2 112/20 112/21 115/8 123/4 127/8 130/25 137/7 138/14 184/12 191/13 191/14 231/10 259/2 286/2 324/22 338/17 345/12 367/22 411/18 415/8 415/15 415/22 424/14 425/13 430/9 430/14 435/1 437/15 437/17 437/19 442/6 442/17 442/25 443/9 443/11 443/13 445/18 445/23 448/10 451/14 457/14
roommate [2] 25/18 25/20
routine [1] 172/20
Rowan [1] 11/14
RPR [3] 1/24 471/22 471/24
RSD [1] 47/24
rule [9] 65/14 65/17 129/23 292/21 296/4 296/4 392/23 400/2 436/8
rules [2] 9/9 339/23
ruling [2] 129/12 394/3
run [21] 74/14 77/5 94/16 94/24 208/15 214/18 214/24 231/14 231/15 231/16 232/10 232/12 237/25 246/24 247/1 315/16 362/14 363/5 387/5 391/4 442/12
running [29] 71/10 71/16 72/3 74/5 115/14 133/15 142/9 155/21 188/14 194/22 196/14 208/12 208/13 209/10 209/18 212/11 215/21 219/13 220/21 231/3 231/9 237/10 239/21 271/10 288/10 301/10 362/19 375/15 378/15
runs [6] 133/22 134/3 247/2 356/20 363/2 379/2

S

s/Deborah [1] 471/22
safe [3] 95/10 152/3 370/10
safety [2] 32/22 256/2
said [204] 15/20 25/15 29/3 45/3 62/21 63/3 74/16 76/17 79/8 79/10 80/2 80/16 81/2 85/18 87/2 87/12 87/23 99/3 99/5 99/22 99/23 99/24 99/25 100/9 100/18 108/25 109/2 111/13 111/14 112/9 112/12 112/16 112/19 113/1 113/6 113/18 113/20 113/20 113/22 113/24 114/11 114/18 116/8 119/13 120/11 131/8 131/9 137/8 137/20 138/7 139/5 139/19 140/3 145/12 146/1 146/8 151/17 152/9 161/6 163/8 163/12 173/12 174/13 174/14 175/11 178/22 179/20 186/2 194/17 194/19 195/1 195/1 195/15 199/14 212/10 223/25 228/14 235/1 236/3 237/5 238/1 240/3 248/23 249/18 251/5 262/3 263/16 278/1 278/9 279/6 294/9 297/6 297/20 312/11 313/12 314/10 324/11 324/15 324/21 325/1 325/9 326/7 326/9 326/14 326/17 326/20 327/17 327/21 328/17 328/19 331/7 333/4 334/9 334/23 335/14 335/14 335/20 335/22 335/24 336/2 336/4 336/10 337/2 337/17 347/1 348/8 350/7 356/1 356/19 360/11 361/14 361/16 362/4 362/18 364/2 365/17 366/5 367/18 368/1 368/2 368/18 368/25 369/2 369/2 369/12 369/13 369/18 369/22 371/12 371/20 372/19 373/2 373/3 373/4 373/6 373/7 373/9 373/9 373/10 373/17 375/20 376/16 376/17 376/21 376/24 378/17 381/3 382/15 383/5 383/6 383/9 383/15 383/19 384/25 385/7 385/18 387/15 387/22 388/1 388/3 388/6 388/9 388/20 390/20 391/6 392/12 394/2 408/4 416/20 417/7 418/15 418/17 418/18 428/1 435/7 436/4 438/4 447/5 449/10 449/21 464/16 465/16 466/8 469/9
Sales [1] 54/1
same [81] 71/9 72/21 76/18 76/19 76/19 76/25 78/6 78/7 79/22 79/24 82/11 82/14 82/14 82/15 89/11 89/16 90/11 100/13 107/23 116/19 126/1 135/9 137/1 154/23 174/19 217/22 219/7 219/10 219/13 221/9 227/1 228/8 229/7 229/9 229/9 229/11 229/13 229/15 229/16 229/16 229/17 251/22 251/24 252/1 266/1 266/3 266/4 271/23 272/1 277/23 277/23 278/17 333/19 333/24 339/23 364/5 364/5 364/5 383/6 383/7 386/11 386/19 395/23 402/12 403/17 410/17 419/24 438/1 438/2 440/23 440/24 440/24 440/25 441/2 441/3 443/21 445/2 464/5 465/19 465/20 465/20
sanction [1] 407/9
sand [1] 237/21
sandy [3] 220/21 237/15 238/10
sat [8] 132/10 147/2 279/8 311/20 326/19 355/23 371/4 391/22
satisfied [3] 400/23 402/5 402/21
satisfying [3] 400/7 400/12 400/18
saw [103] 71/15 71/16 71/17 71/24 73/10 73/18 73/25 76/17 77/2 77/5 77/17 82/11 83/9 84/5 84/12 84/21 85/25 88/16 89/5 90/12 100/2 100/6 101/11 101/14 104/12 111/6 111/13 111/15 111/16 115/10 115/16 115/19 115/22 135/9 146/12 163/12 163/19 182/18 194/15 194/17 196/14 210/6 212/17 213/11 216/1 216/18 216/25 217/12 217/22 218/1 218/3 218/5 218/25 219/10 219/25 220/7 220/20 220/20 221/8 221/14 222/23 223/12 227/12 227/23 227/24 227/24 228/7 229/6 229/7 229/17 230/9 230/24 232/8 233/13 234/5 234/8 234/16 237/9 238/3 238/5 238/25 239/8 240/1 241/2 241/4 242/3 242/3 250/18 277/13 323/22 349/15 359/2 362/14 363/5 363/15 365/12 372/18 375/16 377/15 378/24 379/4 385/15 385/17
say [114] 9/9 26/3 28/22 28/23 30/3 34/15 35/11 46/19 46/21 46/22 46/24 65/17 69/3 69/10 75/1 81/10 82/9 95/10 107/3 108/10 108/15 110/25 111/12 112/7 117/16 124/10 127/12 129/1 129/19 133/16 137/11 143/15 147/8 148/16 162/16 168/14 169/2 171/3 181/22 184/8 188/2 188/4 188/16 189/17 195/22 197/20 197/21 199/3 208/2 208/11 221/14 228/25 241/7 254/7 255/9 256/2 257/10 257/17 272/7 279/12 289/5 292/18 293/23 295/12 297/15 298/6 298/15 309/6 311/8 321/16 325/11 327/9 331/24 336/19 339/5 343/1 357/17 361/15 365/4 368/24 369/20 369/21 372/4 379/18 381/11 381/18 383/25 384/1 384/2 386/2 386/4 387/24 387/24 389/16 394/4 412/17 412/18 422/1

S

say... [16] 423/21 436/1 436/25 441/16 441/16 444/16 444/17 450/7 459/19 464/9 465/16 466/3 466/3 466/11 466/17 467/10
saying [31] 15/19 71/25 78/25 140/10 146/4 146/17 168/6 168/15 170/19 187/2 189/17 189/22 226/15 238/19 253/5 253/11 293/20 293/20 293/22 294/5 294/25 299/3 299/4 377/3 377/3 389/15 436/17 450/19 463/19 467/8 467/8
scan [2] 194/15 207/20
scanner [14] 6/19 132/10 135/3 135/3 251/17 251/18 257/23 258/11 277/15 277/16 277/22 278/6 366/11 366/12
scanners [1] 366/13
scared [1] 223/8
SCDC [3] 462/7 462/11 464/16
scene [35] 92/3 97/23 102/4 102/12 103/15 103/24 134/15 152/23 158/2 194/24 260/23 266/11 270/15 271/5 271/9 274/10 274/12 274/25 275/1 285/9 324/6 346/12 346/12 346/13 348/13 362/12 362/14 365/9 369/5 375/1 382/4 408/13 409/8 428/10 429/6
scheduling [2] 317/8 341/25
scheme [2] 408/15 428/12
schizophrenia [1] 302/9
schizophrenic [2] 288/25 298/5
school [4] 15/13 36/18 44/20 53/15
Schoon [3] 12/21 58/20 58/21
Schroder [1] 38/12
science [1] 410/8
scribble [2] 452/11 452/17
scrutinize [1] 403/5
scuffle [1] 209/21
search [1] 265/8
seat [61] 27/25 46/20 46/22 47/2 47/3 47/18 48/4 48/17 49/3 49/17 50/4 50/13 51/1 51/13 51/23 52/10 52/23 53/9 53/21 54/7 54/19 55/6 55/17 56/6 56/16 57/2 57/16 58/3 58/16 59/4 59/18 60/4 62/5 70/11 91/6 97/9 104/1 105/16 135/4 141/5 166/11 171/23 180/20 192/25 201/12 206/1 211/17 214/8 234/2 234/3 243/6 251/16 259/24 264/12 269/22 273/19 275/3 287/6 299/14 304/19 319/12
seated [20] 20/18 21/19 28/1 47/21 48/7 48/20 50/7 51/16 54/10 54/22 56/9 57/5 58/6 58/19 59/7 59/21 60/7 122/17 123/24 423/14
seats [2] 62/6 62/9
second [29] 35/22 66/20 68/11 110/16 177/3 179/15 180/6 183/16 197/10 197/16 197/24 222/10 222/18 224/16 242/1 250/25 261/11 261/12 274/17 295/24 358/18 376/1 414/11 420/16 422/11 426/2 427/9 431/10 436/22
seconds [2] 241/25 358/23
secret [1] 151/15
secretly [1] 406/25
Section [5] 17/19 18/3 18/12 18/21 19/4
Section 16-11-330 [1] 17/19
Section 16-3-910 [3] 18/3 18/12 18/21
secure [2] 185/12 278/8
security [2] 154/5 468/24
seeing [3] 86/7 104/19 379/13
seeking [1] 368/5
seeks [8] 147/18 150/1 153/6 155/6 156/18 159/24 176/1 266/18
seem [1] 293/3
seemed [6] 83/13 142/19 217/9 225/9 232/4 279/11
seems [2] 279/13 378/14
seen [32] 9/12 33/17 79/16 79/19 80/23 80/24 98/4 99/2 112/2 130/6 139/12 174/18 182/23 227/5 228/6 241/16 260/20 261/16 263/14 271/10 324/5 324/7 333/20 334/5 335/9 336/21 346/12 375/3 378/7 380/11 382/3 382/5
sees [19] 133/15 134/1 134/2 362/24 364/4 364/13 364/19 364/21 375/14 375/14 375/21 376/14 376/20 377/13 377/20 377/21 378/5 378/14 378/15
seize [6] 18/1 18/10 18/19 19/2 358/11 406/14
seized [1] 406/7
select [1] 16/5
selected [4] 60/17 60/25 416/18 441/2
selecting [1] 46/14
selection [5] 61/8 188/25 189/4 272/4 272/4
self [2] 10/1 120/4
self-reported [1] 10/1
self-serving [1] 120/4
send [25] 60/17 69/18 135/18 285/22 306/22 338/13 344/11 347/25 352/3 386/22 388/23 415/7 415/14 416/6 424/13 424/19 425/13 435/25 436/6 437/5 437/9 446/11 446/18 451/4 451/9
sending [2] 468/15 468/19
sense [12] 125/3 216/7 239/20 337/11 362/18 366/22 366/24 389/18 389/20 390/12 391/1 412/11
sent [18] 132/10 132/21 348/9 348/11 356/14 356/23 356/24 361/6 371/5 434/14 434/25 436/2 437/24 441/24 442/5 442/17 460/15 465/9
sentence [11] 297/5 297/20 298/2 460/1 460/17 461/22 461/24 464/16 464/20 464/25 469/5
sentences [2] 333/10 383/20
sentencing [3] 5/8 457/6 468/1
separate [5] 43/2 383/3 399/13 399/19 459/23
separately [3] 82/7 349/20 399/15
September [4] 1/9 8/1 188/21 471/15
sequester [3] 66/21 66/25 67/2
sergeant [11] 23/17 23/24 96/23 97/11 97/17 259/13 260/1 260/7 270/10 271/8 276/7
series [2] 19/10 278/15
seriously [1] 457/2
seriousness [1] 400/4
serve [9] 36/1 36/4 45/22 62/4 124/10 456/20 456/22 456/24 468/9
served [6] 9/24 186/4 401/6 421/1 463/9 469/8
Server [1] 55/11
service [12] 42/14 61/23 145/3 162/6 167/11 167/13 416/20 416/22 417/5 456/18 463/23 466/25
services [7] 32/11 36/5 39/6 50/10 51/7 56/12 416/24
serving [2] 120/4 467/1
SESSIONS [4] 1/1 15/10 413/20 471/14
set [18] 9/24 76/11 132/11 135/4 149/2 157/5 196/10 196/18 198/11 198/22 265/5 265/5 272/6 278/5 367/9 370/3 435/16 443/22
sets [2] 154/5 233/24
setting [4] 194/23 196/17 265/7 445/3
seven [3] 166/25 193/12 198/16
seventh [3] 460/9 460/10 460/19
several [20] 16/6 30/7 36/1 38/11 38/22 71/6 74/17 85/16 127/2 186/2 186/3 207/17 225/5 227/25 235/16 379/24 379/24 395/20 395/20 399/1
sexual [1] 32/7
Shack [4] 251/17 257/22 371/4 390/15
shaking [1] 223/18
shall [5] 123/17 123/20 339/14 358/11 358/14
shape [1] 277/23
Sharon [3] 14/23 47/8 47/11
Shawn [1] 38/12
she [270] 15/3 15/12 15/18 15/19 15/22 22/14 25/21 25/25 27/16 42/15 45/21 47/2 49/24 50/20 52/5 57/11 65/13 66/7 66/11 98/4 98/4 98/6 98/7 98/8 98/11 98/13 98/13 98/25 99/2 99/3 99/3 99/3 99/4 99/6 99/15 100/8 100/9 100/19 100/20 101/14 101/16 101/17 102/1 102/12 102/13 102/13 103/2 103/14 103/24 103/24 104/1 104/2 104/3 104/3 104/6 104/11 104/12 104/14 104/14 115/13 115/19 115/22 115/25 115/25 116/2 134/2 134/2 134/3 134/5 134/5 134/8 135/7 135/7 135/9 143/5 143/9 145/2 146/22 146/22 151/5 151/6 151/11 151/24 152/2 152/2 152/4 152/4 152/5 152/9 152/12 152/23 154/18 155/16 173/20 174/1 175/7 175/9 175/9 175/14 177/22 179/6 179/11 179/20 179/20 179/20 179/21 189/7 189/10 189/16 189/17 189/22 190/11 190/12 190/13 190/14 190/15 190/15 191/16 191/16 191/17 220/2 220/3 220/5 220/17 223/25 223/25 224/24 225/7 225/8 225/9 225/24 226/3 226/5 245/11 245/23 245/23 260/20 260/22 260/24 261/1 261/8 262/2 262/3 262/3 262/7 262/9 262/10 263/3 263/14 263/15 263/16 275/16 275/17 275/18 275/19 275/19 275/24 275/25 303/1 328/9 342/7 345/21 349/2 349/3 349/8 349/11 349/12 350/23 350/24 350/24 351/1 351/4 351/4 351/5 351/5 353/8 353/8 353/9 353/11 356/5 357/17 357/18 359/5 359/6 359/6 363/20 363/22 364/4 364/6 364/7 364/9 364/19 365/10 365/11 365/17 365/17 368/16 369/22 374/4 374/5 375/10 375/13 375/14 375/14 375/16 375/20 375/20 375/21 375/22 375/22 376/12 376/14 376/16 376/17 376/20 376/24 377/2 377/3 377/4 377/5 377/5 377/7 377/9 377/13 377/13 377/14 377/16 377/19 377/20 377/21 377/22 377/24 377/25 377/25 378/1 378/2 378/2 378/3 378/5 378/6 378/6 380/7 380/8 380/8 380/13 380/17 381/3 381/6 381/12 381/13 382/16 403/18 403/19 417/13 417/18 420/11 422/22 424/20 435/7 436/3 436/4 436/21 436/22 436/23 436/24 436/25 442/24 457/4 457/7 457/8
she'll [1] 420/16
she's [2] 317/22 351/22
SHELLENBERG [17] 1/17 2/25 3/2 3/5 3/17 3/19 3/21 3/25 4/2 4/4 5/2 8/21 27/7 27/10 28/18 29/13 355/11
sheriff [2] 34/20 35/2
Sheriff's [43] 23/4 23/6 23/8 23/11 23/13 23/15 23/18 23/20 23/21 23/25 24/3 24/6 24/9 24/12 24/15 24/18 24/21 24/24 35/2 35/19 36/6 38/13 82/17 91/14 91/20 97/17 105/25 106/23 107/16 108/6 193/3 193/10 193/15 252/23 260/2 264/21 270/5 274/2 319/21 319/24 321/8 321/11 323/7
shift [5] 106/12 193/22 270/12 274/6 320/9
shirt [77] 41/15 43/8 71/10 73/17 77/6 77/6 84/13 84/18 84/25 87/21 88/16 88/18 89/9 89/17 89/19 94/7 94/8 98/9 104/15 113/14 113/19 115/20 115/23 134/19 142/25 143/1 158/20 158/21 159/1 159/1 159/2 159/5 159/5 198/2 199/1 207/23 217/5 217/6 217/7 217/12 217/15 217/18 217/19 219/8 225/18 225/19 229/9 235/8 237/14 244/23 247/7 247/10 247/11 250/18 260/21 325/18 326/15

S

shirt... [20] 326/15 334/16 362/25 363/7 363/8 363/13 364/5 364/16 364/18 367/11 376/21 377/4 378/25 384/12 387/6 390/7 418/8 418/8 419/25 420/1
Shonda [24] 17/7 18/20 20/6 22/16 143/7 144/22 146/20 146/21 148/7 148/19 150/16 151/6 151/23 152/8 168/6 169/4 169/23 171/13 172/1 172/2 350/22 399/10 414/16 453/7
Shonda's [3] 149/16 169/19 170/6
shooting [5] 69/4 288/10 292/13 301/12 359/24
shopping [1] 177/15
short [9] 40/6 99/9 104/18 129/6 277/4 364/4 365/2 402/16 459/19
shortly [3] 134/24 318/7 338/14
shot [20] 69/3 69/5 69/7 288/6 288/12 292/11 293/23 293/23 293/25 294/2 295/10 295/11 298/4 301/7 359/23 360/8 370/8 407/25 427/22 469/2
shotgun [1] 405/20
should [34] 19/14 28/2 45/21 74/7 74/11 102/1 102/5 120/9 121/17 126/8 174/25 189/12 216/10 227/20 247/1 255/9 341/5 352/9 360/21 368/2 395/7 397/11 398/11 398/14 403/5 411/17 412/7 417/1 425/14 439/23 440/7 440/9 440/10 440/12
shoulder [5] 71/21 71/22 215/19 234/9 234/15
shoulders [1] 400/15
shouldn't [3] 140/5 140/6 382/23
show [30] 67/18 95/22 102/22 103/9 103/11 103/16 104/13 147/4 149/13 152/14 154/22 156/6 158/23 159/3 164/25 173/15 175/22 182/3 187/5 202/13 233/12 249/11 265/17 265/25 266/13 277/20 306/16 308/17 310/4 405/1
show-up [3] 102/22 103/9 103/11
show-up/driveby [2] 103/16 104/13
showed [4] 107/21 146/7 256/23 362/12
showing [9] 117/23 146/16 167/22 251/12 265/21 266/1 272/10 272/14 351/11
shown [7] 396/15 408/12 409/18 410/11 410/23 428/9 429/15
shows [2] 154/1 347/20
shut [9] 241/19 241/23 241/25 242/4 256/19 276/8 328/23 368/13 406/17
sic [1] 136/1
side [74] 73/6 73/9 74/8 74/10 76/2 77/12 77/12 79/11 84/14 85/11 87/25 88/1 88/3 88/4 88/5 88/9 90/12 93/14 134/10 148/12 156/5 164/9 164/10 164/12 178/5 183/5 194/19 195/23 210/7 210/8 210/8 210/9 210/10 213/1 219/18 220/9 220/11 220/12 221/12 221/21 222/4 226/1 228/5 231/12 231/25 231/25 232/5 232/19 233/18 233/24 234/1 234/9 234/14 234/18 240/6 245/23 245/23 246/13 251/2 263/11 288/19 289/15 301/22 307/22 365/7 375/21 375/22 376/13 376/19 376/25 414/5 414/5 441/8 452/9
sides [1] 439/9
sight [5] 209/6 236/20 262/21 262/24 262/24
sign [17] 93/16 95/7 109/3 161/11 246/14 278/11 283/10 322/4 322/6 322/7 381/7 412/23 413/2 413/11 415/4 417/7 457/8
signal [1] 381/8
signed [14] 107/25 109/17 109/17 110/7 110/19 117/18 118/3 322/23 322/23 368/18 418/3 419/15 438/5 453/18
significant [1] 44/20
signify [1] 413/12
signing [2] 117/23 117/24
signs [1] 255/13
silent [7] 108/9 154/5 321/15 374/13 387/12 397/23 411/12
silently [1] 381/22
simply [9] 16/20 108/6 112/6 125/1 132/24 133/3 324/9 395/14 398/22
since [17] 28/8 29/2 158/24 202/22 286/12 303/1 329/8 351/25 426/18 447/19 448/8 458/22 460/10 462/10 462/10 463/12 463/21
single [3] 56/22 364/14 383/22
siren [4] 94/21 254/14 254/18 254/24
sirens [4] 134/4 210/3 230/11 375/13
sister [2] 34/8 42/14
sister-in-law [1] 34/8
sit [8] 62/5 62/11 62/11 122/18 170/3 435/17 438/7 457/7
sits [1] 136/18
sitting [20] 77/1 107/5 135/4 146/2 148/4 165/6 169/18 170/4 239/14 249/19 277/1 285/15 311/23 320/18 356/15 359/12 367/1 390/13 440/22 440/22
situation [2] 254/16 410/6
six [8] 141/22 186/14 198/15 459/22 460/7 465/13 468/4 468/5
skin [1] 217/4
slam [1] 357/1
SLED [2] 34/8 35/19
sleep [5] 426/9 426/15 426/23 429/24 443/23
sleeved [3] 143/1 158/21 159/1
slightest [1] 404/23
slingshot [2] 17/12 405/21
slip [4] 96/4 143/11 146/23 146/24
slips [3] 145/17 145/17 385/23
Sloan [2] 247/15 247/19
sloppy [1] 257/10
slow [8] 88/25 89/2 227/16 227/18 262/25 263/9 426/8 429/22
slowly [2] 148/18 227/16
slows [2] 375/14 375/21
small [6] 61/6 206/14 206/15 221/20 231/10 359/17
smaller [1] 233/6
smart [1] 469/9
Snipes [3] 14/7 51/5 51/6
Socha [1] 11/16
social [9] 21/3 21/22 25/11 27/23 56/12 61/21 61/23 126/24 448/21
socially [1] 29/14
society [2] 460/13 465/2
Software [1] 47/13
sole [4] 125/13 393/11 393/21 393/25
solely [3] 128/4 130/1 394/9
solemn [2] 126/14 128/2
solemnly [7] 70/6 269/17 273/14 287/1 300/3 304/14 319/7
SOLICITOR [12] 1/17 1/17 68/2 102/9 128/9 128/9 128/10 128/12 256/23 340/6 377/17 461/14
Solicitor's [9] 27/11 27/12 29/24 29/25 204/8 204/9 204/12 282/14 382/13
somebody [16] 10/18 67/8 69/3 115/19 294/1 336/7 348/1 358/21 358/22 358/23 359/23 362/14 366/23 422/2 445/25 466/15
somebody's [1] 149/18
someone [23] 22/7 22/9 61/18 112/10 133/4 212/10 216/15 226/9 229/4 230/24 237/12 238/16 239/21 289/3 324/23 333/5 378/15 378/18 379/5 384/8 384/9 385/6 385/20
someone's [2] 14/25 420/13
something [65] 10/8 11/1 19/21 63/1 100/18 102/8 104/14 111/8 111/17 119/15 129/1 131/24 134/5 139/5 140/2 143/11 143/21 144/3 144/4 144/6 144/12 144/15 146/7 146/24 148/5 152/24 161/6 161/8 168/21 173/23 174/7 185/4 185/9 186/21 187/2 187/8 187/15 187/17 187/20 187/22 190/14 191/3 210/1 210/2 212/10 216/7 239/22 270/20 286/16 289/3 311/12 323/24 337/7 351/16 357/20 363/14 363/23 366/17 406/22 407/8 407/9 417/16 417/19 422/3 449/18
sometime [2] 118/21 440/21
sometimes [13] 129/4 129/9 281/7 281/15 281/16 322/18 350/7 357/4 360/11 379/10 391/11 408/3 428/1
somewhat [2] 67/18 168/1
somewhere [8] 80/1 270/17 307/8 324/13 375/3 376/13 376/15 464/25
son [13] 68/14 69/11 190/21 191/8 287/20 288/4 291/2 291/14 292/10 292/11 295/1 301/7 301/12
Sonic [2] 316/13 372/19
soon [11] 61/20 154/7 173/4 255/3 298/18 330/25 365/23 374/11 391/18 417/19 448/9
sorry [28] 43/10 70/2 92/18 94/23 148/24 159/9 159/17 177/4 197/2 197/13 206/22 224/1 226/4 241/18 245/20 249/23 251/12 257/22 260/16 267/14 270/13 287/25 294/8 302/25 306/6 435/22 452/15 452/16
sort [2] 153/22 270/24
soundly [1] 445/8
sounds [2] 381/19 391/13
source [2] 374/16 441/3
SOUTH [32] 1/1 1/4 1/9 16/4 17/19 18/3 18/6 18/12 18/15 18/21 18/24 19/5 22/25 32/10 33/11 35/24 48/10 50/9 50/19 57/8 123/19 132/18 214/16 359/15 370/10 399/25 413/18 413/22 452/23 471/4 471/9 471/14
space [4] 85/8 219/6 220/13 233/17
spaces [2] 85/9 233/24
speak [19] 15/22 15/24 19/20 46/3 63/3 79/4 119/6 119/7 173/9 185/23 188/23 189/2 225/22 226/5 275/10 283/13 431/13 458/16 460/20
speakers [2] 435/23 437/7
speaking [11] 75/20 79/22 84/4 110/24 172/20 173/5 221/6 221/8 228/12 346/18 466/24
specific [8] 65/18 66/2 72/24 101/21 226/4 278/13 278/14 296/2
specifically [9] 326/3 358/16 359/2 385/5 386/2 386/4 403/25 457/25 462/21
specifics [1] 467/12
sped [4] 220/17 220/17 221/17 222/21
speed [8] 99/10 112/4 198/3 317/19 324/6 363/21 363/25 381/6
speeding [5] 212/14 212/19 232/2 255/10 381/9
speeds [2] 133/23 377/10
spell [2] 97/10 141/9
spelled [1] 97/12
spent [3] 112/9 332/17 465/11
Spigner [1] 12/9
spoke [10] 76/3 110/12 113/13 116/20 162/3 185/21 223/8 325/24 326/13 334/15
spoken [2] 460/21 464/7
spokesperson [2] 62/12 130/25
sport [1] 214/23
sports [3] 214/18 214/21 219/3
spouse [2] 46/18 55/12
spree [1] 465/17
Spring [1] 36/17
spun [2] 198/2 366/7

S

square [1] 197/6
Sr [1] 58/10
SRO [1] 38/3
stack [1] 8/12
staff [3] 30/8 30/13 142/8
stage [2] 339/10 348/19
stairs [1] 291/5
stalemate [2] 426/7 429/22
stalked [1] 44/19
stand [54] 19/13 20/4 20/14 20/22 20/25 21/5 22/4 22/6 25/12 27/5 27/14 27/20 28/5 30/2 31/3 31/9 31/17 31/22 32/8 33/8 33/18 33/22 39/16 45/18 45/25 46/5 46/16 63/9 70/11 91/7 97/9 105/17 123/12 124/5 128/23 130/8 135/13 141/6 166/12 171/24 174/8 180/21 198/5 198/6 234/4 248/19 248/21 298/23 338/19 361/11 361/17 387/23 393/6 396/5
standard [8] 66/22 67/11 121/1 322/16 360/20 360/25 391/10 391/11
standardized [4] 107/16 108/5 320/23 321/7
standing [30] 28/3 82/5 82/8 84/9 88/20 103/1 146/16 147/6 147/13 148/10 148/14 148/18 149/16 167/23 170/11 182/23 220/24 223/4 224/14 227/25 235/9 235/15 239/1 266/1 288/8 301/9 301/13 313/25 378/23 389/23
stands [6] 20/7 20/10 20/12 20/16 136/17 338/21
Starkes [1] 11/20
start [29] 27/4 39/17 69/24 137/7 141/19 143/3 181/21 184/11 284/1 284/2 289/24 290/8 290/9 303/1 317/2 317/7 342/21 343/3 343/19 345/10 345/23 415/8 419/12 432/12 433/7 447/16 447/19 447/21 448/15
started [27] 74/5 74/8 75/6 77/24 78/23 131/24 175/5 175/8 194/23 196/16 208/9 209/17 224/3 226/6 227/1 236/3 265/5 276/6 290/7 290/8 302/9 303/1 303/12 303/16 324/16 436/14 460/8
starting [4] 112/6 342/22 342/23 364/7
State's [82] 64/7 64/9 64/11 64/13 64/15 64/17 64/19 64/21 64/23 65/1 65/3 65/5 65/7 95/23 101/7 116/25 117/3 119/19 147/4 147/18 147/22 149/13 150/2 150/6 152/15 153/11 154/22 155/7 155/10 156/6 156/15 157/1 158/23 159/3 159/14 159/17 159/25 160/5 160/7 160/9 160/11 164/25 167/22 175/22 176/2 176/5 182/4 192/11 199/11 199/14 200/24 202/14 203/1 203/8 203/14 233/5 249/12 250/2 250/6 251/13 259/11 265/17 266/6 266/8 266/14 266/18 267/1 267/4 272/10 272/14 277/20 278/24 279/2 306/16 308/17 310/4 318/22 321/5 338/8 347/13 401/10 421/6
stated [29] 19/10 46/3 66/11 104/21 110/20 110/21 111/4 114/6 124/3 126/23 131/14 220/2 225/8 227/14 329/4 332/17 332/22 334/14 334/17 334/18 344/25 348/10 357/13 360/5 404/8 411/19 439/12 446/25 467/3
statehouse [1] 39/6
statement [57] 5/2 5/3 5/4 5/5 72/6 72/9 81/3 82/17 109/7 119/20 120/4 120/4 120/7 120/22 121/1 128/10 128/15 131/20 136/15 161/1 161/4 228/16 279/20 280/25 281/2 281/21 312/7 312/14 322/9 329/19 355/7 368/24 370/20 383/8 383/12 386/1 386/8 386/9 387/12 388/22 393/23 396/22 396/25 397/2 397/3 397/4 397/6 397/10 397/23 398/3 398/5 398/7 398/9 398/11 398/12 398/13 398/14
statements [17] 65/24 65/25 66/16 66/17 128/18 131/15 280/11 281/18 281/24 281/25 340/2 379/16 382/9 396/7 396/11 396/12 396/14
states [8] 108/6 292/21 339/13 339/14 347/3 375/10 376/12 432/2
stating [1] 283/10
station [13] 145/16 147/7 149/16 151/24 152/8 163/5 169/19 170/6 170/12 174/11 175/10 176/13 390/22
stations [3] 374/19 374/21 390/21
status [1] 126/24
stay [15] 10/12 11/2 122/10 123/3 143/23 145/10 187/2 187/12 239/23 291/21 301/21 356/11 358/18 415/23 466/1
stayed [8] 99/7 143/12 163/3 163/6 174/10 256/2 324/18 462/15
staying [1] 191/20
steal [1] 67/21
Stec [3] 13/4 56/20 56/21
step [27] 90/17 96/19 101/3 119/22 165/17 171/8 180/3 183/20 195/7 205/4 210/22 219/24 219/24 226/19 233/12 242/9 245/11 258/14 263/23 268/17 273/5 285/17 292/4 304/4 311/12 316/17 338/6
steps [27] 90/19 96/22 101/5 119/23 165/19 171/10 180/5 183/22 195/9 200/18 205/7 210/24 213/21 233/14 242/11 245/14 258/15 264/1 268/20 269/10 273/7 285/18 292/6 299/17 304/7 316/19 338/7
Stewart [1] 271/5
stick [1] 457/5
stickup [1] 174/14
stipulated [1] 356/4
stipulations [1] 393/8
stolen [1] 190/23
stomach [1] 450/10
stood [6] 22/5 22/14 182/19 189/7 234/22 238/23
stop [47] 74/17 80/17 85/21 91/18 93/16 94/16 94/19 94/20 95/4 95/7 95/13 99/19 108/20 108/22 114/20 115/4 116/5 229/6 245/10 246/14 247/1 248/5 248/23 249/17 249/25 254/5 255/13 255/18 255/19 256/21 261/12 263/6 277/19 321/25 322/2 327/19 364/18 377/12 377/15 379/2 381/7 398/2 415/2 415/18 415/18 415/19 430/16
stopped [24] 73/25 73/25 80/17 87/4 113/2 113/11 210/16 218/11 218/12 236/15 254/20 255/1 255/3 260/25 261/13 325/3 328/13 336/25 337/5 357/8 365/24 366/1 377/9 380/5
stopping [3] 255/12 255/13 358/21
stops [3] 381/7 381/7 381/13
store [3] 142/4 167/2 316/1
stories [1] 329/22
story [11] 115/3 116/14 138/4 138/9 284/2 325/15 328/3 329/1 368/9 370/24 370/25
Stowers [1] 11/12
straight [2] 75/4 276/5
stranger [1] 309/12
stray [2] 301/14 468/18
street [25] 74/9 76/11 77/12 79/11 80/11 86/4 88/9 114/22 127/6 137/2 182/18 221/21 222/4 225/25 226/1 232/1 232/5 245/18 246/11 246/13 250/13 275/1 372/16 372/18 465/6
streets [2] 93/14 93/15
strength [1] 402/24
stricken [1] 393/2
strict [1] 130/17
strike [3] 55/21 59/8 314/8
strikes [2] 10/19 59/9
striped [1] 41/15
stripped [1] 400/17
strong [7] 186/14 459/23 460/11 461/21 462/1 465/5 468/5
struck [1] 288/11
stuck [3] 152/20 362/20 378/24
Stuckey [3] 13/6 56/10 56/11
student [2] 54/13 190/21
Students [1] 32/5
stuff [5] 142/10 274/21 279/16 366/14 420/8
subject [2] 250/25 339/22
submit [5] 292/16 292/19 365/19 368/22 385/19
submitted [3] 127/7 256/24 441/5
subpoenas [2] 281/8 382/11
subsequent [2] 119/8 402/22
subsequently [3] 155/4 158/17 366/10
substance [1] 405/15
substantial [5] 104/24 400/22 462/12 464/19 465/11
substantially [1] 277/23
such [11] 9/4 17/9 17/11 92/9 121/22 136/24 358/20 394/17 401/8 412/3 421/4
sudden [1] 385/5
suddenly [2] 149/10 406/14
suffered [1] 132/7
sufficient [12] 10/7 347/15 349/25 350/9 405/1 408/6 408/10 409/8 428/4 428/8 429/6 459/8
sufficiently [3] 348/24 409/6 429/4
suggested [2] 224/23 227/17
Suggestion [2] 426/9 429/23
suggestive [5] 102/23 103/3 103/8 103/11 103/20
suitcase [1] 251/17
summarize [2] 293/10 331/24
summarized [1] 331/23
summary [2] 333/8 383/18
summation [1] 101/9
Summit [8] 112/11 114/12 327/15 332/16 332/18 383/16 384/23 385/1
summoned [1] 344/6
sun [1] 360/25
super [1] 390/7
supervisor [5] 51/8 51/19 185/23 193/21 243/23
supervisor/help [1] 51/19
supervisors [2] 161/15 270/9
support [3] 33/13 464/11 467/20
suppose [1] 441/4
supposed [8] 9/10 129/14 307/1 307/4 307/21 356/22 358/1 365/20
Suppression [1] 243/24
sure [61] 15/25 22/7 81/4 93/1 99/6 99/8 100/4 100/11 109/2 109/14 111/8 111/18 118/22 127/2 139/1 139/2 144/13 151/21 162/10 173/24 178/13 183/25 184/2 188/11 190/15 190/15 191/4 216/12 224/12 225/14 239/11 239/17 263/3 268/10 268/15 280/12 280/14 282/25 297/25 300/12 320/25 322/16 329/10 333/18 334/1 334/8 334/24 335/16 356/23 357/23 374/7 375/16 378/4 380/8 382/22 416/5 421/25 435/11 445/4 459/1 468/8
surprisingly [1] 208/3
surrounding [6] 157/15 215/14 296/22 382/11 398/4 410/6
surveillance [4] 282/17 282/20 282/21 382/10
survive [1] 288/20
suspect [24] 86/20 86/22 93/23 119/4 197/1

S

suspect... [19] 197/7 197/10 197/16 197/24 244/6 244/7 244/19 244/20 247/3 252/21 255/17 255/23 271/10 274/17 274/22 276/20 331/15 380/14 389/6
suspects [5] 98/5 274/8 274/15 276/19 320/15
suspension [11] 107/10 111/5 119/3 119/9 257/19 331/9 331/12 365/16 365/23 366/20 462/14
suspicious [9] 72/1 144/11 216/4 216/12 230/25 237/10 238/6 375/14 378/8
sustained [5] 150/25 177/7 179/16 285/4 301/17
swear [38] 46/25 47/2 47/17 48/3 48/16 50/3 51/12 54/6 54/18 56/5 57/1 59/17 60/3 70/6 91/1 97/4 105/11 123/10 123/17 140/25 166/6 171/18 180/15 192/20 201/7 205/21 211/12 214/3 243/1 259/19 264/7 269/17 273/14 287/1 300/3 304/14 319/7 338/25
sweating [2] 275/4 279/15
swerving [1] 212/13
switch [1] 62/6
sworn [27] 16/24 63/7 70/15 91/10 97/14 105/21 123/13 128/22 141/13 166/15 172/3 180/25 193/5 201/16 206/4 211/21 214/12 243/10 260/4 264/15 270/1 273/23 287/9 300/20 304/23 319/17 393/17
Sybil [1] 11/12
system [5] 118/12 118/13 118/25 137/24 202/8

T

T-shirt [4] 71/10 134/19 142/25 217/7
table [3] 107/5 136/18 320/19
TAC [1] 253/16
tag [21] 92/24 96/10 101/20 101/21 116/3 213/2 223/21 245/1 247/12 247/13 260/22 324/5 363/16 363/17 364/9 364/19 365/7 365/22 377/24 378/1 378/1
tagged [1] 247/13
tailgate [17] 236/22 237/3 241/16 308/7 356/21 363/18 364/10 364/11 364/13 365/7 365/14 365/21 366/2 378/3 378/4 382/20 382/24
taken [14] 15/13 64/5 122/13 147/10 191/2 224/9 244/5 259/5 272/6 272/23 277/14 318/11 370/11 374/12
takes [5] 155/19 386/14 449/22 450/1 450/12
taking [17] 15/18 17/5 132/24 150/22 151/2 152/3 162/13 175/5 247/21 347/13 349/13 356/8 357/19 405/1 405/3 410/18 457/1
talk [62] 61/18 63/4 108/12 108/23 109/9 110/19 110/25 116/9 119/10 127/10 138/22 139/9 142/16 168/7 184/17 189/22 190/2 190/4 238/6 275/12 275/21 276/9 276/13 276/17 279/14 279/19 282/3 283/18 284/4 296/21 311/1 318/1 321/18 322/2 322/11 322/25 323/9 323/12 323/16 325/15 328/19 328/19 328/24 329/3 335/12 336/6 340/20 341/8 362/15 363/7 363/15 365/4 366/13 375/23 377/15 377/20 378/15 382/24 386/11 389/18 431/14 438/12
talked [23] 78/7 87/5 112/23 138/21 167/4 186/22 234/22 274/17 275/13 298/12 298/14 314/10 324/23 328/15 330/17 335/19 335/22 336/16 367/7 378/20 384/2 390/24 461/14
talkie [2] 228/13 228/14
talking [59] 72/20 74/2 77/2 82/9 84/2 84/9 85/1 107/4 113/5 113/9 113/17 115/22 116/8 135/9 143/9 146/21 148/14 162/20 168/9 173/16 173/25 174/5 175/9 182/12 220/24 225/18 233/13 234/16 235/8 237/10 237/13 238/9 239/9 253/8 266/15 276/21 278/14 296/15 302/10 324/7 326/3 330/11 334/5 334/25 335/17 337/5 365/12 367/18 376/14 377/2 379/5 380/20 380/21 382/6 386/13 389/24 390/10 422/4 466/23
talks [1] 384/10
Tamesha [3] 13/6 56/10 56/11
tan [1] 364/17
tannish [1] 217/15
tape [1] 362/17
tapes [2] 281/11 282/13
Target [1] 52/5
targeted [1] 465/7
Task [2] 91/16 243/18
Taylor [5] 14/13 49/21 49/22 49/24 112/12
TD [40] 17/9 71/8 76/14 106/8 114/23 115/5 131/22 135/17 141/17 141/21 142/3 142/14 166/19 172/7 181/10 181/11 194/6 195/15 196/10 206/9 206/11 215/13 215/23 222/5 248/18 260/11 264/23 267/9 268/21 270/7 274/5 278/18 278/19 305/18 320/4 327/21 358/8 418/9 419/20 420/1
teacher [1] 53/15
Team [1] 243/24
Technical [1] 54/13
technician [2] 57/22 58/22
technology [1] 48/11
teeth [2] 443/22 445/3
Teirra [3] 14/11 50/8 50/9
telephone [3] 126/21 182/20 182/24
television [1] 127/18
teller [30] 142/22 143/5 143/6 143/14 144/23 145/19 146/4 146/20 148/11 162/5 163/5 165/5 168/25 169/3 172/19 176/13 179/3 179/4 179/5 183/5 194/16 195/21 221/12 221/13 275/22 276/14 349/5 356/1 373/25 374/4
tellers [11] 131/23 133/8 144/24 182/12 275/12 283/2 285/12 373/16 374/14 374/24 382/9
telling [13] 68/14 138/23 217/14 219/23 226/18 237/16 284/7 293/4 330/3 361/24 373/16 379/8 385/20
tells [7] 161/14 384/11 384/16 386/12 389/16 448/5 461/22
temple [2] 301/20 301/23
ten [21] 10/19 99/11 101/13 103/25 103/25 106/13 157/10 172/9 262/20 272/7 274/3 285/23 438/18 438/19 462/25 463/4 463/6 464/18 464/20 467/17 469/7
ten feet [2] 103/25 103/25
ten miles [2] 99/11 262/20
tend [1] 124/10
tendencies [1] 412/15
tends [1] 371/25
terminology [1] 279/12
test [1] 462/20
testified [53] 70/15 91/10 97/14 102/13 103/14 103/24 104/1 104/3 104/11 104/14 105/21 117/18 120/16 141/13 160/22 166/15 172/3 180/25 193/5 201/16 206/4 211/21 214/12 239/8 243/10 260/4 264/15 270/1 273/23 287/9 291/1 291/4 292/18 295/9 295/10 300/20 304/23 313/12 319/17 332/13 337/4 348/4 349/11 353/7 375/18 377/5 380/7 380/7 381/6 385/12 395/13 395/19 396/16
testify [33] 66/15 67/24 68/8 121/16 130/7 285/10 290/18 297/1 297/2 297/6 297/14 297/14 298/8 317/25 339/18 339/19 339/20 339/22 340/9 340/13 340/14 340/16 340/18 340/20 341/5 341/11 341/17 346/24 349/2 374/5 411/5 411/16 411/17
testifying [2] 68/4 102/11
testimony [112] 69/15 69/19 70/7 83/6 91/2 97/5 103/6 103/13 103/13 103/22 104/9 104/25 105/12 120/1 120/8 120/14 120/19 125/16 126/11 128/22 129/21 129/24 129/25 130/11 130/17 130/18 138/20 141/1 166/7 167/24 171/19 172/13 179/22 180/16 184/7 192/21 201/8 205/22 211/13 214/4 243/2 258/21 259/20 264/8 269/18 273/15 286/8 286/18 287/2 292/9 292/12 292/17 293/2 293/21 294/24 295/10 296/23 299/1 299/5 300/4 304/15 319/8 337/3 347/1 347/3 349/3 349/22 350/16 353/2 372/25 373/10 377/14 378/23 380/1 393/1 393/4 393/5 394/16 395/22 395/23 395/24 395/25 396/8 396/14 396/18 396/19 396/20 402/8 403/22 404/4 418/15 418/16 418/22 419/4 420/5 420/13 421/24 422/22 422/24 423/2 423/10 424/14 424/18 425/6 425/8 425/10 425/15 437/16 442/23 443/1 443/10 458/1
text [1] 126/21
thank [157] 15/5 20/8 20/18 21/18 22/21 26/8 27/3 29/8 29/19 30/17 30/25 32/19 33/4 34/6 35/6 35/15 36/11 36/23 37/15 37/25 38/9 38/18 39/3 39/12 40/3 40/12 40/21 41/4 41/13 41/14 41/22 42/5 42/12 42/22 43/14 43/22 44/9 44/17 45/5 45/14 60/15 60/22 69/16 69/20 92/17 96/21 101/4 102/7 105/16 123/24 131/18 136/10 136/12 140/15 140/16 141/5 153/16 156/15 156/24 160/19 169/13 171/23 179/25 180/20 183/15 183/21 188/18 191/12 195/12 200/11 200/16 200/17 203/19 204/5 205/6 206/15 210/21 211/5 213/13 229/25 242/8 242/18 244/17 248/20 252/6 252/9 258/25 263/24 263/24 266/25 268/4 268/19 268/24 269/9 273/2 273/3 273/6 279/25 285/25 292/8 300/18 303/23 313/4 313/7 316/16 317/4 318/10 330/4 338/15 341/13 341/19 344/24 346/3 346/8 351/19 351/20 352/19 352/20 352/21 355/4 355/10 370/16 370/17 376/11 392/13 415/20 416/19 417/5 417/23 422/5 423/1 425/16 429/20 431/16 434/16 438/22 441/12 443/3 446/20 448/23 451/12 452/20 452/21 453/23 456/12 457/12 457/22 459/14 461/1 461/3 461/6 461/9 466/7 467/21 469/20 469/21 469/22
thankful [1] 459/20
Thanksgiving [1] 364/25
that [1889]
that's [24] 110/13 180/1 206/10 207/3 209/3 210/18 214/25 224/11 236/2 236/23 237/8 261/22 267/15 282/11 317/11 322/22 323/14 326/1 329/6 330/13 332/15 333/3 450/3 457/20
their [26] 27/20 28/5 36/2 79/2 128/17 128/19 138/5 140/18 192/12 204/12 209/16 275/20 283/2 292/23 292/24 299/21 318/24 340/4 355/24 356/9 361/21 381/23 438/4 447/17 448/11 459/21
themselves [1] 458/16
theory [6] 350/8 400/21 408/18 409/9 428/15 429/7
there [445] 8/23 9/4 9/11 9/15 14/25 16/6 19/10 19/18 19/21 21/1 21/25 25/8 25/21 26/20 27/21 28/3 28/23 28/24 29/21 31/4 31/10 31/13 31/18 31/19 31/23 33/5 33/9 33/10 33/15 33/19 44/6 45/15 45/19 46/1 46/2 46/6 46/23 62/13 66/7 66/10 67/7 71/6 74/8 74/9 74/15 74/19 76/14 78/13 78/14

T

there... [396] 79/15 79/23 81/22 81/25 82/3 84/8 84/9 84/20 85/5 85/6 85/8 85/8 87/18 88/14 89/9 91/15 93/19 93/20 93/21 95/6 96/12 102/1 102/3 102/25 103/15 106/15 107/5 110/23 115/1 115/4 116/10 116/12 117/23 122/19 122/21 123/1 124/3 124/6 125/22 127/1 127/1 131/23 133/24 134/4 134/16 135/4 137/1 137/14 138/19 139/3 139/3 139/8 140/4 140/7 142/12 143/15 143/18 143/19 143/24 144/6 144/14 144/18 144/22 144/24 145/1 145/1 145/2 146/9 146/16 147/2 147/6 147/13 148/4 148/14 149/19 149/25 151/15 151/17 152/18 152/22 153/25 157/14 157/22 158/8 161/23 163/1 163/2 165/21 166/20 166/24 167/1 167/7 167/12 167/18 167/20 167/23 172/8 172/10 172/16 172/18 172/19 174/8 174/10 176/21 176/22 176/24 176/25 177/9 178/2 178/2 178/6 182/19 182/23 186/6 186/7 190/3 190/19 194/13 195/4 195/5 196/23 198/13 198/14 198/15 200/2 201/23 201/24 201/25 203/6 206/16 207/12 207/22 208/24 209/25 214/17 215/7 215/21 215/24 216/10 216/11 216/21 216/25 220/2 220/21 220/24 221/4 221/5 221/19 221/20 221/21 222/6 222/15 222/22 224/13 225/14 225/16 226/1 226/2 226/8 227/22 228/22 229/2 230/15 231/10 231/10 232/1 233/23 233/25 234/9 234/15 234/17 234/22 236/8 236/9 237/12 238/16 238/23 239/1 239/2 239/8 239/14 239/22 242/4 246/16 247/18 247/25 248/3 248/7 248/18 249/7 250/14 250/17 250/25 251/21 253/4 255/4 256/17 257/3 257/3 258/3 260/15 261/23 262/17 262/23 263/3 263/7 263/8 265/5 266/11 267/10 267/17 267/17 267/18 267/19 270/11 270/20 270/25 271/7 272/22 274/25 275/2 275/6 275/7 275/9 276/20 277/1 277/12 277/13 279/11 282/3 282/19 282/20 285/15 288/3 293/24 293/25 294/16 296/24 299/14 300/15 301/13 301/21 305/12 305/21 306/2 306/8 306/10 306/22 308/11 311/20 311/20 320/9 320/18 321/7 322/4 322/4 322/19 324/18 325/14 326/19 326/21 328/23 332/7 332/8 332/9 335/9 335/13 335/23 338/11 340/17 344/7 346/13 346/14 347/2 347/14 348/1 349/1 349/6 349/6 349/9 349/25 350/12 350/15 351/2 351/12 352/5 352/12 353/25 355/15 355/16 355/18 355/23 356/5 356/13 356/14 356/19 356/23 356/24 357/7 358/6 359/6 359/9 359/9 359/10 359/15 360/7 360/8 360/15 361/3 361/6 361/23 362/1 362/13 362/23 364/6 367/2 367/22 371/14 373/23 374/7 374/8 375/5 375/11 376/22 378/10 381/1 381/1 381/5 382/6 382/22 383/13 383/19 385/14 386/22 386/24 387/18 387/19 388/23 389/10 389/12 389/13 389/23 392/3 392/4 392/5 392/6 393/1 394/13 396/6 401/15 401/22 407/24 409/11 410/7 410/8 412/6 416/6 420/8 420/8 420/9 420/10 420/12 421/9 421/17 421/22 421/23 423/1 424/14 424/16 427/21 429/9 431/6 432/18 434/19 434/20 436/8 436/10 436/14 437/4 438/8 441/4 442/11 444/11 448/10 448/13 448/15 450/15 450/18 452/9 457/4 458/9 459/8 464/11 465/9 468/22 468/23

there was [1] 177/9

thereafter [1] 318/8

therefore [8] 120/9 121/3 125/6 349/9 349/13 408/14 428/11 441/9

thereof [1] 397/21

thereto [2] 409/14 429/11

they [356] 10/5 10/8 10/9 10/12 10/14 16/24 20/3 20/15 27/11 46/21 46/22 67/8 68/5 68/8 68/19 71/8 74/6 74/11 74/11 75/21 75/22 76/2 76/8 76/10 76/20 76/24 76/24 77/11 78/15 78/15 78/21 79/8 79/9 79/10 79/14 79/17 79/17 79/25 80/1 80/2 80/2 80/2 80/3 80/5 80/6 84/10 85/1 85/13 86/20 86/22 86/22 88/10 88/20 88/25 92/25 93/14 93/23 98/19 100/15 101/13 101/21 112/11 116/1 118/19 121/5 121/17 121/21 121/25 122/1 122/1 122/6 122/8 127/10 127/12 127/12 127/13 132/2 133/10 134/17 134/17 134/18 134/19 134/20 134/20 135/7 135/8 136/22 137/5 137/8 137/9 137/11 137/16 138/4 138/4 138/9 139/1 139/2 139/11 139/12 139/12 139/25 140/1 140/10 140/10 140/11 140/11 145/19 154/4 154/16 156/22 157/14 157/21 158/20 161/4 161/22 164/10 164/10 164/12 164/12 168/6 168/9 168/13 172/21 187/1 187/2 187/3 187/4 187/7 187/8 187/10 188/16 194/19 195/1 196/17 202/8 202/10 215/14 216/14 216/14 217/9 217/10 221/2 221/24 221/25 226/7 226/8 227/7 230/10 230/11 232/14 233/4 233/20 234/5 234/20 234/22 235/1 235/7 235/7 238/23 239/2 239/10 239/11 239/18 239/19 240/11 240/12 244/6 244/7 244/18 245/1 245/3 245/7 247/20 248/2 253/12 253/24 255/23 255/24 256/24 260/24 261/13 261/25 266/23 268/9 274/14 275/15 276/19 276/22 278/10 278/13 278/14 280/11 280/12 281/16 281/24 281/25 282/6 289/18 289/19 289/24 290/8 290/9 294/14 301/12 303/10 303/12 303/15 323/3 323/6 327/8 327/13 327/14 328/6 328/21 333/18 333/20 333/23 333/25 334/4 334/6 335/8 340/15 343/1 343/4 343/13 343/22 345/4 348/4 350/21 352/4 352/11 353/9 353/10 353/11 353/12 353/16 359/1 361/21 361/22 361/23 361/24 362/2 362/8 362/9 362/10 362/11 365/4 365/9 366/1 366/23 367/6 368/10 368/10 368/25 370/9 370/24 370/25 371/10 371/12 373/16 376/25 377/2 377/3 379/12 379/13 379/16 379/19 380/25 382/1 382/2 382/14 383/4 383/5 383/6 383/6 386/10 386/10 386/19 386/19 386/20 386/20 389/23 390/11 390/21 391/12 392/2 415/12 417/6 417/15 418/17 418/23 419/1 419/3 419/3 419/4 420/7 422/11 422/11 423/9 423/20 423/22 423/25 426/2 426/18 426/23 432/2 432/5 432/10 432/13 432/15 432/16 433/2 433/6 433/14 435/21 435/22 436/5 436/11 436/14 436/15 437/24 438/4 441/16 441/16 441/17 442/12 443/23 444/1 444/5 446/3 446/6 446/9 446/12 447/1 447/17 447/17 448/11 448/14 449/9 451/4 451/5 457/14 458/22 459/2 459/9 460/22 460/23 462/7 462/21 462/22 462/24 464/13 465/18 467/5 468/13 468/14

they'll [2] 62/23 424/1

thing [30] 8/24 110/4 120/5 132/5 134/16 135/2 139/6 182/23 184/25 199/7 230/5 239/17 268/14 271/17 271/23 272/1 298/17 363/25 364/24 364/25 365/23 370/13 372/24 380/4 386/19 406/10 419/16 419/24 436/25 445/19

things [25] 65/18 66/2 69/13 92/9 93/24 130/6 133/9 138/19 140/8 140/8 153/1 161/15 280/19 290/9 317/20 361/6 366/16 380/24 401/15 402/16 407/4 407/6 420/10 421/10 466/9

think [100] 9/9 9/17 28/20 29/2 35/10 38/14 44/4 68/15 68/20 81/21 85/23 85/24 88/21 89/19 101/23 104/14 114/13 131/24 136/22 137/17 137/18 138/4 138/14 139/2 139/22 140/9 149/2 154/20 157/8 157/10 165/12 186/15 191/16 223/18 226/7 230/13 234/9 239/8 249/17 266/9 271/22 271/24 279/16 281/22 283/6 284/7 284/9 294/24 295/9 296/4 296/25 317/1 317/23 328/6 332/13 335/11 342/10 345/1 348/23 350/9 350/19 353/14 371/9 376/2 379/13 379/16 383/13 387/21 388/11 388/15 388/18 389/10 389/12 391/25 396/21 401/22 415/15 416/25 420/7 421/17 426/14 430/25 432/23 438/6 442/12 444/6 449/14 449/19 450/14 451/1 451/5 452/15 458/15 458/17 463/4 464/8 467/15 468/12 468/13 469/13

thinking [7] 78/2 78/3 143/20 143/24 174/14 426/25 432/13

thinks [3] 128/12 363/25 444/5

third [9] 119/9 233/17 237/11 238/6 238/9 238/14 238/15 362/13 419/24

this [588]

Thomas [2] 269/24 269/25

though [9] 114/5 126/5 203/4 206/13 329/11 358/3 363/18 385/7 420/4

thought [25] 76/24 78/20 80/2 84/9 84/10 84/14 111/7 111/16 136/2 144/2 190/13 191/16 223/22 236/7 238/5 241/19 266/9 283/15 283/23 323/23 336/13 351/8 466/15 468/14 468/21

thoughts [2] 130/16 444/3

threat [1] 397/7

threaten [1] 116/15

threatened [2] 120/8 120/21

three [27] 20/1 67/3 67/4 67/6 75/12 121/15 122/8 122/9 151/9 152/12 187/16 204/2 204/17 222/16 290/12 303/19 319/25 348/25 350/13 379/15 420/4 445/21 456/20 456/24 459/23 461/23 464/17

three feet [1] 152/12

through [73] 10/13 11/3 26/21 29/14 77/1 101/12 120/2 121/18 123/7 133/12 138/5 142/22 151/7 151/12 151/25 152/5 155/25 156/1 156/2 156/10 156/10 157/17 163/20 163/21 175/1 177/24 177/24 178/5 178/6 179/4 182/13 194/20 195/2 195/25 196/13 212/14 212/20 219/13 231/12 232/18 240/5 240/6 240/12 263/2 266/21 266/22 267/19 271/11 275/20 278/6 288/10 288/18 300/9 301/10 301/23 307/8 307/15 309/10 322/20 323/5 329/4 329/10 329/17 361/13 361/25 374/23 375/15 391/23 415/3 417/10 441/1 462/23 467/6

throughout [3] 120/5 124/19 400/11

throwing [1] 351/10

Thursday [1] 143/19

thus [2] 46/4 130/22

tie [1] 277/4

till [8] 106/13 163/9 324/14 343/2 350/24 351/1 351/1 359/5

times [9] 61/14 100/21 123/3 186/3 225/5 225/6 290/12 303/19 420/7

tire [3] 218/10 218/11 236/5

tires [1] 225/16

today [29] 16/2 16/23 61/8 86/17 102/11 102/14 104/11 106/21 107/3 116/20 121/20 132/14 136/18 172/14 186/5 186/7 275/22 276/25 285/10 312/21 317/10 342/6 342/14 355/19 371/16 386/7 392/12 464/13 465/8

toe [1] 158/11

together [24] 26/23 29/4 82/1 112/12 153/2

T

together... [19] 158/22 210/5 220/1 289/18 290/9 291/15 303/16 323/3 335/9 359/19 360/9 383/3 407/15 408/1 408/1 426/12 427/12 427/23 427/24
told [88] 68/7 80/25 86/19 99/20 102/24 106/15 111/23 113/24 114/7 114/13 115/16 116/11 119/8 135/23 136/20 146/13 173/21 179/21 185/22 187/25 188/5 196/18 197/11 197/21 200/9 216/7 216/11 216/17 222/23 226/5 227/5 227/7 228/7 251/22 251/24 252/2 255/6 263/14 274/20 275/7 276/22 291/12 292/16 294/1 295/7 306/8 309/8 315/16 316/1 326/21 331/20 332/7 332/12 334/20 334/21 335/2 335/25 336/1 336/16 336/17 337/12 349/5 349/16 351/4 352/9 353/10 356/18 364/1 364/11 367/8 367/9 367/9 369/7 370/2 370/24 370/25 372/17 374/14 374/19 374/24 379/6 380/8 389/5 401/7 421/2 462/21 466/2 469/3
Tom [2] 23/19 269/12
tomorrow [23] 184/6 186/8 186/17 187/6 187/7 188/16 317/12 317/17 345/19 345/22 346/2 426/8 429/23 430/8 431/4 433/3 445/11 445/14 446/5 446/10 447/1 447/14 448/22
Tonda [3] 13/20 53/13 53/14
tone [2] 194/4 198/17
tonight [3] 188/17 426/15 432/25
tons [1] 226/1
Tony [5] 22/18 151/18 180/10 180/23 180/24
too [13] 8/10 67/9 70/19 78/10 122/5 184/4 303/21 357/10 364/7 426/24 435/20 435/23 465/14
took [34] 107/1 107/1 116/2 122/24 126/15 151/25 152/4 152/5 152/8 157/21 161/23 173/9 179/14 199/3 215/10 241/8 247/18 247/18 251/7 276/6 279/10 279/14 284/14 292/13 311/19 320/19 321/4 348/7 355/20 358/7 359/5 362/4 404/11 461/19
tool [1] 132/12
top [7] 88/24 95/5 98/12 143/1 174/2 321/10 356/21
total [2] 188/10 466/22
totality [5] 101/10 101/23 103/6 104/22 120/23
totally [1] 330/2
touch [4] 11/2 185/5 185/6 185/11
tough [1] 307/15
tow [3] 6/16 96/4 256/23
toward [2] 73/1 169/2
towards [52] 31/15 75/18 76/9 76/10 79/1 79/2 79/2 84/17 156/2 156/11 156/12 156/16 158/15 163/15 163/23 168/25 169/3 169/23 170/3 177/24 178/1 195/3 195/4 207/11 208/7 208/16 208/17 208/21 208/21 210/11 210/12 210/13 212/22 212/22 217/13 223/3 226/7 231/21 231/21 232/5 237/14 237/15 237/19 239/21 240/10 240/11 246/4 254/21 363/2 363/2 364/20 366/8
towed [2] 96/6 251/10
towing [1] 257/18
toy [5] 355/21 357/23 405/24 468/16 468/19
track [3] 196/24 197/8 209/14
tracked [1] 134/17
tracker [5] 271/19 272/1 272/2 353/12 374/12
tracking [9] 270/24 270/25 271/2 271/7 271/12 271/13 271/14 271/17 272/11
tracks [14] 74/14 75/18 87/19 95/6 196/19 209/1 220/22 221/22 237/19 248/5 254/25 275/3 356/9 363/3
traffic [35] 80/10 80/11 88/7 88/24 88/24 93/19 93/21 94/16 94/19 94/20 95/4 95/6 95/13 99/8 227/14 227/17 227/18 229/6 248/4 248/4 249/17 249/25 254/5 255/15 255/18 255/19 256/21 261/12 262/5 262/18 262/25 263/6 323/19 331/8 462/12
train [2] 275/3 363/2
transcript [6] 1/6 351/8 420/8 420/9 470/3 471/11
transcription [1] 420/9
transferred [1] 323/11
transpired [2] 111/22 226/13
transport [2] 275/7 323/9
trap [1] 406/22
traumatic [1] 132/7
traveling [2] 246/4 246/22
treat [1] 412/9
tree [1] 214/22
trees [2] 206/12 221/20
trial [95] 9/4 9/20 10/13 11/3 21/16 26/2 27/1 28/19 29/6 29/17 30/15 30/23 32/17 33/2 34/4 34/14 35/4 35/13 36/9 36/21 37/7 37/23 38/7 38/16 39/1 39/10 40/1 40/10 40/19 41/2 41/11 41/20 42/3 42/10 42/20 43/5 43/12 43/20 44/3 44/15 45/1 45/12 45/18 62/1 63/16 124/11 124/15 124/17 124/19 124/20 127/15 127/21 128/5 128/7 128/25 136/6 140/5 186/5 186/19 191/6 191/10 293/9 294/17 339/10 345/6 371/12 371/15 392/19 392/20 392/22 392/24 393/3 393/22 393/24 394/2 394/12 394/14 396/14 400/3 400/11 403/15 437/8 457/17 457/25 458/8 458/12 459/4 459/6 459/12 459/19 460/8 461/4 461/16 464/14 471/12
tried [8] 78/18 209/20 209/21 223/15 225/12 284/4 379/2 393/20
trier [1] 189/12
tries [4] 61/18 377/25 377/25 378/1
trooper [1] 35/9
Trooper's [1] 33/12
trouble [4] 68/14 462/15 466/12 466/14
truck [114] 73/12 73/15 73/23 76/1 78/6 78/7 78/8 82/10 83/11 83/19 83/20 83/23 84/3 84/6 84/13 84/16 85/14 85/18 87/16 88/14 88/19 89/5 89/13 89/14 90/6 92/22 93/8 96/7 98/11 100/9 101/18 101/19 101/19 101/20 103/2 115/24 133/23 134/10 198/1 212/13 212/15 212/16 212/18 219/2 219/4 219/4 219/16 219/17 219/18 219/19 220/7 221/9 222/1 222/21 222/24 224/2 225/1 225/2 225/10 225/13 225/15 226/10 226/24 227/23 227/25 229/13 233/15 234/21 235/14 235/17 235/22 239/6 240/1 240/3 241/2 241/5 242/3 244/12 244/19 245/8 246/9 246/19 252/18 253/7 307/18 307/19 307/22 308/2 315/20 324/4 328/12 346/12 356/22 357/1 361/8 363/8 363/21 364/12 364/14 365/6 365/13 365/20 366/7 366/8 376/17 376/23 377/8 377/21 378/21 380/10 380/13 380/14 380/17 382/5
trucks [2] 241/12 241/18
true [26] 77/10 123/18 123/20 126/14 129/20 130/21 130/22 138/10 138/10 138/11 138/11 294/14 334/11 347/7 347/13 365/16 368/19 380/12 383/25 386/21 386/21 401/8 401/8 421/3 421/4 471/11
truly [4] 123/18 140/10 140/10 140/11
trust [1] 396/18
truth [80] 70/8 70/8 70/8 91/2 91/3 91/3 97/5 97/6 97/6 105/12 105/13 105/13 138/24 141/1 141/2 141/2 166/7 166/8 166/8 171/19 171/20 171/20 180/16 180/17 180/17 192/21 192/22 192/22 201/8 201/9 201/9 205/22 205/23 205/23 211/13 211/14 211/14 214/4 214/5 214/5 243/2 243/3 243/3 259/20 259/21 259/21 264/8 264/9 264/9 269/19 269/19 269/19 273/16 273/16 273/16 284/7 287/3 287/3 287/3 293/5 293/20 294/6 300/5 300/5 300/5 304/16 304/16 304/16 319/9 319/9 319/9 339/1 339/1 361/24 362/2 373/16 379/8 394/11 395/17 396/12
truthful [1] 403/19
truthfully [1] 466/10
truthfulness [4] 292/25 294/15 294/20 294/20
Truven [1] 50/21
try [31] 10/17 22/7 62/23 78/15 121/17 122/19 123/1 123/18 137/12 183/24 184/3 220/15 222/25 236/19 239/24 281/4 281/5 282/17 282/21 363/16 377/24 382/12 386/16 391/4 391/4 422/1 422/4 435/24 440/21 446/2 446/11
trying [24] 74/6 74/11 86/5 123/7 146/25 173/13 196/21 207/23 217/10 235/2 250/15 294/23 314/1 316/25 362/24 368/23 372/3 378/16 378/25 379/1 449/20 450/9 450/12 452/13
Tuesday [1] 461/15
TUFFMAN [1] 214/22
tuned [3] 277/17 359/13 366/12
Turbeville [5] 14/17 48/21 48/22 48/23 49/6
turn [19] 215/9 215/11 224/1 225/24 225/24 245/22 246/10 250/14 253/22 253/23 253/24 254/8 254/18 256/20 375/25 377/11 381/8 435/20 435/24
turned [25] 93/6 148/17 149/1 149/4 149/24 149/25 151/24 152/4 175/1 179/21 190/25 212/25 218/21 220/15 235/24 235/25 236/13 254/4 254/9 254/23 278/2 320/18 324/7 363/6 461/15
turning [2] 71/6 250/13
turns [1] 363/10
TV [1] 384/1
Tweeting [1] 61/24
Twenty [3] 299/7 299/8 305/2
Twenty-eight [3] 299/7 299/8 305/2
twice [2] 42/1 303/19
two-month [1] 465/18
type [13] 96/5 154/24 220/5 225/16 225/18 225/19 271/14 292/12 330/18 466/21 466/22 467/10 468/10
types [2] 281/13 394/13
typically [1] 283/1
typing [1] 420/8
typo [4] 337/13 337/15 337/18 337/19

U

U.S [2] 17/10 30/1
ultimate [1] 397/1
un [1] 102/3
un-uniformed [1] 102/3
unable [4] 349/12 349/13 439/13 464/13
unanimous [8] 413/4 413/6 423/16 424/8 439/15 439/21 440/4 452/2
unanimously [10] 414/4 414/13 414/17 414/21 414/25 453/1 453/4 453/7 453/10 453/13
unavailable [1] 66/9
uncomfortable [1] 174/25
uncommon [1] 280/23
under [35] 25/18 104/22 107/8 107/10 107/11 110/16 111/5 119/2 119/9 119/9 120/23 126/14 149/10 187/9 248/25 251/9

U

under... [19] 257/19 292/22 320/20 331/9 331/11 331/12 350/5 350/8 365/15 365/22 366/20 402/25 403/3 411/14 413/11 453/15 462/14 463/3 465/13
underneath [1] 322/5
understand [30] 63/11 63/12 63/18 63/22 68/5 68/8 81/5 102/10 108/8 109/8 109/10 110/20 122/3 124/18 176/21 176/24 186/21 187/17 253/22 271/16 288/16 321/14 322/10 322/12 339/5 339/7 340/23 392/1 436/18 446/8
understanding [6] 66/23 286/11 334/7 341/17 427/7 451/24
understands [5] 63/8 109/15 298/1 322/17 463/19
understood [10] 108/25 119/2 119/4 170/25 170/25 230/20 283/10 283/12 320/25 331/7
unduly [4] 102/23 103/8 103/11 103/20
uneasy [1] 147/15
unemployed [2] 54/25 59/13
unemployment [2] 313/17 313/19
Unfortunately [2] 373/15 464/12
unfriendly [1] 127/13
uniform [2] 103/17 103/17
uniformed [2] 102/2 102/3
uniforms [1] 228/2
uninfluenced [1] 399/16
unique [2] 359/8 370/7
unit [8] 94/15 94/18 246/23 246/25 248/9 248/10 265/4 320/17
United [1] 339/13
units [8] 196/17 198/13 198/16 247/20 248/2 250/17 251/3 320/12
university [3] 48/10 48/12 50/19
unlawful [4] 360/1 406/24 407/17 427/14
unlawfully [8] 17/25 18/9 18/18 19/2 133/3 358/11 406/7 406/10
unless [7] 186/21 296/4 400/6 400/23 431/25 448/16 456/20
until [39] 9/4 61/10 62/1 77/24 80/17 80/19 99/24 108/23 126/16 127/23 135/23 136/24 163/4 163/5 184/20 185/17 226/19 227/21 241/4 242/3 288/3 301/4 322/2 323/8 324/18 342/12 343/4 343/23 345/17 362/11 373/12 400/11 400/16 415/9 423/10 423/20 425/25 430/17 462/11
untrue [1] 368/24
untruthfully [1] 396/16
untruthfulness [1] 292/25
unusual [4] 209/24 212/6 215/6 280/22
Update [2] 426/7 438/1
uphold [1] 124/4
upon [9] 120/25 207/16 345/2 358/6 394/3 400/15 412/9 412/25 465/1
uproot [1] 276/1
use [23] 107/16 108/5 153/25 223/15 257/20 271/22 271/24 281/4 281/5 294/19 295/17 321/7 357/21 376/8 396/9 396/10 404/23 412/10 460/11 466/9 466/21 466/23 469/10
used [16] 25/21 108/10 109/12 132/13 136/3 241/14 294/22 298/3 321/16 322/14 397/23 405/16 418/2 418/17 419/14 459/24
uses [2] 321/8 381/8
using [5] 17/15 337/12 405/10 466/18 469/12
usual [2] 215/8 230/23
usually [18] 118/2 118/11 121/23 121/25 122/19 123/5 185/5 230/17 281/3 281/3 281/5 292/18 295/12 298/6 299/3 299/4 371/8 431/25
utility [1] 219/3

V

VA [1] 51/19
vacant [2] 208/22 208/24
vague [1] 225/13
Valley [1] 36/18
value [3] 340/5 394/11 395/3
various [1] 36/1
vehicle [92] 6/16 75/15 78/23 79/10 80/3 80/3 80/22 80/25 81/1 82/2 82/15 86/9 87/6 87/9 92/20 92/23 93/2 93/5 93/13 94/3 94/9 95/9 95/9 95/14 96/6 96/12 98/19 99/4 99/7 99/10 99/10 99/14 100/1 100/5 112/1 115/10 215/8 217/16 217/17 217/20 218/1 218/2 218/6 218/7 219/3 220/5 220/18 223/1 227/8 228/6 228/10 229/3 229/4 236/4 236/14 244/8 244/12 245/4 245/6 245/17 246/21 247/5 247/5 248/7 248/12 248/23 249/4 249/21 249/25 250/24 251/2 251/7 251/10 251/12 251/15 254/3 257/21 260/21 260/25 261/3 261/13 263/2 263/5 263/12 277/13 277/14 277/15 307/17 328/6 328/7 328/9 366/11
vehicles [2] 88/10 252/21
verbal [1] 281/25
verdict [93] 5/7 9/4 11/3 123/20 124/15 126/13 126/14 128/4 130/23 131/2 131/3 138/17 341/24 346/10 348/19 349/24 350/3 350/10 351/11 351/18 353/20 353/23 391/20 399/19 400/12 412/19 412/22 413/2 413/4 413/6 413/8 413/9 413/10 413/11 413/11 413/13 413/13 413/14 413/15 413/17 413/24 413/25 415/6 415/9 416/7 434/9 439/13 439/14 439/22 440/3 440/5 440/6 440/18 441/11 444/7 449/10 451/24 452/2 452/5 452/8 452/22 453/20 454/9 454/11 454/13 454/15 454/17 454/19 454/21 454/23 454/25 455/2 455/4 455/6 455/8 455/10 455/12 455/14 455/16 455/18 455/20 455/22 455/24 456/1 456/3 456/5 456/7 458/4 458/7 459/4 459/5 459/11 459/13
verified [1] 101/21
very [29] 89/17 99/9 104/6 145/20 148/17 163/13 204/5 204/5 209/20 233/2 234/2 288/25 289/5 329/24 331/6 345/13 372/24 377/25 378/2 387/23 392/13 401/15 421/9 430/11 456/13 463/14 463/14 469/2 469/9
via [1] 419/2
vicinity [1] 103/18
victims [11] 19/25 20/22 20/25 21/4 21/23 32/6 67/3 67/4 67/6 355/13 460/20
victims' [3] 21/7 21/14 32/2
Victor [3] 14/13 49/21 49/22
victory [1] 381/23
video [15] 6/3 117/21 117/24 135/2 233/6 250/25 253/8 254/13 256/19 256/19 275/18 283/1 380/18 381/11 381/24
videos [1] 282/20
view [4] 78/9 99/25 103/23 220/16
views [2] 439/24 452/8
violate [2] 462/22 467/5
violated [3] 462/24 467/4 467/7
violation [6] 17/18 18/3 18/12 18/21 19/4 255/16
violations [2] 462/13 462/19
violence [3] 404/17 405/4 405/5
violent [1] 39/15
visible [4] 220/10 220/11 237/2 237/21
visual [1] 240/13
voice [1] 381/17
voir [2] 8/14 8/20
voluntarily [4] 121/2 283/20 340/10 397/5
voluntariness [2] 119/20 120/6
voluntary [4] 383/12 397/11 398/8 398/13
vulnerable [3] 357/5 359/11 460/12

W

Wachovia [1] 76/13
waist [1] 174/3
wait [14] 168/13 227/9 275/8 297/22 348/12 367/23 385/4 417/1 417/8 422/10 423/8 425/25 441/15 457/16
waited [1] 320/17
waiting [11] 8/7 146/25 199/7 250/16 251/3 311/25 312/1 355/24 356/16 359/13 361/7
waive [5] 9/19 283/15 339/21 387/11 387/11
waived [1] 276/13
Waiver [2] 109/5 322/6
Wal [1] 154/20
Wal-Mart [1] 154/20
walk [6] 145/15 163/12 163/17 232/10 235/12 376/22
walked [42] 81/1 83/13 87/9 112/22 131/22 132/3 132/4 143/13 145/18 148/7 155/22 155/22 155/24 156/1 156/1 156/2 162/5 162/5 163/2 163/5 163/21 163/23 164/8 170/16 177/20 178/16 183/3 183/5 208/7 226/17 228/5 228/10 228/11 235/16 235/22 311/20 355/25 373/22 373/25 374/4 374/22 374/23
Walkie [2] 228/13 228/14
Walkie-talkie [2] 228/13 228/14
walking [19] 144/5 156/10 156/16 163/19 163/20 164/1 168/25 169/2 169/3 169/23 170/2 170/3 170/5 170/7 170/19 177/23 226/6 255/20 362/23
walks [2] 155/19 155/19
wall [1] 85/4
Walmsley [1] 24/14
wander [1] 130/16
wanted [21] 9/7 9/8 67/14 68/20 77/21 99/4 112/21 116/8 119/10 173/12 173/15 190/14 190/15 191/4 203/5 262/2 283/21 314/1 325/15 344/3 459/1
wants [7] 63/3 189/10 189/17 293/23 318/5 430/5 431/9
warrant [2] 63/21 284/14
was [1112]
washed [1] 367/17
washes [1] 364/24
wasn't [42] 76/20 78/2 78/3 93/12 99/3 100/17 107/20 111/8 111/17 144/15 145/18 173/24 175/9 210/4 216/7 216/12 220/10 223/17 224/8 235/2 235/6 235/9 240/10 251/18 254/20 255/9 255/10 255/12 256/17 261/9 279/11 286/20 291/9 292/14 293/25 294/16 376/24 381/9 382/22 383/22 448/3 467/5
waste [1] 317/14
watch [4] 113/12 127/16 380/23 381/21
watched [3] 157/16 163/22 384/1
watching [1] 254/16
water [1] 276/12
wave [1] 124/5
waved [2] 173/16 173/17
way [88] 9/13 16/17 16/22 61/15 74/6 74/11 75/20 76/7 76/10 81/25 89/18 94/15 94/22 99/12 99/14 101/24 125/22 129/18 130/7 137/24 139/4 141/25 145/23 170/7 174/11 182/13 185/6 186/1 186/24 198/3 202/22 204/22 208/15 217/15 236/8 237/18 238/20 238/20 241/18 246/23 253/4 255/4 258/18 262/23 279/11 288/22 288/24 302/5 302/7 308/15 325/3 342/4 346/16 346/21 347/4

way... [33] 347/10 348/11 349/9 356/25 357/3 357/9 359/4 360/20 363/20 376/22 376/24 377/14 379/12 387/2 387/13 389/7 389/9 392/4 402/12 403/17 410/7 410/8 410/17 411/6 412/7 430/15 440/1 446/19 449/21 461/10 463/3 466/23 469/19
ways [4] 87/4 94/17 253/23 386/24
we [390] 8/6 8/8 9/10 10/18 10/24 11/1 15/18 16/3 16/5 19/16 22/7 25/23 26/23 29/4 46/13 46/23 47/5 61/2 61/19 63/13 63/25 66/12 66/13 66/17 66/24 67/13 69/18 69/24 73/24 75/4 75/13 80/13 80/16 80/18 80/19 80/20 82/6 89/1 93/16 93/22 93/24 99/18 99/25 100/4 106/22 107/13 107/16 107/24 108/5 108/7 108/13 109/14 110/4 113/5 113/18 113/24 113/25 115/17 116/13 118/17 118/18 118/18 118/18 122/8 122/20 122/23 123/2 123/4 123/5 123/6 123/7 124/17 129/2 129/4 136/6 138/22 138/22 139/9 139/9 140/13 143/9 143/10 143/11 143/11 143/17 143/21 143/22 143/23 144/13 144/15 146/15 155/3 157/15 157/16 158/8 158/8 158/9 158/10 158/19 159/21 161/8 161/9 161/12 162/7 163/20 163/23 165/22 165/23 168/12 173/19 173/24 173/25 174/5 175/12 182/17 184/6 184/7 184/11 184/23 185/1 185/5 185/10 185/17 186/18 186/19 187/14 188/4 188/7 188/15 188/22 192/11 194/4 196/23 197/25 199/6 199/8 199/9 202/7 204/2 207/17 207/20 212/10 227/14 227/22 228/4 233/7 241/17 246/13 246/13 246/16 247/1 247/15 247/18 247/18 247/20 248/1 250/24 251/2 253/19 254/11 254/25 258/20 259/3 262/19 263/8 263/8 263/9 263/10 265/5 265/10 265/13 265/21 266/9 267/19 268/22 271/4 272/15 279/14 281/3 281/3 281/4 281/4 281/4 281/5 286/12 286/17 288/3 288/3 289/21 300/9 301/4 301/9 303/9 316/25 316/25 317/7 317/10 317/17 317/24 318/22 320/23 321/7 321/13 321/19 322/18 323/5 323/8 323/8 326/14 330/3 330/16 330/22 331/1 331/1 336/6 338/14 339/9 341/22 341/23 342/1 342/6 342/10 342/18 342/21 342/24 343/9 343/12 343/19 344/1 345/6 345/7 345/10 345/19 345/23 348/23 352/6 352/9 354/4 354/21 355/19 357/13 361/10 362/15 363/12 365/16 366/11 368/16 368/18 368/18 368/20 371/13 372/11 372/12 372/12 372/15 372/16 372/20 372/21 373/15 373/22 374/9 374/11 374/11 374/15 374/17 374/18 374/22 374/25 375/5 375/8 375/8 378/9 380/3 380/14 381/25 382/7 382/16 382/17 383/2 389/2 389/2 389/14 389/17 389/19 391/7 391/9 391/10 391/13 391/13 391/14 392/11 401/16 414/3 414/4 414/8 414/12 414/16 414/20 414/24 416/23 417/10 417/15 417/19 419/1 419/16 420/12 420/17 421/10 422/3 423/15 424/8 424/17 424/18 425/5 425/21 425/24 426/8 426/9 426/9 426/9 426/13 429/21 429/23 429/23 429/24 429/24 430/7 430/7 430/25 431/3 432/1 432/5 433/17 433/22 434/10 434/14 434/21 434/23 435/16 435/17 436/10 436/12 436/16 436/17 437/4 437/6 438/1 438/2 438/12 439/10 440/25 441/15 442/10 442/16 442/24 443/18 443/20 443/21 443/22 444/24 445/1 445/3 445/7 445/7 445/8 445/9 445/22 445/22 447/10 447/18 447/20 448/22 449/25 450/11 450/14 450/17 451/25 453/1 453/4 453/7 453/10 453/13 454/3 456/14 456/17 457/19 459/20 460/8 460/14 468/12
we'll [45] 10/17 11/1 27/4 39/17 47/6 62/18 62/22 62/23 69/14 187/7 258/17 258/24 259/11 286/19 299/15 317/1 317/9 318/9 346/1 352/10 357/14 372/13 382/24 416/6 417/13 422/3 422/4 422/10 422/12 423/2 423/8 423/10 424/15 424/20 427/1 430/22 431/14 432/25 433/5 435/24 437/9 447/14 447/16 447/21 451/9
we're [16] 37/19 99/22 99/23 99/24 132/14 137/12 139/17 173/5 292/1 293/6 322/17 330/24 351/3 359/4 432/23 445/9
weapon [16] 17/13 17/16 17/18 133/1 133/2 256/14 347/11 357/21 357/22 405/8 405/10 405/13 405/14 405/17 405/23 406/1
weapons [1] 405/20
wear [2] 61/14 390/7
wearing [15] 71/10 73/13 89/19 98/9 101/15 159/5 159/16 229/9 244/22 247/8 250/19 277/2 277/3 364/16 364/17
weather [6] 251/17 257/23 366/16 371/5 371/5 390/14
weaves [1] 267/18
Wednesday [1] 141/20
weeds [2] 265/22 266/2
week [15] 15/9 15/9 60/19 60/21 140/6 184/17 290/12 303/19 303/19 417/10 417/11 456/13 456/18 461/2 464/12
weekend [5] 110/4 118/17 330/22 457/3 457/11
weeks [1] 68/13
weigh [2] 395/7 412/2
weighing [1] 395/8
weight [9] 351/13 353/16 394/11 395/3 396/21 398/5 398/10 401/9 421/4
Weinberg [5] 14/23 47/8 47/11 190/11 191/13
welcome [2] 291/21 417/8
Wendy's [1] 465/6
weren't [10] 75/12 93/17 144/13 226/9 235/1 235/4 255/15 333/24 462/22 465/5
westerner [1] 241/17
Whaley [8] 22/21 205/16 206/3 206/7 212/9 357/8 362/22 366/5
what [603]
What's [1] 28/12
whatever [15] 115/7 149/8 161/13 278/12 278/12 278/12 278/15 283/21 297/5 353/16 389/15 426/21 447/15 463/7 466/3
whatsoever [9] 45/21 340/16 346/22 358/13 360/24 366/22 407/13 411/10 411/15
Wheeler [16] 17/7 18/20 20/6 22/16 171/13 172/1 172/2 172/6 350/22 353/3 353/4 353/7 376/12 399/10 414/16 453/7
whenever [1] 333/13
WHEREUPON [155] 11/6 21/1 21/25 27/21 29/21 31/4 31/10 31/13 31/18 31/23 33/9 33/15 33/19 45/19 46/1 46/6 46/9 47/20 48/6 48/19 49/5 49/19 50/6 50/15 51/3 51/15 51/25 52/12 52/25 53/11 53/23 54/9 54/21 55/8 55/19 56/8 56/18 57/4 57/18 58/5 58/18 59/6 59/20 60/6 60/23 62/19 64/5 64/7 64/9 64/11 64/13 64/15 64/17 64/19 64/21 64/23 65/1 65/3 65/5 65/7 95/23 117/3 122/13 122/15 124/6 147/22 150/6 153/11 155/10 157/1 160/5 160/7 160/9 160/11 176/5 180/7 185/15 188/19 190/6 190/8 191/24 192/5 200/24 203/8 203/14 250/6 259/1 259/5 259/8 267/1 267/4 279/2 284/24 286/1 299/18 300/15 316/21 317/5 318/11 318/17 338/16 344/15 346/4 352/22 354/16 415/21 417/21 417/25 419/6 422/6 422/8 422/16 423/4 423/6 423/13 424/3 425/1 425/17 425/19 425/23 427/2 427/4 431/17 433/11 433/18 434/17 435/2 435/5 437/12 437/14 437/18 437/22 438/24 439/4 441/13 441/23 442/1 442/3 442/8 443/6 443/8 443/12 443/16 444/20 444/22 447/23 448/24 449/2 449/5 449/7 450/5 451/13 451/16 451/20 469/23
wherever [2] 62/11 221/3
whether [30] 63/17 68/19 103/7 125/10 127/21 129/13 129/21 129/24 129/25 130/2 139/18 174/24 235/25 314/1 340/19 341/5 361/21 396/2 396/9 396/13 397/1 397/4 397/10 402/13 402/18 403/18 403/19 405/16 405/24 410/13
whichever [2] 69/22 414/9
while [43] 17/12 17/13 17/15 28/3 74/2 77/9 86/19 92/4 92/19 93/4 93/15 113/5 129/6 129/16 133/25 142/12 146/16 146/25 157/24 165/9 174/10 190/23 207/21 216/9 246/22 274/18 279/10 279/14 302/17 313/25 352/11 366/25 373/23 374/16 386/14 396/5 396/24 405/9 415/17 449/22 450/1 461/16 462/7
white [21] 47/20 48/19 49/6 51/4 51/15 52/25 53/11 53/23 54/9 54/21 55/8 55/19 57/4 57/18 58/5 59/6 59/20 71/10 84/18 199/1 217/15
whoever [3] 118/8 358/11 380/9
whole [36] 33/6 70/8 91/3 97/6 105/13 116/3 120/5 132/5 135/2 141/2 143/12 163/19 166/8 171/20 180/17 192/22 201/9 205/23 211/14 214/5 243/3 259/21 264/9 269/19 273/16 287/3 300/5 304/16 319/9 324/2 339/1 364/25 385/25 390/14 434/5 441/1
whom [1] 123/20
whose [7] 79/14 90/11 328/7 328/9 365/13 418/15 419/4
why [61] 45/21 77/20 77/22 93/17 93/20 95/3 112/21 132/8 132/14 144/11 173/22 175/10 196/22 207/16 209/9 236/24 246/25 248/6 251/1 255/20 256/19 293/7 305/7 305/21 305/23 306/22 310/14 327/25 335/5 344/8 352/8 359/15 364/11 364/18 365/21 366/21 367/22 368/9 368/20 373/2 374/7 375/19 379/22 389/21 389/25 390/2 390/4 390/6 390/8 390/10 390/16 390/17 390/23 390/25 390/25 391/3 391/4 440/1 446/2 466/24 467/3
wife [7] 47/24 49/24 50/20 57/10 58/22 464/3 467/19
wife's [1] 52/3
Wilcox [1] 12/7
Wilder [1] 24/2
Wiley [1] 112/10
will [300] 10/8 10/9 10/14 15/15 15/21 15/22 16/6 19/12 19/16 19/19 20/3 20/14 22/3 22/6 22/7 22/10 28/22 46/13 46/16 46/17 46/19 46/23 46/23 46/24 47/1 47/3 47/5 61/4 61/16 61/16 61/18 61/19 61/21 62/5 62/5 62/12 62/15 62/21 63/4 63/13 63/16 63/21 64/3 66/14 66/24 67/2 67/4 67/18 69/6 69/8 69/18 69/24 70/7 70/18 91/2 97/5 101/8 102/10 102/12 105/12 108/16 116/25 118/19 119/24 121/4 121/16 121/24 124/13 124/17 124/24 125/9 126/13 128/8 128/9 128/10 128/21 129/15 129/16 129/18 129/22 130/10 130/20 131/2 131/3 131/6 131/14 131/16 133/8 133/10 133/14 134/1 134/16 134/22 135/1 135/20 136/22 137/6 140/5 140/13 141/1 147/20 150/4 153/9 156/9 156/22 160/3 165/23 166/7 171/19 180/16 184/11 184/14 184/16 184/23 184/25 185/3 185/3 185/11

A514

W

will... [182] 185/17 187/2 187/3 187/5 188/15 188/17 189/5 192/11 192/12 192/21 197/19 199/11 201/8 205/22 211/13 214/4 243/2 250/4 258/20 259/3 259/20 264/8 266/23 269/18 271/25 273/15 278/6 281/4 281/5 281/8 287/2 289/1 289/5 292/18 293/13 295/11 296/12 297/3 297/4 297/10 297/18 297/21 298/6 299/5 300/4 304/15 317/7 317/10 317/19 317/23 318/7 318/22 319/8 321/22 332/4 338/14 339/22 340/6 340/14 340/22 341/23 341/23 342/3 342/21 344/1 344/8 344/9 345/19 345/21 345/23 346/6 350/2 351/21 351/23 354/21 354/22 354/24 354/25 355/3 357/14 358/4 365/19 367/4 371/19 371/24 379/22 381/16 381/17 381/18 381/19 381/22 388/13 392/1 397/5 399/19 400/4 402/15 406/23 412/19 412/21 412/22 412/23 413/1 413/2 413/14 414/9 414/14 414/18 415/2 415/4 415/5 415/15 416/12 416/23 417/15 417/18 418/21 418/23 420/4 420/14 420/16 421/23 422/22 424/17 424/19 425/21 426/1 427/9 430/7 430/7 430/9 431/3 432/5 433/7 433/10 433/25 434/7 434/10 434/14 434/21 434/23 435/7 435/16 435/17 436/22 437/24 438/4 439/10 440/21 440/23 440/24 440/25 441/3 441/5 441/7 441/15 441/19 443/19 444/5 444/6 447/20 448/13 448/22 450/22 451/2 452/5 452/19 456/19 456/22 456/24 457/4 457/7 457/17 459/12 462/16 464/9 465/16 466/5 468/20 469/7 469/17 469/18

will issue [1] 281/8

willfully [1] 406/10

William [19] 1/7 13/4 13/16 16/5 17/3 17/24 18/6 18/8 18/17 18/24 18/25 20/17 54/11 54/12 56/20 56/21 246/1 413/22 452/24

Williams [62] 12/11 14/21 22/17 23/3 47/22 47/23 62/3 65/22 65/23 66/6 70/2 70/13 70/14 70/18 97/25 98/2 102/10 106/14 109/22 111/20 111/23 118/6 118/7 118/23 133/25 134/23 135/6 143/7 204/20 213/23 214/10 214/11 214/15 230/3 233/12 260/18 261/5 261/23 270/13 272/23 273/9 273/21 273/22 280/6 285/7 320/11 320/14 323/12 324/1 324/15 330/2 363/4 363/4 365/2 367/6 375/9 375/10 382/17 385/15 389/23 424/18 425/8

willing [6] 99/1 109/1 109/9 227/11 322/11 445/22

Wilson [1] 30/11

window [3] 142/22 161/12 218/22

wins [1] 440/20

wiser [4] 468/12 468/13 468/15 469/19

wish [11] 19/18 19/22 108/18 321/23 341/10 341/17 417/2 430/1 457/14 466/1 469/16

wished [2] 149/8 460/22

wishes [2] 46/2 457/5

withdraw [1] 222/11

withdrawal [2] 145/17 146/24

withdrawing [1] 65/19

withhold [1] 116/17

within [16] 103/24 104/18 191/1 198/15 214/23 226/13 272/6 296/10 330/19 365/3 385/8 386/9 404/15 406/17 441/11 465/17

without [30] 9/20 18/2 18/11 18/20 19/3 108/19 110/19 116/9 147/19 147/21 150/3 150/5 153/8 153/10 155/8 156/23 160/3 187/10 189/15 250/5 266/20 266/24 321/24 358/14 358/20 398/2 406/9 407/8 408/6 428/4

witness's [7] 66/1 104/5 104/10 260/17 380/1 396/8 396/18

witnessed [2] 118/3 226/20

witnesses [43] 2/1 22/2 22/3 66/21 66/25 68/18 122/8 126/11 128/22 129/22 130/11 130/13 130/14 130/14 138/5 138/22 140/7 285/9 300/10 318/4 339/23 341/21 341/23 345/2 345/3 348/8 350/16 355/13 361/12 361/13 361/18 361/20 361/25 362/7 375/8 378/9 379/25 395/13 395/18 395/20 395/21 396/5 396/7

woke [3] 112/7 333/13 383/15

woman [1] 68/12

won't [4] 343/4 358/2 437/4 458/21

wonderful [2] 457/3 457/10

wood [1] 186/12

Woodall [3] 13/10 55/10 55/11

WOODBERRY [14] 287/8 287/15 287/16 287/18 291/1 298/24 299/23 300/7 300/10 300/13 300/14 300/19 300/23 458/23

Woodberry's [1] 458/1

wooded [25] 71/12 73/5 76/15 79/3 84/5 84/11 84/15 85/7 87/18 183/6 183/7 215/22 215/24 216/19 224/14 231/5 232/20 232/25 233/1 267/15 271/10 272/8 272/18 418/18 418/20

woodline [3] 84/19 104/9 267/18

woods [59] 71/16 72/3 72/21 84/21 84/22 133/12 133/22 134/18 134/19 142/22 155/25 156/3 156/4 156/4 156/5 156/12 156/13 156/16 157/24 158/19 158/22 163/15 163/17 163/18 163/23 164/3 164/8 164/14 178/3 178/5 178/6 195/4 195/25 210/12 210/14 216/25 217/23 219/11 219/13 220/21 223/6 224/7 224/18 231/21 232/9 232/10 232/11 232/12 233/19 233/19 307/10 307/11 307/15 309/10 362/20 363/6 374/24 375/2 375/23

word [2] 139/4 357/18

words [6] 17/14 148/9 174/14 189/5 375/11 405/9

work [35] 25/21 26/22 26/23 32/10 32/14 32/21 36/16 38/11 46/18 50/9 50/18 52/4 56/12 58/8 106/7 121/24 167/16 167/17 181/5 184/6 199/7 207/2 207/4 207/9 207/10 214/16 271/15 357/3 357/10 371/6 391/11 456/13 459/21 462/23 466/25

worked [8] 25/18 38/21 291/15 456/13 463/16 463/20 463/23 464/1

worker [1] 162/21

workers [1] 172/13

working [19] 26/11 106/3 106/6 106/12 121/24 123/5 123/6 151/6 151/11 167/1 193/15 243/19 243/25 260/9 274/6 275/17 317/22 320/9 351/22

works [8] 25/20 34/8 39/5 46/18 56/13 137/24 241/16 382/18

world [2] 401/15 421/10

worried [1] 121/21

worry [2] 47/6 185/8

worst [1] 364/24

wouldn't [12] 26/3 85/21 247/1 342/11 343/2 343/22 360/15 360/15 360/16 361/24 390/10 447/1

wound [3] 305/8 305/8 305/9

wrestling [1] 214/22

write [6] 92/6 131/2 372/4 399/19 431/1 431/3

writing [11] 10/9 145/16 147/6 187/2 187/21 187/22 188/6 431/9 431/11 431/12 442/14

written [10] 16/20 65/24 65/25 66/8 66/16 66/17 161/1 161/4 257/1 398/22

wrong [9] 15/3 28/24 44/6 134/5 212/10 279/12 357/9 385/24 466/13

wrongdoing [1] 410/21

wrote [8] 110/11 258/3 295/8 298/4 325/23 329/13 330/14 431/6

Wyatt [17] 23/10 90/21 91/8 91/9 91/13 116/5 242/21 243/8 243/9 328/14 331/12 374/19 380/6 380/6 380/16 381/3 390/20

Wylie [1] 332/18

Y

y'all's [1] 210/7

yard [2] 277/10 277/11

Yeah [1] 225/21

year [19] 44/19 289/2 297/11 297/24 298/6 299/10 302/13 302/19 340/4 358/22 365/1 460/6 461/22 461/24 464/1 464/4 467/19 468/16 468/17

years [52] 9/22 28/9 42/15 86/16 98/15 141/22 142/1 166/25 172/9 186/13 190/22 193/12 193/14 201/24 260/8 270/6 274/3 288/5 289/22 289/23 289/25 291/2 294/3 295/3 302/16 303/8 303/14 305/5 319/24 320/1 370/8 385/10 456/20 456/25 460/1 461/17 461/19 461/20 461/23 463/11 464/17 464/20 467/3 467/11 467/15 467/18 468/3 468/9 468/18 469/7 469/16 469/17

yell [1] 146/14

yelled [1] 255/21

yelling [1] 209/16

yellow [40] 73/17 77/6 84/13 84/25 87/21 88/16 88/18 89/9 89/17 89/19 94/7 98/9 104/15 113/14 115/23 198/1 217/5 217/6 217/7 217/12 217/18 217/19 219/8 235/8 237/14 244/22 247/11 247/24 260/21 325/18 326/15 363/7 363/8 363/13 364/5 364/16 376/21 377/4 390/7 442/12

yesterday [6] 300/9 352/25 433/23 435/21 437/6 438/2

yet [7] 63/7 166/22 363/17 387/3 420/10 423/16 424/9

York [3] 288/1 301/2 305/4

you [2249]

you'll [8] 46/21 134/13 134/14 135/2 135/6 258/19 354/12 374/9

young [3] 121/15 132/6 469/10

younger [2] 466/12 466/14

yours [1] 450/11

yourself [5] 207/16 253/23 254/8 363/24 444/11

yourselves [1] 258/19

Z

Zane [1] 37/19

zone [5] 77/13 99/9 99/13 222/6 263/4

zoom [2] 78/18 223/17

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Appellant Case No. 2014-002126

The State, Respondent,

v.

Arthur William Macon, Appellant

BRIEF OF APPELLANT

Glenn Walters, Sr.
R. Bentz Kirby
P O Box 1346
Orangeburg, SC 29116
(803) 531-8844
(Fax) (803) 531-3628

Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities		ii
Statement of Issues on Appeal		1
Statement of Case		1
Facts		1
Standard of Review		3
Arguments		
I.	THE TRIAL COURT ERRED BY ALLOWING JASON COLON'S FATHER TO TESTIFY THAT JASON COLON WAS SCHIZOPHRENIC, HAD A LOBOTOMY, WAS PASSIVE, AND HAD THE MIND OF A THIRTEEN (13) YEAR OLD TO PROVE THE CHARACTER OF JASON COLON AND TO BOLSTER COLON'S TESTIMONY AGAINST THE DEFENDANT	4
II.	THE TRIAL COURT ERRED BY ALLOWING RICKY WOODBERRY TO GIVE TESTIMONY REGARDING THE MEDICAL CONDITION OF JASON COLON WHICH WAS BOTH HEARSAY AND WHICH HE LACKED THE SPECIAL KNOWLEDGE, SKILL, EXPERIENCE OR TRAINING TO SO TESTIFY	11
Conclusion		15

TABLE OF AUTHORITIES

Cases

In re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003)	9, 14
Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (S.C., 2005)	6
State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (S.C. App., 2015)	9, 14
State v. Douglas, 380 S.C. 499, 671 S.E.2d 606(S.C., 2009)	5
State v. Fripp, 396 S.C. 434, 721 S.E.2d 465 (S.C. App., 2012)	12
State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (S.C. App., 2003)	7, 12
State v. Holder, 676 S.E.2d 690, 382 S.C. 278 (S.C., 2009)	9
State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (S.C., 1987)	10
State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (S.C., 1989)	10
State v. Lyles, 379 S.C. 328, 665 S.E.2d 201(S.C. App., 2008)	3
State v. Mitchell, 399 S.C. 410, 731 S.E.2d 889 (S.C. App., 2012)	12
State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (S.C., 1998)	9
State v. Page, 406 S.C. 272, 750 S.E.2d 623 (S.C. App., 2013)	3
State v. Sims, 387 S.C. 557, 694 S.E.2d 9 (S.C., 2010)	5, 7
State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996)	6,7,8, 11

Statutes

SC Code §16-11-0330 (A)	1

Other Authorities

S.C.R.E. 401	2, 4. 5, 14

S.C.R.E. 403	10
S.C.R.E. 404	2, 8
S.C.R.E. 405	3
S.C.R.E. 601	5,6
S.C.R.E. 701	8, 11
S.C.R.E. 702	7, 11
S.C.R.E. 801	6,7
S.C.R.E. 802	7

Legal Books

McCormick on Evidence, § 12 (3rd Ed.1984)	8

Medical Treatise

DSM -5 American Psychiatric Association (2013)	13

Dictionary

Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/lobotomy	12
Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/schizophrenia	13

STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court commit error when it allowed Ricky Woodberry to testify that Jason Colon was schizophrenic, had a lobotomy, was passive and had the mind of a thirteen (13) year old in order to bolster Colon's testimony against the Appellant?

2. Did the Trial Court commit error when it allowed Ricky Woodberry to testify about Jason Colon's medical condition as the testimony was hearsay and Woodberry lacked the necessary special knowledge, skill, experience or training to testify on this issue?

STATEMENT OF CASE

On July 16, 2014, the Appellant, Arthur William Macon, was indicted for Armed Robbery under SC Code §16-11-0330 (A)[1]. The case had the Docket No. 2013-GS-40-000579. [R pp 2-3] The robbery was alleged to have occurred on August 30, 2012, at a location of the TD Bank. [R pp 2-3] The allegation in the indictment was that the Appellant planned the robbery and conspired with Jason Colon to rob the bank. An arrest warrant was issued on September 20. 2012. [R pp 4-5] The case was tried in the General Sessions Court of Richland County on September 29 through October 3, 2014, before the Honorable Deandrea G. Benjamin. The jury returned a verdict of Guilty and on October 3, 2014, the Appellant was sentenced to twenty-three (23) years of imprisonment with the South Carolina Department of Corrections. [R p1] This appeal followed.

FACTS

The TD Bank branch at 8550 Farrow Road, Richland County was robbed by Jason Colon. [R pp 20 L. 24 - 21 L 25]. He went in to cash a check but did in fact rob the bank. [R pp 132 L 18-139 L 3T pp 305, 312]. Mr. Colon testified that his plan when he went in to the bank was to cash

[1] There were other charges for kidnapping related to the incident, but a Not Guilty verdict was returned on all of those charges.

his unemployment check but that he decided to rob the bank while he was standing in the lobby of the bank.. [R 140 L 12- 142 L 3]. His testimony was that Appellant "told" him to rob the bank, but he also testified the pellet gun was given to him months prior to the date of the robbery and that he decided to rob the bank after he was inside the bank. [R pp 140 L 12- 142 L 3]. According to the testimony of the Investigator Kerry Johnson, Mr. Macon admitted that Mr Colon had been in the truck with Appellant and that he dropped Colon off at bus stop on Farrow Road. The Appellant denied any knowledge of the robbery or the actions of Mr. Colon. [R pp 153 L 8 - 156 L 21]. Mr. Colon stated that the Appellant had dropped him off at the Sonic on Farrow Road. [R p 143 L 13 - 15].

At the beginning of the trial, it was revealed to the Court that Jason Colon was a Co-Defendant in the case and that he had been offered a plead the charge of entering a bank with intent to steal and if he accepted the plea the other charges against him would be dropped. [R p 7 L 10 - 24]. The Appellant's lawyer objected to the parents of Jason Colon testifying to the general character, demeanor, personality and issues related to Mr Colon's disability and the Court and parties determined they would reserve ruling on these issues until the witnesses were called. At that time there would be a proffer of the testimony. [R pp 8 L 2 - 9 L 16]. The proffer and Motions regarding the testimony were in fact held prior to Ricky Woodberry's testimony. [R pp 112 L 3 - 126 L 12].

The testimony sought to be admitted about Mr. Colon regarded his injury to the head and that as a result, Mr. Colon was schizophrenic and very passive. Mr. Woodberry was to testify that Mr. Colon had the mind of a thirteen (13) year old. [R pp 114 L 12 - 118 L 19]. The Attorney for the Appellant correctly objected to this testimony in full because it was hearsay, character evidence barred by S.C.R.E., Rule 404 (3) and was not relevant. S.C.R.E. Rule 401. The State admitted that

it wanted to introduce the testimony in order to bolster Jason Colon's testimony against the Appellant. [R pp 120 L 13- 122 L 24]. Additionally, the Appellant's attorney objected that the testimony was improper because the witness was not a doctor and the testimony should not be allowed.. [R 122 L 8- 22]. The Court ruled pursuant to S.C,R,E, Rule 405 (b) it was admissible to prove the character of Mr. Colon with regard to him having the mind of a thirteen (13) year old and that he was passive.

However, during Mr. Woodberry's testimony, the Court allowed the witness to testify that Colon was shot in the frontal lobe and the result was that Colon received a lobotomy and became schizophrenic. The testimony also included the fact that Mr. Colon and the Appellant had been "hanging out before the robbery." [R pp 126 L 22 - 130 L 24].

STANDARD OF REVIEW

The standard of review has been set forth in *State v. Lyles*, 379 S.C. 328, 665 S.E.2d 201 (S.C. App., 2008) (citations omitted). "In criminal cases, the appellate court sits to review errors of law only. ... [The] court is bound by the trial court's factual findings unless they are clearly erroneous. ... The appellant court does not reevaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. ... A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of a legal error which results in prejudice to the defendant. ... An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support. ... To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." *Id.* at 204. *Accord*, *State v. Page*, 406 S.C. 272, 750 S.E.2d 623 (S.C. App., 2013). In this case, the evidence objected to was hearsay, improper character

evidence and was not relevant. [R pp 119 L 8 - 126 L 11]. The parent of Jason Colon was not competent to testify regarding Jason Colon's medical condition and the only reason the evidence was introduced was to bolster the State's argument that Appellant was the mastermind who planned the crime and manipulated Colon into actually robbing the bank. S.C.R.E. Rule 401.

ARGUMENTS

I. THE TRIAL COURT ERRED BY ALLOWING JASON COLON'S FATHER TO TESTIFY THAT JASON COLON WAS SCHIZOPHRENIC, HAD A LOBOTOMY, WAS PASSIVE, AND HAD THE MIND OF A THIRTEEN (13) YEAR OLD TO PROVE THE CHARACTER OF JASON COLON AND TO BOLSTER COLON'S TESTIMONY AGAINST THE DEFENDANT

The only evidence which directly connects the Appellant to this robbery is the testimony of Jason Colon. [R pp 132 L 18 - 143 L 16].[2] He stated that Arthur Macon told him to go there and that Macon had given him a fake gun to demand the money. [R pp 132 L 18 - 133 L 25]. He also testified that the Appellant had talked to him about doing this a few months before the robbery. [R p138 L 1-11]. However, on cross examination Colon testified that he went into the bank to cash a check and that he decided to rob the bank after he was inside the bank. [R pp 140 L 12 - 142 L 3]. He also testified that Mr. Macon dropped him off at the Sonic, not the bank. [R p 143 L 13-16]. Thus the evidence that Macon was involved in this robbery is minimal at best and Jason Colon confessed to the armed robbery of the bank. [R pp 138 L 19 - 139 L 10].

In order to bolster the testimony of Colon, the State presented Colon's father to testify regarding the fact that Macon had manipulated Colon into the robbery and that Colon was not capable of planning and executing the robbery. The Appellant's lawyer objected to this testimony

---

[2] While there is some evidence that the Appellant was in the area, the evidence is clear that he dropped Jason Colon off in the area. However, this is no evidence he was involved in the robbery other than Colon's testimony.

and a proffer was made to the court. [R pp 112 L 19- 118 L 19]. In summary, the proffered testimony was that while living in Brooklyn, Jason Colon had been caught in a shoot out and his brain was damaged, specifically his frontal lobe. Woodberry testified that as a result of the lobotomy, Colon became Schizophrenic[3], very passive with the mind of a 13-year-old and he was easily led by others. [R pp 115 L 4- 116 L 8]. On cross examination Woodberry admitted he had no personal knowledge of any of the events or whether Colon and the Appellant had ever worked together. All of Woodberry's testimony was hearsay and he "only [knew] what he ad been told." [R P 119 L 1-13]. The State's attorney expressly stated that Woodberry was offered by the State to testify regarding Mr Colon's medical condition, his mental capacity and his relationship to [Macon]." [R pp 118 L 25 - 119 L 3].

At that point in the trial Appellant's attorney objected on the grounds that the testimony was hearsay, improper evidence of character of a witness and was not relevant. [R pp 119 L 9 - 120 L 12]. S.C.R.E. Rule 401. The State argued it was not character evidence and it was only evidence of Colon's medical condition. [R pp 120 L 15 - 121 L 4]. In fact, whether you consider the proffered testimony character evidence or evidence of a medical condition, allowing the proffered and allowed testimony is both an error of law and an abuse of discretion which was more prejudicial than probative. The Court should not have allowed this testimony into evidence. *State v. Sims*, 387 S.C. 557, 694 S.E.2d 9 (S.C., 2010).

In order to testify a witness must be competent. S.C.R.E. Rule 601. A witness in disqualified only if the witness can not express himself concerning the matter to be understood or is incapable

---

[3] Clearly the witness was not competent to make this diagnosis and there was no medical evidence to support this declaration. Further, it is completely wrong and irrelevant as the behavior discussed about Mr. Colon was not consistent with schizophrenia.

of understanding the duty of a witness to tell the truth. *Id.* In *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606(S.C., 2009), a witness was allowed to testify about the need for a victim to have a medical exam based upon her personal observations. However, she was not allowed to give her opinion about her interview. Opinion by a lay witness is only admissible if the opinion does not require any special knowledge. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). A witness is presumed to be competent, even if mentally ill (schizophrenic) and the illness would only affect the credibility of the witness. *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (S.C., 2005).

Jason Colon entered into a plea bargain and testified in the case. Thus, it can not be argued that he was not a competent witness pursuant to Rule 601 and the only rational assumption is that he was qualified under Rule 601 to be a witness. Accordingly, there was no need for Woodberry's testimony as he had no personal knowledge of the factual evidence in question. Therefore any statements he gave were hearsay and improper opinion evidence. His testimony on the medical issues was clearly was hearsay as the statement, if it happened at all, was made by a doctor who was not present to give an opinion or a diagnosis. S.C.R.E. 801. A review of Woodberry's testimony shows that all of it was hearsay and was inadmissible.

Direct examination by Mr. Cathcart on behalf of the State:

Q. And where did the bullet exactly hit him?
A. In his temple in his head, frontal lobe.
Q. Okay. And when – – did the bullet stay in there?
A. No, it went in and came out the other side.
Q Through the Temple lobe?
A Yes.
Q Frontal lobe?
A Yes.
Q So he basically got a lobotomy from the bullet?
A Yes.
Q Did the doctors indicate – – well, did that change him in any way?

A Yes, it did.
Q Okay. Did it make camp in what way? How -- did he become what?
A He was diagnosed with schizophrenia. He started talking to his self. He became passive.
Q Did the doctors indicate his mind would be that of what?
A A 13 year old.
Q Okay. And he is how old now?
A He is 28.
Q And has he improved in the past couple of years?
A No. No. While he is on medication he has gotten a little better.
Q Okay. But he still has the mind of 13 year old?
A Yes, he does.

[R pp 128 L 19 - 129 L 20]. There is nothing within his testimony which is not hearsay and it all is submitted to prove of the truth of the matter, that Jason Colon was mentally ill, was easily led and had the mind of a thirteen (13) year old.

The straightforward definition of hearsay is set forth in *State v. Sims*, 387 S.C. 557, 694 S.E.2d 9 (S.C., 2010).

> "Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible evidence "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802. SCRE."

Id at 694 SE2nd at 13. Almost every word of the testimony of Ricky Woodberry falls into this definition. He testified about a shooting he never witnessed and stated he was told medical facts by a medical doctor who was not in court. Additionally, if the doctor had been in court he would have had to testify as an expert witness. S.C.R.E. 702. Clearly no expert witness was called to testify to the underlying hearsay in Woodberry's testimony. An expert witness is allowed to assist the trier of fact to understand the evidence or to determine a fact in issue. *State v. Grubbs*, 353 S.C.

374, 577 S.E.2d 493 (S.C. App., 2003). However, a lay witness may not testify about a matter which requires special knowledge. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). While a witness may testify regarding impressions drawn from an observed fact, the testimony by Woodberry was not related to any fact he observed.

In *Williams* the Supreme Court addressed this issue and stated:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding the witness has personal knowledge of the matter. Rule 602, S.C.R.E. The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge. Rule 701, S.C.R.E.

Id. at 54. It was not asserted by the State that Colon was not competent to testify or that any of his supposed deficiencies would have prevented him from testifying. Therefore, as he was competent to testify, and his testimony is the only testimony directly linking Macon to the bank robbery, the jury should have been allowed to evaluate his testimony without bolstering from Woodberry. In this instance, the testimony was given to show that Colon was lead by Macon into committing the crime. The testimony clearly was related to the character of Colon, and indirectly the character of Macon and was inadmissible pursuant to Rule 404 of the Rules of Evidence.

The courts have differentiated between a fact and an opinion by pointing out that there is a difference in the degree of concreteness. *Supra. Williams* at 469 S.E.2d 54. The court stated that:

> The terms "fact" and "opinion" denote merely a difference of degree of concreteness[321 S.C. 464] of description. *McCormick on Evidence*, § 12 (3rd Ed.1984). Some statements are not mere opinions but are impressions drawn from collected, observed facts.

In this instance it is clear that the testimony allowed was not a fact based upon personal observation but was an opinion drawn from hearsay evidence. It is clear that character evidence is what the testimony was to provide.

> The term 'character' refers to a generalized description of a person's disposition or a general trait such as honesty, temperance or peacefulness. Generally speaking, character refers to an aspect of an individual's personality which is usually described in evidentiary law as a 'propensity.' " (Citations and internal quotation omitted). ... Such evidence could only invite the jury to infer Petitioner was acting in conformity with this character trait when he committed the crimes with which he was charged. Because this is an improper basis upon which to determine guilt, the evidence should not have been admitted.

State v. Nelson, 331 S.C. 1, 6-7 501 S.E.2d 716 (S.C., 1998). *Accord, State v. Holder*, 676 S.E.2d 690, 382 S.C. 278 (S.C., 2009). The character traits involved Colon's personality, including his propensity to act as instructed by others, together with his physical injuries and supposed mental illness. The jury should have been allowed to assess the credibility of Colon's testimony without the improper bolstering by Woodberry offering his opinions about Colon's character. *State v. Brown*, 411 S.C. 332, 339, 768 S.E.2d 246, 250 (S.C. App., 2015). Thus, Woodberry's testimony was clearly improper bolstering of Colon's character by saying that Colon was not capable of making his own decisions.

This case is similar to the case of *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003), where the trial court did not allow an actual expert witness to use hearsay as the basis of the opinion proffered to the trial court. The hearsay was in the form of a log which was "replete with subjective opinions and judgments and therefore is inadmissible hearsay." *Id.* at 62.

Additionally, the testimony of Woodberry was a back door attack on the credibility and

character of the Appellant. The logical implication of this testimony was that Colon was incapable of deciding to rob the bank on his own and therefore only the Appellant could have coaxed Colon into acting. In general, it is improper to attack the character of the Appellant by showing he is a "bad person". While the State did not introduce any direct evidence regarding the Appellant, the clear implication is that he was the "mastermind". As such, in addition to the other arguments set forth above, this evidence as more prejudicial than probative. *See*, *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (S.C., 1987); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (S.C., 1989) and S.C.R.E. 403. The bolstering of testimony and the attack on Appellant's character as well as testimony regarding Colon's character is clearly shown by the State's examination of Woodberry.

Direct Examination of Woodberry by the State's attorney Mr. Cathcart:

Q Do you know Arthur Macon?
A Yes, I do.
Q Okay. How do you know him?
A He is a cousin of Jason's mother.
Q Okay. And y'all moved down here 11 years ago?
A Yes, we did.
Q How long before this incident -- well, did they hang out before this incident occurred?
A They only started hanging out like two months before the incident.
Q So y'all had been here like 11 years before hand. And so two months before this occurred, they started hanging out together?
A Yes.
Q Okay. About how much?
A Mabel twice a week, three times a week he would come by.
Q And would he ever take Jason off to?
A Yes, he would.

[R p 130 L 4-22]. There is no mistaking the fact that the purpose of Woodberry's testimony was to show that the Appellant manipulated Jason Colon. The purpose of the testimony was to prove the

truth of the matter asserted.

The testimony of Ricky Woodberry was hearsay, improper character evidence and was not relevant to the issues before the court. It was used to bolster the testimony of Colon. The jury received improper hearsay evidence and did not make a direct decision regarding the testimony of Colon. The opinion that he was mentally ill and had the mind of a thirteen (13) year old was not probative of any relevant fact and was in fact extremely prejudicial to the Appellant as Colon's testimony is the only testimony linking him to the bank robbery. The evidence should not have been allowed at trial and is both an abuse of discretion by the trial court and an error of law. As such, this conviction should be reversed.

II. THE TRIAL COURT ERRED BY ALLOWING RICKY WOODBERRY TO GIVE TESTIMONY REGARDING THE MEDICAL CONDITION OF JASON COLON WHICH WAS BOTH HEARSAY AND WHICH HE LACKED THE SPECIAL KNOWLEDGE, SKILL, EXPERIENCE OR TRAINING TO SO TESTIFY

Although it is clear that Woodberry's testimony was improper character evidence, the justification provided by the State was that it was evidence of Colon's medical condition. [R pp 120 L 15 - 125 L 7]. Despite the objection of the attorney for the Appellant Woodberry was allowed to testify to medical issues which required expert testimony. Woodberry was allowed to testify on matters which required particular medical knowledge and which he did not have the proper special knowledge, skill, experience or training to give competent testimony. The medical testimony was that Jason Colon was shot in the head in the temporal lobe, Colon received a lobotomy from this gun shot, and that Colon was schizophrenic and passive. [R pp 128 L 19 - 129 L 20]. Under S.C.R.E. Rules 701 and 702, this testimony was improper and could only be provided by a qualified expert who could testify regarding the brain damage and resulting mental disability and mental illness.

First, he had no first hand knowledge of the facts. [R pp 128 L 5 - p 303 L 22]. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). It was clear legal error for the trial court to allow this testimony. A witness can not testify about matters regarding a medical condition unless the witness is an expert who possesses the necessary scientific, technical, or other specialized knowledge that will assist the trier of fact. *State v. Grubbs*, 353 S.C. 374, 577 S.E.2d 493 (S.C. App., 2003).

Second, a witness giving opinion testimony may not do so from inadmissible hearsay. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003). Clearly this was inadmissible hearsay as the basis of the testimony of Woodberry was based on what he was supposedly told by an unknown doctor. [R p 129 L 2 - 20]. There was no proper foundation introduced to allow this testimony.

Third, the nature of the testimony is clearly such that an expert must be called to testify on the issue. Woodberry testified that a doctor told him that Colon received a "lobotomy" from a bullet wound. However, there was no proper foundation laid for this testimony. A lobotomy is a medical term and it relates directly to a medical procedure. A review of the dictionary definition shows that medical testimony is required to give this opinion. The definition of a lobotomy is "surgical severance of nerve fibers connecting the frontal lobes to the thalamus performed especially formerly for the relief of some mental disorders." *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/lobotomy. It is clear to any thinking person that Woodberry lacked the medical knowledge to testify on this medical condition and his testimony was inadmissible hearsay. This testimony was medical in nature and not based upon matters which are based upon his perception. *State v. Mitchell*, 399 S.C. 410, 731 S.E.2d 889 (S.C. App., 2012); *State*

v. Fripp, 396 S.C. 434, 721 S.E.2d 465 (S.C. App., 2012). There was no way that Woodberry had any knowledge on the issue of Colon's brain damage. Woodberry was not competent to testify that Colon had received a lobotomy. Additionally, a lobotomy is preformed by a surgeon for the purpose of the relief of certain disorders. There is no credible evidence that the nerve fibers of the frontal lobes to the thalamus where surgically severed, or that the bullet wound had that effect. Finally, the testimony is unreliable because Woodberry testified that a doctor told him it the wound gave Colon schizophrenia. A lobotomy is performed to relieve certain existing mental disorders, it does not cause schizophrenia. Therefore, it is clear that this testimony was not only improper, but was highly prejudicial.

Woodberry was also not competent to testify that the bullet wound gave Colon schizophrenia and caused him to be passive. There is no evidence Colon has schizophrenia, and even if he did, there is no evidence that Colon was incapacitated to the point he was incapable of making a decision.[4]

Schizophrenia is a medical term which describes a particular mental illness. A literal definition of schizophrenia is found in the dictionary and is not in accord with the general public perception. Technically, schizophrenia is "a psychotic disorder characterized by loss of contact with the environment, by noticeable deterioration in the level of functioning in everyday life, and by disintegration of personality expressed as disorder of feeling, thought (as delusions), perception (as hallucinations), and behavior....". Merriam-Webster Dictionary http://www.merriam-webster.com/dictionary/schizophrenia..

---

[4] If Colon was schizophrenic he was not competent to testify, or at least, expert testimony was necessary to show that his testimony was reliable. *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606(S.C., 2009).

To know if a person suffers from the disease of schizophrenia the diagnosis must be made in accord with the *DSM -5 American Psychiatric Association* (2013). The criteria for a diagnosis of schizophrenia must be made by a competent medical doctor skilled as a psychiatrist and must comport with the stated definition:

> Schizophrenia Diagnostic Criteria 295.90
>
> A. Two (or more) of the following, each present for a significant portion of time during a 1-month period (or less if successfully treated). At least one of these must be (1), (2), or (3):
>
> 1. Delusions.
> 2. Hallucinations.
> 3. Disorganized speech (e.g., frequent derailment or incoherence).
> 4. Grossly disorganized or catatonic behavior.
> 4. Negative symptoms (i.e., diminished emotional expression or avolition).

Id. The definition requires a diagnosis that two of the five conditions set forth are present. Additionally, there must be evidence that at least of the first three conditions is also present. Those three are delusions, hallucinations or disorganized speech. There is no evidence even one of these three conditions are present, much less a required additional condition. As stated above, the statement by Woodberry was inadmissible hearsay and clearly was irrelevant and should never have been admitted.

The prejudicial impact of this testimony is evident. By allowing this testimony, the testimony of Colon was bolstered as the jury was lead to believe he had received a lobotomy, was schizophrenic and passive. As the attorney for the Appellant argued at trial the sole purpose of this improper testimony was to bolster the testimony of Colon. *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (S.C. App., 2015). The Supreme Court has clearly said that unreliable hearsay is prejudicial

when the evidence is entered and used in a significant way by the State. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003).

In order for evidence to be admitted, it must be reliable and it must be relevant. S.C.R.E. Rule 401. There is no evidence or testimony here which is reliable. Rather there is only an inadmissible hearsay statement by Woodberry. And, the definition of both a lobotomy and schizophrenia in the most basic meaning indicate the evidence was not reliable. There is no evidence which comports with the plain meaning, nor the clinical meaning of the medical conditions which are the subject of this testimony. It was error for the trial court to allow this testimony and the case law on relevance is clear on this issue. *State v. Page*, supra and *State v. Lyles* supra.

CONCLUSION

A cursory examination of the testimony of Woodberry indicates it is neither relevant or reliable. It was introduced to bolster the testimony of Jason Colon and to allow the State to argue that the Appellant had planned the bank robbery. Colon was competent to testify and testified he decided the rob the bank after he went in to cash his check. Woodberry is not competent to provide any opinion or hearsay evidence regarding the mental condition of Colon as that is the province of medical experts. There is no relevant issue that Colon received a lobotomy or is schizophrenic. Allowing the jury to hear this improper hearsay evidence was both an error of law and an abuse of discretion. Therefore, the judgment and verdict below should be reversed.

Respectfully submitted, this the 11th day of August, 2016 at Orangeburg, South Carolina.

R. Bentz Kirby
Glenn Walters
Post Office Box 1346
Orangeburg, South Carolina 29116
(803) 531-8844
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Appellant Case No. 2014-002126

The State,Respondent,

v.

Arthur William Macon,Appellant

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCAR.

August 11, 2016

Glenn Walters, Attorney at Law, PA

R. Bentz Kirby
Glenn Walters
PO Box 1346
Orangeburg, SC 29116
803-531-8844
Attorneys for Appellant

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2014-002126

THE STATE, ...RESPONDENT

v.

ARTHUR WILLIAM MACON, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN M. WILSON
Attorney General

RANEE SAUNDERS
Assistant Attorney General
S.C. Bar No. 100073

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-2508

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

P.O. Box 192
Columbia, South Carolina 29202
(803) 748-4785

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Respondent's Statement of Issues on Appeal 1

Statement of the Case 2

Statement of Facts 3

Argument:

The trial court properly admitted Ricky Woodberry's testimony and any alleged error was harmless 6

Conclusion 17

TABLE OF AUTHORITIES

Cases:

McGhee v. Wells, 57 S.C. 280, 35 S.E. 529 (1900) 10

Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005) 10

State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) 10

State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) 9, 15

State v. Cain, 246 S.C. 536, 144 S.E.2d 905 (1965) 15

State v. Caldwell, 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008) 10

State v. Dawson, 402 S.C. 160, 740 S.E.2d 501 (2013) 6

State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) 8, 15

State v. Garner, 389 S.C. 61, 697 S.E.2d 615 (Ct. App. 2010) 9

State v. Gibson, 390 S.C. 347, 701 S.E.2d 766 (Ct. App. 2010) 14

State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009) 6

State v. James, 255 S.C. 365, 179 S.E.2d 41 (1971) 9

State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) 8

State v. Keller, 224 S.C. 257, 78 S.E.2d 373 (1953) 15

State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) 8

State v. Lee, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012) 14

State v. Mitchell, 286 S.E.2d 572, 336 S.E.2d 150 (1985) 8

State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) 13

State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) 7

State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006) 6, 9

State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) 10

State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) 6

State v. Wilson, 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010) 8

Other Authorities:

Rule 607, SCRE 11

Rule 702, SCRE 15

Rule 801(c), SCRE 8

Rule 802, SCRE 8

81 Am. Jur. 2d *Witnesses* § 893 (2015) 10

23A C.J.S. *Criminal Procedure and Rights of the Accused* § 1488 (2016) 16

98 C.J.S. *Witnesses* § 626 (2013) 10

1 *McCormick On Evid.* § 186 12

Webster's Third New International Dictionary of the English Language (2002) 12

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

The trial court properly admitted Ricky Woodberry's testimony and any alleged error was harmless.

STATEMENT OF THE CASE

Arthur William Macon (Appellant) was indicted at the October term of the grand jury for Richland County for four counts of kidnapping and one count of armed robbery (2013-GS-40-579). (R.2-3) Appellant proceeded to trial by jury and was found guilty of armed robbery. He was acquitted on the kidnapping charges. The Honorable DeAndrea G. Benjamin sentenced him to twenty-three years' imprisonment. Appellant timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

On August 30, 2012, after Appellant dropped him off, Appellant's cousin, Jason Colon, entered a TD Bank and robbed it with a plastic pistol that had been altered to appear authentic. He absconded with $6,000. Appellant was eventually apprehended in connection with the crime and charged with four counts of kidnapping and one count of armed robbery.

At trial, Diana Williams testified that after noticing police cars surrounding the TD Bank parking lot, she saw a man running from that parking lot through the woods towards the parking lot of a Hilton Garden Inn. (R.42.) Thinking he looked suspicious, Williams called 911 as she followed him in her car. (R.43.) Once the man reached the Hilton, Williams observed him conversing with another man who was wearing a yellow shirt. (R.44.) The man in yellow was gesturing toward the back of the parking lot "as if he was telling the [suspicious man] to go back that way." (R.44.) The man in the yellow shirt then got into a black truck and drove away. (R.46.) As he backed out, he nearly struck Williams' vehicle and she was able to observe his face. (R.45–46.) Williams remained on the phone with 911 during this time, giving details of what occurred and a description of the truck and its driver. (R.51.) Because the tailgate of the truck was down, Williams was only able to give a partial plate number. (R.46.) Based on Williams's description, officers eventually apprehended Appellant. (R.54.) Williams, who was still in her car, drove past where he had been pulled over. (R.88–90.) After observing him, she identified Appellant as the man she had seen in the black truck. (R.55.)

Investigator Jason Williams testified he interviewed Colon upon his arrest. He expressed how distressed Colon appeared and explained the interview "took kind of a while because it seemed like he wasn't all the way there." (R.106.) He mentioned Colon was "a little mentally challenged," but he was eventually able to get Colon's statement, in which he confessed to committing the robbery. (R.106.) Investigator Williams further testified that he searched

Appellant's truck after it was impounded and discovered a police scanner which was tuned to Richland County. (R.104.) Specifically, it was set to broadcast transmissions in the region where the TD Bank was located. (R.105.)

The State then sought to offer the testimony of Ricky Woodberry, Colon's father, and made a proffer outside the presence of the jury. (R.113.) Appellant first objected to Woodberry's testimony regarding how his son sustained a childhood head injury because Woodberry was not present when Colon was shot and therefore any statement he offered was hearsay. (R.119.) Appellant additionally objected to the remainder of Woodberry's testimony—that Colon is "easily led" and "passive"—as improper character evidence designed to bolster Colon's testimony "making it seem more or less likely that [Colon] may be passive, may be cooperative with the police, may be telling the truth." (R.120.) He further argued the evidence was irrelevant. (R.120.)

After the proffer, the trial court stated it would preclude Woodberry from mentioning that his son is "easily led" or usually says yes, but would allow him to testify as to how Colon was injured and that he is passive. (R.126.) Woodberry then testified before the jury that his son was shot in the head by a stray bullet when they were living in Brooklyn, New York. (R.128.) Appellant objected and the trial court sustained the objection; however, Appellant did not move to strike and lodged no further objections. (R.128.) Woodberry continued to discuss how the bullet entered Colon's temple and went through his frontal lobe. (R.128.) According to Woodberry, Colon was subsequently diagnosed with schizophrenia. (R.129.) Woodberry further attested that his son began talking to himself and became passive. (R.129.) Colon has improved some after medication, but Woodberry testified he retained the mind of a thirteen-year-old. (R.129.)

Colon then testified.[1] He explained he had gone to the TD Bank the day of the robbery to cash his unemployment check. (R.132, 140.) However, he then testified Appellant gave him a toy gun and told him to go into the bank and demand money. (R.133.) Colon explained that Appellant had colored in part of the gun to make it look real. (R.133.) Colon testified that after the robbery he was supposed to meet Appellant in front of the hotel and get into the bed of the truck. (R.134.) On cross-examination, he indicated he and Appellant had discussed the robbery months prior, and that was when Appellant gave him the gun. (R.141.) However, on redirect, Colon suggested he had received the gun on the day of the robbery. (R.142.)

Investigator Kerry Johnson testified as to his interview with Appellant after his apprehension. He explained that initially, Appellant explicitly informed him he did not have anyone with him while he was driving around that day. (R.152.) However, after Investigator Johnson told Appellant Colon had identified him as his cousin who dropped him off outside the bank, Appellant modified his statement. He claimed Colon was with him earlier in the day because he wanted a ride to "his homeboy's house" but Appellant instead just dropped him off at the bus stop—which happened to be near the TD Bank. (R.154.)

The jury ultimately found Appellant guilty of armed robbery. (SROA.1.) He was sentenced to twenty-three years' imprisonment. (SROA.2.)

[1] Although it appears Colon had reached a plea deal with the State, no evidence of that was offered before the jury.

ARGUMENT

The trial court properly admitted Ricky Woodberry's testimony and any alleged error was harmless.[2]

Appellant argues the trial court erred in allowing Ricky Woodberry to testify about his son's mental capacity because it was hearsay, not relevant, and was improper character evidence designed to bolster Colon's testimony. He further alleges Woodberry was not qualified to give the testimony because he was not a qualified medical expert. Appellant's arguments are meritless.

In criminal cases, the appellate court's review is limited to errors of law. *State v. Dawson*, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. Holder*, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). Nevertheless, an appellate court will not reverse based on the erroneous admission or exclusion of evidence unless prejudice has been shown. *State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). Accordingly, appellate courts will decline to set aside convictions for insubstantial errors which could not reasonably have affected the result. *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006).

Prior to Woodberry's testimony, Appellant objected that (1) any discussion of the circumstances leading to Colon's injury was hearsay because Woodberry was not present when the shooting occurred, and (2) any mention of Colon's mental capacity would be impermissible character evidence or otherwise irrelevant. The trial court allowed Woodberry to testify to his

[2] For simplicity, the State has combined Appellant's arguments into a single issue.

perception of his son's mental state and how his son sustained that injury; however, Woodberry was not allowed to assert that his son was easily led or usually said yes. (R.123–126.) When the jury returned, the State proceeded to question Woodberry:

> A. My son was shot in the head.
> Q. Okay. How did that occur?
> A. He was standing in front of the building where we resided at, and two gentleman [sic] came running through the building, you know, one was chasing the other, and they were shooting at each other. And my son happened to be standing there, and he caught a stray bullet.
> MS. GOLDBERG: Your Honor, I would renew my previous objection.
> THE COURT: All right. Objection sustained.
> BY MR. CATHCART: And where did the bullet exactly hit him?
> A: In his temple in his head, frontal lobe.
> Q: Okay. And when -- did the bullet stay in there?
> A: No, it went in and came out the other side.
> Q: Through the temple [sic] lobe?
> A: Yes.
> Q: Frontal lobe?
> A: Yes.
> Q: So he basically got a lobotomy from a bullet?
> A: Yes.
> Q: Did the doctors indicate -- well, did that change him in any way?
> A: Yes, it did.
> Q: Okay. Did it make him in what way? How -- did he become what?
> A: He was diagnosed with schizophrenia. He started talking to hisself [sic]. He became passive.
> Q: Did the doctors indicate his mind would be that of what?
> A: A 13-year-old.
> Q: Okay. And he is how old now?
> A: He is 28.
> Q: And has he improved in the past couple of years?
> A: No. No. While he is on medication he has gotten a little better.
> Q: Okay. But he still has the mind of 13-year-old?
> A: Yes, he does.

(R.128–129.) Appellant did not cross-examine Woodberry.[3]

[3] Arguably, Appellant has not preserved any challenges to this testimony. During direct examination, Appellant renewed his previous objection, *which the trial court sustained.* He did not move to strike any of the testimony, offered immediately before the objection, nor did he request a curative instruction. Therefore, he failed to preserve any issue for the court's review because he received no adverse ruling to appeal. *State v. Patterson*, 324 S.C. 5, 18, 482 S.E.2d

I. HEARSAY

Appellant is precluded from arguing Woodberry's discussion of his son's mental state should be excluded on the basis of hearsay because he never objected on that ground. Instead, he limited his challenge at trial to asserting it was impermissible character evidence or not relevant. Under settled principles of issue preservation, a party may not argue one ground at trial and a different ground on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Appellant is therefore procedurally barred from making this argument. Moreover, Woodberry's testimony was based on personal observation, and any possible reference to out of court statements was not offered for the truth of the matter asserted.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "The general rule is that hearsay is not admissible." *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007); *see* Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."). The rationale for excluding hearsay evidence is that such evidence denies the adverse party an opportunity to cross-examine the declarant of the hearsay statement. *State v. Mitchell*, 286

760, 766 (1997) ("The trial judge ruled in appellant's favor and appellant failed to move to strike or request a curative instruction. Therefore, this issue is not preserved for review."); *State v. Wilson*, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) ("When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue."). Furthermore, despite the fact that the trial court sustained the objection to testimony it had previously ruled to allow in the proffer, Appellant lodged no further objections to Woodberry's testimony. There is, therefore, no preserved contemporaneous objection for the Court to review. *State v. Johnson*, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005) (holding that absent a contemporaneous objection that is ruled on by the trial court, a party is cannot raise the issue on appeal). Admittedly, the record is confusing as to what exactly is being objected to and what the judge is ruling, but in such instances it is incumbent upon defense counsel to ensure the record clearly reflects there was a contemporaneous objection that resulted in an adverse ruling. That simply was not done here.

S.E.2d 572, 573, 336 S.E.2d 150, 150–151 (1985); *see State v. James*, 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971) ("The hearsay rule signifies a rule rejecting assertions offered testimonially which have not been in some way subjected to the test of cross-examination.").

An improper admission of hearsay testimony is only reversible error when the admission causes prejudice. *State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (Ct. App. 2010). Accordingly, appellate courts will decline to set aside convictions for insubstantial errors which could not reasonably have affected the result. *Price*, 368 S.C. at 499, 629 S.E.2d at 366. "Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence." *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

Appellant claims Woodberry's mention of his son's diagnosis of schizophrenia is hearsay; however, that reference was not presented as proof Colon was schizophrenic. As Appellant discusses in detail in his brief, many of the other observed characteristics Woodberry described seem inconsistent with schizophrenia. The testimony was offered to explain Colon's behavior, not diagnose him. The import of the testimony emanates from observations based on facts within the purview of Woodberry's experience interacting with his son. Woodberry presents his own understanding of his son's condition. His son started talking to himself. His son became passive. His son still possesses the mind of a thirteen-year-old even though he is twenty-eight.

Moreover, to the extent Woodberry's testimony contained any hearsay, it would indicate no more than that Colon suffered from a mental defect, which had already been attested to without objection by Investigator Williams, who, on three separate instances explained that Colon was "a little mentally challenged." (R.106.) Accordingly, any erroneous admission was harmless.

II. RELEVANCE AND CHARACTER EVIDENCE

Appellant's argument that Woodberry's testimony was not relevant or was improper character evidence also fails.

"The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion." *State v. Alexander*, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991). Evidence is relevant which tends to make some matter in issue upon which it bears more or less probable; "it is not required that the inference sought should necessarily follow from the fact proved." *State v. Sweat*, 362 S.C. 117, 126–27, 606 S.E.2d 508, 513 (Ct. App. 2004). Although evidence must be "logically relevant" to a material fact or element of the crime to be admissible, "it need not be 'necessary' to the State's case." *State v. Caldwell*, 378 S.C. 268, 287, 662 S.E.2d 474, 484 (Ct. App. 2008).

Although perhaps unnecessary given other evidence explaining the same, Woodberry's testimony was relevant because it assisted the jury in understanding the difficulties of Colon's manner in expressing himself on the stand and thereby contextualized the testimony. *Sellers v. State*, 362 S.C. 182, 190–91, 607 S.E.2d 82, 86 (2005) (discussing a witness's schizophrenia and concluding that although a "witness's mental illness is not enough to rebut the presumption [that he is competent to testify, a] witness's mental capacity could. . . affect the credibility of that witness's testimony"); 81 Am. Jur. 2d *Witnesses* § 893 ("[T]he condition of a witness's health may be shown to explain his or her demeanor while on the witness stand."); *see McGhee v. Wells*, 57 S.C. 280, 35 S.E. 529, 530 (1900) (declining, based on a lack of prejudice, to address whether it was error to allow testimony of witness's physical condition but concluding "for aught we know, it may have been relevant to explain the manner of the witness on the stand, which counsel may have deemed proper to explain, in order not to be prejudiced thereby"). The

evidence aided the jury's understanding of Colon's limited manner of expression in his testimony and this was clearly relevant in its determination of his credibility. 98 C.J.S. *Witnesses* § 626 ("Matters affecting the credibility of a witness are always relevant, and relevant evidence that affects credibility should not be excluded."). Pursuant to Rule 607, SCRE, a party may impeach the credibility of his own witness. Colon offered important testimony, but it is apparent that he had some difficulty communicating clearly and there were certainly inconsistencies in his testimony. Therefore, Woodberry's statements allowed context for contradictions that the solicitor must have anticipated Colon would make.

Nevertheless, Appellant argues that testimony served only as character evidence that Colon is "easily led by others" and therefore "has a propensity to act as instructed by others." (Appellant's Br. 5, 9.) This argument is misleading as it is premised on testimony that was *expressly excluded* by the trial court following the proffer. In addition to the testimony properly admitted, Woodberry indicated outside the presence of the jury that his son is "easily led" and "[m]ost of the time he will say yes" when asked to do something." (R.116.) However, prior to Woodberry testifying before the jury, the trial court ruled it would "not allow[] in the testimony about [Colon] being easily led" or "usually saying yes." (R.126.) Despite repeatedly arguing in his brief that this evidence was erroneously admitted, the trial court ruled in favor of Appellant at trial and did not allow Woodberry to make any comment indicating Colon does what he is told.

In actuality, the *only* statement Appellant could possibly attack as character evidence is Woodberry's comment that Colon is "passive." Despite Appellant's desire to equate this single word with the excluded language, this conclusion is simply impermissible within the bounds of semantics. As evidenced by its rulings, the trial court's understanding of how the jury would be impressed by the word passive is distinct from how it would be affected by testimony that Colon

was "easily led" or a compliant follower. Thus, the trial court limited Woodberry's testimony to use of the word passive and prohibited the rest. Under these circumstances, it cannot be said that the trial court abused its discretion because it plainly understood and was persuaded by Appellant's argument after the proffer and accordingly prohibited any suggestion that Colon was some easily controlled minion. In essence, Appellant is asserting that the trial court did not understand the meaning of the word passive and therefore should have excluded it as well.

However, passive does not carry the damning connotation Appellant presupposes. Passive is defined as:

> 1. **a**: not acting but acted upon: subject to or produced by an external agency: receptive to outside impressions or influences **b** (1) *of a verb form or voice* asserting that the person or thing represented by the grammatical subject is subjected to or affected by the action represented by the verb (2) *of a grammatical construction*: containing a passive verb form **c**: lacking in energy or will: LETHARGIC **d**: induced by an outside agency without either active participation or resistance or the individual affected
> 2. **a**: not active or operating: not moving: INERT, QUIESCENT **b**: existing in a dormant state but capable of being used or brought into play: LATENT **c**: of, relating to, or characterized by a state of chemical inactivity: not reacting readily: resistant to corrosion
> 3. *Scots law*: of, relating to, or subject to a liability
> 4. **a**: receiving or enduring without resistance: PATIENT, SUBMISSIVE, UNRESISTING **b**: carried through or expressed by indirect means: existing without being active or open

Webster's Third New International Dictionary of the English Language 1651 (2002). At the outset, it is questionable whether passive can even properly be characterized as "character" as opposed to a condition of his mental state. Although our case law has equated character and propensity, the two are not necessarily interchangeable. As one treatise has noted:

> not all evidence of propensity is evidence of character. . . . An amputee may have a tendency to limp, a person with a cold may have a tendency to sniffle, and an individual with Parkinson's disease may have a tendency to shake under stress, but these propensities are not traits of character because the behaviors are not particularly blameworthy or praiseworthy, and jurors are not likely to misestimate

> the ability of these conditions to predict the behavior on a given occasion. (internal citation omitted)).

1 *McCormick On Evid.* § 186 n.12 (7th ed.) (internal citation omitted). There is a distinction in those "propensities" that are consequential manifestations of physical impairments. Those can be neither lauded nor denigrated because they are not aspects changeable by the actor, as an honest or violent nature would be. This distinction undergirds the rationale behind disallowing character evidence—the jury should not be allowed to assume behavior based solely on what a person seems likely to do. *See State v. Nelson*, 331 S.C. 1, 7, 501 S.E.2d 716, 719 (1998) (noting character evidence at issue invited "the jury to infer Petitioner was acting in conformity with this character trait when he committed the crimes with which he was charged" and concluding "this is an improper basis upon which to determine guilt"). Allowing the jury to so speculate ignores the fact that the individual could have chosen to act otherwise. However, similar to a stroke victim's resultant forgetfulness, Colon became passive after being shot through his frontal lobe. It is an indelible part of his person, not some proclivity or natural tendency with which he can chose not to conform.

Further, though perhaps the inference could be made that Colon was generally unmotivated and inactive, and by that rationale unlikely to conceive of this crime alone, this is a conclusion left to the jury. Passive is not a direct description such as describing someone as easily led or compliant—those could indicate but one inference. Passive is multifaceted in its scope; yet, any attempt to put so fine a point on a single word out of context ignores the reality of a trial atmosphere. The jury did not pour over this one word with dictionary in hand. It heard it merely as a passing reference in the context of Colon's mental problems—he started talking to himself and he became passive. Nothing in that statement invites the sensational leap Appellant would take that the jury must have assumed Colon was somehow controllable.

Inasmuch as Woodberry's testimony may have indicated Colon was likely to go along with the suggestions of others, this conclusion could be more readily attained through examining the testimony of Colon himself, whose truncated and inconsistent responses exemplified his tendency to be led. Even Appellant's counsel attested during her closing that "Colon was very agreeable on the stand. . . . He did say yes a lot. . . . He just agrees with whatever anyone tells him to say." (R.198, 200.) Thus, if anything, the line of questioning at issue inured to the benefit of Appellant in discrediting Colon's testimony.

Of course the suggestion sought by the evidence was that Colon and Appellant acted in concert; the theory of Appellant's guilt was premised on accomplice liability. Proof of an unlawful agreement may be premised on circumstantial evidence. *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010) ("In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties."). Illustrating how Colon was generally inactive and therefore unlikely to conceive of this crime alone is merely one part of presenting evidence allowing a jury to draw that inference. To the extent Appellant believes this is prejudicial, evidence adduced by the State is prejudicial by design. *See State v. Lee*, 399 S.C. 521, 529, 732 S.E.2d 225, 229 (Ct. App. 2012) (noting that "[a]ll evidence is meant to be prejudicial" and "damage to a defendant's case that results from the legitimate probative force of the evidence" is not unfairly prejudicial). Certainly the evidence corroborates Colon's testimony to some extent, but as noted above, his testimony was far from linear or consistent. It can hardly be claimed Woodberry bolstered Colon's testimony when that version of events was somewhat fluid in the retelling.

Additionally, other evidence was presented implicating Appellant such that Woodberry's testimony could not have affected the result. Diana Williams identified Appellant and his vehicle immediately after witnessing his conversation with Colon and quick departure from the parking lot. Colon's version of the events corresponded with Williams's observations. Appellant's truck had a radio set to the specific frequency used by officers in the vicinity. Moreover, the actual substance of the testimony was cumulative to Investigator Williams's repeated assertions that Colon was "a little mentally challenged." "Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence." *Blackburn*, 271 S.C. at 329, 247 S.E.2d at 337. Therefore, to the extent there was any error in the admission of Woodberry's testimony it would not be reversible because Appellant suffered no unfair prejudice and likely benefitted from the inferences arising from its admission.

III. LACK OF SPECIAL KNOWLEDGE, SKILL, EXPERIENCE, OR TRAINING

Appellant finally challenges Woodberry's testimony on the basis that he is not a medical expert and therefore could not opine on Colon's medical condition. This argument is unpreserved and misconstrues the nature of the testimony.

Initially, Appellant never alleged Woodberry was not qualified as an expert under Rules 701 and 702, SCRE, as he does now. It is well-settled a party may not argue one ground at trial and a different ground on appeal. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694. Appellant is therefore procedurally barred from making this argument.

Furthermore, Woodberry is clearly not offering medical testimony. Although Appellant's brief offers enlightening commentary on lobotomies and the characteristics of schizophrenia, nothing remotely scientific was presented by Woodberry. A witness is competent to give testimony as to his perceptions of the mental state of another. *State v. Keller*, 224 S.C. 257, 262,

78 S.E.2d 373, 375 (1953) (finding it was error to for the trial court not to allow a lay witness to testify as to his opinion on whether "appellant was of unsound mind, assuming that 'unsound mind' was used in the sense of being the equivalent of 'insane'"); *see State v. Cain*, 246 S.C. 536, 540, 144 S.E.2d 905, 907 (1965) *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) ("Under our decisions, it is proper for lay witnesses to express an opinion as to whether a person was insane."); 23A C.J.S. *Criminal Procedure and Rights of the Accused* § 1488 (2016) ("[A]n otherwise qualified witness who is not a medical expert can testify about a person's mental condition or sanity if that opinion is reliable and based on the witness' personal knowledge or observations.").

Woodberry indicated his son had been diagnosed with schizophrenia—not that he himself was providing such diagnosis. Further, he stated his son had been shot through his frontal lobe and merely agreed that this was akin to him being lobotomized. Woodberry's comment on the background of his son's medical condition could not reasonably be confused with expert opinion.[4] Accordingly, even if Appellant had preserved this argument, the trial court did not err in allowing Woodberry's testimony on the basis that he was not a medical expert.

[4] As Appellant acknowledges in his brief, "[i]t is clear to any thinking person that Woodberry lacked the medical knowledge to testify on this medical condition . . ." (Appellant's Br.12.)

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

ALAN M. WILSON
Attorney General

RANEE SAUNDERS
Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: _____
Ranee Saunders
S.C. Bar No. 100073

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-2508

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
August 17, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2014-002126

THE STATE,.....RESPONDENT

v.

ARTHUR WILLIAM MACON,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 21(b), SCACR.

ALAN WILSON
Attorney General

RANEE SAUNDERS
Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: _____
Ranee Saunders
S.C. Bar No. 100073

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-2508

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
August 17, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2014-002126

THE STATE, ...RESPONDENT

v.

ARTHUR WILLIAM MACON, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated August 17, 2016, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Glenn Walters, Sr. Esquire
R. Bentz Kirby, Esquire
P.O. Box 1346
Orangeburg, South Carolina 29116

I further certified that all parties required by Rule to be served have been served. This 17th, day of August, 2016.

Angela Bennett
Administrative Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

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 Court of Appeals

The State, Respondent,

v.

Arthur William Macon, Appellant.

Appellate Case No. 2014-002126

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Unpublished Opinion No. 2018-UP-031
Submitted December 12, 2017 – Filed January 17, 2018

AFFIRMED

Glenn Walters, Sr. and R. Bentz Kirby, both of Glenn Walters & Associates, PA, of Orangeburg, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Susan Ranee Saunders, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

PER CURIAM: Appellant Arthur William Macon appeals his conviction of armed robbery, for which he was sentenced to twenty-three years' imprisonment. Macon argues the circuit court erred by permitting Ricky Woodberry to testify that Jason Colon—his son—had a lobotomy, was schizophrenic and passive, and had the mind

of a thirteen-year-old because it was improper character evidence designed to bolster Colon's testimony. Macon also argues Woodberry's testimony was hearsay and outside the scope of a lay witness opinion. We affirm.

1. The circuit court correctly permitted Woodberry's testimony as it was not improper character evidence and did not constitute bolstering. *See State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) ("Improper bolstering occurs when a[] . . . witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." (quoting *State v. Douglas*, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009))); *State v. Douglas*, 380 S.C. 499, 503–04, 671 S.E.2d 606, 609 (2009) (concluding a witness did not vouch for the victim's veracity because the witness never stated she believed the victim and gave no other indication concerning the victim's veracity).

2. The circuit court should have limited Woodberry from going into the details of how the childhood shooting occurred because it was hearsay as he was not present when it occurred. *See State v. Bottoms*, 260 S.C. 187, 196, 195 S.E.2d 116, 119–20 (1973) (finding a lay witness opinion must be based upon the personal observations of the witness and not merely upon the statements of another witness). However, because it was an insignificant detail in relation to the case overall, Macon was not prejudiced. *See State v. Motley*, 251 S.C. 568, 575, 164 S.E.2d 569, 572 (1968) (stating the burden is on the defendant to show an error in admission of evidence is prejudicial); *State v. Garner*, 389 S.C. 61, 68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[An] error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors."). Furthermore, it was reasonable to allow Woodberry to testify that Colon was shot in the head—as this testimony was rationally based on his observation of Colon.

3. Macon waived the argument that testimony regarding Colon's medical condition constituted hearsay. *See State v. Dicapua*, 383 S.C. 394, 399, 680 S.E.2d 292, 294 (2009) (finding a party's concession to the admission of evidence waived any direct challenge to the admissibility of that evidence); *State v. Thomason*, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

4. Macon's argument that Woodberry's testimony was outside the scope of a lay witness opinion is unpreserved. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d

691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]. Issues not raised and ruled upon in the [circuit] court will not be considered on appeal."). Even if the argument was preserved, the testimony was not medical testimony, as Woodberry was not testifying to Colon's diagnosis. *See State v. Williams*, 321 S.C. 455, 464, 429 S.E.2d 49, 54 (1996) ("Some statements are not mere opinions, but are impressions drawn from collected, observed facts."); *id.* ("A natural inference based on stated facts is not opinion evidence.").

AFFIRMED.[1]

SHORT, KONDUROS, and GEATHERS, JJ., concur.

---

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Appellant Case No. 2014-002126

The State,Respondent,

v.

Arthur William Macon,Appellant

MOTION FOR REHEARING

The Court issued its opinion on January 17, 2018, and affirmed the lower court decision in the Opinion 2018-UP-031. The Appellant, by and through his undersigned attorneys, made a Motion of Extension of Time to File the Motion for a Rehearing which was granted and extended the time period until February 16, 2018. The Appellant hereby makes the following Motion for Rehearing in accord with Appellate Rule 221 and respectfully represents unto this Honorable Court as follows:

1. The Court incorrectly ruled that Woodberry's testimony was not improper character evidence and did not constitute bolstering.

Woodberry's testimony was improper character witness ultimately about both the Defendant and Colon. It was introduced for the purpose of bolstering the testimony of Colon. A review of the

testimony shows that Woodberry was asked about the shooting in New York and contained an improper opinion that the result was Colon was passive, had schizophrenia and had the mind of a 13-year old. [R pp 300 L23- 302 L 20]. The State then further had Woodberry testify that Colon and Macon had begun hanging around about two months before the robbery and that the Appellant would "take Jason off too". [R p 303 L 4-22]. Therefore the implication of the testimony was that Colon had the mind of a 13-year old, was easily lead and suffered from schizophrenia. That painted a picture of Colon as a person unable to make decisions for himself. That was coupled with the assertion that Macon had begun taking Colon off three months before the trial. This is a classic case of bolstering as Woodberry was allowed to give his improper and unfounded opinion in order to take the assessment of Colon as a witness out of the province of the jury. *State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (S.C. App., 2013). The testimony was a back door attack on Macon in order to make Colon to be a more sympathetic witness who was under the control of Macon. While Woodberry never testified directly that he believed Colon, the clear and only implication was that Colon was a simple minded, mentally ill person, who was lead astray by Macon. The instant case should be controlled by *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (S.C. App., 2012), as Woodberry's testimony "included comments on the credibility of the victim's account of the [bank robbery], the trial court erred in admitting it." Id at 397 SC at 465, 725 SE2d at 142. The entirety of Woodberry's testimony was a comment on the credibility of Colon. The State admitted the purpose of the testimony was to show how Macon used Colon. [R 294 l 18-22]. The Appellant objected to all of this testimony on the grounds that it was improper character evidence. [R pp 291 L 25 - 296 L 11].

2. <u>The hearsay was not harmless and Macon was prejudiced</u>.

The Opinion of the Court finds that the testimony of Woodberry was hearsay, but limits the application of hearsay argument to the testimony regarding how Colon was shot. It is the argument of the Appellant that all Woodberry's testimony regarding any kind of medical condition, such as schizophrenia is hearsay and the allowance of that testimony was in fact prejudicial. The Appellant made this argument at trial. [R pp 292 L 8 - 299 L 12]. As argued in the Appellant's briefs the testimony regarding a lobotomy and schizophrenia resulting from the gunshot wound was improper hearsay which was admitted to bolster the testimony of Colon and to show that Macon controlled Colon. The Supreme Court has clearly said that unreliable hearsay is prejudicial when the evidence is entered and used in a significant way by the State. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003). As stated in *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (S.C. App., 2013), when the evidence is highly prejudicial and is improper hearsay, the error is not harmless and the case should be reversed. The evidence was prejudicial as it was the lynchpin to the entire case of the State as it was used to show that Macon "controlled" Colon, a young man who had a lobotomy, was schizophrenic and had a lobotomy. The only reasonable conclusion after this testimony was that the Appellant controlled Colon and therefore was guilty.

3. <u>The argument that Woodberry's testimony was outside the scope of a lay witness was preserved and the testimony as a medical opinion, not an impression drawn from observed facts</u>.

First, the Appellant discussed the Motion in Limine concerning Mr. Woodbery's testimony prior to the beginning of the Court and it was known that the Appellant objected to the Court allowing the testimony as it was improper and prejudicial. [R pp 7 L 25 - 9 L 20]. The parties agreed to hear the Motion and proffer the testimony in camera prior to allowing Woodberry to testify. The proffer was taken and the Motion was argued before the Court. [R pp 112 L 19 - 126 L 12]. The

Court ruled that Woodberry could testify about the Colon's injury and the incident surrounding that situation, even though he was not present. [R pp 129 L 20 - 126 L 12]. The Court also ruled that Woodberry could testify that Colon was shot in the frontal lobe, became schizophrenic, passive and has the mind of a 13-year old, but could not testify that he was easily led.

The testimony of Woodberry was that Colon got a lobotomy from the gunshot and was left as a schizophrenic person with the mind of at 13-year old. The testimony was based on what the doctors had told Woodberry. [R. P 302 L 2-20]. When giving his testimony, he based all his opinions on what the doctor had told him. [R p 302 L 4-10, L 11-20]. Thus all of the testimony was based on the information he received from the doctors, not his observations.

CONCLUSION

The evidence given by Woodberry was improper character evidence given to bolster the testimony of Colon. Woodberry, via hearsay, vouched for Colon and his testimony. The trial court allowing improper testimony by Woodberry was not insignificant and was prejudicial as it was the foundation for the entire point of Woodberry's testimony. There was nothing to Woodberry's testimony other than this improper evidence. Finally, the Appellant asserts both that the argument that Woodberry's testimony was improper was both preserved and it was improper expert witness evidence based on hearsay. As such it is substantial. The Appellant is entitled to a new trial in this case as the errors prevented him receiving a fair trial.

This the 16th day of February, 2018, at Orangeburg, South Carolina.

Glenn Walters, Sr.
R. Bentz Kirby
P O Box 1346
Orangeburg, SC 29116
(803) 531-8844
(Fax) (803) 531-3628

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Appellant Case No. 2014-002126

The State, Respondent,

v.

Arthur William Macon, Appellant

CERTIFICATE OF SERVICE

On the 16th day of February, 2018, the undersigned served a copy of the Motion for a Rehearing on counsel for the Respondent by placing a copy in the United States Mail, postage fully paid, to the following address:

J Benjamin Alpin
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

Glenn Walters, Sr.
R. Bentz Kirby
P O Box 1346
Orangeburg, SC 29116
(803) 531-8844
(Fax) (803) 531-3628

Attorneys for Appellant

The South Carolina Court of Appeals

The State, Respondent,

v.

Arthur William Macon, Appellant.

Appellate Case No. 2014-002126

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

J.

John D. Geathers J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Glenn Walters, Sr., Esquire
R. Bentz Kirby, Esquire
John Benjamin Aplin, Esquire

FILED
March 22, 2018

Susan Ranee Saunders, Esquire
Daniel Edward Johnson, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Opinion No. 2018-UP-031

Appellant Case No. 2018-000737

The State, Respondent,

v.

Arthur William Macon, Appellant

APPENDIX
PETITION FOR A WRIT OF CERTIORARI

Glenn Walters, Sr.
R. Bentz Kirby
P O Box 1346
Orangeburg, SC 29116
(803) 531-8844
Attorneys for Appellant

Other counsel of Record:

Alan M. Wilson
J Benjamin Aplin
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-2508

Daniel E Johnson
Solicitor, Fifth Judicial Circuit
PO Box 192
Columbia, SC 29202
(803) 748-4785

Attorneys for Respondent

INDEX

Certificate of Counsel 1

Questions Presented 1

1. Did the Court of Appeals err in holding that Woodberry's testimony was not improper character evidence and did not constitute bolstering.

2. Did the Court of Appeals err in holding that Woodberry's hearsay testimony was harmless and that the Appellant was not harmed.

3. Did the Court of Appeals err in holding that the argument that Woodberry's testimony was outside the scope a lay witness was not preserved at trial.

Statement of Case 1

Arguments

1. THE COURT OF APPEALS SHOULD HAVE RULED THAT PRIMARY PORTION OF WOODBERRY'S TESTIMONY WAS IMPROPER CHARACTER EVIDENCE AND WAS USED PRIMARILY FOR BOLSTERING THE TESTIMONY OF COLON. 2

2. WOODBERRY'S TESTIMONY WAS IMPROPER HEARSAY AND WAS THE LINCHPIN TO THE CASE AGAINST THE APPELLANT AND THEREFORE WAS NOT HARMLESS. 10

3. THE ARGUMENT THAT WOODBERRY'S TESTIMONY WAS OUTSIDE THE SCOPE OF A LAY WITNESS WAS PRESERVED AT TRIAL AND IS PROPERLY BEFORE THE COURT. 15

Conclusion 18

Certificate of Counsel

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 22, 2018.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Woodberry's testimony was not improper character evidence and did not constitute bolstering.

2. Did the Court of Appeals err in holding that Woodberry's hearsay testimony was harmless and that the Appellant was not harmed.

3. Did the Court of Appeals err in holding that the argument that Woodberry's testimony was outside the scope a lay witness was not preserved at trial.

STATEMENT OF CASE

On July 16, 2014, the Appellant, Arthur William Macon, was indicted for Armed Robbery under SC Code §16-11-0330 (A). The case had the Docket No. 2013-GS-40-000579. [R pp 2-3] The robbery was alleged to have occurred on August 30, 2012, at a location of the TD Bank. [R pp 2-3] The allegation in the indictment was that the Appellant planned the robbery and conspired with Jason Colon to rob the bank. An arrest warrant was issued on September 20. 2012. [R pp 4-5] The case was tried in the General Sessions Court of Richland County on September 29 through October 3, 2014, before the Honorable Deandrea G. Benjamin. The jury returned a verdict of Guilty and on October 3, 2014, the Appellant was sentenced to twenty-three (23) years of imprisonment with the South Carolina Department of Corrections. [R p1] The appeal to the Court of Appeals followed. The Court of Appeals issued an unpublished opinion affirming the Court of Appeals on January 17, 2018. The decision was issued upon briefs without oral argument. [Court of Appeals Opinion No. 2018-UP-031. On February 16, 2018, the Appellant filed a Motion for Rehearing. [Motion of

Appellant]. The Court of Appeals denied the Request for a Rehearing on March 22, 2018. The Appellant hereby files this Petition for a Writ of Certiorari to the Court of Appeals on this even date.

ARGUMENTS

1. THE COURT OF APPEALS SHOULD HAVE RULED THAT PRIMARY PORTION OF WOODBERRY'S TESTIMONY WAS IMPROPER CHARACTER EVIDENCE AND WAS USED PRIMARILY FOR BOLSTERING THE TESTIMONY OF COLON.

In its Opinion, the Court of Appeals ruled that the testimony of Woodberry was not improper character evidence and did not constitute bolstering. [Opinion]. While the Court cited three cases to support its conclusion, the Appellant assets the Court improperly applied the law to these facts. The Court of Appeals stated that Woodberry did not vouch for Colon as he did not state he believed Colon and did not give an indication of the veracity of Colon. In fact the entire import of Woodberry's testimony was for the purpose of vouching for Colon. [Opinion P 2].

The only evidence which directly connects the Appellant to this robbery is the testimony of Jason Colon. [R pp 132 L 18 - 143 L 16].[1] He stated that Arthur Macon told him to go into the bank and that Macon had given him a fake gun to demand the money. [R pp 132 L 18 - 133 L 25]. He also testified that the Appellant had talked to him about doing this a few months before the robbery. [R p138 L 1-11]. However, on cross examination Colon testified that he went into the bank to cash a check and that he decided to rob the bank after he was inside the bank. [R pp 140 L 12 - 142 L 3]. He also testified that Mr. Macon dropped him off at the Sonic, not the bank. [R p 143 L 13-16]. Thus the evidence that Macon was involved in this robbery is minimal at best and Jason Colon confessed to the armed robbery of the bank. [R pp 138 L 19 - 139 L 10].

In order to bolster the testimony of Colon, the State presented Colon's father to testify

[1] The evidence is clear that he dropped Jason Colon off in the area. However, this is no evidence he was involved in the robbery other than Colon's testimony.

regarding the fact that Macon had manipulated Colon into the robbery and that Colon was not capable of planning and executing the robbery. The Appellant's lawyer objected to this testimony and a proffer was made to the court. [R pp 112 L 19- 118 L 19]. In summary, the proffered testimony was that while living in Brooklyn, Jason Colon had been caught in a shoot out and his brain was damaged, specifically his frontal lobe. Woodberry testified that as a result of the lobotomy, Colon became Schizophrenic[2], very passive with the mind of a 13-year-old and he was easily led by others. [R pp 115 L 4- 116 L 8]. On cross examination Woodberry admitted he had no personal knowledge of any of the events or whether Colon and the Appellant had ever worked together. All of Woodberry's testimony was hearsay and he "only [knew] what he had been told." [R P 119 L 1-13]. The State's attorney expressly stated that Woodberry was offered by the State to testify regarding Mr Colon's medical condition, his mental capacity and his relationship to [Macon]." [R pp 118 L 25 - 119 L 3].

Appellant's attorney objected to Woodberry's testimony on the grounds the testimony was hearsay, improper evidence of character of a witness and was not relevant. [R pp 119 L 9 - 120 L 12]. S.C.R.E. Rule 401. The State argued it was not character evidence and it was only evidence of Colon's medical condition.[3] [R pp 120 L 15 - 121 L 4]. Whether you consider the proffered testimony character evidence or evidence of a medical condition, allowing the testimony is both an error of law and an abuse of discretion which was more prejudicial than probative. *State v. Sims*,

---

[2] Clearly the witness was not competent to make this diagnosis and there was no medical evidence to support this declaration. The testimony itself is incorrect and not reliable. Further, it was irrelevant as the behavior discussed about Mr. Colon was not consistent with schizophrenia. Therefore Woodberry's testimony was not factually correct and should not have been admitted.

[3] This argument by the State essentially admits that the testimony was improper hearsay which Woodberry was not qualified to give.

387 S.C. 557, 694 S.E.2d 9 (S.C., 2010).

In order to testify a witness must be competent. S.C.R.E. Rule 601. A witness is disqualified only if the witness can not express himself concerning the matter to be understood or is incapable of understanding the duty of a witness to tell the truth. *Id.* In *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606(S.C., 2009), a witness was allowed to testify about the need for a victim to have a medical exam based upon her personal observations. However, she was not allowed to give her opinion about her interview. Opinion by a lay witness is only admissible if the opinion does not require any special knowledge. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). A witness is presumed to be competent, even if mentally ill (schizophrenic) and the illness would only affect the credibility of the witness. *Sellers v. State*, 362 S.C. 182, 607 S.E.2d 82 (S.C., 2005).

Jason Colon entered into a plea bargain and testified in the case. Thus, it can not be argued that he was not a competent witness pursuant to Rule 60. The only rational assumption is that he was qualified under Rule 601 to be a witness. Accordingly, there was no need for Woodberry's testimony as he had no personal knowledge of the facts in this case. Therefore any evidence he was allowed to give hearsay and improper opinion evidence. He testified regarding complex medical issues which he was not qualified to render an opinion upon.[4] The testimony was hearsay as the statement, if it happened at all, was made by a doctor who was not present to give an opinion or a diagnosis. S.C.R.E. 801. A review of Woodberry's testimony shows that all of it was hearsay and was inadmissible.

Direct examination by Mr. Cathcart on behalf of the State:

---

[4] He testified that Colon was schizophrenic even though he had no qualifications to make such a diagnosis. Further, all competent evidence is that Colon was not schizophrenic.

Q. And where did the bullet exactly hit him?
A. In his temple in his head, frontal lobe.
Q. Okay. And when – – did the bullet stay in there?
A. No, it went in and came out the other side.
Q Through the Temple lobe?
A Yes.
Q Frontal lobe?
A Yes.
Q So he basically got a lobotomy from the bullet?
A Yes.
Q Did the doctors indicate – – well, did that change him in any way?
A Yes, it did.
Q Okay. Did it make camp in what way? How – – did he become what?
A He was diagnosed with schizophrenia. He started talking to his self. He became passive.
Q Did the doctors indicate his mind would be that of what?
A A 13 year old.
Q Okay. And he is how old now?
A He is 28.
Q And has he improved in the past couple of years?
A No. No. While he is on medication he has gotten a little better.
Q Okay. But he still has the mind of 13 year old?
A Yes, he does.

[R pp 128 L 19 - 129 L 20]. There is nothing within his testimony which is not hearsay and it all is submitted to prove of the truth of the matter -- that Jason Colon was mentally ill, was easily led and had the mind of a thirteen (13) year old. Woodberry was not competent to testify that a gunshot wound performed a lobotomy on Colon as this is a medical opinion requiring knowledge beyond that of the lay witness.

The straightforward definition of hearsay is set forth in *State v. Sims*, 387 S.C. 557, 694 S.E.2d 9 (S.C., 2010).

> "Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Generally, hearsay is not admissible evidence "except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE."

Id at 694 SE2nd at 13. Almost every word of the testimony of Ricky Woodberry is in fact hearsay as defined by the rule. He testified about a shooting he never witnessed and stated he was told medical facts about Colon's condition by a medical doctor who was not in court. If the doctor had been in court he would have testified as an expert witness. S.C.R.E. 702. No expert witness was called to testify to the underlying hearsay in Woodberry's testimony. An expert witness is allowed to assist the trier of fact to understand the evidence or to determine a fact in issue. *State v. Grubbs*, 353 S.C. 374, 577 S.E.2d 493 (S.C. App., 2003). However, a lay witness may not testify about a matter which requires special knowledge. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). While a witness may testify regarding impressions drawn from an observed fact, the testimony by Woodberry was not related to any fact he observed.

In *Williams* the Supreme Court addressed this issue and stated:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding the witness has personal knowledge of the matter. Rule 602, S.C.R.E. The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge. Rule 701, S.C.R.E.

Id. at 54. It was not asserted by the State that Colon was not competent to testify or that any of his supposed deficiencies would have prevented him from testifying. According to all evidence, Colon was competent to testify. His testimony is the only evidence linking Macon to the bank robbery. The jury should have been allowed to evaluate his testimony without the bolstering from Woodberry.

In this case, Woodberry's testimony was given to show that Colon was lead by Macon into committing the crime. It was implied to the jury that Colon was lead into the commission of the crime because he had received a lobotomy and was schizophrenic Woodberry's testimony clearly

was related to the character of Colon, and indirectly the character of Macon and was inadmissible pursuant to Rule 404 of the Rules of Evidence.

The courts have differentiated between a fact and an opinion by pointing out that there is a difference in the degree of concreteness. *Supra, Williams* at 469 S.E.2d 54. The court stated that:

> The terms "fact" and "opinion" denote merely a difference of degree of concreteness[321 S.C. 464] of description. *McCormick on Evidence*, § 12 (3rd Ed.1984). Some statements are not mere opinions but are impressions drawn from collected, observed facts.

In this instance it is clear that the testimony allowed was not a fact based upon personal observation but was an opinion based upon hearsay evidence provided as an opinion from an unknown doctor. It is clear Woodberry's testimony was character evidence offered to inform the jury on both the character of Colon and the Appellant.

> The term `character' refers to a generalized description of a person's disposition or a general trait such as honesty, temperance or peacefulness. Generally speaking, character refers to an aspect of an individual's personality which is usually described in evidentiary law as a `propensity.' " (Citations and internal quotation omitted). ... Such evidence could only invite the jury to infer Petitioner was acting in conformity with this character trait when he committed the crimes with which he was charged. Because this is an improper basis upon which to determine guilt, the evidence should not have been admitted.

State v. Nelson, 331 S.C. 1, 6-7 501 S.E.2d 716 (S.C., 1998). *Accord, State v. Holder*, 676 S.E.2d 690, 382 S.C. 278 (S.C., 2009). The character traits involved Colon's personality, including his propensity to act as instructed by others, together with his physical injuries and supposed mental illness. The jury should have been allowed to assess the credibility of Colon's testimony without the improper bolstering by Woodberry offering his opinions about Colon's character. *State v. Brown*, 411 S.C. 332, 339, 768 S.E.2d 246, 250 (S.C. App., 2015). Thus, Woodberry's testimony had the effect of improper bolstering evidence regarding Colon's character and to convince a jury

that Colon was not capable of making his own decisions.

This case is similar to the case of *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003), where the trial court did not allow an actual expert witness to use hearsay as the basis of the opinion proffered to the trial court. The hearsay was in the form of a log which was "replete with subjective opinions and judgments and therefore is inadmissible hearsay." *Id.* at 62.

Additionally, the testimony of Woodberry was a back door attack on the credibility and character of the Appellant. The logical implication of this testimony was that Colon was incapable of deciding to rob the bank on his own and therefore only the Appellant could have coaxed Colon into so acting. In general, it is improper to attack the character of the Appellant by showing he is a "bad person". While the State did not introduce any direct evidence regarding the Appellant, the clear implication is that he was the "mastermind". As such, in addition to the other arguments set forth above, this evidence as more prejudicial than probative. *See, State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (S.C., 1987); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (S.C., 1989) and S.C.R.E. 403. The bolstering of testimony and the attack on Appellant's character as well as testimony regarding Colon's character is clearly shown by the State's examination of Woodberry.

Direct Examination of Woodberry by the State's attorney Mr. Cathcart:

Q Do you know Arthur Macon?
A Yes, I do.
Q Okay. How do you know him?
A He is a cousin of Jason's mother.
Q Okay. And y'all moved down here 11 years ago?
A Yes, we did.
Q How long before this incident -- well, did they hang out before this incident occurred?
A They only started hanging out like two months before the incident.
Q So y'all had been here like 11 years before hand. And so two months before this occurred, they started hanging out together?

A Yes.
Q Okay. About how much?
A Mabel twice a week, three times a week he would come by.
Q And would he ever take Jason off to?
A Yes, he would.

[R p 130 L 4-22]. Woodberry's testimony was offered to show that the Appellant manipulated Jason Colon. The purpose of the testimony was to prove the truth of the matter asserted.

The testimony of Ricky Woodberry was hearsay, improper character evidence and was not relevant to the issues before the court. It was used to bolster the testimony of Colon. The jury received improper hearsay evidence and did not make a direct decision regarding the testimony of Colon. The opinion that he was mentally ill and had the mind of a thirteen (13) year old was not probative of any relevant fact and was in fact extremely prejudicial to the Appellant as Colon's testimony is the only testimony linking him to the bank robbery. The evidence should not have been allowed at trial and is both an abuse of discretion by the trial court and an error of law. As such, this conviction should be reversed.

This is a classic case of bolstering as Woodberry was allowed to give his improper and unfounded opinion in order to take the assessment of Colon as a witness out of the province of the jury. *State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (S.C. App., 2013). The testimony was a back door attack on Macon in order to make Colon to be a more sympathetic witness who was under the control of Macon. While Woodberry never testified directly that he believed Colon, the clear and only implication was that Colon was a simple minded, mentally ill person, who was lead astray by Macon. The instant case should be controlled by *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (S.C. App., 2012), as Woodberry's testimony "included comments on the credibility of the victim's account of the [bank robbery], the trial court erred in admitting it." Id at 397 SC at 465,

725 SE2d at 142. The entirety of Woodberry's testimony was a comment on the credibility of Colon. The State submitted the purpose of the testimony was to show how Macon used Colon. [R 294 l 18-22]. The Appellant objected to all of this testimony on the grounds that it was improper character evidence. [R pp 291 L 25 - 296 L 11].

2. WOODBERRY'S TESTIMONY WAS IMPROPER HEARSAY AND WAS THE LINCHPIN TO THE CASE AGAINST THE APPELLANT AND THEREFORE WAS NOT HARMLESS.

In its opinion, the Court of Appeals found that at least a portion of Woodberry's testimony was inadmissible hearsay but the admission of the hearsay was not prejudicial. It relied upon *State v. Garner*, 389 S.C. 61, 697 S.E.2d 615 (S.C. App., 2010) and *State v. Motley*, 251 S.C. 568, 164 S.E.2d 569 (S.C., 1968), and ruled that if the evidence is insignificant and it was not prejudicial to allow the testimony. Additionally, it stated that the burden was on the Appellant to show the error had prejudiced him. The Court of Appeals also cited the case of *State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (S.C. 1973), which should control the result in this case. In *Bottoms*, the State used a prior inconsistent statement of a witness as substantive evidence and not simply to impeach a witness. This Court properly ruled the admission of the evidence was prejudicial evidence which could not be cured by a brief charge. It was noted that the Solicitor published a great portion of the prior statement which was "not competent as substantive evidence of the facts to which the statements relate." Id. 195 SE2d at 118. *Bottoms* should control the result of this case. The Appellant asserts that the prejudicial effect of allowing Woodberry to testify and give evidence regarding Colon's medical condition so bolstered Colon's testimony that the effect was actual prejudice which prevented Macon from receiving a fair trial.

It is clear that Woodberry's testimony was improper character evidence. The State justified

its submission of the evidence by claiming it was evidence of Colon's medical condition. [R pp 120 L 15 - 125 L 7]. Despite the objection of the attorney for the Appellant Woodberry was allowed to testify and give evidence regarding medical issues which required expert testimony. Woodberry was allowed to testify on matters which required particular medical knowledge and which he did not have the proper special knowledge, skill, experience or training to give competent testimony. The medical testimony was that Jason Colon was shot in the head in the temporal lobe, Colon received a lobotomy from this gun shot, and Colon was schizophrenic and passive. [R pp 128 L 19 - 129 L 20]. Under S.C.R.E. Rules 701 and 702, this testimony was improper hearsay and could only be provided by a qualified expert who could testify regarding the brain damage and resulting mental disability and mental illness. First, Woodberry had no first hand knowledge of the facts. [R pp 128 L 5 - p 303 L 22]. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (S.C., 1996). It was clear legal error for the trial court to allow this testimony. A witness can not testify about matters regarding a medical condition unless the witness is an expert who possesses the necessary scientific, technical, or other specialized knowledge that will assist the trier of fact. *State v. Grubbs*, 353 S.C. 374, 577 S.E.2d 493 (S.C. App., 2003).

Second, a witness giving opinion testimony may not do so from inadmissible hearsay. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003). Clearly this was inadmissible hearsay as the basis of the testimony of Woodberry was facts he supposedly was told by an unknown doctor. [R p 129 L 2 - 20]. There was no proper foundation introduced to allow this testimony.

Third, the nature of the testimony is such that an expert must be called to testify on the issue. Woodberry testified that a doctor told him that Colon received a "lobotomy" from a bullet wound. However, there was no proper foundation laid for this testimony. A lobotomy is a medical term and

it relates directly to a medical procedure. A review of the dictionary definition shows that medical testimony is required to give this opinion. The definition of a lobotomy is "surgical severance of nerve fibers connecting the frontal lobes to the thalamus performed especially formerly for the relief of some mental disorders." *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/lobotomy. It is clear Woodberry lacked the actual or medical knowledge to testify on Colon's medical condition and his testimony was inadmissible hearsay. This testimony was medical in nature and not based upon matters which are based upon his perception. *State v. Mitchell*, 399 S.C. 410, 731 S.E.2d 889 (S.C. App., 2012); *State v. Fripp*, 396 S.C. 434, 721 S.E.2d 465 (S.C. App., 2012). Woodberry was not competent to testify that Colon had received a lobotomy. Nor, was there any evidence this was Colon's actual medical condition. A lobotomy is an operation preformed by a surgeon for the purpose of the relief of certain disorders. There is no credible evidence that the nerve fibers of the frontal lobes to the thalamus where surgically severed, or that the bullet wound had that effect. Finally, the testimony is unreliable because Woodberry testified that a doctor told him the wound gave Colon schizophrenia. A lobotomy is performed to relieve certain existing mental disorders, it does not cause schizophrenia. Therefore, it is clear that this testimony was not only improper, but was highly prejudicial.

Woodberry was also not competent to testify that the bullet wound gave Colon schizophrenia and caused him to be passive. There is no evidence Colon has schizophrenia, and even if he did, there is no evidence that Colon was incapacitated to the point he was incapable of making a decision.[5]

---

[5] If Colon was schizophrenic he was not competent to testify, or at least, expert testimony was necessary to show that his testimony was reliable. *State v. Douglas*, 380 S.C.

Schizophrenia is a medical term which describes a particular mental illness. A literal definition of schizophrenia is found in the dictionary. The actual definition is not in accord with the general public perception of schizophrenia. Technically, schizophrenia is "a psychotic disorder characterized by loss of contact with the environment, by noticeable deterioration in the level of functioning in everyday life, and by disintegration of personality expressed as disorder of feeling, thought (as delusions), perception (as hallucinations), and behavior....".Merriam-Webster Dictionary http://www.merriam-webster.com/dictionary/schizophrenia..

To know if a person suffers from the disease of schizophrenia the diagnosis must be made in accord with the *DSM -5 American Psychiatric Association* (2013). The criteria for a diagnosis of schizophrenia must be made by a competent medical doctor skilled as a psychiatrist and must comport with the stated definition:

> Schizophrenia Diagnostic Criteria 295.90
>
> A. Two (or more) of the following, each present for a significant portion of time during a 1-month period (or less if successfully treated). At least one of these must be (1), (2), or (3):
>
> 1. Delusions.
> 2. Hallucinations.
> 3. Disorganized speech (e.g., frequent derailment or incoherence).
> 4. Grossly disorganized or catatonic behavior.
> 4. Negative symptoms (i.e., diminished emotional expression or avolition).

Id. The definition requires a diagnosis that two of the five conditions set forth are present. Additionally, there must be evidence that at least one of the first three conditions is also present. Those three are delusions, hallucinations or disorganized speech. There is no evidence even one of these three conditions are present, much less a required additional condition. As stated above, the

---

499, 671 S.E.2d 606(S.C., 2009).

statement by Woodberry was inadmissible hearsay and clearly was irrelevant and should never have been admitted.

The prejudicial impact of this testimony is evident. The jury was presented evidence that Colon had suffered a lobotomy and suffered from schizophrenia. This allowed the jury to form opinions regarding his competency and whether or not he could be controlled by the Appellant. Essentially, it allowed the jury to disregard Colon's direct testimony that he went in the bank to cash a check and decided on his own to rob the bank. By allowing this testimony of Woodberry, the testimony of Colon was bolstered as the jury was lead to believe he had received a lobotomy, was schizophrenic and passive. As the attorney for the Appellant argued at trial the sole purpose of this improper testimony was to bolster the testimony of Colon. *State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (S.C. App., 2015). The Supreme Court has clearly said that unreliable hearsay is prejudicial when the evidence is entered and used in a significant way by the State. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003).

In order for evidence to be admitted, it must be reliable and it must be relevant. S.C.R.E. Rule 401. There is no evidence or testimony given by Woodberry which is reliable. Rather there is only an inadmissible hearsay statement by Woodberry. And, the definition of both a lobotomy and schizophrenia in the most basic meaning indicate the evidence medically was not reliable. There is no evidence which comports with the plain meaning, nor the clinical meaning of the medical conditions which are the subject of this testimony. It was error for the trial court to allow this testimony and the case law on relevance is clear on this issue. *State v. Page*, supra and *State v. Lyles* supra.

The Opinion of the Court finds that the testimony of Woodberry was hearsay, but limits the application of hearsay argument to the testimony regarding how Colon was shot. It is the argument

of the Appellant that all Woodberry's testimony regarding any kind of medical condition, such as schizophrenia is hearsay and the allowance of that testimony was in fact prejudicial. The Appellant objected to this testimony at trial. [R pp 292 L 8 - 299 L 12]. The Supreme Court has clearly said that unreliable hearsay is prejudicial when the evidence is entered and used in a significant way by the State. *In re Care and Treatment of Harvey*, 355 S.C. 53, 584 S.E.2d 893 (S.C., 2003). As stated in *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (S.C. App., 2013), when the evidence is highly prejudicial and is improper hearsay, the error is not harmless and the case should be reversed. The evidence was prejudicial as it was the lynchpin to the entire case of the State as it was used to show that Macon "controlled" Colon, a young man who had a lobotomy, was schizophrenic and had a lobotomy. The only reasonable conclusion after this testimony was that the Appellant controlled Colon and therefore was guilty.

3. THE ARGUMENT THAT WOODBERRY'S TESTIMONY WAS OUTSIDE THE SCOPE OF A LAY WITNESS WAS PRESERVED AT TRIAL AND IS PROPERLY BEFORE THE COURT.

In its briefs before the Court of Appeals the Respondent argues the issues raised by the Appellant were not preserved for review by this Court. The argument, briefly stated, is that the objection made on Page 301 of the Record was insufficient to preserve any issues for trial. [R, p 128 L 15-17]. This argument is incorrect. Macon did not concede to the admission of the evidence regarding Colon's medical condition.

First, the Appellant made the Motion in Limine concerning Mr. Woodberry's testimony prior to the beginning of the Court and it was known that the Appellant objected to the Court allowing the testimony as it was improper and prejudicial. [R pp 7 L 25 - 9 L 20]. The parties agreed to hear the Motion and proffer the testimony in camera prior to allowing Woodberry to testify. The proffer was taken and the Motion was argued before the Court. [R pp 112 L 19 - 126 L 12]. The Court ruled that

Woodberry could testify about the Colon's injury and the incident surrounding that situation, even though he was not present. [R pp 129 L 20 - 126 L 12]. The Court also ruled that Woodberry could testify that Colon was shot in the frontal lobe, became schizophrenic, passive and has the mind of a 13 year old, but could not testify that he was easily led. The objection during the actual testimony by Appellant's attorney was to the testimony regarding the original shooting and the Court sustained the objection. That objection was to testimony which contradicted the ruling of the Court. The Record confirms the issues were preserved for this appeal.

In fact, as set forth in Rule 17 *S.C.R.Crim.P.* once evidence has been objected to, it is no longer necessary to object:

> If an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.

Further, pursuant to Rule 18 *S.C.R.Crim.P.*, it would have been improper for the Appellant's lawyer to continue to argue these issues as they were expressly dealt with in the Motion in Limine. This is set forth within the rule.

> (a) Argument After Ruling. Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.
>
> (b) Argument on Objection. No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court

Once a Court's ruling is settled, the Appellant does not have to continue to object to preserve the issue. This issue was discussed at length in *State v. Humphries*, 346 S.C. 435, 551 S.E.2d 286,(S.C. App., 2001), rev. on other grounds 354 S.C. 87, 579 S.E.2d 613 (S.C., 2003), wherein the Court stated that when a trial court is clear that a ruling on a Motion in Limine is final, the opposing party need not continue to object. Once a court has made a final evidentiary ruling, there is no need to continue to object to preserve the right to appeal. *State v. Mitchell*, 330 S.C. 189, 498 S.E.2d 642

(S.C., 1998).[6] This case is one in which the Court made its ruling immediately prior to the testimony and therefore it is clear that a further objection would not only have been in violation of the Rules, but it would have been futile and no further objection was necessary. *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (S.C., 1994).

First, the Appellant discussed the Motion in Limine concerning Mr. Woodberry's testimony prior to the beginning of the Court and it was known that the Appellant objected to the Court allowing the testimony as it was improper and prejudicial. [R pp 7 L 25 - 9 L 20]. The parties agreed to hear the Motion and proffer the testimony in camera prior to allowing Woodberry to testify. The proffer was taken and the Motion was argued before the Court. [R pp 112 L 19 - 126 L 12]. The Court ruled that Woodberry could testify about the Colon's injury and the incident surrounding that situation, even though he was not present. [R pp 129 L 20 - 126 L 12]. The Court also ruled that Woodberry could testify that Colon was shot in the frontal lobe, became schizophrenic, passive and has the mind of a 13-year old, but could not testify that he was easily led.

The testimony of Woodberry was that Colon got a lobotomy from the gunshot and was left as a schizophrenic person with the mind of at 13-year old. The testimony was based on what the doctors had told Woodberry. [R. P 302 L 2-20]. When giving his testimony, he based all his opinions on what the doctor had told him. [R p 302 L 4-10, L 11-20]. Thus all of the testimony was based on the information he received from the doctors, not his observations.

---

[6] In *Mitchell* the Court discussed this issue in footnote 3 and pointed out that a Motion in Limine is not final because the Court may change its point of view. In this instance the Court's ruling directly addressed the issues and was made immediately after the proffer and prior to the testimony. There was nothing which occurred at the trial between the ruling and the testimony which required a further objection.

CONCLUSION

The Court of Appeals failed to properly apply the law regarding whether the admission of evidence is inadmissible hearsay to the facts in this case. The evidence admitted was inadmissible hearsay and was improper character evidence submitted to bolster the testimony of Colon. The record shows that the Appellant properly objected to the improper testimony which was outside the scope of a lay witness. Further a Motion in Limine was heard and ruled upon. Therefore all issues were preserved. The Court of Appeals committed at least three errors of law and the Petitioner is entitled to a Writ of Certiorari in order that this court might address these errors of law and improper application of the facts which actually are in evidence.

Respectfully submitted, this the 1ST day of May, 2018, at Orangeburg, South Carolina.

Glenn Walters, Attorney at Law, PA
R. Bentz Kirby
Glenn Walters
Post Office Box 1346
Columbia, SC 29116

(803) 531-8844

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

Deandrea G. Benjamin, Circuit Court Judge

Appellant Case No. 2014-002126

The State,Respondent,

v.

Arthur William Macon,Appellant

CERTIFICATE OF SERVICE

On the 1st day of May, 2018, the undersigned served a copy of the Appellant's Petition for a Writ of Certiorari to the Court of Appeals upon counsel for the Respondent and the Court of Appeals by either hand delivery or placing a copy in the United States Mail, postage fully paid, to the following address:

J Benjamin Aplin
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

Daniel E Johnson
Solicitor, Fifth Judicial Circuit
PO Box 192
Columbia, SC 29202

The Hon. Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Glenn Walters, Attorney at Law, PA

R. Bentz Kirby
Glenn Walters
Post Office Box 1346
Columbia, SC 29116
(803) 531-8844
Attorneys for Appellant

STATE OF SOUTH CAROLINA
In The Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2018-000737

Opinion No. 2018-UP-031 (S.C. Court App. Filed January 17, 2018)

THE STATE,

Respondent,

vs.

ARTHUR WILLIAM MACON,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General
S.C. Bar Number 101464

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, SC 29202
(803) 748-4785

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF ISSUES ON CERTIORARI.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....3

ARGUMENT.....7

I. The Court of Appeals correctly determined Ricky Woodberry's testimony was not improper character evidence and was not bolstering.....7

II. The Court of Appeals correctly determined that although Ricky Woodberry's testimony was hearsay, any error was harmless and did not prejudice Petitioner.....11

III. The Court of Appeals correctly determined Petitioner did not preserve his argument for appeal that Ricky Woodberry's testimony was outside the scope of lay witness testimony.....14

CONCLUSION.....17

STATEMENT OF ISSUES ON CERTIORARI

I.

Whether the Court of Appeals correctly determined Ricky Woodberry's testimony was not improper character evidence and was not bolstering.

II.

Whether the Court of Appeals correctly determined that although Ricky Woodberry's testimony was hearsay, any error was harmless and did not prejudice Petitioner.

III.

Whether the Court of Appeals correctly determined Petitioner did not preserve his argument for appeal that Ricky Woodberry's testimony was outside the scope of lay witness testimony.

STATEMENT OF THE CASE

In January 2013, the Richland County Grand Jury indicted Petitioner for one count of armed robbery and four counts of kidnapping. On September 29-October 3, 2014, a jury trial was held in the Richland County Court of General Sessions with the Honorable DeAndrea G. Benjamin presiding. Petitioner was represented by Kristy G. Goldberg, Esq. The Respondent (the State) was represented by Assistant Solicitors Richard Cathcart and Jeremiah Shellenberg of the Fifth Circuit Solicitor's Office. At the conclusion of trial, the jury acquitted Petitioner of each kidnapping count, but convicted him of armed robbery. Following the verdict, the trial judge sentenced Petitioner to twenty three years' imprisonment.

On appeal, the Court of Appeals issued an unpublished opinion affirming Petitioner's conviction. State v. Macon, Op. No. 2018-UP-031 (Filed January 17, 2018). Thereafter, Petitioner filed a petition for rehearing with the Court of Appeals on February 16, 2018. The petition for rehearing was denied on March 22, 2018. Petitioner filed a Petition for a Writ of Certiorari with this Court. This Return on behalf of the State now follows.

STATEMENT OF FACTS

On August 30, 2012, Jason Colon entered the TD Bank branch on Farrow Road in Richland County and robbed it with a plastic pistol that was altered to appear authentic. (R. 133). Colon absconded with $6,000 and retreated to the Hilton Garden Inn across the street from the bank. After noticing police cars surrounding the TD Bank parking lot, Diana Williams saw a man running from that parking lot through the woods towards the parking lot of a Hilton Garden Inn. (R. 42). This man was later identified as Jason Colon. Thinking Colon looked suspicious, Williams called 911 as she followed him in her car. (R. 43). Once Colon reached the Hilton, Williams observed him speaking with another man who wore a collared yellow shirt. (R. 44). The man in yellow gestured toward the back of the parking lot "as if he was telling [Colon] to go back that way." (R. 44). The man in yellow then drove away in a black truck. (R. 46). As he backed out, he nearly struck Williams' vehicle and she was able to observe his face. (R. 45–46).

Williams remained on the phone with 911 during this time, giving details of what occurred and a description of the truck and its driver. (R. 51). Because the tailgate of the truck was down, Williams was only able to give a partial plate number. (R. 46). Based on Williams's description, Officer Frieda Wyatt eventually pulled over the black pickup truck. (R. 75). Wyatt identified Petitioner as the driver. (R. 76). Williams, still in her car, drove past where the black pickup was pulled over. (R. 88–90). After observing him, Williams identified Petitioner as the man she had seen speaking with Colon in the parking lot of the Hilton Garden Inn. (R. 55). Petitioner was placed under arrest for driving under suspension and was later charged with one count of armed robbery and four counts of kidnapping.

Investigator Jason Williams interviewed Colon upon his arrest. Williams expressed how distressed Colon appeared and explained the interview "took kind of a while because it seemed

like he wasn't all the way there." (R. 106). Williams explained Colon was "a little mentally challenged," but he was eventually able to get Colon's statement, in which he confessed to committing the robbery. (R. 106). Williams searched Petitioner's truck after it was impounded and discovered a police scanner tuned to the same channel used by Richland County Sheriff's deputies. (R. 104). Specifically, it was set to broadcast transmissions in the region where the TD Bank was located. (R. 105).

Investigator Kerry Johnson interviewed Petitioner after his apprehension. Initially, Petitioner explicitly informed Johnson he did not have anyone with him while he was driving around that day. (R. 152). However, after Johnson told Petitioner that Colon had identified him as his cousin who dropped him off outside the bank, Petitioner modified his statement. Petitioner claimed Colon was with him earlier in the day because Colon wanted a ride to "his homeboy's house" but Petitioner instead just dropped him off at a bus stop—which happened to be near the TD Bank. (R. 154).

At trial, the State sought to offer the testimony of Colon's father, Ricky Woodberry. Petitioner objected and the State proffered Woodberry's testimony outside the presence of the jury. (R. 113). Petitioner initially objected to Woodberry's testimony regarding how his son suffered a head injury during a shooting because Woodberry was not present when Colon was shot and therefore any statement he offered was hearsay. (R. 119). Petitioner additionally objected to the remainder of Woodberry's testimony—that Colon is "easily led" and "passive"—as improper character evidence designed to bolster Colon's testimony "making it seem more or less likely that [Colon] may be passive, may be cooperative with the police, may be telling the truth." (R. 120). Petitioner further argued the evidence was irrelevant. (R. 120).

After the proffer, the trial court ruled it would preclude Woodberry from mentioning that

his son is "easily led" or usually says yes, but would allow him to testify as to how Colon was injured and that Colon is passive. (R. 126). Woodberry then testified before the jury that his son was shot in the head by a stray bullet while they were living in Brooklyn, New York. (R. 128). Petitioner objected, saying "Your Honor, I would renew my previous objection." (R. 128, lines 15-16). The trial court sustained the objection; however, Petitioner did not move to strike and lodged no further objections[1]. (R. 128). Woodberry continued to discuss how the bullet entered Colon's temple and went through his frontal lobe. (R. 128). According to Woodberry, Colon was subsequently diagnosed with schizophrenia. (R. 129). Woodberry further attested that his son began talking to himself and became passive. (R. 129). Colon improved some with medication, but Woodberry testified he retained the mind of a thirteen-year-old. (R. 129).

Colon then testified.[2] Colon explained he went to the TD Bank the day of the robbery to cash his unemployment check. (R. 132, 140). However, Colon then testified Petitioner gave him a toy gun and told him to go into the bank and demand money. (R. 133). Colon explained Petitioner colored in part of the gun to make it look real. (R. 133). Colon testified that after the robbery he was supposed to meet Petitioner in front of the hotel and get into the bed of the truck. (R. 134). On cross examination, Colon indicated he and Petitioner discussed the robbery months prior, and that was when Petitioner gave him the gun. (R. 141). However, on redirect, Colon

---

[1] The record is unclear as to what Petitioner is objecting to at this point as well as what objection the trial judge is sustaining. It is possible that Petitioner is merely renewing his previous objections made *in limine* in the presence of the jury, or perhaps Petitioner was objecting on different grounds. Petitioner's statement "Your Honor, I would renew my previous objection" seems to indicate that Petitioner is placing his previous objection on the record. Accordingly, it is possible that by sustaining Petitioner's objection the trial judge was reaffirming her previous ruling that Woodberry would be precluded from testifying that Colon is easily lead or usually says yes, or the trial judge could have been sustaining an entirely new objection. In either event, Petitioner did not move to strike Woodberry's testimony, nor did Petitioner object any further and Woodberry continued to testify unabated.

[2] Although it appears Colon had reached a plea deal with the State, no evidence of that was offered before the jury. (R. 7).

ARGUMENT

In Petitioner's petition for a Writ of Certiorari, Petitioner alleges the Court of Appeals erred for three reasons. First, Petitioner alleges the Court of Appeals erred in finding that Woodberry's testimony was not improper character evidence and did not constitute bolstering. Secondly, Petitioner alleges the Court of Appeals erred in finding that Woodberry's testimony was so insignificant overall that it did not prejudice Petitioner and any error in its admission was harmless. Finally, Petitioner contends that his argument regarding Woodberry's testimony being outside the scope of a lay witness was properly preserved for appeal. Petitioner's arguments are meritless. Furthermore, the facts of this case do not feature any of the considerations governing review by this Court under rule 242 SCAR. Most significantly, there was no dissent in the decision of the Court of Appeals, and the decision of the Court of Appeals is not in conflict with a prior decision of this Court. Petitioner's request for a Writ of Certiorari should be denied.

I.

The Court of Appeals correctly determined Ricky Woodberry's testimony was not improper character evidence and was not bolstering.

Petitioner contends the Court of Appeals erred by finding that Woodberry's testimony was not improper character evidence and did not constitute bolstering. In support of that contention, Petitioner maintains the Court of Appeals improperly applied the law to the facts in this case. Specifically, Petitioner alleges the purpose of Woodberry's testimony was to bolster the testimony of Colon by suggesting that he was incapable of planning a robbery because of his medical condition. Petitioner's argument is without merit. The Court of Appeals properly affirmed the trial court's judgement, because Woodberry's testimony did not vouch for Colon's credibility or indicate that he was telling the truth.

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). An appellate court will not reverse based on the erroneous admission or exclusion of evidence unless prejudice has been shown. State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). "The prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain 'the assessment of witness credibility within the exclusive province of the jury.'" State v. Taylor, 404 S.C. 506, 514-515, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). "What commonly is called 'character evidence' is only such when 'character' is employed as a synonym for 'reputation'." Michelson v. U.S., 335 U.S. 469, 477, 69 S.Ct. 213, 219 (1948).

To determine whether the Court of Appeals erred in holding that Woodberry's testimony was properly admitted, it is instructive to review the relevant portion of the testimony. The following testimony was presented before the jury during the State's direct examination of Woodberry:

Q: Okay. And how long had y'all been in Brooklyn?

A: All our life until we came here.

Q: Okay. And what if anything occurred that made y'all come here?

A. My son was shot in the head.

Q. Okay. How did that occur?

A. He was standing in front of the building where we resided at, and two gentlemen came running through the building, you know, one was chasing the other, and they were shooting at each other. And my son happened to be standing there, and he caught a stray bullet.

MS. GOLDBERG: Your Honor, I would renew my previous objection.

THE COURT: All right. Objection sustained.

BY MR. CATHCART: And where did the bullet exactly hit him?

A: In his temple in his head, frontal lobe.

Q: Okay. And when -- did the bullet stay in there?

A: No, it went in and came out the other side.

Q: Through the temple lobe?

A: Yes.

Q: Frontal lobe?

A: Yes.

Q: So he basically got a lobotomy from a bullet?

A: Yes.

Q: Did the doctors indicate -- well, did that change him in any way?

A: Yes, it did.

Q: Okay. Did it make him in what way? How -- did he become what?

A: He was diagnosed with schizophrenia. He started talking to hisself [sic]. He became passive.

Q: Did the doctors indicate his mind would be that of what?

A: A 13-year-old.

Q: Okay. And he is how old now?

A: He is 28.

Q: And has he improved in the past couple of years?

A: No. No. While he is on medication he has gotten a little better.

Q: Okay. But he still has the mind of 13-year-old?

A: Yes, he does[3].

(R. 128-129).

Petitioner argues Woodberry's testimony served only as character evidence that Colon is "easily led by others" and therefore "has a propensity to act as instructed by others." (Petition for Writ of Certiorari p. 5, 7). This argument is misleading as it is premised on testimony that was expressly excluded by the trial judge following the proffer. Woodberry indicated outside the presence of the jury that his son is easily led and most of the time he will say yes when asked to do something. (R. 116). However, prior to Woodberry presenting his testimony to the jury, the trial judge ruled it would "not allow in the testimony about [Colon] being easily led" or "usually saying yes." (R. 126). Woodberry complied with this restriction and never testified before the jury that Colon was easily led or usually says yes. Thus, the portion of Woodberry's testimony about which Petitioner complains was not presented to the jury. The jury merely heard

[3] Arguably, Petitioner has not preserved any challenges to this testimony. During direct examination, Petitioner renewed his previous objection, which the trial court sustained. He did not move to strike any of the testimony, offered immediately before the objection, nor did he request a curative instruction. Therefore, he failed to preserve any issue for the court's review because he received no adverse ruling to appeal. See State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) ("The trial judge ruled in appellant's favor and appellant failed to move to strike or request a curative instruction. Therefore, this issue is not preserved for review."); State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) ("When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue."). Furthermore, if we assume the trial judge sustained the objection to testimony it had previously ruled to allow in the proffer, Appellant lodged no further objections to Woodberry's testimony. There is, therefore, no preserved contemporaneous objection for the Court to review.

Woodberry testify his son was diagnosed with schizophrenia, was passive, and had the mind of a thirteen-year-old. None of these descriptions vouch for Colon's credibility or indicate whether he is telling the truth. Furthermore, these descriptions do not reference Colon's reputation. Woodberry's testimony that his son was diagnosed with schizophrenia and has the mind of a thirteen-year-old describe Colon's medical difficulties. Woodberry's personal knowledge of these difficulties are based on his acquaintance with his son's health. Additionally, the word "passive" does not refer to Colon's credibility or reputation. Even assuming for the sake of argument that the word passive does refer to Colon's character, Woodberry used the word to describe his son in the context of his son being diagnosed with schizophrenia and talking to himself. Therefore, the jury was unlikely to draw any inference that Colon being passive relates in any way to his credibility or reputation. The jury was more likely to conclude Colon was a physically and mentally damaged person because of an unfortunate event from his childhood. Therefore, Woodberry's testimony does not constitute bolstering or improper character evidence. Petitioner's request for a Writ of Certiorari should be denied.

II.

The Court of Appeals correctly determined that although Ricky Woodberry's testimony was hearsay, any error was harmless and did not prejudice Petitioner.

Next, Petitioner argues the Court of Appeals erred in holding that Woodberry's testimony, while constituting hearsay[4], was insignificant in relation to the case overall and therefore any error was harmless. In support of this claim, Petitioner argues Woodberry was unqualified to provide medical testimony about the effect of Colon's previous injuries on his

[4] The State disagrees with the Court of Appeals finding that Woodberry's testimony was hearsay. Woodberry's statements were not offered to prove the truth of the matter asserted. The State did not offer Woodberry's testimony to prove that Colon was shot while standing outside of his apartment building in Brooklyn, New York. Woodberry's statements were offered to prove Colon suffered from mental deficiencies because of an injury he suffered during childhood, not to prove the specific details regarding how Colon was shot.

mental status. Petitioner maintains the effect of this testimony was to suggest that Petitioner controlled Colon. Petitioner's argument is without merit. The Court of Appeals properly affirmed the trial court's judgement, because any error in the admission of Woodberry's testimony was harmless and did not prejudice Petitioner.

"Whether an error is harmless depends on the circumstances of the particular case." Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result." State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "Error is harmless when it could not reasonably have affected the result of the trial." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E. 2d 888 (1971)). To warrant reversal, the admission of evidence must not only be in error, but also result in prejudice to the appellant. State v. Gault, 375 S.C. 570, 574, 654 S.E.2d 98, 100 (Ct. App. 2007). Accordingly, an appellant must demonstrate "there is a reasonable probability the verdict was influenced by the challenged evidence." Id. The introduction of inadmissible evidence is harmless when the evidence is merely cumulative to other evidence presented without objection. State v. Kirton, 381 S.C. 7, 37-38, 671 S.E.2d 107, 122-23 (Ct. App. 2008).

As an initial matter, Woodberry's statements were not hearsay. Woodberry's description of his son's shooting and subsequent health difficulties were not offered to prove Petitioner committed the alleged robbery, nor were they offered to prove that Colon was schizophrenic. Woodberry's testimony was offered to show that Colon suffered from a mental defect because of a gunshot wound he suffered when he was a child. This was relevant evidence because it assisted

the jury in understanding Colon's difficulties expressing himself on the witness stand. Woodberry's testimony thereby helped to contextualize Colon's testimony.

To the extent Woodberry's testimony contained any hearsay, it indicated no more than Colon suffered from a mental defect, which already was attested to without objection by Investigator Williams. Investigator Williams explained three separate times Colon was "a little mentally challenged." (R.106.) Accordingly, Woodberry's testimony was cumulative to evidence that was already presented to the jury without objection. Additionally, Woodberry's testimony was an insignificant detail in relation to the case overall. Woodberry's statements regarding Colon's mental condition did not implicate Petitioner as a participant in the robbery nor did they vouch for Colon's credibility. If anything, Woodberry's statement that Colon was schizophrenic may have detracted from Colon's credibility. Therefore, any error in the admission of Woodberry's testimony was harmless.

Moreover, Petitioner did not suffer any prejudice from Woodberry's testimony. Not only was Petitioner not prejudiced by Woodberry describing Colon's medical condition, Petitioner used the testimony he previously sought to exclude - that Colon was easily led and usually says yes - to his advantage in closing argument. Petitioner argued in closing:

> I don't think there is evidence of [Petitioner's] guilt. I think there is either clear evidence that he is not guilty or there is really no evidence as to what happened because we don't know what Mr. Colon is really saying. He just agrees with whatever anyone tells him to say.

(R. 200, lines 10-16). The trial judge ruled prior to Woodberry's testimony that he could not testify Colon was easily led or usually says yes. Woodberry complied with that restriction and yet Petitioner attacked Colon's credibility with the same testimony he sought to exclude. (R. 126). Therefore, even if Woodberry was permitted to tell the jury that Colon was easily led,

Petitioner was not prejudiced because he used the same facts to his advantage. Petitioner's request for a Writ of Certiorari should be denied.

III.

The Court of Appeals correctly determined Petitioner did not preserve his argument for appeal that Ricky Woodberry's testimony was outside the scope of lay witness testimony.

Petitioner contends the Court of Appeals erred in holding his argument regarding Woodberry's testimony being outside the scope of a lay witness was not preserved for appeal. On the contrary, the Court of Appeals correctly held Petitioner failed to preserve this argument for appeal because it was not raised to the trial court. Even assuming for the sake of argument that Petitioner did raise an objection on the grounds of improper lay witness testimony, Petitioner did not ask for a curative instruction after Woodberry's testimony, nor did he move for a mistrial. Perhaps most significantly, Petitioner did not object any further as Woodberry continued to testify about Colon's medical condition.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). "When an objecting party is sustained, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is

insufficient, in order to create an appealable issue." State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010).

To determine whether Petitioner properly preserved his argument for appeal, it is instructive to review the objection that Petitioner placed on the record. Petitioner summarized his objection as follows: "So I guess to summarize, my grounds would be hearsay, improper character evidence of a witness, and relevance." (R. 120, lines 10-12). Petitioner did not cite improper lay witness testimony as one of his grounds for objection. Therefore, this particular ground for objection was not raised to or ruled upon by the trial court and thus is not preserved for consideration on appeal. Petitioner did lodge a general objection during Woodberry's direct testimony that was sustained. The record is unclear as to exactly the basis of Petitioner's objection. Petitioner's statement: "Your Honor, I would renew my previous objection" would seem to indicate that Petitioner was objecting on the aforementioned grounds of hearsay, improper character evidence, and relevance. (R. 120, 128). Even assuming for the sake of argument that Petitioner was objecting on the basis of Woodberry's statements being outside the scope of proper lay witness testimony, Petitioner did not object to Woodberry's continued testimony on the subject of his son's health. Furthermore, Petitioner didn't move to strike any testimony, ask for a curative instruction, or move for a mistrial. Therefore, there is no appealable issue preserved for this Court to consider.

Even if Petitioner had appropriately preserved this issue for appeal, Woodberry's statements about his son's health were not medical testimony. Woodberry was not offering a professional diagnosis of Colon's schizophrenia. Woodberry was offering a description of Colon's mental defects that were rationally based on his observations of his son. The Court of

Appeals correctly ruled that this issue was not properly preserved for appeal. Petitioner's request for a Writ of Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

SCOTT MATTHEWS
Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: Scott Matthews
Scott Matthews
S.C. Bar # 101464

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

ATTORNEYS FOR RESPONDENT

May 29, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
Honorable Deandrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2018-000737

THE STATE,

Respondent,

vs.

ARTHUR WILLIAM MACON;

Petitioner.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by sending two copies of the same to:

R. Bentz Kirby, Esquire
P.O. Box 1346
Orangeburg, SC 29116

I further certify that all parties required by Rule to be served have been served.
This 29th day of May, 2018.

Sally Ellison

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

The Supreme Court of South Carolina

The State, Respondent,

v.

Arthur William Macon, Petitioner.

Appellate Case No. 2018-000737
Trial Court Case No. 2013-GS-40-00579

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina
October 18, 2018

cc:
Glenn Walters, Sr., Esquire
R. Bentz Kirby, Esquire
Alan McCrory Wilson, Esquire
John Benjamin Aplin, Esquire
Daniel Edward Johnson, Esquire
Jonathan Scott Matthews, Esquire
The Honorable DeAndrea G. Benjamin
Jeanette W. McBride
The Honorable Jenny Kitchings

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 06, 2018

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Arthur William Macon
Lower Court Case No. 2013GS4000579
Appellate Case No. 2014-002126

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Glenn Walters, Sr., Esquire
R. Bentz Kirby, Esquire
John Benjamin Aplin, Esquire
Susan Ranee Saunders, Esquire

A. 612

STATE OF SOUTH CAROLINA)
)
COUNTY OF Richland)

IN THE COURT OF COMMON PLEAS

Arthur William Macon, SCDC# 304226,)
Plaintiff(s))

vs.)

State of South Carolina)
Defendant(s))

CIVIL ACTION COVERSHEET

2019
~~2018~~-CP - 40- 5591

Submitted By: Charles Grose
Address: 404 Main Street, Greenwood, SC 29646

SC Bar #: 66063
Telephone #: 864-538-4466
Fax #: 864-538-4405
Other:
E-mail: charles@groselawfirm.com

RICHLAND COUNTY FILED
2019 OCT -4 P 3:02
JEANNETTE W. WALKER C.C.P. & G.S.

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. **This form is NOT required to be filed in E-Filed Cases.**

DOCKETING INFORMATION (*Check all that apply)*

***If Action is Judgment/Settlement do not complete*

☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION *(Check One Box Below)*

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-NI-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
- ☒ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Incapacitated Adult Settlement (790)
- ☐ Other (799) _____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Permanent Restraining Order (680)
- ☐ Interpleader (690)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____ **Date:** Sept. 23, 2019

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2019-CP-40-5591
Arthur William Macon, SCDC# 304226, Applicant,	)	
	)	**Application for Post-Conviction Relief**
vs.	)	
	)	
State of South Carolina, Respondent.	)	

RICHLAND COUNTY FILED 2019 OCT -4 PM 5:02 JEANNETTE W. McBRIDE C.C.P. & G.S.

Pursuant to the Uniform Post-Conviction Relief Act, S.C. Code Ann. § 17-27-10 *et seq.*, Arthur William Macon submits this application for post-conviction relief.[1]

1) Mr. Macon is confined at the Broad River Correctional Institution.

2) The Honorable Deandrea G. Benjamin, Presiding Judge for the Fifth Judicial Circuit, imposed sentence.

3) The co-defendant is Jason Colon.

4) Judge Benjamin imposed the sentence on indictment number 2013-GS-40-00579, charging Mr. Macon with armed robbery. The jurors acquitted Mr. Macon of four counts of kidnapping.

5) On October 3, 2014, Judge Benjamin sentenced Mr. Macon to twenty-three years imprisonment.

[1] This pleading is based on Form 5, Revised 3/2003, which can be found on the South Carolina Judicial Department website. Mr. Macon reserves the right to amend this pleading is provided by law. Rule 71.1(d), SCRCP; S.C. Code Ann. § 17-27-90 (expressly contemplating supplemental or amended PCR application); *Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) ("[T]he interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims."); *see also Robertson v. State*, 418 S.C. 505, 522, 795 S.E.2d 29, 38 (2016) (applying *Strickland* standard to performance of PCR counsel). When assisting Mr. Macon in drafting this pleading, undersigned counsel had access to the Record on Appeal, which omitted numerous pages from the trial transcript. Counsel intends to review the full trial transcript and amend this application.

6) The finding of guilt followed a plea of not guilty and trial by jury.

7) Mr. Macon appealed the conviction and sentence.

8) The Court of Appeals affirmed Mr. Macon's conviction and sentence. *State v. Macon*, Appellate Case No. 2014-002126, Unpublished Opinion No. 2018-UP-031 (Filed January 17, 2018). By written order dated March 28, 2018, the South Carolina Court of Appeals denied Mr. Macon's Petition for Rehearing. By written order dated October 18, 2018, the South Carolina Supreme Court denied Mr. Macon's petition for a writ of *certiorari* (Appellate Case No. 2018-000737). The Remittitur issued on November 6, 2018.

9) Not applicable because Mr. Macon appealed and did not answer "no" to number 7 above.

10) Grounds for relief:

a) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, because trial counsel had a conflict of interest. *Strickland v. Washington,* 466 U.S. 668 (1984).

b) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the pre-trial stage of his case. *Strickland.*

c) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the trial of his case. *Strickland.*

d) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3

and 14 of the South Carolina Constitution, while the jurors were deliberating about his guilt or innocence. *Strickland.*

e) The cumulative effect of trial counsel's errors entitles Mr. Macon to a new trial. *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles v. Whitley*, 514 U.S. 419 (1995).

11) Supporting facts:

a) Appointed trial counsel, who is married to a Richland County Solicitor, had a conflict of interest, as a result of that relationship, that was not disclosed to Mr. Macon. *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008), *abrogated on other grounds by by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *and see Commonwealth v. Croken*, 432 Mass. 266, 273, 733 N.E.2d 1005, 1011 (2000) ("where a criminal defense lawyer represents a client and a close relative or an intimate companion is a colleague of the prosecutor who seeks to convict the client, the requirements of the [ethical] rule must be met") (citing Massachusetts Bar Association, Committee on Professional Ethics, Opinion No. 95–3 (relative of a district attorney could represent criminal defendants whom the district attorney's office prosecuted, provided [1] the relative not represent clients in cases in which the district attorney is involved; and [2] the conflict be fully disclosed in writing and consented to by the client)); *People v. Jackson*, 167 Cal. App. 3d 829, 213 Cal. Rptr. 521 (Ct. App. 1985) (failure of appointed trial counsel to inform defendant of counsel's ongoing "dating" relationship with prosecutor denied defendant his right to effective assistance of counsel under the California Constitution).

b) Trial counsel's performance was deficient and prejudicial during the pre-trial stages of Mr. Macon's case in one or more of the following ways:

1) Failing to investigate, develop, and present evidence to establish that Mr. Macon in not guilty of the charge of armed robbery. *Ard v. Catoe*, 372 S.C. 318, 642

S.E.2d 590 (2007).

2) Failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on January 16, 2013 and the face of the indictment states the grand jurors returned a "true bill" on July 16, 2014.

c) Trial counsel's performance was deficient and prejudicial during the trial of Mr. Macon's case in one or more of the following ways:

1) Failing to object to the prosecutor's closing argument calling Mr. Macon "a liar." Tr. 368, line 9. *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937) ("referring to defendant as a 'bare faced liar'" during closing argument required new trial); *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (cumulative error of solicitor's improper argument calling defendant a liar and improperly excluded evidence warranted reversal), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002).

2) Failing to object to the prosecution and prosecution witnesses improperly vouching for Jason Colon, who was the co-defendant and material witness for the state. *E.g. State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566, (2018); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

d) Trial counsel's performance was deficient and prejudicial while the jurors were deliberating about Mr. Macon's guilt or innocence in one or more of the following ways:

1) When the jurors sent a note (Court's Exhibit 4) stating, "We are not unanimous on any of the charges yet, how do you want us to proceed?," and the Solicitor

agreed, "They are deadlocked," trial counsel failed object to the trial judge instructing the jurors to continue deliberating when that instruction did not instruct the jurors that "the verdict of the jury should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgment which was not concurred in by the majority." *Allen v. United States*, 164 U.S. 492, 501 (1896).

2) When the jurors sent a note (Court Exhibit 5) stating, "Still at a stalemate," trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.

3) When the jurors sent a note (Court's Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.

4) When the jurors sent a note (Court's Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," trial counsel failed to object to the trial judge's *Allen* charge that singled out the sole juror that was holding out for acquittal. *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001); *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999). *See also Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002).

5) When the jurors sent a note (Court's Exhibit 12) stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set

in and we need refreshing," and the foreman of the jury informed the trial judge the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.

e) The cumulative effect of trial counsel's errors, as set forth in 11(a)-(d), entitles Mr. Macon to a new trial. *Williams; Kyles.*

12) Prior to filing this application, Mr. Macon has not filed any petitions in state or federal court other than the appeals specified in number 8 above.

13) Not applicable because Mr. Macon has not filed any petitions in state or federal court other than the appeals specified in number 8 above, and he did not answer "yes" to number 12 above.

14) No ground set forth in number 10 above has been presented to this Court or any other state or federal court.

15) Not applicable because Mr. Macon did not answer "yes" to number 14 above.

16) No ground set forth in number 10 above has been presented to this Court or any other state or federal court because this application is the first opportunity for Mr. Macon to raise allegations of ineffective assistance of counsel.

17) Mr. Macon was represented by counsel during his jury trial and during his appeals to the Court of Appeals and Supreme Court.

18) Kristy G. Goldberg of the Law Office of Kristy Goldberg, LLC 1720 Main Street, Suite 303, Columbia, SC 29201, represented Mr. Macon during his jury trial. Glenn Walters and R. Bentz Kirby, both of Glenn Walters & Associates, PA, P.O. Box 1346, Orangeburg, SC 29116, represented Mr. Macon during his appeals to the Court of Appeals and Supreme Court.

19) This Court should issue an order granting post-conviction relief, vacating the conviction and sentence, and remanding this case to the Court of General Sessions for a new trial.

20) Mr. Macon is not under any sentence from any other court that he has not challenged.

Respectfully Submitted,

By

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Arthur William Macon

VERIFICATION

I, Arthur William Macon, 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.

Arthur Macon

Arthur William Macon

Sworn to and subscribed before me

this 19th day of Sept, 2019

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 5/31/2023

RICHLAND COUNTY
FILED
2019 OCT -4 PM 5:02
JEANNETTE W. McBRIDE
C.C.P. & G.S.

WITNESSES

(S) Jason Williams – Richland County Sheriff

ARREST WARRANT NUMBER

2012A4010200696

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: JUL 16 2014

ORIGINAL

VERDICT

Guilty

Foreperson of Petit Jury

Date: 10-3-14

AMENDED

DOCKET NO. 2013GS40000579

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JANUARY TERM 2013

67

THE STATE

vs.

Arthur William Macon

Indictment for
ARMED ROBBERY

SC Code: **16-11-0330(A)**
CDR Code: **0139**

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I

hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on JANUARY 16, 2013, the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Arthur William Macon did in Richland County on or about August 30, 2012, commit robbery by feloniously taking from the person or presence of Marcella Delpino and/or Brittney Ellison and/or Shonda Wheeler and/or Courtney Nick, by means of force or intimidation, goods or monies of TD BANK, such goods or monies being described as U.S. CURRENCY, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he or she was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of §16-11-330(A), SC Code of Laws (1976, as amended)

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

DAN JOHNSON, SOLICITOR

ARREST WARRANT

2012A4010200696

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Richland Bond Court

THE STATE 1208032230 -R3

against

Arthur William Macon

Address: 18 Flora Circle

Columbia, SC 29223-6906

Phone: (803)699-7220 SSN: 125-68-7518

Sex: M Race: B Height: 5 11 Weight: 172

DL State: SC DL #: 011481011

DOB: 9/30/1984 Agency ORI #: 04000

Prosecuting Agency: Richland County Sheriff Department

Prosecuting Officer: Jason Williams - 1340

Offense: Armed Robbery

Offense Code: 0139

Code/Ordinance Sec: 16-11-0330(A)

This warrant is CERTIFIED FOR SERVICE in the [ ] County/ [ ] Municipality of . The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Arthur Macon on 8-31-12

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Richland County General Sessions
1701 Main Street
P O Box 192
Columbia, SC 29202

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

AFFIDAVIT

ORIGINAL A. 62

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

STATE OF SOUTH CAROLINA)

[X] County/ [ ] Municipality of)

Richland Bond Court)

Personally appeared before me the affiant Jason Williams who being duly sworn deposes and says that defendant Arthur William Macon did within this county and state on or about 8/30/2012 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Richland Bond Court) in the following particulars:

DESCRIPTION OF OFFENSE: Armed Robbery

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on or about 8/30/12 while at 8850 Farrow Rd (TD Bank) in the Upper Township Magisterial District of RICHLAND COUNTY, one Arthur William Macon did commit the crime of Armed Robbery. It is believed the defendant committed the crime Armed Robbery because he did with the intent to permanently deprive TD BANK conspire with his CO-Defendant to rob the bank while using a weapon. The defendant served as a look out as his Co-defendant entered the bank and demanded the teller to put cash into a bag. Once the Co-defendant exited the bank with the money both fled the scene on foot and were later arrested and positively identified by eye witness. Affiant and others are witness to prove same

Signature of Affiant

STATE OF SOUTH CAROLINA)

[X] County/ [ ] Municipality of)

Richland Bond Court)

Affiant's Address 5623 Two Notch Road
Columbia, SC 29223-

Affiant's Telephone (803)576-3000

RICHLAND COUNTY FILED 2012 SEP 20 AM 11:05 JEANETTE W. WALKER CLERK C.C.P. & G.S.

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 8/30/2012 defendant Arthur William Macon did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Richland Bond Court) as set forth below:

DESCRIPTION OF OFFENSE: Armed Robbery

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 8/30/2012

(L.S.)

Signature of Issuing Judge

Josef Robinson

Judge Code: 7220

Judge's Address

Judge's Telephone (803)576-2341

Issuing Court: [ ] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL ORIGINAL ORIGINAL

BAIL set by

Judge B. Wofford-Kanwat

on AUG 31 2012

Type and Amount: 30,000 CS/GB

Name of Surety:

PRELIMINARY HEARING held by

Judge

on

Defendant Attorney:

Decision:

DISPOSITION before

Judge

on

by

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition:

Sentence:

JURORS

WITNESSES

Name:
Address:
Telephone:

Name:
Address:
Telephone:

Name:
Address:
Telephone:

Name:
Address:
Telephone:

Name:
Address:
Telephone:

Name:
Address:
Telephone:

Name:
Address:
Telephone:

Name:
Address:
Telephone:

Name:
Address:
Telephone:

CODEFENDANTS

23 AUG 08 2012
JOHNSON COUNTY, KANSAS
CLERK OF THE DISTRICT COURT

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)
STATE)
VS: Arthur William Macon)
AKA:)
Race: Black Sex: Male Age: 30)
DOB: 9-30-84 SS#: 125-68-7518)
Address: 18 Flora Circle)
City, State, Zip: Columbia SC)
DL# * SID#)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013 -GS- 40 - 579
A/W#: 2013A4010200696
Date of Offense: 8-30-13
S.C. Code §: 16-11-330(A)
CDR Code #: 0139

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS
TO: Armed Robbery
In violation of § 16-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 0139
☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☑ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. ____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor | 6648 SC Bar # | Defendant | Attorney for Defendant | 72675 SC Bar #

WHEREFORE, the Defendant is committed to the ☒ **State Department of Corrections** ☐ **County Detention Center,** for a determinate term of 23 ~~days/months/years~~ or ☐ under the **Youthful Offender Act** not to exceed ____ years and/or to pay a fine of $ ____ ; provided that upon the service of ____ days/months/years and or payment of $ ____ ; plus costs and assessments as applicable*; the balance is suspended with **probation** for ____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: ____

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. 10 mos

☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**

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	$ ____
§14-1-211 (A)(2)(DUI Surcharge)	$100	$ ____
§56-5-2995 (DUI Assessment)	$12	$ ____
§56-1-286 (DUI Breath Test)	$25	$ ____
§47.12 (Public Def/Prob)	$500	$ ____
§14-1-212 (Law Enforce. Funding)	$25	$ ____
§14-1-213 (Drug Court Surcharge)	$100	$ ____
§50-21-114 (BUI Breath Test Fee)	$50	$ ____
§56-5-2942(J) (Vehicle Assessment)	$40/ea	$ ____
§90.7(SCCJA Surcharge)	$5	$ ____
3% to County (if paid in installments)		$ ____
TOTAL		$ ____

____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. ____

May serve W/E beginning ____
Substance Abuse Counseling ☐

Random Drug/Alcohol Testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ ____ Beginning ____
$ ____ Paid to Public Defender Fund

Other: ____

☐ Appointed PD or appointed other counsel, §47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk: Jeanette McBride
Court Reporter: McCurdy

Presiding Judge: NM
Judge Code: 2161
Sentence Date: 10-3-14

SCCA/217 (11/2009)

ORIGINAL

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

October 7, 2019

RICHLAND COUNTY
FILED
2019 OCT 10 PM 2:49
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

The Honorable Jeanette W. McBride
Clerk of Court, Richland County
PO Box 2766
Columbia, SC 29202-2766

Re: *Arthur William Macon v. State of South Carolina*
Case Number: 2018-CP-40-05591

Dear Ms. McBride:

Enclosed for filing, please find Mr. Macon's petition for a writ of mandamus, along with a certificate of service. Because this action seeks post-conviction relief, I understand there is not a filing fee.

Also, this letter will confirm that Mr. Macon is withdrawing this motion, as moot, because his PCR application was filed last Friday afternoon after emailing this motion to the Court and counsel. Copies of the email correspondence are attached to the motion.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Mr. Arthur William Macon
Megan Harrigan Jameson, Esquire

STATE OF SOUTH CAROLINA)
)
COUNTY OF Richlad)
)
Arthur William Macon, SCDC# 304226)
Plaintiff,)
vs.)
)
State of South Carolina)
Defendant.)

IN THE COURT OF COMMON PLEAS
5th JUDICIAL CIRCUIT

CASE NO.: 2019-CP-40-05591

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

RICHLAND COUNTY FILED 2019 OCT 10 PM 2:49 JEANETTE W. McBRIDE C.C.P. & G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Charles Grose, Bar No. 66063 Address: 404 Main Streeet, Greenwood, SC 29646 Phone: 864-538-4466 Fax 864-538-4466 E-mail: charles@groselawfirm.com Other: ____	S.C. Attoreny General's Office, Bar No. ____ Address: Columbia, SC Phone: 803-734-3737 Fax____ E-mail: ____Other: ____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Petition for Writ of Mandamus
Estimated Time Needed: n/a Court Reporter Needed: ☐ **YES**/☒ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff /☐ Defendant — October 7, 2019 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
)	Case No. 2019-CP-40-_____
Arthur William Macon, SCDC# 304226,)	
Applicant,)	**Petition for Writ of Mandamus**
)	
vs.)	
)	
)	
State of South Carolina,)	
Respondent.)	
)	

RICHLAND COUNTY FILED 2019 OCT 10 PM 2:49 JEANNETTE W. MCBRIDE C.C.P. & G.S.

Arthur Macon petitions this Court for a writ of mandamus requiring the Clerk of Court for Richland County to file his application for post-conviction relief, a copy of which is attached, which was mailed on September 23, 2019. Dominque McDaniel of the Richland County Clerk of Court's Office has confined receipt of the application but explained it will not be filed until another branch of the Clerk of Court's office process the criminal case record. This Court's intervention is needed to prevent prejudice as time is running on the statute of limitations. Undersigned counsel has communicated with the Clerk of Court's Office without success.

IT IS SO MOVED.

Respectfully Submitted,

By _____

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Arthur William Macon

October 4, 2019
Greenwood, South Carolina

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

September 23, 2019

The Honorable Jeanette W. McBride
Clerk of Court, Richland County
PO Box 2766
Columbia, SC 29202-2766

Re: *Arthur William Macon v. State of South Carolina*
Case Number: 2018-CP-40-_____

Dear Ms. McBride:

Enclosed for filing, please find the original and one copy of Mr. Macon's application for post-conviction relief. Please file the original and return the copy to me in the enclosed envelope.

Because this action seeks post-conviction relief, I understand there is not a filing fee.

I also understand your office will forward a copy of this application to the Attorney General's Office pursuant to S.C. Code Ann. § 17-27-40; however, by copy of this letter to the post-conviction relief section, I am providing the Attorney General's Office with a courtesy copy.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: Mr. Arthur William Macon

Megan Harrigan Jameson, Esquire
S.C. Attorney General's Office

STATE OF SOUTH CAROLINA)
)
COUNTY OF Richland)

IN THE COURT OF COMMON PLEAS

Arthur William Macon, SCDC# 304226,)
Plaintiff(s))

vs.

State of South Carolina)
Defendant(s))

CIVIL ACTION COVERSHEET

2018-CP - 40- _____

Submitted By: Charles Grose
Address: 404 Main Street, Greenwood, SC 29646

SC Bar #: 66063
Telephone #: 864-538-4466
Fax #: 864-538-4405
Other:
E-mail: charles@groselawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. **This form is NOT required to be filed in E-Filed Cases.**

DOCKETING INFORMATION (*Check all that apply)*

If Action is Judgment/Settlement do not complete

☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION *(Check One Box Below)*

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-NI-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
- ☒ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Incapacitated Adult Settlement (790)
- ☐ Other (799) _____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)
- ☐ Permanent Restraining Order (680)
- ☐ Interpleader (690)

Submitting Party Signature: _____ **Date:** Sept. 23, 2019

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2019-CP-40-_____
Arthur William Macon, SCDC# 304226, Applicant,	)	
	)	**Application for Post-Conviction Relief**
vs.	)	
	)	
State of South Carolina, Respondent.	)	

Pursuant to the Uniform Post-Conviction Relief Act, S.C. Code Ann. § 17-27-10 *et. seq.*, Arthur William Macon submits this application for post-conviction relief.[1]

1) Mr. Macon is confined at the Broad River Correctional Institution.

2) The Honorable Deandrea G. Benjamin, Presiding Judge for the Fifth Judicial Circuit, imposed sentence.

3) The co-defendant is Jason Colon.

4) Judge Benjamin imposed the sentence on indictment number 2013-GS-40-00579, charging Mr. Macon with armed robbery. The jurors acquitted Mr. Macon of four counts of kidnapping.

5) On October 3, 2014, Judge Benjamin sentenced Mr. Macon to twenty-three years imprisonment.

[1] This pleading is based on Form 5, Revised 3/2003, which can be found on the South Carolina Judicial Department website. Mr. Macon reserves the right to amend this pleading is provided by law. Rule 71.1(d), SCRCP; S.C. Code Ann. § 17-27-90 (expressly contemplating supplemental or amended PCR application); *Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) ("[T]he interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims."); *see also Robertson v. State*, 418 S.C. 505, 522, 795 S.E.2d 29, 38 (2016) (applying *Strickland* standard to performance of PCR counsel). When assisting Mr. Macon in drafting this pleading, undersigned counsel had access to the Record on Appeal, which omitted numerous pages from the trial transcript. Counsel intends to review the full trial transcript and amend this application.

6) The finding of guilt followed a plea of not guilty and trial by jury.

7) Mr. Macon appealed the conviction and sentence.

8) The Court of Appeals affirmed Mr. Macon's conviction and sentence. *State v. Macon*, Appellate Case No. 2014-002126, Unpublished Opinion No. 2018-UP-031 (Filed January 17, 2018). By written order dated March 28, 2018, the South Carolina Court of Appeals denied Mr. Macon's Petition for Rehearing. By written order dated October 18, 2018, the South Carolina Supreme Court denied Mr. Macon's petition for a writ of *certiorari* (Appellate Case No. 2018-000737). The Remittitur issued on November 6, 2018.

9) Not applicable because Mr. Macon appealed and did not answer "no" to number 7 above.

10) Grounds for relief:

a) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, because trial counsel had a conflict of interest. *Strickland v. Washington,* 466 U.S. 668 (1984).

b) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the pre-trial stage of his case. *Strickland.*

c) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the trial of his case. *Strickland.*

d) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3

and 14 of the South Carolina Constitution, while the jurors were deliberating about his guilt or innocence. *Strickland.*

e) The cumulative effect of trial counsel's errors entitles Mr. Macon to a new trial. *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles v. Whitley*, 514 U.S. 419 (1995).

11) Supporting facts:

a) Appointed trial counsel, who is married to a Richland County Solicitor, had a conflict of interest, as a result of that relationship, that was not disclosed to Mr. Macon. *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008), *abrogated on other grounds by by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *and see Commonwealth v. Croken*, 432 Mass. 266, 273, 733 N.E.2d 1005, 1011 (2000) ("where a criminal defense lawyer represents a client and a close relative or an intimate companion is a colleague of the prosecutor who seeks to convict the client, the requirements of the [ethical] rule must be met") (citing Massachusetts Bar Association, Committee on Professional Ethics, Opinion No. 95–3 (relative of a district attorney could represent criminal defendants whom the district attorney's office prosecuted, provided [1] the relative not represent clients in cases in which the district attorney is involved; and [2] the conflict be fully disclosed in writing and consented to by the client)); *People v. Jackson*, 167 Cal. App. 3d 829, 213 Cal. Rptr. 521 (Ct. App. 1985) (failure of appointed trial counsel to inform defendant of counsel's ongoing "dating" relationship with prosecutor denied defendant his right to effective assistance of counsel under the California Constitution).

b) Trial counsel's performance was deficient and prejudicial during the pre-trial stages of Mr. Macon's case in one or more of the following ways:

1) Failing to investigate, develop, and present evidence to establish that Mr. Macon in not guilty of the charge of armed robbery. *Ard v. Catoe*, 372 S.C. 318, 642

S.E.2d 590 (2007).

2) Failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on January 16, 2013 and the face of the indictment states the grand jurors returned a "true bill" on July 16, 2014.

c) Trial counsel's performance was deficient and prejudicial during the trial of Mr. Macon's case in one or more of the following ways:

1) Failing to object to the prosecutor's closing argument calling Mr. Macon "a liar." Tr. 368, line 9. *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937) ("referring to defendant as a 'bare faced liar'" during closing argument required new trial); *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (cumulative error of solicitor's improper argument calling defendant a liar and improperly excluded evidence warranted reversal), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002).

2) Failing to object to the prosecution and prosecution witnesses improperly vouching for Jason Colon, who was the co-defendant and material witness for the state. *E.g. State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566, (2018); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

d) Trial counsel's performance was deficient and prejudicial while the jurors were deliberating about Mr. Macon's guilt or innocence in one or more of the following ways:

1) When the jurors sent a note (Court's Exhibit 4) stating, "We are not unanimous on any of the charges yet, how do you want us to proceed?," and the Solicitor

agreed, "They are deadlocked," trial counsel failed object to the trial judge instructing the jurors to continue deliberating when that instruction did not instruct the jurors that "the verdict of the jury should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgment which was not concurred in by the majority." *Allen v. United States*, 164 U.S. 492, 501 (1896).

2) When the jurors sent a note (Court Exhibit 5) stating, "Still at a stalemate," trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.

3) When the jurors sent a note (Court's Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.

4) When the jurors sent a note (Court's Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," trial counsel failed to object to the trial judge's *Allen* charge that singled out the sole juror that was holding out for acquittal. *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001); *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999). *See also Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002).

5) When the jurors sent a note (Court's Exhibit 12) stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set

in and we need refreshing," and the foreman of the jury informed the trial judge the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.

e) The cumulative effect of trial counsel's errors, as set forth in 11(a)-(d), entitles Mr. Macon to a new trial. *Williams; Kyles.*

12) Prior to filing this application, Mr. Macon has not filed any petitions in state or federal court other than the appeals specified in number 8 above.

13) Not applicable because Mr. Macon has not filed any petitions in state or federal court other than the appeals specified in number 8 above, and he did not answer "yes" to number 12 above.

14) No ground set forth in number 10 above has been presented to this Court or any other state or federal court.

15) Not applicable because Mr. Macon did not answer "yes" to number 14 above.

16) No ground set forth in number 10 above has been presented to this Court or any other state or federal court because this application is the first opportunity for Mr. Macon to raise allegations of ineffective assistance of counsel.

17) Mr. Macon was represented by counsel during his jury trial and during his appeals to the Court of Appeals and Supreme Court.

18) Kristy G. Goldberg of the Law Office of Kristy Goldberg, LLC 1720 Main Street, Suite 303, Columbia, SC 29201, represented Mr. Macon during his jury trial. Glenn Walters and R. Bentz Kirby, both of Glenn Walters & Associates, PA, P.O. Box 1346, Orangeburg, SC 29116, represented Mr. Macon during his appeals to the Court of Appeals and Supreme Court.

19) This Court should issue an order granting post-conviction relief, vacating the conviction and sentence, and remanding this case to the Court of General Sessions for a new trial.

20) Mr. Macon is not under any sentence from any other court that he has not challenged.

Respectfully Submitted,

By _____

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Arthur William Macon

VERIFICATION

I, Arthur William Macon, 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.

Arthur Macon
Arthur William Macon

Sworn to and subscribed before me
this 19th day of Sept, 2019

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 5/31/2023

Subject: Re: Arthur William Macon v. State of South Carolina
Date: Friday, October 4, 2019 at 5:03:17 PM Eastern Daylight Time
From: Charles Grose
To: DOMINQUE MCDANIEL, jnewmansc@sccourts.org, Newman, Jocelyn Law Clerk (Ivia Smith)
CC: Megan Jameson, Laura Wingard

Thank you.

I hope everyone has a good weekend too.

Best,
Charles

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
Phone: 864-538-4466
Fax: 864-538-4405
Web: GroseLawFirm.com
Email: charles@groselawfirm.com

From: DOMINQUE MCDANIEL <MCDANIEL.DOMINQUE@richlandcountysc.gov>
Date: Friday, October 4, 2019 at 5:01 PM
To: Charles Grose <charles@groselawfirm.com>, "jnewmansc@sccourts.org" <jnewmansc@sccourts.org>, "Newman, Jocelyn Law Clerk (Ivia Smith)" <jnewmanlc@sccourts.org>
Cc: Megan Jameson <MJameson@scag.gov>, Laura Wingard <laura@groselawfirm.com>
Subject: RE: Arthur William Macon v. State of South Carolina

Please see the attached file.
Have a nice weekend.

Dominque McDaniel

From: Charles Grose <charles@groselawfirm.com>
Sent: Friday, October 4, 2019 4:35 PM
To: jnewmansc@sccourts.org; Newman, Jocelyn Law Clerk (Ivia Smith) <jnewmanlc@sccourts.org>
Cc: Megan Jameson <MJameson@scag.gov>; DOMINQUE MCDANIEL <MCDANIEL.DOMINQUE@richlandcountysc.gov>; Laura Wingard <laura@groselawfirm.com>
Subject: Arthur William Macon v. State of South Carolina

Dear Judge Newman,

I represent Mr. Macon. On September 23, 2019, my office mailed the Clerk of Court for Richland County an application for post-conviction relief ("PCR"). Because we have not received a filed copy by return mail, and because this filing has not been entered on the Public Index, my office has called twice to learn about the status. Yesterday, we were informed it would be filed by the end of today. As

of this afternoon it has not been filed, even though, this afternoon, Ms. Dominque McDaniel confirmed the Clerk of Court has received the application. Attached is a petition for a writ of mandamus requiring the Clerk of Court to file the PCR application. Hard copies will be mailed on Monday. Until this application is filed, time is being counted against Mr. Macon's PCR and federal habeas statutes of limitation, thereby resulting in prejudice. This Court's assistance, accordingly, is necessary to prevent additional prejudice.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide additional information.

Best,
Charles

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
Phone: 864-538-4466
Fax: 864-538-4405
Web: GroseLawFirm.com
Email: charles@groselawfirm.com

THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
)	Case No. 2019-CP-40-_____
Arthur William Macon, SCDC# 304226,)	
Applicant,)	**Petition for Writ of Mandamus**
)	
vs.)	
)	
)	
State of South Carolina,)	
Respondent.)	
)	

RICHLAND COUNTY
FILED
2019 OCT 10 PM 2:49
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Megan Harrigan Jameson, Esquire
Johnny James, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

By _____

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

10/7, 2019
Greenwood, South Carolina

A. 644

STATE OF SOUTH CAROLINA)
) **IN THE COURT OF COMMON PLEAS**
COUNTY OF Richland)
)
Arthur William Macon, SCDC# 304226,) **CIVIL ACTION COVERSHEET**
Plaintiff(s))
) 2019-CP - 40- 05591
vs.)
)
State of South Carolina)
Defendant(s))

Submitted By: Charles Grose
Address: 404 Main Street, Greenwood, SC 29646

SC Bar #: 66063
Telephone #: 864-538-4466
Fax #: 864-538-4405
Other:
E-mail: charles@groselawfirm.com

FILED
2020 JAN -8 P 2:43
JEANETTE W. GRAY
C.C.P. & G.S.
RICHLAND COUNTY, SC

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. **This form is NOT required to be filed in E-Filed Cases.**

DOCKETING INFORMATION *(Check all that apply)*

If Action is Judgment/Settlement do not complete

☐ **JURY TRIAL** demanded in complaint. ☒ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION *(Check One Box Below)*

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-NI-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
- ☒ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Incapacitated Adult Settlement (790)
- ☐ Other (799) _____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Permanent Restraining Order (680)
- ☐ Interpleader (690)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____ **Date:** Dec. 23, 2019

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2019-CP-40-05591
Arthur William Macon,	)	
Applicant,	)	
	)	**First Amended**
vs.	)	**Application for Post-Conviction Relief**
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

RICHLAND COUNTY
FILED
2020 JAN 13 PM 12:13
JEANNETTE W. McBRIDE
C.C. & C.S.

Pursuant to the Uniform Post-Conviction Relief Act, S.C. Code Ann. § 17-27-10 *et seq.*, Arthur William Macon submits this application for post-conviction relief.[1]

1) Mr. Macon is confined at the Broad River Correctional Institution.

2) The Honorable Deandrea G. Benjamin, Presiding Judge for the Fifth Judicial Circuit, imposed sentence.

3) The co-defendant is Jason Colon.

4) Judge Benjamin imposed the sentence on indictment number 2013-GS-40-00579, charging Mr. Macon with armed robbery. The jurors acquitted Mr. Macon of four counts of kidnapping.

5) On October 3, 2014, Judge Benjamin sentenced Mr. Macon to twenty-three years imprisonment.

[1] This pleading is based on Form 5, Revised 3/2003, which can be found on the South Carolina Judicial Department website. Mr. Macon reserves the right to amend this pleading is provided by law. Rule 71.1(d), SCRCP; S.C. Code Ann. § 17-27-90 (expressly contemplating supplemental or amended PCR application); *Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) ("[T]he interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims."); *see also Robertson v. State*, 418 S.C. 505, 522, 795 S.E.2d 29, 38 (2016) (applying *Strickland* standard to performance of PCR counsel). When assisting Mr. Macon in drafting this pleading, undersigned counsel had access to the Record on Appeal, which omitted numerous pages from the trial transcript. Counsel intends to review the full trial transcript and amend this application.

6) The finding of guilt followed a plea of not guilty and trial by jury.

7) Mr. Macon appealed the conviction and sentence.

8) The Court of Appeals affirmed Mr. Macon's conviction and sentence. *State v. Macon*, Appellate Case No. 2014-002126, Unpublished Opinion No. 2018-UP-031 (Filed January 17, 2018). By written order dated March 28, 2018, the South Carolina Court of Appeals denied Mr. Macon's Petition for Rehearing. By written order dated October 18, 2018, the South Carolina Supreme Court denied Mr. Macon's petition for a writ of *certiorari* (Appellate Case No. 2018-000737). The Remittitur issued on November 6, 2018.

9) Not applicable because Mr. Macon appealed and did not answer "no" to number 7 above.

10) Grounds for relief:

a) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, because trial counsel had a conflict of interest. *Strickland v. Washington,* 466 U.S. 668 (1984).

b) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the pre-trial stage of his case. *Strickland.*

c) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the trial of his case. *Strickland.*

d) Mr. Macon was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3

and 14 of the South Carolina Constitution, while the jurors were deliberating about his guilt or innocence. *Strickland.*

e) The cumulative effect of trial counsel's errors entitles Mr. Macon to a new trial. *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles v. Whitley*, 514 U.S. 419 (1995).

11) Supporting facts:

a) Trial counsel's performance was deficient and prejudicial during the trial of Mr. Macon's case in one or more of the following ways:

1) Appointed trial counsel, who is married to a Richland County Solicitor, had a conflict of interest, as a result of that relationship, that was not disclosed to Mr. Macon. *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008), *abrogated on other grounds by by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *and see Commonwealth v. Croken*, 432 Mass. 266, 273, 733 N.E.2d 1005, 1011 (2000) ("where a criminal defense lawyer represents a client and a close relative or an intimate companion is a colleague of the prosecutor who seeks to convict the client, the requirements of the [ethical] rule must be met") (citing Massachusetts Bar Association, Committee on Professional Ethics, Opinion No. 95–3 (relative of a district attorney could represent criminal defendants whom the district attorney's office prosecuted, provided [1] the relative not represent clients in cases in which the district attorney is involved; and [2] the conflict be fully disclosed in writing and consented to by the client)); *People v. Jackson*, 167 Cal. App. 3d 829, 213 Cal. Rptr. 521 (Ct. App. 1985) (failure of appointed trial counsel to inform defendant of counsel's ongoing "dating" relationship with prosecutor denied defendant his right to effective assistance of counsel under the California Constitution).

2) Appointed counsel had a conflict of interest as a result of the flat fee

contract agreement with the Commission on Indigent Defense that provided an incentive for appointed counsel to not seek a mistrial when the jurors were deadlocked. See ¶¶ 10(d) and 11(d).

b) Trial counsel's performance was deficient and prejudicial during the pre-trial stages of Mr. Macon's case in one or more of the following ways:

1) Failing to investigate, develop, and present evidence to establish that Mr. Macon in not guilty of the charge of armed robbery. *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007).

2) Failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on January 16, 2013 and the face of the indictment states the grand jurors returned a "true bill" on July 16, 2014.

c) Trial counsel's performance was deficient and prejudicial during the trial of Mr. Macon's case in one or more of the following ways:

1) Failing to object to the prosecutor's closing argument calling Mr. Macon "a liar." Tr. 368, line 9. *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937) ("referring to defendant as a 'bare faced liar'" during closing argument required new trial); *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (cumulative error of solicitor's improper argument calling defendant a liar and improperly excluded evidence warranted reversal), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002).

2) Failing to object to the prosecution and prosecution witnesses improperly vouching for Jason Colon, who was the co-defendant and material witness for the state. *E.g. State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566, (2018); *State v. Kromah*, 401 S.C.

340, 737 S.E.2d 490 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

d) Trial counsel's performance was deficient and prejudicial while the jurors were deliberating about Mr. Macon's guilt or innocence in one or more of the following ways:

1) When the jurors sent a note (Court's Exhibit 4) stating, "We are not unanimous on any of the charges yet, how do you want us to proceed?," and the Solicitor agreed, "They are deadlocked," trial counsel failed object to the trial judge instructing the jurors to continue deliberating when that instruction did not instruct the jurors that "the verdict of the jury should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgment which was not concurred in by the majority." *Allen v. United States*, 164 U.S. 492, 501 (1896).

2) When the jurors sent a note (Court Exhibit 5) stating, "Still at a stalemate," trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.

3) When the jurors sent a note (Court's Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.

4) When the jurors sent a note (Court's Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in

agreement with the majority and said will not change their minds [sic]," trial counsel failed to object to the trial judge's *Allen* charge that singled out the sole juror that was holding out for acquittal. *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001); *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999). *See also Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002).

5) When the jurors sent a note (Court's Exhibit 12) stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need refreshing," and the foreman of the jury informed the trial judge the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.

e) The cumulative effect of trial counsel's errors, as set forth in 11(a)-(d), entitles Mr. Macon to a new trial. *Williams; Kyles.*

12) Prior to filing this application, Mr. Macon has not filed any petitions in state or federal court other than the appeals specified in number 8 above.

13) Not applicable because Mr. Macon has not filed any petitions in state or federal court other than the appeals specified in number 8 above, and he did not answer "yes" to number 12 above.

14) No ground set forth in number 10 above has been presented to this Court or any other state or federal court.

15) Not applicable because Mr. Macon did not answer "yes" to number 14 above.

16) No ground set forth in number 10 above has been presented to this Court or any other state or federal court because this application is the first opportunity for Mr. Macon to raise

allegations of ineffective assistance of counsel.

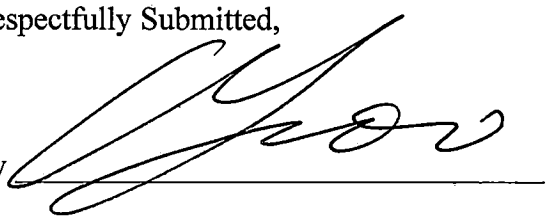
17) Mr. Macon was represented by counsel during his jury trial and during his appeals to the Court of Appeals and Supreme Court.

18) Kristy G. Goldberg of the Law Office of Kristy Goldberg, LLC 1720 Main Street, Suite 303, Columbia, SC 29201, represented Mr. Macon during his jury trial. Glenn Walters and R. Bentz Kirby, both of Glenn Walters & Associates, PA, P.O. Box 1346, Orangeburg, SC 29116, represented Mr. Macon during his appeals to the Court of Appeals and Supreme Court.

19) This Court should issue an order granting post-conviction relief, vacating the conviction and sentence, and remanding this case to the Court of General Sessions for a new trial.

20) Mr. Macon is not under any sentence from any other court that he has not challenged.

Respectfully Submitted,

By 

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Arthur William Macon

December 23, 2019
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2019-CP-40-05591
Arthur William Macon,	)	
Applicant,	)	
	)	
vs.	)	
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

RICHLAND COUNTY
FILED
2020 JAN -8 PM 12:43
JEANETTE W. McBRIDE
C.C.P. & G.S.

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Megan Harrigan Jameson, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

By _____

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

December 23, 2019
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2019-CP-40-05591
Arthur William Macon,	)	
Applicant,	)	
	)	
vs.	)	
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

RICHLAND COUNTY
FILED
2020 JAN -8 PM 12:58
JEANNETTE W. McBRIDE
C.C.P. & G.S.

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Megan Harrigan Jameson, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

By _____

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

December 23, 2019
Greenwood, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	5th JUDICIAL CIRCUIT
COUNTY OF Richlad)	
)	CASE NO.: 2019-CP-40-05591
)	
Arthur William Macon, SCDC# 304226)	**MOTION AND ORDER INFORMATION**
Plaintiff,)	**FORM AND COVERSHEET**
vs.)	
)	
State of South Carolina)	
Defendant.)	

RICHLAND COUNTY FILED 2020 JAN -8 PM 12:47 JEANNETTE W. McBRIDE C.C.P. & G.S.

Plaintiff's Attorney:	Defendant's Attorney:
Charles Grose, Bar No. 66063	S.C. Attoreny General's Office, Bar No.
Address:	Address:
404 Main Streeet, Greenwood, SC 29646	Columbia, SC
Phone: 864-538-4466 Fax 864-538-4466	Phone: 803-734-3737 Fax
E-mail: charles@groselawfirm.com Other:	E-mail: Other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for and Order Allowing Discovery
Estimated Time Needed: 15 Min. Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff /☐ Defendant — Date submitted: Dec. 23, 2019

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☒ EXEMPT:
(check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other:	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2019-CP-40-05591
Arthur William Macon,	)	
Applicant,	)	
	)	**Motion for an Order Allowing Discovery**
vs.	)	
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

RICHLAND COUNTY
FILED
2020 JAN -6 PM 2:4
JEANNETTE W. McBRIDE
C.C.P. & G.S.

Arthur Macon moves this Court for an order allowing him to conduct discovery pursuant to S.C. Code Ann § 17-27-150(a).[1] Paragraphs 10(d) and 11(d) of the First Amended Application for Post-Conviction Relief allege appointed counsel rendered prejudicial, deficient performance for failing to seek a mistrial when the jurors indicated on multiple occasions they were deadlocked and unable to reach a verdict. Paragraph 11(a)(2) of the First Amended Application for Post-Conviction Relief alleges:

> Appointed counsel had a conflict of interest as a result of the flat fee contract agreement with the Commission on Indigent Defense that provided an incentive for appointed counsel to not seek a mistrial when the jurors were deadlocked. See ¶¶ 10(d) and 11(d).

In order to develop this claim, Mr. Macon will need to issue subpoenas to the South Carolina Commission of Indigent Defense for information regarding its flat fee contract program,[2]

---

[1] Prior to filing this motion, counsel for Mr. Macon has not consulted with counsel for the State. No one from the Attorney General's Office has entered an appearance in this case. Additionally, in the recent experience of undersigned counsel, the State typically requests a hearing on Motions for Discovery in PCR cases, even when the State does not oppose the motion.

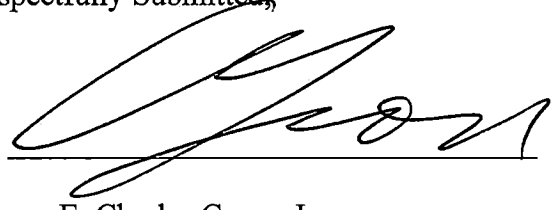
[2] Attached to this motion is a sample of the Commission's Agreement for Attorney Services in criminal cases that can be found on the Commissions website at https://sccid.sc.gov/resources/docs/608%20Contract/608%20Contract%20(Criminal)(sample).pdf (last viewed Dec. 21, 2019).

the frequency the Commission allows "additional compensation" pursuant to Section III(e) of the contract, information about the Commission's audit of attorneys "time expended representing all indigent clients" under Section X(a) of the contract, and a copy of the contract under which services were provided to Mr. Macon. Additionally, Mr. Macon might need to take a deposition of a representative of the Commission pursuant to Rule 30(b)(6), SCRCP regarding its flat fee contract program.

This Court, therefore, should issue an order allowing Mr. Macon to conduct discovery pursuant to S.C. Code Ann § 17-27-150(a).

IT IS SO MOVED.

Respectfully Submitted,

By 

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Arthur William Macon

December 23, 2019
Greenwood, South Carolina

AGREEMENT FOR
ATTORNEY SERVICES
(Criminal Conflicts)

This Agreement entered into this _____ day of _____ by and between the South Carolina Commission on Indigent Defense (SCCID) and _____(Attorney).

In consideration of the mutual covenants and promises contained herein, SCCID and Attorney agree as follows:

I. TERM

a. Subject to the provisions for termination set forth below and in Section XI this agreement will begin on the date this Agreement is signed by both parties and expires on _____. SCCID reserves the right and authority in its sole discretion to terminate this Agreement for any reason and at any time upon thirty (30) days notice to Attorney. Upon thirty (30) days notice this Agreement shall be null and void and have no further effect whatsoever. However any egregious conduct shall be grounds for immediate termination of this Agreement. (See Termination Clause, Section XI)

II. SERVICES

a. SCCID contracts with Attorney for the representation of indigent clients in the category or categories of cases and in the counties as set forth in Attachment A of this Agreement (See Attachment A). If Attorney is excused by a Court from an appointment for good cause shown Attorney does not relinquish the right to continue to receive appointments as provided by Attachment A.

b. In performing the legal services described in this Agreement, Attorney at all times shall comply with the requirements of the Rules of Professional Conduct, the South Carolina Rules of Court (to include the Appellate Court Rules, Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Evidence, Family Court Rules, Rules of Probate Court, Alternative Dispute Resolution Rules, Rules for the Administrative Law Court Rules), orders or directives of the Courts of this State, applicable South Carolina statutes and all of the uniform policies, guidelines and standards promulgated by SCCID, all of which are hereby expressly incorporated in, merged and made a part of this contract in each and every particular.

c. Attorney shall render to, and on behalf of the indigent clients he or she represents all professional legal services reasonably required from the time of appointment to and including a final adjudication or disposition. When appropriate Attorney agrees to timely file and serve a notice of appeal or petition for review and to take such other actions as may be required to protect the indigent client's interests in accordance with the South Carolina Rules of Appellate Procedure and applicable statutory law. The Division of Appellate Defense or such other counsel as the Court may appoint may prosecute the

appeal as appropriate. Attorney shall notify the Chief Attorney of the Division of Appellate Defense as soon as an appeal or petition for review has been filed and served, and promptly provide all pleadings and other necessary documents to the Division of Appellate Defense or other such counsel appointed by the Court.

d. In performing any work under this Agreement, Attorney shall provide competent representation to the indigent client. Competent representation requires the legal knowledge, skill, thoroughness and preparedness reasonably necessary for that representation. Attorney's business relationships outside of this agreement shall not interfere with the performance of the services specified herein.

e. Notification of Appointment: Within fifteen (15) days of being appointed to a case, Attorney must register the case on the SCCID website as required by the South Carolina Supreme Court (Order dated September 29, 2006) and in accordance with the policies and guidelines of SCCID. Failure to timely and fully register each assigned case as required, including any updates of required data may be grounds for termination of this Agreement, in the discretion of SCCID.

f. If appointment of Attorney is terminated due to the indigent client subsequently obtaining private counsel; or if the indigent client does not continue to qualify as indigent, Attorney shall still be entitled to compensation for fees and expenses properly and reasonably incurred.

g. If for any reason the Court permits Attorney to withdraw or if Attorney is otherwise removed from a case prior to full performance of the duties for reasons other than breach of duty or the provisions of Section XI, Attorney may receive compensation for Attorney's fees for work already satisfactorily performed and reasonably incurred. Subject to the attorney-client and the work-product privilege, if Attorney withdraws or is removed from the case Attorney shall deliver all files, notes, documents and research related to the representation of the client to the successor attorney within 15 days after receiving notice from the successor attorney.

h. Attorney agrees to maintain and to operate continuously throughout the term of this Agreement with at least the minimum number of staff required to deliver the legal services outlined herein.

III. COMPENSATION / EXPENSES/ EXPERT AND OTHER SERVICES

a. For services rendered SCCID agrees to pay a flat fee of $900 (Nine Hundred Dollars) per case paid upon appointment and the attorney's subsequent registration of the case as described in II(c) followed by processing of payment through the Comptroller General's Office.

b. A case is defined as an action in which an Attorney has been appointed to represent a client under the terms of this Agreement. A newly assigned case is each new unique

client, including a former client with new charges, petitions, or other cause of action but excluding a client with new charges, petitions, or other causes of action that are appointed to Attorney pursuant to this Agreement.

c. Attorney understands and agrees that case related expenses are included in the $900 flat fee. Attorney agrees to pay all expenses incidental to the performance of this Agreement including but not limited to all salaries, overhead, and all routine and necessary cost and expenses incurred in providing contract services, including routine travel expenses.

d. Outside costs and expenses such as expenses for expert witnesses, investigators, scientific tests and other reasonable and necessary expenses Attorney reasonably believes are necessary for a proper representation of client shall be applied for and reimbursed in accordance with laws of the State of South Carolina and the policies of SCCID. Attorney expressly understands that such expenses must be approved by the court prior to being incurred.

e. In the event Contractor is assigned to an extraordinary case, where the issues presented requires extraordinary time and effort for proper representation of the Client, Contractor may apply in writing to SCCID for additional compensation. Contractor shall immediately make this application to SCCID, in writing, once contractor identifies case may require extraordinary time and effort. A jury trial or contested adjudication in and of itself shall not be deemed extraordinary. However, at SCCID's sole discretion, extensive pretrial litigation, an extended jury trial or extended contested adjudication may be deemed extraordinary. In determining whether to approve a request for additional compensation in an extraordinary case SCCID shall consider the complexity of the case and other equitable factors including the availability and status of SCCID funds. To be considered an extraordinary case the offense charged/indicted must be a violent crime as identified in S.C. Code Section 16-1-60. The amount and timing of an additional compensation that is approved beyond the standard $900 flat fee is at SCCID's sole discretion. However total compensation shall not exceed the statutory cap of $3500 as established in S.C. Code Section 17-3-50(A).

IV. QUALIFICATIONS OF ATTORNEY

Attorney represents that he or she:

a. Is a member in good standing of the South Carolina Bar and will immediately notify SCCID in writing of any change in this status.

b. Possesses all municipal, county and state licenses which may be required in order to conduct business as an attorney in the counties and Judicial Circuits described in Attachment A; and that the same shall be kept current in all respects during the term of this Agreement and while any representation of a client is pending hereunder.

c. Is qualified to provide effective and adequate legal representation to indigent persons he or she may represent and meets at least the minimum experience and continuing education requirements identified in the rules, regulations and guidelines promulgated by SCCID and the South Carolina Supreme Court. Attorney will also comply with any CLE requirements mandated by SCCID.

d. Will immediately notify SCCID in writing of any disciplinary action(s) taken or any investigations commenced by the Office of Disciplinary Counsel.

e. Will notify SCCID of all appointed cases handled by Attorney in which there is a judicial finding that the Attorney provided ineffective assistance of counsel.

f. Attorney agrees to immediately notify SCCID if at any time during the period of this contract any claim, lawsuit or any other action (civil or criminal) becomes pending against attorney.

V. INDEPENDENT CONTRACTOR

a. The parties agree that this Agreement does not create the relationship of employer and employee. This Agreement is not intended to and shall not be construed to create the relationship of agent, servant, employee, partnership, joint venture, or association between SCCID and Attorney. Attorney is, and shall at all times be, deemed an independent contractor and shall be wholly responsible for the manner in which Attorney performs the services required by the terms of this Agreement. Attorney exclusively assumes responsibility for the acts of Attorney's employees, agents, subcontractors, and all others acting at the direction of or on behalf of Attorney, as they relate to the services to be provided under this Agreement. Attorney and Attorney's agents and employees shall not be entitled to any rights or privileges as if employees of SCCID or the State of South Carolina, including but not limited to, compensation, insurance and unemployment insurance. It shall be the sole responsibility of Attorney to comply with all applicable federal, state, county, and municipal statutes, ordinances, rules, and regulations in the performance of Attorney's obligations under this Agreement.

VI. NO ASSIGNMENT

a. Attorney shall not delegate or assign his or her obligations under this Agreement, whether in whole or in part, without the prior written consent of SCCID. Attorney shall not assign any monies due or to become due to Attorney under this Agreement without the prior written consent of SCCID.

VII. NO PROHIBITION ON PRIVATE PRACTICE

a. Nothing in this Agreement shall preclude Attorney from representing privately retained clients, including clients involved in cases of a similar nature who are not indigent. Attorney shall not be prohibited from engaging in the private practice of

law, provided that no private case shall be accepted that may cause a conflict of interest with a case appointed to Attorney under this Agreement.

VIII. EXTERNAL COMPENSATION

a. Attorney agrees that compensation for matters directly assigned to Attorney and covered under this Agreement shall be the sole compensation received by Attorney for the particular matters. Attorney shall not be precluded from accepting representation of indigents for matters for which he or she is not directly appointed (i.e., on behalf of other counsel) and for matters not covered by this Agreement.

IX. INDEMNIFICATION/ LEGAL MALPRACTICE INSURANCE

a. Attorney shall indemnify, defend, save, and hold harmless SCCID and the State of South Carolina, their officials, officers, agents, and employees from and against any and all claims, liabilities, losses, and/or causes of action including court costs and attorney's fees that may hereafter at any time be made or brought by anyone for the purpose of enforcing any claim on account of any injury or damage allegedly caused or occurring to any person or property which may arise, in whole or in part, whether intentional or unintentional, from any willful misconduct, or negligent act or omission of Attorney, Attorney's associates, law partners, agents, or employees during performance under this Agreement.

For each attorney furnishing services under this Agreement, prior to the commencement of any representation of a client hereunder, Attorney shall furnish evidence of legal malpractice insurance coverage that is current and in effect of at least $300,000 per claim/$500,000 aggregate and Attorney shall retain such insurance for any liability arising out of the services provided even after the attorney in no longer under contract with SCCID.

X. RECORD RETENTION/AUDIT

a. Attorney shall keep detailed records to enable SCCID or its agents to verify all costs, expenses and Attorney's time expended representing all indigent clients in cases appointed under this Agreement and shall make such records available to SCCID and its agents at any reasonable time. The records include supporting documentation necessary to adequately evaluate and substantiate payments made under this Agreement. SCCID and/ or its agents may, at its discretion, audit or inspect Attorney's books and financial records relating to services under this Agreement at any and all reasonable times. Attorney agrees to retain and to make available for inspections, upon reasonable notice, all books, statements, ledgers and other financial records relating to services under this Agreement for a period of five (5) years from the date of each payment, or until all Federal or State audits that may relate to each payment are complete for the applicable fiscal year, whichever is later. All financial records shall be made available to SCCID and/ or its agents at Attorney's place of business. The recordkeeping duties under this Agreement are separate and apart from recordkeeping requirements under Rule 407,

SCACR (the Rules of Professional Conduct) and Rule 417, SCACR (Financial Recordkeeping).

XI. TERMINATION/ CONTRACT EXPIRATION

This Agreement may be terminated as follows:

a. In addition to any other remedy authorized by law, SCCID shall have the right to terminate this Agreement upon thirty (30) days notice to Attorney if in its sole opinion Attorney or Attorney's agents or employees fail to comply with any of the terms of this Agreement to include those terms expressly incorporated and merged into this Agreement. Such failure shall constitute a material breach of this Agreement by Attorney. In the event of breach of duty in a case by Attorney, Attorney shall not be entitled to payment of Attorney's fees and shall reimburse SCCID for fees already received as an initial flat fee except as may be provided by court order. Any egregious conduct shall be grounds for immediate termination.

b. In the event Attorney is unable to perform this Agreement due to permanent or temporary disability, injury, continuing disabling sickness, or for other similar causes beyond the control of Attorney, then this Agreement may be terminated. In such event Attorney shall take appropriate steps to withdraw from all appointed cases, including filing motions to withdraw as required by South Carolina law. If Attorney is permitted to withdraw or is terminated in accordance with Section XI(a) from an appointed case, work materials that are not protected by the attorney/client privilege and the work-product privilege shall be turned over to such attorneys as may be subsequently appointed by the Court.

c. SCCID may, in its sole and absolute discretion, terminate this Agreement for any reason upon thirty (30) days notice to Attorney. Attorney may, in Attorney's absolute discretion, terminate this Agreement without cause upon thirty (30) days notice to SCCID provided that Attorney shall be responsible for all existing obligations to clients already appointed to pursuant to this Agreement.

d. Attorney understands that because the flat fee compensation is intended to cover the entire case any termination in accordance with Section XI(c) or by expiration of this Agreement does not affect the existing obligations to clients already assigned pursuant to this Agreement and attorneys continuing duty shall continue until final adjudication or disposition as described in Section II(c).

e. Notice of termination of this Agreement must be given to the other party in writing, sent by certified or registered United States mail, with return receipt requested, addressed to the party for whom it is intended, delivery restricted to the addressee, at the place last specified for giving of notice in compliance with the provisions of this paragraph. For the present, the parties designate the following for giving written notice:

FOR SCCID

South Carolina Commission on Indigent Defense
Attn: J. Hugh Ryan (General Counsel)
PO BOX 11433
Columbia, SC 29211-1433

FOR ATTORNEY

_____
Print name

_____
Address

XII. NO WAIVER/GOVERNING LAW

a. All rights hereunder are cumulative, not alternative, and are in addition to any other rights given by law. The validity, construction, and interpretation of this Agreement shall be governed by the laws of the State of South Carolina and the South Carolina Constitution. Venue for all actions arising from or related to this Agreement shall be in Richland County, South Carolina.

XIII. SEVERABILITY

a. Any section, subsection, paragraph, term, condition, provision or other part (hereinafter collectively referred to as "part") of this Agreement that is judged, held, found, or declared to be voidable, void, invalid, illegal or otherwise not fully enforceable shall not affect any other part of this Agreement, and the remainder of this Agreement shall continue to be of full force and effect. Any agreement of the parties to amend, modify, eliminate, or otherwise change any part of this Agreement shall not affect any other part of this Agreement, and the remainder of this Agreement shall continue to be of full force and effect.

XIV. AMENDMENT OR RENEWAL OF AGREEMENT

a. This Agreement expresses the entirety of the understandings of the parties concerning all matters covered. No renewal of this Agreement, or addition to, or alteration of, the terms of this Agreement, whether by written or verbal understanding of the parties, their officers, agents, or employees shall be valid unless in the form of a written amendment to this Agreement and formally approved by the parties.

XV. MISCELLANEOUS PROVISIONS

a. SCCID's and Attorney's performance under this Agreement are contingent upon appropriation by the Legislature, county funding and any other funding sources necessary to fund the performance of this contract.

b. SCCID's performance under this Agreement is contingent upon written approval of the South Carolina Attorney General in accordance with applicable South Carolina law.

c. The headings used in this Agreement are for illustrative purposes and are not a limitation of any of the rights and obligations of the parties.

d. Attorney shall affix Attorney's name, and Bar number on all communications addressed to SCCID. Attorney shall keep SCCID informed at all times of Attorney's current name and address, telephone and facsimile numbers, e-mail address and tax identification number.

XVI. ENTIRE AGREEMENT

a. This document incorporates and includes all prior negotiations, correspondence, conversations, agreements, or understandings applicable to the matters contained herein and the parties agree that there are no commitments, agreements, or understandings concerning the subject matter of this Agreement that are not contained in this document. Accordingly it is agreed that no deviation from the terms thereof shall be predicated upon any prior representations or agreements whether oral or written. This is the entire agreement of the parties. It may be changed only by an agreement in writing signed by both parties.

STATE OF SOUTH CAROLINA
COMMISSION ON INDIGENT DEFENSE BY:
_____
J. Hugh Ryan III, General Counsel
DATE: _____

ATTEST:_____.

ATTORNEY
Signature: _____
Print name: _____
South Carolina Bar No.: _____
Attorney's Tax ID No.: _____
Attorney's E-Mail Address: _____
Mailing Address:_____.
Fax number _____
Cell number_____
DATE: _____

ATTEST:_____.

SCCID

Attachment A

(to agreement between SCCID and contracting attorney, dated the_____ day of _____).

Contracting Attorney _____

SC Bar number: _____

Counties covered _____

Sample

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Arthur W. Macon, #304226, Applicant, v. State of South Carolina, Respondent,	2019-CP-40-5591 **RETURN** **(Counsel Retained)**

RICHLAND COUNTY FILED
2020 JUN 25 AM 10:09
JEANETTE W. McBRIDE C.C.P. & G.S.

In response to Arthur W. Macon's (Applicant) action for post-conviction relief (PCR) commenced October 4, 2019, the State makes this return:

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was indicted at the January 2013 term of the Richland County Grand Jury for armed robbery (2013-GS-40-0579). Applicant was represented by Kristy G. Goldberg (Counsel). Assistant Solicitors Richard C.R. Cathcart, Sr. and Jeremiah J. Shellenberg, Jr. prosecuted the case.

Applicant's case proceeded to a jury trial September 29–October 3, 2014, before Judge DeAndrea G. Benjamin. The jury convicted Applicant as indicted. Judge Benjamin sentenced Applicant to serve twenty-three years' imprisonment. Applicant appealed.

Glen Walters, Sr. and R. Bentz Kirby of Glenn Walters & Associates, PA, represented Applicant on appeal. Applicant raised the following issues on appeal:

1. Did the Trial Court commit error when it allowed Ricky Woodberry to testify that Jason Colon was schizophrenic, had a lobotomy, was passive and had the mind of a thirteen (13) year old in order to bolster Colon's testimony against [Applicant]?

2. Did the Trial Court commit error when it allowed Ricky Woodberry to testify about Jason Colon's medical condition as the testimony was hearsay and Woodberry lacked the necessary special knowledge, skill, experience or training to testify on this issue?

The case was submitted on briefs to the Court of Appeals on December 12, 2017. Thereafter, on January 17, 2018, the Court of Appeals affirmed. *State v. Macon*, Op. No. 2018-UP-031 (S.C. Ct. App. filed Jan. 17, 2018). Applicant petitioned for rehearing on February 16, 2018. The Court of Appeals denied the petition for rehearing on March 22, 2018.

Thereafter, Applicant petitioned for a writ of certiorari to our Supreme Court on May 1, 2018. Our Supreme Court denied certiorari on October 18, 2018. *State v. Macon*, S.C. Sup. Ct. Order filed Oct. 18, 2018. The Case was remitted back to the circuit court on November 6, 2018.

Applicant timely commenced this PCR action on October 4, 2019.

II. Facts

Applicant's charges stem from a bank robbery. On August 30, 2012, Applicant's cousin, Jason Colon, robbed a TD Bank. Colon absconded with $6,000. Applicant was eventually arrested in connection to the crime.

At trial, Diana Williams testified that after noticing police cars surrounding the TD Bank parking lot, she saw a man (Colon) running from that parking lot through the woods towards the parking lot of a Hilton Garden Inn. (Tr.215.) Thinking he looked suspicious, Williams called 911 as she followed him in her car. (Tr.216.) Once Colon reached the Hilton, Williams observed him conversing with another man (Applicant) who was wearing a yellow shirt. (Tr.217.) Applicant gestured towards the back of the parking lot "as if he was telling the [suspicious man] to go back that way." (Tr.217.) Applicant then got into a black truck and drove away. (Tr.219.) As he backed out, he nearly struck Williams' vehicle, and she observed his face. (Tr.218–19.) Williams remained on the phone with 911 during this time, giving details of what occurred and a description

of the truck and its driver. (Tr.224.) Williams was only able to give a partial plate number because the truck's tailgate was down. (Tr.219.) However, based on Williams's description of the truck and driver, officers eventually stopped Applicant. (Tr.227.) Williams, who was still in her car, drove past the traffic stop. (Tr.261–63.) Williams identified Applicant as the person from the Hilton parking. (Tr.228.)

Colon was also arrested. Investigator Jason Williams testified he interviewed Colon upon his arrest. He explained Colon appeared distressed and explained the interview "took kind of a while because it seemed like he wasn't all the way there." (Tr.279.) Williams noted, in his opinion, Colon was "a little mentally challenged," but he was eventually able to take Colon's statement, and Colon confessed to committing the robbery. (Tr.279.) Williams also testified that he searched Applicant's truck after it was impounded, and he discovered a police scanner which was tuned to Richland County's frequency. (Tr.277.) Specifically, the police scanner was tuned to broadcast transmissions in the TD Bank vicinity. (Tr.278.)

The State then proffered Ricky Woodberry's testimony. Woodberry was Colon's father. (Tr.286.) Counsel objected to Woodberry's testimony about how Colon sustained a childhood head injury as hearsay arguing Woodberry was not present when Colon sustained the injury. (Tr.292.) Counsel objected to the remainder of Woodberry's testimony, that Colon was "easily led" and "passive," as irrelevant and as improper character evidence offered to bolster Colon's credibility. (Tr.293.)

After the proffer, the trial court ruled Woodberry could testify about Colon's head injury and passive demeanor, but it precluded testimony that Colon was "easily led" or usually agreed. (Tr.299.) Woodberry then testified that Colon was shot in the head by a stray bullet when they lived in Brooklyn, New York. (Tr.301.) Counsel then renewed her previous objection, which the

trial court sustained. (Tr.301.) Woodberry went on to explain the bullet entered Colon's temple and penetrated his frontal lobe. (Tr.301.) Woodberry testified Colon was subsequently diagnosed with schizophrenia. (Tr.302.) Woodberry also testified that Colon began talking to himself and became passive after the head injury. (Tr.302.) Finally, Woodberry stated that Colon's condition improved with medication, but Colon retained the cognitive ability of a thirteen-year-old. (Tr.302.)

Colon testified at trial and explained that he went to the TD Bank intending to cash his unemployment check. (Tr.305, 313.) However, Applicant gave him a toy gun and told him to go in the bank and demand money. (Tr.306.) Colon recalled that Applicant had colored in part of the toy gun to make it look real. (Tr.306.) Colon testified that after the robbery, he was supposed to meet Applicant in front of the hotel and get into the bed of Applicant's truck. (Tr.307.) Colon's testimony waivered as to when Applicant gave him the gun and instructed him to rob the bank. On cross-examination, Colon indicated that he and Applicant planned the robbery months prior, and that was when Applicant gave him the gun. (Tr.314.) However, on redirect, Colon suggested Applicant gave him the gun the day of the robbery. (Tr.315.)

Investigator Kerry Johnson testified he interviewed Applicant after he was arrested. Johnson explained that initially, Applicant denied having anyone with him while he was driving around that day. (Tr.325.) However, after Johnson confronted Applicant that Colon had identified him as his cousin who dropped him off outside the bank, Applicant modified his statement. Applicant claimed Colon was with him earlier in the day because he wanted a ride to "his homeboy's house," but Applicant instead dropped Colon off at the bus stop near the TD Bank. (Tr.327.)

III. Allegations

In his original PCR application and amended PCR application filed January 8, 2020, Applicant makes the following allegations of ineffective assistance of counsel:

a. Conflict of interest:
   1. Counsel had a conflict of interest and failed to disclose to Applicant that her husband is a Deputy Solicitor for the Fifth Circuit Solicitor's Office; and
   2. Counsel had a conflict of interest as a result of the flat fee contract agreement with the Commission on Indigent Defense that provided an incentive for Counsel to not seek a mistrial when the jury was deadlocked.

b. Pretrial:
   1. Failing to investigate, develop, and present evidence to establish that Applicant is not guilty of armed robbery; and
   2. Failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on January 16, 2013 and the face of the indictment states the grand jurors returned a "true bill" on July 16, 2014.

c. During trial:
   1. Failing to object to the prosecutor's closing argument calling Applicant "a liar" at (Tr.368, ln. 9.); and
   2. Failing to object to the prosecution and prosecution witness improperly vouching for Jason Colon, who was the co-defendant and material witness for the State.

d. During jury deliberations:
   1. When the jurors sent a note (Court's Exhibit 4) stating, "We are not unanimous on any of the charges yet, how do you want us to proceed?" and the Solicitor agreed, "They are deadlocked," Counsel failed to object to the trial court instructing the jurors to continue deliberating when that instruction did not instruct the jurors that "the verdict should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgement which was not concurred in by the majority," *Allen v. United States*, 164 U.S. 492, 501 (1896);
   2. When the jurors sent a note (Court Exhibit 5) stating, "Still at a stalemate," trial counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330;
   3. When the jurors sent a note (Court Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330;

4. When the jurors sent a note (Court Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to object to the trial court's *Allen* charge that singled out the sole juror that was holding out for acquittal. *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001); *State v. Hughes*, 336 S.C. 525, 521 S.E.2d 500(1999);
5. When the jurors sent a note (Court's Exhibit 12) stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need refreshing," and the foreman of the jury informed the trial court the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330.

e. Cumulative error:
   1. The cumulative effect of Counsel's errors, as set forth in 11(a)–(d), entitles Applicant to a new trial. *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles v. Whitley*, 514 U.S. 419 (1995).

Applicant requests relief in the form of a new trial.

Attached to this return and incorporated herein are the Richland County Clerk of Court records, Applicant's SCDC records, Applicant's appellate records, the trial transcript, and the records of this PCR action.

IV. RESPONSE TO ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

Applicant's allegations of ineffective assistance of trial counsel are without merit. To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove "there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

a. Conflict of Interest

The Rules of Professional Conduct, whose purpose is to regulate and guide the legal profession in ethical conduct, do not have any bearing on assessing a claim of ineffective assistance of counsel and "[n]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty." *Langford v. State*, 310 S.C. 357, 426 S.E.2d 793 (1993) (citing Rule 407, SCACR).

An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007); *Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." *State v. Gregory*, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Once an actual conflict of interest is shown, applicant does not have to demonstrate prejudice. *Thomas v. State*, 346 S.C. 140, 145, 551 S.E.2d 254, 256-57 (2001). Additionally, where defendant waives *potential* conflict, once actual conflict arises, counsel must withdraw from representing one or both clients or acquire another waiver covering the specific conflict. *Id.*

b. Pretrial

Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant, and make an independent investigation of the facts and circumstances of the

case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. *Id.*

"An indictment is merely a notice document." *State v. Baker*, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010). Whether the indictment could be made more definite and certain is irrelevant. *Baker*, 390 S.C. at 62, 700 S.E.2d at 442. *Baker* set for the following test for viewing indictments:

> [T]he court must look at the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged.

Id.

Moreover, "an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood." *Id.* at 63, 700 S.E.2d at 443 (citing *State v. Tumbleston*, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007.) Furthermore, in order to challenge the sufficiency of an indictment, an objection must be made before the jury is sworn in. S.C. Code Ann. §17-19-90.

A court reviewing an indictment for sufficiency should consider the indictment "'on its face,' *and* consider the events at trial." *State v. Reddick*, 348 S.C. 631, 636, 560 S.E.2d 441, 443 (Ct. App. 2002). (italics in original). In other words, a court should examine "the totality of the circumstances" to determine if the applicant was cognizant of the crimes for which he was charged. *Id.*

c. Trial; and
d. Deliberations

Strickland requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for 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*, 466 U.S.at 688-689. "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 counsel's performance must be highly deferential. *Id.* at 689. 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). 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). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

e. Cumulative Error

The propriety of the cumulative error analysis is an unsettled question of law in South Carolina. *See Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002). The Fourth Circuit Court of Appeals has rejected the cumulative error analysis stating "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively." *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998).

Recently, in *Smalls v. State*, our Supreme Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. 422 S.C. at 194, 810 S.E.2d at 864 ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors."). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* at 188, 810 S.C. at 844 (internal citations omitted).

Applicant cannot satisfy either requirement of *Strickland*. However, the record likely does not refute or disprove Applicant's allegations of ineffective assistance of trial counsel; therefore, the State requests an evidentiary hearing to fully resolve the issues. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (providing an evidentiary hearing shall be held when a PCR application "alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court").

V. Any Future Amendments & Invocation of Discovery

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, Op. No. 27921 (S.C. Sup. Ct. filed Oct. 2, 2019) (Shearouse Adv. Sh. No. 39 at 14), or, alternatively, the State will request a continuance in the matter. *See Id.* at 24 (Kittredge, J., dissent) ("If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.").

Applicant moved for discovery on January 8, 2020. Pursuant to section 17-27-150 of the South Carolina Code, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Further, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in advance of the evidentiary hearing. As noted above, the State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State. *See Love*, *supra*.

VI. Any and All other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VII. Conclusion

WHEREFORE, the State requests an evidentiary hearing be held on the claims of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

SAMUEL L. KEY
Assistant Attorney General

By: s/ Samuel L. Key
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

June 15, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
	)	2019-CP-40-5591
Arthur W. Macon, #304226	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
State of South Carolina,	)	
	)	
Respondent,	)	
	)	

RICHLAND COUNTY
FILED
2020 JUN 25 AM 10:09
JANETTE W. HOBRIDE
C.C.P. & G.S.

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

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

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

E. Charles Grose, Jr. Esquire
Grose Law Firm
404 Main Street
Greenwood, SC 29646

DATED this the 15th day of June, 2020.

Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

June 15, 2019

The Honorable Jeanette W. McBride
Richland County Clerk of Court
PO Box 2766
Columbia, SC 29202-2766

Re: **Arthur W. Macon, #304226 v. State of South Carolina**
2019-CP-40-5591

Dear Ms. McBride,

Enclosed please find the original Return of the Respondent, in the above-captioned case, for filing in your office.

Sincerely,

s/ Samuel L. Key

Samuel L. Key
Assistant Attorney General

SK/em
Enclosure

cc: E. Charles Grose, Esquire

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2019-CP-40-05591
Arthur William Macon,	)	
Applicant,	)	
	)	**Order**
vs.	)	
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

RICHLAND COUNTY
FILED
2020 NOV 16 PM 12:48
C.C.P., G.S., & F.C.

This matter came before this Court on Arthur Macon's motion this Court to issue and an order allowing him to conduct discovery pursuant to S.C. Code Ann § 17-27-150(a), requesting information from the South Carolina Commission on Indigent Defense ("SCCID"). Charles Grose represented the State. Samuel Key of the South Carolina Attorney General's Office represented the State. Hervery Young appeared on behalf of SCCID. Prior to the hearing, SCCID provided Mr. Macon with the information requested about this case. Subsequent to the hearing, SCCID provided Mr. Macon with the other requested information. This Court finds this motion is moot.

Therefore, it is ordered that the motion to conduct discovery is dismissed as moot.

IT IS SO ORDERED.

Alex Kinlaw, Jr.
Presiding Judge, Fifth Judicial Circuit

11/6, 2020
Greenville, South Carolina

ALAN WILSON
ATTORNEY GENERAL

November 24, 2020

The Honorable Jeanette W. McBride
Richland County Clerk of Court
PO Box 2766
Columbia, SC 29202-2766

RICHLAND COUNTY
FILED
2020 NOV 30 PM 2:51
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

Re: **Frank McKenzie v. State of South Carolina 2006-CP-40-1355**
Aurelio Ottey v. State of South Carolina 2014-CP-40-1241
Jeroid J. Price v. State of South Carolina 2014-CP-40-4524
Antwan Lydell Gaddist v. State of South Carolina 2014-CP-6736
Demetrius Goodwin v. State of South Carolina 2015-CP-40-2461
Steven B. Gillian v. State of South Carolina 2015-CP-40-3331
Anthony Hackshaw v. State of South Carolina 2015-CP-40-5695
Walter Thomas v. State of South Carolina 2016-CP-40-3639
Hamid Demmiro v. State of South Carolina 2016-CP-40-3723
Willie Green v. State of South Carolina 2016-CP-40-3992
Marcus Rashawn Kelly v. State of South Carolina 2016-CP-40-4599
Abram D. Braveboy v. State of South Carolina 2016-CP-40-5602
Geovani A. Solorzano v. State of South Carolina 2016-CP-40-6728
Wayne Vinson v. State of South Carolina 2016-CP-40-7066
William Rex Bush v. State of South Carolina 2016-CP-40-7347
Michael D. Thomas v. State of South Carolina 2017-CP-40-0943
Larry K. Brown v. State of South Carolina 2017-CP-40-0953
Elijah Green v. State of South Carolina 2017-CP-40-1200
Leslie Todd Parvin v. State of South Carolina 2017-CP-40-2220
Joseph Charles Tice v. State of South Carolina 2017-CP-40- 2850
Timothy Leon Marsh v. State of South Carolina 2017-CP-40-3266
Donald E. Griffin v. State of South Carolina 2017-CP-40-3998
Maurice A. Roberts v. State of South Carolina 2017-CP-40-4450
William A. Wallace v. State of South Carolina 2017-CP-40-4518
Ray A. Pickett v. State of South Carolina 2017-CP-40- 4770
Brett D. Parker v. State of South Carolina 2017-CP-40-4896
Ahmad Jamal Wilkins v. State of South Carolina 2017-CP-40-5019
John Henry Simmons v. State of South Carolina 2017-CP-40-5246
Carmen Rice v. State of South Carolina 2017-CP-40-6361
Reginald Delaney v. State of South Carolina 2017-CP-40-6430
Marcus Bailey v. State of South Carolina 2017-CP-40-6660
Christopher Keitt v. State of South Carolina 2017-CP-40-6718
Dudley Bruce Mack v. State of South Carolina 2017-CP-40-7110

Brandon J. Berry v. State of South Carolina 2017-CP-40-7548
Anthony Porterfield v. State of South Carolina 2017-CP-40-7564
Xavier U. Brannon v. State of South Carolina 2017-CP-40-7665
Corey L. Reddick v. State of South Carolina 2018-CP-40-0003
Gary A. White v. State of South Carolina 2018-CP-40-0514
Emmanuel Elleby v. State of South Carolina 2018-CP-40-0591
Elijah Marshall v. State of South Carolina 2018-CP-40-0627
Charles Bradberry v. State of South Carolina 2018-CP-40-0628
Christopher X. Trice v. State of South Carolina 2018-CP-40-0883
Perez A. Brooks v. State of South Carolina 2018-CP-40-0908
Jason Boykin v. State of South Carolina 2018-CP-40-1055
Xavier T. Roach v. State of South Carolina 2018-CP-40-1261
Theodore Manning v. State of South Carolina 2018-CP-40-1846
Corey Reddick v. State of South Carolina 2018-CP-40-2278
Jaysen R. Hodge v. State of South Carolina 2018-CP-40-2680
Courtney E. Woode v. State of South Carolina 2018-CP-40-2752
James M. Baxley v. State of South Carolina 2018-CP-40-2753
Kurtino Weathersbee v. State of South Carolina 2018-CP-40-2848
Randall Gadson v. State of South Carolina 2018-CP-40-2998
Trenton Barnes v. State of South Carolina 2018-CP-40-3077
Tommy Jerome Riley v. State of South Carolina 2018-CP-40-3484
Calvert Myers v. State of South Carolina 2018-CP-40-3490
Dominique Nixon v. State of South Carolina 2018-CP-40-3666
Robert Guinyard v. State of South Carolina 2018-CP-40-3875
Demetrice James v. State of South Carolina 2018-CP-40-3876
Joe Stokes v. State of South Carolina 2018-CP-40-3877
Joshua William Porch v. State of South Carolina 2018-CP-40-4103
Holly Jo Thompson v. State of South Carolina 2018-CP-40-4637
Max J. Knoten v. State of South Carolina 2018-CP-40-4638
Aryee Henderson v. State of South Carolina 2018-CP-40-4964
Karreem T. Wiley v. State of South Carolina 2018-CP-40-5314
Douglas Burn Murphy v. State of South Carolina 2018-CP-40-5508
Dondre M. Scott v. State of South Carolina 2018-CP-40-5508
James Bonham Lawson v. State of South Carolina 2018-CP-40-5685
Roosevelt Doctor v. State of South Carolina 2018-CP-40-6110
Jason Boyles v. State of South Carolina 2018-CP-40-6626
Marie Assa'ad Faltas v. State of South Carolina 2019-CP-40-0112
Sylvester Wilder v. State of South Carolina 2019-CP-40-0171
Vincent Boseman v. State of South Carolina 2019-CP-40-0173
John Wallace Heyward v. State of South Carolina 2019-CP-40-0286
Lahborn Allah v. State of South Carolina 2019-CP-40-0289
Ikeisha Perry v. State of South Carolina 2019-CP-40-0584
Willaim Mario Jones v. State of South Carolina 2019-CP-40-0589
Geordi Jerrell Heyward v. State of South Carolina 2019-CP-40-0775
Basil W. Akbar v. State of South Carolina 2019-CP-40-0849
Lorenzo B. Young v. State of South Carolina 2019-CP-40-1119
Keylan Durham v. State of South Carolina 2019-CP-40-1125

Rick A. Mantei v. State of South Carolina 2019-CP-40-1193
Louis Gainey v. State of South Carolina 2019-CP-40-1302
Hank Eric Hawes v. State of South Carolina 2019-CP-40-1308
Reginald Spellman v. State of South Carolina 2019-CP-40-1309
Michael D. Amaker v. State of South Carolina 2019-CP-40-1501
Anthony L. Brown v. State of South Carolina 2019-CP-40-1585
Courtney Shante Thompson v. State of South Carolina 2019-CP-40-1813
Darrell Lee Daniels v. State of South Carolina 2019-CP-40-1814
Phillip Jackson v. State of South Carolina 2019-CP-40-1815
Marie Assa'ad-Faltas v. State of South Carolina 2019-CP-40-2217
Marie Assa'ad-Faltas v. State of South Carolina 2019-CP-40-2218
Marie Assa'ad-Faltas v. State of South Carolina 2019-CP-40-2219
Dexter L. Myers v. State of South Carolina 2019-CP-40-2444
James Bethel v. State of South Carolina 2019-CP-40-2999
Michael Trabue v. State of South Carolina 2019-CP-40-3011
Thomas Junior Martin v. State of South Carolina 2019-CP-40-3510
Willie Green v. State of South Carolina 2019-CP-40-3973
Quandelle Wilson v. State of South Carolina 2019-CP-40-4614
Wayland Purnell v. State of South Carolina 2019-CP-40-4618
Tensisha McClinton v. State of South Carolina 2019-CP-40-4651
Bryan Murray v. State of South Carolina 2019-CP-40-4660
Quandelle Wilson v. State of South Carolina 2019-CP-40-4997
Jeffrey A. Davis v. State of South Carolina 2019-CP-40-5193
Quatavious Bivens v. State of South Carolina 2019-CP-40-5634
Arthur William Macon v. State of South Carolina 2019-CP-40-5591
Anthony Clark v. State of South Carolina 2019-CP-40-5704
Charles Lamb v. State of South Carolina 2019-CP-40-5705
Herbert Bell v. State of South Carolina 2019-CP-40-6468
Taurus Watts v. State of South Carolina 2019-CP-40-6500
Savoyy Woodard v. State of South Carolina 2019-CP-40-6527
Kedrick B. Brown v. State of South Carolina 2019-CP-40-6531
Myron Kelley v. State of South Carolina 2019-CP-40-6860
Channen F. Ricks v. State of South Carolina 2019-CP-40-6992
Shawn Patrick Bell v. State of South Carolina 2019-CP-40-7003
Kenneth Rivera v. State of South Carolina 2020-CP-40-0791
Soleiman H. Hattar v. State of South Carolina 2020-CP-40-1001
Willie Gilmore v. State of South Carolina 2020-CP-40-1099
Ronald S. Tillman v. State of South Carolina 2020-CP-40-1157
Allen Jackson v. State of South Carolina 2020-CP-40-1485
Shane Isaac Johnson v. State of South Carolina 2020-CP-40-1574
Linda Ann Tyler v. State of South Carolina 2020-CP-40-1583
Perry Thomas Edmonds v. State of South Carolina 2020-CP-40-1686
Terry Lee Coleman v. State of South Carolina 2020-CP-40-1789
Darryl A. Fuller v. State of South Carolina 2020-CP-40-1877
Frank Furtick v. State of South Carolina 2020-CP-40-1941
Christopher James Reese v. State of South Carolina 2020-CP-40-2096
Jimmy Portee v. State of South Carolina 2020-CP-40-2097
Dominic L. Lyde v. State of South Carolina 2020-CP-40-2527
Timothy Green v. State of South Carolina 2020-CP-40-3207

Devonte K. Anderson v. State of South Carolina 2020-CP-40-3535
Daniel R. McClain v. State of South Carolina 2020-CP-40-3774
Edmond S. Adams v. State of South Carolina 2020-CP-40-3837
Ryais Ryche Rivers v. State of South Carolina 2020-CP-40-3933
Matthew Jamison v. State of South Carolina 2020-CP-40-4834
Dudley B. Mack v. State of South Carolina 2020-CP-40-4848
Arthur Jones v. State of South Carolina 2020-CP-40-4856
Jose Reyes, Jr. v. State of South Carolina 2020-CP-40-4935

Dear Ms. McBride:

Please substitute undersigned counsel as counsel of record for the State in this post-conviction relief appeal and remove Lindsey A. McCallister, as counsel of record for the State. Thank you for your consideration of this request, and please contact me at (803) 734-1680 if you have any questions or concerns.

Sincerely,

s/Michal D. Davidson

Michael D. Davidson
Assistant Attorney General
SC Bar No. 104114

MDD/em

cc: Tara D. Shurling, Esquire
Jonathan D. Waller, Esquire
Nancy C. Fennell, Esquire
Tricia A. Blanchett, Esquire
Christopher P. Kenney, Esquire
Cassity A. Brewer, Esquire
Arthur K. Aiken, Esquire
Leah B. Moody, Esquire
Elizabeth A. Franklin-Best, Esquire
Tommy A. Thomas, Esquire
Lir P. Derieg, Esquire
Ola A. Johnson, Esquire
George R. McElveen, Esquire
Timothy Lee Griffith, Esquire
B. Allen Bullard Jr., Esquire
Aimee J. Zmroczek, Esquire

E. Charles Grose Jr., Esquire
William G. Yarborough III, Esquire
Scott D. Spivey, Esquire

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF RICHLAND) 2019-CP-40-05591

Arthur W. Macon,)
)
Plaintiff,)
)
vs.) TRANSCRIPT OF RECORD
)
State of South Carolina,)
)
Defendant.)

April 16, 2021
WebEx

B E F O R E:

THE HONORABLE BROOKS P. GOLDSMITH, JUDGE.

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

E. CHARLES GROSE, JR., ESQ.
Attorney for the Plaintiff

LINDSEY A. MCCALLISTER, ASSISTANT ATTORNEY GENERAL
MICHAEL D. DAVIDSON, ASSISTANT ATTORNEY GENERAL
Attorneys for the Defendant

DEBORAH M. McCURDY, RPR
Official Court Reporter

INDEX OF WITNESSES

KRISTY G. GOLDBERG

Direct By Mr. Grose 7

Cross By Ms. McCallister 63

Redirect By Mr. Grose 92

ARTHUR WILLIAM MACON, IV

Direct By Mr. Grose 99

DANIEL R. GOLDBERG

Direct By Mr. Davidson 109

Cross By Mr. Grose 118

KRISTY G. GOLDBERG

Direct By Ms. McCallister 124

Cross By Mr. Grose 126

EXHIBITS

Applicant's Exhibits		ID	EV
14	Email	12	12
10	Substitution order	13	13
11	Voucher Information	14	14
1	Jury Note(Court 2)	26	26
2	Jury Note(Court 3)	27	27
3	Jury Note(Court 4)	32	32
4	Jury Note(Court 5)	34	34
5	Jury Note(Court Exhibit 7)	42	42
6	Jury Note(Court Exhibit 8)	43	43
7	Jury Note(Court Exhibit 9)	47	47
8	Jury Note(Court Exhibit 11)	48	48
9	Jury Note(Court Exhibit 12)	50	50
12 AND 13	Indictments	63	63

APRIL 16, 2021

(WHEREUPON, the hearing began at 9:53 a.m.)

THE COURT: I believe we are ready to proceed now. Mr. Davidson?

MR. DAVIDSON: Yes, Your Honor. May it please the Court?

This is the case of Arthur Macon versus the State of South Carolina, Docket Number 2019-CP-40-5591.

Applicant was indicted in January 2013 for armed robbery. He was represented on those charges by Kristy Goldberg.

Applicant proceeded to a jury trial September 29th through October 3rd, 2014, before Judge Benjamin. The jury convicted Applicant as indicted, and Judge Benjamin sentenced Applicant to serve 23 years' imprisonment. Applicant appealed.

Glenn Walters, Sr., and Bentz Kirby, of the private bar, represented Applicant on appeal and raised the following issues:

Did the trial court commit error when it allowed Ricky Woodberry to testify that Jason Colon was schizophrenic, had a lobotomy, was passive, and had a mind of a 13-year-old, in order to bolster

Colon's testimony against Applicant?

And the second issue was: Did the trial court commit error when it allowed Ricky Woodberry to testify about Jason Colon's medical condition as the testimony was hearsay and Woodberry lacked the necessary special knowledge, skill, experience or training to testify on the issue?

After briefing, the Court of Appeals affirmed on January 17th, 2018. Applicant petitioned for rehearing on February 16th, 2018, and the Court of Appeals denied the petition for rehearing on March 22nd, 2018.

Thereafter, Applicant petitioned for writ of certiorari to our Supreme Court on May 1st, 2018. Our Supreme Court denied cert on October 18th, 2018, and the case was remitted back to the circuit court on November 6, 2018.

This PCR was timely filed on October 4th, 2019. Applicant, through counsel, filed an amended application on January 8th, 2020.

Applicant is present and he is represented by Mr. Charles Grose.

Your Honor, the State is ready to proceed. We just ask that Mr. Grose puts the allegations he plans to go forward with on the record.

THE COURT: Mr. Grose?

MR. GROSE: Thank you. May it please the Court?

Your Honor, we intend to go forward with everything with the exception of Paragraph 11(b)(1). We are not going to present any evidence on that, so we'll withdraw that.

THE COURT: All right. You may proceed.

MR. GROSE: All right. Would it be possible, Your Honor, that I be allowed to share the screen, because I have some exhibits and transcripts to project?

THE COURT: You may.

MR. GROSE: Okay, thank you. It looks like I can do that now.

And unless you particularly want to hear any kind of opening statement, I would just move into calling witnesses, Your Honor.

THE COURT: That would be fine. No objection.

MR. GROSE: All right, I'd call Kristy Goldberg.

THE COURT: And, Ms. Goldberg, are you with us?

MS. GOLDBERG: I'm trying to be. Yes, I am.

THE COURT: Would you raise your right hand,

please.

(Witness complies.)

THE COURT: Do you swear or affirm the testimony and evidence you are about to give in this case is the truth?

MS. GOLDBERG: Yes.

THE COURT: Thank you. Mr. Grose.

KRISTY G. GOLDBERG,

after being duly sworn, testified as follows:

DIRECT EXAMINATION

Q Could you state your full name for the record and spell your last name?

A Kristy Goldberg. G-O-L-D-B-E-R-G.

Q All right. And are you an attorney?

A Yes.

Q And how long have you been practicing law?

A Since 2005.

Q All right. And if you don't mind, if you could just sort of summarize your educational background beginning with college and your work history.

A I went to college at Clemson, graduated in 2002, Went to USC Law School, and graduated in 2005. Worked at the Richland County Public Defender's Office for about three years. Then worked at Davidson & Lindemann for about three years. Then I

went into private practice opening my own office, where I did mostly criminal defense, PCR's, family, DSS cases. And then now I am at Wilson, Jones, Carter & Baxley, and I have been here since 2019.

Q Okay. And did you represent Arthur Macon?

A Yes.

Q Okay. And can you tell Judge Goldsmith how that came about?

A Yes. There was another attorney, Prentiss Counts -- well, it is Prentiss Shealey now, I think Counts at the time, I don't remember when she got married -- but she had been appointed Mr. Macon's case for a very brief time, and she was leaving her employment to go somewhere where she wouldn't -- I think that is when she went to LLR, so she couldn't do this type of case anymore. And I had just recently opened my practice, so she asked if I wanted to take on that appointment, and I said yes. So it went from there. We got a consent order, and all that.

Q All right. I am trying to share my screen now. Can you see that?

A Yes.

Q Okay. I'm sorry. Okay, I'm going to show you what has been marked as Applicant's Exhibit Number 14

for today.
A Uh-huh.
Q Which is a 2-page document. And that is the first page, and there is the second page.
A That's right. And that makes me realize that I was wrong. It wasn't when she was leaving her practice, it was because her husband was involved in the Co-Defendant's -- actually represented the Co-Defendant, so it was a conflict.
Q Okay. And it just has her -- I'm sorry?
A So that is why she asked if I wanted it.
Q Okay. And I take it that Brian is her husband?
A That's correct, Brian Shealey.
Q And so just looking at the timestamps on that, on September 18th, 2012, at 1:42 p.m., that is when she emailed you about her conflict because of her husband and asked if you were interested in the case?
A Correct.
Q All right. And going by the timestamps, it was that same day at 1344, or 1:44, that you responded, is that correct?
A Yes.
Q And you indicated that you were going to run that past Dan. Is that Dan Goldberg?

A Yes.
Q And he is then and now your husband?
A Correct.
Q All right. And both then and now he is a Solicitor in Richland County?
A Correct.
Q And Mr. Macon's case was a Richland County General Sessions case?
A Yes.
Q Okay. And so you asked her to give you the client's name, which she did, according to the timestamps, at 1:45 that same day?
A Right.
Q All right. And then it looks like, just moving up, within a couple of minutes of that, at 1:47, you forward that string of emails to your husband?
A Right.
Q And the only message was is, See below?
A Right.
Q And that is the second page of the exhibit we have been looking at. Going to the first page, the bottom portion of it is the same up through where Ms. Counts provides you Mr. Macon's name and that it was assigned to Mr. Cathcart up to that point?
A Right.

Q All right. And then at 2:01 -- and we are still on the same day -- you respond and indicate that, We are good to go, and asked her to send the information and a signed substitution order and you would take it to the judge and that you would also send her your next conflict?
A Yes.
Q All right. So roughly all of that happened in about 17 minutes?
A Right.
Q Okay. And, of course, we don't -- and these documents, we don't have your husband's response to any of that, do we?
A Right. I think that he called me.
Q Okay. All right. So my question is, is during this, you know, 17-minute period, did you speak with Mr. Macon?
A Oh, no.
Q Okay. All right.

MR. GROSE: Your Honor, I would move Applicant's Exhibit Number 14 into evidence.

THE COURT: Any objection?

MR. DAVIDSON: No objection.

THE COURT: Hearing none, the motion is granted.

(WHEREUPON, Applicant's Exhibit No. 14 was marked for identification and received into evidence.)

BY MR. GROSE:

Q All right. I'm going to put what has been marked as Applicant's Exhibit Number 10 on the screen and ask, Ms. Goldberg, do you recognize that?

A Yes.

Q Okay. And what is that?

A That is the substitution order.

Q Okay. And that looks like it was filed -- well, let me take that back. It looks like it was signed by Judge Benjamin on September 19th, 2012?

A Yes.

Q And so that would be the day after your emails with Ms. Counts?

A Yes.

Q And I can put that back up if you need to see the dates.

A I mean, if that is what the dates are, I'm not going to dispute that.

Q Okay. All right. So between the emails and Judge Benjamin signing this order, did you speak with Mr. Macon?

A No.

MR. GROSE: All right. Your Honor, I would move Applicant's Number 10 into evidence.

THE COURT: Hearing no objection, the motion is granted.

(WHEREUPON, Applicant's Exhibit No. 10 was marked for identification and received into evidence.)

BY MR. GROSE:

Q I'm going to put Applicant's Exhibit Number 11 on the screen, and this is a multiple-page document, but it includes your voucher to Indigent Defense and the timesheets.

A Okay.

Q And I'm just trying to scroll through it slowly. If you need me to stop anywhere, let me know.

A I mean, I know what I'm looking at. I don't know if I'm looking for anything in particular.

Q Well, right now I'm just asking if you recognize that?

A Yes. Yes.

Q And does that appear to be your -- a printout of your voucher and the timesheets?

A It does.

Q Okay. And it looks like your first entry was on September 19th, 2012, when you received the

appointment order, documents, and warrants, is that right?
A Yes.
Q And then on that same day you spoke with Mr. Macon?
A Yes.
Q And that would be, I guess, the first time that you spoke with him, which would be after receiving that order?
A Right. I wouldn't have had his contact information before I got the warrants and stuff.
Q Okay.

MR. GROSE: All right. Your Honor, I would move Applicant's Number 11 into evidence.

THE COURT: Hearing no objection, the motion is granted.

(WHEREUPON, Applicant's Exhibit No. 11 was marked for identification and received into evidence.)

BY MR. GROSE:
Q Do you have anything in writing signed by you and Mr. Macon where you disclosed to him that your husband was a Solicitor for Richland County and where he agreed or waived that potential conflict?
A No.
Q Looking at this voucher, it looks like you billed

right at the $3,500 in fees, is that right?
A That -- well, that is what the voucher looks like, but -- well, it says $3,604.
Q Okay.
A Is what I'm looking at.
Q And -- okay. So you are looking at there?
A Yes.
Q With total requested?
A Right.
Q And I guess what the total was paid was $3,500, plus $10 for expenses?
A Yes.
Q Okay. And I'm looking at that down there, including that. Do you know whether or not the $3,500 was a statutory cap in fees at that time?
A I don't know.
Q Okay. All right. Now, when the Attorney General put the procedural history on the record, he said that Mr. Macon was convicted as indicted. Did you hear him say that?
A Yes, but I don't -- well, he was only convicted of one charge.
Q Right. And I think, you know, what he said was technically correct in that Mr. Macon was indicted for armed robbery, and on that charge he was

convicted as indicted?
A Correct.
Q But he was also -- and this is the part that he left out -- is that Mr. Macon was also indicted for several counts of kidnapping?
A Correct.
Q Do you remember that?
A Yes.
Q And the jurors ultimately acquitted Mr. Macon on those charges, is that right?
A That's right.
Q The kidnapping charges. Okay. Can you -- do you recall enough to kind of provide us a summary as to what the State's evidence, the State's theory was in this case?
A The State's theory was that Mr. Macon talked to and maybe convinced his cousin to rob a bank. And that Mr. Macon dropped him off and was planning on picking him up after, and had supplied his cousin with a fake gun to use. And so Mr. Macon was involved in the planning before, maybe after, but didn't -- Mr. Macon never went inside. That is the State's theory.
Q All right. And Mr. Macon denied those allegations?
A He did.

Q All right. And what was the defense at trial?
A The defense at trial was that Mr. Macon's cousin went in the bank and decided to rob it all on his own, and that there was no planning ahead of time. While Mr. Macon may have been nearby and may have dropped him off, there was no pre-planning, there was no agreement to rob, and so Mr. Macon wasn't involved.
Q Okay. And the cousin, do you remember the cousin's name?
A It is Jason Colon. I just don't know if I'm pronouncing his last name right.
Q All right. That is certainly what it looks like to me. Did Jason turn out to be a fairly pivotal witness at trial?
A Yes.
Q And, in fact, I think it is probably fair to say based on the summary that you just gave, the State's theory rested pretty heavily on, you know, Jason's testimony, is that right?
A I mean, they had other circumstantial evidence about Mr. Macon being there, the way Mr. Macon may have been acting from the way others perceived him, but as far as direct evidence, I think that was the bulk of it.

Q Okay. And one of the witnesses that testified at trial was Ricky Woodberry, is that right?
A Yes. Yes.
Q And do you remember who Ricky Woodberry was?
A If I remember right, I think that was Colon's dad.
Q Right. And I'm looking at Page 300 of the transcript where the direct examination begins. And down here at the bottom it looks like he says that he is Jason's father?
A Okay.
Q All right. And do you recall what the purpose of him testifying was?
A Well, there were two -- well, I guess there was really one when it boiled down to it -- and that was -- the purpose was to testify that Mr. Colon was -- had a traumatic brain injury and the way his personality and I guess behavior was as a result.
Q Okay. And a lot of that testimony is I guess on Page 301 and 302. At Line 7 he starts talking about how he was shot and there is testimony about how that occurred?
A Right.
Q Is that right?
A That's right.
Q And he was shot in the temple of his head in the

frontal lobe, and it looks like, you know, a pretty serious gunshot wound. It went in and came out the other side.

A Right.

Q According to the testimony, through the temporal lobe. And I guess the Solicitor's question was is that Jason, you know, basically got a lobotomy from a bullet?

A Right.

Q Is that right?

A Right.

Q And as a result of that, Jason was diagnosed with schizophrenia. And the testimony is, is that Jason functions with a mind of a 13-year-old even though he was 28 at the time of trial?

A Correct.

Q Is that -- okay. And this was something that the Solicitor emphasized in his closing argument. Looking at Page 370 of the transcript beginning at Line 6 through 11, do you see that?

A Yes. I mean, he brought it back up.

Q Right. He brought it back up. And, you know, he talks about, you know, Jason was shot in the head, it changed his life forever. They brought him down here to South Carolina to be amongst family and be

safe, not to be taken advantage of.
A That's what he said.
Q Is that right? All right. And then he -- the Solicitor closes his argument, Armed robbery and kidnapping are heinous crimes. It is not a good thing to do. What he did is despicable. I ask that you find him guilty of all the charges. Is that right?
A Yes.
Q And then that is sort of the end of his argument?
A Uh-huh.
Q After that statement at Line 16 to 11teen -- I'm sorry, 16 to 11 -- I'm sorry, I will get it right the third time -- Line 6 to 11, there is no objection after that, is there?
A There is not.
Q Okay. All right, now, I think that part of the Solicitor's argument was to try to contrast Jason and Arthur. Would that be fair to say?
A I mean, not the paragraph that you are referring to.
Q Well, the paragraph that I'm -- was referring to, Line 6 through 11 on 370, you know, he is building up Jason as somebody who is sympathetic, was changed, and somebody who is vulnerable and being

taken advantage of, right?
A Right.
Q And a couple of pages before that, you know, he goes through, you know, Arthur's statements. And this is on Page 368.
A Right.
Q And at Line 8 he says, Every time he, meaning Arthur, is confronted with a lie, he changes his story. Why? Because he's a liar. Not a good one. That is what they do when they are caught.
And then at Lines 12 through 14, he talks about the lies a little bit more, is that right?
A That's right.
Q All right. And after he calls Arthur a liar, there is no objection, is there?
A No.
Q All right. And are you familiar with any case law in South Carolina that it is improper for a Prosecutor to call a Defendant a liar in argument?
A Well, my argument was that the statements Arthur made were not lies. So that is what I was planning on arguing all along. I was planning on telling the jury that Mr. Cathcart was incorrect. So I don't know that I'm familiar with that case law off the top of my head, but I wasn't worried about that

because I thought he was wrong.
Q Okay. Well, so at the time that Mr. Cathcart called Arthur a liar, is it fair to say that you weren't aware of any case law that prohibited that type of argument?
A I don't know if I was aware of it at the time or not.
Q Okay. All right. So you made your closing argument and then we, you know, get to jury deliberations, is that right?
A That's right.
Q Okay. And it looks like -- I think the date was October 1st, but it looks like the jury began their deliberations at 10:51 a.m. on whatever day that was. And I'm looking at Page 417 of the transcript, Lines 21 and 22, is that right?
A Yes. That would have been Wednesday.
Q Okay. So the jurors in this case actually deliberated the rest of the day on Wednesday, all day on Thursday, and into the early afternoon on Friday?
A Correct.
Q Do you recall that?
A I do.
Q Okay. So it looks like we are still on that

Wednesday. On the bottom of that page it says: The following occurs at 1:10 p.m. And there is actually a juror note that goes with this. And I'm going to show you what is marked as Applicant's Exhibit Number 1, which was also Court's Exhibit Number 2 at trial. Do you recall seeing that note?

A I don't think I saw -- I don't recall -- judges don't always show us the notes, they just read them, so I don't know that I saw it. Maybe, maybe not.

Q Okay. All right. Well, what is on the record is -- this is looking at Page 418.

A Right.

Q The judge says: Please allow us to see the list of the Miranda rights form that was used with booking interrogations. It does not have to be a signed copy. She says, That is Number 1.

Number 2: Where was the money found in proximity to the bank?

Number 3: Where in the parking lot did Mr. Colon take off shirt? Where was shirt found in proximity to TD Bank?

And last question: Please give us the definition of reasonable doubt.

A Right.

Q And then the judge says: That is about the only one I can answer.

And I take that to mean the last question regarding the definition of reasonable doubt?

A That's right.

Q Is that right?

A Yes.

Q And I think the judge then says that the other questions, you know, she didn't know whose testimony they were talking about, but she indicated that she could play back testimony. Is that right?

A Yes.

Q All right. And then there is some discussion going on Page 418 on to 419 about what they are going to do. And then at Line 5 the judge asked for the jurors to come back into the courtroom, is that right?

A Yes.

Q All right. And at this time, looking at Line 6 and 7 -- well, really all the way through 9 -- it indicates that all of the jurors are in the courtroom?

A Right.

Q Meaning the whole jury is present at this point,

right?
A Yes.
Q And then the judge goes through those questions summarizing what they were for the jurors, is that right?
A Looks like it.
Q And it looks like on Page 420 at about Line 4, the judge tells them that as to those three questions, the first three: I will tell you that I can play back testimony that is in evidence, and explains that there is no transcript. And down at Line 14 through 16, the judge tells the jurors that she would give then an opportunity to go back and tell the Court who it is that they want to hear. Is that right?
A Yes. Yes.
Q Okay. And then as the last question, the one that she can answer, is regarding the definition of reasonable doubt, she then provides that instruction to the jurors, is that right?
A Yes. Yes.
Q Okay. All right. And it looks like the jurors go back to deliberations at 1:17 and that at that point Court's Exhibit 2 was marked for identification?

A Yes.
Q And that is, again, Applicant's 1 that is marked as Court 2. Do you have any reason to think that that is not the note?
A No.
MR. GROSE: All right. Your Honor, I would move Applicant's 1 into evidence.
THE COURT: Without objection, the motion is granted.
MR. GROSE: Thank you.
(WHEREUPON, Applicant's Exhibit 1 was marked for identification and received into evidence.)
BY MR. GROSE:
Q Then it looks like fairly soon after that the jury comes back into the courtroom at 1:31 p.m. Is that right?
A Right.
Q All right. And it is an indication there that the court reporter has found the testimony and she will play it back for you at this time.
And then at Lines 24 and 25 it says, Requested testimony was played in open court?
A Right.
Q Then on the beginning of 423 at Line 1, the Court

says: Thank you. If there is any other testimony, just let us know and we'll play it back. The jury retires to continue deliberations at 1:37. And then at Line 6, Court's Exhibit Number 3 was marked for identification only. Do you see that?

A Yes.

Q All right. I'm going to show you now what has been marked as Applicant's Exhibit Number 2, which is also identified as Court's Exhibit Number 3. And it says: Testimony from, looks like Mr. Whaley, Ford services manager. Do you see that?

A I do.

Q Do you have any reason to think that this exhibit does not correspond with the testimony that we just talked about that was replayed in court?

A No.

MR. GROSE: All right. At this time I would move Applicant's Exhibit Number 2 into evidence, Your Honor.

THE COURT: Hearing no objection, the motion is granted.

MR. GROSE: Thank you.

(WHEREUPON, Applicant's Exhibit No. 2 was marked for identification and received into evidence.)

BY MR. GROSE:
Q And then it looks like there was another break. And at 3:01 p.m., the Court -- well, the jurors come back into the courtroom.
A Yes.
Q Is that right?
A Uh-huh.
Q And the transcript doesn't specifically say, but -- well, actually I'm not sure -- let me take that back. That does not say that the jurors are there yet. That just says that is when the court resumed?
A Correct.
Q I think that would be a fairer reading of it?
A I think that is right.
Q Yes. Because then there is a discussion that looks like it is just between the lawyers.
A Well, at the top of the next page the jury comes in, so.
Q Right. Right. So -- so the judge says at Line 15: So the latest note says that, We are not unanimous on any of the charges yet. How do you want us to proceed?

And the Solicitor says: Answer the darn question.

Do you know what he meant by that? That is at Line 18.

A Well, Mr. Cathcart can be little tongue in cheek at times. I think what he was saying or joking or suggesting is that he wants them to come up with a verdict. He wants them to answer the question, guilty or innocent. That is how he wanted them to proceed.

Q All right. And the judge says, If you want me to -- I don't know if I need to give them an Allen charge until they say.

And then at Line 22 Mr. Cathcart interrupts and says, They are deadlocked. Most ridiculous. But, no.

I mean, you described him as tongue in cheek. That sounds kind of incredulous there.

A Well, what he -- I think what he meant was -- he was kind of agreeing with her and finishing her sentence that she can't give an Allen charge until they are deadlocked. I don't know why he thought that was ridiculous or not, you will have to ask him. But he was agreeing she can't give an Allen charge, she just has to tell them, Keep working.

Q Well, but, what she did was at Line 24 she says, I can bring them in and I can tell them that they

have to continue to deliberate and then they will come back.

A Right.

Q And that is really the end of the discussion. And as you pointed out on 424 at Lines 3 to 4, the jury comes back into the courtroom, is that right?

A Yes.

Q And the judge addresses -- and it says: All the jury is -- the bailiff announces that the jury is all present?

A Yes.

Q So that is everyone.

And the judge says, Mr. Foreman, I have received your note. We are not unanimous on any charges yet. How do you want us to proceed?

And at Line 11 she says, You have to continue your deliberations, okay? Line 13, I'm going to send you all back to the jury room. If there is any testimony that you would like to hear again, we will pull it up so you can hear it again, or if there is anything -- and at that point the foreman indicates about requesting testimony and that they would bring it back, you know, when they find it.

A Yes.

Q So would you agree that that was, you know, more or

less an instruction to continue deliberating?
A Yes.
Q And it didn't have any of the Allen charge language in it as far as the language that goes to protect the jurors who might be in the minority, does it?
A No, it just told them to continue -- I mean, they didn't say there were completely, you know -- they said they hadn't come to a unanimous decision yet. So I think she just, Well, that is okay, you can keep working on it.
Q Okay. But none of the Allen charge type protections at that point?
A I don't -- I mean, it is not an Allen charge, that is the best I can say.
Q Okay. I'm going to show you what has been marked as Applicant's Exhibit 3. It is also Court's Exhibit Number 4. Does that look like the note that the judge was just discussing with the jurors and before that with counsel?
A Based on the transcript, it looks like it probably is.
MR. GROSE: All right. At this time I would move Applicant's Exhibit Number 3 into evidence.
THE COURT: Without objection, the motion is granted.

(WHEREUPON, Applicant's Exhibit No. 3 was marked for identification and received into evidence.)

BY MR. GROSE:

Q All right. And still looking back at Page 424 of the transcript, at Line 21 it says that the jury is out. It doesn't provide a time. But then going on to 4:25, the jury came back into the courtroom at 3:09 p.m.

And at Line 10 it says, Requested testimony was played to the court. And then the jury returns to deliberate at 3:35.

A Yes.

Q All right. And it says Court's Exhibit 4 was marked. And that was Number 3 that we just talked about, or Applicant's Number 3. And then there was -- well, I think we are getting ahead of ourselves, so I will come back to that in a minute. So they played the testimony. And then at 6:10 p.m. it says at Line 23 is the time. And at Line 24 it says, We have another note. And your client -- do you want to wait until he comes back? I can check. It is probably -- it will take a second. They are bringing him up. And then at Line 3 on 426 you tell the judge, You can go ahead

and tell us what it is.

And the Court says, Please give us a copy of hand of one is hand of all or re-explain it. Update: Still at a stalemate. Progress is really slow. Do we need to come back tomorrow? Suggestion: We feel as if we sleep on it we might be clearer in the morning.

Is that fair to say?

A Yes, that is what it says.

Q Okay. At Line 13 the judge says, We can put y'all in a hotel. Do you know if that happened or not?

A No, it didn't happen. I mean, not as I remember. I don't remember ever being in a trial where a judge put jurors in a hotel, so I don't think so.

Q Yes. Do you know why she would even say that?

A I almost wonder if she was -- I think she was joking. I think she was joking, because of Cathcart's question above that. I think maybe that was just some banter.

Q Okay. Do you remember whether the jurors laughed at the idea of being put up in a hotel?

A Well, the jurors weren't in the room. They don't come in --

Q Okay. All right, so they never heard that, is what you are saying?

A No, that was just the attorneys talking, and the judge.
Q You're right. On 427, that is when the jury comes back in at Lines 4 to 5?
A Right. I mean, that was clearly a joke because he was asking, You mean everybody is going to sleep here together? Like that was just all kidding.
Q Okay. It also says on 427 that Court's Exhibit Number 5 was marked as an exhibit.

Showing you what is marked as Applicant's Exhibit Number 4, also Court's Exhibit Number 5, does that appear to be the note that we are talking about?

A It seems like it.

MR. GROSE: At this time I would move Applicant's Number 4 into evidence, Your Honor.

THE COURT: Hearing no objection, the motion is granted.

(WHEREUPON, Applicant's Exhibit No. 4 was marked for identification and received into evidence.)

BY MR. GROSE:
Q And so at this point the judge, after the jury returns at 6:15, reads them the jury instruction on the hands of one, hands of all. And that continues

on to 428 and on to 429. And then at the bottom of 429 at Lines 21 to 25, she gets to the second part of the note about them still being at a stalemate.

A Right.

Q All right. And the note actually at this point uses the word "stalemate"?

A Right.

Q And she says -- well, she reads their suggestion and she says, Is that what you all wish to do, come back in the morning?

And the foreman says, I'll go with the majority.

And the judge says at Line 4 -- this is on 430 -- All right, is that what the majority wants to do? And the foreman says, Yes.

Do we know what the jurors that were not in the majority wanted to do at that point?

A All I knew was what was in the transcript.

Q All right. And there is -- you know, the next thing is, is that the judge asks or says, What we will do is we will come back tomorrow at 9:30, report to your room, and we will begin your deliberations at that time. Then there is some other instructions after that.

And then the foreman has a question about the

hand of one, hand of all. And the judge instructs him they will have to write the question down, write it down tomorrow.

And he points out, Well, I wrote it there on the first part of it. And there is discussion about wanting it in writing. And the judge is going to speak to the lawyers about that. And then the jury is excused at 6:21, is that right?

A Yes.

Q All right. And you said just a minute ago that all you know was, you know, what was in the transcript and I guess what was happening in the courtroom. At that point you did not make any request to find out what the majority -- I mean, excuse me -- what the minority of jurors wanted to do?

A I would not have thought to make that request, no.

Q Okay. I mean, they might have wanted to stay that night. That is a possibility, isn't it?

A I guess it is a possibility. I guess my point is, I didn't really think that I was allowed to ask those kind of questions of the jury either. But, I mean, I don't know -- I didn't know anything else.

Q All right. Well, but you could have asked the judge to ask those questions, right?

A I guess I could have.

Q And it is possible that the jurors in the minority had already decided that they didn't want to deliberate anymore, and that is a possibility too?
A Yes.
Q Okay. All right. So then we are still on that Wednesday at the bottom of 431. There is some discussion about providing charges. That goes back, or continues on to 432. And there is discussion about whether to give them the whole charge or just what they are asking for. And it looks like there is an agreement to just provide them what they are asking for, is that right?
A Yes.
Q All right. And then there is discussions about with the lawyers about returning in the morning. The judge says, See y'all at 9:30, and court adjourned on that Wednesday, which would have been October 1st of 2014, at 6:23 p.m., is that right?
A Yes. Yes.
Q Okay. And so then the next morning, October 2, 2014, that would be the Thursday of that week, correct?
A Yes.
Q All right. And the jury comes into the courtroom at 9:50, is that right?

A Okay, yes.
Q And going back to the night before, all the jurors were in the courtroom together when they were recharged and instructed to come back on Thursday, right?
A For sure, yes.
Q And according to this, what we are looking at at Lines 18 to 19 on Page 433, the entire jury is present in the courtroom again?
A Yes.
Q Okay. And the judge sort of reviews what had happened and says as far as their request for the jury instruction in writing and that she is giving them that. She reminds them to consider the instructions as a whole, and sort of some procedural discussion, and the jury returns to deliberate at 9:53, is that right?
A Yes.
Q Okay. So it looks like they cleaned up -- took the footnotes out of it and sent the charge back to the jury. And Court's Number 6 was marked for identification on Page 435 at Lines 1 and 2?
A Right.
Q Now, I'm going to show you -- oh, nevermind, that was the instruction. I apologize. I don't have

that marked as an exhibit.
A Okay.
Q So then at 10:51, I guess back on the record, jurors are not there. And it says: Debbie has said that she will go back. I just need to get on the record. Let's put this on the record. All right. The court reporter has agreed to go back. I want to make sure there is an agreement to the parties. And you indicate that Arthur wants to -- would like to hear it as well. And there is ultimately some discussion, but what they are talking about is the jurors want to hear more testimony and whether or not to do it in open court or have the court reporter go into the jury room, is that right?
A Yes, because it looks like there must have been a trial going on next door and there was some volume issue, so that is why it was being discussed.
Q Right. And the judge ultimately decided to send the court reporter back there?
A That's what it looks like.
Q And obviously with the instructions that she wasn't going to discuss the case with them or anything?
A Right.
Q And then it says Court's Number 7 was marked for

identification only. And Applicant's Exhibit Number 5 is also marked Court's Number 7, and it requests the testimony of four different witnesses, doesn't it?

A Yes.

Q All right. And so -- and I'm going just in the order that they are listed on this note. The hotel general manager, and that is the first one, you would agree with that?

A Well, yes. I mean, she has numbers.

Q Okay. Then it says --

A Whatever.

Q Yes. Okay, well, it says hotel general manager, and then it has Number 2; and then it is Jason's testimony, Number 4; investigator, white male that read from the paper, Kerri, is Number 3; and the first officer on the scene -- and that is singular -- first officer on the scene is Number 1?

A Yes.

Q And I think we discussed earlier that, you know Jason was a particular central witness in this case, right?

MS. MCCALLISTER: Charles?

MR. GROSE: Yes?

MS. MCCALLISTER: Charles, I'm sorry to

interrupt you. You are cutting in and out. Can you hear what he is saying? I can't.

THE COURT REPORTER: I couldn't hear what she just said.

MR. GROSE: Yes, I couldn't hear what you just said either.

THE COURT: I've been able to hear what Mr. Grose has been saying.

MS. MCCALLISTER: I think we are having -- okay, I'm having some issues with Mr. Grose cutting in and out. Can we maybe have a second to try to fix our audio issues before Mr. Grose continues?

MR. GROSE: That's fine by me.

THE COURT: Let's take a five minute recess.

MS. MCCALLISTER: Thank you, Your Honor.

THE COURT: We will be in recess for five minutes.

(Break.)

THE COURT: Mr. Grose?

MR. GROSE: May it please the Court?

DIRECT EXAMINATION CONTINUES:

BY MR. GROSE:

Q Applicant's Exhibit Number 5, which is also Court Exhibit Number 7. And we had, you know, talked about the testimony that the jurors were wanting to

consider. Do you recall that?
A Yes.
Q All right. And one of the witnesses that they wanted to consider was Jason?
A That's right.
Q All right. And I think we talked earlier, and I think this is when he had some technical issues, that Jason was a central witness as far as the State's presentation was concerned?
A Yes.
MR. GROSE: At this time, Your Honor, I would move Applicant's Exhibit Number 5 into evidence.
THE COURT: Hearing no objection, the motion is granted.
(WHEREUPON, Applicant's Exhibit No. 5 was marked for identification and received into evidence.)
BY MR. GROSE:
Q So then at 11:15 to 12:00 o'clock, looking at Page 437, Lines 14 to 20 was when the court reporter went to the jury room and played the -- replayed the testimony, is that right?
A Right.
Q All right. And then at the bottom of that page at Line 24 -- well, starting at Line 22, the judge

goes back on the record at 1:02 p.m., roughly an hour later, says: There is another note that will be marked as Court's Exhibit Number 8. And it says: Update. We are now 11 to 1, same as yesterday at this time when we left. The one person is not in agreement with the majority and said that they will not change their mind. Signed by the foreperson.

A Right.

Q Do you see that?

A Yes.

Q All right. And I'm showing you now what is marked as Applicant's Exhibit Number 6, which is also Court's Exhibit Number 8. Does that appear to be the note that we were just discussing?

A It looks like it.

MR. GROSE: At this time, Your Honor, I would move Applicant's Number 6 into evidence.

THE COURT: Hearing no objection, the motion is granted.

(WHEREUPON, Applicant's Exhibit No. 6 was marked for identification and received into evidence.)

BY MR. GROSE:

Q Going back to Page 438 at Line 6, the judge says:

So I can give them an Allen charge. I think I have to do it at this point. And then let them sit back there, I guess, for however long after I give them an Allen charge. All right?

And at that point, you ask for some time to talk with Arthur. And at Line 13 Mr. Cathcart says, I gave him an option. Do you know what he meant by when he said that?

A No. Let me look real quick and see if there is anything in my notes.

(Pause.)

A No, I don't. And I don't have anything in my notes, so I don't know.

Q All right. And you request five to ten minutes, is that fair to say?

A Whatever it says, yes. Yes.

Q Look at Line 18.

A Yes.

Q And then at the bottom of that page, Lines 23 to 25, that exhibit that we just talked about, Court's 8, was marked?

A Right.

Q All right. And then at 11:21 -- I'm over on Page 439 now -- the jury came back into the courtroom. I may have said 11:21, I meant

1:21 p.m. Do you see that, Lines 4 to 5?
A Yes.
Q Okay. And according to Lines 4 and 5 and Line 6, it appears that the entire jury is present in the courtroom, correct?
A Yes.
Q All right. And at that point the judge gives them an Allen charge, is that right?
A Yes.
Q And we see that going on to Page 440, 441. And then the jury retires to the jury room at 1:24 p.m. That is Lines 13 and 14 on Page 441. Is that right?
A Right.
Q Okay. Now, I think this is obvious, but, you know -- from the note -- but at this point, you know, the judge knew the count, is that right?
A Yes. Yes. I don't know if she knew -- I don't know that she knew which way the count was, but she knew the count.
Q But she knew the count. And so at this point, the concern comes as to whether or not you are singling out, you know, a single juror?
A Right.
Q With an Allen charge? Okay. And then there is

some discussions at Lines 15 to 21 that if they remain deadlocked, then the Court would have to declare a mistrial, is that correct?

A Yes.

Q Okay. Then still on Page 441 at the bottom of the page, Lines 23 and 24, at 2:21 p.m. -- and we are still on the Thursday -- a question was sent out from the jury, is that right?

A Yes.

Q Okay. And at this point on 442 they mark two exhibits, Court's Number 9 and Court's Number 10. And it says Court's 10 was sent back to the jury room?

A Right.

Q And so I'm showing you now what is Applicant's Exhibit Number 7 that is marked as Court's Exhibit Number 9, and it says: Please provide a full explanation of reasonable doubt in writing if possible.

A Right.

Q And you don't have any reason to doubt that that was the note that the jurors sent out?

A No.

Q Okay. And so this is the second time that the jury has requested an explanation of reasonable doubt?

A That's right.
Q All right.
MR. GROSE: And at this time, Your Honor, I would move Applicant's Number 7 into evidence.
THE COURT: Hearing no objection, the motion is granted.
(WHEREUPON, Applicant's Exhibit No. 7 was marked for identification and received into evidence.)
BY MR. GROSE:
Q And I have not marked it, but I would just represent that Court's Exhibit Number 10 is the written typed copy of the reasonable doubt instructions. And then at Line -- back on Page 442, that is explained at Lines 10 through 20, that by consent of the parties the reasonable doubt charge would be sent back to the jury room.
Then the judge says: The next one is -- Your Honor, this is Exhibit Number 11 -- Please let us hear Jason's testimony again. Do you see that?
A Yes.
Q And I'm going to show you what is marked Applicant's Exhibit Number 8, that is also marked as Court's Exhibit Number 11. Does that appear to be the note that the judge had just talked about on

the record?
A Looks like it.
MR. GROSE: Your Honor, at this time I move Applicant's Number 8 into evidence.
THE COURT: Hearing no objection, the motion is granted.
(WHEREUPON, Applicant's Exhibit No. 8 was marked for identification and received into evidence.)
BY MR. GROSE:
Q So this is the second time that they have asked to hear Jason's testimony replayed, is that correct?
A Yes.
Q Okay. All right, and still on Page 442 of the transcript at the very bottom beginning at Line 24, the judge says, So that is what we're going to do. She -- I assume referring to the court reporter -- is going to pull it up and go back into the jury room again and allow them to hear the testimony?
A Right.
Q And then the judge puts on the record what I just talked about is Exhibit Number 10 being the reasonable doubt instruction and Court's Number 11 is what we just looked at?
A Right.

Q Correct?
A Uh-huh.
Q And then it looks like at Line 8 through 14 of that page, between 3:58 and 4:13 on that Thursday afternoon, the court reporter was in the jury room replaying Jason's testimony?
A Right.
Q All right. And then as far as the lawyers and the Court at Line 15 were in a break. At Line 16 the following occurred at 6:21 p.m. Is that right?
A Yep.
Q Do you see where I'm at? And the judge says: We have received another note that will be marked as Court's Exhibit Number 12. It says, Your Honor, we have deliberated for the past eight hours and we are still in the same position. What the transcript says is, The teeth have now set in and we need freshness. Do you see that?
A I do.
Q Lines 20 to 22. Now I am going to show you what has been marked as Applicant's Exhibit Number 9, which is Court's Exhibit Number 12. Do you see that?
A Yes.
Q Does that appear to be the note that we're talking

about?
A I think it probably is.
Q All right. And that last sentence where the transcript said "the teeth," the note actually says, "Fatigue has now set in and we need freshness"?
A Right.
Q Is that correct?
A Yes.
MR. GROSE: So at this time, Your Honor, I would move Applicant's Exhibit Number 9 into evidence.
THE COURT: Hearing no objection, the motion is granted.
(WHEREUPON, Applicant's Exhibit No. 9 was marked for identification and received into evidence.)
BY MR. GROSE:
Q And so now we have Mr. Shellenberg saying -- well, he is asking, They need to sleep on it again? We're still on 443 going on to 444. 443 at Line 25, the judge says, I don't know. I don't know what freshness means. Does that mean they need to go outside and get fresh air, refreshments? I don't know. And then she says, My thoughts are to

bring the foreman in and ask him what it is that they are asking for and also to ask him if he thinks they will ever be able -- do you think you will be able to reach a verdict with further deliberations? Do you see that?

A Right.

Q And Mr. Cathcart says, you know, that he would prefer that they just ask the first part, not the other part, What do you mean by fresh? I also would not have a problem if you just go back there yourself instead of bringing them out here.

At Line 13 the judge says, No, I want to put on the record what they mean by freshness because I don't know, obviously reluctant to go back into the jury room.

And at Line 18 she says, So can you bring the foreman in? Do you see that?

A Yes.

Q And at that point they mark Exhibit Number -- Court Exhibit 12, which we just talked about. And then the foreman enters the courtroom at 6:23 p.m., is that right?

A Uh-huh.

Q Is that a yes?

A Yes.

Q And I do that too when I'm testifying. You have actually done very, very well. I am just reminding you for the court reporter.
A Thanks.
Q This is the first time that, with regards to the deadlock in deliberations, this is the first time that we have the foreman in the courtroom without the rest of the jury. Wouldn't you agree with that?
A I think so.
Q Because when we have been going through it before, it has all been about all the jurors coming back.
A Okay.
Q And so still on Page 444 at Line 24, the judge says, I received your note, which we have marked as Court's Exhibit Number 12, and it reads -- and, again, it has "the teeth," but we know that that means "fatigue" --
A Right.
Q -- from the note, correct? And then on 445 at Line 6, the foreman says, Well, many of them are feeling like we are at an impasse. We don't know how much longer we can deliberate and still be soundly doing what we need to do, but we are at your mercy. Do you see that?

A Yes.
Q Okay. Do you know what the foreman meant when he said, We're at your mercy?
A I think he was asking the judge to give them some guidance on what they need to do.
Q Okay. All right, and Mr. Cathcart asked or says, I would just ask if it means come back tomorrow or take a break or dinner or -- and then the judge says, I assume addressing the foreman, Do y'all need to go outside, are you asking to come back tomorrow, are you asking for food, are you asking, do you want to go back and just -- and then at Line 17 the foreman says, Some of them -- well, a good bit of them -- want to get out of the room. That is the biggest thing.
A Uh-huh.
Q At 20, do you see where the judge says now or forever?
A Yep.
Q At Line 21 the foreman says, Two or three want it to be forever, but, you know, we are willing to do what we need to do, just don't want to be in that room right now. You know, some people are having claustrophobia problems. Somebody even mentioned if they could just get fresh air for an hour. And

that wraps up at Line 1 on 446, right?
A Right.
Q And the Court says, Why don't you just go and try to see what it is that they need? And Mr. Cathcart points out that it is almost 6:30 and suggests coming back tomorrow. And there is a discussion about whether the jury has to do that.

And then at Line 11, So can I send you back and try to find out what it is that they are looking for? The foreman agrees to do that. The judge says, You can send a note or come back. The foreman says he will come back. At Line 22 he leaves the courtroom. At 6:40 he returns.

At Line 25 he says, All right, the majority stated that they wouldn't mind coming back tomorrow. However, the question is, what is a reasonable amount of deliberation time that you mentioned earlier before you declare?

And then the judge cuts off, In the charge when I said reasonable? And the foreman says yes. Right?
A Right.
Q Now, so at the very last line on 446, the judge says -- or not the judge, the foreman says, The majority stated that they wouldn't mind coming back

tomorrow, right?
A Right. Uh-huh.
Q The foreman does not report what the minority says at that point, does he?
A No.
Q But earlier on 445 at Line 20, when the judge asked if they wanted to get out of the room now or forever, the foreman said that two or three want it to be forever?
A Right.
Q And this is after the judge had -- after he already said up there at Line 6 and 7 that, Many of them are feeling like we are at an impasse. Do you recall that? Still on 445?
A Yes.
Q All right. And so, again, I know this is part of the same interaction, but at 6:40 we just have, for the second time we just have the foreman in the courtroom without the rest of the jurors, right?
A Right. It looks like it.
Q But it certainly -- well the instruction was at Line 11, So I can send you back and try to find out what it is they are looking for. And the foreman exits at Line 22 and returns at Line 24, right?
A Right.

Q At this point, I guess at Line 14 the foreman says, We'll come back tomorrow or whatever time you give me. And the judge says, We'll start back at 10:00 in the morning. And then at Line 23, that is when the rest of the jury actually comes into the courtroom?
A Right.
Q Do you agree with that?
A Yep.
Q At 6:42. And then at Line 25 on 447, going on to the next page, the judge says she had received the note. She says, The foreman tells us that you are ready to retire for the evening and that you would like to come back tomorrow. That is not exactly accurate because two or three wanted to be done forever. And so at that point she sends them home, is that right?
A Right.
Q And they were excused at 6:44. And at no point during this time did you call the judge's attention to the fact that two or three of them wanted to be out of the jury room forever, did you?
A She already knew that.
Q All right. But you didn't point out that that was indicative that you had jurors that didn't want to

deliberate anymore, did you?
A No.
Q And you didn't point out to the judge that when the foreman said that some of the jurors believed that they were at an impasse, you didn't point that out that this means this jury could probably not reach a verdict, did you?
A Well, no. I mean, they didn't say that. They -- I mean, they continued to say that they were willing to try and willing to continue deliberating. Maybe one or two or three of them may not have been, but the majority was willing to. So, no. I mean --
Q Well, we know at least two or three did not want to continue deliberating, don't we?
A Well, the foreman said they wanted to leave the room forever.
Q Well, I mean, in all fairness, that means they don't want to come back and deliberate anymore, I mean, that is a reasonable interpretation of that, you would agree?
A Well, yes, but then -- yes. Then the majority said they want to come back the next day, so. I mean, it is what it is. You can interpret it however you want, but the record says what it says.
Q Right. Well, the record says what it says, and you

didn't move for a mistrial or ask the judge to declare a hung jury at that point?
A I did not.
Q Then on Page 449, the court adjourned at 6:54 p.m. on Thursday, October 2nd. And then on Line 4, October 3rd begins. That is that Friday, correct?
A Right.
Q And unlike that Thursday, the deliberations just start when the jury comes in, they don't come to the courtroom first?
A Right.
Q And at 12:18 the judge goes back on the record at Line 7, right?
A Uh-huh.
Q And says, They don't have a question or a verdict, but the clerk has said that if I am to order them lunch that I need to probably order it now. And then at Line 13 she says, I'm going to bring the foreman in and ask him, Do you think I need to order you all lunch, because it might be two hours before lunch gets here, and see what he says?
A Right.
Q Do you see that?
A Uh-huh.
Q Is that a yes?

A Yes. Sorry.
Q No worries. In Richland County does it typically take two hours to get lunch for the jurors? I mean, I know it is not an easy -- I mean, there is a lot of moving parts to it because you have got to get the orders for so many people.
A Yes, I don't know what the typical time is, but it does usually take a while.
Q Okay. And so if it could be two hours and this is happening at 12:18, that would put the jurors getting their food at 2:18 in the afternoon?
A Correct.
Q Okay. And then there is some discussions about how to phrase it. And on Page 450 at 12:20 the foreman comes back into the courtroom, right?
A Right.
Q And, again, we just have the foreman, we don't have everybody?
A Right.
Q Correct?
A Correct.
Q And so beginning at about Line 9 the judge explains, you know, what it is that she was considering. And at Line 17 the foreman says, Well I mean, we are all right there, but lunch may help,

you know.

And then the judge says, But what I'm saying is it may not get here for another hour. The foreman says, Another hour or two, you know.

And then it just says, the judge says, I will let you continue to deliberate. At Line 24 the foreman says, Yes.

And Line 25, And if it looks like in the next 20 minutes or so you think that I need to order lunch, go ahead and let me know. Right?

A Right.

Q All right. And, you know, then there is some discussion about just letting the bailiffs know and where the food would probably come from.

A Right.

Q And then at Lines 13 and 14 on Page 451, the foreman leaves the courtroom?

A Right.

Q All right. And we don't know because the record doesn't say, and of course we weren't -- none of us, including you, were in the jury room, we don't know what the foreman told the jury, do we?

A No.

Q All right. And then at 12:47 on that Friday they have a verdict?

A Correct.
Q And as we discussed earlier, that was guilty of the armed robbery and not guilty of all the kidnapping charges?
A Right.
Q And at no point during these deliberations that went on for, you know, roughly two and a half days, did you ever ask the judge to declare a mistrial because the jurors were hung?
A No.
Q Okay. All right. I want to ask you -- let's see. I want to ask you some questions about the indictment. And I'm going to show you two exhibits.
A Okay.
Q One is marked as Applicant's Exhibit Number 12, and it is two pages. And it does say at the top, it is amended and it gives the indictment number of the case. It has January term 2013, but the true-billed date looks like it is July 16 of 2014. And the second page it does say that the Grand Jury convened on January 16 of 013. And that is Exhibit 12.

Exhibit 13 is a document that the Attorney General's Office provided to me yesterday that is

four pages. And the first page, the way I have them sequenced, the first page has the case number handwritten in, it is the January term 2013. And it looks like that was true-billed on January 17th. It has the same language as the prior exhibit regarding January 16th as when the General Sessions term convened. Then Page 3 is the amended indictment and has that July 16th, 2014, date.

A Right.

Q Do you have -- do you know what was going on there why those dates don't appear to match up?

A I mean, it looked like the Solicitor just didn't change the date on the back of the indictment when he sent it -- when he sent the amended indictment to be true-billed. It looks like he just didn't change the date, the month from January to July.

Q Okay. Do you recall whether you ever looked into that at the time?

A I cannot recall if I even noticed it.

Q Okay.

MR. GROSE: Your Honor, at this time I would just move Applicant's 12 and 13 and into evidence.

THE COURT: Hearing no objection, the motion is granted.

(WHEREUPON, Applicant's Exhibit Nos. 12

AND 13 were marked for identification and received into evidence.)

MR. GROSE: As a matter of housekeeping, I think at this time Applicant's 1 through 14 should all be in evidence. I want to make sure everybody agrees with that?

THE COURT: What do you say, Mr. Davidson?

MS. MCCALLISTER: I'm sorry, Your Honor, I'm going back through my notes just to doublecheck that.

THE COURT: Okay.

(Pause.)

MS. MCCALLISTER: Yes, I believe that is correct. I have in my notes 1 through 14.

MR. GROSE: And while she was looking at that, I kind of looked through my notes, and that is all the questions I have at this time, Your Honor.

THE COURT: Cross-examination by the Attorney General?

MS. MCCALLISTER: Thank you, Your Honor.

MR. GROSE: And I tried to stop my screen sharing so that wouldn't interfere. Let me know if I didn't get that done.

MS. MCCALLISTER: I think it stopped.

CROSS-EXAMINATION

BY MS. MCCALLISTER:

Q Okay, Ms. Goldberg, you discussed a little bit about how you got to be on this case, but let's go back to the beginning about your emails. So you email -- you received an email from another attorney asking you to take the case because that attorney had a conflict, correct?

A Yes.

Q Okay. And because it was a Richland County case which the Richland County Solicitor's Office was prosecuting, your response was that you needed to check with Dan, your husband, I assume to check to see if he had any involvement with the case?

A Yes -- no. The arrest date, I looked to make sure it was August 30th of 2012, and I think those emails were from early September. So this case would have been brand new in the Solicitor's Office. But regardless, I wanted to see if he had had any involvement at all since it is at their office, because if it had, I wasn't going to take it.

Q Okay. And so you forwarded him sort of the email chain with Mr. Macon's name in it so he would know which case you were inquiring about, correct?

A Yes. And then I think he called me is why there

not a response, so that whole conversation then put him on notice, well, okay, since you are not involved, I'm going to take the case, you don't get involved with it from here on out, lock yourself off.

Q Okay. So your response when you say back to Ms. Shealey, We are good to go, your testimony is that was following a phone conversation with your husband where he confirmed that he had no involvement up to that point?

A Yes.

Q And he confirmed that he would have no involvement going forward?

A Yes.

Q Okay. And how -- at that point in time you were in private practice with your own firm, correct?

A Yes.

Q Okay. So where were your files stored?

A In my office, which was -- there was a physical office on Main Street.

Q Okay. So your office for your law practice was separate from your house or your residence?

A Yes.

Q And the files for Mr. Macon's case were stored in your office?

A Correct.
Q And did your husband have access to the office or those files?
A No.
Q Okay. And I believe you testified you didn't have anything in writing where you talked about this with Mr. Macon. Do you know if you spoke to him about it?
A It was generally my practice, I didn't take very many Richland County cases, I just ended up getting particular -- I think that this particular case came in very soon after I opened my practice, and I hadn't established my own contracts with OID yet, so once I established my own contracts with OID, I wasn't getting random cases like this, and I never had a Richland County contract, so I didn't have many Richland County cases, but my practice would have been to say, Hey, just so you know, I'm married to someone who works in that office, don't get your hopes up, that doesn't mean he can do you any favors, we're not going to -- he is not involved in your case, but I'm just letting you know.
Q Okay. So that would have been your general practice at the time?

A Yes.
Q Okay. Do you recall Mr. Macon ever raising an objection?
A No, I don't recall. If he had I would have gotten rid of the case. I don't remember -- I mean, I honestly don't remember a specific conversation, but I can tell you if he had objected, I wouldn't have argued with him or told him he didn't have a choice, I would have just conflicted it out to someone else.
Q Okay. So you don't recall specifically having a discussion with Mr. Mason, you are just testifying about what your general practice was at the time?
A Yes.
Q Okay. Did you ever speak to your husband about the case?
A Not that --
Q I mean, after -- you know, the specifics. After this email exchange, or whatever?
A I mean, I don't -- wouldn't have had any reason to -- I mean, obviously since we are married at some point he knew a trial was coming up, he knew I was going to be in trial. He knew things like that, like peripheral things, but I wouldn't have discussed the case with him in any significant way

as far as him being involved in the case, because he wasn't involved in the case.

Q Okay. In terms of like just --

A Like strategy, defenses, none of that.

Q Okay. So you are saying he would have known your schedule, but he wouldn't have known that -- you did not discuss with him any sort of details of the case, the evidence, plea offers, anything like that?

A Right. Right.

Q Okay. And in terms of the Solicitors that you dealt with on the case, you only dealt with Mr. Shellenberg and Mr. Cathcart?

A Yes. It was Mr. Cathcart's case all along, and then Mr. Shellenberg came in towards the end to help prepare for trial and help try it.

Q Okay. And so you just mentioned that you didn't have your own contract with OID at this time, but OID, the Office of Indigent Defense, they did pay you for your time on this case, correct?

A Yes.

Q Okay. And at that time it wasn't a flat fee arrangement, it was sort of like traditional billing hours where you billed it to this case, correct?

A Correct.
Q And you were paid an hourly right?
A That's right.
Q Okay. And what would have happened in this case if you had -- if there had been a mistrial declared and you had to go back and retry the case? Would you have been paid again in the same arrangement with your hourly billing?
A Well, it is funny, I hadn't noticed -- what Mr. Grose brought out that when I requested $3,600 and they only paid me $3,500, I hadn't noticed that. I don't know even know if I noticed that at the time because it was so close. And I don't remember what the statutory maximums were back then. I guess that could have been maximum. But even with that, if I had tried to try this case again, I would have gone to a judge and asked for an order to pay me my hourly rate beyond the maximum. And I have had judges do that in other cases where they have granted it. I mean, I definitely think I would have been paid more.
Q Okay. So with the fact of getting paid, did that go into your calculation about whether you should move for a mistrial?
A Not at all.

Q Okay. Okay. And you talked a little bit -- you talked a little bit about the indictment issue just now. I think you said that you don't even recall if you had noticed the discrepancy in the dates. When you look at those two indictments, do you see, you know, in the amendments anything that, you know, sort of changes, you know, what Mr. Macon was charged with or, you know, the notice of the date and time of the, you know, allegations, or anything like that?

A No. It looks like a typo on the date that the Grand Jury convened.

Q Okay. So in your opinion, looking at those two documents, it doesn't change anything, it just looks like it is a typo when they sent it back -- when they sent the amended indictment back?

A That's right.

Q Okay. And I think -- okay. And so all along in this case, you were on notice that the charges were going to be for the one count of armed robbery and the counts of kidnapping? I think it is four counts of kidnapping. Correct?

A Yes.

Q And you knew that it was at TD Bank on whatever day it was?

A Yes.
Q Okay. So when you got an amended indictment, that wasn't -- nothing was new to you with getting an amended indictment?
A No. I don't even know -- I mean, I guess I --
Q I think it just changes the name of the victim from TD Bank to the individual tellers, is what the change was.
A Okay.
Q Okay. So that change, that wouldn't have been necessarily even new information, you would have known who those people were?
A Yes.
Q Okay. And that change wouldn't change anything with your preparation of this case for trial?
A No.
Q Okay. Mr. Grose asked you some questions about the Solicitor's closing argument where he, you know, essentially argues that Mr. Macon was lying when he gave his statements to the police, or lying about his story. And you did not object to that characterization that he was lying, correct?
A Right.
Q And can you just talk generally -- I mean, do you have a general sort of practice about objecting

during closing arguments? Is that something that you frequently do?

A I try not to when possible, because one of my -- every time I have ever tried a case, one of my strategies is that I want the jury to like me. I want the jury to like me. I want the jury to think that what I'm saying makes more sense than the State. I want them to think that I'm the one that is being more logical, that they are the one that is overreaching, that they are the one that is exaggerating. And in that particular case, when he was calling him a liar, I knew I had an argument against that. I knew I could explain all of Mr. Macon's statements in a way that made sense, which I did in my closing statement, and so I could use that to say, you know, the State is calling him a liar and he is clearly not, they are exaggerating, they are overreaching, they are being ridiculous, listen to me, don't listen to them.

So I'm not saying it was helpful for the State to call him a liar, clearly that is not a good thing, but, you know, sometimes when the State takes an extreme position, I can use it to my benefit. I didn't see any reason to object to that.

Q Okay. So you didn't see any reason to object even though I think you maybe agreed, you know, that it might be objectionable, but you had a reason for not objecting?
A Yes.
Q Okay. And in addition to that, I mean, I think that sort of that issue of whether he had changed his story and, you know, whether he was, you know, just sort of making things up as he went along, that had come out in the testimony, at least with the officer who took the statement, correct?
A Yes.
Q Okay. So is it fair to say that you -- that the Solicitor in sort of making that argument was commenting on evidence and testimony that had been presented?
A Yes.
Q Okay. And did you think at that point, you know, even if you had thought to object, that that would, you know, that would benefit you in any way by, you know -- would help your client in any way to object to that?
A Well, I didn't think -- given that he was commenting on actual evidence, the only thing the Solicitor really did was -- that could have been

improper was actually kind of use the word liar, like to use such an aggressive word. And whether there is case law on point for that or not, I don't know. By at the time, or even now, my instinct is that if I asked for a mistrial based on that word being used alone, I didn't think a judge would have granted it, so I didn't think requesting -- objecting would have really done anything.

Q Okay. And as you have already testified, you felt like you could sort of use that in your own closing argument to say, you know, Oh, the State is exaggerating, here is what he said and here is why it is logical and not a lie?

A Yes. Yes.

Q Okay. Let's sort of go through I guess this timeline with the jury notes one more time a little bit. I'll try to be quick.

We have seen that -- they obviously were having some discussion about how this case was going to go. They were -- it was not a case where they, you know, went back there and everybody agreed immediately. They wanted to hear witnesses and they wanted to, you know, be instructed on various aspects of the case multiple times, correct?

A Yes.
Q And the first time that they send out a note -- I think it is on Page 417, that is the note where -- wait, I'm sorry. Okay. I think that is the first noted is where they ask to see some testimony -- or they ask a couple of questions and the judge says, I can't answer these factual questions, but you can have testimony if you want it. They give them -- You guys give the testimony that they requested and then they play the testimony in open court and they go back and they continue deliberating. So the first time they come out they are just saying, We just have these -- they are looking for clarification on factual issues. They are still deliberating, correct?
A Yes.
Q Okay. And then the next time they come in, I think a few hours later, an hour and a half or so later, that is when they come in and that is the first time that the jury says, you know, We don't -- we're not unanimous on any charges yet?
A Right.
Q Okay. And in your testimony with Mr. Grose about, you know, sort of what the Solicitor was doing there, your testimony was the Solicitor, the judge,

and I assume you were on the same page with that note, that language. They were not saying that they were deadlocked at that point, correct?

A Yes.

Q That is how you interpret --

A That is how I remember it, and that is how I read the transcript too.

Q Okay. So at that point the judge tells them -- they are essentially just looking for guidance, What do we do? We haven't reached it yet. And the judge says, Just keep deliberating, you can keep going, if you want to hear more stuff, we'll pull it up for you?

A Right.

Q Okay. And you agreed with Mr. Grose that that is clearly not an Allen charge?

A Yes.

Q But it is not an Allen charge because there is no indication of deadlock at that point, correct?

MR. GROSE: I'm going to object to the form of the question because it implies I agree that that wasn't an Allen charge. I mean, whatever her belief is is what it is, but I just object to that part of the question.

MS. MCCALLISTER: Okay. I can rephrase the

question.

THE COURT: I will sustain that.

BY MS. MCCALLISTER:

Q Okay. So when the jury comes in with that note that says, We are not unanimous yet, you and the Solicitor and the judge have a discussion, and your recollection of the discussion and from your reading of the transcript is that nobody thought that note was indicating deadlock, is that right?

A Yes. No, they just said they were not unanimous yet. They didn't say they were deadlocked in any way.

Q Okay. And so you guys have a discussion and the judge just tells them, You have just got to keep going, keep working on it, correct?

A Right. They had only been gone a few hours at that point, like maybe three or four hours at that point, so.

Q Okay. And there is some testimony -- or it is not testimony, I guess, but the judge is saying, I don't think I can give them an Allen charge yet, and you and the Solicitor agree, correct?

A Yes. In the transcript what the Solicitor says is in agreement with that. And I don't think I say anything in the record, but I clearly agreed too

because I wasn't challenging it any way.
Q Okay. So when the Solicitor -- it is attributed to the Solicitor saying Allen charge, but he is sort of finishing the judge's sentence where she is saying, I'm not going to give an Allen charge yet?
A Correct.
Q Okay. So I guess what I'm saying is, the posture at that time is that you, the judge, the Solicitor agreed that she would tell them to keep deliberating, but nobody saw that as an Allen charge and you weren't asking for an Allen charge?
A Correct.
Q And the reason you weren't asking for an Allen charge is because in your mind they weren't indicating deadlock?
A That's right.
Q Okay. Okay. So then she tells them that. They go out. And I think they then ask again for a little bit more testimony. They do that. And then they return to deliberations again for later that afternoon?
A Right.
Q And then I believe they come back again, ask for some -- they want the hand of one, hand of all instruction, but at that point, that is the first

time I guess the jury uses the word stalemate. So the note from the foreman says stalemate, but then also says, you know, Suggestion: We feel we might be able to do better in the morning?

A Right.

Q Okay. So reading those two statements together, did you take that as an indication that they were deadlocked?

A No.

Q Okay. And I assume that is because of the indication that it might be better for them to come back in the morning?

A That's right. And I feel like a stalemate is different than deadlock. Like, I haven't looked up the word, I don't know, but it kind of seems like they are just kind of at a stuck point, but it doesn't -- but they are willing to continue. They want -- and they are the ones who suggested come back in the morning. I don't -- I wouldn't think that means they are deadlocked at all.

Q Okay. So it is sort of in your mind saying at that point we're at a stalemate, we would like to come back in the morning is sort of just saying like, We need a break to chill out on this for a second?

A Right.

Q Okay. So at that point you don't make a motion for a mistrial because you are again not saying it is a -- that they are not at a deadlock?
A Right. They are still indicating they want to deliberate more.
Q Okay. And at the same time they are also asking for a clarification of a legal issue that is hand of one, hand of all, correct?
A Right. But they are going to need to still -- they want to consider, so.
Q Right. Okay. Okay. And so then I think by this point we're on to Thursday. So it is really kind of the third time that the jury comes out or the foreman comes out with a note that is talking about the progress of deliberations, but this is the time where they say, We're 11 to 1, same as yesterday. The person who is not in agreement will not change their mind.

And at this point, this is when you and the Solicitor and the judge discuss the fact that this is now the appropriate time for an Allen charge?
A Right.
Q Okay. And you had a chance -- did you have a chance to review the Allen charge that the judge was proposing?

A I don't know.
Q Okay. But you -- in any event, she gives the charge, and you didn't object to anything in the charge?
A No. Now let me say, there is two, I guess, reasons I would have objected there. One is, I took, you know, as it says in the transcript, I took five to ten minutes to talk it through with Mr. Macon before. I don't know that we were looking at the language, but, you know, what an Allen charge is, whether it is a good thing, whether it is a bad thing, whether we should go ahead and object to just the fact that she is giving one at all, or something like that, or go ahead and ask for a mistrial and ask for her not to give one. So we clearly discussed that there. Like that is what that issue would have been. But then once she gave the Allen charge, I didn't object. I didn't see anything wrong with what she said. I didn't find any of it objectionable.
Q Okay. And so even though they said they were 11 to 1, it doesn't say 11 to 1 which way?
A No.
Q But clearly both you and the Court were on notice that there was one juror who was sort of holding

out, whichever way?
A Correct.
Q And when she read the Allen charge, you didn't see anything in the Allen charge that struck you as sort of singling that juror out?
A Correct.
Q Okay. So then they go back to deliberate after the Allen charge. And then the next note is again asking for a clarification of a legal issue, reasonable doubt, and they want to hear testimony from Jason Colon. So at that point they are clearly continuing to work on coming to an agreement, correct?
A Yes.
MR. GROSE: I'm going to just object to -- excuse me, I'm just going to object -- it took me a while to get off mute -- I am just objecting to that last question as it calls for speculation.
Q Okay. I can rephrase it. Did you read that note, asking for reasonable doubt and asking for testimony, did you read that note to mean that the jury was continuing to deliberate?
A Yes. I mean, they had been given an Allen charge and instead of coming back out and saying that they are deadlocked again, they asked for more, so they

were clearly working on it.
Q Okay. And so since they were working on it, you didn't see a reason for that to be a basis for a motion for a mistrial?
A No. No.
Q Okay. So then after that they come back -- I guess this is the fourth or fifth time -- this time the foreman comes in, and this is sort of where he says, you know, most of the people just want to get out of the room for a little while and talks about some of them are sort of feeling some claustrophobia, and I believe, you know -- he says, We are willing to do what we need to do, but we just don't want to be in that room right now.
A Right.
Q And this is when the judge sends him back in to find out exactly what the jury is requesting, correct?
Kristy, have we lost you?
A Oh, are you there?
Q Yes. Can you hear us?
A Yes. I'm not sure I know what happened. Can you give me two seconds? I was connected to my hot spot, and my battery is dying. I need a second charger. Hold on one second.

(Pause.)
A I'm back. Hopefully I will stay.
Q So this is the note where they are saying, you know, sort of, Fatigue has set in, we need some freshness. And so the judge calls the foreman in to get some clarification on what that means and what exactly they are trying to communicate to the Court, correct?
A Yes.
Q Okay. So he comes in and says, you know, Some of us feel like we are at an impasse, we don't know how much longer we can deliberate and still be doing soundly what we need to do. We're at your mercy.

And so then the Court says, Okay, so what does that mean? Do you need to go outside? Do you want to come back tomorrow? Do you want some food?

And this is when he says, Well, a good bit of them just want to get out of that room.

She says, Now or forever?

And the foreman says, Two or three want it to be forever, but, you know, we are willing to do what we need to do, just don't want to be in that room right now. Some people are having claustrophobia problems. Some people mentioned, If

I can just get fresh air for an hour.

So he is sort of saying a couple of different things there, not really giving a full answer in exactly what the jury is asking for, correct?

A Right.

Q So she sends him back in to go and see what the jury wants, correct?

A Yes.

Q Okay. And so then he comes back and he says, Well the majority says they don't mind coming back tomorrow. We just want to know how long is reasonable -- a reasonable amount of deliberation time?

And I'm assuming that is a reference back to the Allen charge, correct?

A Right. Well -- yes, that is right.

Q And the judge tells the foreman, That is up to you. It is up to you, the jury, to determine what you believe is a reasonable amount of time, correct?

A Yes.

Q And then so then the foreman then immediately says, Okay, well, we'll come back tomorrow?

A Right.

Q Okay. Okay. And so then they do come back again in the morning, and then the next time sort of

deliberations are interrupted is because the judge wants to know about lunch and not because the jury is asking for anything, correct?

A Right.

Q Okay. So then the judge sort of explains lunch, and the foreman says, Well, we are pretty close.

And the judge says, Okay, go back there and decide if you think you need lunch.

And then they ultimately come back with a verdict?

A Right.

Q Okay. So throughout this time, over the course of these two days, you are obviously -- you are talking about Allen charges. There is mention of, you know, at what point do you declare a mistrial. So I'm assuming that you are thinking about that issue, At what point do you ask for a mistrial?

A Yes.

Q Is that right? Okay. So can you sort of explain what your thought process was or your strategy was in dealing with these notes and the jury deliberations?

A I thought pretty much throughout that it was good that the jury was out. They seemed to be actively engaged, actively thinking about it. I think by

the time it is all said and done, the jury -- not only were -- they were out deliberating for as long as the trial was, if not longer, and they had reheard almost every witness. So clearly there was a lot of reasonable doubt they were dealing with. And they weren't sure and they didn't know. And I was hopeful that that meant that it would be in our favor because there were so many issues they were clearly looking at. It wasn't a one issue case. There were a lot of facts and a lot of issues that didn't make sense. And I thought the fact that they kept asking for so much and so many different witnesses and so many different issues meant it was going to go our way. I believed it would. And if it didn't, I thought for sure it would deadlock because of the length of time that they were not coming to an agreement, the amount of reasonable doubt, the amount of issues. I thought, is it deadlocked? Well, I don't remember ever -- I mean, I definitely knew that we were at that area where maybe I ask for a mistrial, maybe I don't. But I don't remember thinking that asking for a mistrial would do Mr. Macon any favors at any point because I thought we put up a good case, I thought it was hopefully going our way, and I thought, well, if it

mistries, I would rather it mistry by the jury saying they are deadlocked than the judge just declaring it, because if the jury comes back and says they don't know, then the Solicitor knows that he wasn't able to convince the jury of guilt and maybe I get a better offer. And that is a lot better than me asking for it and the judge just making the decision. I don't know that that carries as much weight with the Solicitor.

Q Okay. And all of this that you are sort of thinking about, did you discuss this with Mr. Macon?

A You know, Mr. Macon was not in the courtroom the entire time the jury was out, but he was in there for a substantial amount of time while the jury was out. There was long periods of time each day where he was allowed to just sit in the jury -- in the courtroom with me, and we would discuss things. We would discuss the trial, we would discuss what we thought the jury was thinking, we would discuss everything. And you can even tell in the transcript we discussed whether or not we should object to an Allen charge, whether or not we should, you know, do anything motion-wise while the jury was saying they might be deadlocked. So, I

mean, I had ample time to talk to him about everything, and that was what was going on. So, yes, I'm pretty sure I discussed it all with him.

Q Okay. And so if Mr. Macon had taken sort of a strong position on, you know, wanting to do a mistrial or not wanting, you know, not wanting to let this go on anymore, would you have done so?

A Yes.

Q Okay. Let me make sure -- and then you talked a little bit I think about Mr. Colon and how he was sort of a main witness for the Prosecution. He is the cousin, he is the person who I guess sort of had the traumatic brain injury, correct?

A Yes.

Q Okay. And you were asked about his dad testifying, and that would be Mr. Ricky Woodberry, correct?

A Yes.

Q Okay. And so you objected to Mr. Woodberry's testimony in its entirety, correct?

A Yes.

Q And I think you raised multiple different objections. You objected to some of it that it was hearsay and some of it that it was essentially, even though the State was trying to characterize it as sort of testimony about a medical condition,

your argument was that they were sort of trying to back-door character evidence, correct?
A Yes.
Q Okay. And so the judge ruled on that argument and ultimately limited some of the testimony. I think there was a point where he was going to testify that Colon was easily led, and she did not allow that testimony to come in, correct?
A Right.
Q But she did allow him to testify, you know, sort of that he had been -- had this brain injury, that he had been shot?
A Right.
Q And that it sort of changed his personality afterwards?
A That's right.
Q Okay. And that issue went up on appeal, correct?
A Yes.
Q Okay. Is that something -- I think you had -- you made your objection to that maybe pretrial and then you renewed your objection sort of during testimony in front of the jury, correct?
A Right. They had him proffer the whole testimony. So we proffered it. I objected to it. There was argument on the record. And then when he actually

testified in front of the jury, I just renewed my objections.

Q Okay. And when he actually testified in front of the jury, he abided by the limitation where he -- he was not allowed to testify that Mr. Colon was easily led by others?

A Right.

Q Okay. And in your opinion, that argument that it was character evidence, that, in your opinion, that was your strongest argument to keep that evidence out?

A It -- yes.

Q Okay. And so you weren't trying to argue, you know, Well, this can come in some other way, you were arguing, This is character evidence no matter what you try to say it is and it should stay out?

A Right.

MS. MCCALLISTER: Your Honor, I think I'm done. I just want to check through all of the allegations to make sure I have covered everything. If I could just have a minute?

THE COURT: All right.

(Pause.)

MS. MCCALLISTER: Okay. Your Honor, I think that is all the questions I have for Ms. Goldberg.

THE COURT: All right, thank you.

Mr. Grose, redirect?

MR. GROSE: Yes, sir, I do have a little bit, but I don't think it will take very long.

REDIRECT EXAMINATION

BY MR. GROSE:

Q I believe, Ms. Goldberg, you testified earlier that you didn't have any specific -- you don't recall any specific conversation with Arthur about your wife being -- I mean, your husband being a Solicitor?

A I don't recall the specific conversation, no.

Q Okay. You -- do you know what steps your husband took to make sure he was screened from this case in the Solicitor's Office?

A I don't know about the inner workings. I mean, he knew the name and he knew it was my case, so. You'll have to ask him.

Q Okay. You are not aware of any procedure that the Solicitor's Office has to screen one Solicitor from another Solicitor?

A I don't -- I mean, aside from him just knowing if the name comes up he is not involved, like he is not going to be involved in it, I don't know what they do.

Q Right. And I know he is a deputy now. Was he a deputy back then?
A I don't remember what year that started.
Q Okay. There was a question -- I'm going to share the screen again. Can y'all see that now?
A It is white.
Q Let me try again. Okay. I don't know why -- can you see it now?
A Yes.
Q Okay. So at 439 -- on Page 439 of the transcript --
A Okay.
Q -- the jury comes in at 1:21. And what I'm getting at is is that the Attorney General asked you some questions about were they all still continuing to deliberate and work.

And at Line 7 it says, All right, ladies and gentlemen of the jury, I have received your note, which is Court's Exhibit Number 8, and read it to both sides, and so I will now read what we call an Allen charge. Do you see that?

A Yes.
Q Okay. I think -- all right, so I'm putting Applicant's Exhibit Number 6, which is Court's Exhibit Number 8, on the screen. Can you see that?

A Yes.
Q All right. And so at that point the note says, We are 11 to 1, same as yesterday at this same time when we left. The one person is not in agreement with the majority and said they will not change their minds?
A Right.
Q So that is at least some evidence that not everybody else is working towards a verdict?
A That is the one that came directly before the Allen charge, correct?
Q Correct.
A Right. So that is the note that we got that I then took ten minutes to talk to Mr. Macon about whether we should object to an Allen charge even being instructed or not.
Q Okay. But that is not really what the record says. Looking at 438 at Line 11, you do ask for a few minutes. And what it says at Line 13 is, I gave him an option. And that is coming from Mr. Cathcart.
A That's true. Now, I have no idea what that means. Did he offer him a plea offer or something at that time? I honestly don't remember.
Q Right.

A Maybe that was discussed also. But clearly we were discussing the note. We wouldn't have just not talked about the Allen charge or the note.
Q Well, but the -- do you have any specific recollection of that conversation?
A I don't. But, I mean, I know based on the transcript and how that all played out that that is exactly what we were talking about.
Q Okay.
A Now, whether we discussed other things --
Q The only thing that --
A -- I can't tell you.
Q Right. But the only thing that is reflected in the transcript is that Mr. Cathcart had given Arthur an option, and that is what y'all were going to discuss?
A No. It says -- Cathcart says he gave him an option, but I don't think that is what we're going to discuss, one way or the other.
Q Okay. But that is the only thing that is reflected in the trans -- right, you don't say one way or the other, but the only thing in the record is the option, whatever the option was?
A And I don't know -- I mean, I looked back at my notes from trial, and I don't have anything about

what that might have been. So I don't know that it was anything worth discussing. I mean, it might have been -- it may have been that he was just going to give Arthur -- like renew his original plea offer, like a cap of 15 that Arthur never wanted in the first place. So while Cathcart might have thought that was an option worth discussing, that doesn't mean it was. If it was -- I mean, we would have mentioned it. But if it was something that Mr. Macon was never going to do, that conversation would have lasted about ten seconds and the rest of conversation would have been about the Allen charge.

Q All right. But that is just speculation because you don't specifically recall that conversation?

A Well, I don't recall the conversation specifically, but I can tell from the transcript what was happening.

Q Okay. And the Attorney General asked you some questions about objecting to the -- Jason's father's testimony about Jason and his injuries. Do you recall those questions?

A Yes.

Q And then there were some objections that were made at that time. That is correct, right?

A Yes.
Q But when we look at the transcript earlier where the Prosecution talked about Jason in his closing, there was no objection to that, was there?
A No, there wasn't.
MR. GROSE: Okay. That's all I have, Judge. Thank you.
THE COURT: Anything else from the Attorney General?
MS. MCCALLISTER: No, Your Honor.
THE COURT: All right. Let's talk about what we are going to do. How many more witnesses do you anticipate, Mr. Grose?
MR. GROSE: I'm going to call Mr. Macon. I imagine from my perspective it is going to be pretty short. There is just a couple of things that I think he can testify to, and then I plan to rest.
THE COURT: What about the Attorney General?
MS. MCCALLISTER: We have two witnesses, I believe, and I think those will also be short. They are limited to the one issue.
THE COURT: Okay. Do you want to take a 30-minute lunch break? Will 30 minutes work for everybody?

MR. GROSE: It will work for me. I can make it work.

MS. MCCALLISTER: Yes, we can -- whatever Your Honor wants to do.

THE COURT: We have got somebody here -- Mr. Macon may not be able to do a 30-minute lunch break, I don't know. Let's try. Let's try a 30-minute lunch break, because I anticipate what we are going to have happen is we will finish this up at maybe 2:00 or 2:30, maybe, and then we have got another trial that won't be a short trial either, I don't believe.

Let's regroup at 1:00 o'clock.

MS. MCCALLISTER: Thank you, Your Honor.

MR. GROSE: Thank you.

(Lunch break.)

MR. GROSE: I logged out. I ask to be able to share the screen again?

THE COURT: Certainly.

MR. GROSE: Thank you.

THE COURT: Call your next witness.

MR. GROSE: I call Arthur Macon.

THE COURT: Mr. Macon, will you please raise your right hand?

(Witness complies.)

THE COURT: Do you swear or affirm the evidence you are about to give in this case is the truth?

THE WITNESS: I swear.

THE COURT: Mr. Grose?

ARTHUR WILLIAM MACON, IV, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GROSE:

Q Arthur, if you could state your full name for the record and spell your last name.

A Arthur William Macon, IV. The last name is M-A-C-O-N.

Q Okay. And just let me know if you can't hear me very well, okay?

A Yes, sir.

Q All right. Are you the Applicant in this PCR case?

A Yes, sir.

Q And where are you currently at, which facility?

A I'm currently at Broad River Correctional Facility.

Q All right. And what are you -- what charge are you sentenced for?

A Sentenced for armed robbery, 7 to 23 years for that charge.

Q And did you have a jury trial on that charge?

A Yes, sir.
Q And were you also charged with some other offenses?
A I was. I was also charged with four counts of kidnapping.
Q All right. And what happened with those charges?
A I was found not guilty of those charges.
Q Okay. And who was your lawyer?
A My trial lawyer was Kristy Goldberg.
Q Okay. Were you aware that somebody else was appointed to represent you before she was?
A No, sir.
Q Okay. Were you ever aware that Ms. Goldberg at the time she represented you was married to Dan Goldberg, who was an Assistant Solicitor for Richland Solicitor's Office?
A No, sir.
Q Did she ever have any conversations -- Ms. Goldberg ever have any conversation with you about that?
A No, sir, she did not.
Q Did she ever ask you to sign anything indicating that it was okay for her to represent you --
THE COURT REPORTER: I'm sorry, I couldn't hear you, Mr. Grose. I didn't hear your question. I am hearing some feedback from somewhere.
MR. GROSE: Yes, I'm not sure -- I am hearing

the feedback too. I'm not sure where it is coming from.

(Pause.)

THE COURT: Let's try it again.

MR. GROSE: Okay.

BY MR. GROSE:

Q The question I was asking was, did Ms. Goldberg ever have you sign a document saying that it was okay for her to represent you while her husband was a Solicitor in the same county where you were being prosecuted?

A No, sir.

Q Okay. Are you able to see the screen?

A Yes, sir.

Q All right. I am going to show you what is marked as Applicant's Exhibit Number 14. Did you see those earlier when we were asking questions about it?

A Yes, I did.

Q All right. How did you feel when you found out about these emails?

A I was a little shocked, to be honest. It just seemed that there was -- in my opinion, it seems like there might have been some questions concerning her representing me. She seemed to have

reached out to her husband about that. Concerned about that. But, yes, I was a little shocked because she never, like, let me know that.

Q Okay. Did you ever on your own figure out that she was married to a Solicitor?

A It was -- as Ms. Goldberg stated earlier, that I had -- my jury was out so long, they allowed me to stay in the courtroom while they was like running pleas in between. And in the process of them running the pleas, I went about asking her about one of the Solicitors I had seen come into the courtroom being that he seemed to have a little court presence to him. And I asked her who was he. And that is when she stated to me that -- like she was like, Oh, my husband? And I was a little -- yes, I kind of was a little, like I said, shocked. I didn't really say nothing. I just kind of thought -- I didn't know what to think at that time, to be honest. But that is when I realized that her husband was a Solicitor.

Q All right. And of course at that point your fate was already in the hands of the jurors, correct?

A Yes, sir.

Q All right. At the beginning of the case, if it had been disclosed to you that Ms. Goldberg was married

to a Solicitor in the same county where you were being prosecuted and that you could ask for somebody else to represent you, what would you have done?

A I would have asked for somebody else to represent me.

Q Okay. All right. We had some -- a lot of questions earlier about, you know, when the jury was out deliberating and they came back with notes, and stuff like that. Were you able to hear all of that discussion earlier?

A Yes, sir.

Q I'm sorry?

A Yes, I was.

Q All right. And do you recall -- or let me rephrase that. Did you have -- ever have any discussions with Ms. Goldberg about asking for the judge to declare a mistrial?

A No, sir.

Q At the time all of this was going on, did you understand that under certain circumstances your lawyer could ask the judge to declare a mistrial?

A I didn't know that at the time of my trial.

Q Okay. And do you understand now that under certain circumstances when the jury cannot reach a verdict

the person's lawyer can move for a mistrial?
A Yes, sir. While studying my case, I have learned that we could have moved for a mistrial a few times during that deliberation.
Q And if you had known that while your jurors were deliberating, what would you want to have had happen?
A I definitely would have asked for a mistrial. Yes, sir, I would have asked for a mistrial.

MR. GROSE: Okay. Your Honor, that is all the questions I have at this time.

THE COURT: Cross-examination?

THE WITNESS: Say what? I'm sorry, I couldn't hear you.

THE COURT: I was asking the Attorney General if they wish to cross-examine.

MR. DAVIDSON: Your Honor, I have no questions.

THE COURT: All right.

THE WINTESS: I'm sorry, Your Honor, I'm not sure if it is possible -- I know the question wasn't asked, but I'm not sure if it is possible for me to say something about what was said a little earlier.

It was a point where my lawyer stated that we

talked about the Allen charge, we discussed that. I just wanted to say that that was inaccurate. At the point where --

MR. DAVIDSON: Your Honor, I would object. He wasn't asked a question.

THE WITNESS: Oh, I'm sorry. I didn't know if I could say --

THE COURT: Hold on just one minute. We have got an objection here. Mr. Grose?

MR. GROSE: You know, he and I didn't speak over lunch. I was working -- worried about getting lunch. If I could just be allowed to ask him a question and follow up on that, I'm prepared to do it.

THE COURT: Briefly. I'll allow it. Go ahead.

EXAMINATION BY MR. GROSE CONTINUES:

BY MR. GROSE:

Q I understand you want to, Arthur, you want to clarify something about the discussion between you and Ms. Goldberg prior to the judge giving the Allen charge?

A Yes, sir.

Q Can you go ahead and tell the judge what that is, please?

A I just wanted to say that at that time Ms. Goldberg testified that what we discussed was the Allen charge. We did not discuss the Allen charge at that time. What we discussed in that interjection was exactly -- was Cathcart's offer that he offered me. The offer was completely different than the first offer that he offered me. He actually offered me a worse offer. The reason why he offered me a worse offer at that time was because the jury -- they knew the jury's selection, the way they was going to be voting. So when the jury came back and said that they would be voting 11 to 1, my lawyer advised me that Cathcart was offering me an offer at that time to plea.

So I say, Okay, what is the offer?

She said that the offer was something to 30 years, which was different than the original offer at that time.

So I said, That is worse. I said, Why would I take that offer?

She said, Well, the jury is not in our favor.

So I said how does she know that the jury wasn't in our favor.

At that time she informed me that one of the bailiffs might have overheard the jury and that we

knew that it was 11 to 1 not in my favor, and that was the discussion going on during that --

MR. DAVIDSON: Your Honor, I would object to the --

A -- five to ten minutes.

THE COURT: Hold on just one minute. I have an objection. Mr. Davidson?

MR. DAVIDSON: Your Honor, he is testifying to hearsay of the bailiff.

MR. GROSE: I think, Your Honor, that goes to, you know, what the conversation was about at the time and what his thought process at the time was.

MR. DAVIDSON: He is testifying to something that someone told him about what the bailiff said.

THE COURT: Well, wasn't he testifying to what his lawyer said?

MR. DAVIDSON: That she heard from the bailiff who heard from somebody else.

THE COURT: Yes. I'll allow that. I agree with Mr. Grose. I overrule the objection. Go ahead.

BY MR. GROSE:

Q All right, Arthur, you can finish your statement.

A Yes, sir, that was really -- that was what we discussed, though, during that timeframe of those

five to ten minutes. At that time I told her that I didn't want to plead and I wanted to continue the trial, and that is what we did.

Q All right. And if you knew that you could have asked for a mistrial later on -- because they gave the Allen charge and then they sent out another note -- if you knew you could ask for a mistrial, would you have wanted her to have done that?

A Absolutely.

MR. GROSE: That is all I have. Thank you for your patience, Your Honor.

THE WITNESS: Thank you.

THE COURT: Any recross? Does the Attorney General wish to recross?

MR. DAVIDSON: No, sir, Your Honor.

THE COURT: Mr. Grose, call your next witness.

MR. GROSE: Your Honor, I don't have any witnesses. I would just have two housekeeping matters.

One, I just want the record to reflect that prior to the hearing I emailed the exhibits to the court reporter, copying the Attorney General, so she does have a copy of those.

And I don't know that at the beginning that Your Honor asked if we consented to doing this

hearing by video. I don't know that that is required, but I did want the record to reflect that we had actually requested that it be put on the docket and to go forward. We had actually been trying to do that since sometime last year, so not only did we consent, we actually requested to be able to do it this way.

And with that, since I have no other witnesses, I would rest.

THE COURT: All right. Thank you, sir.

And for the Attorney General?

MR. DAVIDSON: Your Honor, the State calls Daniel Goldberg.

THE COURT: Mr. Goldberg, please raise your right hand.

(Witness complies.)

THE COURT: Do you swear or affirm that the evidence you are about to give in this case is the truth?

MR. GOLDBERG: Yes, sir.

THE COURT: All right, thank you, sir.

DANIEL R. GOLDBERG,

after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAVIDSON:

Q Good afternoon, Mr. Goldberg.
A Good afternoon.
Q Thank you for being here. How much -- or how long have you been practicing law?
A I have been practicing law for 16 years.
Q And how much of that time has been in criminal law?
A All of it.
Q And where do you currently work?
A The Fifth Circuit Solicitor's Office in Richland County.
Q And do you recall around when you started working there?
A I started as a law clerk in November of 2003, and became an Assistant Solicitor in 2005.
Q Okay. So you were working at the Solicitor's Office in January of 2013?
A Yes, sir.
Q And what was your position at that time?
A Deputy Solicitor.
Q And can you explain for the record what kind of job duties you may have had in that role?
A Sure. Kind of had two jobs. One is carry a case load, and the second is more of an administrative position in terms of working for the elected Solicitor and doing whatever he needed and was

asked of me, as well as some level of supervisory responsibilities over attorneys and staff.

Q And can you explain where you were in the hierarchy of the office structure, kind of like from the top down where you were?

A Sure. There is the elected Solicitor. Then there was -- for the whole circuit -- myself and two other Deputy Solicitors. Then in Richland County at the time there were I believe six team leaders, and then on each team there was, you know, somewhere between three and five Assistant Solicitors on each team. And as I said, I was one of the Deputy Solicitors.

Q And do you recall how the team leader structure was organized? Like how was it organized on the team leader level, I guess?

A Like what were the teams? How were the teams divided up you mean?

Q Yes?

A At the time, the teams were based upon where the offenses occurred in Richland County. So we had I think six teams that were loosely based on regions of the county. So, generally speaking, if a crime occurred in a particular area, it would be assigned to that team. It wasn't a uniform rule, but it was

mostly how it was done. So that was kind of a generic breakdown of it. And there was a team leader for each one of those regions.

Q Okay. And then under those team leaders were Assistant Solicitors?

A That's correct.

Q So if an Assistant Solicitor was assigned a case, who would they kind of go to first if they had any questions about a case?

A Their team leader.

Q And if their team leader couldn't answer back, I'm guessing it would kind of like go up the chain, right?

A That's correct.

Q Were you married to anyone when your office prosecuted Mr. Macon's case?

A Yes, I was married to Kristy Goldberg.

Q And prior to Mr. Macon's case, do you recall your office prosecuting any cases where your wife Kristy was Defense counsel?

A Yes.

Q And what is the general practice that you guys used when she was considering whether or not to take a case within your circuit?

A She would contact me and provide me with the name

of the Defendant and ask me if I had up to that point had any involvement with the prosecution of that particular Defendant.

I would then, you know, obviously consider whether I had, and I would let her know what the results were and whether I had or had not.

Q And typically if it is something that comes in as a new case and it is assigned out, would you say -- let me retract that. You had your own case load, though, right?

A Yes.

Q And if she came to you and it was one of the cases on your case load, what would you do?

A I think, the best I can remember, if that was the case, she would not take the case. She would either -- if it was someone who was going to retain her, she would not accept the case. If it was a case where she was appointed, then I believe he would try to, you know, substitute someone else in. If neither of those things could be done, then I would remove myself from the case. But I don't even recall that happening.

Q Okay. Specifically to Mr. Macon's case, do you recall speaking with your wife Kristy about any potential conflicts you may have had before she

took Mr. Macon as a client?
A I mean, I vaguely recall her asking me if I had any involvement with his case, and I did not.
Q Okay. Do you recall specifically how this case was handled within your office, like how it was assigned?
A I don't. I don't remember specifically how it was assigned. Generally speaking, when -- as far as case assignments go, I usually get a stack of new cases within a couple of days to a week of an arrest. The only information I have at the time is the warrant and the Defendant's criminal history, and I will then either assign the case to an Assistant Solicitor, to myself, or give the stack to the team leader for them to assign the cases out. The vast majority of the time at that point I don't even have any knowledge of who represents any of those individuals. On occasion that happens, but I don't -- that did not happen in this instance.
Q Okay. And when you assign cases, typically it is based on the location of where the crime occurred?
A Back then that was --
Q At that time?
A Yes, that was the -- the bulk of the cases were

done that way back then. There of course would be some cases that would not fall into that category as decided by myself or the elected Solicitor, for whatever reason we wanted a particular Solicitor to handle a case, then they would be assigned it regardless of where it occurred. That did happen from time to time. I don't have a specific recollection as to how this case would have been assigned. I don't really have any reason to believe that it would have been anything out of the ordinary course of business, though.

Q And when this case was assigned, was Kristy even involved at that point?

A Not to my knowledge.

Q Okay. Do you recall who this case was assigned to?

A Richard Cathcart.

Q Was there anyone that ended up helping him with this case?

A I believe he ended up asking J.J., Jeremiah J.J. Shellenberg to assist him.

Q Okay. Do you recall who their team leader was?

A Let's see. I guess back then that would have been Luck Campbell -- no, actually, I'm sorry, I was thinking that it was Luck Campbell, but I'm mistaken. As it turns out, at the time Richard

himself was a team leader.
Q Okay.
A He was the team leader over Region 3.
Q Okay. After the case was assigned and you told your wife Kristy that there was no -- like you had no involvement, did you ever discuss the case with Mr. Cathcart?
A No.
Q Did you discuss it with Mr. Shellenberg?
A No.
Q Do you recall either of them coming to you with any questions?
A No. I mean, Mr. Cathcart at the time would have been somewhere in the neighborhood of 18 to 20 years of experience prosecuting, and we had worked together through my entire career and obviously had -- knows my wife, knew of our situation, and would have known not to involve me in any conversation whatsoever. The only thing I would have known about the case just would have been kind of tangentially I would have known about scheduling and it appearing on a trial docket, things of that nature, not only because my wife and I have would have to be planning at home for her being in a trial, but also just by virtue of being in the

office and being around the trial docket and seeing the names of the attorneys on a particular trial docket and seeing that this case was scheduled.

Q Do you recall ever asking either Mr. Cathcart or Mr. Shellenberg directly to not contact you about this case because it was your wife?

A I don't recall if I specifically would have said that or not. I think in most instances in those situations over the years I did specifically say that to people, but I don't recall if I actually said that to them or not.

Q But generally the rule was, because they knew you were married, not to contact you?

A That's correct. And, you know, I would also take steps, you know, like if somebody, like, for example, if, you know, a young Assistant Solicitor who didn't know better came to me and started talking to me about a case that, you know, I recognized the name and figured out that they were talking about one of her cases, I would stop them immediately and tell them, Hey, I can't be involved. You need to go talk to your team leader or talk to the other Deputy Solicitor or the elected Solicitor because this is a conflict for me to be involved. But I don't recall anything like

that even remotely happening in this instance.
Q Okay. So as far as your office, you were not involved in this case in any way?
A No, sir.
Q Okay. And just a few more questions, thank you. Do you recall ever speaking with Ms. Goldberg about this case?
A No, not about any substance. If there was any conversation, it would have only been as it relates possibly to scheduling and making arrangements for, you know, our household and the like due to scheduling, but not anything material to the case in any way.
Q Okay. And did you ever have access to her file for Mr. Macon?
A No.

MR. DAVIDSON: Okay. I have no further questions. Please answer any questions Mr. Grose may have.

THE COURT: Mr. Grose?

MR. GROSE: Thank you. May it please the Court? I just have a few questions.

CROSS-EXAMINATION

Q As I understand your testimony, you were one of the three Deputy Solicitors at the time?

A That's correct.
Q Or was it four?
A Three.
Q Three?
A Yes.
Q All right. And you talked about the process of assigning cases. Were you the only Deputy Solicitor involved in assigning cases, or did that rotate somehow?
A It would come through me and, as I said, I would assign some of them directly and the rest I would give to the team leaders to assign out to the Assistant Solicitors.
Q Okay. So Mr. Macon's case would have come through you in some capacity, then, for assignment?
A It is possible, but, as I said, that would have occurred within the first couple of days of the case being pending in our office before I had any knowledge of who would have represented him.
Q Okay. And you talked about there being trial teams and -- well, being teams with team leaders?
A Yes.
Q And Mr. Cathcart was one of the team leaders?
A Yes.
Q All right. Who did the team leaders report to?

A The team leaders would report to either the Deputy Solicitors or the elected Solicitor himself.
Q Okay. I mean, was there a structure where certain team leaders reported to a particular deputy, or did they -- could they report to any deputy?
A They weren't directed towards one more than the other. It just would depend on, you know, whatever the issue was and who was available to talk it through with them.
Q Okay. And as far as building Chinese walls, in a situation like this, is there any provision for the Solicitor's Office case file to be kept separate from other case files so that you couldn't access it?
A The physical file would be kept by the particular Assistant Solicitors in their offices. So, for example, my own case files would be in my office only, or my paralegal, for that matter. And, you know, for example, Mr. Cathcart's files would be in his office or with his paralegal, which, for the record, we had different paralegals at the time, and still do.
Q And that would have been one of my questions. Did y'all share investigators?
A Not that I recall. I mean, it is possible that we

have had the same investigator do work for us at various times because we have 30 something lawyers and we only have four investigators, so I am not going to tell you that there has never been any overlap, but there was no involvement here in this case.

Q Okay. And, but when the files are kept either in the lawyer's office or the paralegal's office, are they kept under lock and key there? I mean, are they locked when the people aren't there?

A No.

Q And at the time, did the Solicitor's Office share a computer network?

A Yes.

Q All right. Was there any provisions made where on the network you would have been walled off from being able to access anything pertaining to Mr. Macon?

A Our system does not have that capability. If it is on there, it is on there. And whoever has access to the system could access whatever is in those cases.

I will say that back at that time the standard, though, or the norm, rather, would be to have just a paper file and not necessarily have it

scanned and saved into the system. So it was pretty hit or miss with that back then. Nowadays, you know, most every case is in the system, but back then that was probably the exception to the rule for it to even be there. And I have no idea if it was or it wasn't.

Q Okay. And I think I'm about done. Were there any written policies at the Solicitor's Office for walling somebody in your position off if their spouse represented a Defendant?

A There is no in-house written policies to that effect, no. It would simply be, you know, abiding by the standard rules as applied to the rest of the legal world. And, as I stated, there would be, you know, a conversation generally had with the assistant telling them, Hey, oh by the way, you know, Kristy is in this, so I'm out, don't talk to me about it. And, you know, when you are talking about somebody like Mr. Cathcart, who has actually been here I think 10 or 12 years longer than I have, I think he has worked here for 28 years now, so at the time about 20 years, he would have been very familiar with those processes of conflicts, and the like, and would have been very capable if he had some issue about needing a supervisor's

guidance, or something to that effect. He would have been more than capable of either handling it himself or, you know, going to another deputy or to the elected Solicitor himself to take it up, not needing me in any way.

Q Okay. So no standardized policy then?

A There was no written policy about in-house -- in-house about conflicts, no.

MR. GROSE: Okay. That's all I have, Your Honor. Thank you.

THE COURT: Anything else, Mr. Davidson?

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

THE COURT: Thank you.

Thank you, Mr. Goldberg.

THE WITNESS: Yes, sir, Your Honor, thank you.

THE COURT: You may call your next witness. You may call your next witness, Mr. Davidson.

MS. MCCALLISTER: Your Honor, I don't think Mr. Davidson has any further questions. I would like to recall Ms. Goldberg very quickly.

THE COURT: All right.

KRISTY G. GOLDBERG,

after being previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. MCCALLISTER:

Q You did not have your camera on, but you were listening to the testimony, correct?

A Yes.

Q Did you listen to Mr. Macon's testimony?

A Yes.

Q Okay. And you heard him talk about the conversation that you had just prior to the judge giving an Allen charge, correct?

A Yes.

Q And I believe his testimony was that someone had informed you all about, you know, sort of the breakdown of the split, sort of which way the numbers were. Do you recall that?

A I do.

Q Do you recall that conversation? Do you recall that coming up in your conversation?

A No. To be fair, I remember that at some point in my life something like that happened where a bailiff overheard kind of where the jurors were leaning. I don't -- I can't say it was this trial. I can't say it wasn't this trial. But if I knew that it was 11 guilty to 1 not guilty and we were already at the Allen charge point, I can't imagine that it would have been my decision to say, Yes, I

think that one person is going to totally be able to talk the 11 others into changing their minds, so let's continue to go forward. I think my decision would have been to ask for mistrial.

Now, I don't remember, you know, I don't know if we talked about that and it was Mr. Macon's decision to proceed forward, but my advice under those circumstances, kind of my general practice advice under those type of circumstances, would have been, We should ask for a mistrial because this isn't going our way. I guess that is the best I can say.

Q Okay. So you don't necessarily recall a specific conversation with him about that, but based on what you have testified already was your strategy regarding handling the mistrial, the fact that you continued to go forward would suggest that you did not have a conversation like that?

A I mean, I don't know what we had a conversation about, but I know that we -- I know that we had a conversation about the status of the trial as it was at that moment. And what the status was at that moment was 11 to 1. Whether a bailiff had overheard any more information or not, I don't know. If he did, I know how that -- I know how

that would have changed my advice as an attorney. But what actually happened in that regard, I don't know.

MS. MCCALLISTER: Okay. Thank you. That's all the questions that I have.

MR. GROSE: Just briefly.

THE COURT: Cross-examination?

MR. GROSE: Yes, thank you, Your Honor. Just briefly.

CROSS-EXAMINATION

BY MR. GROSE:

Q All the possibilities of -- the discussion of the possibilities set aside, you don't have any recollection of the specifics of that conversation, do you?

A No. I mean, I just said that we would have talked about exactly what was going on, you know.

Q Including whatever that option was that Mr. Cathcart had given Mr. Macon?

A I am not going to dispute that maybe there was an offer for a higher plea offer. That sounds like something that Cathcart would do. That probably would explain why it is not in my notes because I did not think it was a legitimate offer that was ever something that mattered, that Mr. Macon was

ever going to take, so it would make sense that we would have just discounted it pretty quickly if it was a higher offer than previous. So that makes sense to me.

Q Why do you say that that sounds like something that Mr. Cathcart would do?

A Well, if he felt like he was doing -- I mean, he is a tough Solicitor. He is good at his job, and he is tough. And he was really tough on Mr. Macon. I thought he was tougher than he should have been on Mr. Macon because of Mr. Macon's prior record. So I totally could imagine him offering me something at trial that was higher than a prior plea offer.

Q All right. And so you don't dispute what Arthur said about what that option was?

A I don't have anything that I can -- any evidence to dispute that, no.

MR. GROSE: Thank you, Ms. Goldberg. Thank you, Judge. That is all I have.

THE COURT: All right, thank you, sir.

MS. MCCALLISTER: Nothing further from me for Ms. Goldberg.

THE COURT: Anything else from the Attorney General?

MR. DAVIDSON: No, Your Honor.

THE COURT: Any other witnesses?

MR. DAVIDSON: No other witnesses.

THE COURT: From the Applicant, anything in reply?

MR. GROSE: Nothing in reply, Your Honor. I would just want the record to reflect that Mr. Cathcart has been in attendance through the entire time and that neither party has called him as a witness.

Do you want to hear arguments from us, or would you want briefing, or how would you like to proceed?

THE COURT: I'd like to have arguments. If y'all are ready for arguments, oral arguments, I'm ready to receive them.

MR. GROSE: All right. Your Honor, I think that what we have spent the most time on today was the -- discussing what happened during the jury deliberations, and that while there may be multiple ways that you could look at some of what happened, it is undisputed that the deliberations took place on over three days lasting, you know, a good solid two and a half out of those three days. Essentially it went to the jury between 10:00 and 11:00 on a Wednesday. The jurors weren't released

until, you know, 6:00 o'clock that night. They came back at 9:30 the next morning, began deliberating again. They were there all day. They were sent home, and then they came back and were there from 10:00 until -- the verdict was a little bit before 1:00 on that Friday.

Initially when the jurors are having questions or sending out notes about being deadlocked, all of the jurors are coming into the courtroom together. And that changed on Thursday night. When they -- on the Wednesday when they initially said that they were at an impasse, and of course the language that they used would be in the note, you know, there was some discussion about whether or not an Allen charge was appropriate at that point. And, you know, we have gotten into some semantics here today as to whether or not the charge that the judge gave on Wednesday, whether it was an Allen charge or whether it was something else. But it is pretty clear from the record that that charge was to continue deliberating.

And there is some case law I want to refer you to at the end, but the purpose of an Allen charge is -- or part of the purpose is, is to protect the jurors in the minority so that they realize that

they don't have to give in to the majority of jurors, that they don't have to allow the other jurors to, you know, for lack of a better term, beat them into agreeing with them, not physically, but, you know, through the whole process. None of that protective language was given at that point.

Then you get into the Thursday deliberations where the jurors come back multiple times and say that they are at an impasse, and they announce what the vote is at that point. So it is very clear at that point that there is just one juror that is potentially holding out. And the notes, in fact, say that that juror has said that he or she does not intend to change their mind.

An Allen charge was given. It wasn't objected to at that point. But then they come back at the end of that day, still at the same impasse. At this point is when just the foreman comes into the courtroom. The judge at this point is not interacting with any of the other jurors anymore, at least not on this issue. Yes, she did excuse them that day, but she is not interacting with them on that issue. And the foreman very clearly states that two or three of the jurors want out of that room permanently. The only one way that I think

that that can be interpreted is that those jurors at least thought that further deliberations was not productive. And this, of course, is after the Allen charge has been given. And the judge asked the foreman what he wants to have happen.

And the State is probably going to try to portray this as the jurors continuing to consent to being there, but you have two to three who have expressed that they want to be out of that room permanently. And when the foreman comes back, he reports the majority wants to continue, but there is a minority that is not inquired into at that point. In the context of that note, I think that we know that they didn't want to come back again the next day. And it would not be unusual for, you know, the majority of jurors to want to continue to try to wear down, you know, the ones that are in the minority. In this case, the one juror. And so that is something that the judge has to take into account. And it is not the jurors' decision to decide when there has been too much -- or deliberations should end, it is the judge's decision to decide that.

We have a statute that is directly on point, Section 14-7-1330. At that point on Thursday

night, the correct procedure for the judge to have followed was to declare a mistrial. I can argue that a mistrial should have been declared earlier based on my interpretation of that first Allen charge, what I consider to be an Allen charge, but be that as it may, by this point on Thursday night, a mistrial should have been declared. That is what the statute asks for. And it was very clear that not all of the jurors were asking to continue to deliberate.

The judge had some interaction because she excused the jurors, but the next day the jurors didn't come into the courtroom, they went straight to the jury room. They began deliberations. At some point around noontime, the clerk told the judge, Hey, if we're going to feed these jurors, hey, we need to get on it, you know, it is going to take a while to get the food here.

The only interaction between the judge and the jury about whether or not to order food or not was between the judge and the foreperson. We have no idea what the foreperson went back there and told the other jurors. For all we know, he went back and said, Look, they haven't ordered us lunch, we are going to be here for another two hours. Are

you going to keep holding out or are you going to let the rest of us go home? Because the verdict, you know, bounces out within 30 to 40 minutes of the judge having that conversation with the foreperson.

So I think that the mistrial was appropriate. Trial counsel should have asked for the mistrial in the form of a motion. It should have been granted. If it wasn't granted, I think it would have been reversed on appeal under the circumstances of this case. And I think that Mr. Macon has satisfied his burden of proof on that.

There are a couple of -- there are some cases that are cited in the PCR application, Your Honor, and I assume that you have that. I have a couple of cases that are not cited in there. If I could just email you copies of those or the citations to those -- of course I will copy the Attorney General when I do it -- I'd appreciate that opportunity.

With regard to the conflict, you know, I ran a Public Defender's Office for a lot of years, and there is that special rule, and if a Public Defender's Office is going to handle a case where there is a conflict, there is all kinds of Chinese wall provisions that you have to take. It almost

makes it impossible to be able to do it.

At the end of the day, that is something that Arthur Macon should have had -- known about and have had a say in it. I think our rules in South Carolina, you know, would have required under this situation for full disclosure and informed consent from Arthur.

In the PCR application, we cite to some rules in other states that say that it is okay if a Prosecutor and a Defense lawyer are in a relationship, that the office can prosecute the case and the Defense lawyer can defend it, but the precautions have to be taken, and there is a requirement of full disclosure and informed consent. And that was not done here.

And with regard to Jason, I understand there were some objections that were made about Jason during the testimony of his father. There was not an objection during closing arguments where Mr. Cathcart talked about, you know, Jason and said that, you know, he was brought to South Carolina to be safe and not to be taken advantage of. I think that is -- that kind of argument is kind of in line with the Gilchrist case that we cite in the PCR application. I think there should have been an

objection there. I don't know that that necessarily would have been a mistrial, but an objection and a curative instruction would have gone a long way there. And, of course, if it wasn't given, it would be an appellate issue.

Same with calling somebody a liar. There is case law that goes back almost a century on that. It is one thing to talk about the evidence. It is another thing to start calling, you know, people names like that in closing argument.

And so we believe that we have met our burden of proof and that the Court should order a new trial.

THE COURT: All right. Thank you, Mr. Grose.

And for the Attorney General?

MS. MCCALLISTER: Thank you, Your Honor. I guess I will just start with the mistrial issue since that is where Mr. Grose started.

Your Honor, the State would argue -- you know, we talked about these notes, then we talked about, you know, sort of what they mean. But the State would argue, and Ms. Goldberg testified, you know, the first time the jury came in, the note said, you know, We're not unanimous on any charges yet. What do you want us to do? And she testified -- you

know, the note uses the word "yet," which implies, you know, that they are not deadlocked, that they are continuing to talk about it. And, you know, Ms. Goldberg testified between her and the Solicitors and the judge in the courtroom, nobody interpreted that note as, you know, as meaning that they were deadlocked, they were just sort of asking, you know, What do we do here? What is the procedure? Give us some guidance. And the judge just says, you know, Please continue to deliberate.

They asked for some more testimony pretty much immediately, which is an indication that they are still deliberating as well, you know, and they go back and they keep talking. And they come out a second time. You know, at that point they do use the word stalemate, but the note also says, We feel we can make progress if we come back in the morning.

So, you know, again, as Ms. Goldberg testified, and I think it is reasonable, a reasonable interpretation of that note is sort of them saying, We need -- we just need to take a break from each other, we need to take a break from this, we need to sleep on it, but we can come back tomorrow. So, again, that note doesn't indicate a

deadlock.

They request more testimony after that, which is another indication that they are continuing to talk about the issues.

I think the third note, when it says that they are 11 to 1, the same as yesterday, that is the first indication that the jury has deadlocked. And the parties and the Court both agreed it was time for an Allen charge at that point. The Court gave a pretty standard Allen charge, which, if you look in the record, the Allen charge I think starts on Page 439 and, you know, the judge talks about, You should make every reasonable effort to reach a unanimous verdict, consult with each other, listen to the opinions of your fellow jurors, tell each other how you feel and why, discuss your differences with an open mind. Although it must be unanimous, you have the right to your own opinion. The verdict you agree to has to be your own. The majority should consider the minority, and vice versa.

So that is -- I don't think that that Allen charge in any way singles out the one juror. I think it is pretty clear that the judge is instructing them, you know, to please make every

reasonable effort to come to a verdict and to talk to each other and for the sides to listen to each other, not just for one person to acquiesce. And so they do that.

You know, they then, after that they sent a note asking for the reasonable doubt charge and to hear Mr. Colon's testimony again. So, you know, consent -- the case law says in these situations with the -- when the jury is coming in and out after deadlock, the statute, you know, talks about -- or case law talks about when they are deadlocked and that they can give consent to continue their deliberations even when they are deadlocked, and that consent can be explicit consent or it can be implied consent. And I would argue that this is implied consent when you are asking for, you know, the jury charge to be read to you again and to hear more testimony. That is implied consent if the discussions are ongoing.

And then, you know, Mr. Grose has argued that, you know, at this point only the foreman comes in the next time and talks about, you know, Some people in the room do want to be out of there forever, the majority just want to take a break. We're willing to do what we need to do, we just

don't want to be in that room right now.

And the judge sends the foreman back to find out exactly what the jury is requesting. And he comes back and says, The majority doesn't mind coming back tomorrow.

And then she does, in fact, call the whole jury back into the jury room[sic] and she said, I received your note. I have inquired because I wasn't clear from the note exactly what you all were asking for. The foreman tells us that you are all ready to retire for the evening and that you would like to come back in the morning. That is to the whole jury she is saying that.

And no one in the jury speaks up and says, No, I don't want to come back in the morning. No, that is not correct, that is not what we told the foreman. That is not what we want. No one says that.

And so the jury does come back and they continue to deliberate some more. And when, you know, the lunch issue comes up and she calls the foreman out, the foreman says, We are close. We just need a little bit more time. And so he goes back in and they come out shortly thereafter with a verdict.

So Mr. Grose argued, We don't know what the foreman said. Well, we don't know what the foreman said, but, Your Honor, it is Applicant's burden to prove what the foreman said. That is pure speculation.

And I would point out on Page 454 and 455 of the transcript, the jury was polled, and all of the jurors, you know, acknowledged that this was their verdict and that it was a unanimous verdict.

So, Your Honor, I would submit Ms. Goldberg gave a valid strategy and reasonable explanation for why she didn't move for a mistrial at this point, that she felt like, you know, that things were going their way. The fact that they were deliberating for so long indicated that there was reasonable doubt there that they were working through or working with. And, you know, she explained why she thought it would be better for Mr. Macon to, you know, have the judge declare the mistrial rather than for her to move for it.

She has also been pretty clear that, although she may not recall the specifics of the conversation, that she and Mr. Macon did have a conversation about that issue, Should we object to the Allen charge, should we just go ahead and move

for a mistrial.

Moving on to -- I guess sort of the next issue was the conflict issue. You know, both Ms. Goldberg and Mr. Goldberg have testified, you know, that the most involvement that he had would have been before she was even on the case, and it would have been simply the administrative function of assigning the case out to the attorneys who were going to handle it, you know, that he wouldn't have -- that he didn't have any contact with them in terms of, you know, the substance of this case after that, he didn't work on this case, they didn't come to him with questions, they had other people to go to for questions, and they knew to do so. And there has been no evidence that Mr. Goldberg was involved in this case in any way or that, you know, that his relationship with Ms. Goldberg had any influence on this case.

He -- you know, and I'm looking at the rule, I think Rule 1.8, the Rules of Ethics about conflicts of interest, you know, is when the lawyers are personally representing, you know, an opposing party. And in this case, Mr. Goldberg did not personally represent any opposing party. And I don't think that that conflict -- I would argue

that conflict is not imputed to the other Solicitors in the office and that it was proper for Cathcart and Mr. Shellenberg to represent the State in this matter against Ms. Goldberg. You know, there has been no evidence that they had any sort of, you know, he had any sort of influence on her or her on him, vice versa.

The issue about, you know, what was argued in closing, I think Ms. Goldberg offered again a very, you know, reasonable strategy for not objecting to the comment about saying that Mr. Macon was lying. That was obviously, you know, something that was in evidence and that was in issue in the trial that, you know, he had changed his story every time the investigator came back with more information and that she felt like she could actually use that comment to her benefit. So just because something is objectionable doesn't mean that the attorney has to object every single time, you know, that if she offers a reasonable explanation for why she did not. And I think she has done that in this case.

Again, I would say the same thing for the argument about Mr. Colon's testimony. She clearly objected to that testimony and tried to keep it out as best as she could, and -- but it was an issue at

trial. You know, there was some testimony that he was easily influenced and that, you know, that Mr. Macon was sort of the mastermind of this whole thing. And I think, you know, the Solicitor was commenting on that, which the Solicitor is entitled to do, entitled to argue their version of the events and their version of the testimony.

I think that is everything. Oh, the indictment. You know, I think our argument is simply, as Ms. Goldberg testified to, that is just a scrivener's error, a typo. It didn't affect her preparation. It didn't change anything that they didn't already know.

And so we would submit that the Applicant has not proved his case on any of his allegations, Your Honor.

THE COURT: All right. Thank you.

Anything in reply, Mr. Grose?

MR. GROSE: Yes, just briefly. I think with regard to the closing argument calling Arthur a liar, it was clear that Ms. Goldberg did not know about the law on that, which is cited in our PCR application. And so when you are not aware of the law, then that cannot turn into a valid strategic decision.

With regards to the Allen charge and the hung jury issue, I think that the State, by their argument, has conceded that they did not have explicit agreement by these jurors to continue deliberating, that, rather, their implied -- or their relying on the implied consent to continue deliberating, I would remind Your Honor that even the foreman said to the judge that, We're at your mercy.

And I think that we have, through the juror notes and through the statements of the foreman, we have a very clear record that at least two or three jurors had explicitly stated that they did not want to continue, and those jurors too were at the mercy of the judge.

And I don't understand the distinction about moving for a mistrial or letting the judge come up with it on her own. Under either scenario, it is the judge's decision.

And also I don't understand this ideal of trying to stay popular and that being the reason to not make objections and make motions to preserve the record when those are in your client's best interest.

And that is all I have, Your Honor.

THE COURT: All right. Thank you, sir.

You wanted some time to submit a couple of cases to the Court, is that correct, Mr. Grose?

MR. GROSE: Yes, sir. I can email those to you this afternoon. And I will -- of course, I will copy the State. And if they want to respond, I obviously have no objection to that.

MS. MCCALLISTER: Yes. I think we might have -- I might have a few cases to send as well.

THE COURT: All right. Mr. Grose is going to send his today. The Attorney General responds in five days. And if Mr. Grose needs time to counter-copy cases, he gets an additional five days. So we are looking at, you know, 10 or 12, something like that, days. I will then have everything I need.

MR. GROSE: Yes, sir.

THE COURT: So, any questions?

MS. MCCALLISTER: No, Your Honor.

MR. GROSE: No, sir.

THE COURT: All right. Thank you so much.

MR. GROSE: Thank you, Your Honor.

(WHEREUPON, the hearing adjourned at 2:13 p.m.)

(END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Official Court Reporter for the Fifth 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 evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 16th day of April, 2021.

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

October 8, 2021

s/*Deborah M. McCurdy, RPR*

Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

BY MR. DAVIDSON: [1] 109/25
BY MR. GROSE: [19] 12/4 13/8 14/19 26/14 28/1 32/4 34/22 41/22 42/18 43/24 47/10 48/10 50/18 92/6 99/9 101/6 105/18 107/22 126/11
BY MS. MCCALLISTER: [3] 64/1 77/3 124/1
MR. DAVIDSON: [14] 4/6 11/23 104/17 105/4 107/3 107/8 107/13 107/17 108/15 109/12 118/17 123/12 127/25 128/2
MR. GOLDBERG: [1] 109/20
MR. GROSE: [55] 6/2 6/9 6/14 6/20 11/20 13/1 14/12 26/6 26/10 27/17 27/22 31/22 34/15 40/24 41/5 41/13 41/20 42/11 43/17 47/3 48/3 50/10 62/21 63/3 63/15 63/21 76/20 82/15 92/3 97/6 97/14 98/1 98/15 98/17 98/20 98/22 100/25 101/5 104/10 105/10 107/10 108/10 108/17 118/21 123/9 126/6 126/8 127/18 128/5 128/16 143/19 145/4 145/17 145/20 145/22
MS. GOLDBERG: [2] 6/24 7/6
MS. MCCALLISTER: [21] 40/23 40/25 41/9 41/15 63/8 63/13 63/20 63/24 76/25 91/18 91/24 97/10 97/20 98/3 98/14 123/19 126/4 127/21 135/16 145/8 145/19
THE COURT: [75] 4/4 6/1 6/8 6/13 6/19 6/22 6/25 7/3 7/7 11/22 11/24 13/3 14/14 26/8 27/20 31/24 34/17 41/7 41/14 41/16 41/19 42/13 43/19 47/5 48/5 50/13 62/23 63/7 63/11 63/18 77/2 91/22 92/1 97/8 97/11 97/19 97/23 98/5 98/19 98/21 98/23 99/1 99/5 101/4 104/12 104/15 104/19 105/8 105/15 107/6 107/15 107/19 108/13 108/16 109/10 109/14 109/17 109/21 118/20 123/11 123/14 123/17 123/22 126/7 127/20 127/23 128/1 128/3 128/13 135/14 143/17 145/1 145/10 145/18 145/21
THE WINTESS: [1] 104/20
THE WITNESS: [5] 99/4 104/13 105/6 108/12 123/16

$

$10 [1] 15/11
$3,500 [4] 15/1 15/10 15/15 69/11
$3,600 [1] 69/10
$3,604 [1] 15/3

0

013 [1] 61/22
05591 [1] 1/2

1

1.8 [1] 141/20
10 [11] 12/6 13/2 13/5 32/10 46/11 46/12 47/12 47/15 48/22 122/20 145/14
10:00 [3] 56/3 128/24 129/5
10:51 [2] 22/14 39/3
11 [27] 3/13 6/6 13/9 14/13 14/16 19/20 20/13 20/14 20/23 30/16 43/4 47/19 47/24 48/23 54/8 55/22 80/16 81/21 81/22 94/3 94/18 106/12 107/1 124/23 125/2 125/23 137/6
11:00 [1] 128/25
11:15 [1] 42/19
11:21 [2] 44/23 44/25
11teen [1] 20/12
12 [12] 3/14 21/11 49/14 49/22 51/20 52/16 61/16 61/23 62/22 62/25 122/20 145/14
12:00 o'clock [1] 42/19
12:18 [2] 58/12 59/10
12:20 [1] 59/14
12:47 [1] 60/24
13 [11] 30/17 33/10 44/6 45/12 51/12 58/18 60/16 61/24 62/22 63/1 94/19
13-year-old [2] 4/25 19/14
1330 [1] 131/25
1344 [1] 9/21
14 [13] 8/25 11/21 12/1 21/11 25/11 42/20 45/12 49/3 56/1 60/16 63/4 63/14 101/16
15 [4] 28/20 46/1 49/9 96/5
16 [9] 1/9 4/1 20/12 20/13 25/12 49/9 61/20 61/22 110/5
16th [4] 5/10 62/6 62/8 146/15
17 [3] 11/9 53/13 59/24
17-minute [1] 11/16
17th [2] 5/9 62/4
18 [5] 29/2 38/8 44/17 51/16 116/14
18th [2] 5/15 9/15
19 [1] 38/8
19th [2] 12/13 13/25
1:00 [2] 98/13 129/6
1:02 p.m [1] 43/1
1:10 p.m [1] 23/2
1:17 [1] 25/23
1:21 [1] 93/13
1:21 p.m [1] 45/1
1:24 p.m [1] 45/11
1:31 [1] 26/16
1:37 [1] 27/3
1:42 [1] 9/15
1:44 [1] 9/21
1:45 [1] 10/12
1:47 [1] 10/15
1st [3] 5/14 22/13 37/18

2

2-page [1] 9/3
20 [8] 42/20 47/15 49/20 53/17 55/6 60/9 116/14 122/22
2002 [1] 7/21
2003 [1] 110/13
2005 [3] 7/17 7/22 110/14
2012 [4] 9/15 12/13 13/25 64/15
2013 [4] 4/11 61/19 62/3 110/16
2014 [5] 4/15 37/18 37/21 61/20 62/8
2018 [6] 5/9 5/10 5/12 5/14 5/16 5/17
2019 [2] 5/19 8/4
2019-CP-40-05591 [1] 1/2
2019-CP-40-5591 [1] 4/10
2020 [1] 5/20
2021 [4] 1/9 4/1 146/15 146/19
21 [5] 22/16 32/6 35/2 46/1 53/20
22 [6] 22/16 29/12 42/25 49/20 54/12 55/24
22nd [1] 5/12
23 [6] 4/18 32/20 44/19 46/6 56/4 99/23
24 [9] 26/22 29/24 32/21 42/25 46/6 48/15 52/14 55/24 60/6
25 [7] 26/22 35/2 44/20 50/22 54/14 56/10 60/8
28 [2] 19/15 122/21
29th [1] 4/15
2:00 [1] 98/10
2:01 [1] 11/1
2:13 [1] 145/24
2:18 [1] 59/11
2:21 p.m [1] 46/6
2:30 [1] 98/10
2nd [1] 58/5

3

30 [4] 97/24 106/16 131/2 133/3
30-minute [3] 97/24 98/6 98/8
300 [1] 18/6
301 [1] 18/19
302 [1] 18/19
30th [1] 64/15
368 [1] 21/5
370 [2] 19/19 20/23
3:01 p.m [1] 28/3
3:09 p.m [1] 32/9
3:35 [1] 32/12
3:58 [1] 49/4
3rd [2] 4/15 58/6

4

40 [1] 133/3
417 [2] 22/15 75/3
418 [2] 23/12 24/15
419 [1] 24/15
420 [1] 25/7
423 [1] 26/25
424 [2] 30/5 32/5
426 [1] 32/25
427 [2] 34/3 34/8
428 [1] 35/1
429 [2] 35/1 35/2
430 [1] 35/14
431 [1] 37/6
432 [1] 37/8
433 [1] 38/8
435 [1] 38/22
437 [1] 42/20
438 [2] 43/25 94/18
439 [4] 44/24 93/10 93/10 137/12
440 [1] 45/10
441 [3] 45/10 45/12 46/5
442 [3] 46/10 47/15 48/14
443 [2] 50/21 50/21
444 [2] 50/21 52/14
445 [3] 52/20 55/6 55/14
446 [2] 54/1 54/23
447 [1] 56/10
449 [1] 58/4
450 [1] 59/14
451 [1] 60/16
454 [1] 140/6
455 [1] 140/6
4:13 [1] 49/4
4:25 [1] 32/8
4th [1] 5/18

5

5591 [1] 4/10

6

63 [1] 3/15
6:00 [1] 129/1
6:10 p.m [1] 32/20
6:15 [1] 34/24
6:21 [1] 36/8
6:21 p.m [1] 49/10
6:23 [1] 51/21
6:23 p.m [1] 37/18
6:30 [1] 54/5
6:40 [2] 54/13 55/17
6:42 [1] 56/10
6:44 [1] 56/19
6:54 p.m [1] 58/4

8

8th [1] 5/20

9

9:30 [3] 35/21 37/16 129/2
9:50 [1] 37/25
9:53 [2] 4/2 38/17

A

abided [1] 91/4
abiding [1] 122/12
able [13] 41/7 51/3 51/4 79/4 88/5 98/6 98/17 101/13 103/10 109/7 121/17 125/1 134/1
about [146] 5/4 7/4 7/24 7/25 8/8 9/16 11/9 17/22 18/20 18/20 19/23 21/12 21/25 24/1 24/10 24/15 25/7 27/15 30/22 32/16 34/13 35/3 35/25 36/6 36/7 37/7 37/9 37/14 37/15 39/12 41/25 44/20 47/25 48/22 50/1 51/20 52/12 54/7 59/13 59/22 60/13 61/12 64/3 64/4 64/24 66/6 66/8 67/13 67/15 69/23 70/2 71/17 71/20 71/25 74/19 75/23 80/14 83/10 86/2 86/14 86/16 86/25 88/11 89/1 89/10 89/15 89/25 92/9 92/16 93/15 94/14 95/3 95/8 95/25 96/11 96/12 96/20 96/21 97/3 97/11 97/19 99/2 100/18 101/17 101/21 102/1 102/2 102/10 102/10 103/8 103/17 104/23 105/1 105/11 105/20 107/11 107/14 109/18 112/9 113/24 116/20 116/21 117/5 117/18 117/20 118/6 118/8 119/6 119/20 122/7 122/18 122/19 122/22 122/25 123/7 123/8 124/7 124/12 125/6 125/14 125/20 125/21 126/17 127/15 129/8 129/14 132/20 134/3 134/17 134/20 135/8 135/20 135/20 136/3 137/4 137/12 138/11 138/11 138/22 140/24 141/20 142/8 142/11 142/23 143/22 144/16
above [1] 33/18
Absolutely [1] 108/9
accept [1] 113/17
access [6] 66/2 118/14 120/13 121/17 121/20 121/21
according [4] 10/11 19/5 38/7 45/3
account [1] 131/20
accurate [2] 56/15 146/11
acknowledged [1] 140/8
acquiesce [1] 138/3
acquitted [1] 16/9
acting [1] 17/23
actively [2] 86/24 86/25
actual [1] 73/24
actually [20] 9/8 22/18 23/3 28/9 35/5 50/4 52/2 56/5 74/1 90/25 91/3 106/7 109/3 109/4 109/6 115/23 117/10 122/19 126/2 142/16
addition [1] 73/6
additional [1] 145/13
addresses [1] 30/8
addressing [1] 53/9
adjourned [3] 37/17 58/4 145/23
administrative [2] 110/23 141/7
advantage [3] 20/1 21/1 134/22
advice [3] 125/7 125/9 126/1
advised [1] 106/13
affect [1] 143/11
affirm [3] 7/3 99/1 109/17
affirmed [1] 5/8
after [29] 5/8 7/9 12/15 14/7 16/19 16/21 20/12 20/15 21/14 26/15 34/23 35/24 44/3 55/11 55/11 66/12 67/18 67/18 82/7 83/6 99/7 109/23 116/4 123/24 131/3 137/2 138/5 138/10 141/12
afternoon [7] 22/20 49/5 59/11 78/21 110/1 110/2 145/5
afterwards [1] 90/15
again [31] 26/2 30/19 30/20 38/9 47/20 48/19 50/20 52/17 55/16 59/17 69/7 69/17 78/18 78/20 78/23 80/2 82/8 82/25 85/24 93/5 93/7 98/18 101/4 129/3 131/14 136/19 136/25 138/7 138/18 142/9 142/22
against [3] 5/1 72/13 142/4
aggressive [1] 74/2
ago [1] 36/10
agree [9] 30/25 40/9 52/8 56/8 57/20 76/21 77/22 107/19 137/19
agreed [8] 14/23 39/7 73/2 74/22 76/15 77/25 78/9 137/8
agreeing [3] 29/18 29/22 130/4
agreement [10] 17/7 37/11 39/8 43/6 77/24 80/17 82/13 87/17 94/4 144/4
agrees [2] 54/10 63/6
ahead [10] 17/4 32/17 32/25 60/10 81/12 81/14 105/16 105/24 107/21 140/25
air [3] 50/24 53/25 85/1
all [166]
allegations [5] 5/24 16/24 70/9 91/20 143/15
Allen [55] 29/10 29/19 29/22 31/3 31/11 31/13 44/1 44/4 45/8 45/25 76/16 76/18 76/22 77/21 78/3 78/5 78/10 78/11 78/13 80/21 80/24 81/10 81/18 82/3 82/4 82/8 82/23 85/15 86/14 88/23 93/21 94/10 94/15 95/3 96/13 105/1 105/22 106/2 106/3 108/6 124/9 124/24 129/14 129/18 129/23 130/15 131/4 132/4 132/5 137/9 137/10 137/11 137/22 140/25 144/1
allow [7] 23/14 48/19 90/7 90/10 105/15 107/19 130/2
allowed [8] 4/23 5/3 6/10 36/20 88/17 91/5 102/7 105/12
almost [5] 33/16 54/5 87/4 133/25 135/7
alone [1] 74/6
along [4] 21/22 68/14 70/18 73/9
already [8] 37/2 55/11 56/23 74/9 102/22 124/24 125/15 143/13
also [25] 11/5 16/3 16/4 23/5 27/9 31/16 34/8 34/11 40/2 41/23 43/13 47/23 51/2 51/9 79/3 80/6 95/1 97/21 100/2 100/3 116/25 117/14 136/16 140/21 144/20
although [2] 137/17 140/21
always [1] 23/8
am [13] 6/24 8/3 8/21 49/20 52/2 58/16 82/17 100/24 100/25 101/15 121/3 126/20 146/16
amended [7] 5/19 61/18 62/7 62/14 70/16 71/2 71/4
amendments [1] 70/6
amongst [1] 19/25
amount [6] 54/17 85/12 85/19 87/17 87/18 88/15
ample [1] 89/1
announce [1] 130/9
announces [1] 30/9
another [15] 8/9 28/2 32/21 43/2 49/13 60/3 60/4 64/5 92/21 98/11 108/6 123/3 132/25 135/9 137/3
answer [8] 24/2 25/18 28/24 29/6 75/7 85/3 112/11 118/18
anticipate [2] 97/13 98/8
any [80] 6/6 6/16 11/13 11/22 21/17 22/4 26/3 27/1 27/13 28/22 30/14 30/19 31/3 36/13 46/21 64/13 64/19 66/21 67/20 67/25 68/7 72/24 73/1 73/20 73/21 75/21 77/11 78/1 81/2 81/20 87/23 87/23 92/8 92/9 92/19 95/4 100/17 100/18 103/16 108/13 108/17 112/8 112/19 113/2 113/24 114/2 114/17 114/17 115/9 116/11 116/18 118/3 118/8 118/8 118/13 118/18 119/18 120/5 120/11 121/4 121/15 122/7 123/5 123/20 125/24 126/13 127/16 128/1 130/20 135/24 137/23 141/10 141/16 141/18 141/24 142/3 142/6 143/15 145/18 146/17
anymore [6] 8/16 37/3 57/1 57/18 89/7 130/20
anyone [2] 112/15 115/17
anything [34] 13/17 14/20 30/21 36/22 39/23 44/10 44/12 66/6 68/8 70/6 70/9 70/14 71/14 74/8 77/25 81/3 81/19 82/4 86/3 88/24 95/25 96/2 97/8 100/20 115/10 117/25 118/12 121/17 123/11 127/16 127/23 128/3 143/12 143/18
anywhere [1] 13/15
apologize [1] 38/25
appeal [4] 4/20 90/17 133/10 146/13
appealed [1] 4/18
Appeals [2] 5/8 5/11
appear [6] 13/21 34/12 43/14 47/24 49/25 62/11
appearing [1] 116/22
appears [1] 45/4
appellate [1] 135/5
Applicant [14] 4/11 4/14 4/16 4/17 4/18 4/20 5/1 5/9 5/13 5/19 5/21 99/17 128/3 143/14
Applicant's [47] 3/2 8/25 11/21 12/1 12/6 13/2 13/5 13/9 14/13 14/16 23/4 26/2 26/7 26/11 27/8 27/18 27/23 31/16 31/23 32/1 32/16 34/10 34/16 34/19 40/1 41/23 42/12 42/15 43/13 43/18 43/21 46/15 47/4 47/7 47/23 48/4 48/7 49/21 50/11 50/15 61/16 62/22 62/25 63/4 93/24 101/16 140/3
application [5] 5/20 133/14 134/8 134/25 143/23
applied [1] 122/13
appointed [3] 8/12 100/10 113/18
appointment [2] 8/18 14/1
appreciate [1] 133/19
appropriate [3] 80/21 129/15 133/6
April [3] 1/9 4/1 146/15
are [139] 4/4 6/6 6/22 7/4 7/14 11/1 11/3 12/20 15/6 20/5 20/20 21/10 21/17 22/25 24/15 24/22 28/10 28/21 29/13 29/20 30/14 32/17 32/24 33/25 34/12 37/5 37/10 37/12 38/7 39/4 39/11 40/7 41/1 41/9 43/4 45/22 46/6 49/16 50/25 51/2 52/21 52/22 52/24 53/10 53/11 53/11 53/21 53/23 54/9 55/13 55/13 55/23 56/12 59/25 65/2 65/7 67/12 67/21 68/5 72/9 72/10 72/17 72/18 72/18 75/12 75/13 75/14 76/9 77/5 79/16 79/17 79/18 79/20 80/2 80/3 80/4 80/6 80/9 82/11 82/25 83/11 83/13 83/20 84/3 84/7 84/11 84/22 84/24 86/1 86/6 86/13 86/13 86/16 88/2 88/10 92/19 94/3 97/12 97/22 98/9 99/2 99/17 99/19 99/21 99/21 101/13 109/18 121/7 121/8 121/9 122/18 128/14 129/7 129/9 130/9 131/17 132/25 132/25 133/1 133/13 133/13 133/14 133/16 134/10 136/2 136/3 136/12 137/3 137/6 138/11 138/13 138/16 138/19 139/10 139/22 141/21 143/23 144/23 145/14
are deadlocked [1] 29/20
area [2] 87/20 111/24
aren't [1] 121/10
argue [7] 91/13 132/2 135/19 135/22 138/16 141/25 143/6
argued [4] 67/8 138/20 140/1 142/8

A

argues [1] 71/19
arguing [2] 21/22 91/15
argument [23] 19/18 20/4 20/10 20/18 21/19 21/20 22/5 22/9 71/18 72/12 73/14 74/11 90/1 90/4 90/25 91/8 91/10 134/23 135/10 142/23 143/9 143/20 144/3
arguments [6] 72/1 128/10 128/13 128/14 128/14 134/19
armed [6] 4/12 15/25 20/4 61/3 70/20 99/23
around [3] 110/11 117/1 132/15
arrangement [2] 68/23 69/7
arrangements [1] 118/10
arrest [2] 64/14 114/11
Arthur [24] 1/4 4/8 8/5 20/19 21/8 21/14 21/20 22/3 39/9 44/6 92/9 95/14 96/4 96/5 98/22 99/6 99/10 99/12 105/19 107/23 127/14 134/3 134/7 143/20
Arthur's [1] 21/4
as [107] 4/16 5/4 7/9 8/25 12/6 15/19 16/1 16/13 17/24 17/24 18/17 19/12 20/24 23/4 25/8 25/17 26/2 27/8 27/9 29/15 30/5 31/4 31/4 31/16 33/6 33/12 34/9 34/10 38/12 38/12 38/15 39/1 39/10 42/8 42/8 43/3 43/4 43/13 45/22 46/16 47/24 49/8 49/8 49/13 49/21 52/15 61/2 61/16 62/5 62/6 63/3 68/1 68/1 73/9 74/9 78/10 79/7 80/16 81/7 82/4 82/18 87/2 87/3 88/9 89/25 94/3 99/7 101/16 102/6 109/23 110/13 111/1 111/1 111/12 113/7 114/1 114/8 114/8 115/3 115/8 115/25 118/2 118/2 118/9 118/24 119/10 119/16 120/10 120/10 122/13 122/14 123/24 125/21 126/1 128/9 129/17 131/7 132/6 136/6 136/6 136/13 136/19 137/6 142/25 142/25 143/10 145/9
aside [2] 92/22 126/13
ask [35] 5/24 12/7 20/6 29/21 36/20 36/24 44/5 51/1 51/2 51/8 53/7 58/1 58/19 61/8 61/11 61/12 75/5 75/6 78/18 78/23 81/14 81/15 86/17 87/21 92/18 94/18 98/17 100/20 103/2 103/22 105/12 108/7 113/1 125/4 125/10
asked [29] 8/17 9/11 9/17 10/10 11/3 24/16 36/23 48/11 53/6 55/6 69/17 71/17 74/5 82/25 89/15 93/14 96/19 102/13 103/5 104/8 104/9 104/22 105/5 108/5 108/25 111/1 131/4 133/7 136/11
asking [35] 13/18 34/6 37/10 37/12 50/20 51/2 53/4 53/10 53/11 53/11 64/6 78/11 78/13 80/6 82/9 82/20 82/20 85/4 86/3 87/12 87/22 88/7 101/7 101/17 102/10 103/17 104/15 114/2 115/19 117/4 132/9 136/8 138/6 138/17 139/10
asks [2] 35/20 132/8
aspects [1] 74/24
assign [5] 114/13 114/15 114/21 119/11 119/12
assigned [11] 10/24 111/24 112/7 113/8 114/6 114/8 115/5 115/9 115/12 115/15 116/4
assigning [3] 119/7 119/8 141/8
assignment [1] 119/15
assignments [1] 114/9
assist [1] 115/20
assistant [12] 1/18 1/19 100/14 110/14 111/11 112/5 112/7 114/14 117/16 119/13 120/16 122/16
assume [6] 48/17 53/9 64/12 76/1 79/10 133/15
assuming [2] 85/14 86/16
attendance [1] 128/7
attention [1] 56/20
attorney [24] 1/17 1/18 1/19 7/14 8/9 15/17 61/24 63/18 64/6 64/7 93/14 96/19 97/8 97/19 104/15 108/13 108/22 109/11 126/1 127/23 133/18 135/15 142/18 145/11
attorneys [5] 1/19 34/1 111/2 117/2 141/8
attributed [1] 78/2
audio [1] 41/12
August [1] 64/15
August 30th [1] 64/15
available [1] 120/8
aware [6] 22/4 22/6 92/19 100/9 100/12 143/23

B

back [125] 5/16 12/12 12/18 19/21 19/22 24/11 24/17 25/10 25/13 25/23 26/16 26/21 27/2 28/4 28/10 30/2 30/6 30/18 30/23 32/5 32/8 32/18 32/22 33/5 34/4 35/10 35/21 37/8 38/2 38/4 38/20 39/3 39/5 39/7 39/20 43/1 43/25 44/2 44/24 46/12 47/14 47/17 48/18 51/10 51/14 52/12 53/7 53/10 53/12 54/6 54/8 54/11 54/12 54/15 54/25 55/22 56/2 56/3 56/14 57/18 57/22 58/12 59/15 62/13 63/9 64/4 65/6 69/6 69/14 70/15 70/16 74/21 75/11 78/23 79/12 79/19 79/23 82/7 82/24 83/6 83/16 84/2 84/17 85/6 85/9 85/10 85/14 85/22 85/24 86/7 86/9 88/3 90/2 93/2 95/24 103/9 106/12 112/11 114/23 115/1 115/22 121/23 122/2 122/4 129/2 129/4 130/8 130/16 131/10 131/14 132/22 132/23 135/7 136/14 136/17 136/24 139/2 139/4 139/5 139/7 139/12 139/15 139/19 139/24 142/15
back-door [1] 90/2
background [1] 7/19
bad [1] 81/11
bailiff [6] 30/9 107/9 107/14 107/17 124/20 125/23
bailiffs [2] 60/13 106/25
bank [6] 16/17 17/3 23/19 23/22 70/24 71/7
banter [1] 33/19
bar [1] 4/20
based [9] 17/18 31/20 74/5 95/6 111/20 111/22 114/22 125/14 132/4
basically [1] 19/7
basis [1] 83/3
battery [1] 83/24
Baxley [1] 8/4
be [107] 6/9 6/10 6/19 6/24 12/15 13/21 14/6 14/7 17/14 19/25 19/25 20/1 20/19 23/16 28/14 29/3 31/5 33/7 34/12 37/21 41/16 43/3 43/14 47/17 47/25 49/13 49/25 51/3 51/4 52/23 53/21 53/22 55/9 56/15 56/21 58/20 59/9 62/15 63/5 64/3 67/23 70/20 73/3 74/17 74/23 79/4 79/11 83/3 83/14 84/12 84/22 84/23 86/24 87/7 88/25 89/16 92/24 97/15 97/21 98/6 98/11 98/17 101/22 102/19 105/12 106/11 106/12 109/3 109/6 111/24 113/20 115/1 115/5 116/24 117/21 117/25 120/12 120/15 120/17 120/19 121/24 122/5 122/12 122/14 124/18 125/1 128/19 129/13 131/1 131/9 131/15 132/5 132/6 132/25 134/1 134/13 134/22 134/22 135/5 137/17 137/19 138/14 138/15 138/17 138/23 139/1 140/18
beat [1] 130/4
became [1] 110/14
because [51] 6/11 9/7 9/18 21/9 22/1 28/16 33/17 34/5 39/16 51/13 52/11 56/15 58/20 59/5 60/19 61/9 64/6 64/9 64/20 68/1 69/13 72/3 76/18 76/21 78/1 78/14 79/10 80/2 86/1 86/2 87/8 87/16 87/23 88/3 96/14 98/8 102/3 106/9 108/5 116/23 117/6 117/12 117/24 121/2 125/10 126/23 127/11 132/11 133/2 139/8 142/17
been [75] 7/16 8/4 8/12 8/25 10/21 12/5 17/5 17/23 22/17 27/7 31/15 37/17 39/16 41/7 41/8 49/21 52/11 52/12 57/11 64/17 66/18 66/24 69/5 69/7 69/15 69/21 71/10 73/15 73/25 77/16 81/17 82/23 90/11 90/12 96/1 96/3 96/3 96/12 101/24 102/25 109/4 110/4 110/5 110/6 115/8 115/10 115/22 116/14 116/20 118/9 120/23 121/4 121/16 122/20 122/22 122/24 123/2 124/25 125/4 125/10 127/10 128/7 131/4 131/21 132/3 132/7 133/8 133/9 134/25 135/2 140/21 141/6 141/7 141/15 142/5
before [17] 4/15 14/10 16/21 21/3 31/19 38/2 41/12 52/11 54/18 58/21 81/9 94/10 100/10 113/25 119/18 129/6 141/6
began [4] 4/2 22/13 129/2 132/14
begin [1] 35/22
beginning [8] 7/20 19/19 26/25 48/15 59/22 64/4 102/24 108/24
begins [2] 18/7 58/6
behavior [1] 18/17
being [32] 7/9 17/22 20/25 33/13 33/21 35/3 39/18 48/22 68/1 72/9 72/18 74/6 92/10 92/10 94/15 99/7 101/10 102/12 103/2 109/23 110/3 116/24 116/25 117/1 119/18 119/20 119/21 121/17 123/24 129/8 131/8 144/21
belief [1] 76/23
believe [15] 4/4 63/13 66/5 78/23 83/12 85/19 92/7 97/21 98/12 111/9 113/18 115/10 115/19 124/11 135/11
believed [2] 57/4 87/14
below [1] 10/18
benefit [3] 72/24 73/20 142/17
Benjamin [4] 4/16 4/17 12/13 12/23
Bentz [1] 4/19
best [5] 31/14 113/14 125/11 142/25 144/23
better [7] 79/4 79/11 88/6 88/7 117/17 130/3 140/18
between [10] 12/22 28/17 49/4 102/9 105/20 111/11 128/24 132/19 132/21 136/4
beyond [1] 69/18
biggest [1] 53/15
billed [5] 14/25 61/20 62/4 62/15 68/24
billing [2] 68/24 69/8
bit [12] 21/12 53/14 64/2 70/1 70/2 74/17 78/19 84/18 89/10 92/3 129/6 139/23
boiled [1] 18/14
bolster [1] 4/25
booking [1] 23/15
both [5] 10/4 81/24 93/20 137/8 141/3
bottom [9] 10/22 18/8 23/1 35/1 37/6 42/24 44/19 46/5 48/15
bounces [1] 133/3
brain [3] 18/16 89/13 90/11
brand [1] 64/17

B

break [12] 28/2 41/18 49/9 53/8 79/24 97/24 98/7 98/8 98/16 136/23 136/23 138/24
breakdown [2] 112/2 124/13
Brian [2] 9/12 9/13
brief [1] 8/13
briefing [2] 5/8 128/11
briefly [4] 105/15 126/6 126/9 143/19
bring [5] 29/25 30/23 51/1 51/16 58/18
bringing [2] 32/24 51/11
Broad [1] 99/20
BROOKS [1] 1/13
brought [5] 19/21 19/22 19/24 69/10 134/21
building [2] 20/23 120/10
bulk [2] 17/25 114/25
bullet [1] 19/8
burden [3] 133/12 135/11 140/3
business [1] 115/11

C

calculation [1] 69/23
call [12] 6/20 21/19 56/20 72/21 93/20 97/14 98/21 98/22 108/16 123/17 123/18 139/6
called [4] 11/14 22/3 64/25 128/8
calling [6] 6/18 72/12 72/16 135/6 135/9 143/20
calls [5] 21/14 82/18 84/5 109/12 139/21
came [15] 8/8 19/2 32/8 44/24 66/12 68/15 94/10 103/9 106/11 113/12 117/17 129/2 129/4 135/23 142/15
camera [1] 124/2
Campbell [2] 115/23 115/24
can [67] 6/15 8/7 8/22 12/18 16/12 24/2 25/9 25/18 29/3 29/25 29/25 30/20 31/9 31/14 32/23 32/25 33/10 41/1 41/11 44/1 51/16 52/23 54/8 54/11 55/22 57/23 66/20 67/7 71/24 72/23 75/7 76/11 76/25 77/21 82/19 83/21 83/22 84/12 85/1 86/19 88/21 91/14 93/5 93/7 93/25 96/17 97/17 98/1 98/3 104/1 105/24 107/23 110/20 111/3 113/14 125/12 127/16 131/1 132/2 134/11 134/12 136/17 136/24 138/12 138/14 138/15 145/4
can't [10] 29/19 29/22 41/2 75/7 95/12 99/14 117/21 124/21 124/22 124/24
cannot [3] 62/19 103/25 143/24
cap [2] 15/15 96/5
capability [1] 121/19
capable [2] 122/24 123/2
capacity [1] 119/15
captioned [1] 146/13
career [1] 116/16
CAROLINA [10] 1/1 1/7 4/9 19/25 21/18 134/5 134/21 146/4 146/10 146/14
carries [1] 88/9
carry [1] 110/22
Carter [1] 8/4
case [116] 4/8 5/16 7/5 8/13 8/16 9/18 10/7 10/8 16/15 21/17 21/24 22/4 22/18 39/23 40/22 61/19 62/2 64/3 64/6 64/9 64/13 64/16 64/24 65/3 65/24 66/11 66/22 67/5 67/16 67/25 68/1 68/2 68/8 68/12 68/14 68/20 68/24 69/4 69/6 69/16 70/19 71/15 72/4 72/11 74/3 74/19 74/20 74/24 87/9 87/24 92/14 92/17 99/2 99/17 102/24 104/2 109/18 110/22 112/7 112/9 112/16 112/18 112/24 113/8 113/9 113/13 113/15 113/15 113/17 113/18 113/21 113/23 114/3 114/4 114/9 114/13 115/5 115/8 115/12 115/15 115/18 116/4 116/6 116/20 117/3 117/6 117/18 118/3 118/7 118/12 119/14 119/18 120/12 120/13 120/17 121/6 122/3 129/22 131/18 133/11 133/23 134/12 134/24 135/7 138/8 138/11 141/6 141/8 141/11 141/12 141/16 141/18 141/23 142/21 143/15 146/13
cases [21] 8/3 66/10 66/15 66/17 69/20 112/19 113/12 114/10 114/15 114/21 114/25 115/2 117/20 119/7 119/8 121/22 133/13 133/16 145/3 145/9 145/13
category [1] 115/2
Cathcart [27] 10/24 21/23 22/2 29/3 29/12 44/6 51/7 53/6 54/4 68/13 94/21 95/14 95/17 96/6 106/13 115/16 116/7 116/13 117/4 119/23 122/19 126/19 126/22 127/6 128/7 134/20 142/3
Cathcart's [4] 33/18 68/14 106/5 120/19
caught [1] 21/10
central [2] 40/21 42/8
century [1] 135/7
cert [1] 5/15
certain [3] 103/21 103/24 120/3
certainly [3] 17/13 55/21 98/19
CERTIFICATE [1] 146/1
certify [2] 146/10 146/16
certiorari [1] 5/14
chain [2] 64/23 112/12
challenging [1] 78/1
chance [2] 80/23 80/24
change [12] 43/7 62/13 62/16 70/14 71/8 71/10 71/14 71/14 80/17 94/5 130/14 143/12
changed [7] 19/24 20/25 73/7 90/14 126/1 129/10 142/14
changes [3] 21/8 70/7 71/6
changing [1] 125/2
character [3] 90/2 91/9 91/15
characterization [1] 71/22
characterize [1] 89/24
charge [69] 15/22 15/25 29/11 29/19 29/23 31/3 31/11 31/13 37/10 38/20 44/1 44/4 45/8 45/25 47/17 54/19 76/16 76/18 76/22 77/21 78/3 78/5 78/11 78/11 78/14 80/21 80/24 81/3 81/4 81/10 81/18 82/3 82/4 82/8 82/23 85/15 88/23 93/21 94/11 94/15 95/3 96/13 99/21 99/24 99/25 105/1 105/22 106/3 106/3 108/6 124/9 124/24 129/15 129/17 129/18 129/20 129/23 130/15 131/4 132/5 132/5 137/9 137/10 137/11 137/23 138/6 138/17 140/25 144/1
charged [3] 70/8 100/2 100/3
charger [1] 83/25
charges [14] 4/12 16/10 16/12 20/7 28/22 30/15 37/7 61/4 70/19 75/21 86/14 100/5 100/6 135/24
CHARLES [4] 1/17 5/22 40/23 40/25
check [4] 32/23 64/12 64/12 91/19
cheek [2] 29/3 29/15
chill [1] 79/24
Chinese [2] 120/10 133/24
choice [1] 67/9
circuit [6] 5/16 110/9 111/7 112/24 146/9 146/23
circumstances [5] 103/21 103/25 125/8 125/9 133/10
circumstantial [1] 17/21
citations [1] 133/17
cite [2] 134/8 134/24
cited [3] 133/14 133/16 143/22
clarification [4] 75/14 80/7 82/9 84/6
clarify [1] 105/20
claustrophobia [3] 53/24 83/12 84/25
cleaned [1] 38/19
clear [8] 129/20 130/10 132/8 137/24 139/9 140/21 143/21 144/12
clearer [1] 33/7
clearly [14] 34/5 72/17 72/21 76/16 77/25 81/16 81/24 82/12 83/1 87/4 87/9 95/1 130/23 142/23
Clemson [1] 7/21
clerk [3] 58/16 110/13 132/15
client [3] 32/22 73/21 114/1
client's [2] 10/11 144/23
close [3] 69/13 86/6 139/22
closes [1] 20/4
closing [11] 19/18 22/8 71/18 72/1 72/15 74/10 97/3 134/19 135/10 142/9 143/20
Co [2] 9/8 9/9
Co-Defendant [1] 9/9
Co-Defendant's [1] 9/8
college [2] 7/20 7/21
Colon [8] 4/23 17/11 18/15 23/21 82/11 89/10 90/7 91/5
Colon's [5] 5/1 5/4 18/5 138/7 142/23
come [53] 24/17 28/4 29/5 30/2 31/8 32/18 33/5 33/23 35/9 35/21 38/4 53/7 53/10 54/11 54/12 56/2 56/14 57/18 57/22 58/9 60/14 73/10 75/12 75/17 75/19 78/23 79/11 79/18 79/22 83/6 84/17 85/22 85/24 86/9 90/8 91/14 102/11 119/10 119/14 130/8 130/16 131/14 132/13 136/14 136/17 136/24 138/1 139/12 139/15 139/19 139/24 141/13 144/17
comes [25] 26/16 28/18 30/6 32/22 34/3 37/24 45/22 56/5 58/9 59/15 77/4 80/13 80/14 83/8 84/10 85/9 88/3 92/23 93/13 113/7 130/18 131/10 138/21 139/4 139/21
coming [16] 52/12 54/6 54/15 54/25 67/22 82/12 82/24 85/10 87/17 94/20 101/1 116/11 124/17 129/9 138/9 139/5
comment [2] 142/11 142/17
commenting [3] 73/15 73/24 143/5
commit [2] 4/22 5/3
COMMON [2] 1/1 146/14
communicate [1] 84/7
complete [1] 146/11
completely [2] 31/7 106/6
complies [3] 7/2 98/25 109/16
computer [1] 121/13
conceded [1] 144/3
concern [1] 45/22
concerned [2] 42/9 102/1
concerning [1] 101/25
condition [2] 5/4 89/25
confirmed [2] 65/9 65/12
conflict [11] 9/9 9/16 11/6 14/23 64/7 117/24 133/20 133/24 141/3 141/25 142/1
conflicted [1] 67/9
conflicts [4] 113/25 122/23 123/8 141/20
confronted [1] 21/8
connected [1] 83/23
consent [14] 8/19 47/16 109/6 131/7 134/6 134/15 138/8 138/12 138/14 138/15 138/15 138/16 138/19 144/6
consented [1] 108/25
consider [7] 38/14 42/1 42/4 80/10 113/4 132/5 137/20
considering [2] 59/24 112/23

C

consult [1] 137/14
contact [5] 14/9 112/25 117/5 117/13 141/10
context [1] 131/13
continue [22] 27/3 30/1 30/16 31/1 31/6 57/10 57/14 60/6 75/11 79/17 108/2 125/3 129/21 131/11 131/16 132/9 136/10 138/13 139/20 144/4 144/6 144/14
continued [2] 57/9 125/17
continues [5] 34/25 37/8 41/12 41/21 105/17
continuing [6] 82/12 82/22 93/15 131/7 136/3 137/3
contract [2] 66/16 68/18
contracts [2] 66/13 66/14
contrast [1] 20/18
convened [3] 61/22 62/7 70/12
conversation [26] 65/1 65/8 67/6 92/9 92/12 95/5 96/11 96/12 96/15 96/16 100/18 107/11 116/19 118/9 122/15 124/8 124/16 124/17 125/14 125/18 125/19 125/21 126/14 133/4 140/23 140/24
conversations [1] 100/17
convicted [4] 4/16 15/19 15/21 16/1
convince [1] 88/5
convinced [1] 16/17
copies [1] 133/17
copy [7] 23/17 33/2 47/13 108/23 133/18 145/6 145/13
copying [1] 108/22
correct [73] 9/13 9/19 9/22 10/3 10/6 15/24 16/2 16/6 19/16 22/22 28/13 37/22 45/5 46/3 48/12 49/1 50/8 52/20 58/6 59/12 59/20 59/21 61/1 63/14 64/7 64/24 65/16 66/1 68/20 68/25 69/1 70/22 71/22 73/11 74/25 75/15 76/3 76/19 77/15 77/22 78/6 78/12 80/8 82/2 82/6 82/13 83/18 84/8 85/4 85/7 85/15 85/19 86/3 89/13 89/16 89/19 90/2 90/8 90/17 90/22 94/11 94/12 96/25 102/22 112/6 112/14 117/14 119/1 124/3 124/9 132/1 139/16 145/3
Correctional [1] 99/20
correspond [1] 27/14
could [30] 7/11 7/18 24/11 36/23 36/25 53/25 57/6 59/9 69/15 72/13 72/15 73/25 74/10 91/21 99/10 103/2 103/22 104/3 105/7 105/12 108/4 108/7 113/20 120/5 121/21 127/12 128/20 133/16 142/16 142/25
couldn't [7] 8/15 41/3 41/5 100/22 104/13 112/11 120/13
counsel [5] 5/19 31/19 112/20 133/7 146/17
count [5] 45/17 45/19 45/20 45/21 70/20
counter [1] 145/13
counter-copy [1] 145/13
counts [8] 8/10 8/11 10/23 12/16 16/5 70/21 70/22 100/3
county [19] 1/2 7/23 10/5 10/7 14/22 59/2 64/9 64/10 66/10 66/16 66/17 101/10 103/1 110/10 111/8 111/21 111/23 146/5 146/14
couple [10] 10/15 21/3 75/6 85/2 97/16 114/10 119/17 133/13 133/15 145/2
course [11] 11/11 60/20 86/12 102/21 115/1 115/11 129/12 131/3 133/18 135/4 145/5
court [62] 1/1 1/25 3/6 3/7 3/8 3/9 3/10 3/11 3/12 3/13 3/14 4/7 4/22 5/2 5/8 5/10 5/14 5/15 5/17 6/3 25/14 26/3 26/20 26/23 26/25 27/15 28/3 28/11 32/11 33/2 37/16 39/7 39/13 39/14 39/20 41/3 41/20 41/23 42/20 46/2 48/17 49/5 49/9 51/19 52/3 54/3 58/4 75/10 81/24 84/8 84/15 100/22 102/13 108/22 118/22 135/12 137/8 137/9 145/3 146/8 146/13 146/23
Court's [26] 23/5 25/24 27/4 27/9 31/16 32/14 34/8 34/11 38/21 39/25 40/2 43/3 43/14 44/20 46/11 46/11 46/12 46/16 47/12 47/24 48/23 49/14 49/22 52/16 93/19 93/24
courtroom [28] 24/17 24/23 26/16 28/4 30/6 32/8 36/12 37/24 38/3 38/9 44/25 45/5 51/21 52/7 54/13 55/19 56/6 58/10 59/15 60/17 88/13 88/18 102/8 102/12 129/9 130/19 132/13 136/5
cousin [5] 16/17 16/19 17/2 17/9 89/12
cousin's [1] 17/9
covered [1] 91/20
CP [2] 1/2 4/10
crime [2] 111/23 114/22
crimes [1] 20/5
criminal [3] 8/2 110/6 114/12
cross [10] 2/4 2/10 2/13 63/18 63/25 104/12 104/16 118/23 126/7 126/10
Cross-examination [6] 63/18 63/25 104/12 118/23 126/7 126/10
cross-examine [1] 104/16
curative [1] 135/3
currently [3] 99/19 99/20 110/8
cuts [1] 54/19
cutting [2] 41/1 41/10

D

dad [2] 18/5 89/15
Dan [4] 9/25 9/25 64/12 100/13
Daniel [2] 109/13 109/22
darn [1] 28/24
date [8] 22/12 61/20 62/8 62/13 62/16 64/14 70/8 70/11
dates [4] 12/19 12/20 62/11 70/4
DAVIDSON [9] 1/19 2/9 4/5 7/25 63/7 107/7 123/11 123/18 123/20
day [18] 9/21 10/12 11/2 12/15 14/4 22/14 22/19 22/20 57/22 70/24 88/16 129/3 130/17 130/22 131/15 132/12 134/2 146/15
days [9] 61/7 86/13 114/10 119/17 128/22 128/23 145/12 145/14 145/15
deadlock [9] 52/6 76/19 77/9 78/15 79/14 80/3 87/15 137/1 138/10
deadlocked [17] 29/13 29/20 46/2 76/3 77/11 79/8 79/20 82/25 87/19 88/2 88/25 129/8 136/2 136/7 137/7 138/12 138/14
dealing [2] 86/21 87/5
dealt [2] 68/12 68/12
Debbie [1] 39/4
DEBORAH [4] 1/25 146/8 146/21 146/23
decide [3] 86/8 131/21 131/23
decided [4] 17/3 37/2 39/19 115/3
decision [9] 31/8 88/8 124/25 125/3 125/7 131/20 131/23 143/25 144/19
declare [9] 46/3 54/18 58/2 61/8 86/15 103/18 103/22 132/2 140/19
declared [3] 69/5 132/3 132/7
declaring [1] 88/3
defend [1] 134/12
Defendant [7] 1/8 1/19 9/9 21/19 113/1 113/3 122/10
Defendant's [2] 8/8 114/12
Defender's [3] 7/23 133/21 133/23
defense [8] 8/2 13/11 17/1 17/2 68/19 112/20 134/10 134/12
defenses [1] 68/4
definitely [3] 69/21 87/20 104/8
definition [3] 23/24 24/4 25/18
deliberate [16] 30/1 32/12 37/3 38/17 52/23 57/1 57/18 60/6 80/5 82/7 82/22 84/12 93/16 132/10 136/10 139/20
deliberated [2] 22/19 49/15
deliberating [16] 31/1 57/10 57/14 75/11 75/15 76/11 78/10 87/2 103/9 104/6 129/3 129/21 136/13 140/15 144/5 144/7
deliberation [3] 54/17 85/12 104/4
deliberations [21] 22/10 22/14 25/23 27/3 30/17 35/23 51/5 52/6 58/8 61/6 78/20 80/15 86/1 86/22 128/19 128/21 130/7 131/2 131/22 132/14 138/13
denied [3] 5/11 5/15 16/24
depend [1] 120/7
deputy [12] 93/1 93/2 110/19 111/8 111/13 117/23 118/25 119/7 120/1 120/4 120/5 123/3
described [1] 29/15
despicable [1] 20/6
details [1] 68/7
determine [1] 85/18
diagnosed [1] 19/12
did [77] 4/22 5/2 8/2 8/5 10/11 11/16 12/23 15/19 16/25 17/14 20/6 23/20 29/24 36/13 56/20 56/22 57/1 57/7 57/13 58/3 61/8 66/2 67/15 68/7 68/19 69/22 71/21 72/15 73/18 73/25 79/7 80/23 82/19 82/21 88/11 90/7 90/10 94/23 99/25 100/17 100/19 100/20 101/7 101/16 101/19 101/20 102/4 103/16 103/20 106/3 108/3 109/2 109/6 114/3 114/19 115/6 116/6 116/9 117/9 118/14 119/8 119/25 120/5 120/23 121/12 124/2 124/5 125/17 125/25 126/24 130/21 140/23 141/23 142/20 143/21 144/3 144/13
didn't [55] 16/22 24/9 31/3 31/7 33/12 36/20 36/22 37/2 56/24 56/25 57/3 57/5 57/8 58/1 62/12 62/15 63/23 66/5 66/9 66/16 67/8 68/17 72/24 73/1 73/23 74/6 74/7 77/11 81/3 81/18 81/18 81/19 82/3 83/3 87/6 87/11 87/15 92/8 100/23 102/17 102/18 103/23 105/6 105/10 108/2 117/17 131/14 132/13 140/12 141/10 141/12 141/13 143/11 143/12 143/13
differences [1] 137/17
different [9] 40/3 79/14 85/2 87/12 87/13 89/21 106/6 106/17 120/21
dinner [1] 53/8
direct [11] 2/3 2/7 2/9 2/12 7/10 17/24 18/7 41/21 99/8 109/24 123/25
directed [1] 120/6
directly [4] 94/10 117/5 119/11 131/24
disclosed [2] 14/21 102/25
disclosure [2] 134/6 134/14
discounted [1] 127/2
discrepancy [1] 70/4
discuss [14] 39/23 68/7 80/20 88/11 88/18 88/19 88/19 88/20 95/16 95/19 106/3 116/6 116/9 137/16

D

discussed [14] 39/18 40/20 61/2 64/2 67/25 81/16 88/22 89/3 95/1 95/10 105/1 106/2 106/4 107/25
discussing [6] 31/18 43/15 95/2 96/2 96/7 128/18
discussion [20] 24/14 28/16 30/4 36/5 37/7 37/9 38/16 39/11 54/6 60/13 67/12 74/19 77/6 77/7 77/13 103/11 105/20 107/2 126/12 129/14
discussions [5] 37/14 46/1 59/13 103/16 138/19
dispute [4] 12/21 126/20 127/14 127/17
distinction [1] 144/16
divided [1] 111/18
do [158]
docket [5] 4/9 109/4 116/22 117/1 117/3
document [4] 9/3 13/10 61/24 101/8
documents [3] 11/12 14/1 70/14
does [26] 13/21 13/23 23/16 27/14 28/10 31/5 31/17 34/12 43/14 47/24 49/25 50/23 55/3 55/4 59/2 59/8 61/17 61/21 84/15 106/22 108/13 108/23 121/19 130/13 139/6 139/19
doesn't [12] 28/8 32/7 40/4 60/20 66/20 70/14 79/17 81/22 96/8 136/25 139/4 142/18
doing [6] 52/23 75/24 84/13 108/25 110/25 127/7
don't [129] 7/18 8/11 11/11 11/12 13/16 15/16 15/21 17/11 21/24 22/6 23/7 23/7 23/8 23/9 29/10 29/20 31/13 33/13 33/14 33/22 36/22 38/25 44/12 44/12 44/13 45/18 45/18 46/21 50/22 50/22 50/25 51/14 52/22 53/22 54/3 57/14 57/18 58/9 58/15 59/7 59/17 60/19 60/21 62/11 65/3 66/19 67/4 67/5 67/6 67/11 67/20 69/12 69/13 70/3 71/5 72/19 74/3 75/20 77/21 77/24 79/15 79/19 80/1 81/1 81/9 83/14 84/11 84/23 85/10 87/19 87/21 87/22 88/4 88/8 92/4 92/8 92/12 92/16 92/22 92/24 93/3 93/7 94/24 95/6 95/18 95/21 95/24 95/25 96/1 96/15 96/16 98/7 98/12 108/17 108/24 109/1 113/21 114/7 114/7 114/17 114/19 115/7 115/9 117/7 117/10 117/25 122/17 123/19 124/21 125/5 125/5 125/13 125/19 125/24 126/2 126/13 127/14 127/16 130/1 130/2 135/1 137/22 139/1 139/15 140/1 140/2 141/25 144/16 144/20
done [15] 52/2 56/15 63/23 74/8 87/1 89/7 91/19 103/4 108/8 112/1 113/20 115/1 122/7 134/15 142/21
door [2] 39/17 90/2
doublecheck [1] 63/9
doubt [15] 23/24 24/4 25/19 46/18 46/21 46/25 47/13 47/16 48/23 82/10 82/20 87/5 87/18 138/6 140/16
down [9] 15/13 18/8 18/14 19/24 25/11 36/2 36/3 111/5 131/17
dropped [2] 16/18 17/6
DSS [1] 8/3
due [1] 118/11
duly [4] 7/9 99/7 109/23 123/24
during [11] 11/15 56/20 61/6 72/1 90/21 104/4 107/2 107/25 128/18 134/18 134/19
duties [1] 110/21
dying [1] 83/24

E

each [9] 88/16 111/10 111/12 112/3 136/23 137/14 137/15 138/2 138/2
earlier [13] 40/20 42/6 54/18 55/6 61/2 92/7 97/2 101/17 102/6 103/8 103/11 104/24 132/3
early [2] 22/20 64/16
easily [3] 90/7 91/6 143/2
easy [1] 59/4
educational [1] 7/19
effect [2] 122/12 123/1
effort [2] 137/13 138/1
eight [1] 49/15
either [11] 36/21 41/6 98/11 113/16 114/13 116/11 117/4 120/1 121/7 123/2 144/18
elected [6] 110/24 111/6 115/3 117/24 120/2 123/4
else [12] 36/22 67/10 94/9 97/8 100/9 103/3 103/5 107/18 113/19 123/11 127/23 129/19
email [7] 3/3 64/5 64/5 64/22 67/19 133/17 145/4
emailed [2] 9/16 108/21
emails [6] 10/16 12/15 12/22 64/4 64/16 101/21
emphasized [1] 19/18
employment [1] 8/14
end [8] 20/10 30/4 68/15 129/23 130/17 131/22 134/2 145/25
ended [3] 66/10 115/17 115/19
engaged [1] 86/25
enough [1] 16/13
enters [1] 51/21
entire [5] 38/8 45/4 88/14 116/16 128/8
entirety [1] 89/19
entitled [2] 143/5 143/6
entry [1] 13/24
error [3] 4/22 5/3 143/11
ESQ [1] 1/17
essentially [4] 71/19 76/9 89/23 128/24
established [2] 66/13 66/14
Ethics [1] 141/20
EV [1] 3/2
even [24] 19/14 33/15 53/24 62/19 69/12 69/16 70/3 71/5 71/11 73/1 73/19 74/4 81/21 88/21 89/24 94/15 113/22 114/17 115/12 118/1 122/5 138/13 141/6 144/7
evening [2] 56/13 139/11
event [1] 81/2
events [1] 143/7
ever [21] 33/13 51/3 61/8 62/17 67/2 67/15 72/4 87/19 100/12 100/17 100/18 100/20 101/8 102/4 103/16 116/6 117/4 118/6 118/14 126/25 127/1
every [8] 21/7 72/4 87/4 122/3 137/13 137/25 142/14 142/19
everybody [6] 34/6 59/18 63/5 74/21 94/9 97/25
everyone [1] 30/12
everything [6] 6/5 88/21 89/2 91/20 143/8 145/16
evidence [49] 6/6 7/4 11/21 12/3 13/2 13/7 14/13 14/18 16/14 17/21 17/24 25/10 26/7 26/13 27/18 27/25 31/23 32/3 34/16 34/21 42/12 42/17 43/18 43/23 47/4 47/9 48/4 48/9 50/12 50/17 62/22 63/2 63/5 68/8 73/15 73/24 90/2 91/9 91/10 91/15 94/8 99/2 109/18 127/16 135/8 141/15 142/5 142/13 146/12
exactly [9] 56/14 83/17 84/7 85/4 95/8 106/5 126/17 139/3 139/9
exaggerating [3] 72/11 72/18 74/12
examination [14] 4/10 4/17 41/21 63/18 63/25 92/5 99/8 104/12 105/17 109/24 118/23 123/25 126/7 126/10
examine [1] 104/16
example [3] 117/16 120/17 120/19
exception [2] 6/5 122/4
exchange [1] 67/19
excuse [3] 36/14 82/16 130/21
excused [3] 36/8 56/19 132/12
exhibit [70] 3/10 3/11 3/12 3/13 3/14 8/25 10/20 11/21 12/1 12/6 13/5 13/9 14/16 23/5 23/5 25/24 26/11 27/4 27/8 27/9 27/13 27/18 27/23 31/16 31/17 31/23 32/1 32/14 34/8 34/9 34/11 34/11 34/19 39/1 40/1 41/23 41/24 42/12 42/15 43/3 43/13 43/14 43/21 44/20 46/16 46/16 47/7 47/12 47/19 47/23 47/24 48/7 48/22 49/14 49/21 49/22 50/11 50/15 51/19 51/20 52/16 61/16 61/23 61/24 62/5 62/25 93/19 93/24 93/25 101/16
Exhibit 12 [1] 61/23
Exhibit 13 [1] 61/24
Exhibit 3 [1] 31/16
exhibits [6] 3/1 3/2 6/11 46/11 61/14 108/21
exits [1] 55/24
expenses [1] 15/11
experience [2] 5/6 116/15
explain [6] 33/3 72/13 86/19 110/20 111/3 126/23
explained [2] 47/15 140/18
explains [3] 25/10 59/23 86/5
explanation [4] 46/18 46/25 140/11 142/20
explicit [2] 138/14 144/4
explicitly [1] 144/13
expressed [1] 131/9
extreme [1] 72/23

F

facility [2] 99/19 99/20
fact [10] 17/17 56/21 69/22 80/20 81/13 87/11 125/16 130/12 139/6 140/14
facts [1] 87/10
factual [2] 75/7 75/14
fair [7] 17/17 20/19 22/3 33/8 44/15 73/13 124/18
fairer [1] 28/14
fairly [2] 17/14 26/15
fairness [1] 57/17
fake [1] 16/20
fall [1] 115/2
familiar [3] 21/17 21/24 122/23
family [2] 8/2 19/25
far [9] 17/24 31/4 38/12 42/8 49/8 68/1 114/8 118/2 120/10
fate [1] 102/21
father [2] 18/9 134/18
father's [1] 96/21
fatigue [3] 50/5 52/18 84/4
favor [4] 87/8 106/21 106/23 107/1
favors [2] 66/21 87/23
February [1] 5/10
February 16th [1] 5/10
fee [1] 68/22
feed [1] 132/16
feedback [2] 100/24 101/1
feel [7] 33/6 79/3 79/13 84/11 101/20 136/16 137/16
feeling [3] 52/21 55/13 83/11
fees [2] 15/1 15/15
fellow [1] 137/15

F

felt [4] 74/9 127/7 140/13 142/16
few [7] 75/18 77/16 94/18 104/3 118/5 118/22 145/9
fifth [4] 83/7 110/9 146/9 146/23
figure [1] 102/4
figured [1] 117/19
file [4] 118/14 120/12 120/15 121/25
filed [3] 5/18 5/19 12/11
files [7] 65/18 65/24 66/3 120/13 120/17 120/19 121/7
find [8] 20/7 30/23 36/13 54/9 55/22 81/19 83/17 139/2
fine [2] 6/19 41/13
finish [2] 98/9 107/23
finishing [2] 29/18 78/4
firm [1] 65/16
first [27] 9/3 10/21 13/24 14/6 25/9 36/5 40/8 40/17 40/18 51/8 52/5 52/6 58/10 62/1 62/2 75/2 75/4 75/12 75/19 78/25 96/6 106/7 112/8 119/17 132/4 135/23 137/7
five [9] 41/14 41/16 44/14 81/7 107/5 108/1 111/11 145/12 145/13
fix [1] 41/12
flat [1] 68/22
follow [1] 105/13
followed [1] 132/2
following [4] 4/21 23/2 49/10 65/8
follows [4] 7/9 99/7 109/23 123/24
food [6] 53/11 59/11 60/14 84/17 132/18 132/20
footnotes [1] 38/20
Ford [1] 27/11
foregoing [1] 146/10
foreman [57] 30/13 30/21 35/11 35/15 35/25 51/1 51/17 51/21 52/7 52/21 53/2 53/9 53/13 53/20 54/10 54/12 54/20 54/24 55/3 55/8 55/18 55/23 56/1 56/12 57/4 57/15 58/19 59/14 59/17 59/24 60/4 60/7 60/17 60/22 79/2 80/14 83/8 84/5 84/21 85/17 85/21 86/6 130/18 130/23 131/5 131/10 138/21 139/2 139/10 139/17 139/22 139/22 140/2 140/2 140/4 144/8 144/11
foreperson [4] 43/8 132/21 132/22 133/5
forever [11] 19/24 53/18 53/21 55/8 55/9 56/16 56/22 57/16 84/20 84/22 138/24
form [3] 23/15 76/20 133/8
forward [8] 5/25 6/4 10/16 65/13 109/4 125/3 125/7 125/17
forwarded [1] 64/22
found [5] 23/18 23/21 26/20 100/6 101/20
four [7] 40/3 62/1 70/21 77/17 100/3 119/2 121/3
fourth [1] 83/7
frequently [1] 72/2
fresh [4] 50/24 51/9 53/25 85/1
freshness [5] 49/18 50/6 50/23 51/13 84/5
Friday [4] 22/21 58/6 60/24 129/6
front [3] 90/22 91/1 91/3
frontal [1] 19/1
full [6] 7/11 46/17 85/3 99/10 134/6 134/14
function [1] 141/7
functions [1] 19/14
funny [1] 69/9
further [7] 51/4 118/17 123/12 123/20 127/21 131/2 146/16

G

G-O-L-D-B-E-R-G [1] 7/13
gave [10] 17/18 44/7 71/20 81/17 94/19 95/17 108/5 129/17 137/9 140/11
general [25] 1/18 1/19 10/7 15/17 40/8 40/13 62/6 63/19 66/24 67/13 71/25 93/14 96/19 97/9 97/19 104/15 108/14 108/22 109/11 112/22 125/8 127/24 133/18 135/15 145/11
General's [1] 61/25
generally [6] 66/9 71/24 111/23 114/8 117/12 122/15
generic [1] 112/2
gentlemen [1] 93/18
get [23] 20/13 22/9 39/5 50/24 53/14 53/25 55/7 59/3 59/6 60/3 63/23 65/3 66/20 82/17 83/9 84/6 84/19 85/1 88/6 114/9 130/7 132/17 132/18
gets [3] 35/2 58/21 145/13
getting [8] 32/17 59/11 66/10 66/15 69/22 71/3 93/13 105/11
Gilchrist [1] 134/24
give [27] 7/4 10/10 23/23 25/13 29/10 29/19 29/22 33/2 37/9 44/1 44/3 53/4 56/2 75/8 75/9 77/21 78/5 81/15 83/23 96/4 99/2 109/18 114/14 119/12 130/1 136/9 138/12
given [8] 73/23 82/23 95/14 126/19 130/6 130/15 131/4 135/5
gives [3] 45/7 61/18 81/2
giving [5] 38/13 81/13 85/3 105/21 124/9
Glenn [1] 4/19
go [49] 5/25 6/4 8/14 11/3 25/13 25/22 32/25 35/11 39/5 39/7 39/14 48/18 50/24 51/10 51/14 53/10 53/12 54/3 60/10 64/3 65/7 69/6 69/23 74/15 74/20 75/11 78/17 81/12 81/14 82/7 84/16 85/6 86/7 87/14 89/7 105/15 105/24 107/20 109/4 112/8 112/12 114/9 117/22 125/3 125/17 133/2 136/13 140/25 141/14
goes [10] 21/4 23/3 25/3 31/4 37/7 43/1 58/12 107/10 135/7 139/23
going [85] 6/6 8/24 9/20 9/24 10/21 12/5 12/21 13/9 23/4 24/14 24/15 27/7 30/17 31/15 32/7 34/6 36/7 38/2 38/24 39/17 39/23 40/6 43/25 45/10 47/22 48/16 48/18 49/20 50/21 52/11 56/10 58/18 61/13 62/10 63/9 64/20 65/3 65/13 66/21 67/23 70/20 74/20 76/12 76/20 77/15 78/5 80/9 82/15 82/16 87/14 87/25 89/2 90/6 92/24 93/4 95/15 95/18 96/4 96/10 97/12 97/14 97/15 98/9 101/15 103/20 106/11 107/2 113/16 121/4 123/3 125/1 125/11 126/17 126/20 127/1 131/6 132/16 132/17 132/25 133/1 133/1 133/23 140/14 141/9 145/10
Goldberg [44] 4/13 6/21 6/22 7/8 7/13 9/25 12/7 64/2 91/25 92/7 100/8 100/12 100/14 100/17 101/7 102/6 102/25 103/17 105/21 106/1 109/13 109/14 109/22 110/1 112/17 118/6 123/15 123/21 123/23 127/18 127/22 135/22 136/4 136/19 140/10 141/4 141/4 141/16 141/18 141/23 142/4 142/9 143/10 143/21
GOLDSMITH [2] 1/13 8/7
gone [3] 69/17 77/16 135/4
good [14] 11/3 20/5 21/9 53/13 65/7 72/21 81/11 84/18 86/23 87/24 110/1 110/2 127/8 128/22
got [12] 8/11 8/19 14/10 19/7 59/5 64/3 71/2 77/14 94/16 98/5 98/10 105/9
gotten [2] 67/4 129/16
graduated [2] 7/21 7/22
Grand [2] 61/21 70/12
granted [17] 11/25 13/4 14/15 26/9 27/21 31/25 34/18 42/14 43/20 47/6 48/6 50/14 62/24 69/20 74/7 133/8 133/9
GROSE [36] 1/17 2/3 2/5 2/7 2/10 2/13 5/22 5/24 6/1 7/7 41/8 41/10 41/12 41/19 69/10 71/17 75/23 76/15 92/2 97/13 99/5 100/23 105/9 105/17 107/20 108/16 118/18 118/20 135/14 135/18 138/20 140/1 143/18 145/3 145/10 145/12
guess [27] 14/6 15/10 18/13 18/17 18/18 19/6 36/12 36/19 36/19 36/25 39/3 44/3 56/1 69/15 71/5 74/15 77/20 78/7 79/1 81/5 83/6 89/12 111/16 115/22 125/11 135/17 141/2
guessing [1] 112/12
guidance [4] 53/5 76/9 123/1 136/9
guilt [1] 88/5
guilty [7] 20/7 29/7 61/2 61/3 100/6 124/23 124/23
gun [1] 16/20
gunshot [1] 19/2
guys [3] 75/9 77/13 112/22

H

had [96] 4/24 4/25 8/12 8/16 14/9 16/19 17/21 18/16 37/2 38/11 41/24 42/7 47/25 55/11 56/11 56/25 64/7 64/13 64/18 64/19 64/20 65/9 66/16 67/4 67/7 67/20 69/5 69/5 69/6 69/16 69/19 70/4 72/12 73/3 73/7 73/10 73/15 73/19 77/16 80/23 82/23 87/3 89/1 89/4 89/13 90/11 90/11 90/12 90/19 90/23 95/14 102/7 102/11 102/24 103/7 104/5 104/6 109/3 109/4 110/21 110/22 111/21 112/8 113/1 113/2 113/5 113/6 113/6 113/9 113/25 114/2 116/5 116/15 116/17 119/18 120/21 121/1 122/15 122/25 124/8 124/11 125/19 125/20 125/23 126/19 132/11 134/3 134/4 141/5 141/13 141/18 142/5 142/6 142/14 144/13 146/12
hadn't [4] 31/8 66/13 69/9 69/11
half [3] 61/7 75/18 128/23
hand [11] 6/25 33/3 33/3 36/1 36/1 78/24 78/24 80/7 80/8 98/24 109/15
handle [3] 115/5 133/23 141/9
handled [1] 114/5
handling [2] 123/2 125/16
hands [3] 34/25 34/25 102/22
handwritten [1] 62/3
happen [6] 33/12 98/9 104/7 114/19 115/6 131/5
happened [10] 11/8 33/11 38/12 69/4 83/22 100/5 124/19 126/2 128/18 128/20
happening [5] 36/12 59/10 96/18 113/22 118/1
happens [1] 114/18
has [49] 8/25 9/10 12/5 26/20 27/7 29/23 31/15 35/25 39/4 39/7 40/10 40/14 41/8 46/25 49/21 50/5 52/12 52/17 54/7 58/16 61/19 62/2 62/5 62/8 84/4 92/20 110/6 121/4 121/20 122/19 122/21 123/20 128/7 128/8 130/13 131/4 131/19 131/21 133/11 137/7 137/19 138/20 140/21 141/15 142/5 142/18 142/21 143/14

H

has... [1] 144/3
have [252]
haven't [3] 76/10 79/14 132/24
having [8] 41/9 41/10 53/23 67/11 74/19 84/24 129/7 133/4
he [172]
he's [1] 21/9
head [3] 18/25 19/23 21/25
hear [26] 6/16 15/20 25/14 30/19 30/20 39/10 39/12 41/2 41/3 41/5 41/7 47/20 48/12 48/19 74/22 76/12 82/10 83/21 99/14 100/23 100/23 103/10 104/14 128/10 138/7 138/18
heard [4] 33/24 107/17 107/18 124/7
hearing [17] 4/2 11/24 13/3 14/14 27/20 34/17 42/13 43/19 47/5 48/5 50/13 62/23 100/24 100/25 108/21 109/1 145/23
hearsay [3] 5/5 89/23 107/9
heavily [1] 17/19
heinous [1] 20/5
help [4] 59/25 68/16 68/16 73/21
helpful [1] 72/20
helping [1] 115/17
her [37] 8/13 9/6 9/7 9/10 9/12 9/16 9/16 10/10 11/3 11/6 29/18 29/18 76/22 81/15 100/21 101/9 101/9 101/25 102/1 102/10 102/13 102/20 108/1 108/8 113/5 113/17 114/2 116/24 117/20 118/14 136/4 140/20 142/6 142/7 142/17 143/11 144/18
here [21] 8/4 18/8 19/25 34/7 51/11 58/21 60/3 65/4 74/12 74/12 98/5 105/9 110/3 121/5 122/20 122/21 129/16 132/18 132/25 134/15 136/8
hereby [1] 146/10
hereto [1] 146/17
hey [5] 66/18 117/21 122/16 132/16 132/17
hierarchy [1] 111/3
higher [3] 126/21 127/3 127/13
him [52] 14/7 14/21 15/20 16/18 16/19 17/6 17/23 18/12 19/24 20/7 29/15 29/22 32/24 36/2 44/7 51/1 51/2 58/19 64/22 65/2 66/7 67/8 67/8 67/25 68/1 68/7 72/12 72/16 72/21 83/16 85/6 89/1 89/3 90/10 90/23 92/18 92/22 94/20 94/23 95/17 102/13 105/12 107/14 115/17 115/20 119/19 124/7 125/14 127/12 128/8 141/13 142/7
himself [4] 116/1 120/2 123/3 123/4
his [34] 14/9 16/17 16/19 17/3 17/12 18/16 18/25 19/18 19/24 20/4 20/10 21/8 71/20 71/21 73/8 89/15 90/14 96/4 96/21 97/3 107/12 107/16 114/3 120/20 120/20 124/11 127/8 133/11 134/18 141/17 142/14 143/15 143/15 145/11
history [3] 7/20 15/18 114/12
hit [1] 122/2
Hold [3] 83/25 105/8 107/6
holding [3] 81/25 130/12 133/1
home [4] 56/16 116/24 129/4 133/2
honest [2] 101/22 102/19
honestly [2] 67/6 94/24
Honor [58] 4/6 5/23 6/4 6/10 6/18 11/20 13/1 14/12 26/6 27/19 34/16 41/15 42/11 43/17 47/3 47/19 48/3 49/14 50/10 62/21 63/8 63/17 63/20 91/18 91/24 97/10 98/4 98/14 104/10 104/17 104/20 105/4 107/3 107/8 107/10 108/11 108/15 108/17 108/25 109/12 123/10 123/13 123/16 123/19 126/8 127/25 128/5 128/16 133/14 135/16 135/19 140/3 140/10 143/16 144/7 144/25 145/19 145/22
HONORABLE [1] 1/13
hopeful [1] 87/7
hopefully [2] 84/2 87/25
hopes [1] 66/20
hot [1] 83/23
hotel [5] 33/11 33/14 33/21 40/7 40/13
hour [6] 43/2 53/25 60/3 60/4 75/18 85/1
hourly [3] 69/2 69/8 69/18
hours [9] 49/15 58/20 59/3 59/9 68/24 75/18 77/16 77/17 132/25
house [4] 65/22 122/11 123/7 123/8
household [1] 118/11
housekeeping [2] 63/3 108/18
how [37] 7/16 8/7 18/20 18/21 28/22 29/7 30/15 52/22 59/13 64/3 65/15 74/19 76/5 76/6 76/6 84/12 85/11 89/10 95/7 97/12 101/20 106/22 110/3 110/3 110/6 111/14 111/15 111/17 112/1 114/4 114/5 114/7 115/8 125/25 125/25 128/11 137/16
however [3] 44/3 54/16 57/23
huh [9] 9/2 20/11 28/7 49/2 51/23 53/16 55/2 58/14 58/24
hung [3] 58/2 61/9 144/1
husband [16] 9/7 9/12 9/17 10/2 10/16 14/22 64/12 65/9 66/2 67/15 92/10 92/13 101/9 102/1 102/15 102/20
husband's [1] 11/12

I

I'd [3] 6/20 128/13 133/19
I'll [4] 35/11 74/17 105/15 107/19
I'm [80] 6/24 8/24 8/24 9/10 12/5 12/20 13/9 13/14 13/16 13/17 13/18 15/5 15/13 17/11 18/6 20/12 20/13 20/22 21/24 22/15 23/3 27/7 28/9 30/17 31/15 38/24 40/6 40/25 41/10 43/12 44/23 46/15 47/22 49/12 52/1 58/18 60/2 61/13 63/8 63/8 65/3 66/18 66/22 72/7 72/8 72/20 75/4 76/20 78/5 78/7 82/15 82/16 83/22 84/2 85/14 86/16 89/3 91/18 93/4 93/13 93/23 97/14 99/20 100/22 100/25 101/1 103/13 104/13 104/20 104/20 104/22 105/6 105/13 112/11 115/23 115/24 122/7 122/17 128/14 141/19
I've [1] 41/7
ID [1] 3/2
idea [4] 33/21 94/22 122/5 132/22
ideal [1] 144/20
identification [17] 12/2 13/6 14/17 25/25 26/12 27/5 27/24 32/2 34/20 38/22 40/1 42/16 43/22 47/8 48/8 50/16 63/1
identified [1] 27/9
imagine [3] 97/15 124/24 127/12
immediately [4] 74/22 85/21 117/21 136/12
impasse [7] 52/22 55/13 57/5 84/11 129/12 130/9 130/17
implied [5] 138/15 138/16 138/19 144/5 144/6
implies [2] 76/21 136/1
impossible [1] 134/1
imprisonment [1] 4/18
improper [2] 21/18 74/1
imputed [1] 142/1
inaccurate [1] 105/2
includes [1] 13/11
including [3] 15/14 69/21 126/18
incorrect [1] 24/23
incredulous [1] 29/16
INDEX [1] 2/1
indicate [3] 11/2 39/9 136/25
indicated [3] 9/24 24/11 140/15
indicates [2] 24/22 30/22
indicating [4] 77/9 78/15 80/4 100/20
indication [7] 26/19 76/19 79/7 79/11 136/12 137/3 137/7
indicative [1] 56/25
indicted [6] 4/11 4/17 15/19 15/24 16/1 16/4
indictment [10] 61/13 61/18 62/8 62/13 62/14 70/2 70/16 71/2 71/4 143/9
indictments [2] 3/15 70/5
Indigent [2] 13/11 68/19
individual [1] 71/7
individuals [1] 114/18
influence [2] 141/18 142/6
influenced [1] 143/2
information [7] 3/5 11/4 14/9 71/11 114/11 125/24 142/15
informed [4] 106/24 124/12 134/6 134/14
initially [2] 129/7 129/11
injuries [1] 96/21
injury [3] 18/16 89/13 90/11
inner [1] 92/16
innocent [1] 29/7
inquired [2] 131/12 139/8
inquiring [1] 64/24
inside [1] 16/22
instance [2] 114/20 118/1
instances [1] 117/8
instead [2] 51/11 82/24
instinct [1] 74/4
instructed [3] 38/4 74/23 94/16
instructing [1] 137/25
instruction [9] 25/20 31/1 34/24 38/13 38/25 48/23 55/21 78/25 135/3
instructions [4] 35/24 38/15 39/22 47/14
instructs [1] 36/1
intend [2] 6/4 130/14
interacting [2] 130/20 130/22
interaction [3] 55/17 132/11 132/19
interest [3] 141/21 144/24 146/17
interested [1] 9/17
interfere [1] 63/22
interjection [1] 106/4
interpret [2] 57/23 76/5
interpretation [3] 57/19 132/4 136/21
interpreted [2] 131/1 136/6
interrogations [1] 23/16
interrupt [1] 41/1
interrupted [1] 86/1
interrupts [1] 29/12
introduced [1] 146/12
investigator [3] 40/15 121/1 142/15
investigators [2] 120/24 121/3
involve [1] 116/18
involved [16] 9/7 16/21 17/8 65/3 65/4 66/22 68/1 68/2 92/23 92/24 115/13 117/22 117/25 118/3 119/8 141/16
involvement [9] 64/13 64/19 65/10 65/12 113/2 114/3 116/6 121/5 141/5
is [503]
isn't [2] 36/18 125/11
issue [26] 5/2 5/7 39/18 70/2 73/7 80/7 81/17 82/9 86/17 87/9

I

issue... [16] 90/17 97/22 120/8 122/25 130/21 130/23 135/5 135/17 139/21 140/24 141/2 141/3 142/8 142/13 142/25 144/2
issues [10] 4/21 41/10 41/12 42/7 75/14 87/8 87/10 87/13 87/18 137/4
it [417]
its [1] 89/19
IV [2] 99/6 99/12

J

J.J [2] 115/19 115/19
January [10] 4/11 5/9 5/20 61/19 61/22 62/3 62/4 62/6 62/16 110/16
January 16 [1] 61/22
January 16th [1] 62/6
January 17th [2] 5/9 62/4
January 2013 [1] 4/11
January 8th [1] 5/20
Jason [19] 4/23 5/4 17/11 17/14 19/7 19/12 19/13 19/23 20/18 20/24 40/21 42/4 42/8 82/11 96/21 97/3 134/16 134/17 134/20
Jason's [7] 17/20 18/9 40/14 47/20 48/12 49/6 96/20
Jeremiah [1] 115/19
job [2] 110/20 127/8
jobs [1] 110/22
joke [1] 34/5
joking [3] 29/4 33/17 33/17
Jones [1] 8/3
JR [1] 1/17
judge [109] 1/13 4/16 4/17 8/7 11/5 12/13 12/22 23/14 24/1 24/8 24/16 25/3 25/8 25/12 28/20 29/9 30/8 30/13 31/18 32/25 33/10 33/14 34/2 34/23 35/13 35/20 36/1 36/6 36/24 37/16 38/11 39/19 42/25 43/25 45/7 45/17 47/18 47/25 48/16 48/21 49/12 50/22 51/12 52/14 53/4 53/8 53/17 54/11 54/19 54/23 54/24 55/6 55/11 56/3 56/11 57/3 58/1 58/12 59/22 60/2 60/5 61/8 69/17 74/6 75/6 75/25 76/8 76/11 77/6 77/14 77/20 78/8 80/20 80/24 83/16 84/5 85/17 86/1 86/5 86/7 88/2 88/7 90/4 97/6 103/17 103/22 105/21 105/24 124/8 127/19 129/17 130/19 131/4 131/19 132/1 132/11 132/16 132/19 132/21 133/4 136/5 136/9 137/12 137/24 139/2 140/19 144/8 144/15 144/17
judge's [4] 56/20 78/4 131/22 144/19
judges [2] 23/7 69/19
Judicial [1] 146/9
July [3] 61/20 62/8 62/16
July 16 [1] 61/20
July 16th [1] 62/8
juror [9] 23/3 45/23 81/25 82/5 130/11 130/13 131/18 137/23 144/10
jurors [55] 16/9 22/18 24/17 24/22 25/4 25/12 25/20 25/22 28/3 28/10 31/5 31/18 33/14 33/20 33/22 35/16 36/15 37/1 38/2 39/4 39/12 41/25 46/22 52/12 55/19 56/25 57/4 59/3 59/10 61/9 102/22 104/5 124/20 128/25 129/7 129/9 129/25 130/2 130/3 130/8 130/20 130/24 131/1 131/7 131/16 132/9 132/12 132/12 132/16 132/23 137/15 140/8 144/4 144/13 144/14
jurors' [1] 131/20
jury [114] 3/6 3/7 3/8 3/9 3/10 3/11 3/12 3/13 3/14 4/14 4/16 21/23 22/9 22/13 24/25 26/15 27/2 28/18 30/5 30/9 30/9 30/18 32/6 32/8 32/11 34/3 34/23 34/24 36/8 36/21 37/24 38/8 38/13 38/16 38/21 39/14 42/21 44/24 45/4 45/11 45/11 46/8 46/12 46/24 47/17 48/18 49/5 51/15 52/8 54/7 56/5 56/22 57/6 58/2 58/9 60/21 60/22 61/21 70/12 72/5 72/6 72/6 74/16 75/20 77/4 79/1 80/13 82/22 83/17 85/4 85/7 85/18 86/2 86/21 86/24 87/1 88/1 88/3 88/5 88/14 88/15 88/17 88/20 88/25 90/22 91/1 91/4 93/13 93/18 99/25 102/7 103/8 103/25 106/10 106/11 106/21 106/22 106/25 128/18 128/24 132/14 132/20 135/23 137/7 138/9 138/17 139/3 139/7 139/7 139/13 139/14 139/19 140/7 144/2
jury's [1] 106/10
just [136] 5/24 6/17 7/19 8/16 9/10 9/14 10/14 13/14 13/18 17/11 17/18 23/8 27/2 27/14 28/11 28/17 29/23 31/6 31/9 31/18 32/15 33/19 34/1 34/7 36/10 37/10 37/11 39/5 40/6 41/4 41/5 43/15 44/20 47/11 47/25 48/21 48/24 51/8 51/10 51/20 52/2 53/7 53/12 53/22 53/25 54/3 55/17 55/18 58/8 59/17 60/5 60/13 62/12 62/15 62/22 63/9 66/10 66/18 66/22 67/9 67/12 68/3 68/17 70/2 70/14 71/6 71/24 73/9 75/12 75/13 76/9 76/11 76/23 77/10 77/14 77/14 79/16 79/23 81/13 82/15 82/16 82/17 83/9 83/14 84/19 84/23 85/1 85/11 88/2 88/7 88/17 91/1 91/19 91/21 92/22 95/2 96/3 96/14 97/16 99/14 101/22 102/17 105/2 105/8 105/12 106/1 107/6 108/18 108/20 116/20 116/25 118/5 118/22 120/7 121/25 124/8 126/6 126/8 126/16 127/2 128/6 130/11 130/18 133/17 135/17 136/7 136/10 136/22 138/3 138/24 138/25 139/23 140/25 142/17 143/10 143/19

K

keep [11] 29/23 31/10 76/11 76/11 77/14 77/15 78/9 91/10 133/1 136/14 142/24
kept [5] 87/12 120/12 120/15 121/7 121/9
Kerri [1] 40/16
key [1] 121/9
kidding [1] 34/7
kidnapping [7] 16/5 16/12 20/5 61/3 70/21 70/22 100/4
kin [1] 146/16
kind [23] 6/17 16/13 29/16 29/18 36/21 63/16 74/1 79/15 79/16 80/12 102/16 102/17 110/20 110/22 111/4 112/1 112/8 112/12 116/20 124/20 125/8 134/23 134/23
kinds [1] 133/24
Kirby [1] 4/19
knew [24] 35/18 45/17 45/18 45/19 45/20 45/21 56/23 67/22 67/22 67/23 70/24 72/12 72/13 87/20 92/17 92/17 106/10 107/1 108/4 108/7 116/17 117/12 124/22 141/14
know [243]
knowing [1] 92/22
knowledge [4] 5/6 114/17 115/14 119/19
known [8] 68/5 68/6 71/12 104/5 116/18 116/20 116/21 134/3
knows [2] 88/4 116/17
Kristy [13] 4/13 6/20 7/8 7/13 83/19 100/8 112/17 112/19 113/24 115/12 116/5 122/17 123/23

L

lack [1] 130/3
lacked [1] 5/5
ladies [1] 93/17
language [7] 31/3 31/4 62/5 76/2 81/10 129/12 130/6
last [11] 7/12 17/12 23/23 24/3 25/17 50/3 54/23 82/18 99/11 99/12 109/5
lasted [1] 96/11
lasting [1] 128/22
later [5] 43/2 75/18 75/18 78/20 108/5
latest [1] 28/21
laughed [1] 33/20
law [17] 7/16 7/22 21/17 21/24 22/4 65/21 74/3 110/4 110/5 110/6 110/13 129/22 135/7 138/8 138/11 143/22 143/24
lawyer [9] 100/7 100/8 103/22 104/1 104/25 106/13 107/16 134/10 134/12
lawyer's [1] 121/8
lawyers [6] 28/17 36/7 37/15 49/8 121/2 141/21
leader [10] 111/14 111/16 112/3 112/10 112/11 114/15 115/21 116/1 116/3 117/22
leaders [8] 111/9 112/4 119/12 119/21 119/23 119/25 120/1 120/4
leaning [1] 124/21
learned [1] 104/2
least [6] 57/13 73/10 94/8 130/21 131/2 144/12
leave [1] 57/15
leaves [2] 54/13 60/17
leaving [2] 8/13 9/6
led [2] 90/7 91/6
left [3] 16/4 43/5 94/4
legal [3] 80/7 82/9 122/14
legitimate [1] 126/24
length [1] 87/16
less [1] 31/1
let [20] 12/12 13/15 27/2 28/9 44/2 44/9 47/19 60/6 60/10 63/22 81/5 89/7 89/9 93/7 99/14 102/3 103/15 113/5 113/9 133/2
let's [12] 39/6 41/14 61/11 64/3 74/15 97/11 98/7 98/7 98/13 101/4 115/22 125/3
letting [3] 60/13 66/22 144/17
level [2] 111/1 111/16
liar [10] 21/9 21/14 21/19 22/3 72/12 72/17 72/21 74/1 135/6 143/21
lie [2] 21/8 74/13
lies [2] 21/12 21/21
life [2] 19/24 124/19
like [101] 6/14 10/14 12/11 12/12 13/24 14/25 15/2 17/13 18/8 19/1 22/12 22/13 22/25 25/6 25/7 25/22 26/15 27/10 28/2 28/17 30/19 31/17 31/20 34/7 34/14 37/11 38/19 39/10 39/16 39/21 43/16 48/2 49/3 52/22 55/13 55/20 56/14 60/8 61/20 62/4 62/12 62/15 66/15 67/23 67/24 68/3 68/4 68/8 68/23 70/10 70/11 70/15 72/5 72/6 74/2 74/10 77/17 79/13 79/14 79/15 79/22 79/23 81/14 81/16 84/11 92/23 96/4 96/5 101/24 102/3 102/8 102/14 102/15 102/16 103/10 111/4 111/15 111/17 112/12 114/5 116/5 117/15 117/15 117/25 118/11 120/11 122/19 122/24 123/21 124/19 125/18 126/21 127/5 127/7 128/11 128/13 135/10 139/12 140/13 142/16 145/15
limitation [1] 91/4

L

limited [2] 90/5 97/22
Lindemann [1] 7/25
LINDSEY [1] 1/18
line [67] 18/19 19/20 20/12 20/14 20/23 21/7 24/16 24/20 25/7 25/11 26/25 27/4 28/20 29/2 29/12 29/24 30/16 30/17 32/6 32/10 32/20 32/21 32/25 33/10 35/13 42/25 42/25 43/25 44/6 44/17 45/3 47/14 48/15 49/3 49/9 49/9 50/21 51/12 51/16 52/14 52/20 53/12 53/20 54/1 54/8 54/12 54/14 54/23 55/6 55/12 55/22 55/24 55/24 56/1 56/4 56/10 58/5 58/13 58/18 59/22 59/24 60/6 60/8 93/17 94/18 94/19 134/23
Lines [18] 21/11 22/16 26/22 30/5 34/4 35/2 38/8 38/22 42/20 44/19 45/1 45/3 45/12 46/1 46/6 47/15 49/20 60/16
list [1] 23/14
listed [1] 40/7
listen [5] 72/19 72/19 124/5 137/14 138/2
listening [1] 124/3
little [18] 21/12 29/3 64/2 70/1 70/2 74/16 78/18 83/10 89/10 92/3 101/22 102/2 102/12 102/15 102/16 104/24 129/5 139/23
LLR [1] 8/15
load [3] 110/23 113/9 113/13
lobe [2] 19/1 19/6
lobotomy [2] 4/24 19/7
location [1] 114/22
lock [2] 65/4 121/9
locked [1] 121/10
logged [1] 98/17
logical [2] 72/9 74/13
long [10] 7/16 44/3 85/11 87/2 88/16 92/4 102/7 110/3 135/4 140/15
longer [4] 52/23 84/12 87/3 122/20
look [8] 31/17 44/9 44/17 70/5 97/2 128/20 132/24 137/10
looked [7] 48/24 62/12 62/17 63/16 64/14 79/14 95/24
looking [27] 9/14 10/21 13/16 13/17 14/25 15/5 15/6 15/13 18/6 19/19 22/15 23/12 24/20 32/5 38/7 42/19 54/10 55/23 63/15 70/13 75/13 76/9 81/9 87/9 94/18 141/19 145/14
looks [35] 6/14 10/14 12/11 12/12 13/24 14/25 15/2 17/13 18/8 19/1 22/12 22/13 22/25 25/6 25/7 25/22 26/15 27/10 28/2 28/16 31/20 37/11 38/19 39/16 39/21 43/16 48/2 49/3 55/20 60/8 61/20 62/4 62/15 70/11 70/15
loosely [1] 111/22
lost [1] 83/19
lot [9] 18/18 23/20 59/5 87/5 87/10 87/10 88/6 103/7 133/21
Luck [2] 115/23 115/24
lunch [17] 58/17 58/20 58/21 59/3 59/25 60/10 86/2 86/5 86/8 97/24 98/6 98/8 98/16 105/11 105/12 132/24 139/21
lying [4] 71/19 71/20 71/22 142/11

M

M-A-C-O-N [1] 99/13
Macon [50] 1/4 4/8 8/5 11/17 12/24 14/4 14/21 15/19 15/24 16/4 16/9 16/16 16/18 16/20 16/22 16/24 17/5 17/7 17/22 17/22 66/7 67/2 70/7 71/19 81/8 87/23 88/12 88/13 89/4 94/14 96/10 97/14 98/6 98/22 98/23 99/6 99/12 114/1 118/15 121/18 126/19 126/25 127/9 127/11 133/11 134/3 140/19 140/23 142/11 143/3
Macon's [14] 8/12 10/7 10/23 17/2 64/23 65/24 72/14 112/16 112/18 113/23 119/14 124/5 125/6 127/11
made [7] 21/21 22/8 72/14 90/20 96/24 121/15 134/17
main [2] 65/20 89/11
majority [18] 35/12 35/14 35/17 36/14 43/6 54/14 54/25 57/12 57/21 85/10 94/5 114/16 130/1 131/11 131/16 137/20 138/24 139/4
make [17] 36/13 36/16 39/8 63/5 64/14 80/1 87/11 89/9 91/20 92/14 98/1 127/1 136/17 137/13 137/25 144/22 144/22
makes [4] 9/5 72/7 127/3 134/1
making [4] 73/9 73/14 88/8 118/10
male [1] 40/15
manager [3] 27/11 40/8 40/13
many [9] 52/21 55/12 59/6 66/10 66/17 87/8 87/12 87/13 97/12
March [1] 5/12
March 22nd [1] 5/12
mark [2] 46/10 51/19
marked [40] 8/25 12/2 12/5 13/6 14/17 23/4 25/24 26/2 26/12 27/4 27/8 27/24 31/15 32/2 32/15 34/9 34/10 34/20 38/21 39/1 39/25 40/2 42/16 43/3 43/12 43/22 44/21 46/16 47/8 47/11 47/22 47/23 48/8 49/13 49/21 50/16 52/15 61/16 63/1 101/15
married [9] 8/12 66/19 67/21 100/13 102/5 102/25 112/15 112/17 117/13
Mason [1] 67/12
mastermind [1] 143/3
match [1] 62/11
material [1] 118/12
matter [4] 63/3 91/15 120/18 142/4
mattered [1] 126/25
matters [1] 108/19
maximum [2] 69/15 69/19
maximums [1] 69/14
may [24] 4/6 5/14 6/2 6/8 6/13 17/5 17/5 17/22 41/20 44/25 57/11 59/25 60/3 96/3 98/6 110/21 113/25 118/19 118/21 123/17 123/18 128/19 132/6 140/22
maybe [17] 16/17 16/21 23/9 23/9 33/18 41/11 57/10 73/2 77/17 87/21 87/21 88/6 90/20 95/1 98/10 98/10 126/20
MCCALLISTER [3] 1/18 2/4 2/12
McCURDY [4] 1/25 146/8 146/21 146/23
me [62] 9/5 11/14 12/12 13/15 13/15 17/14 28/9 29/9 36/14 41/13 44/9 56/3 60/10 61/25 63/22 64/25 69/11 69/18 72/5 72/6 72/19 81/5 82/16 82/16 83/23 88/7 88/18 89/9 93/7 98/1 99/14 99/14 101/25 102/3 102/7 102/14 103/6 103/15 104/23 106/6 106/7 106/8 106/9 106/13 106/13 106/24 111/1 112/25 112/25 113/1 113/9 114/2 116/18 117/17 117/18 117/24 119/10 122/18 123/5 127/4 127/12 127/21
mean [63] 12/20 13/16 17/21 19/21 20/20 24/3 29/15 31/6 31/13 33/12 34/5 34/6 36/14 36/17 36/22 40/10 50/23 51/9 51/13 57/8 57/9 57/12 57/17 57/19 57/22 59/4 59/4 59/25 62/12 66/20 67/5 67/18 67/20 67/21 69/20 71/5 71/24 73/6 76/22 82/21 82/23 84/18 87/19 89/1 92/10 92/16 92/22 95/6 95/24 96/2 96/8 96/8 111/18 114/2 116/13 120/3 120/25 121/9 125/19 126/16 127/7 135/21 142/18
meaning [3] 21/7 24/25 136/6
means [8] 50/23 52/18 53/7 57/6 57/17 79/20 84/6 94/22
meant [7] 29/1 29/17 44/8 44/25 53/2 87/7 87/13
medical [2] 5/4 89/25
mention [1] 86/14
mentioned [5] 53/24 54/18 68/17 84/25 96/9
mercy [5] 52/24 53/3 84/14 144/9 144/14
message [1] 10/18
met [1] 135/11
MICHAEL [1] 1/19
might [15] 31/5 33/6 36/17 58/20 73/3 79/3 79/11 88/25 96/1 96/2 96/6 101/24 106/25 145/8 145/9
mind [13] 4/25 7/18 19/14 43/7 54/15 54/25 78/14 79/21 80/18 85/10 130/14 137/17 139/4
minds [2] 94/6 125/2
minority [8] 31/5 36/15 37/1 55/3 129/25 131/12 131/18 137/20
minute [10] 11/16 32/18 36/10 41/14 91/21 97/24 98/6 98/8 105/8 107/6
minutes [12] 10/15 11/9 41/17 44/14 60/9 81/8 94/14 94/19 97/24 107/5 108/1 133/3
Miranda [1] 23/15
miss [1] 122/2
mistaken [1] 115/25
mistrial [36] 46/3 58/1 61/8 69/5 69/24 74/5 80/2 81/15 83/4 86/15 86/17 87/21 87/22 89/6 103/18 103/22 104/1 104/3 104/8 104/9 108/5 108/7 125/4 125/10 125/16 132/2 132/3 132/7 133/6 133/7 135/2 135/17 140/12 140/20 141/1 144/17
mistries [1] 88/1
mistry [1] 88/1
moment [2] 125/22 125/23
money [1] 23/18
month [1] 62/16
more [23] 21/12 30/25 39/12 69/21 72/7 72/9 74/16 76/12 78/19 80/5 82/25 97/12 110/23 118/5 120/6 123/2 125/24 136/11 137/2 138/18 139/20 139/23 142/15
morning [14] 33/7 35/10 37/15 37/20 56/4 79/4 79/12 79/19 79/23 85/25 129/2 136/18 139/12 139/15
most [6] 29/13 83/9 117/8 122/3 128/17 141/5
mostly [2] 8/2 112/1
motion [17] 11/24 13/3 14/14 26/8 27/20 31/24 34/17 42/13 43/19 47/5 48/5 50/13 62/23 80/1 83/4 88/24 133/8
motion-wise [1] 88/24
motions [1] 144/22
move [20] 6/17 11/20 13/2 14/13 26/7 27/18 31/23 34/15 42/12 43/18 47/4 48/3 50/11 58/1 62/22 69/24 104/1 140/12 140/20 140/25
moved [1] 104/3
moving [4] 10/14 59/5 141/2 144/17
Mr [15] 2/3 2/5 2/7 2/9 2/10 2/13 29/12 30/13 41/7 98/5 100/23 105/17 118/20 123/18 145/3
Mr. [130] 4/5 5/22 5/24 6/1 7/7 8/12 10/7 10/23 10/24 11/17 12/24

M

Mr.... [119] 14/4 14/21 15/19 15/24 16/4 16/9 16/16 16/18 16/20 16/22 16/24 17/2 17/5 17/7 17/22 17/22 18/15 21/23 22/2 23/21 27/10 29/3 41/10 41/12 41/19 44/6 50/19 51/7 53/6 54/4 63/7 64/23 65/24 66/7 67/2 67/12 68/13 68/13 68/14 68/15 69/10 70/7 71/17 71/19 72/14 75/23 76/15 81/8 87/23 88/12 88/13 89/4 89/10 89/16 89/18 91/5 92/2 94/14 94/21 95/14 96/10 97/13 97/14 98/23 99/5 105/9 107/7 107/20 108/16 109/14 110/1 112/16 112/18 113/23 114/1 116/7 116/9 116/13 117/4 117/5 118/15 118/18 119/14 119/23 120/19 121/18 122/19 123/11 123/15 123/20 124/5 125/6 126/19 126/19 126/25 127/6 127/9 127/11 127/11 128/7 133/11 134/20 135/14 135/18 138/7 138/20 140/1 140/19 140/23 141/4 141/16 141/23 142/3 142/11 142/23 143/3 143/18 145/10 145/12

Mr. Cathcart [20] 10/24 21/23 22/2 29/3 44/6 51/7 53/6 54/4 68/13 94/21 95/14 116/7 116/13 117/4 119/23 122/19 126/19 127/6 128/7 134/20

Mr. Cathcart's [2] 68/14 120/19

Mr. Charles [1] 5/22

Mr. Colon [4] 18/15 23/21 89/10 91/5

Mr. Colon's [2] 138/7 142/23

Mr. Davidson [5] 4/5 63/7 107/7 123/11 123/20

Mr. Goldberg [6] 109/14 110/1 123/15 141/4 141/16 141/23

Mr. Grose [24] 5/24 6/1 7/7 41/10 41/12 41/19 69/10 71/17 75/23 76/15 92/2 97/13 99/5 105/9 107/20 108/16 118/18 135/14 135/18 138/20 140/1 143/18 145/10 145/12

Mr. Macon [42] 11/17 12/24 14/4 14/21 15/19 15/24 16/4 16/9 16/16 16/18 16/20 16/22 16/24 17/5 17/7 17/22 17/22 66/7 67/2 70/7 71/19 81/8 87/23 88/12 88/13 89/4 94/14 96/10 97/14 98/23 114/1 118/15 121/18 126/19 126/25 127/9 127/11 133/11 140/19 140/23 142/11 143/3

Mr. Macon's [14] 8/12 10/7 10/23 17/2 64/23 65/24 72/14 112/16 112/18 113/23 119/14 124/5 125/6 127/11

Mr. Mason [1] 67/12

Mr. Ricky [1] 89/16

Mr. Shellenberg [6] 50/19 68/13 68/15 116/9 117/5 142/3

Mr. Whaley [1] 27/10

Mr. Woodberry's [1] 89/18

Ms [5] 2/4 2/12 6/22 65/6 102/6

Ms. [27] 10/23 12/7 12/16 64/2 91/25 92/7 100/12 100/17 101/7 102/25 103/17 105/21 106/1 118/6 123/21 127/18 127/22 135/22 136/4 136/19 140/10 141/4 141/18 142/4 142/9 143/10 143/21

Ms. Counts [2] 10/23 12/16

Ms. Goldberg [25] 12/7 64/2 91/25 92/7 100/12 100/17 101/7 102/25 103/17 105/21 106/1 118/6 123/21 127/18 127/22 135/22 136/4 136/19 140/10 141/4 141/18 142/4 142/9 143/10 143/21

much [10] 52/22 84/12 86/23 87/12 88/9 110/3 110/6 131/21 136/11 145/21

multiple [5] 13/10 74/24 89/21 128/19 130/8

multiple-page [1] 13/10

must [2] 39/16 137/17

mute [1] 82/17

my [57] 8/1 8/17 8/21 11/15 21/20 21/25 36/19 44/10 44/12 50/25 63/9 63/14 63/16 63/21 65/19 66/9 66/12 66/13 66/14 66/17 69/18 72/3 72/4 72/15 72/23 74/4 83/23 83/24 91/1 92/17 95/24 97/15 100/8 101/23 102/7 102/15 103/23 104/2 104/25 106/12 107/1 115/14 116/16 116/17 116/23 120/17 120/17 120/18 120/23 124/19 124/25 125/3 125/7 125/8 126/1 126/23 132/4

myself [4] 111/7 113/21 114/14 115/3

N

name [15] 7/11 7/12 10/11 10/23 17/10 17/12 64/23 71/6 92/17 92/23 99/10 99/11 99/12 112/25 117/19

names [2] 117/2 135/10

nature [1] 116/23

nearby [1] 17/5

necessarily [4] 71/11 121/25 125/13 135/2

necessary [1] 5/6

need [35] 12/18 13/15 29/10 33/5 39/5 49/18 50/5 50/20 50/23 52/24 53/5 53/10 53/22 54/4 58/17 58/19 60/9 79/24 80/9 83/13 83/24 84/4 84/13 84/16 84/23 86/8 117/22 132/17 136/22 136/22 136/23 136/24 138/25 139/23 145/16

needed [2] 64/11 110/25

needing [2] 122/25 123/5

needs [1] 145/12

neighborhood [1] 116/14

neither [3] 113/20 128/8 146/16

network [2] 121/13 121/16

never [7] 16/22 33/24 66/15 96/5 96/10 102/3 121/4

nevermind [1] 38/24

new [6] 64/17 71/3 71/11 113/8 114/9 135/12

next [21] 11/6 28/18 35/19 37/20 39/17 47/18 56/11 57/22 60/8 75/17 82/8 85/25 98/21 108/16 123/17 123/18 129/2 131/15 132/12 138/22 141/2

night [6] 36/18 38/2 129/1 129/10 132/1 132/6

no [117] 6/19 11/18 11/23 12/1 12/25 13/3 13/5 14/14 14/16 14/24 17/4 17/6 17/7 20/14 21/15 21/16 25/11 26/5 27/16 27/20 27/23 29/14 31/6 32/1 33/12 34/1 34/17 34/19 36/16 42/13 42/15 43/19 43/21 44/9 44/12 46/23 47/5 47/7 48/5 48/7 50/13 50/15 51/12 55/5 56/19 57/2 57/8 57/12 59/2 60/23 61/6 61/10 62/23 64/14 65/9 65/12 66/4 67/4 70/11 71/5 71/16 76/18 77/10 79/9 81/5 81/23 83/5 83/5 91/15 92/12 94/22 95/17 97/4 97/5 97/10 100/11 100/16 100/19 101/12 103/19 104/17 108/15 109/8 115/23 116/5 116/6 116/8 116/10 116/13 118/4 118/8 118/16 118/17 121/5 121/11 122/5 122/11 122/12 123/6 123/7 123/8 123/12 124/18 126/16 127/17 127/25 128/2 132/21 139/14 139/14 139/15 139/17 141/15 142/5 145/7 145/19 145/20

nobody [3] 77/8 78/10 136/5

none [5] 11/24 31/11 60/20 68/4 130/5

noontime [1] 132/15

norm [1] 121/24

Nos [1] 62/25

not [169]

note [61] 3/6 3/7 3/8 3/9 3/10 3/11 3/12 3/13 3/14 23/3 23/6 26/4 28/21 30/14 31/17 32/21 34/12 35/3 35/5 40/7 43/2 43/15 45/16 46/22 47/25 49/13 49/25 50/4 52/15 52/20 54/11 56/12 75/2 75/3 76/2 77/4 77/9 79/2 80/14 82/8 82/19 82/21 84/3 93/18 94/2 94/13 95/2 95/3 108/7 129/13 131/13 135/23 136/1 136/6 136/16 136/21 136/25 137/5 138/6 139/8 139/9

noted [1] 75/5

notes [15] 23/8 44/10 44/13 63/9 63/14 63/16 74/16 86/21 95/25 103/9 126/23 129/8 130/12 135/20 144/11

nothing [4] 71/3 102/17 127/21 128/5

notice [4] 65/2 70/8 70/19 81/24

noticed [5] 62/19 69/9 69/11 69/12 70/4

November [2] 5/17 110/13

now [43] 4/5 6/15 8/3 8/10 8/21 10/2 10/4 13/18 15/17 20/17 27/7 38/24 43/4 43/12 44/24 45/15 46/15 49/17 49/20 50/5 50/19 53/17 53/23 54/23 55/7 58/17 70/3 74/4 80/21 81/5 83/14 84/20 84/24 93/1 93/5 93/8 93/20 94/22 95/10 103/24 122/21 125/5 139/1

Nowadays [1] 122/2

number [64] 4/9 8/25 11/21 12/6 13/2 13/9 14/13 23/5 23/6 23/17 23/18 23/20 27/4 27/8 27/9 27/18 31/17 31/23 32/15 32/16 34/9 34/11 34/11 34/16 38/21 39/25 40/2 40/2 40/14 40/15 40/16 40/18 41/23 41/24 42/12 43/3 43/13 43/14 43/18 46/11 46/11 46/16 46/17 47/4 47/12 47/19 47/23 47/24 48/4 48/22 48/23 49/14 49/21 49/22 50/11 51/19 52/16 61/16 61/18 62/2 93/19 93/24 93/25 101/16

numbers [2] 40/10 124/14

O

o'clock [3] 42/19 98/13 129/1

object [18] 71/21 72/24 73/1 73/19 73/21 76/20 76/23 81/3 81/12 81/18 82/15 82/16 88/23 94/15 105/4 107/3 140/24 142/19

objected [7] 67/7 81/6 89/18 89/22 90/24 130/15 142/24

objecting [6] 71/25 73/4 74/8 82/17 96/20 142/10

objection [28] 6/19 11/22 11/23 13/3 14/14 20/15 21/15 26/8 27/20 31/24 34/17 42/13 43/19 47/5 48/5 50/13 62/23 67/3 90/20 90/21 97/4 105/9 107/7 107/20 134/19 135/1 135/3 145/7

objectionable [3] 73/3 81/20 142/18

objections [5] 89/22 91/2 96/24 134/17 144/22

obvious [1] 45/15

obviously [9] 39/22 51/14 67/21 74/18 86/13 113/4 116/16 142/12 145/7

occasion [1] 114/18

occurred [7] 18/21 49/10 111/21 111/24 114/22 115/6 119/17

0

occurs [1] 23/2
October [9] 4/15 5/15 5/18 22/13 37/18 37/20 58/5 58/6 146/19
October 18th [1] 5/15
October 2 [1] 37/20
October 4th [1] 5/18
off [9] 16/18 17/6 21/24 23/21 54/19 65/5 82/17 121/16 122/9
offenses [2] 100/2 111/21
offer [19] 88/6 94/23 94/23 96/5 106/5 106/6 106/7 106/8 106/9 106/14 106/15 106/16 106/17 106/20 126/21 126/21 126/24 127/3 127/13
offered [5] 106/5 106/7 106/8 106/9 142/9
offering [2] 106/13 127/12
offers [2] 68/8 142/20
office [36] 7/24 8/1 61/25 64/10 64/18 64/20 65/19 65/20 65/21 65/25 66/2 66/19 68/19 92/15 92/20 100/15 110/9 110/16 111/4 112/15 112/19 114/5 117/1 118/2 119/18 120/12 120/17 120/20 121/8 121/8 121/12 122/8 133/21 133/23 134/11 142/2
officer [3] 40/17 40/18 73/11
offices [1] 120/16
Official [2] 1/25 146/8
oh [8] 11/18 38/24 74/11 83/20 102/15 105/6 122/16 143/8
OID [4] 66/13 66/14 68/18 68/19
okay [208]
old [2] 4/25 19/14
once [2] 66/14 81/17
one [59] 15/22 18/1 18/14 21/9 24/2 25/17 33/3 34/25 36/1 40/8 42/3 43/5 47/18 57/11 61/16 70/20 72/3 72/4 72/8 72/9 72/10 74/16 78/24 80/8 81/6 81/13 81/15 81/25 83/25 87/9 92/20 94/4 94/10 95/19 95/21 97/22 102/11 105/8 106/24 107/6 108/20 110/22 111/12 112/3 113/12 117/20 118/24 119/23 120/6 120/23 125/1 130/11 130/25 131/18 135/8 137/23 138/3 139/14 139/17
ones [2] 79/18 131/17
ongoing [1] 138/19
only [25] 10/18 15/21 24/1 27/5 40/1 68/12 69/11 73/24 77/16 87/2 95/11 95/13 95/20 95/22 109/6 114/11 116/19 116/23 118/9 119/7 120/18 121/3 130/25 132/19 138/21
open [4] 26/23 39/13 75/10 137/17
opened [2] 8/17 66/12
opening [2] 6/17 8/1
opinion [5] 70/13 91/8 91/9 101/23 137/18
opinions [1] 137/15
opportunity [2] 25/13 133/19
opposing [2] 141/22 141/24
option [9] 44/7 94/20 95/15 95/18 95/23 95/23 96/7 126/18 127/15
oral [1] 128/14
order [16] 3/4 4/25 8/19 11/4 12/10 12/23 14/1 14/8 40/7 58/16 58/17 58/20 60/9 69/18 132/20 135/12
ordered [1] 132/24
orders [1] 59/6
ordinary [1] 115/11
organized [2] 111/15 111/15
original [2] 96/4 106/17
other [30] 17/21 19/3 24/8 27/1 35/24 51/9 69/19 91/14 95/10 95/19 95/22 100/2 109/8 111/8 117/23 120/7 120/13 128/1 128/2 130/2 130/20 132/23 134/9 136/23 137/14 137/16 138/2 138/3 141/13 142/1
others [3] 17/23 91/6 125/2
our [17] 5/14 5/15 41/12 87/7 87/14 87/25 106/21 106/23 116/17 118/11 119/18 121/19 125/11 134/4 135/11 143/9 143/22
ourselves [1] 32/18
out [77] 16/4 17/14 19/2 30/5 32/7 36/4 36/14 38/20 41/1 41/11 45/23 46/7 46/22 51/11 53/14 54/5 54/9 55/7 55/22 56/22 56/24 57/3 57/5 65/4 67/9 69/10 73/10 75/2 75/12 78/18 79/24 80/13 80/14 82/1 82/5 82/24 83/10 83/17 84/19 86/24 87/2 88/14 88/16 91/11 91/16 95/7 98/17 101/20 102/1 102/4 102/7 103/9 108/6 113/8 114/16 115/10 115/25 117/19 119/12 122/17 128/23 129/8 130/12 130/24 131/9 133/1 133/3 136/14 137/23 138/9 138/23 139/3 139/22 139/24 140/6 141/8 142/24
outside [3] 50/24 53/10 84/16
over [7] 44/23 86/12 105/11 111/2 116/3 117/9 128/22
overheard [3] 106/25 124/20 125/24
overlap [1] 121/5
overreaching [2] 72/10 72/18
overrule [1] 107/20
own [13] 8/1 17/4 65/16 66/13 66/14 68/18 74/10 102/4 113/9 120/17 137/18 137/19 144/18

P

p.m [15] 9/15 23/2 26/16 28/3 32/9 32/20 37/18 43/1 45/1 45/11 46/6 49/10 51/21 58/4 145/24
page [45] 9/3 9/4 9/4 10/20 10/21 13/10 18/6 18/19 19/19 21/5 22/15 23/1 23/12 24/15 25/7 28/18 32/5 38/8 38/22 42/20 42/24 43/25 44/19 44/24 45/10 45/12 46/5 46/6 47/14 48/14 49/4 52/14 56/11 58/4 59/14 60/16 61/21 62/1 62/2 62/7 75/3 76/1 93/10 137/12 140/6
Page 3 [1] 62/7
Page 368 [1] 21/5
Page 417 [1] 22/15
Page 418 [1] 24/15
Page 420 [1] 25/7
Page 424 [1] 32/5
Page 435 [1] 38/22
Page 437 [1] 42/20
Page 439 [2] 44/24 93/10
Page 440 [1] 45/10
Page 449 [1] 58/4
Page 450 [1] 59/14
Page 451 [1] 60/16
pages [3] 21/3 61/17 62/1
paid [6] 15/10 69/2 69/7 69/11 69/21 69/22
paper [2] 40/16 121/25
paragraph [3] 6/5 20/20 20/22
paralegal [2] 120/18 120/20
paralegal's [1] 121/8
paralegals [1] 120/21
parking [1] 23/20
part [9] 16/3 20/17 35/2 36/5 51/8 51/9 55/16 76/24 129/24
particular [11] 13/17 40/21 66/11 66/11 72/11 111/24 113/3 115/4 117/2 120/4 120/15
particularly [1] 6/16
parties [3] 39/9 47/16 137/8
parts [1] 59/5
party [4] 128/8 141/23 141/24 146/17
passive [1] 4/24
past [2] 9/25 49/15
patience [1] 108/11
Pause [5] 44/11 68/12 84/1 91/23 101/3
pay [2] 68/19 69/18
PCR [6] 5/18 99/17 133/14 134/8 134/24 143/22
PCR's [1] 8/2
pending [1] 119/18
people [11] 53/23 59/6 71/12 83/9 84/24 84/25 117/10 121/10 135/9 138/23 141/14
perceived [1] 17/23
period [1] 11/16
periods [1] 88/16
peripheral [1] 67/24
permanently [2] 130/25 131/10
person [6] 43/6 80/17 89/12 94/4 125/1 138/3
person's [1] 104/1
personality [2] 18/17 90/14
personally [2] 141/22 141/24
perspective [1] 97/15
pertaining [1] 121/17
petition [1] 5/11
petitioned [2] 5/9 5/13
phone [1] 65/8
phrase [1] 59/14
physical [2] 65/19 120/15
physically [1] 130/4
picking [1] 16/19
pivotal [1] 17/14
place [2] 96/6 128/21
Plaintiff [2] 1/5 1/17
plan [1] 97/17
planning [7] 16/18 16/21 17/4 17/6 21/21 21/22 116/24
plans [1] 5/25
play [5] 24/11 25/9 26/21 27/2 75/10
played [5] 26/23 32/11 32/19 42/21 95/7
plea [6] 68/8 94/23 96/5 106/14 126/21 127/13
plead [1] 108/2
pleas [4] 1/1 102/9 102/10 146/14
please [16] 4/6 6/2 7/1 23/14 23/23 33/2 41/20 46/17 47/19 98/23 105/25 109/14 118/18 118/21 136/10 137/25
plus [1] 15/11
point [73] 10/24 24/25 25/24 30/21 31/12 34/23 35/5 35/17 36/13 36/19 44/2 44/5 45/7 45/16 45/21 46/10 51/19 55/4 56/1 56/16 56/19 56/24 57/3 57/5 58/2 61/6 65/10 65/15 67/22 73/18 74/3 76/3 76/8 76/19 77/17 77/18 78/25 79/16 79/22 80/1 80/12 80/19 82/11 86/15 86/17 87/23 90/6 94/2 102/21 104/25 105/3 113/2 114/16 115/13 124/18 124/24 129/15 130/6 130/10 130/11 130/16 130/18 130/19 131/13 131/24 131/25 132/6 132/15 136/15 137/9 138/21 140/6 140/13
pointed [1] 30/5
points [2] 36/4 54/5
police [1] 71/20
policies [2] 122/8 122/11
policy [2] 123/6 123/7
polled [1] 140/7
popular [1] 144/21
portion [1] 10/22
portray [1] 131/7
position [6] 49/16 72/23 89/5 110/18 110/24 122/9
possibilities [2] 126/12 126/13
possibility [3] 36/18 36/19 37/3
possible [8] 6/9 37/1 46/19 72/3

P

possible... [4] 104/21 104/22 119/16 120/25
possibly [1] 118/10
posture [1] 78/7
potential [2] 14/23 113/25
potentially [1] 130/12
practice [13] 8/1 8/17 9/7 65/16 65/21 66/9 66/12 66/17 66/25 67/13 71/25 112/22 125/8
practicing [3] 7/16 110/4 110/5
pre [1] 17/6
pre-planning [1] 17/6
precautions [1] 134/13
prefer [1] 51/8
Prentiss [2] 8/9 8/10
preparation [2] 71/15 143/12
prepare [1] 68/16
prepared [1] 105/13
presence [1] 102/13
present [6] 5/21 6/6 24/25 30/10 38/9 45/4
presentation [1] 42/9
presented [1] 73/16
preserve [1] 144/22
pretrial [1] 90/20
pretty [13] 17/19 19/1 86/6 86/23 89/3 97/16 122/2 127/2 129/19 136/11 137/10 137/24 140/21
previous [1] 127/3
previously [1] 123/24
printout [1] 13/21
prior [7] 62/5 105/21 108/21 112/18 124/8 127/11 127/13
private [3] 4/20 8/1 65/16
probably [10] 17/17 31/20 32/23 50/2 57/6 58/17 60/14 122/4 126/22 131/6
problem [1] 51/10
problems [2] 53/24 84/25
procedural [2] 15/18 38/16
procedure [3] 92/19 132/1 136/9
proceed [8] 4/4 5/23 6/8 28/23 29/8 30/15 125/7 128/12
proceeded [1] 4/14
proceedings [1] 146/12
process [5] 86/20 102/9 107/12 119/6 130/5
processes [1] 122/23
productive [1] 131/3
proffer [1] 90/23
proffered [1] 90/24
progress [3] 33/4 80/15 136/17
prohibited [1] 22/4
project [1] 6/12
pronouncing [1] 17/12
proof [2] 133/12 135/12
proper [1] 142/2
proposing [1] 80/25
prosecute [1] 134/11
prosecuted [3] 101/11 103/2 112/16
prosecuting [3] 64/11 112/19 116/15
prosecution [3] 89/11 97/3 113/2
Prosecutor [2] 21/19 134/10
protect [2] 31/4 129/24
protections [1] 31/12
protective [1] 130/6
prove [1] 140/4
proved [1] 143/15
provide [5] 16/13 32/7 37/11 46/17 112/25
provided [1] 61/25
provides [2] 10/23 25/19
providing [1] 37/7
provision [1] 120/11
provisions [2] 121/15 133/25
proximity [2] 23/19 23/22
Public [3] 7/23 133/21 133/22
pull [3] 30/20 48/18 76/12
pure [1] 140/4
purpose [4] 18/11 18/15 129/23 129/24
put [13] 12/5 12/18 13/9 15/18 33/10 33/14 33/21 39/6 51/12 59/10 65/1 87/24 109/3
puts [2] 5/24 48/21
putting [1] 93/23

Q

question [23] 11/15 19/6 23/23 24/3 25/17 28/25 29/6 33/18 35/25 36/2 46/7 54/16 58/15 76/21 76/24 77/1 82/18 93/4 100/23 101/7 104/21 105/5 105/13
questions [33] 24/9 25/3 25/8 36/21 36/24 61/12 63/17 71/17 75/6 75/7 91/25 93/15 96/20 96/22 101/17 101/24 103/8 104/11 104/18 112/9 116/12 118/5 118/18 118/18 118/22 120/23 123/12 123/20 126/5 129/7 141/13 141/14 145/18
quick [2] 44/9 74/17
quickly [2] 123/21 127/2

R

raise [3] 6/25 98/23 109/14
raised [2] 4/21 89/21
raising [1] 67/2
ran [1] 133/20
random [1] 66/15
rate [1] 69/18
rather [4] 88/1 121/24 140/20 144/5
re [1] 33/3
re-explain [1] 33/3
reach [4] 51/4 57/6 103/25 137/13
reached [2] 76/10 102/1
read [9] 23/8 40/16 76/6 82/3 82/19 82/21 93/19 93/20 138/17
reading [3] 28/14 77/8 79/6
reads [3] 34/24 35/8 52/16
ready [6] 4/4 5/23 56/13 128/14 128/15 139/11
real [1] 44/9
realize [2] 9/5 129/25
realized [1] 102/19
really [14] 18/14 24/21 30/4 33/4 36/20 73/25 74/8 80/12 85/3 94/17 102/17 107/24 115/9 127/9
reason [13] 26/3 27/13 46/21 67/20 72/24 73/1 73/3 78/13 83/3 106/8 115/4 115/9 144/21
reasonable [27] 23/24 24/4 25/19 46/18 46/25 47/13 47/16 48/23 54/17 54/20 57/19 82/10 82/20 85/12 85/12 85/19 87/5 87/17 136/20 136/21 137/13 138/1 138/6 140/11 140/16 142/10 142/20
reasons [1] 81/5
recall [41] 16/13 18/11 22/23 23/6 23/7 42/1 55/14 62/17 62/19 67/2 67/4 67/11 70/3 92/8 92/12 96/15 96/16 96/22 103/15 110/11 111/14 112/18 113/22 113/24 114/2 114/4 115/15 115/21 116/11 117/4 117/7 117/10 117/25 118/6 120/25 123/21 124/14 124/16 124/16 125/13 140/22
receive [1] 128/15
received [21] 12/3 13/7 13/25 14/18 26/12 27/25 30/14 32/3 34/21 42/17 43/23 47/9 48/9 49/13 50/17 52/15 56/11 63/2 64/5 93/18 139/8
receiving [1] 14/7
recently [1] 8/17
recess [2] 41/14 41/16
recharged [1] 38/4
recognize [2] 12/7 13/14
recognized [1] 44/19
recollection [4] 77/7 95/5 115/8 126/14
record [32] 1/6 5/25 7/11 15/18 23/11 39/3 39/6 39/6 43/1 48/1 48/21 51/13 57/24 57/25 58/12 60/19 77/25 90/25 94/17 95/22 99/11 108/20 109/2 110/20 120/21 127/11 128/6 129/20 137/11 144/12 144/23 146/11
recross [2] 108/13 108/14
redirect [3] 2/5 92/2 92/5
refer [1] 129/22
reference [1] 85/14
referring [3] 20/20 20/22 48/17
reflect [3] 108/20 109/2 128/6
reflected [2] 95/13 95/20
refreshments [1] 50/24
regard [4] 126/2 133/20 134/16 143/20
regarding [4] 24/4 25/18 62/6 125/16
regardless [2] 64/18 115/6
regards [2] 52/5 144/1
Region [1] 116/3
regions [2] 111/22 112/3
regroup [1] 98/13
reheard [1] 87/4
rehearing [2] 5/10 5/11
relates [1] 118/9
relationship [2] 134/11 141/17
relative [1] 146/13
released [1] 128/25
reluctant [1] 51/14
relying [1] 144/6
remain [1] 46/2
remember [20] 8/11 16/7 17/9 18/4 18/5 33/12 33/13 33/20 67/5 67/6 69/14 76/6 87/19 87/22 93/3 94/24 113/14 114/7 124/18 125/5
remind [1] 144/7
reminding [1] 52/2
reminds [1] 38/14
remitted [1] 5/16
remotely [1] 118/1
remove [1] 113/21
renew [1] 96/4
renewed [2] 90/21 91/1
rephrase [3] 76/25 82/19 103/15
replayed [3] 27/15 42/22 48/12
replaying [1] 49/6
reply [3] 128/4 128/5 143/18
report [5] 35/22 55/3 119/25 120/1 120/5
reported [1] 120/4
reporter [15] 1/25 26/20 39/7 39/14 39/20 41/3 42/21 48/17 49/5 52/3 100/22 108/22 146/1 146/8 146/23
reports [1] 131/11
represent [9] 8/5 47/12 100/10 100/21 101/9 103/3 103/5 141/24 142/3
represented [7] 4/12 4/20 5/21 9/8 100/13 119/19 122/10
representing [2] 101/25 141/22
represents [1] 114/17
request [5] 36/13 36/16 38/12 44/14 137/2
requested [8] 15/8 26/22 32/10 46/25 69/10 75/9 109/3 109/6
requesting [4] 30/22 74/7 83/17 139/3
requests [1] 40/3
required [2] 109/2 134/5
requirement [1] 134/14
residence [1] 65/22
respond [2] 11/2 145/6

R

responded [1] 9/21
responds [1] 145/11
response [4] 11/12 64/11 65/1 65/6
responsibilities [1] 111/2
rest [10] 22/19 52/8 55/19 56/5 96/12 97/18 109/9 119/11 122/13 133/2
rested [1] 17/19
result [2] 18/17 19/12
results [1] 113/6
resumed [1] 28/12
retain [1] 113/16
retire [2] 56/13 139/11
retires [2] 27/3 45/11
retract [1] 113/9
retry [1] 69/6
return [1] 78/20
returning [1] 37/15
returns [5] 32/11 34/24 38/16 54/13 55/24
reversed [1] 133/10
review [1] 80/24
reviews [1] 38/11
Richard [2] 115/16 115/25
RICHLAND [17] 1/2 7/23 10/5 10/7 14/22 59/2 64/9 64/10 66/10 66/16 66/17 100/15 110/9 111/8 111/21 146/5 146/14
Ricky [5] 4/23 5/3 18/2 18/4 89/16
rid [1] 67/5
ridiculous [3] 29/13 29/21 72/19
right [280]
rights [1] 23/15
River [1] 99/20
rob [3] 16/17 17/3 17/7
robbery [6] 4/12 15/25 20/4 61/3 70/20 99/23
role [1] 110/21
room [27] 30/18 33/22 35/22 39/14 42/21 45/11 46/13 47/17 48/19 49/5 51/15 53/14 53/23 55/7 56/22 57/16 60/21 83/10 83/14 84/19 84/24 130/25 131/9 132/14 138/23 139/1 139/7
rotate [1] 119/9
roughly [3] 11/8 43/1 61/7
RPR [3] 1/25 146/21 146/23
rule [6] 111/25 117/12 122/5 133/22 141/19 141/20
ruled [1] 90/4
rules [4] 122/13 134/4 134/8 141/20
run [1] 9/24
running [2] 102/8 102/10

S

s/Deborah [1] 146/21
safe [2] 20/1 134/22
said [55] 8/18 15/18 15/23 20/2 31/8 36/10 39/5 41/4 41/6 43/7 44/8 44/25 50/4 53/3 54/20 55/8 55/12 57/4 57/15 57/21 58/16 70/3 74/12 77/10 81/19 81/21 87/1 94/5 102/16 104/23 106/12 106/16 106/19 106/19 106/21 106/22 107/14 107/16 111/12 117/7 117/11 119/10 119/16 126/16 127/15 129/11 130/13 132/24 134/20 135/23 139/7 140/2 140/3 140/4 144/8
same [22] 9/21 10/12 10/22 11/2 14/4 43/4 49/16 55/17 62/5 69/7 76/1 80/6 80/16 94/3 94/3 101/10 103/1 121/1 130/17 135/6 137/6 142/22
satisfied [1] 133/11
saved [1] 122/1
saw [3] 23/7 23/9 78/10
say [50] 15/20 17/17 20/19 22/3 28/8 28/10 29/11 31/7 31/14 33/8 33/15 44/15 57/8 57/9 60/20 61/17 61/21 63/7 65/6 66/18 72/16 73/13 74/11 77/11 77/24 80/16 81/5 81/22 91/16 95/21 102/17 104/13 104/23 105/2 105/7 106/1 106/15 113/8 117/9 121/23 124/21 124/22 124/25 125/12 127/5 130/8 130/13 134/4 134/9 142/22
saying [27] 29/4 33/25 41/2 41/8 50/19 60/2 68/5 72/7 72/20 75/12 76/2 77/20 78/3 78/5 78/7 79/21 79/23 80/2 82/24 84/3 85/2 88/2 88/25 101/8 136/22 139/13 142/11
says [127] 15/3 18/8 21/7 23/1 23/14 23/17 24/1 24/8 26/22 27/1 27/10 28/11 28/20 28/21 28/24 29/9 29/13 29/24 30/8 30/13 30/16 32/6 32/10 32/14 32/20 32/21 33/2 33/9 33/10 34/8 35/8 35/9 35/11 35/13 35/15 35/20 37/16 38/12 39/4 39/25 40/11 40/13 43/2 43/4 43/25 44/7 44/16 46/12 46/17 47/18 48/16 49/12 49/14 49/17 50/5 50/22 50/25 51/7 51/12 51/16 52/15 52/21 53/6 53/9 53/13 53/17 53/20 54/3 54/11 54/12 54/14 54/20 54/24 54/24 55/3 56/1 56/3 56/11 56/12 57/24 57/24 57/25 57/25 58/15 58/18 58/21 59/24 60/2 60/4 60/5 60/5 60/7 75/6 75/20 76/11 77/5 77/23 79/2 79/3 81/7 83/9 83/12 84/10 84/15 84/18 84/20 84/21 85/9 85/10 85/21 86/6 86/7 88/4 93/17 94/2 94/17 94/19 95/17 95/17 136/10 136/16 137/5 138/8 139/4 139/14 139/17 139/22
scanned [1] 122/1
scenario [1] 144/18
scene [2] 40/17 40/18
schedule [1] 68/6
scheduled [1] 117/3
scheduling [3] 116/21 118/10 118/12
schizophrenia [1] 19/13
schizophrenic [1] 4/24
School [1] 7/22
screen [10] 6/10 8/21 12/6 13/10 63/21 92/20 93/5 93/25 98/18 101/13
screened [1] 92/14
scrivener's [1] 143/11
scroll [1] 13/14
second [15] 5/2 9/4 10/20 32/24 35/2 41/11 46/24 48/11 55/18 61/21 79/24 83/24 83/25 110/23 136/15
seconds [2] 83/23 96/11
Section [1] 131/25
Section 14-7-1330 [1] 131/25
see [41] 8/22 10/18 12/18 19/20 23/14 27/5 27/11 37/16 43/10 44/9 45/1 45/10 47/20 49/12 49/18 49/22 51/5 51/17 52/25 53/17 54/4 58/21 58/23 61/11 64/13 64/18 70/5 72/24 73/1 75/5 81/18 82/3 83/3 85/6 93/5 93/8 93/21 93/25 101/13 101/16 115/22
seeing [3] 23/6 117/1 117/3
seemed [4] 86/24 101/23 101/25 102/12
seems [3] 34/14 79/15 101/23
seen [2] 74/18 102/11
selection [1] 106/10
semantics [1] 129/16
send [10] 11/3 11/6 30/18 39/19 54/8 54/11 55/22 75/2 145/9 145/11
sending [1] 129/8
sends [4] 56/16 88/16 83/6 139/2
sense [5] 72/7 72/14 87/11 127/1 127/4
sent [12] 38/20 46/7 46/12 46/22 47/17 62/14 62/14 70/15 70/16 108/6 129/4 138/5
sentence [3] 29/19 50/3 78/4
sentenced [3] 4/17 99/22 99/23
separate [2] 65/22 120/12
September [5] 4/15 9/15 12/13 13/25 64/16
September 18th [1] 9/15
September 19th [2] 12/13 13/25
September 29th [1] 4/15
sequenced [1] 62/2
serious [1] 19/2
serve [1] 4/18
services [1] 27/11
Sessions [2] 10/8 62/6
set [4] 49/17 50/5 84/4 126/13
several [1] 16/5
share [6] 6/10 8/21 93/4 98/18 120/24 121/12
sharing [1] 63/22
she [114] 8/11 8/12 8/13 8/14 8/15 8/15 8/17 9/6 9/11 9/16 10/11 23/17 24/9 24/10 24/11 25/12 25/18 25/19 26/20 29/19 29/22 29/23 29/24 29/24 30/16 31/9 33/15 33/16 33/16 33/17 35/2 35/8 35/8 35/9 38/13 38/14 39/5 39/22 40/10 41/3 45/18 45/19 45/19 45/21 48/17 50/25 51/16 56/11 56/12 56/16 56/23 58/18 59/23 63/15 78/4 78/9 78/17 81/2 81/13 81/17 81/19 82/3 84/20 85/6 90/7 90/10 100/10 100/13 100/17 100/19 100/20 101/25 102/3 102/4 102/14 102/14 106/16 106/21 106/22 106/24 107/17 108/23 112/23 112/25 113/12 113/15 113/15 113/17 113/18 113/25 130/13 130/21 130/22 132/11 135/25 139/6 139/7 139/13 139/21 140/12 140/13 140/17 140/18 140/21 140/22 140/23 141/6 142/16 142/16 142/19 142/20 142/21 142/23 142/25
Shealey [3] 8/10 9/13 65/7
Shellenberg [7] 50/19 68/13 68/15 115/20 116/9 117/5 142/3
shirt [2] 23/21 23/21
shocked [3] 101/22 102/2 102/16
short [3] 97/16 97/21 98/11
shortly [1] 139/24
shot [4] 18/20 18/25 19/23 90/12
should [21] 63/4 69/23 81/12 88/22 88/24 91/16 94/15 125/10 127/10 131/22 132/3 132/7 133/7 133/8 134/3 134/25 135/12 137/13 137/20 140/24 140/25
show [10] 8/24 23/4 23/8 27/7 31/15 38/24 47/22 49/20 61/13 101/15
showing [3] 34/10 43/12 46/15
sic [1] 139/7
side [1] 19/3
sides [2] 93/20 138/2
sign [2] 100/20 101/8
signed [5] 11/4 12/12 14/20 23/16 43/7
significant [1] 67/25
signing [1] 12/23
simply [3] 122/12 141/7 143/10
since [9] 7/17 8/4 64/19 65/2 67/21 83/2 109/5 109/8 135/18
single [2] 45/23 142/19
singles [1] 137/23

S

singling [2] 45/22 82/5
singular [1] 40/18
sir [28] 92/3 99/16 99/18 100/1 100/11 100/16 100/19 101/12 101/14 102/23 103/12 103/19 104/2 104/9 105/23 107/24 108/15 109/10 109/20 109/21 110/17 118/4 123/16 127/20 145/1 145/4 145/17 145/20
sit [2] 44/2 88/17
situation [3] 116/17 120/11 134/6
situations [2] 117/9 138/8
six [2] 111/9 111/22
skill [1] 5/6
sleep [4] 33/6 34/6 50/20 136/24
slow [1] 33/5
slowly [1] 13/14
so [201]
Solicitor [44] 10/4 14/22 19/18 20/4 28/24 62/12 73/14 73/25 75/24 75/25 77/6 77/22 77/23 78/2 78/3 78/8 80/20 88/4 88/9 92/11 92/20 92/21 100/14 101/10 102/5 102/20 103/1 110/14 110/19 110/25 111/6 112/7 114/14 115/3 115/4 117/16 117/23 117/24 119/8 120/2 123/4 127/8 143/4 143/5
Solicitor's [13] 19/6 20/18 64/10 64/17 71/18 92/15 92/20 100/15 110/9 110/15 120/12 121/12 122/8
Solicitors [12] 68/11 102/11 111/8 111/12 111/13 112/5 118/25 119/13 120/2 120/16 136/5 142/2
solid [1] 128/22
some [66] 6/11 24/14 33/19 35/23 37/6 38/15 39/11 39/17 41/10 42/7 44/5 46/1 53/4 53/13 53/23 57/4 59/13 60/12 61/12 67/22 71/17 74/19 75/5 77/19 78/24 83/11 83/11 84/4 84/6 84/10 84/17 84/24 84/25 89/22 89/23 90/5 91/14 93/14 94/8 96/19 96/24 100/2 100/24 101/24 103/7 111/1 115/2 119/11 119/15 122/25 124/18 128/20 129/14 129/16 129/22 132/11 132/15 133/13 134/8 134/17 136/9 136/11 138/22 139/20 143/1 145/2
somebody [12] 20/24 20/25 53/24 98/5 100/9 103/3 103/5 107/18 117/15 122/9 122/19 135/6
somehow [1] 119/9
someone [6] 66/19 67/10 107/14 113/16 113/19 124/11
something [24] 19/17 72/1 81/14 90/19 94/23 96/9 104/23 105/20 106/16 107/13 113/7 121/2 123/1 124/19 126/22 126/25 127/5 127/12 129/19 131/19 134/2 142/12 142/17 145/15
sometime [1] 109/5
sometimes [1] 72/22
somewhere [4] 8/14 100/24 111/11 116/14
soon [2] 26/15 66/12
sorry [14] 8/24 9/10 20/13 20/13 40/25 59/1 63/8 75/4 100/22 103/13 104/13 104/20 105/6 115/23
sort [45] 7/19 20/10 38/11 38/15 64/22 68/7 68/23 70/7 71/25 73/7 73/9 73/14 74/10 74/15 75/24 78/4 79/21 79/23 81/25 82/5 83/8 83/11 84/4 85/2 85/25 86/5 86/19 88/10 89/4 89/11 89/12 89/25 90/1 90/10 90/14 90/21 124/12 124/13 135/21 136/7 136/21 141/2 142/5 142/6 143/3
soundly [2] 52/23 84/13
sounds [3] 29/16 126/21 127/5
SOUTH [10] 1/1 1/7 4/9 19/25 21/18 134/4 134/21 146/4 146/9 146/14
speak [5] 11/16 12/23 36/7 67/15 105/10
speaking [4] 111/23 113/24 114/8 118/6
speaks [1] 139/14
special [2] 5/6 133/22
specific [7] 67/6 92/8 92/9 92/12 95/4 115/7 125/13
specifically [9] 28/8 67/11 96/15 96/16 113/23 114/4 114/7 117/7 117/9
specifics [3] 67/18 126/14 140/22
speculation [3] 82/18 96/14 140/5
spell [2] 7/12 99/11
spent [1] 128/17
split [1] 124/13
spoke [3] 14/4 14/7 66/7
spot [1] 83/24
spouse [1] 122/10
Sr [1] 4/19
stack [2] 114/9 114/14
staff [1] 111/2
stalemate [8] 33/4 35/3 35/6 79/1 79/2 79/13 79/22 136/16
standard [3] 121/24 122/13 137/10
standardized [1] 123/6
start [4] 56/3 58/9 135/9 135/17
started [5] 93/3 110/11 110/13 117/17 135/18
starting [1] 42/25
starts [2] 18/19 137/11
state [21] 1/1 1/7 4/9 5/23 7/11 72/8 72/16 72/20 72/22 74/11 89/24 99/10 109/12 131/6 135/19 135/21 142/3 144/2 145/6 146/4 146/9
State's [6] 16/14 16/14 16/16 16/23 17/19 42/9
stated [7] 54/15 54/25 102/6 102/14 104/25 122/14 144/13
statement [5] 6/17 20/12 72/15 73/11 107/23
statements [6] 21/4 21/20 71/20 72/14 79/6 144/11
states [2] 130/23 134/9
status [2] 125/21 125/22
statute [3] 131/24 132/8 138/10
statutory [2] 15/15 69/14
stay [5] 36/17 84/2 91/16 102/8 144/21
steps [2] 92/13 117/15
still [22] 11/1 22/25 32/5 33/4 35/3 37/5 46/5 46/7 48/14 49/16 50/21 52/14 52/23 55/14 75/14 80/4 80/9 84/12 93/15 120/22 130/17 136/13
stop [3] 13/15 63/21 117/20
stopped [1] 63/24
stored [2] 65/18 65/24
story [4] 21/9 71/21 73/8 142/14
straight [1] 132/13
strategic [1] 143/24
strategies [1] 72/5
strategy [5] 68/4 86/20 125/15 140/11 142/10
Street [1] 65/20
string [1] 10/16
strong [1] 89/5
strongest [1] 91/10
struck [1] 82/4
structure [3] 111/4 111/14 120/3
stuck [1] 79/16
studying [1] 104/2
stuff [3] 14/10 76/12 103/10
submit [3] 140/10 143/14 145/2
substance [2] 118/8 141/11
substantial [1] 88/15
substitute [1] 113/19
substitution [3] 3/4 3/11 112/10
such [1] 74/2
suggest [1] 125/17
suggested [1] 79/18
suggesting [1] 29/5
suggestion [3] 33/6 35/8 79/3
suggests [1] 54/5
summarize [1] 7/19
summarizing [1] 25/4
summary [2] 16/13 17/18
supervisor's [1] 122/25
supervisory [1] 111/1
supplied [1] 16/19
Supreme [2] 5/14 5/15
sure [18] 28/9 38/6 39/8 63/5 64/14 83/22 87/6 87/15 89/3 89/9 91/20 92/14 100/25 101/1 104/21 104/22 110/22 111/6
sustain [1] 77/2
swear [4] 7/3 99/1 99/4 109/17
sworn [4] 7/9 99/7 109/23 123/24
sympathetic [1] 20/24
system [4] 121/19 121/21 122/1 122/3

T

take [31] 8/18 9/12 11/5 12/12 23/21 24/3 28/9 32/23 41/14 53/8 59/3 59/8 64/6 64/20 65/3 66/9 79/7 92/4 97/23 106/20 112/23 113/15 117/14 123/4 127/1 131/19 132/18 133/25 136/22 136/23 138/24
taken [5] 20/1 21/1 89/4 134/13 134/22
takes [1] 72/23
talk [16] 44/6 71/24 81/8 89/1 94/14 97/11 117/22 117/23 120/8 122/17 124/7 125/2 135/8 136/3 137/4 138/1
talked [23] 16/16 27/15 32/15 41/24 42/6 44/20 47/25 48/22 51/20 66/6 70/1 70/2 89/9 95/3 97/3 105/1 119/6 119/20 125/6 126/16 134/20 135/20 135/20
talking [13] 18/19 24/10 34/1 34/12 39/12 49/25 80/14 86/14 95/8 117/18 117/20 122/18 136/14
talks [7] 19/23 21/11 83/10 137/12 138/10 138/11 138/22
tangentially [1] 116/21
TD [3] 23/22 70/24 71/7
team [21] 111/9 111/10 111/12 111/14 111/15 111/25 112/2 112/4 112/10 112/11 114/15 115/21 116/1 116/3 117/22 119/12 119/21 119/23 119/25 120/1 120/4
teams [6] 111/17 111/17 111/20 111/22 119/20 119/21
technical [1] 42/7
technically [1] 15/24
teeth [3] 49/17 50/4 52/17
tell [16] 8/7 25/9 25/13 29/23 29/25 32/25 33/1 67/7 78/9 88/21 95/12 96/17 105/24 117/21 121/4 137/15
tellers [1] 71/7
telling [2] 21/22 122/16
tells [8] 25/8 25/12 56/12 76/8 77/14 78/17 85/17 139/10
temple [1] 18/25
temporal [1] 19/5
ten [6] 44/14 81/8 94/14 96/11 107/5 108/1
term [4] 61/19 62/3 62/7 130/3
terms [4] 68/3 68/11 110/24 141/11
testified [18] 7/9 18/1 66/5 74/9 91/1 91/3 92/7 99/7 106/2 109/23

testified... [8] 123/24 125/15 135/22 135/25 136/4 136/20 141/4 143/10
testify [8] 4/23 5/4 5/7 18/15 90/6 90/10 91/5 97/17
testifying [7] 18/12 52/1 67/12 89/15 107/8 107/13 107/15
testimony [63] 5/1 5/5 7/4 17/20 18/18 18/20 19/5 19/13 24/10 24/11 25/10 26/20 26/23 27/1 27/10 27/14 30/19 30/22 32/10 32/19 39/13 40/3 40/15 41/25 42/22 47/20 48/12 48/19 49/6 65/7 73/10 73/15 75/5 75/8 75/9 75/10 75/23 75/25 77/19 77/20 78/19 82/10 82/21 89/19 89/25 90/5 90/8 90/21 90/23 96/21 118/24 124/3 124/5 124/11 134/18 136/11 137/2 138/7 138/18 142/23 142/24 143/1 143/7
than [13] 72/7 79/14 88/2 88/7 106/6 106/17 120/6 122/20 123/2 127/3 127/10 127/13 140/20
thank [35] 6/2 6/14 7/7 26/10 27/1 27/22 41/15 63/20 92/1 97/7 98/14 98/15 98/20 108/10 108/12 109/10 109/21 110/3 118/5 118/21 123/10 123/14 123/15 123/16 126/4 126/8 127/18 127/18 127/20 135/14 135/16 143/17 145/1 145/21 145/22
Thanks [1] 52/4
that [996]
That's [25] 9/5 9/13 16/11 18/24 20/2 21/13 22/11 24/5 39/21 41/13 42/5 47/1 69/3 70/17 78/16 79/13 90/16 94/22 97/6 112/6 112/14 117/14 119/1 123/9 126/4
their [23] 22/13 35/8 38/12 43/7 59/11 64/19 80/18 94/6 112/10 112/11 115/21 120/16 122/9 125/2 130/14 138/13 140/8 140/14 143/6 143/7 144/2 144/5 144/6
them [61] 23/9 25/8 29/5 29/6 29/7 29/10 29/23 29/25 29/25 31/6 34/24 35/3 37/9 37/12 38/14 38/14 39/23 44/1 44/2 44/3 45/7 48/19 51/11 52/21 53/4 53/13 53/14 55/12 56/16 56/21 57/11 58/16 62/2 72/8 72/19 75/8 76/8 77/14 77/21 78/9 78/17 79/11 83/11 84/19 102/9 114/15 116/11 117/11 117/20 117/21 119/11 120/9 122/16 128/15 130/4 130/4 130/22 130/22 136/22 137/25 141/10
then [140] 7/24 7/25 8/3 10/2 10/4 10/14 11/1 14/4 20/3 20/10 21/11 22/9 24/1 24/8 24/14 24/16 25/3 25/13 25/17 25/19 26/15 26/22 26/25 27/4 28/2 28/16 29/12 30/1 32/7 32/11 32/16 32/19 32/24 35/1 35/23 35/25 36/7 37/5 37/14 37/20 39/3 39/25 40/11 40/14 40/14 42/19 42/24 44/2 44/19 44/23 45/11 45/25 46/2 46/5 47/14 47/18 48/21 49/3 49/8 50/25 51/20 52/20 53/8 53/12 54/8 54/19 56/4 56/10 57/21 57/21 58/4 58/5 58/18 59/13 60/2 60/5 60/12 60/16 60/24 62/7 64/25 65/1 68/15 69/15 75/10 75/17 78/17 78/18 78/19 78/23 79/2 80/11 81/17 82/7 82/8 83/6 84/15 85/9 85/21 85/21 85/21 85/24 85/25 86/5 86/9 88/4 89/9 90/20 90/25 93/2 94/13 96/24 97/17 98/10 108/6 111/6 111/8 111/10 112/4 113/4 113/18 113/20 114/13 114/23 115/1 115/5 115/22 119/15 122/2 122/4 123/6 129/4 130/7 130/16 135/20 138/5 138/20 139/6 143/24 145/15
theory [4] 16/14 16/16 16/23 17/19
there [142] 8/9 8/19 9/4 15/6 15/13 17/4 17/6 17/6 17/22 18/13 18/13 18/20 20/14 20/15 20/16 21/14 21/15 23/2 24/14 25/11 26/19 27/1 28/2 28/10 28/16 29/16 30/18 30/21 31/7 32/16 35/19 35/23 36/4 36/5 37/6 37/8 37/11 37/14 39/4 39/8 39/10 39/16 39/17 39/20 43/2 44/3 44/9 45/25 51/10 54/6 55/12 59/4 59/13 59/25 60/12 62/10 64/25 65/19 69/5 74/3 74/21 75/25 76/18 77/19 81/5 81/6 81/16 81/25 83/20 85/3 86/7 86/14 87/4 87/8 87/10 88/14 88/16 90/6 90/24 93/4 96/24 97/4 97/4 97/5 97/16 101/23 101/24 110/12 111/6 111/6 111/9 111/10 112/2 115/1 115/17 116/5 118/8 119/20 120/3 120/11 121/4 121/5 121/9 121/10 121/15 121/20 121/20 122/5 122/7 122/11 122/14 123/7 126/20 128/19 129/3 129/5 129/13 129/22 130/11 131/8 131/11 131/21 132/22 133/13 133/13 133/16 133/22 133/24 133/24 134/13 134/16 134/18 134/25 135/1 135/4 135/6 138/23 140/15 140/16 141/15 142/5 143/1
thereafter [2] 5/13 139/24
these [11] 11/11 61/6 75/7 75/13 86/13 86/21 101/21 132/16 135/20 138/8 144/4
they [225]
thing [16] 20/6 35/20 53/15 72/22 73/24 81/11 81/12 95/11 95/13 95/20 95/22 116/19 135/8 135/9 142/22 143/4
things [10] 67/23 67/24 73/9 85/3 88/18 95/10 97/16 113/20 116/22 140/13
think [112] 8/10 8/15 11/14 15/23 17/17 17/24 18/5 20/17 22/12 23/7 24/8 26/3 27/13 28/14 28/15 29/4 29/17 31/9 32/17 33/14 33/16 33/17 33/18 36/20 40/20 41/9 42/6 42/7 44/1 45/15 50/2 51/3 52/10 53/4 58/19 60/9 63/4 63/24 64/15 64/25 66/11 69/21 70/3 70/18 70/21 71/6 72/6 72/8 73/2 73/6 73/18 73/23 74/6 74/7 75/3 75/4 75/17 77/21 77/24 78/18 79/19 80/11 86/8 86/25 89/10 89/21 90/5 90/19 91/18 91/24 92/4 93/23 95/18 97/17 97/21 102/18 107/10 111/22 113/14 117/8 122/7 122/20 122/21 123/19 125/1 125/3 126/24 128/16 130/25 131/13 133/6 133/9 133/11 134/4 134/22 134/25 136/20 137/5 137/11 137/22 137/24 141/20 141/25 142/9 142/21 143/4 143/8 143/9 143/19 144/2 144/10 145/8
thinking [6] 86/16 86/25 87/22 88/11 88/20 115/24
thinks [1] 51/3
third [3] 20/14 80/13 137/5
this [143] 4/8 5/18 7/5 8/16 11/16 12/23 13/10 14/25 16/3 16/15 19/17 21/5 22/18 23/3 23/12 24/20 24/25 26/21 27/13 27/17 31/22 34/15 34/23 35/5 35/13 38/7 39/6 40/7 40/21 42/7 42/11 43/5 43/17 44/2 45/15 45/16 45/21 46/10 46/24 47/3 47/19 48/3 48/11 50/10 52/5 52/6 55/11 55/16 56/1 56/20 57/6 57/6 59/9 62/21 63/4 63/17 64/3 64/16 66/6 66/11 66/15 67/19 68/18 68/20 68/24 69/4 69/16 70/19 71/15 74/15 74/19 79/24 80/11 80/15 80/19 80/19 80/20 83/7 83/7 83/8 83/10 84/3 84/18 86/12 88/10 88/11 89/7 90/11 91/14 91/15 92/14 94/3 98/9 99/2 99/17 103/20 104/11 108/25 109/7 109/18 114/4 114/19 115/8 115/12 115/15 115/18 117/3 117/6 117/24 118/1 118/3 118/7 120/11 121/5 122/17 123/13 124/21 124/22 125/11 130/18 130/19 130/21 131/3 131/7 131/18 132/6 133/10 134/5 136/24 138/16 138/21 140/8 140/12 141/11 141/12 141/16 141/18 141/23 142/4 142/21 143/3 144/20 145/5
those [37] 4/12 16/10 16/24 25/3 25/8 36/21 36/24 62/11 64/15 66/3 70/5 70/13 71/12 79/6 96/22 97/21 100/5 100/6 101/17 107/25 108/23 112/3 112/4 113/20 114/18 117/8 121/21 122/23 125/8 125/9 128/23 131/1 133/17 133/18 144/14 144/23 145/4
though [8] 19/14 73/2 81/21 89/24 107/25 113/10 115/11 121/24
thought [20] 22/1 29/20 36/16 73/19 77/8 86/20 86/23 87/11 87/15 87/18 87/24 87/24 87/25 88/20 96/7 102/18 107/12 127/10 131/2 140/18
thoughts [1] 50/25
three [21] 7/24 7/25 25/8 25/9 53/20 55/8 56/15 56/21 57/11 57/13 77/17 84/21 111/11 118/25 119/3 119/4 128/22 128/23 130/24 131/8 144/12
through [31] 4/15 5/19 10/22 13/14 19/5 19/20 20/23 21/4 21/11 24/21 25/3 25/12 47/15 49/3 52/11 63/4 63/9 63/14 63/16 74/15 81/8 91/19 116/16 119/10 119/14 120/9 128/7 130/5 140/17 144/10 144/11
throughout [2] 86/12 86/23
Thursday [12] 22/20 37/21 38/4 46/7 49/4 58/5 58/8 80/12 129/10 130/7 131/25 132/6
time [115] 8/11 8/13 14/6 15/15 17/4 19/15 20/14 21/7 22/2 22/6 24/20 26/21 27/17 31/22 32/7 32/20 34/15 35/23 42/11 43/5 43/17 44/5 46/24 47/3 48/3 48/11 50/10 52/5 52/6 54/17 55/18 56/2 56/20 59/7 62/18 62/21 63/4 63/17 65/15 66/25 67/13 68/18 68/20 68/22 69/13 70/9 72/4 74/4 74/16 75/2 75/12 75/17 75/20 78/8 79/1 80/6 80/13 80/15 80/21 83/7 83/7 85/13 85/19 85/25 86/12 87/1 87/16 88/14 88/15 88/16 89/1 94/3 94/24 96/25 100/13 102/19 103/20 103/23 104/11 106/1 106/4 106/9 106/14 106/18 106/24 107/12 107/12 108/1 110/6 110/18 111/9 111/20 114/11 114/16 114/24 115/7 115/7 115/25 116/13 118/25 120/21 121/12 121/23 122/22 128/8 128/17 135/23 136/15 137/8 138/22 139/23 142/14 142/19 145/2 145/12
timeframe [1] 107/25
timeline [1] 74/16
timely [1] 5/18
times [5] 29/4 74/24 104/3 121/2 130/8
timesheets [2] 13/12 13/22
timestamps [3] 9/14 9/20 10/12
today [4] 9/1 128/17 129/16 145/11
together [5] 34/7 38/3 79/6 116/16 129/9

T

told [9] 31/6 60/22 67/8 107/14 108/1 116/4 132/15 132/22 139/16
tomorrow [15] 33/5 35/21 36/3 53/7 53/11 54/6 54/16 55/1 56/2 56/14 84/17 85/11 85/22 136/25 139/5
tongue [2] 29/3 29/15
too [7] 37/3 52/1 76/7 77/25 101/1 131/21 144/14
took [9] 38/19 73/11 81/6 81/7 82/16 92/14 94/14 114/1 128/21
top [4] 21/25 28/18 61/17 111/4
total [2] 15/8 15/10
totally [2] 125/1 127/12
tough [3] 127/8 127/9 127/9
tougher [1] 127/10
towards [3] 68/15 94/9 120/6
traditional [1] 68/23
training [1] 5/7
trans [1] 95/21
transcript [26] 1/6 18/7 19/19 22/16 25/11 28/8 31/20 32/6 35/18 36/11 48/15 49/17 50/4 76/7 77/8 77/23 81/7 88/22 93/11 95/7 95/14 96/17 97/2 140/7 145/25 146/11
transcripts [1] 6/11
traumatic [2] 18/16 89/13
trial [38] 4/14 4/22 5/2 17/1 17/2 17/15 18/2 19/15 23/6 33/13 39/17 67/22 67/23 68/16 71/15 87/3 88/19 95/25 98/11 98/11 99/25 100/8 103/23 108/3 116/22 116/25 117/1 117/2 119/20 124/21 124/22 125/21 127/13 133/7 135/13 142/13 143/1 146/12
tried [4] 63/21 69/16 72/4 142/24
true [5] 61/20 62/4 62/15 94/22 146/11
true-billed [3] 61/20 62/4 62/15
truth [3] 7/5 99/3 109/19
try [18] 20/18 41/11 54/3 54/9 55/22 57/10 68/16 69/16 72/3 74/17 91/16 93/7 98/7 98/7 101/4 113/19 131/6 131/17
trying [9] 6/24 8/21 13/14 84/7 89/24 90/1 91/13 109/5 144/21
turn [2] 17/14 143/24
turns [1] 115/25
two [31] 18/13 46/10 53/20 55/8 56/15 56/21 57/11 57/13 58/20 59/3 59/9 60/4 61/7 61/13 61/17 70/5 70/13 79/6 81/5 83/23 84/21 86/13 97/20 108/18 110/22 111/7 128/23 130/24 131/8 132/25 144/12
type [4] 8/16 22/5 31/11 125/9
typed [1] 47/13
typical [1] 59/7
typically [3] 59/2 113/7 114/21
typo [3] 70/11 70/15 143/11

U

Uh [9] 9/2 20/11 28/7 49/2 51/23 53/16 55/2 58/14 58/24
Uh-huh [9] 9/2 20/11 28/7 49/2 51/23 53/16 55/2 58/14 58/24
ultimately [5] 16/9 39/11 39/19 86/9 90/5
unanimous [10] 28/21 30/14 31/8 75/21 77/5 77/10 135/24 137/14 137/18 140/9
under [9] 103/21 103/24 112/4 121/9 125/7 125/9 133/10 134/5 144/18
understand [7] 103/21 103/24 105/19 118/24 134/16 144/16 144/20
undisputed [1] 128/21
uniform [1] 111/25
unless [1] 6/16
unlike [1] 58/8
until [5] 29/11 29/19 32/22 129/1 129/5
unusual [1] 131/15
up [41] 10/14 10/22 10/24 12/18 16/19 19/21 19/22 20/24 29/5 30/20 32/24 33/21 38/19 48/18 54/1 55/12 62/11 65/10 66/10 66/20 67/22 73/9 76/13 79/14 85/17 85/18 87/24 90/17 92/23 98/9 105/13 111/18 112/12 113/1 115/17 115/19 123/4 124/17 139/14 139/21 144/17
Update [2] 33/4 43/4
upon [1] 111/20
us [22] 6/23 16/13 23/8 23/14 23/23 27/2 28/22 30/15 33/1 33/2 47/19 56/12 60/21 83/21 84/11 121/1 128/10 132/24 133/2 135/25 136/9 139/10
USC [1] 7/22
use [8] 16/20 72/16 72/23 74/1 74/2 74/10 136/15 142/16
used [4] 23/15 74/6 112/22 129/13
uses [3] 35/6 79/1 136/1
usually [2] 59/8 114/9

V

vaguely [1] 114/2
valid [2] 140/11 143/24
various [2] 74/24 121/2
vast [1] 114/16
verdict [16] 29/6 51/4 57/7 58/15 60/25 86/10 94/9 103/25 129/5 133/2 137/14 137/19 138/1 139/25 140/9 140/9
versa [2] 137/21 142/7
version [2] 143/6 143/7
versus [1] 4/8
very [17] 8/13 48/15 52/2 52/2 54/23 66/9 66/12 92/4 99/15 122/23 122/24 123/21 130/10 130/23 132/8 142/9 144/12
vice [2] 137/20 142/7
victim [1] 71/6
video [1] 109/1
virtue [1] 116/25
volume [1] 39/17
vote [1] 130/10
voting [2] 106/11 106/12
voucher [5] 3/5 13/11 13/22 14/25 15/2
vs [1] 1/6
vulnerable [1] 20/25

W

wait [2] 32/22 75/4
waived [1] 14/23
wall [1] 133/25
walled [1] 121/16
walling [1] 122/9
walls [1] 120/10
Walters [1] 4/19
want [66] 6/16 25/14 28/22 29/9 30/15 32/22 37/2 39/8 39/12 51/12 53/12 53/14 53/20 53/22 55/8 56/25 57/13 57/18 57/22 57/24 61/11 61/12 63/5 72/5 72/6 72/6 72/8 75/8 76/12 78/24 79/18 80/4 80/10 82/10 83/9 83/14 84/16 84/17 84/19 84/21 84/23 85/11 91/19 97/23 104/6 105/19 105/19 108/2 108/20 109/2 128/6 128/10 128/11 129/22 130/24 131/9 131/14 131/16 135/25 138/23 138/24 139/1 139/15 139/17 144/13 145/6
wanted [21] 8/18 9/11 29/7 35/17 36/15 36/17 42/4 55/7 56/15 56/21 57/15 64/18 74/22 74/23 96/6 105/2 106/1 108/2 108/8 115/4 145/2
wanting [5] 36/6 41/23 89/5 89/6 89/6
wants [9] 29/5 29/6 35/14 39/9 85/7 86/2 98/4 131/5 131/11
warrant [1] 114/12
warrants [2] 14/1 14/10
was [390]
wasn't [25] 9/6 17/7 21/25 39/22 64/20 66/15 68/2 68/22 71/3 76/22 78/1 87/9 88/5 97/5 104/22 105/5 106/23 107/15 111/25 122/6 124/22 130/15 133/9 135/5 139/9
way [33] 17/22 17/23 18/16 24/21 45/19 62/1 67/25 72/14 73/20 73/21 77/12 78/1 81/22 82/1 87/14 87/25 91/14 95/19 95/21 106/10 109/7 115/1 118/3 118/13 122/16 123/5 124/13 125/11 130/25 135/4 137/23 140/14 141/16
ways [1] 128/20
we [203]
we'll [6] 6/7 27/2 56/2 56/3 76/12 85/22
we're [15] 48/16 49/25 50/21 53/3 66/21 75/21 79/22 80/12 80/16 84/13 95/18 132/16 135/24 138/25 144/8
wear [1] 131/17
WebEx [1] 1/9
Wednesday [8] 22/17 22/19 23/1 37/6 37/17 128/25 129/11 129/18
week [2] 37/21 114/10
weight [1] 88/9
well [63] 8/10 12/11 13/18 15/2 15/3 15/21 18/13 18/13 20/22 21/20 22/2 23/11 24/21 28/3 28/9 28/18 29/3 29/17 29/24 31/9 32/17 33/22 35/8 36/4 36/23 39/10 40/10 40/13 42/25 50/19 52/2 52/21 53/13 55/21 57/8 57/13 57/15 57/17 57/21 57/25 59/24 65/2 69/9 73/23 84/18 85/9 85/16 85/22 86/6 87/19 87/25 91/14 95/4 96/16 99/15 106/21 107/15 111/1 119/21 127/7 136/13 140/2 145/9
went [18] 7/21 7/22 8/1 8/15 8/19 16/22 17/3 19/2 42/21 61/7 73/9 74/21 90/17 102/10 128/24 132/13 132/22 132/23
were [104] 9/17 9/24 18/13 21/21 24/10 25/4 31/7 35/16 38/3 38/3 41/25 43/15 49/9 56/19 57/5 57/9 60/21 61/9 63/1 64/16 64/24 65/15 65/18 65/24 69/2 69/14 70/19 70/19 71/12 74/18 74/20 76/1 76/2 76/3 77/10 77/11 79/7 81/9 81/21 81/24 83/1 83/2 87/2 87/2 87/5 87/8 87/8 87/10 87/16 87/20 89/15 90/1 91/15 93/15 95/1 95/8 95/15 96/24 96/24 100/2 100/9 100/12 101/10 101/17 103/1 103/10 104/5 110/15 111/3 111/5 111/9 111/17 111/17 111/20 111/22 112/4 112/15 113/6 114/25 117/13 117/19 118/2 118/24 119/7 122/7 124/2 124/14 124/20 124/23 129/3 129/4 129/4 129/12 132/9 134/17 134/17 136/7 136/7 139/10 140/14 140/14 140/16 141/8 144/14
weren't [10] 22/4 33/22 60/20 78/11 78/13 78/14 87/6 91/13 120/6 128/25
Whaley [1] 27/10
what [185]
whatever [14] 22/14 40/12 44/16 56/2 67/19 70/24 76/22 95/23 98/3 110/25 115/4 120/7 121/21 126/18
whatsoever [1] 116/19

W

when [82] 4/22 5/3 8/11 8/15 9/6 9/15 13/25 15/17 18/14 21/10 28/11 30/23 34/3 38/3 42/7 42/20 43/5 44/8 52/1 52/11 53/2 54/20 55/6 56/4 57/3 58/9 62/6 62/13 62/14 65/6 69/10 70/5 70/15 70/16 71/2 71/19 72/3 72/11 72/22 75/19 77/4 78/2 80/19 82/3 83/16 84/18 90/25 91/3 94/4 97/2 101/17 101/20 102/14 102/19 103/8 103/25 106/11 110/11 112/15 112/23 114/8 114/21 115/12 121/7 121/10 122/18 129/7 129/10 129/11 130/18 131/10 131/21 133/19 137/5 138/9 138/11 138/13 138/16 139/20 141/21 143/23 144/23
where [54] 8/2 8/14 10/22 14/21 14/23 18/7 23/18 23/20 23/21 33/13 49/12 50/3 53/17 60/14 65/9 65/18 66/6 68/24 69/20 71/18 74/20 75/3 75/5 78/4 80/16 83/8 84/3 87/20 88/16 90/6 91/4 97/2 99/19 101/1 101/10 103/1 104/25 105/3 110/8 111/3 111/5 111/20 112/19 113/18 114/22 115/6 120/3 121/15 124/19 124/20 130/8 133/23 134/19 135/18
WHEREUPON [15] 4/2 12/1 13/5 14/16 26/11 27/23 32/1 34/19 42/15 43/21 47/7 48/7 50/15 62/25 145/23
whether [27] 15/14 33/20 37/9 39/13 45/22 54/7 62/17 69/23 73/7 73/8 74/2 81/11 81/11 81/12 88/22 88/23 94/14 95/10 112/23 113/5 113/6 125/23 129/14 129/17 129/18 129/19 132/20
which [29] 9/3 10/11 14/7 23/5 27/8 37/17 41/23 43/13 45/19 49/22 51/20 52/15 64/10 64/24 65/19 72/15 81/22 93/19 93/24 99/19 106/17 120/20 124/13 136/1 136/12 137/2 137/10 143/5 143/22
whichever [1] 82/1
while [14] 17/5 59/8 63/15 82/17 83/10 88/15 88/24 96/6 101/9 102/8 104/2 104/5 128/19 132/18
white [2] 40/15 93/6
who [28] 18/4 20/24 20/25 25/14 31/5 66/19 71/12 73/11 79/18 80/17 81/25 89/12 100/7 100/14 102/13 107/18 112/8 113/16 114/17 115/15 115/21 117/17 119/19 119/25 120/8 122/19 131/8 141/8
whoever [1] 121/20
whole [10] 24/25 37/9 38/15 65/1 90/23 111/7 130/5 139/6 139/13 143/3
whose [1] 24/9
why [18] 9/11 21/9 29/20 33/15 39/18 54/3 62/11 64/25 74/12 93/7 106/8 106/19 126/23 127/5 137/16 140/12 140/18 142/20
wife [7] 92/10 112/19 113/24 116/5 116/17 116/23 117/6
will [39] 20/13 25/9 26/20 29/21 30/1 30/20 32/18 32/23 35/21 35/21 35/22 36/2 39/5 41/16 43/2 43/7 49/13 51/3 51/4 54/12 60/5 77/2 80/17 84/2 92/4 93/20 94/5 97/21 97/24 98/1 98/9 98/23 114/13 121/23 133/18 135/17 145/5 145/6 145/15
WILLIAM [2] 99/6 99/12
willing [8] 53/21 57/9 57/10 57/12 79/17 83/13 84/22 138/25
Wilson [1] 8/3
wise [1] 88/24
wish [3] 35/9 104/16 108/14
withdraw [1] 6/7
within [6] 10/15 112/24 114/5 114/10 119/17 133/3
without [4] 26/8 31/24 52/7 55/19
witness [14] 7/2 17/15 40/21 42/8 87/4 89/11 98/21 98/25 108/16 109/16 123/13 123/17 123/18 128/9
witnesses [13] 2/1 6/18 18/1 40/3 42/3 74/22 87/13 97/12 97/20 108/18 109/9 128/1 128/2
won't [1] 98/11
wonder [1] 33/16
Woodberry [6] 4/23 5/3 5/5 18/2 18/4 89/16
Woodberry's [1] 89/18
word [8] 35/6 74/1 74/2 74/5 79/1 79/15 136/1 136/16
work [9] 7/20 82/12 93/16 97/24 98/1 98/2 110/8 121/1 141/12
worked [4] 7/23 7/24 116/15 122/21
working [12] 29/23 31/10 77/15 83/1 83/2 94/9 105/11 110/11 110/15 110/24 140/16 140/17
workings [1] 92/16
works [1] 66/19
world [1] 122/14
worried [2] 21/25 105/11
worries [1] 59/2
worse [3] 106/8 106/9 106/19
worth [2] 96/2 96/7
would [175]
wouldn't [15] 8/14 14/9 52/8 54/15 54/25 63/22 67/7 67/20 67/24 68/6 71/10 71/14 79/19 95/2 141/9
wound [1] 19/2
wraps [1] 54/1
writ [1] 5/13
write [2] 36/2 36/3
writing [5] 14/20 36/6 38/13 46/18 66/6
written [4] 47/13 122/8 122/11 123/7
wrong [3] 9/6 22/1 81/19
wrote [1] 36/4

Y

y'all [7] 33/10 37/16 53/9 93/5 95/15 120/24 128/14
year [4] 4/25 19/14 93/3 109/5
years [11] 7/24 7/25 99/23 106/17 110/5 116/15 117/9 122/20 122/21 122/22 133/21
years' [1] 4/18
Yep [3] 49/11 53/19 56/9
yes [183]
yesterday [5] 43/5 61/25 80/16 94/3 137/6
yet [13] 28/11 28/22 30/15 31/8 66/13 75/21 76/10 77/5 77/11 77/21 78/5 135/24 136/1
you [651]
You'll [1] 92/18
You're [1] 34/3
young [1] 117/16
your [170]
yourself [2] 51/11 65/4

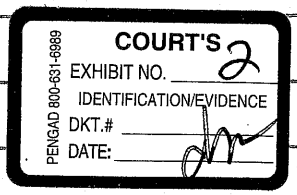
① Please allow us to see the list of miranda rights form that was used with booking / interrogations. Does not have to be a signed copy.

② Where was the money found? (in proximity to the TD Bank)

③ Where in the parking lot did Mr. Whaley see Jason take of his shirt? Where was the shirt found in proximity to TD Bank?

④ Please give us the legal definition of reasonable doubt.

Jessie Williams



Testimonies from:

Mr. Whaley - Food Services Manager

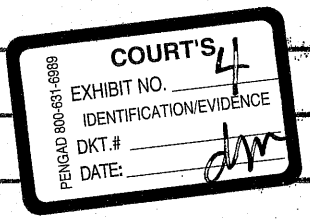
Jessee Williams

PENGAD 800-631-6989
COURT'S 3
EXHIBIT NO.
IDENTIFICATION/EVIDENCE
DKT.#
DATE:

ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
2

We are not unanimous on any of the charges yet. How do you want us to proceed?

Jessie Wall

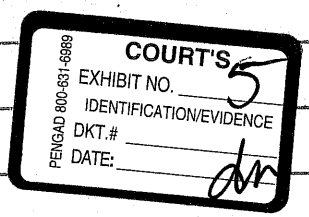


ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
3

Please give us a copy of the hand of one is the hand of all or re explain it.

Jessie

Updat: [redacted] Still [redacted] at a stalemate. Progress is really slow. Do we need to come back tomorrow? - Suggestion: we feel if we sleep on it, we might be clearer in the morning.



ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
4

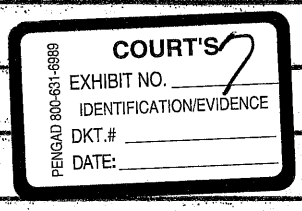
Testimonies

✓ Hotel General Manager ②

✓ Jason's testimony ④

✓ Investigator (White Male) that read from the paper ③ Kerry?

✓ First officer on the scene ①

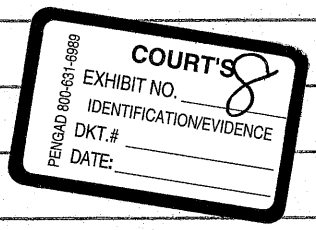


ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
5

Update:

We are now at 11-1. Same as yesterday at this same time and when we left. The 1 person is not in agreement with the majority and said they will not change their minds.

Jessica



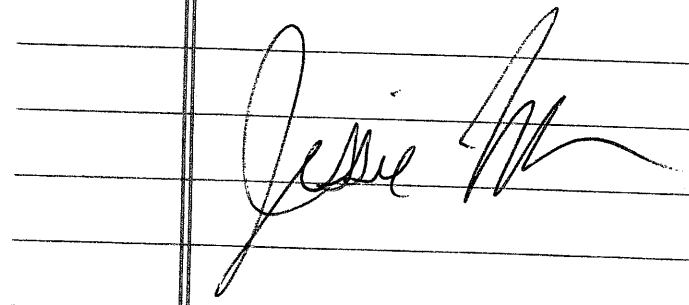
ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
6

Please provide
Full explanation of reasonable
doubt in writing if possible.

Jessie Williams

ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
7

Your Honor,
Please let us hear Jason's testimony again.

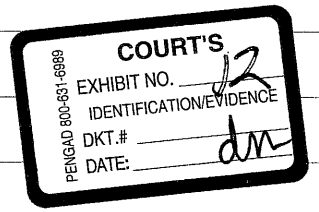


COURT'S
EXHIBIT NO. 11
IDENTIFICATION/EVIDENCE
DKT.#
DATE:
PENGAD 800-631-6989

ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
8

Your Honor,
We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need freshness.

Jessie Williams



ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
9

BOOK 244 - Or 0015

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF GENERAL SESSIONS
	FIFTH JUDICIAL CIRCUIT
STATE,	Warrant: 2012A4010200696
vs.	ORDER SUBSTITUTING COUNSEL
ARTHUR MACON,	
DEFENDANT,	

This matter comes before the Court on the Motion of Prentiss Counts Shealey, Esquire, for substitution as counsel for Defendant Arthur Macon in the above criminal matter. Ms. Shealey has a conflict of interest because husband represents Mr. Macon's co-defendant. Kristy Grafton Goldberg, Esquire has agreed to be substituted as counsel for Defendant ~~Tara Pierce~~ Arthur Macon.

Pursuant to Rule 11(b), S.C.R.Civ.P., Prentiss Counts Shealey, Esquire, is hereby relieved as counsel for Defendant Arthur Macon in the above reference action, and Kristy Grafton Goldberg, Esquire is hereby substituted as counsel of record for the said Defendant. As of the date of the service of this Order, all further notices, papers or pleadings that are served under Rule 5(a),S.C.R.Civ.P., must be served on:

Kristy Grafton Goldberg
Law Office of Kristy Goldberg, LLC
1720 Main Street
Columbia, South Carolina 29201
Office : (803) 252-2299

JEANETTE W. McBRIDE
C.C.P. & G.S.

2012 SEP 20 AM 9:44

CHLAND COUNTY
FILED

AND IT IS SO ORDERED.

The Honorable DeAndrea G. Benjamin
Chief Administrative Judge for General Sessions
Fifth Judicial Circuit

Dated: 9-19, 2012

I SO MOVE:

Prentiss Counts Shealey

I SO CONSENT:

Kristy Grafton Goldberg

ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
10

Case Information

☑ Include Timesheet
☑ Include Other Vouchers
☑ Include Professional Detail
☑ Include Atty Expense Detail
☐ IncludeAttached Docs

File# M15114 CASE ID: 50157 SCCID# M-2012-12702

SC v. Arthur Macon

Case Type: Felony (Non-Capital)

Appointed: 9/19/2012 Registered: 9/20/2012

County of Indictment: Richland
County of Appointment: Richland

pro_bono: No Fees: Expenses: No contract_case: Attorney County: Richland

Prior Attorney: Prentiss Counts Shealey Representing: Court: GS

Appointing Judge: DeAndrea G Benjamin Trial Judge: DeAndrea G Benjamin

Attorney:
Kristy G Goldberg
1720 Main Street, Suite 301
Columbia, SC 29201
kristy@kristygoldberglaw.com
7000173206
803-667-6633

Payee:
Law office of kristy goldberg, llc
1720 Main Street, Suite 303
Columbia, SC 29201

Client(s):
Arthur Macon

Disposition: Jury Trial Outcome: Guilty

Docket/Ticket/Warrant/Indictment	CDR	Description	cdr_other
//2012A4010200696/	139	Robbery / Armed Robbery, robbery while a	

Voucher Information

SC v. Arthur Macon

CID_ID: 53671 Atty Submitted 10/8/2014 Atty Resubmitted:

Type: Final Voucher Status Paid Submitted to CG 10/13/2014

Fees: Total Requested: $3,604.00

In Court Rate: $60.00 ic_hours: 20.6 contract_fee:

Out of Court Rate: $40.00 oc_hours: 59.2 **Total Fees: $3,500.00**

Expenses: Total Requested: $10.00

Professionals:
Investigator:
Translator:
Expert Witness:
Polygraph:
Psychiatric:

Total Prof: **$0.00**

Attorney:
Other Hrly Total:
LD Calls:
Mileage:
Transcripts:
Westlaw:
Other Amt: $10.00

Total Atty: **$10.00**

Total Expenses: $10.00

Voucher Total **$3,510.00**
- Other Contribution: $0.00
Total Paid: **$3,510.00**

DV#: 3005787841
Chck# 141241506
Date Paid: 10/13/2014

GLAcct: 5021030000
Fund: 10010000
FunctionalArea: E230X0032

Payee comments: Not guilty of Kidnappings

SCCID comments

ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
11

Attorney: Kristy G Goldberg | Felony (Non-Capital)

SC v. Arthur Macon | Representing:

cid_id: 53671 cases_id: 50157

		Out of Court:	In Court:
9/19/2012	Received appointment documents and warrant	0.1	0
9/19/2012	Spoke to client. Informed him of procedure/status. I will call him when I get additional information.	0.3	0
9/19/2012	Drafted and filed Rule 5 with Court.	0.2	0
9/20/2012	Drafted and mailed request to preliminary hearing.	0.2	0
9/20/2012	Registered Case	0	0
9/26/2012	Spoke with Federal Public Defender about related charges.	0.1	0
9/26/2012	Contacted Solicitor's paralegal and requested discovery.	0.1	0
10/4/2012	Received notice of preliminary hearing. Contacted federal PD regarding hearing.	0.2	0
10/4/2012	Telephone call with client regarding preliminary hearing and case status.	0.2	0
10/8/2012	Email to solicitor requesting discovery again.	0.1	0
10/12/2012	Spoke to client. Scheduled meeting for Wednesday.	0.2	0
10/16/2012	Received incident report, RAP and warrant from solicitors office.	0.2	0
10/16/2012	Called client to reschedule time of meeting tomorrow.	0.1	0
10/17/2012	Meeting with client to discuss case.	0.9	0
10/19/2012	Attended Court for preliminary hearing.	0.7	0.3
10/22/2012	Spoke to client on phone regarding case status.	0.1	0
10/24/2012	Received and reviewed initial discovery.	0.3	0
10/24/2012	Called and left message with BB&T for videos.	0.2	0
10/24/2012	Called and left message with hotel for videos.	0.2	0
10/24/2012	Emailed Solicitor regarding missing discovery items.	0.1	0
10/24/2012	Called client about picking up discovery.	0.1	0
10/24/2012	Telephone call with audit specialist at BB&T regarding video.	0.2	0
11/1/2012	Received and reviewed 911 calls, photos, and closed incident report. Forwarded items to Federal PD.	0.4	0
11/1/2012	Drafted subpoenas.	0.3	0
11/28/2012	Review of file, meeting with client, and attendance in Federal Court during client's probation violation hearing related to this charge.	2	0
11/28/2012	Telephone call with Hilton Garden Inn employee who stated the video footage no longer exists.	0.1	0
11/28/2012	Received fax letter from Hilton Garden Inn regarding no video footage.	0.1	0

11/28/2012	Telephone call with BB&T regarding video footage.	0.2	0
11/28/2012	Detailed review of criminal history arrests and convictions on central index.	0.4	0
12/2/2012	Recriprocal Rule 5 Received.	0.1	0
12/27/2012	Review of video from BB&T.	0.3	0
1/9/2013	Checked to make sure client is incarcerated in Federal prison.	0.1	0
1/22/2013	Telephone call to solicitor.	0.1	0
1/23/2013	Spoke to solicitor about case and possible plea offers.	0.2	0
1/31/2013	Attended client's second appearance.	0.5	0
1/31/2013	Drafted letter to client regarding case status.	0.4	0
2/19/2013	Email to co-defendant's attorney regarding status.	0.1	0
2/19/2013	Telephone call with client's fiance about case status.	0.2	0
4/9/2013	Received letter from client.	0.1	0
5/14/2013	Multiple emails with solicitor regarding case status and plea offers. Review of file to see what prior convictions would be admissible at trial. Review of Hand of One law.	0.7	0
1/6/2014	Discussed plea offer with Solicitor. Emailed SCDC to make sure of classification level of plea offer charge.	0.3	0
1/6/2014	Meeting with client. Listened to 911 audio and reviewed discovery. Discussed plea offer. Met with solicitor. Renoticed to February 4.	0.7	0
1/22/2014	Client called and asked if Solicitor would offer a cap.	0.1	0
1/24/2014	Solicitor offered a cap of 15.	0.1	0
1/27/2014	Telephone conversation with client about pros and cons of trial.	0.3	0
2/4/2014	Meeting with client and solicitor. Will come back on March 31 to decide if he will plea or go to trial.	0.4	0
5/6/2014	Emails with client regarding case status.	0.2	0
5/23/2014	Received notice of bond setting. Emailed and mailed copy to client.	0.3	0
5/27/2014	Emails with client regarding bond hearing/service of new indictments tomorrow.	0.2	0
5/28/2014	Meeting with client and grandfather and minister and bond hearing for new indictments. Also telephone call with bondsman and filling out bond paperwork.	1.3	0.3
5/28/2014	Review of prior court records on microfilm to see if anything can be helpful to his case.	1.3	0
7/23/2014	Emails with solicitor about case. Email to client about status. Review of new discovery received.	0.6	0
8/3/2014	Spoke to solicitor about case status.	0.2	0

8/8/2014	Spoke to client on phone about case status.	0.1	0
8/9/2014	Received letter from client.	0.1	0
8/12/2014	Emails with client about phone records.	0.2	0
9/2/2014	Spoke to ASOL about co-defendant testimony. Email to client.	0.2	0
9/12/2014	Talked to solicitor about scheduling trial. Called client.	0.3	0
9/15/2014	Received DNA results from State.	0.1	0
9/16/2014	Called client.	0.1	0
9/17/2014	Review of file and began preparing for trial.	2.5	0
9/18/2014	Meeting with client preparing for trial.	2.5	0
9/18/2014	Meeting with solicitor discussing upcoming trial.	1	0
9/18/2014	Telephone call with BB&T employee about how to subpoena record custodian.	0.1	0
9/23/2014	Drafted subpoena to BB&T for a witness to appear in court and faxed to company.	0.3	0
9/24/2014	Prepare for testimony and pre-trial hearings.	3.5	0
9/25/2014	Went to crime scene to visit. called client and left voicemail. Emailed client.	0.8	0
9/25/2014	Telephone call to BB&T records custodian.	0.2	0
9/25/2014	Spoke with Solicitor to confirm status of prior plea offers.	0.1	0
9/26/2014	Received email from client.	0.1	0
9/26/2014	Received email from Solicitor with additional photographs.	0.1	0
9/26/2014	Received copy of photo lineup of Macon.	0.1	0
9/26/2014	Legal research regarding pre-trial motions and jury charges.	5.5	0
9/28/2014	Final pre-trial prep.	2.5	0
9/29/2014	In court waiting on jury qualifications. Then sat through jury qualifications.	0.9	1.6
9/29/2014	In court waiting on trial to begin. Final preparation and meeting with client. Then Picked a jury	0.8	1.3
9/29/2014	Final preparation. Began opening statements and trial.	1.2	2.5
9/29/2014	Preparing for testimony and closing argument.	1	0
9/29/2014	Telephone call to BB&T records custodian.	0.1	0
9/30/2014	Review of jury charges. Submitted proposed jury charges to judge. Review and prepare closing.	1.5	0
9/30/2014	Preparation for trial and meeting with client and trial time.	1.7	4.3
9/30/2014	Telephone call to BB&T records custodian.	0.1	0

10/1/2014	Closing arguments, jury charges, jury deliberations.	2.5	7.8
10/2/2014	Jury deliberating. Several notes. Allen charge.	8.7	1.3
10/3/2014	Back in court for jury deliberating. Verdict, sentence.	2.5	1.5
10/3/2014	Drafted Notice of Appeal and letter to Court of Appeals. Made copies and mailed documents to clerk, ct of appeals, solicitor, indigent defense, etc.	0.4	0
10/7/2014	Spoke to client's family member about end of case.	0.1	0
10/8/2014	Drafted letter to client ending representation. Sent a copy of notes from trial and Appellate documents.	0.2	0
	Total:	59.2	20.6

All Vouchers in this Case

CID_ID	Flag	status	Fees	Expenses	Total Paid	Date to CG	DVNumber	CheckNumber
53671	Paid	Paid	$3,500.00	$10.00	$3,510.00	10/13/2014	3005787841	141241506

All Professionals in this Case

All Attorney Expenses in this case

CID	Other Hourly	LD Calls	Mileage	Transcripts	Westlaw	Other Amt	Total Fee
53671						$10.00	$10.00

files to attach

WITNESSES

(S) Jason Williams – Richland County Sheriff

ARREST WARRANT NUMBER

2012A4010200696

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: JUL 16 2014

ORIGINAL

VERDICT

Guilty

Foreperson of Petit Jury

Date: 10-3-14

AMENDED

DOCKET NO. 2013GS40000579

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JANUARY TERM 2013

67

THE STATE

vs.

Arthur William Macon

Indictment for

ARMED ROBBERY

SC Code: 16-11-0330(A)

CDR Code: 0139

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____ hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

2

ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
12

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on JANUARY 16, 2013, the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Arthur William Macon did in Richland County on or about August 30, 2012, commit robbery by feloniously taking from the person or presence of Marcella Delpino and/or Brittney Ellison and/or Shonda Wheeler and/or Courtney Nick, by means of force or intimidation, goods or monies of TD BANK, such goods or monies being described as U.S. CURRENCY, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he or she was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of §16-11-330(A), SC Code of Laws (1976, as amended)

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

DAN JOHNSON, SOLICITOR

WITNESSES

(S) Jason Williams – Richland County Sheriff

ARREST WARRANT NUMBER

2012A4010200696

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: JAN 17 2013

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2013GS400 00579

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JANUARY TERM 2013

67

THE STATE
vs.

Arthur William Macon

Indictment for
ARMED ROBBERY

SC Code: **16-11-0330(A)**
CDR Code: **0139**

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____ hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
13

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on JANUARY 16, 2013, the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Arthur William Macon did in Richland County on or about August 30, 2012, commit robbery by feloniously taking from the person or presence of TD BANK, by means of force or intimidation, goods or monies of TD BANK, such goods or monies being described as U.S. CURRENCY, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he or she was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of §16-11-330(A), SC Code of Laws (1976, as amended)

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

DAN JOHNSON, SOLICITOR

WITNESSES

(S) Jason Williams – Richland County Sheriff

ARREST WARRANT NUMBER

2012A4010200696

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: JUL 16 2014

VERDICT

Guilty

Foreperson of Petit Jury

Date: 10-3-14

AMENDED

DOCKET NO. 2013GS40000579

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

JANUARY TERM 2013

67

THE STATE
vs.

Arthur William Macon

ORIGINAL

Indictment for
ARMED ROBBERY

SC Code: **16-11-0330(A)**
CDR Code: **0139**

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I _____
hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on JANUARY 16, 2013, the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Arthur William Macon did in Richland County on or about August 30, 2012, commit robbery by feloniously taking from the person or presence of Marcella Delpino and/or Brittney Ellison and/or Shonda Wheeler and/or Courtney Nick, by means of force or intimidation, goods or monies of TD BANK, such goods or monies being described as U.S. CURRENCY, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he or she was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of §16-11-330(A), SC Code of Laws (1976, as amended)

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

DAN JOHNSON, SOLICITOR

Kristy Goldberg

From: Kristy Goldberg <kristy@kristygoldberglaw.com>
Sent: Tuesday, September 18, 2012 2:01 PM
To: Prentiss Counts
Subject: Re: conflict

Good to go! Send me the info and a signed substitution order and I will take it to the judge. I will send you my next conflict also.

Sent from my iPhone

On Sep 18, 2012, at 1:45 PM, Prentiss Counts <countssp@hotmail.com> wrote:

> Arthur Macon. Assigned to Cathcart so far.
>
> ---
>
> Subject: Re: conflict
> From: kristy@kristygoldberglaw.com
> Date: Tue, 18 Sep 2012 13:44:03 -0400
> To: countssp@hotmail.com
>
> Yes, but Let me run the name past Dan to see if it's a conflict first. Name?
>
> Sent from my iPhone
>
> On Sep 18, 2012, at 1:42 PM, Prentiss Counts <countssp@hotmail.com> wrote:
>
> > I got an appointment and Brian has the co-defendant. County case, Armed Robbery. Do you want it?

ARTHUR MACON v. STATE
APPLICANT'S EXHIBIT
14

Kristy Goldberg

From: Kristy Goldberg <kristy@kristygoldberglaw.com>
Sent: Tuesday, September 18, 2012 1:47 PM
To: Dan Goldberg
Subject: Fwd: conflict

See below

Sent from my iPhone

Begin forwarded message:

> **From:** Prentiss Counts <countssp@hotmail.com>
> **Date:** September 18, 2012 1:45:03 PM EDT
> **To:** Kristy Goldberg <kristy@kristygoldberglaw.com>
> **Subject: RE: conflict**
>
> Arthur Macon. Assigned to Cathcart so far.
>
> ---
>
> Subject: Re: conflict
> From: kristy@kristygoldberglaw.com
> Date: Tue, 18 Sep 2012 13:44:03 -0400
> To: countssp@hotmail.com
>
> Yes, but Let me run the name past Dan to see if it's a conflict first. Name?
>
> Sent from my iPhone
>
> On Sep 18, 2012, at 1:42 PM, Prentiss Counts <countssp@hotmail.com> wrote:
>
> > I got an appointment and Brian has the co-defendant. County case, Armed Robbery. Do you want it?

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Arthur W. Macon, #304226, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2019-CP-40-5591 **ORDER OF DISMISSAL**

RICHLAND COUNTY
FILED
2021 JUL -9 AM 10: 27
JEAN H. TOAL
C.C.P. & G.S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Arthur Macon (Applicant) on October 4, 2019, and amended through counsel on December 23, 2019. Respondent made its Return on June 15, 2020. An evidentiary hearing into the matter convened April 16, 2021, via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020.[1] E. Charles Grose, Jr., Esquire, represented Applicant. Assistant Deputy Attorney General Lindsey A. McCallister and Assistant Attorney General Michael Davidson represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Kristy Goldberg, and Deputy Assistant Solicitor Daniel Goldberg, also testified.[2] This Court had before it a copy of the Richland County Clerk of Court's records regarding the subject conviction,

---

[1] See S.C. Sup. Ct. Memorandum dated September 14, 2020 ("Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. *Consent of the parties or counsel is not required.* Please use WebEx, the conferencing platform supported by the Judicial Branch." (emphasis added)). Nonetheless, Applicant indicated his consent to the use of the WebEx platform.

[2] The assistant solicitor who prosecuted the case, Richard Cathcart, was also present for the hearing, but neither Applicant nor the State chose to call him as a witness.

Applicant's records from the South Carolina Department of Corrections, the application and amendment, Respondent's return, the trial transcript, and Applicant's appellate records. After a review of the record and all evidence presented, for the reasons set forth below, this Court finds Applicant has failed to meet his requisite burden of proof and denies relief.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections. Applicant was indicted at the January 2013 term of the Richland County Grand Jury for one count of armed robbery and four counts of kidnapping (2013-GS-40-0579). Applicant was represented by Kristy G. Goldberg (Counsel). Assistant Solicitors Richard C.R. Cathcart, Sr., and Jeremiah J. Shellenberg, Jr., prosecuted the case.

Applicant's case proceeded to a jury trial September 29 through October 3, 2014, before the Honorable DeAndrea G. Benjamin. The jury convicted Applicant as indicted on the armed robbery charge and acquitted him on all four counts of kidnapping. Judge Benjamin sentenced Applicant to a term of twenty-three years' imprisonment.

Applicant filed a timely notice of appeal from his conviction and sentence. Glen Walters, Sr., and R. Bentz Kirby of Glenn Walters & Associates, PA, represented Applicant on appeal. Applicant raised the following issues:

1. Did the Trial Court commit error when it allowed Ricky Woodberry to testify that Jason Colon was schizophrenic, had a lobotomy, was passive and had the mind of a thirteen (13) year old in order to bolster Colon's testimony against [Applicant]?

2. Did the Trial Court commit error when it allowed Ricky Woodberry to testify about Jason Colon's medical condition as the testimony was hearsay and Woodberry lacked the necessary special knowledge, skill, experience or training to testify on this issue?

The case was submitted on briefs to the Court of Appeals on December 12, 2017. Thereafter, on January 17, 2018, the Court of Appeals affirmed Applicant's conviction and sentence. State v. Macon, Op. No. 2018-UP-031 (S.C. Ct. App. filed Jan. 17, 2018). Applicant petitioned for rehearing on February 16, 2018. The Court of Appeals denied the petition for rehearing on March 22, 2018.

Thereafter, Applicant petitioned for a writ of certiorari to the South Carolina Supreme Court on May 1, 2018. The Supreme Court denied certiorari on October 18, 2018. State v. Macon, S.C. Sup. Ct. Order filed Oct. 18, 2018. The case was remitted to the circuit court on November 6, 2018.

Applicant timely commenced this PCR action on October 4, 2019.

SUMMARY OF TESTIMONY AT TRIAL

Applicant's charges stem from a bank robbery at a TD Bank in Richland County on August 30, 2012. Applicant's cousin, Jason Colon (Colon), actually performed the robbery, and absconded with $6000.[3] Applicant was also arrested in connection to the crime.

At trial, Diana Williams (Diana) testified that after noticing police cars surrounding the TD Bank parking lot, she saw a man (later identified as Colon) running from that parking lot through the woods towards the adjacent Hilton Garden Inn. Tr. p. 215. Thinking the man looked suspicious, Diana called 911 as she followed him in her car. Tr. p. 216. Once Colon reached the Hilton, Diana observed him conversing with another man (later identified as Applicant) who was wearing a yellow shirt. Tr. p. 217. Applicant gestured towards the back of the parking lot "as if he was

[3] Multiple witnesses from TD Bank testified and identified Colon as the robber. It was undisputed at trial that Applicant never entered the bank.

telling the [suspicious man] to go back that way." Tr. p. 217. Applicant then got into a black truck and drove away. Tr. p. 219.

As he backed out, he nearly struck Diana's vehicle, and she observed his face. Tr. pp. 2180-19. Diana remained on the phone with 911 during this time, relaying the details of what occurred and a description of the truck and its driver. Tr. p. 224. She was only able to give a partial plate number because the truck's tailgate was down. Tr. p. 219. However, based on her description of the truck and driver, officers eventually stopped Applicant. Tr. p. 227. Diana, who was still in her car, drove past the traffic stop and identified Applicant as the person she saw the Hilton parking lot. Tr. pp. 228, 261-63.

Colon was also detained in the area and arrested. Investigator Jason Williams (Williams) testified he interviewed Colon upon Colon's arrest. He explained Colon appeared distressed and explained the interview "took kind of a while because it seemed like he wasn't all the way there." Tr. p. 279. Williams noted, in his opinion, Colon was "a little mentally challenged," but he was eventually able to take Colon's statement, and Colon confessed to committing the robbery. Tr. p. 279. Williams also testified that he searched Applicant's truck after it was impounded, and he discovered a police scanner which was tuned to Richland County's frequency. Tr. p. 277. Specifically, the police scanner was tuned to broadcast transmissions in the TD Bank vicinity. Tr. p. 278.

The State then proffered Ricky Woodberry's testimony. Woodberry was Colon's father. Tr. p. 286. Counsel objected to Woodberry's testimony about how Colon sustained a childhood head injury as hearsay, arguing Woodberry was not present when Colon sustained the injury. Tr. p. 292. Counsel objected to the remainder of Woodberry's testimony, that Colon was "easily led"

and "passive," as irrelevant and as improper character evidence offered to bolster Colon's credibility. Tr. p. 293. After the proffer, the trial court ruled Woodberry could testify about Colon's head injury and passive demeanor, but it precluded testimony that Colon was "easily led" or usually went along with whatever others wanted to do. Tr. p. 299.

Woodberry then testified that Colon was shot in the head by a stray bullet when they lived in Brooklyn, New York. Tr. p. 301. Counsel renewed her previous objection, which the trial court overruled. Tr. p. 301. Woodberry went on to explain the bullet entered Colon's temple and penetrated his frontal lobe. Tr. p. 301. Woodberry testified Colon was subsequently diagnosed with schizophrenia. Tr. p. 302. Woodberry also testified that Colon began talking to himself and became passive after the head injury. Tr. p. 302. Finally, Woodberry stated that Colon's condition improved with medication, but Colon retained the cognitive ability of a thirteen-year-old. Tr. p. 302.

Colon testified at trial and explained that he went to the TD Bank intending to cash his unemployment check. Tr. pp. 305, 313. However, Applicant gave him a toy gun and told him to go in the bank and demand money. Tr. p. 306. Colon recalled that Applicant had colored in part of the toy gun to make it look real. Tr. p. 306. Colon testified that after the robbery, he was supposed to meet Applicant in front of the hotel and get into the bed of Applicant's truck. Tr. p. 307. Colon's testimony waivered as to when Applicant gave him the gun and instructed him to rob the bank. On cross-examination, Colon indicated that he and Applicant planned the robbery months prior, and that was when Applicant gave him the gun. Tr. p. 314. However, on redirect, Colon suggested Applicant gave him the gun the day of the robbery. Tr. p. 315.

Investigator Kerry Johnson testified he interviewed Applicant after Applicant was arrested. Johnson explained that initially, Applicant denied anyone was with him while he was driving around the day of the robbery. Tr. p. 325. However, after Johnson confronted Applicant that Colon had identified him as his cousin who dropped him off outside the bank, Applicant modified his statement. Applicant claimed Colon was with him earlier in the day because he wanted a ride to "his homeboy's house," but Applicant instead dropped Colon off at the bus stop near the TD Bank. Tr. p. 327. Applicant denied any knowledge or involvement in the robbery.

ALLEGATIONS

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

a. Conflict of interest:
    1. Counsel had a conflict of interest and failed to disclose to Applicant that her husband is a Deputy Solicitor for the Fifth Circuit Solicitor's Office; and
    2. Counsel had a conflict of interest as a result of the flat fee contract agreement with the Commission on Indigent Defense that provided an incentive for Counsel to not seek a mistrial when the jury was deadlocked.
b. Pretrial:
    1. Failing to investigate, develop, and present evidence to establish that Applicant is not guilty of armed robbery; and
    2. Failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on January 16, 2013, and the face of the indictment states the grand jurors returned a "true bill" on July 16, 2014.
c. During trial:
    1. Failing to object to the prosecutor's closing argument calling Applicant "a liar" at (Tr.368, ln. 9.); and
    2. Failing to object to the prosecution and prosecution witness improperly vouching for Jason Colon, who was the co-defendant and material witness for the State.
d. During jury deliberations:
    1. When the jurors sent a note (Court's Exhibit 4) stating, "We are not unanimous on any of the charges yet, how do you want us to

proceed?" and the Solicitor agreed, "They are deadlocked," Counsel failed to object to the trial court instructing the jurors to continue deliberating when that instruction did not instruct the jurors that "the verdict should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgement which was not concurred in by the majority," Allen v. United States, 164 U.S. 492, 501 (1896);

2. When the jurors sent a note (Court Exhibit 5) stating, "Still at a stalemate," trial counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330;
3. When the jurors sent a note (Court Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330;
4. When the jurors sent a note (Court Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to object to the trial court's Allen charge that singled out the sole juror that was holding out for acquittal. Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001); State v. Hughes, 336 S.C. 525, 521 S.E.2d 500(1999);
5. When the jurors sent a note (Court's Exhibit 12) stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need refreshing," and the foreman of the jury informed the trial court the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330.

e. Cumulative error:
   1. The cumulative effect of Counsel's errors, as set forth in 11(a)–(d), entitles Applicant to a new trial. Williams v. Taylor, 529 U.S. 362 (2000); Kyles v. Whitley, 514 U.S. 419 (1995).

At the evidentiary hearing, Applicant proceeded on the allegations in his amended application, which encompasses and expands upon the allegations in his original application, with the exception of the claim of failure to investigate (numbered 11(b)(1) in the amended application). To the extent the allegations in Applicant's original application can be construed as separate

grounds for relief, this Court finds Applicant waived and abandoned those grounds, and they are dismissed with prejudiced.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Counsel testified she graduated from law school in 2005, after which she worked at the Richland County Public Defender's Office for three years before going into private practice. Counsel stated in her private practice she handled mostly criminal defense, PCR, and family court cases. Counsel has been working at the firm of Wilson, Jones, Carter, & Baxley since 2019.

Counsel stated she accepted the representation of Applicant from another attorney, Prentiss Shealey, who had been appointed to the case but had a conflict. Counsel explained she had recently opened her solo practice at the time, so when Shealey emailed to ask if she wanted the case, she accepted and got a consent order assuming the representation. Counsel testified before agreeing to take the case, she emailed her husband, Dan Goldberg, who worked at the Richland County Solicitor's Office, to ensure he had not had any involvement in the case because she would not have agreed to represent Applicant if he had.[4] Counsel testified Goldberg called her back to confirm he had not had any involvement up to that point and would not have any going forward. Counsel stated she did not speak to Applicant before accepting the appointment and obtaining a signed order. Counsel further testified she did not have any written documentation explaining to Applicant that her husband was a solicitor and waiving the conflict.

Counsel stated although she did not have anything in writing from Applicant regarding the conflict, it was her practice at the time to tell clients that she was married to a solicitor, but they

---

[4] Emails between Shealey, Counsel, and Goldberg were introduced as Applicant's Exhibit 14. The signed appointment order was introduced as Applicant's Exhibit 10.

should not expect any favors. Counsel also testified if Applicant had told her he had a problem, she would have conflicted herself out of the representation and passed it on to someone else. Counsel testified, at that time, her case files were stored in her law office, which was separate from her residence. Counsel stated Applicant's file was kept at her office, and her husband did not have access to it. Counsel further testified she did not discuss the specifics of Applicant's case with Goldberg because he was not involved, and she had no reason to do so. She stated he would have been aware when it was coming up for trial, but she did not have any substantive discussions about the case, negotiations, or any defenses or strategy. Counsel testified the case was assigned to Richard Cathcart, which is who she dealt with on the case, and then J.J. Shellenberg became involved towards the end.

Counsel reviewed the payment voucher[5] she submitted to Indigent Defense and testified she bill $3604.00 for her work on the case. Counsel explained that although she did not have a contract with Indigent Defense at the time, they still paid her for her work on the case at an hourly rate. Counsel testified she did not receive a flat fee, and if the case had ended in a mistrial, she would have sought and received permission to bill above the statutory maximum and would have been paid again for her work the second time. Counsel stated payment was not a consideration in her decision as to whether to move for a mistrial.

Counsel testified Applicant was charged with armed robbery and four counts of kidnapping. She explained the State's theory of the case was that Applicant had convinced his cousin to rob a bank and supplied the cousin with a fake, then dropped him off near the bank and

---

[5] Applicant's Exhibit 11.

waited in the area to act as a getaway driver. Counsel further explained Applicant denied the allegations insofar as being involved in any planning or knowing his cousin would rob the bank when he dropped the cousin off, although he admitted to being in the area with the cousin around the time of the robbery. Counsel stated the State had circumstantial evidence tying him to the robbery, but the cousin, Jason Colon, was the witness who tied Applicant directly to the crime.

Counsel testified Colon's father, Ricky Woodberry, also testified at trial and described Colon's traumatic brain injury and the way Colon's behavior and personality changed as a result. Counsel confirmed Woodberry testified Colon essentially was lobotomized by a bullet and now functions with the capacity of a thirteen-year-old even though he was twenty-eight at the time of the robbery. Counsel testified she objected to Woodberry's testimony in its entirety, arguing it was "backdoor character evidence," and she succeeded in keeping parts of his testimony out. Counsel stated she renewed her objection in front of the jury, and the issue was preserved and raised on appeal. Counsel acknowledged the solicitor referred back to Woodberry's testimony in his closing argument, calling Applicant's actions "despicable" and asserting Applicant had lied in his statements to police. Counsel stated she did not object to those arguments, and she was not aware of any case law saying it is improper for a solicitor to call a defendant a liar.

Counsel further testified her general strategy in trying cases is for the jury to like her and think she is more reasonable than the State. Counsel stated she felt she could, and did, offer logical explanations for the discrepancies in Applicant's statement and that it was to her benefit to have the State take an extreme position because it makes them look like they are exaggerating. Counsel testified the solicitor was commenting on his version of the facts and evidence already presented to the jury. Counsel further explained she did not feel a motion for a mistrial based solely on the

solicitor's use of the word liar at that point would have been successful, and her strategy was to argue her view of why Applicant's statement was logical and not a lie.

Counsel testified that the case went to the jury on Wednesday morning, and the jury deliberated all day Wednesday and Thursday and into the early afternoon on Friday. Counsel stated she was aware of the contents of the note[6] the jury sent out around 1:00pm on Wednesday asking questions and requesting playback of some testimony, but the judges do not always show the attorneys the note itself. Counsel testified the judge called all of the jurors back into the courtroom, answered their questions as much as possible, and offered to play back any testimony the jury wanted to hear, as well as provided the requested instruction on reasonable doubt. Counsel stated the jury then sent in another note listing the testimony they wanted to hear,[7] which was played in the courtroom. Counsel testified, at that time, the parties all agreed the juror was still deliberating and looking for clarification on the factual issues in the case.

Counsel testified the jurors sent another out to the judge at approximately 3:00pm[8] on Wednesday afternoon stating they were not unanimous yet and asking what they should do. Counsel explained the exchange between the judge and the solicitor in the record as an agreement that an Allen charge was not appropriate yet, and the judge's only response would be to tell them to keep deliberating. Counsel stated the solicitor can be sarcastic or tongue-in-cheek, but he agreed with the judge that the jury was not indicating deadlock at that point, as did she. Counsel stated the jury then re-entered the courtroom, and the judge gave instructions directing them to keep

---

[6] Applicant's Exhibit 1.
[7] Applicant's Exhibit 2.
[8] Applicant's Exhibit 3.

deliberating, but she did not use the Allen charge language at that time. Counsel explained the jury did not say they were completely deadlocked, just that they had not reached a decision yet, so the judge simply told them to keep working on it, and she agreed that was an appropriate response.

Counsel explained the jury returned another note at 6:10pm[9] on Wednesday evening saying they were at a "stalemate," progress was slow, and it might help to return in the morning. Counsel also pointed out the note also requested clarification of the hand of one, hand of all concept, which, in her mind, indicated the jury wanted to keep deliberating, but just needed a break. Counsel stated the jury returned to the courtroom, and the judge first re-charged the hand of one, hand of all instruction as they requested, then addressed the second part of the note. Counsel testified the note made clear the majority of the jurors wanted to return in the morning, but she did not know what the rest of the jurors wanted to do. Counsel testified she did not think she could ask those kinds of questions of the jury and acknowledged it was possible the minority jurors did not want to deliberate any more at all.

Counsel testified on Thursday morning, the judge reviewed what happened the night before and provided the jury with a written copy of the hand of one, hand of all instructions and sent them back to continue deliberating. Counsel explained that around 10:50am, the jury sent out another note[10] requesting to hear the testimony of four witnesses. Counsel stated because there was a trial taking place in the courtroom next door, the attorneys and the judge decided to send the court reporter into the jury room to play the testimony, with instructions not to speak to the jury about the case or their deliberations.

---

[9] Applicant's Exhibit 4.
[10] Applicant's Exhibit 5.

At 1:02 pm on Thursday afternoon, Counsel testified, the jury sent out another note,[11] this time stating they were 11-1 and the one person was not going to change his or her mind. Counsel explained the parties and the judge did not know which way the jury was leaning, but they were aware of the count, and everyone agreed an Allen charge was appropriate at that time. Counsel testified she did not object to the charge because she felt there was nothing improper in the instruction given, and it did not single out the holdout juror.

Counsel testified that shortly after the judge gave the Allen charge, the jury requested[12] to be charged on reasonable doubt for a second time and then to hear Colon's testimony[13] again. Counsel explained, in her mind, this indicated the jury was continuing to work to reach a verdict, and she did not request a mistrial at that time because she felt the jury was still deliberating.

Counsel explained the next note[14] came around 6:00pm, saying fatigue had set in, so the parties agreed to bring in the jury foreman to clarify what the note was asking for or trying to convey. Counsel testified this was the first time since the jury indicated it was deadlocked that the foreman had been summoned without the rest of the jurors present. Counsel stated the foreman informed the judge that the majority of jurors wanted to be out of the room for the time being, but two or three wanted to be out "forever." Counsel agreed the foreman then spoke to the jury and reported back to the court that the majority had agreed to continue deliberations the next day, but he did not report what the minority wanted to do. Counsel testified the judge then summoned the full jury and informed them of what the foreman reported to her. Counsel stated she did not call

---

[11] Applicant's Exhibit 6.
[12] Applicant's Exhibit 7.
[13] Applicant's Exhibit 8.
[14] Applicant's Exhibit 9.

the judge's attention to the fact that some jurors apparently did not want to continue deliberating because the judge already knew that, and she did not move for a mistrial.

Counsel testified that on Friday, the jury did not come into the courtroom before resuming deliberations, and the judge summoned the foreman alone around 12:15pm to discuss ordering lunch, if needed. Counsel agreed the foreman reported the jury was close to a verdict, and the judge instructed him to let her know within twenty minutes if they needed to order lunch; shortly thereafter, the jury returned with a verdict. Counsel testified Applicant was acquitted of the four kidnapping charges, but convicted of the armed robbery.

Counsel stated she did not move for a mistrial on the basis of a hung jury at any time during deliberations. Counsel explained that she was thinking about the possibility of a mistrial during the course of deliberations, but she felt it was a good sign for Applicant that the jury was actively engaged and clearly looking closely at the issues. Counsel stated ultimately the jury deliberated longer than the trial took to complete and clearly had questions about the evidence and the issues, which she felt was favorable for Applicant. Counsel also testified she felt it would be better for Applicant if the judge declared the mistrial due to deadlock, versus her arguing for one, because that way the solicitor would know he had not proven his case to the jury. Counsel stated she felt that circumstance would result in a better offer or negotiating position for her client, and at the time, she felt the jury's decision or lack thereof would ultimately go Applicant's way.

Counsel further testified Applicant was present with her for much of the time the jury deliberated, and they discussed several issues. She stated if he had taken a strong position on arguing for a mistrial, she would have done it. Counsel reviewed the transcript and noted she asked for a few minutes to speak with Applicant before the judge gave the Allen charge. Counsel

explained that although the record reflects the solicitor stated he gave Applicant "an option," Counsel did not recall a plea offer being extended at that point, although she would not dispute Applicant's recollection. Counsel further testified, based on her memory and what the transcript says, their conversation at that time was about the Allen charge. She also testified that if she had known the breakdown of the jury was 11-1 against Applicant, it would have changed her advice about seeking a mistrial, and she would have advised him to do so at the time.

Regarding the indictment, Counsel testified the indictment was amended during the course of the case, and it appears there was a typo on the amended version[15] because the solicitor did not change the date of the grand jury from January to July. Counsel stated she did not investigate the issue and did not recall if she noticed it at the time. Counsel testified nothing in the amendment was new information; it did not change the charges, the factual allegations, or the date and time of the alleged incident. Counsel explained the amendment merely added the names of the kidnapping victims for each count, which was information she already had. Counsel testified the amended indictment did not change her preparation of the case in any way.

Applicant testified he was not aware he had ever been appointed another lawyer prior to Counsel. Applicant stated he was not aware Counsel was married to a solicitor, and he and Counsel never had any conversations about that, nor did Counsel ever ask him to sign a waiver. Applicant testified he was shocked when he read the emails because, in his opinion, they indicated some concern with Counsel representing him. Applicant further testified he did not find out Counsel was married to a solicitor until Goldberg came into the courtroom on a different matter during

---

[15] The original indictment was entered into evidence as Applicant's Exhibit 12; the amended indictment is Applicant's Exhibit 13.

deliberations, and Counsel told Applicant he was her husband. Applicant stated if he had known Counsel was married to a solicitor, he would have asked for someone else to represent him.

Applicant also testified he and Counsel never discussed whether she should ask the judge for mistrial, and he was not aware at the time that was something he could do. He explained he learned about moving for a mistrial while studying his case, and if he had known, he would have wanted Counsel to make the motion. Applicant further stated he and Counsel did not discuss the Allen charge, but rather discussed a plea offer from the State. Applicant stated the offer was worse than the original offer, and he did not want to accept it. Applicant further stated the offer was worse because the State knew the jury was 11-1, and Counsel informed him the vote was not in their favor because a bailiff had overheard the jury's count.[16]

Goldberg testified he has been practicing law for sixteen years and has done criminal work exclusively. He testified he started at the solicitor's office in 2003 as an intern and became an assistant solicitor in 2005; he was the deputy solicitor in 2013. Goldberg explained, as a deputy, he carried his own caseload and also performed some administrative and supervisory duties as assigned. Goldberg testified the office hierarchy ran from the elected solicitor to three deputies, then down to six team leaders who had between three and five attorneys on their teams. Goldberg explained the cases were divided up and assigned to the teams roughly by location within the county. He testified he generally received a stack of new cases every few days to review, and then he would assign them either to himself, to a specific solicitor, or give to a team leader to assign.

---

[16] Applicant testified regarding the discussion before the Allen charge over the State's objection, as both the State and Applicant's counsel had finished questioning, and Applicant asked address the court on his own.

Goldberg testified if an attorney had a question or problem in a case, he or she would first go to the team leader, and then up the chain if needed.

Goldberg testified he was married to Counsel at the time of Applicant's case, and his office had prosecuted cases where she represented the defendant in the past. He explained their usual process was for Counsel to inform him of the defendant's name, and he would review whether he had any involvement in the prosecution of that particular case. Goldberg stated if he had, Counsel would not accept the case, or, if she had already been appointed, she would substitute someone else, and if neither of those things could be done, he would cease his involvement, but he did not remember that ever happening.

Goldberg testified at the time he assigned the case to Cathcart, Counsel was not yet involved. Goldberg stated eventually Shellenberg was brought on to assist Cathcart. Goldberg explained Cathcart was the team leader for this case, and, at the time, he had almost twenty years of experience as a prosecutor. Goldberg testified he could not recall whether he specifically told Cathcart and Shellenberg not to come to him about this particular case, but it was his usual practice to do so. He also testified the other attorneys in the office were generally aware of his relationship with Counsel and knew not to come to him about cases which involved Counsel. Goldberg explained the office did not have a written policy about spousal conflicts; they just followed the standard rules of professional conduct. He stated occasionally new solicitors might bring him a case that involved Counsel, but he would stop them and ask them to go speak to someone else, and he testified that did not happen in this case.

Goldberg testified he did not speak to Cathcart or Shellenberg about this case, nor did he talk to Counsel about any substantive issue. He stated any conversations they had would have

been only about logistics and scheduling close to the time of trial. Goldberg testified he was not involved in this case in any way, other than possibly making the initial assignment to Cathcart prior to Counsel's involvement. Goldberg testified he did not have access to Counsel's file, and the State's file would have been kept by the solicitor working on the case in his or her own office. Goldberg testified the offices were not locked, and the electronic system the office has does not have the capability to keep individual people out of a case's file, so anyone with access to the system can see any case. Goldberg stated at the time of Applicant's case, it was standard practice to keep a physical file, and not all case files were uploaded to the system, so he was not sure whether Applicant's case was on it at the time or not.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony and evidence presented at the evidentiary hearing, observed the witnesses and evaluated their credibility, considered the arguments of counsel, and weighed these factors accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject conviction, the appellate records, and Applicant's original and amended applications, as well as the trial transcript. This Court finds the combined record from the criminal case and the testimony and evidence presented the evidentiary hearing establishes Applicant received effective assistance of counsel, and relief should be denied and this application dismissed with prejudiced. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

In a post-conviction relief action, the 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. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. 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 plea counsel. Id. at 117, 386 S.E.2d at 625. First, the 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 (1984)). 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." Id. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

This Court finds Applicant has failed to prove his trial counsel's performance was deficient in any way, nor was Applicant prejudiced by her performance. Counsel met with Applicant and

reviewed with him the evidence and discovery in the case, as well as Applicant's version of the facts and possible defenses. This Court finds Applicant ultimately chose to proceed to trial and contest the State's versions of events. This Court finds Counsel ably prepared and presented a defense centered around whether Applicant helped plan the robbery or merely dropped his cousin off not knowing what would happen inside the bank. Moreover, the Court notes Counsel's performance resulted in Applicant being acquitted of four counts of kidnapping, after lengthy jury deliberations.

1. Conflict of interest

Applicant alleges Counsel was constitutionally ineffective because she had a conflict of interest in two ways – first because she "failed to disclose to Applicant that her husband is a Deputy Solicitor for the Fifth Circuit Solicitor's Office," and due to "the flat fee contract agreement with the Commission on Indigent Defense that provided an incentive for Counsel to not seek a mistrial when the jury was deadlocked." This Court disagrees and finds Counsel did not have a conflict of interest as a result of either situation.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). The South Carolina Supreme Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). "The mere possibility defense

counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005).

In this situation, Applicant has failed to prove a conflict exists because of Counsel's relationship with Goldberg, who is a solicitor. Both Counsel and Goldberg testified Goldberg had no involvement in the prosecution of the case, he did not have access to Counsel's file, and they did not have any substantive conversations about the case. This Court finds this testimony credible and further finds Applicant has offered no evidence to establish Counsel actively represented an adverse interest. Goldberg did not personally represent the State in this prosecution and was not involved in the case except, possibly, to review the file and assign it to correct team. See SCRPC Rule 1.8(k) ("A lawyer related to another lawyer as parent, child, sibling or spouse shall not *personally* represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client gives informed consent.") (emphasis added).

Additionally, Counsel credibly testified she did not receive a flat fee for this case, but rather was paid hourly. The Court further finds credible Counsel's explanation that the issue of payment did not factor into her decision regarding whether to move for a mistrial, and if it had been necessary to try the case again, she could have sought to bill additional hours.

Therefore, this Court finds Applicant has failed to prove Counsel had a conflict of interest on either ground. Relief is denied as to both allegations, and they are dismissed with prejudice.

2. Indictment

Applicant also alleges Counsel was constitutionally ineffective for "failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on

January 16, 2013, and the face of the indictment states the grand jurors returned a 'true bill' on July 16, 2014." This Court disagrees and finds Counsel was in no way deficient, nor was Applicant prejudiced, by Counsel's failure to challenge the indictment on this ground.

The indictment is a notice document. S.C. Code § 17-19-20. "The indictment must state the offense with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer, and whether he may plead an acquittal or conviction thereon." State v. Guthrie, 352 S.C. 103, 108, 572 S.E.2d 309, 311-12 (Ct. App. 2002). Further, the "test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." Id. Additionally, the South Carolina Code states in pertinent part:

> If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged.

S.C. Code Ann. section 17–19–100 (2015).

Applying the above-recited statutory and case law to the facts of Applicant's case, this Court finds Applicant has failed to prove he was prejudiced by any deficiency arising from Counsel's failure to move to quash the indictment. This Court has reviewed both the original and amended indictments entered into evidence and finds the amended indictment contained a scrivener's error as to the date the grand jury met to consider it, which did not render the indictment, or the trial, invalid. The amended indictment cited to the correct statute such that Applicant knew the nature of the offense he was required to defend, and Counsel credibly testified

the only change was to add the names of the individual victims, which Counsel already knew. Moreover, Counsel testified this change did not affect her case strategy or trial preparation in any way.

Accordingly, this Court finds Applicant failed to establish either deficiency or prejudice as to this issue. Relief is therefore denied, and the allegation is dismissed with prejudice.

3. Solicitor's closing argument and vouching

Applicant next alleges Counsel was constitutionally ineffective for "failing to object to the prosecutor's closing argument calling Applicant 'a liar'" and "failing to object to the prosecution and prosecution witness improperly vouching for Jason Colon, who was the co-defendant and material witness for the State." This Court disagrees and denies relief as to this issue.

This Court finds Counsel was not deficient, nor was Applicant prejudiced, by Counsel's failure to object to the solicitor's closing argument calling Applicant a liar or characterizing his conduct as "despicable." Moreover, although Counsel admitted she was not aware of any case law to support an objection, she explained that an objection would have been contrary to her overall trial strategy. Counsel stated she felt she had a logical explanation for the inconsistencies in Applicant's statement, and she could make the State appear to be exaggerating and taking an extreme position, which she felt was helpful to Applicant.

It is well settled that "the solicitor must confine his arguments to the evidence in the record and its reasonable inferences." State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). The

relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009).

Additionally, Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for 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, 466 U.S. at 688-689. "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 counsel's performance must be highly deferential. Id. at 689. 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). Examples of such decisions include what evidence should be introduced, whether to object to the admission of evidence, and which motions to file. Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014). 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).

Finally, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To 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. In the context of improper closing arguments, "[a] new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Tucker, 324 S.C. at 169, 478 S.E.2d at 267-68 (internal citations omitted). When making this determination, courts "review the 'alleged impropriety of argument in the context of the entire record.'" State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) (quoting Brown v. State, 383 S.C. 506 (2009)).

Here, the argument Applicant complains about was limited to one instance in the record, and, as Counsel testified, the issue had already been raised to the jury through testimony and evidence presented during the trial. This Court therefore finds, even if Counsel had objected, the outcome of the trial was unlikely to have been different, as it is unlikely the trial court would have granted a mistrial, and Counsel was able to effectively explain the inconsistencies through her own argument.

Accordingly, because the Court finds neither deficiency in Counsel's performance nor any prejudice to Applicant, relief is denied, and these allegations are denied and dismissed with prejudice.

4. Jury deliberations and failure to move for a mistrial

Applicant alleges Counsel was constitutionally ineffective in her handling of the jury deliberations and failure to move for a mistrial at various times. This Court disagrees and denies relief as to this issue.

A. Failure to object to judge's instructions to jury after first note stating, "We are not unanimous on any of the charges yet, how do you want us to proceed?"

Applicant argues Counsel "failed to object to the trial court instructing the jurors to continue deliberating when that instruction did not instruct the jurors that 'the verdict should

represent the opinion of each individual juror,' not 'a mere acquiescence in the conclusion of his fellow[]' jurors, and the jurors in the majority should listen to the minority juror and consider the 'correctness of a judgement which was not concurred in by the majority,'" in accordance with Allen v. United States, 164 U.S. 492, 501 (1896). This Court disagrees.

First, Applicant argues the solicitor agreed with the trial judge that the jury was indicating deadlock. This Court has listened to Counsel's explanation and reviewed the relevant portion of the record and finds the opposite is true – the solicitor and the judge were in agreement that the jury was *not* deadlocked and Allen charge was not yet appropriate. Counsel credibly testified this was her reading of the situation as well. As the jury's note specifically stated, they were informing the court they had not reached a unanimous verdict *yet*, and simultaneously requested to rehear testimony of one of the State's main witnesses, Diana Williams, both of which indicate a continued willingness to deliberate. Accordingly, this Court finds the instruction given by the trial court to be appropriate and, as it was not an Allen charge, Counsel had no basis to object on the ground that the instruction did not comport with Allen's requirements.

Therefore, because Counsel was not deficient, nor was Applicant prejudiced, the Court denies relief as to this issue and dismisses the allegation with prejudice.

B. When the jurors sent a note stating, "Still at a stalemate," trial counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330

Applicant contends Counsel was constitutionally ineffective for failing to move for a mistrial pursuant to section 14-7-1330 of the South Carolina Code when the jury returned, after the court's instruction to keep deliberating and rehearing the requested testimony, with a note informing the court they were "still at a stalemate." After reviewing the text of the note, the relevant portions of the record, and listening to Counsel's credible testimony on this issue, this

Court finds Counsel was not deficient in not moving for a mistrial because the requirements of section 14-7-1330 had not been met.

Section 14-7-1330 states:

> When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

South Carolina case law interprets this section mean the jury must return twice into court and indicate it is deadlocked. See Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) ("Accordingly, when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments.").

As discussed above, this Court finds the jury's first note, stating it was not unanimous yet and requesting to rehear testimony, was not an indication of deadlock. Similarly, this Court finds the second note, informing the court the jury was "still at a stalemate," again does not indicate deadlock. The note goes on to request to be recharged on the hand of one, hand of all principle and states that the majority of the jurors feel progress could be made if they came back the next morning. As the record indicates, the judge assembled the jury and gave the requested instruction, then addressed the second part of the note regarding the "stalemate." When the judge informed the jury they would need to return the next day to continue deliberating, none of the jurors voiced disagreement or indicated that further deliberation would not be fruitful.

Thus, this Court finds, even if the note could be interpreted as indicative of deadlock, the jury impliedly gave consent to continue deliberating. Accordingly, because the requirements of section 14-7-1330 had not been met, Counsel cannot have been deficient for failing to move for a mistrial on that basis, and relief should be denied as to this allegation, and it is dismissed with prejudice.

C. When the jurors sent a note stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330

Applicant again contends Counsel was constitutionally ineffective for failing to move for a mistrial pursuant to section 14-7-1330 of the South Carolina Code when, the next day, the jury returned with a note stating they were divided 11-1 and the holdout had indicated he or she would not be persuaded to change his or her vote. However, as discussed above, this Court finds the requirements of section 14-7-1330 had not been met. The Court finds, based on its reading of the record and Counsel's credible testimony, this note was the first indication of deadlock from the jury, which properly triggered an Allen charge from the trial court.

Because this only the first indication of deadlock, not the second or more as required by the statute, this Court finds Counsel was not deficient for failing to move for a mistrial on that basis at this point. Therefore, the Court denies relief on this ground and dismisses it with prejudice.

D. When the jurors sent a note stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to object to the trial court's Allen charge that singled out the sole juror that was holding out for acquittal

Applicant contends Counsel was constitutionally ineffective for failing to object to the trial court's allegedly improper Allen charge given after the jury indicated the 11-1 split that it was unable to resolve. This Court has reviewed the relevant charge and finds it comports with language

approved by the South Carolina Supreme Court in other cases, and Counsel had no meritorious basis to object to the charge. Therefore, because Counsel was not deficient, the Court denies relief as to this issue.

The Court finds the situation in Applicant's case analogous to State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (2010). In Williams, the Supreme Court approved both the giving of the charge and the language used, which was nearly identical to the language used by the trial court in Applicant's case.[17] Id. at 512-15, 690 S.E.2d at 66-68. The Court stated:

> In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.

Id. at 66, 690 S.E.2d at 512 (quoting Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)). In Williams, the judge charged the jury to "consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way. Discuss your differences with open minds." Id. at 67, 690 S.E.2d at 514. The trial judge in Applicant's case used this exact language in her charge. Tr. pp. 439-440. Further, the judge in Williams, and the trial judge in this case, charged:

> Every one of you has the right to your own opinion, the verdict you agree to must be your own verdict, a result of your own convictions. You should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The minority should consider the majority's opinion and the majority should consider the minority's opinion. You should carefully consider and respect the opinions of each other and evaluate your position for reasonableness, correctness, and partiality. You

---

[17] Williams also addressed the issue of the jury disclosing the vote division. There, as in Applicant's case, the Court noted because the jury voluntarily disclosed the division, without any inquiry from the judge, and the judge promptly informed the parties and stated its intention to give an Allen charge, the trial judge committed no error. Id. at 509-510, 690 S.E.2d at 65.

> must lay aside all outside matters and reexamine the question before you base[d][on] the law and the evidence in this case.

Id. at 67-68, 690 S.E.2d at 514; Tr. p. 440. Although the jury in Applicant's case was charged that the verdict must be unanimous, that portion was immediately followed by the reminder that each juror had a right to his or her own opinion, which should not be given up solely for the purpose of coming to an agreement with the others. Tr. p. 440.

This Court finds the trial judge's Allen charge was a correct statement of the law and was not coercive. Accordingly, Counsel had no basis to object to the charge, and she was not deficient. This Court therefore denies relief as to this issue and finds this allegation should be dismissed with prejudice.

E. When the jurors sent a note stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need refreshing," and the foreman of the jury informed the trial court the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330

Finally, Applicant argues Counsel was constitutionally ineffective for failing to move for a mistrial when, after the trial judge gave the Allen charge, the jury returned with another note stating they were "still in the same position" and "needed freshness" because "fatigue" had set in. The Court disagrees and finds Counsel was not deficient.

After the court received this note, the trial judge summoned the foreman to clarify what the jury meant by needing "freshness." The foreman informed the court that they were not sure how much longer they could continue to deliberate, but they were "at [the court's] mercy." Tr. p. 445. The foreman continued to explain the biggest issue was that they "just want to get out of that room." Tr. p. 445. He then told the court that although two or three jurors wanted to be out of there

"forever," the jury was "willing to do what we need to do." Tr. p. 445. The foreman then consulted with his fellow jurors and ultimately stated, "we'll come back tomorrow." Tr. p. 447. The judge then assembled the entire jury and relayed what the foreman had said. None of the jurors indicated disagreement with returning in the morning to continue deliberating, again indicating implied consent to continue. Tr. pp. 447-48. Indeed, once the jury returned and resumed deliberating, it sent out no further notes and when the judge called in the foreman to inquire about lunch, he informed her they were close to a decision. Tr. p. 450. Finally, when the jury was polled after the judge announced the verdict, all indicated this was their verdict. Tr. pp. 454-56.

Accordingly, this Court finds that even if this note could be considered a second indication of deadlock, the jury, after consultation with the judge, consented to continue its deliberations.

Therefore, this Court finds the requirements of section 14-7-1330 had again not yet been met, and Counsel was not deficient for failing to move for a mistrial. Moreover, Counsel credibly testified she felt the jury's lengthy deliberations were beneficial to Applicant because it indicated the jury had questions about what happened. Additionally, this Court finds credible Counsel's testimony that had she known with certainty the split was 11-1 against Applicant, she would have changed her strategy pursued a mistrial. Accordingly, because the Court finds the conditions of section 14-7-1330 had not been met, and in any event, Counsel had a reasonable strategic explanation for declining to move for a mistrial, relief is denied as to this issue, and the allegation is dismissed with prejudice.

5. Cumulative error

Lastly, Applicant argues the cumulative effect of Counsel's entitles Applicant to a new trial. Because this Court has found Counsel committed no errors, relief must be denied as to this issue.

Importantly, appellate courts in South Carolina Court have not recognized the cumulative-error doctrine as a basis for post-conviction relief. See, e.g., Simpson v. State, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina"); Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002) ("Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina."). Other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative-error analysis of the prejudice prong of Strickland is inappropriate, and the correct analysis focuses upon each individual allegation of ineffective assistance. Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in Fisher v. Angelone:

> Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error. . . it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of the Fourth Circuit individually to assess claims under Strickland v. Washington. . . . To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (citations omitted). Similarly, in Smalls v. State, 422 S.C. 174, 810 S.E. 2d 836 (2018), the South Carolina Supreme Court explained "the strength of the evidence must be considered along with the specific impact of counsel's errors. . . . In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the

outcome of the trial." However, because this Court has found neither deficiency nor prejudice, a cumulative-error analysis would be inappropriate on these facts.

Accordingly, this Court finds relief should be denied as to this issue, and the allegation is dismissed with prejudice.

CONCLUSION

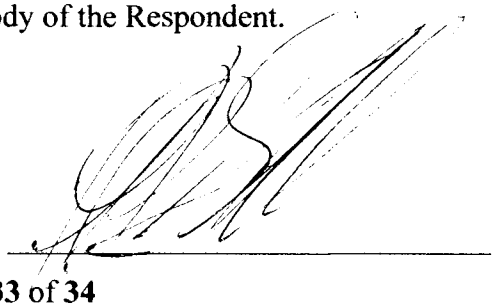
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by her representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.



STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF Richland) 5th JUDICIAL CIRCUIT
)
) CASE NO.: 2019-CP-40-05591
Arthur William Macon)
Plaintiff,) **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**
vs.)
)
State of South Carolina)
Defendant.)

2021 JUL 26 PM 3:00

Plaintiff's Attorney:	Defendant's Attorney:
Charles Grose, Bar No. 66063 Address: 404 Main Street, Greenwood, SC 29646 Phone: 864-538-4466 Fax 864-538-4405 E-mail: charles@groselawfirmcom Other: ____	Lindsey Ann McCallister , Bar No. ____ Address: SC Attoreny General Office, PO Box 11549, Columbia, SC 29211-1549 Phone: ____ Fax____ E-mail: lmccallister@scag.gov Other: ____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Rule 59(e), SCRCP Motion
Estimated Time Needed: 30 Min Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

s/E. Charles Grose, Jr. July 16, 2021
Signature of Attorney for ☒ Plaintiff/☐ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: ____
☐ Other: ____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE ____ Date: ____

CLERK'S VERIFICATION

Collected by:____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Case No. 2019-CP-40-05591
Arthur William Macon,	)	
Applicant,	)	**Rule 59(e), SCRCP Motion**
vs.	)	
State of South Carolina,	)	
Respondent.	)	

2021 JUL 26 PM 3:0

Pursuant to Rule 59(e), SCRCP, Arthur Macon moves this Court for an order altering and amending the order of dismissal dated June 29, 2021 and filed July 9, 2021. Undersigned counsel received notice of entry of this order on July 15, 2021.[1] For the reasons set forth below, this Court should withdraw the order of dismissal, grant post-conviction relief, and remand this case to the Court of General Sessions for a new trial.

I. PROCEDURAL HISTORY.

The State charged Arthur Macon with armed robbery and four counts of kidnapping for an incident occurring on August 30, 2012. The Richland County grand jury indicted Mr. Macon on January 16, 2013. The grand jury amended the indictment, and the amended indictment contains conflicting information regarding the date of the amendment. Applicants Exhibits 12 and 13. From September 29 to October 3, 2014, the State tried Mr. Macon before the Honorable Deandrea G. Benjamin and a jury. Richard C.R. Cathcart and Jeremiah J. Shellenberg, both of the Fifth Circuit Solicitor's Office, represented the State. Kristy G. Goldberg represented Mr. Macon. The jurors convicted Mr. Macon of armed robbery and acquitted him of four counts of kidnapping. On October 3, 2014, Judge Benjamin sentenced Mr. Macon to twenty-three years imprisonment.

[1] Undesigned counsel received an unfiled copy of the order on July 6, 2021.

The Court of Appeals affirmed Mr. Macon's conviction and sentence. *State v. Macon*, Appellate Case No. 2014-002126, Unpublished Opinion No. 2018-UP-031 (Filed January 17, 2018). By written order dated March 28, 2018, the South Carolina Court of Appeals denied Mr. Macon's Petition for Rehearing. By written order dated October 18, 2018, the South Carolina Supreme Court denied Mr. Macon's petition for a writ of *certiorari* (Appellate Case No. 2018-000737). The Remittitur issued on November 6, 2018.

On September 23, 2019, through undersigned counsel, Mr. Macon submitted an application for post-conviction relief ("PCR"), which the Clerk of Court refused to file. On October 4, 2019, Mr. Macon served a petition for a writ of mandamus requiring the Clerk of Court to file his PCR application. The Clerk of Court filed the PCR application on October 4, 2019, rendering the petition for a writ of mandamus moot. On December 23, 2019, Mr. Macon amended his PCR application. The State served its return on June 15, 2020. On April 16, 2021, the Honorable Brooks P. Goldsmith convened an evidentiary hearing via WebEx. Undersigned counsel represented Mr. Macon. Lindsey A. McCallister and Michael Davidson, both of the South Carolina Attorney General's Office, represented the State. By written order dated June 29, 2021, Judge Goldsmith dismissed Mr. Macon's PCR application. This Rule 59(e), SCRCP motion follows.

II. STANDARD OF REVIEW.

Under the first prong of *Strickland v. Washington*, a defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted).

"If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015); *cf. Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002) (same).

The second prong of *Strickland* requires a defendant establish this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018)[2] (citing *Strickland*, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

On appeal, the "standard of review in PCR cases depends on the specific issue before" the appellate court. *Mangal v. State*, 421 S.C. 85, 91-92, 805 S.E.2d 568, 571 (2017). The appellate court will "defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Id.* The appellate court will "not defer to a PCR court's rulings on questions of law." *Id.* "Questions of law are reviewed de novo, and [the appellate] will reverse the PCR court's decision when it is controlled by an error of law." *Id.* "On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure, [the appellate court] appl[ies] an abuse of discretion standard." *Id.*

---

[2] *See also Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (adhering to *Smalls*).

III. LEGAL AUTHORITY.

For the reasons set forth below, this Court should withdraw the order of dismissal, grant post-conviction relief, and remand this case to the Court of General Sessions for a new trial.

A. Threshold Matter: The findings of fact and conclusions of law are those of an advocate and not the Court.[3]

As a threshold matter, the procedure followed by this Court denied Mr. Macon an opportunity to have his post-conviction relief claims adjudicated by a judicial officer. "S.C. Code Ann. §17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991); *see also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). Addressing section 17-27-80 in the context of a capital post-conviction relief case, our Supreme Court "strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Although the Attorney General addressed the merits of each issue, except one, presented during the hearing, the reasoning in the order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, § 8. The admonitions in *Hall, Pruitt,* and *McCray* are consistent with this Court's responsibility, as an independent branch of government, to "safeguard the rights of litigants." *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

Our Supreme Court expressed its ongoing frustration with the validity of final orders in PCR cases during the oral argument in *Kevin S. Epting v. State*, Appellate Case No. 2017-000696, on November 21, 2019, at 11:17 – 13:05.[4] One Justice referred to the Attorney General's Office

---

[3] A copy of the State's proposed order is attached as Exhibit A. The order signed by this Court is identical to the State's proposed order, except for formatting changes.

[4] http://media.sccourts.org/videos/2017-000696.mp4 (last viewed June 22, 2020). *Epting*

drafting the final PCR order as "the classic case of the fox guarding the henhouse," observed PCR applicants have the right to have their issues litigated, and called on the criminal defense bar "to fix this problem." Another Justice stated the entire Court shares these concerns. In *Fishburne v. State*, our Supreme Court recognized the significant issues involved in drafting PCR orders:

> [B]ecause the United States Constitution's Sixth Amendment guarantee to a defendant's right to effective assistance of counsel is engrained in PCR cases, we cannot continue to permit a party's procedural shortcoming—such as the failure to file a Rule 59(e) motion—to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80.

427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). *Fishburne* set a lofty goal for "[t]he preparation and finalization of a PCR order [to be] a collaborative effort." 427 S.C. at 516, 832 S.E.2d at 589 (2019). The final order in this case was not a "collaborative effort." The final order is an advocacy position drafted by "the fox guarding the henhouse," rather than true judicial findings of fact and conclusions of law.

Mr. Macon's PCR case illustrates exactly why a PCR court should not delegate the judicial function of drafting final PCR orders to an advocate. This Court, therefore, should withdraw this order and make its own findings of fact and conclusions of law.

B. Conflict of Interest.[5]

That defense trial counsel, Kristi G. Goldberg, was married to Fifth Circuit Deputy Solicitor Dan Goldberg throughout her representation of Mr. Macon is a fact that is beyond dispute.

---

involved the Attorney General's Office drafting the final order, the PCR judge signing the order that failed to address all the issues, and the applicant's attorney not filing a Rule 59(e), SCRCP motion. On December 4, 2019, the Supreme Court dismissed *certiorari* as improvidently granted.

[5] The First Amended PCR Application, at ¶¶ 10(a)&11(a)(2) alleges, "Appointed counsel had a conflict of interest as a result of the flat fee contract agreement with the Commission on Indigent Defense." Mr. Macon acknowledges discovery in this case revealed trial counsel was compensated at an hourly rate.

The order of dismissal recognizes this fact. *See, e.g.,* Order, at 8 ("Counsel testified before agreeing to take the case, she emailed her husband, Dan Goldberg, who worked at the Richland County Solicitor's Office); 16 (Deputy Solicitor Goldberg "Testified he started at the solicitor's office in 2003 as an intern and became an assistant solicitor in 2005; he was the deputy solicitor in 2013"); 17 (Deputy Solicitor "Goldberg testified he was married to Counsel at the time of Applicant's case."). The order of dismissal further recognizes that Deputy Solicitor Goldberg "performed some administrative and supervisory duties." *Id.*, at 16.

The order of dismissal also states:

> Counsel stated although she did not have anything in writing from Applicant regarding the conflict, it was her practice at the time to tell clients that she was married to a solicitor, but they should not expect any favors. Counsel also testified if Applicant had told her he had a problem she would have conflicted herself out of the representation and passed it on to someone else.

Id., at 8-9. The order of dismissal contains the following conclusion of law:

> In this situation, Applicant has failed to prove a conflict exists because of Counsel's relationship with Goldberg, who is a solicitor. Both Counsel and Goldberg testified Goldberg had no involvement in the prosecution of the case, he did not have access to Counsel's file, and they did not have any substantive conversations about the case. This Court finds this testimony credible and further finds Applicant has offered no evidence to establish Counsel actively represented an adverse interest Goldberg did not personally represent the State in this prosecution and was not involved in the case except, possibly, to review the file and assign it to correct team. *See* SCRPC Rule 1 .8(k) ("A lawyer related to another lawyer as parent, child, sibling or spouse shall not *personally* represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client gives informed consent") (emphasis added).

Id., at 21.

Regarding the conflict of interest, the order of dismissal contains four errors of law. First, there is no affirmative evidence in the record that trial counsel informed Mr. Macon that she is married to the Deputy Solicitor. Assuming arguendo that trial counsel followed her practice at

the time to tell clients that she was married to a solicitor, but they should not expect any favors,"[6] such a statement is far from the "informed consent" required by Rule 1.7, RPC. This testimony fails to disclose her loyalties were divided between her husband and her client. This testimony fails to consider the solicitor's office might treat more harshly a client represented by the spouse of a deputy solicitor. *See, e.g., Lomax v. State*, 379 S.C. 93, 102, 665 S.E.2d 164, 168 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). This testimony also fails to consider and disclose the inherent risk of revealing confidential information. The comment to Rule 1.8, RPC warns:

> When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where the related lawyer personally is representing another party, unless each client gives informed consent.

Second, the order of dismissal fails to acknowledge the informed consent must be "confirmed in writing." Rule 1.7, RPC.

Third, the order of dismissal fails to consider Deputy Solicitor's supervisory role that includes all cases in the solicitor's office, which means he has responsibility for every case in the Solicitor's Office

Fourth, the First Amended PCR Application, at ¶¶ 10(a)&11(a)(1) asked this Court to consider two cases from other jurisdictions that dealt with this issue: (1) *Commonwealth v. Croken*, 432 Mass. 266, 273, 733 N.E.2d 1005, 1011 (2000) ("where a criminal defense lawyer represents

[6] Neither trial counsel's testimony nor the order of dismissal explains why trial counsel had this practice when there is not a conflict of interest.

a client and a close relative or an intimate companion is a colleague of the prosecutor who seeks to convict the client, the requirements of the [ethical] rule must be met") (citing Massachusetts Bar Association, Committee on Professional Ethics, Opinion No. 95–3 (relative of a district attorney could represent criminal defendants whom the district attorney's office prosecuted, provided [1] the relative not represent clients in cases in which the district attorney is involved; and [2] the conflict be fully disclosed in writing and consented to by the client)) and (2) *People v. Jackson*, 167 Cal. App. 3d 829, 213 Cal. Rptr. 521 (Ct. App. 1985) (failure of appointed trial counsel to inform defendant of counsel's ongoing "dating" relationship with prosecutor denied defendant his right to effective assistance of counsel under the California Constitution). The Order of dismissal fails to consider these cases. Once these cases are considered the need to grant post-conviction relief becomes apparent.

Mr. Macon, accordingly, established both deficient performance and prejudice under *Strickland.*

C. Indictment.

The First Amended PCR Application, at ¶¶ 10(b)&11(b)(2), alleges trial counsel failed "to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on January 16, 2013 and the face of the indictment states the grand jurors returned a 'true bill' on July 16, 2014." The order of dismissal, at 22-23, concludes trial counsel "was in no way deficient, nor was Applicant prejudiced, by Counsel's failure to challenge the indictment on this ground." The order of dismissal then discusses the role of an indictment as "a notice document." *Id.* The order of dismissal, however, never considers the constitutional requirement an indictment be presented to the grand jury for a finding of probable cause. S.C. Const. Art. I, § 11.

"Absent evidence to the contrary, the regularity and legality of proceedings in general sessions court is presumed." *Weathers v. State*, 319 S.C. 59, 62, 459 S.E.2d 838, 839 (1995). Here, the contradiction between the dates the grand jurors considered the amended indictment is an irregularity appearing on the face of the indictment. Had trial counsel raised this issue, then the trial court would have quashed the indictment, or the appellate court would have reversed the conviction and sentence on this issue. Mr. Macon, accordingly, established both deficient performance and prejudice under *Strickland.*

D. Solicitor's Closing Argument.

The First Amended PCR Application, at ¶¶ 10(c)&11(c)(1), alleges trial counsel failed to object "to the prosecutor's closing argument calling Mr. Macon 'a liar.' Tr. 368, line 9." The order of dismissal, at 23, finds trial counsel "admitted she was not aware of any case law to support and objection." Thus, this Court must find deficient performance under the first prong of *Strickland.* The First Amended PCR Application, in fact, cited two cases supporting this objection: (1) *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937) ("referring to defendant as a 'bare faced liar'" during closing argument required new trial)) and (2) *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) (cumulative error of solicitor's improper argument calling defendant a liar and improperly excluded evidence warranted reversal), *reversed on other grounds by State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002). The order of dismissal fails to address either of these cases.

The order of dismissal then excuses trial counsel's failure to object as a strategic decision; however, "[d]ecisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). Additionally, the order overlooks the requirement that the purported strategic decisions must be

valid. *Ingle* and *Freiburger, supra.* Mr. Macon, accordingly, established deficient performance under the first prong of *Strickland.*

Mr. Macon additionally established prejudice under the second prong of *Strickland.* The order of dismissal failed to "consider the specific impact counsel's error had on the outcome of the trial." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843. In this case, the jurors were called upon to judge the credibility of the co-defendant Jason Colon. That the jurors were deadlocked for days reveals they struggled with this issue. Our appellate courts consistently find prejudice when credibility is the central issue for the jurors to reconcile. *See, e.g. State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566, (2018); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

E. Improper Vouching.

The First Amended PCR Application, at ¶¶ 10(c)&11(c)(2) alleges trial counsel failed

> to object to the prosecution and prosecution witnesses improperly vouching for Jason Colon, who was the co-defendant and material witness for the state. *E.g. State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566, (2018); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002); *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989); *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012).

Although the order of dismissal, at 23, contains a section captioned "Solicitor's closing argument and vouching," and recites the allegation trial counsel "fail[ed] to object to the prosecution and prosecution witness improperly vouching for Jason Colon, who was the co-defendant and material witness for the State," the order of dismissal never makes any findings of fact or conclusions of law regarding this claim. The failure to make findings of fact on this claim

violates S.C. Code Ann. §17-27-80 and *Fishburne*. This Court, accordingly, should make findings of fact and conclusions of law on this issue.

F. Juror Deliberations.

The First Amended PCR Application, at ¶¶ 10(d)&11(d), alleges the following five grounds of ineffective assistance of counsel regarding juror deliberations:

> (1) When the jurors sent a note (Court's Exhibit 4) stating, "We are not unanimous on any of the charges yet, how do you want us to proceed?," and the Solicitor agreed, "They are deadlocked," trial counsel failed object to the trial judge instructing the jurors to continue deliberating when that instruction did not instruct the jurors that "the verdict of the jury should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgment which was not concurred in by the majority." *Allen v. United States*, 164 U.S. 492, 501 (1896).
>
> (2) When the jurors sent a note (Court Exhibit 5) stating, "Still at a stalemate," trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.
>
> (3) When the jurors sent a note (Court's Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.
>
> (4) When the jurors sent a note (Court's Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," trial counsel failed to object to the trial judge's *Allen* charge that singled out the sole juror that was holding out for acquittal. *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001); *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999). *See also Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002).
>
> (5) When the jurors sent a note (Court's Exhibit 12) stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need refreshing," and the foreman of the jury informed the trial judge the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, trial counsel failed to move for the trial judge to declare a mistrial as mandated by S.C. Code. Ann. § 14-7-1330.

In addition to the cases listed in First Amended PCR Application, Mr. Macon requested this Court review *Brewster v. Hetzel*, 913 F.3d 1042 (2019) and *State v. Taylor*, 427 S.C. 208, 829 S.E.2d 723 (2019). Exhibit B. The order of dismissal, drafted by the Attorney General's Office does not even cite these cases.

The order of dismissal, at 25-26, denies the allegations contained in the First Amended PCR Application, at ¶¶ 10(d)&11(d)(1) by relying on trial counsel's belief that Mr. Cathcart did not agree with the trial judge that the jurors were deadlocked. This testimony and the finding of fact are not supported by the record. The order of dismissal also fails to consider trial counsel's testimony that she did not realize she could have requested an instruction from the trial judge. Thus, the decisions to not request the instruction was not a valid strategic decision. *Weik*, *Ingle* and *Freiburger, supra.* An *Allen* charge was appropriate at this juncture, and Mr. Macon established deficient performance and prejudice under *Strickland.*

The order of dismissal, at 26-28, denies the allegations contained in the First Amended PCR Application, at ¶¶ 10(d)&11(d)(2), because the requirements of S.C. Code § 14-7-1330 had not been met. This conclusion of law is error. The jurors' note stating, "Still at a stalemate," is clear evidence that the jurors sent their first questions when they were deadlocked, which is confirmed by the colloquy between the trial judge and Mr. Cathcart. The order of dismissal, at 27, reasons the jurors were "'still at a stalemate,' again does not indicate deadlock." Dictionary.com, however, defines "stalemate" as "any position or situation in which no action can be taken or progress made; deadlock." https://www.dictionary.com/browse/stalemate (last viewed July 16, 2021). Dictionary.com defines "deadlock" as "a state in which progress is impossible, as in a dispute, produced by the counteraction of opposing forces; standstill; stalemate." https://www.dictionary.com/browse/deadlock (last viewed July 16, 2021). At a

minimum, the trial judge should have provided an *Allen* charge at this point. Mr. Macon, accordingly, established deficient performance and prejudice under *Strickland.* Once again, this Court should consider trial counsel's testimony that she was not aware she could ask for this instruction.

The order of dismissal, at 28, denies the allegations contained in the First Amended PCR Application, at ¶¶ 10(d)&11(d)(3), because "the requirements of section 14-7-1330 had not been met," and "this note was the first indication of deadlock from the jury which properly triggered an *Allen* charge." As seen above, the order of dismissal's purported distinction between "stalemate" and "deadlock" is not supported by the plain meaning of those words. A mistrial should have been declared at this point. Mr. Macon, accordingly, established deficient performance and prejudice under *Strickland.*

The order of dismissal, at 28-30, denies the allegations contained in the First Amended PCR Application, at ¶¶ 10(d)&11(d)(4), because the trial judge's *Allen* charge "comports with language approved by the South Carolina Supreme Court." The order of dismissal, drafted by the Attorney General's Office, did not address whether the instruction "singled out the sole juror that was holding out for acquittal." The order of dismissal could not have reached this conclusion of law if it had considered *Brewster, supra.* Court's Exhibit 8 was the fourth time the jurors announced they were deadlocked. Even under the order of dismissal's interpretation, Court's Exhibit 8 was the second time the jurors announced they were deadlocked. A mistrial should have been declared at this point. Mr. Macon, accordingly, established deficient performance and prejudice under *Strickland.*

The order of dismissal, at 30-31, denies the allegations contained in the First Amended PCR Application, at ¶¶ 10(d)&11(d)(4), because the jurors "consented to continue deliberations."

This conclusion of law is not supported by the record which unequivocally indicates some of the jurors wanted get out of the jury room "forever." Not only did the trial judge not question the jurors who wanted to get out of jury room "forever," these jurors were not even present in the courtroom when the trial judge and the foreperson discussed continued deliberations. Once again, the order of dismissal could not have reached this conclusion of law if it had considered *Brewster, supra.* The order of dismissal concludes "the conditions of section 14-7-1330 had not been met." This conclusion is an error of law. Court's Exhibit 12 is the fifth time the jurors announced they were at a deadlock. A mistrial should have been declared at this point. Mr. Macon, accordingly. established deficient performance and prejudice under *Strickland.*

In a cursory manner, the order of dismissal, at 31, denies the allegations contained in the First Amended PCR Application, at ¶¶ 10(d)&11(d)(4), because trial counsel purportedly made a strategic decision. The order of dismissal overlooks the requirement that a purported strategi decision has to be valid. *Ingle* and *Freiburger, supra.* As seen, trial counsel testified to a lack of familiarity with *Allen* charge law. Everyone in the courtroom was aware the jurors were splint 11-1. Mr. Macon testified they were aware the split was 11-1 to convict. At this point, Mr. Cathcart increased the amount of time the State would recommend during sentencing, following a guilty plea, based on what was known about the jurors' deliberations. A mistrial should have been declared at this point. Mr. Macon, accordingly, established deficient performance and prejudice under *Strickland.*

G. Cumulative Error.

The order of dismissal, at 31-34, denies relief based on the cumulative error doctrine for two reasons. First, the order concludes, "Because this Court has found Counsel committed no

errors, relief must be denied as to this issue." Once this Court reconsiders the matters raised in this motion, it is apparent trial counsel committed multiple errors.

Second, the order of dismissal, at, 32-34, drafted by the Attorney General's Office, devotes significant time arguing that "appellate courts in South Carolina have not recognized the cumulative-error doctrine as a basis for post-conviction relief." The order of dismissal overlooks caselaw that incorporates the cumulative error analysis into the *Strickland* analysis by requiring the prejudice must be "considered collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). The United States Supreme Court's opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered "the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally" in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. "[A]s a whole" implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." 466 U.S. at 694 (emphasis added).

IV. CONCLUSION.

For the foregoing reasons, this Court should withdraw the order of dismissal, grant post-conviction relief, and remand this case to the Court of General Sessions for a new trial.

IT IS SO MOVED.

(signature on next page)

Respectfully Submitted,

By s/*E. Charles Grose, Jr.*

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Arthur William Macon

July 16, 2021
Greenwood, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	2019-CP-40-5591
ARTHUR MACON, #304226 Applicant, vs	)	CERTIFICATE OF SERVICE BY MAIL
STATE OF SOUTH CAROLINA, Respondent,	)	

2021 JUL 30 PM 1:15

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

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

3. I have this day served a copy of the **Return to Applicant's Rule 59e Motion** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

E. Charles Grose, Jr.
Grose Law Firm
404 Main Street
Greenwood, SC 29646

DATED this 26th day of July, 2021.

Lindsey A. McCallister
Assistant Deputy Attorney General

Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Arthur W. Macon, #304226, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2019-CP-40-5591 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Arthur Macon (Applicant) on October 4, 2019, and amended through counsel on December 23, 2019. Respondent made its Return on June 15, 2020. An evidentiary hearing into the matter convened April 16, 2021, via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020.[1] E. Charles Grose, Jr., Esquire, represented Applicant. Assistant Deputy Attorney General Lindsey A. McCallister and Assistant Attorney General Michael Davidson represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Kristy Goldberg, and Deputy Assistant Solicitor Daniel Goldberg, also testified.[2] This Court had before it a copy of the Richland County Clerk of Court's records regarding the subject conviction,

---

[1] See S.C. Sup. Ct. Memorandum dated September 14, 2020 ("Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. *Consent of the parties or counsel is not required.* Please use WebEx, the conferencing platform supported by the Judicial Branch." (emphasis added)). Nonetheless, Applicant indicated his consent to the use of the WebEx platform.

[2] The assistant solicitor who prosecuted the case, Richard Cathcart, was also present for the hearing, but neither Applicant nor the State chose to call him as a witness.

Applicant's records from the South Carolina Department of Corrections, the application and amendment, Respondent's return, the trial transcript, and Applicant's appellate records. After a review of the record and all evidence presented, for the reasons set forth below, this Court finds Applicant has failed to meet his requisite burden of proof and denies relief.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections. Applicant was indicted at the January 2013 term of the Richland County Grand Jury for one count of armed robbery and four counts of kidnapping (2013-GS-40-0579). Applicant was represented by Kristy G. Goldberg (Counsel). Assistant Solicitors Richard C.R. Cathcart, Sr., and Jeremiah J. Shellenberg, Jr., prosecuted the case.

Applicant's case proceeded to a jury trial September 29 through October 3, 2014, before the Honorable DeAndrea G. Benjamin. The jury convicted Applicant as indicted on the armed robbery charge and acquitted him on all four counts of kidnapping. Judge Benjamin sentenced Applicant to a term of twenty-three years' imprisonment.

Applicant filed a timely notice of appeal from his conviction and sentence. Glen Walters, Sr., and R. Bentz Kirby of Glenn Walters & Associates, PA, represented Applicant on appeal. Applicant raised the following issues:

1. Did the Trial Court commit error when it allowed Ricky Woodberry to testify that Jason Colon was schizophrenic, had a lobotomy, was passive and had the mind of a thirteen (13) year old in order to bolster Colon's testimony against [Applicant]?

2. Did the Trial Court commit error when it allowed Ricky Woodberry to testify about Jason Colon's medical condition as the testimony was hearsay and Woodberry lacked the necessary special knowledge, skill, experience or training to testify on this issue?

The case was submitted on briefs to the Court of Appeals on December 12, 2017. Thereafter, on January 17, 2018, the Court of Appeals affirmed Applicant's conviction and sentence. State v. Macon, Op. No. 2018-UP-031 (S.C. Ct. App. filed Jan. 17, 2018). Applicant petitioned for rehearing on February 16, 2018. The Court of Appeals denied the petition for rehearing on March 22, 2018.

Thereafter, Applicant petitioned for a writ of certiorari to the South Carolina Supreme Court on May 1, 2018. The Supreme Court denied certiorari on October 18, 2018. State v. Macon, S.C. Sup. Ct. Order filed Oct. 18, 2018. The case was remitted to the circuit court on November 6, 2018.

Applicant timely commenced this PCR action on October 4, 2019.

SUMMARY OF TESTIMONY AT TRIAL

Applicant's charges stem from a bank robbery at a TD Bank in Richland County on August 30, 2012. Applicant's cousin, Jason Colon (Colon), actually performed the robbery, and absconded with $6000.[3] Applicant was also arrested in connection to the crime.

At trial, Diana Williams (Diana) testified that after noticing police cars surrounding the TD Bank parking lot, she saw a man (later identified as Colon) running from that parking lot through the woods towards the adjacent Hilton Garden Inn. Tr. p. 215. Thinking the man looked suspicious, Diana called 911 as she followed him in her car. Tr. p. 216. Once Colon reached the Hilton, Diana observed him conversing with another man (later identified as Applicant) who was wearing a

[3] Multiple witnesses from TD Bank testified and identified Colon as the robber. It was undisputed at trial that Applicant never entered the bank.

yellow shirt. Tr. p. 217. Applicant gestured towards the back of the parking lot "as if he was telling the [suspicious man] to go back that way." Tr. p. 217. Applicant then got into a black truck and drove away. Tr. p. 219.

As he backed out, he nearly struck Diana's vehicle, and she observed his face. Tr. pp. 2180-19. Diana remained on the phone with 911 during this time, relaying the details of what occurred and a description of the truck and its driver. Tr. p. 224. She was only able to give a partial plate number because the truck's tailgate was down. Tr. p. 219. However, based on her description of the truck and driver, officers eventually stopped Applicant. Tr. p. 227. Diana, who was still in her car, drove past the traffic stop and identified Applicant as the person she saw the Hilton parking lot. Tr. pp. 228, 261-63.

Colon was also detained in the area and arrested. Investigator Jason Williams (Williams) testified he interviewed Colon upon Colon's arrest. He explained Colon appeared distressed and explained the interview "took kind of a while because it seemed like he wasn't all the way there." Tr. p. 279. Williams noted, in his opinion, Colon was "a little mentally challenged," but he was eventually able to take Colon's statement, and Colon confessed to committing the robbery. Tr. p. 279. Williams also testified that he searched Applicant's truck after it was impounded, and he discovered a police scanner which was tuned to Richland County's frequency. Tr. p. 277. Specifically, the police scanner was tuned to broadcast transmissions in the TD Bank vicinity. Tr. p. 278.

The State then proffered Ricky Woodberry's testimony. Woodberry was Colon's father. Tr. p. 286. Counsel objected to Woodberry's testimony about how Colon sustained a childhood head injury as hearsay, arguing Woodberry was not present when Colon sustained the injury. Tr.

p. 292. Counsel objected to the remainder of Woodberry's testimony, that Colon was "easily led" and "passive," as irrelevant and as improper character evidence offered to bolster Colon's credibility. Tr. p. 293. After the proffer, the trial court ruled Woodberry could testify about Colon's head injury and passive demeanor, but it precluded testimony that Colon was "easily led" or usually went along with whatever others wanted to do. Tr. p. 299.

Woodberry then testified that Colon was shot in the head by a stray bullet when they lived in Brooklyn, New York. Tr. p. 301. Counsel renewed her previous objection, which the trial court overruled. Tr. p. 301. Woodberry went on to explain the bullet entered Colon's temple and penetrated his frontal lobe. Tr. p. 301. Woodberry testified Colon was subsequently diagnosed with schizophrenia. Tr. p. 302. Woodberry also testified that Colon began talking to himself and became passive after the head injury. Tr. p. 302. Finally, Woodberry stated that Colon's condition improved with medication, but Colon retained the cognitive ability of a thirteen-year-old. Tr. p. 302.

Colon testified at trial and explained that he went to the TD Bank intending to cash his unemployment check. Tr. pp. 305, 313. However, Applicant gave him a toy gun and told him to go in the bank and demand money. Tr. p. 306. Colon recalled that Applicant had colored in part of the toy gun to make it look real. Tr. p. 306. Colon testified that after the robbery, he was supposed to meet Applicant in front of the hotel and get into the bed of Applicant's truck. Tr. p. 307. Colon's testimony waivered as to when Applicant gave him the gun and instructed him to rob the bank. On cross-examination, Colon indicated that he and Applicant planned the robbery months prior, and that was when Applicant gave him the gun. Tr. p. 314. However, on redirect, Colon suggested Applicant gave him the gun the day of the robbery. Tr. p. 315.

Investigator Kerry Johnson testified he interviewed Applicant after Applicant was arrested. Johnson explained that initially, Applicant denied anyone was with him while he was driving around the day of the robbery. Tr. p. 325. However, after Johnson confronted Applicant that Colon had identified him as his cousin who dropped him off outside the bank, Applicant modified his statement. Applicant claimed Colon was with him earlier in the day because he wanted a ride to "his homeboy's house," but Applicant instead dropped Colon off at the bus stop near the TD Bank. Tr. p. 327. Applicant denied any knowledge or involvement in the robbery.

ALLEGATIONS

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

a. Conflict of interest:
    1. Counsel had a conflict of interest and failed to disclose to Applicant that her husband is a Deputy Solicitor for the Fifth Circuit Solicitor's Office; and
    2. Counsel had a conflict of interest as a result of the flat fee contract agreement with the Commission on Indigent Defense that provided an incentive for Counsel to not seek a mistrial when the jury was deadlocked.
b. Pretrial:
    1. Failing to investigate, develop, and present evidence to establish that Applicant is not guilty of armed robbery; and
    2. Failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on January 16, 2013, and the face of the indictment states the grand jurors returned a "true bill" on July 16, 2014.
c. During trial:
    1. Failing to object to the prosecutor's closing argument calling Applicant "a liar" at (Tr.368, ln. 9.); and
    2. Failing to object to the prosecution and prosecution witness improperly vouching for Jason Colon, who was the co-defendant and material witness for the State.
d. During jury deliberations:

1. When the jurors sent a note (Court's Exhibit 4) stating, "We are not unanimous on any of the charges yet, how do you want us to proceed?" and the Solicitor agreed, "They are deadlocked," Counsel failed to object to the trial court instructing the jurors to continue deliberating when that instruction did not instruct the jurors that "the verdict should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgement which was not concurred in by the majority," Allen v. United States, 164 U.S. 492, 501 (1896);
2. When the jurors sent a note (Court Exhibit 5) stating, "Still at a stalemate," trial counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330;
3. When the jurors sent a note (Court Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330;
4. When the jurors sent a note (Court Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to object to the trial court's Allen charge that singled out the sole juror that was holding out for acquittal. Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001); State v. Hughes, 336 S.C. 525, 521 S.E.2d 500(1999);
5. When the jurors sent a note (Court's Exhibit 12) stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need refreshing," and the foreman of the jury informed the trial court the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330.

e. Cumulative error:
   1. The cumulative effect of Counsel's errors, as set forth in 11(a)–(d), entitles Applicant to a new trial. Williams v. Taylor, 529 U.S. 362 (2000); Kyles v. Whitley, 514 U.S. 419 (1995).

At the evidentiary hearing, Applicant proceeded on the allegations in his amended application, which encompasses and expands upon the allegations in his original application, with the exception of the claim of failure to investigate (numbered 11(b)(1) in the amended application).

To the extent the allegations in Applicant's original application can be construed as separate grounds for relief, this Court finds Applicant waived and abandoned those grounds, and they are dismissed with prejudiced.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Counsel testified she graduated from law school in 2005, after which she worked at the Richland County Public Defender's Office for three years before going into private practice. Counsel stated in her private practice she handled mostly criminal defense, PCR, and family court cases. Counsel has been working at the firm of Wilson, Jones, Carter, & Baxley since 2019.

Counsel stated she accepted the representation of Applicant from another attorney, Prentiss Shealey, who had been appointed to the case but had a conflict. Counsel explained she had recently opened her solo practice at the time, so when Shealey emailed to ask if she wanted the case, she accepted and got a consent order assuming the representation. Counsel testified before agreeing to take the case, she emailed her husband, Dan Goldberg, who worked at the Richland County Solicitor's Office, to ensure he had not had any involvement in the case because she would not have agreed to represent Applicant if he had.[4] Counsel testified Goldberg called her back to confirm he had not had any involvement up to that point and would not have any going forward. Counsel stated she did not speak to Applicant before accepting the appointment and obtaining a signed order. Counsel further testified she did not have any written documentation explaining to Applicant that her husband was a solicitor and waiving the conflict.

---

[4] Emails between Shealey, Counsel, and Goldberg were introduced as Applicant's Exhibit 14. The signed appointment order was introduced as Applicant's Exhibit 10.

Counsel stated although she did not have anything in writing from Applicant regarding the conflict, it was her practice at the time to tell clients that she was married to a solicitor, but they should not expect any favors. Counsel also testified if Applicant had told her he had a problem, she would have conflicted herself out of the representation and passed it on to someone else. Counsel testified, at that time, her case files were stored in her law office, which was separate from her residence. Counsel stated Applicant's file was kept at her office, and her husband did not have access to it. Counsel further testified she did not discuss the specifics of Applicant's case with Goldberg because he was not involved, and she had no reason to do so. She stated he would have been aware when it was coming up for trial, but she did not have any substantive discussions about the case, negotiations, or any defenses or strategy. Counsel testified the case was assigned to Richard Cathcart, which is who she dealt with on the case, and then J.J. Shellenberg became involved towards the end.

Counsel reviewed the payment voucher[5] she submitted to Indigent Defense and testified she bill $3604.00 for her work on the case. Counsel explained that although she did not have a contract with Indigent Defense at the time, they still paid her for her work on the case at an hourly rate. Counsel testified she did not receive a flat fee, and if the case had ended in a mistrial, she would have sought and received permission to bill above the statutory maximum and would have been paid again for her work the second time. Counsel stated payment was not a consideration in her decision as to whether to move for a mistrial.

---

[5] Applicant's Exhibit 11.

Counsel testified Applicant was charged with armed robbery and four counts of kidnapping. She explained the State's theory of the case was that Applicant had convinced his cousin to rob a bank and supplied the cousin with a fake, then dropped him off near the bank and waited in the area to act as a getaway driver. Counsel further explained Applicant denied the allegations insofar as being involved in any planning or knowing his cousin would rob the bank when he dropped the cousin off, although he admitted to being in the area with the cousin around the time of the robbery. Counsel stated the State had circumstantial evidence tying him to the robbery, but the cousin, Jason Colon, was the witness who tied Applicant directly to the crime.

Counsel testified Colon's father, Ricky Woodberry, also testified at trial and described Colon's traumatic brain injury and the way Colon's behavior and personality changed as a result. Counsel confirmed Woodberry testified Colon essentially was lobotomized by a bullet and now functions with the capacity of a thirteen-year-old even though he was twenty-eight at the time of the robbery. Counsel testified she objected to Woodberry's testimony in its entirety, arguing it was "backdoor character evidence," and she succeeded in keeping parts of his testimony out. Counsel stated she renewed her objection in front of the jury, and the issue was preserved and raised on appeal. Counsel acknowledged the solicitor referred back to Woodberry's testimony in his closing argument, calling Applicant's actions "despicable" and asserting Applicant had lied in his statements to police. Counsel stated she did not object to those arguments, and she was not aware of any case law saying it is improper for a solicitor to call a defendant a liar.

Counsel further testified her general strategy in trying cases is for the jury to like her and think she is more reasonable than the State. Counsel stated she felt she could, and did, offer logical explanations for the discrepancies in Applicant's statement and that it was to her benefit to have

the State take an extreme position because it makes them look like they are exaggerating. Counsel testified the solicitor was commenting on his version of the facts and evidence already presented to the jury. Counsel further explained she did not feel a motion for a mistrial based solely on the solicitor's use of the word liar at that point would have been successful, and her strategy was to argue her view of why Applicant's statement was logical and not a lie.

Counsel testified that the case went to the jury on Wednesday morning, and the jury deliberated all day Wednesday and Thursday and into the early afternoon on Friday. Counsel stated she was aware of the contents of the note[6] the jury sent out around 1:00pm on Wednesday asking questions and requesting playback of some testimony, but the judges do not always show the attorneys the note itself. Counsel testified the judge called all of the jurors back into the courtroom, answered their questions as much as possible, and offered to play back any testimony the jury wanted to hear, as well as provided the requested instruction on reasonable doubt. Counsel stated the jury then sent in another note listing the testimony they wanted to hear,[7] which was played in the courtroom. Counsel testified, at that time, the parties all agreed the juror was still deliberating and looking for clarification on the factual issues in the case.

Counsel testified the jurors sent another out to the judge at approximately 3:00pm[8] on Wednesday afternoon stating they were not unanimous yet and asking what they should do. Counsel explained the exchange between the judge and the solicitor in the record as an agreement that an Allen charge was not appropriate yet, and the judge's only response would be to tell them

---

[6] Applicant's Exhibit 1.
[7] Applicant's Exhibit 2.
[8] Applicant's Exhibit 3.

to keep deliberating. Counsel stated the solicitor can be sarcastic or tongue-in-cheek, but he agreed with the judge that the jury was not indicating deadlock at that point, as did she. Counsel stated the jury then re-entered the courtroom, and the judge gave instructions directing them to keep deliberating, but she did not use the Allen charge language at that time. Counsel explained the jury did not say they were completely deadlocked, just that they had not reached a decision yet, so the judge simply told them to keep working on it, and she agreed that was an appropriate response.

Counsel explained the jury returned another note at 6:10pm[9] on Wednesday evening saying they were at a "stalemate," progress was slow, and it might help to return in the morning. Counsel also pointed out the note also requested clarification of the hand of one, hand of all concept, which, in her mind, indicated the jury wanted to keep deliberating, but just needed a break. Counsel stated the jury returned to the courtroom, and the judge first re-charged the hand of one, hand of all instruction as they requested, then addressed the second part of the note. Counsel testified the note made clear the majority of the jurors wanted to return in the morning, but she did not know what the rest of the jurors wanted to do. Counsel testified she did not think she could ask those kinds of questions of the jury and acknowledged it was possible the minority jurors did not want to deliberate any more at all.

Counsel testified on Thursday morning, the judge reviewed what happened the night before and provided the jury with a written copy of the hand of one, hand of all instructions and sent them back to continue deliberating. Counsel explained that around 10:50am, the jury sent out another

[9] Applicant's Exhibit 4.

note[10] requesting to hear the testimony of four witnesses. Counsel stated because there was a trial taking place in the courtroom next door, the attorneys and the judge decided to send the court reporter into the jury room to play the testimony, with instructions not to speak to the jury about the case or their deliberations.

At 1:02 pm on Thursday afternoon, Counsel testified, the jury sent out another note,[11] this time stating they were 11-1 and the one person was not going to change his or her mind. Counsel explained the parties and the judge did not know which way the jury was leaning, but they were aware of the count, and everyone agreed an Allen charge was appropriate at that time. Counsel testified she did not object to the charge because she felt there was nothing improper in the instruction given, and it did not single out the holdout juror.

Counsel testified that shortly after the judge gave the Allen charge, the jury requested[12] to be charged on reasonable doubt for a second time and then to hear Colon's testimony[13] again. Counsel explained, in her mind, this indicated the jury was continuing to work to reach a verdict, and she did not request a mistrial at that time because she felt the jury was still deliberating.

Counsel explained the next note[14] came around 6:00pm, saying fatigue had set in, so the parties agreed to bring in the jury foreman to clarify what the note was asking for or trying to convey. Counsel testified this was the first time since the jury indicated it was deadlocked that the foreman had been summoned without the rest of the jurors present. Counsel stated the foreman

---

[10] Applicant's Exhibit 5.
[11] Applicant's Exhibit 6.
[12] Applicant's Exhibit 7.
[13] Applicant's Exhibit 8.
[14] Applicant's Exhibit 9.

informed the judge that the majority of jurors wanted to be out of the room for the time being, but two or three wanted to be out "forever." Counsel agreed the foreman then spoke to the jury and reported back to the court that the majority had agreed to continue deliberations the next day, but he did not report what the minority wanted to do. Counsel testified the judge then summoned the full jury and informed them of what the foreman reported to her. Counsel stated she did not call the judge's attention to the fact that some jurors apparently did not want to continue deliberating because the judge already knew that, and she did not move for a mistrial.

Counsel testified that on Friday, the jury did not come into the courtroom before resuming deliberations, and the judge summoned the foreman alone around 12:15pm to discuss ordering lunch, if needed. Counsel agreed the foreman reported the jury was close to a verdict, and the judge instructed him to let her know within twenty minutes if they needed to order lunch; shortly thereafter, the jury returned with a verdict. Counsel testified Applicant was acquitted of the four kidnapping charges, but convicted of the armed robbery.

Counsel stated she did not move for a mistrial on the basis of a hung jury at any time during deliberations. Counsel explained that she was thinking about the possibility of a mistrial during the course of deliberations, but she felt it was a good sign for Applicant that the jury was actively engaged and clearly looking closely at the issues. Counsel stated ultimately the jury deliberated longer than the trial took to complete and clearly had questions about the evidence and the issues, which she felt was favorable for Applicant. Counsel also testified she felt it would be better for Applicant if the judge declared the mistrial due to deadlock, versus her arguing for one, because that way the solicitor would know he had not proven his case to the jury. Counsel stated she felt

that circumstance would result in a better offer or negotiating position for her client, and at the time, she felt the jury's decision or lack thereof would ultimately go Applicant's way.

Counsel further testified Applicant was present with her for much of the time the jury deliberated, and they discussed several issues. She stated if he had taken a strong position on arguing for a mistrial, she would have done it. Counsel reviewed the transcript and noted she asked for a few minutes to speak with Applicant before the judge gave the Allen charge. Counsel explained that although the record reflects the solicitor stated he gave Applicant "an option," Counsel did not recall a plea offer being extended at that point, although she would not dispute Applicant's recollection. Counsel further testified, based on her memory and what the transcript says, their conversation at that time was about the Allen charge. She also testified that if she had known the breakdown of the jury was 11-1 against Applicant, it would have changed her advice about seeking a mistrial, and she would have advised him to do so at the time.

Regarding the indictment, Counsel testified the indictment was amended during the course of the case, and it appears there was a typo on the amended version[15] because the solicitor did not change the date of the grand jury from January to July. Counsel stated she did not investigate the issue and did not recall if she noticed it at the time. Counsel testified nothing in the amendment was new information; it did not change the charges, the factual allegations, or the date and time of the alleged incident. Counsel explained the amendment merely added the names of the kidnapping

[15] The original indictment was entered into evidence as Applicant's Exhibit 12; the amended indictment is Applicant's Exhibit 13.

victims for each count, which was information she already had. Counsel testified the amended indictment did not change her preparation of the case in any way.

Applicant testified he was not aware he had ever been appointed another lawyer prior to Counsel. Applicant stated he was not aware Counsel was married to a solicitor, and he and Counsel never had any conversations about that, nor did Counsel ever ask him to sign a waiver. Applicant testified he was shocked when he read the emails because, in his opinion, they indicated some concern with Counsel representing him. Applicant further testified he did not find out Counsel was married to a solicitor until Goldberg came into the courtroom on a different matter during deliberations, and Counsel told Applicant he was her husband. Applicant stated if he had known Counsel was married to a solicitor, he would have asked for someone else to represent him.

Applicant also testified he and Counsel never discussed whether she should ask the judge for mistrial, and he was not aware at the time that was something he could do. He explained he learned about moving for a mistrial while studying his case, and if he had known, he would have wanted Counsel to make the motion. Applicant further stated he and Counsel did not discuss the Allen charge, but rather discussed a plea offer from the State. Applicant stated the offer was worse than the original offer, and he did not want to accept it. Applicant further stated the offer was worse because the State knew the jury was 11-1, and Counsel informed him the vote was not in their favor because a bailiff had overheard the jury's count.[16]

---

[16] Applicant testified regarding the discussion before the Allen charge over the State's objection, as both the State and Applicant's counsel had finished questioning, and Applicant asked address the court on his own.

Goldberg testified he has been practicing law for sixteen years and has done criminal work exclusively. He testified he started at the solicitor's office in 2003 as an intern and became an assistant solicitor in 2005; he was the deputy solicitor in 2013. Goldberg explained, as a deputy, he carried his own caseload and also performed some administrative and supervisory duties as assigned. Goldberg testified the office hierarchy ran from the elected solicitor to three deputies, then down to six team leaders who had between three and five attorneys on their teams. Goldberg explained the cases were divided up and assigned to the teams roughly by location within the county. He testified he generally received a stack of new cases every few days to review, and then he would assign them either to himself, to a specific solicitor, or give to a team leader to assign. Goldberg testified if an attorney had a question or problem in a case, he or she would first go to the team leader, and then up the chain if needed.

Goldberg testified he was married to Counsel at the time of Applicant's case, and his office had prosecuted cases where she represented the defendant in the past. He explained their usual process was for Counsel to inform him of the defendant's name, and he would review whether he had any involvement in the prosecution of that particular case. Goldberg stated if he had, Counsel would not accept the case, or, if she had already been appointed, she would substitute someone else, and if neither of those things could be done, he would cease his involvement, but he did not remember that ever happening.

Goldberg testified at the time he assigned the case to Cathcart, Counsel was not yet involved. Goldberg stated eventually Shellenberg was brought on to assist Cathcart. Goldberg explained Cathcart was the team leader for this case, and, at the time, he had almost twenty years of experience as a prosecutor. Goldberg testified he could not recall whether he specifically told

Cathcart and Shellenberg not to come to him about this particular case, but it was his usual practice to do so. He also testified the other attorneys in the office were generally aware of his relationship with Counsel and knew not to come to him about cases which involved Counsel. Goldberg explained the office did not have a written policy about spousal conflicts; they just followed the standard rules of professional conduct. He stated occasionally new solicitors might bring him a case that involved Counsel, but he would stop them and ask them to go speak to someone else, and he testified that did not happen in this case.

Goldberg testified he did not speak to Cathcart or Shellenberg about this case, nor did he talk to Counsel about any substantive issue. He stated any conversations they had would have been only about logistics and scheduling close to the time of trial. Goldberg testified he was not involved in this case in any way, other than possibly making the initial assignment to Cathcart prior to Counsel's involvement. Goldberg testified he did not have access to Counsel's file, and the State's file would have been kept by the solicitor working on the case in his or her own office. Goldberg testified the offices were not locked, and the electronic system the office has does not have the capability to keep individual people out of a case's file, so anyone with access to the system can see any case. Goldberg stated at the time of Applicant's case, it was standard practice to keep a physical file, and not all case files were uploaded to the system, so he was not sure whether Applicant's case was on it at the time or not.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony and evidence presented at the evidentiary hearing, observed the witnesses and evaluated their credibility, considered the arguments of counsel, and weighed these factors accordingly in its discussion below. Further, this Court has reviewed the

Clerk of Court records regarding the subject conviction, the appellate records, and Applicant's original and amended applications, as well as the trial transcript. This Court finds the combined record from the criminal case and the testimony and evidence presented the evidentiary hearing establishes Applicant received effective assistance of counsel, and relief should be denied and this application dismissed with prejudiced. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

In a post-conviction relief action, the 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. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. 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 plea counsel. Id. at 117, 386 S.E.2d at 625. First, the 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 (1984)). 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." Id. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

This Court finds Applicant has failed to prove his trial counsel's performance was deficient in any way, nor was Applicant prejudiced by her performance. Counsel met with Applicant and reviewed with him the evidence and discovery in the case, as well as Applicant's version of the facts and possible defenses. This Court finds Applicant ultimately chose to proceed to trial and contest the State's versions of events. This Court finds Counsel ably prepared and presented a defense centered around whether Applicant helped plan the robbery or merely dropped his cousin off not knowing what would happen inside the bank. Moreover, the Court notes Counsel's performance resulted in Applicant being acquitted of four counts of kidnapping, after lengthy jury deliberations.

1. Conflict of interest

Applicant alleges Counsel was constitutionally ineffective because she had a conflict of interest in two ways – first because she "failed to disclose to Applicant that her husband is a Deputy Solicitor for the Fifth Circuit Solicitor's Office," and due to "the flat fee contract agreement with the Commission on Indigent Defense that provided an incentive for Counsel to not seek a mistrial

when the jury was deadlocked." This Court disagrees and finds Counsel did not have a conflict of interest as a result of either situation.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). The South Carolina Supreme Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel. Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005).

In this situation, Applicant has failed to prove a conflict exists because of Counsel's relationship with Goldberg, who is a solicitor. Both Counsel and Goldberg testified Goldberg had no involvement in the prosecution of the case, he did not have access to Counsel's file, and they did not have any substantive conversations about the case. This Court finds this testimony credible and further finds Applicant has offered no evidence to establish Counsel actively represented an adverse interest. Goldberg did not personally represent the State in this prosecution and was not involved in the case except, possibly, to review the file and assign it to correct team. See SCRPC Rule 1.8(k) ("A lawyer related to another lawyer as parent, child, sibling or spouse shall not *personally* represent a client in a representation directly adverse to a person whom the lawyer

knows is represented by the other lawyer unless the client gives informed consent.") (emphasis added).

Additionally, Counsel credibly testified she did not receive a flat fee for this case, but rather was paid hourly. The Court further finds credible Counsel's explanation that the issue of payment did not factor into her decision regarding whether to move for a mistrial, and if it had been necessary to try the case again, she could have sought to bill additional hours.

Therefore, this Court finds Applicant has failed to prove Counsel had a conflict of interest on either ground. Relief is denied as to both allegations, and they are dismissed with prejudice.

2. Indictment

Applicant also alleges Counsel was constitutionally ineffective for "failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on January 16, 2013, and the face of the indictment states the grand jurors returned a 'true bill' on July 16, 2014." This Court disagrees and finds Counsel was in no way deficient, nor was Applicant prejudiced, by Counsel's failure to challenge the indictment on this ground.

The indictment is a notice document. S.C. Code § 17-19-20. "The indictment must state the offense with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer, and whether he may plead an acquittal or conviction thereon." State v. Guthrie, 352 S.C. 103, 108, 572 S.E.2d 309, 311-12 (Ct. App. 2002). Further, the "test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the

offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." Id. Additionally, the South Carolina Code states in pertinent part:

> If (a) there be any defect in form in any indictments or (b) on the trial of any case there shall appear to be any variance between the allegations of the indictment and the evidence offered in proof thereof, the court before which the trial shall be had may amend the indictment (according to the proof, if the amendment be because of a variance) if such amendment does not change the nature of the offense charged.

S.C. Code Ann. section 17–19–100 (2015).

Applying the above-recited statutory and case law to the facts of Applicant's case, this Court finds Applicant has failed to prove he was prejudiced by any deficiency arising from Counsel's failure to move to quash the indictment. This Court has reviewed both the original and amended indictments entered into evidence and finds the amended indictment contained a scrivener's error as to the date the grand jury met to consider it, which did not render the indictment, or the trial, invalid. The amended indictment cited to the correct statute such that Applicant knew the nature of the offense he was required to defend, and Counsel credibly testified the only change was to add the names of the individual victims, which Counsel already knew. Moreover, Counsel testified this change did not affect her case strategy or trial preparation in any way.

Accordingly, this Court finds Applicant failed to establish either deficiency or prejudice as to this issue. Relief is therefore denied, and the allegation is dismissed with prejudice.

3. Solicitor's closing argument and vouching

Applicant next alleges Counsel was constitutionally ineffective for "failing to object to the prosecutor's closing argument calling Applicant 'a liar'" and "failing to object to the prosecution

and prosecution witness improperly vouching for Jason Colon, who was the co-defendant and material witness for the State." This Court disagrees and denies relief as to this issue.

This Court finds Counsel was not deficient, nor was Applicant prejudiced, by Counsel's failure to object to the solicitor's closing argument calling Applicant a liar or characterizing his conduct as "despicable." Moreover, although Counsel admitted she was not aware of any case law to support an objection, she explained that an objection would have been contrary to her overall trial strategy. Counsel stated she felt she had a logical explanation for the inconsistencies in Applicant's statement, and she could make the State appear to be exaggerating and taking an extreme position, which she felt was helpful to Applicant.

It is well settled that "the solicitor must confine his arguments to the evidence in the record and its reasonable inferences." State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009).

Additionally, Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for 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, 466 U.S.

at 688-689. "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 counsel's performance must be highly deferential. Id. at 689. 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). Examples of such decisions include what evidence should be introduced, whether to object to the admission of evidence, and which motions to file. Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014). 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).

Finally, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To 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. In the context of improper closing arguments, "[a] new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Tucker, 324 S.C. at 169, 478 S.E.2d at 267-68 (internal citations omitted). When making this determination, courts "review the 'alleged impropriety of argument in the context of the entire record.'" State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) (quoting Brown v. State, 383 S.C. 506 (2009)).

Here, the argument Applicant complains about was limited to one instance in the record, and, as Counsel testified, the issue had already been raised to the jury through testimony and evidence presented during the trial. This Court therefore finds, even if Counsel had objected, the outcome of the trial was unlikely to have been different, as it is unlikely the trial court would have granted a mistrial, and Counsel was able to effectively explain the inconsistencies through her own argument.

Accordingly, because the Court finds neither deficiency in Counsel's performance nor any prejudice to Applicant, relief is denied, and these allegations are denied and dismissed with prejudice.

4. Jury deliberations and failure to move for a mistrial

Applicant alleges Counsel was constitutionally ineffective in her handling of the jury deliberations and failure to move for a mistrial at various times. This Court disagrees and denies relief as to this issue.

A. Failure to object to judge's instructions to jury after first note stating, "We are not unanimous on any of the charges yet, how do you want us to proceed?"

Applicant argues Counsel "failed to object to the trial court instructing the jurors to continue deliberating when that instruction did not instruct the jurors that 'the verdict should represent the opinion of each individual juror,' not 'a mere acquiescence in the conclusion of his fellow[]' jurors, and the jurors in the majority should listen to the minority juror and consider the 'correctness of a judgement which was not concurred in by the majority,'" in accordance with Allen v. United States, 164 U.S. 492, 501 (1896). This Court disagrees.

First, Applicant argues the solicitor agreed with the trial judge that the jury was indicating deadlock. This Court has listened to Counsel's explanation and reviewed the relevant portion of the record and finds the opposite is true – the solicitor and the judge were in agreement that the jury was *not* deadlocked and Allen charge was not yet appropriate. Counsel credibly testified this was her reading of the situation as well. As the jury's note specifically stated, they were informing the court they had not reached a unanimous verdict *yet*, and simultaneously requested to rehear testimony of one of the State's main witnesses, Diana Williams, both of which indicate a continued willingness to deliberate. Accordingly, this Court finds the instruction given by the trial court to be appropriate and, as it was not an Allen charge, Counsel had no basis to object on the ground that the instruction did not comport with Allen's requirements.

Therefore, because Counsel was not deficient, nor was Applicant prejudiced, the Court denies relief as to this issue and dismisses the allegation with prejudice.

B. When the jurors sent a note stating, "Still at a stalemate," trial counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330

Applicant contends Counsel was constitutionally ineffective for failing to move for a mistrial pursuant to section 14-7-1330 of the South Carolina Code when the jury returned, after the court's instruction to keep deliberating and rehearing the requested testimony, with a note informing the court they were "still at a stalemate." After reviewing the text of the note, the relevant portions of the record, and listening to Counsel's credible testimony on this issue, this Court finds Counsel was not deficient in not moving for a mistrial because the requirements of section 14-7-1330 had not been met.

Section 14-7-1330 states:

> When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.

South Carolina case law interprets this section mean the jury must return twice into court and indicate it is deadlocked. See Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) ("Accordingly, when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments.").

As discussed above, this Court finds the jury's first note, stating it was not unanimous yet and requesting to rehear testimony, was not an indication of deadlock. Similarly, this Court finds the second note, informing the court the jury was "still at a stalemate," again does not indicate deadlock. The note goes on to request to be recharged on the hand of one, hand of all principle and states that the majority of the jurors feel progress could be made if they came back the next morning. As the record indicates, the judge assembled the jury and gave the requested instruction, then addressed the second part of the note regarding the "stalemate." When the judge informed the jury they would need to return the next day to continue deliberating, none of the jurors voiced disagreement or indicated that further deliberation would not be fruitful.

Thus, this Court finds, even if the note could be interpreted as indicative of deadlock, the jury impliedly gave consent to continue deliberating. Accordingly, because the requirements of section 14-7-1330 had not been met, Counsel cannot have been deficient for failing to move for a

mistrial on that basis, and relief should be denied as to this allegation, and it is dismissed with prejudice.

C. When the jurors sent a note stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330

Applicant again contends Counsel was constitutionally ineffective for failing to move for a mistrial pursuant to section 14-7-1330 of the South Carolina Code when, the next day, the jury returned with a note stating they were divided 11-1 and the holdout had indicated he or she would not be persuaded to change his or her vote. However, as discussed above, this Court finds the requirements of section 14-7-1330 had not been met. The Court finds, based on its reading of the record and Counsel's credible testimony, this note was the first indication of deadlock from the jury, which properly triggered an Allen charge from the trial court.

Because this only the first indication of deadlock, not the second or more as required by the statute, this Court finds Counsel was not deficient for failing to move for a mistrial on that basis at this point. Therefore, the Court denies relief on this ground and dismisses it with prejudice.

D. When the jurors sent a note stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to object to the trial court's Allen charge that singled out the sole juror that was holding out for acquittal

Applicant contends Counsel was constitutionally ineffective for failing to object to the trial court's allegedly improper Allen charge given after the jury indicated the 11-1 split that it was unable to resolve. This Court has reviewed the relevant charge and finds it comports with language approved by the South Carolina Supreme Court in other cases, and Counsel had no meritorious

basis to object to the charge. Therefore, because Counsel was not deficient, the Court denies relief as to this issue.

The Court finds the situation in Applicant's case analogous to State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (2010). In Williams, the Supreme Court approved both the giving of the charge and the language used, which was nearly identical to the language used by the trial court in Applicant's case.[17] Id. at 512-15, 690 S.E.2d at 66-68. The Court stated:

> In South Carolina state courts, an Allen charge cannot be directed to the minority voters on the jury panel. Instead, an Allen charge should be even-handed, directing both the majority and the minority to consider the other's views. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict.

Id. at 66, 690 S.E.2d at 512 (quoting Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002)). In Williams, the judge charged the jury to "consult with one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way. Discuss your differences with open minds." Id. at 67, 690 S.E.2d at 514. The trial judge in Applicant's case used this exact language in her charge. Tr. pp. 439-440. Further, the judge in Williams, and the trial judge in this case, charged:

> Every one of you has the right to your own opinion, the verdict you agree to must be your own verdict, a result of your own convictions. You should not give up your firmly held beliefs merely to be in agreement with your fellow jurors. The minority should consider the majority's opinion and the majority should consider the minority's opinion. You should carefully consider and respect the opinions of each other and evaluate your position for reasonableness, correctness, and partiality. You

---

[17] Williams also addressed the issue of the jury disclosing the vote division. There, as in Applicant's case, the Court noted because the jury voluntarily disclosed the division, without any inquiry from the judge, and the judge promptly informed the parties and stated its intention to give an Allen charge, the trial judge committed no error. Id. at 509-510, 690 S.E.2d at 65.

> must lay aside all outside matters and reexamine the question before you base[d][on] the law and the evidence in this case.

Id. at 67-68, 690 S.E.2d at 514; Tr. p. 440. Although the jury in Applicant's case was charged that the verdict must be unanimous, that portion was immediately followed by the reminder that each juror had a right to his or her own opinion, which should not be given up solely for the purpose of coming to an agreement with the others. Tr. p. 440.

This Court finds the trial judge's Allen charge was a correct statement of the law and was not coercive. Accordingly, Counsel had no basis to object to the charge, and she was not deficient. This Court therefore denies relief as to this issue and finds this allegation should be dismissed with prejudice.

E. When the jurors sent a note stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need refreshing," and the foreman of the jury informed the trial court the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330

Finally, Applicant argues Counsel was constitutionally ineffective for failing to move for a mistrial when, after the trial judge gave the Allen charge, the jury returned with another note stating they were "still in the same position" and "needed freshness" because "fatigue" had set in. The Court disagrees and finds Counsel was not deficient.

After the court received this note, the trial judge summoned the foreman to clarify what the jury meant by needing "freshness." The foreman informed the court that they were not sure how much longer they could continue to deliberate, but they were "at [the court's] mercy." Tr. p. 445. The foreman continued to explain the biggest issue was that they "just want to get out of that

room." Tr. p. 445. He then told the court that although two or three jurors wanted to be out of there "forever," the jury was "willing to do what we need to do." Tr. p. 445. The foreman then consulted with his fellow jurors and ultimately stated, "we'll come back tomorrow." Tr. p. 447. The judge then assembled the entire jury and relayed what the foreman had said. None of the jurors indicated disagreement with returning in the morning to continue deliberating, again indicating implied consent to continue. Tr. pp. 447-48. Indeed, once the jury returned and resumed deliberating, it sent out no further notes and when the judge called in the foreman to inquire about lunch, he informed her they were close to a decision. Tr. p. 450. Finally, when the jury was polled after the judge announced the verdict, all indicated this was their verdict. Tr. pp. 454-56.

Accordingly, this Court finds that even if this note could be considered a second indication of deadlock, the jury, after consultation with the judge, consented to continue its deliberations.

Therefore, this Court finds the requirements of section 14-7-1330 had again not yet been met, and Counsel was not deficient for failing to move for a mistrial. Moreover, Counsel credibly testified she felt the jury's lengthy deliberations were beneficial to Applicant because it indicated the jury had questions about what happened. Additionally, this Court finds credible Counsel's testimony that had she known with certainty the split was 11-1 against Applicant, she would have changed her strategy pursued a mistrial. Accordingly, because the Court finds the conditions of section 14-7-1330 had not been met, and in any event, Counsel had a reasonable strategic explanation for declining to move for a mistrial, relief is denied as to this issue, and the allegation is dismissed with prejudice.

5. Cumulative error

Lastly, Applicant argues the cumulative effect of Counsel's entitles Applicant to a new trial. Because this Court has found Counsel committed no errors, relief must be denied as to this issue.

Importantly, appellate courts in South Carolina Court have not recognized the cumulative-error doctrine as a basis for post-conviction relief. See, e.g., Simpson v. State, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina"); Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002) ("Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina."). Other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative-error analysis of the prejudice prong of Strickland is inappropriate, and the correct analysis focuses upon each individual allegation of ineffective assistance. Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in Fisher v. Angelone:

> Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error. . . it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of the Fourth Circuit individually to assess claims under Strickland v. Washington. . . . To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (citations omitted). Similarly, in Smalls v. State, 422 S.C. 174, 810 S.E. 2d 836 (2018), the South Carolina Supreme Court explained "the strength of the evidence must be considered along with the specific impact of counsel's errors. . . . In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." However, because this Court has found neither deficiency nor prejudice, a cumulative-error analysis would be inappropriate on these facts.

Accordingly, this Court finds relief should be denied as to this issue, and the allegation is dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations which would require this Court to grant relief. Counsel was not deficient in any manner, nor was Applicant prejudiced by her representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.

BROOKS P. GOLDSMITH
Presiding Judge
Fifth Judicial Circuit

_____, 2021

Exhibit B

Friday, July 16, 2021 at 15:59:54 Eastern Daylight Time

Subject: RE: Arthur William Macon, Case No. 2019-CP-40-05591
Date: Wednesday, April 28, 2021 at 8:57:25 AM Eastern Daylight Time
From: Goldsmith, Brooks
To: Lindsey McCallister, Charles Grose
CC: Michael Davidson
Attachments: image001.jpg

Brooks P. Goldsmith
Circuit Judge, Active/Retired
PO Box 895
Edisto Island , S.C. 29438

From: Lindsey McCallister <LMcCallister@scag.gov>
Sent: Friday, April 23, 2021 5:18 PM
To: Charles Grose <charles@groselawfirm.com>; Goldsmith, Brooks <bgoldsmithj@sccourts.org>
Cc: Michael Davidson <michaeldavidson@scag.gov>
Subject: RE: Arthur William Macon, Case No. 2019-CP-40-05591

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Judge Goldsmith,

I believe you gave me 5 days from Mr. Grose's submission to get the State's cases to you. Unfortunately, I have been out sick for several days and was unable to respond within that timeframe. I would ask that you consider the attached cases in making your decision and apologize for the delay in getting them to you. Thank you.

Lindsey

Lindsey A. McCallister
Assistant Deputy Attorney General

S.C. Attorney General's Office
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211

Office: (803) 734-8357
lmccallister@scag.gov

From: Charles Grose <charles@groselawfirm.com>
Sent: Friday, April 16, 2021 2:18 PM
To: bgoldsmithj@sccourts.org
Cc: Lindsey McCallister <LMcCallister@scag.gov>; Michael Davidson <michaeldavidson@scag.gov>
Subject: Arthur William Macon, Case No. 2019-CP-40-05591

Dear Judge Goldsmith,

Thank you for hearing this case today. Please see the attached cases.

Please let me know if you have any questions or require additional information.

Best,
Charles

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
Phone: 864-538-4466
Fax: 864-538-4405
Web: GroseLawFirm.com
Email: charles@groselawfirm.com

CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

Brewster v. Hetzel, 913 F.3d 1042 (2019)
27 Fla. L. Weekly Fed. C 1644

913 F.3d 1042
United States Court of Appeals, Eleventh Circuit.

Sumnar Robert BREWSTER,
Petitioner-Appellant,
v.
Gary HETZEL, Attorney General, State of Alabama, Respondents-Appellees.

No. 16-16350
|
January 22, 2019

Synopsis

Background: Following affirmance of conviction for armed robbery in the Court of Criminal Appeals of Alabama, 51 So.3d 407, and affirmance of denial of state court post-conviction relief, defendant petitioned for a writ of habeas corpus. The United States District Court for the Northern District of Alabama, No. 4:13-cv-01279-RDP-JEO, R. David Proctor, District Judge, 2016 WL 4507132, adopted report and recommendation of John E. Ott, Chief United States Magistrate Judge, 2015 WL 11995256, and denied petition. Defendant appealed.

Holdings: The Court of Appeals, Ed Carnes, Chief Circuit Judge, held that:

jury's guilty verdict for armed robbery was impermissibly coerced, and therefore failure of trial counsel to object and move for mistrial was prejudicial, as would support habeas corpus petition, and

trial counsel's failure to object and move for a mistrial was deficient performance under *Strickland*, as would support habeas corpus petition based on ineffective assistance of trial counsel.

Reversed.

Attorneys and Law Firms

*1046 Kevin L. Butler, Allison Case, Tobie John Smith, Federal Public Defender, BIRMINGHAM, AL, Sumnar Robert Brewster, Holman CF—Inmate Legal Mail, ATMORE, AL, for Petitioner-Appellant.

John J. Davis, Luther J. Strange, III, Alabama Attorney General's Office, MONTGOMERY, AL, Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Alabama, D.C. Docket No. 4:13-cv-01279-RDP-JEO

Before ED CARNES, Chief Judge, BRANCH, and FAY, Circuit Judges.

Opinion

ED CARNES, Chief Judge:

In olden days a number of methods were used to ensure that juries reached a unanimous verdict. From the fourteenth through the eighteenth centuries, one "method of accelerating unanimity" was to prohibit jurors from eating or drinking until they all agreed on a verdict. 3 William Blackstone, Commentaries *375. And if jurors did not unanimously agree on one before the judges left town, Blackstone recounted, "the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart." Id. at *376. They were hauled around in the cart "until a judgment 'bounced out.' " Renico v. Lett, 559 U.S. 766, 780, 130 S.Ct. 1855, 1866, 176 L.Ed.2d 678 (2010) (Stevens, J., dissenting). Which is to say until the resolve bounced out of the holdout jurors.

In one seventeenth-century sedition trial (involving William Penn and a co-defendant), the jury deadlocked on the most serious charge. George C. Thomas III & Mark Greenbaum, Justice Story Cuts the Gordian Knot of Hung Jury Instructions, 15 Wm. & Mary Bill Rights J. 893, 898–99 (2007). The judge responded by threatening to have a juror named Bushel branded unless the jury agreed that the defendants were guilty as charged. Id. at 899. When no verdict was forthcoming, the judge did not send for a branding iron, but he did have all the jurors "locked in the jury room without meat, drink, fire, and tobacco" until they could agree. Id. (quotation marks omitted). After nicotine withdrawal and the prospect of starvation failed to work, "the judge threatened to cut Bushel's throat" if there were no verdict. Id. (Thus posing the prospect of a dead juror to unlock a deadlocked jury.) When even that threat did not bring forth a unanimous verdict, the judge gave up. Id. Bushel escaped the experience unbranded and with his throat intact, while the jury as a whole

escaped with its disagreement intact. But the judge was angry enough at the jurors' failure to agree that he fined each of them forty marks for their intransigence. Id. Fortunately, when the case made it to the Court of Common Pleas the *1047 fines were set aside. Id. at 899–900. History does not record if Bushel or any of the eleven other brave souls ever served on another jury.

Since those days, we have come a long way and now accept that some jury deliberations will end in deadlock. United States v. Rey, 811 F.2d 1453, 1460 (11th Cir. 1987) ("The jury trial system has not malfunctioned when the jury cannot reach a verdict. One of the safeguards against the conviction of innocent persons built into our criminal justice system is that a jury may not be able to reach a unanimous verdict."). We no longer try to coerce holdout jurors to reach a verdict that they cannot abide. Or at least most of the time we don't.

The jury that convicted our appellant, Sumnar Brewster, might feel some affinity with juries of yesteryear. Over the period of two days of deliberations the jurors repeatedly told the judges—there was one judge on the first day of deliberations and a different one on the second day—that they could not reach a unanimous verdict. And the judges repeatedly ordered them to keep trying. All told, the jurors sent six notes to the two judges stating that they could not reach a verdict.

Three times the jurors disclosed how they were divided: first reporting that they were deadlocked 9 to 3 for conviction, later that they were still deadlocked but now 11 to 1 in favor of conviction, and still later that the one holdout juror was continuing to hold out. Throughout the deadlocking, the judges gave a formal Allen charge, later two additional admonitions that the jurors must continue deliberating, and finally, another long charge that included instructions to keep on deliberating. That lengthy charge emphasized that the jurors had taken an oath to follow the law, which meant they must deliberate more. The judge ended his instructions with the challenge that he had taken his oath seriously and hoped they would do the same.

Shortly thereafter, when told that the one juror who wouldn't vote to convict was doing crossword puzzles, the judge ordered all the reading materials taken out of the jury room. That tactic turned out to be even more effective than threatening to kill the hapless Bushel had been in William Penn's case three hundred years before. Just 18 minutes after all reading materials were removed, Brewster's jury dutifully —and we do mean dutifully—returned a guilty verdict. Through it all Brewster's two attorneys neither objected nor moved for a mistrial. Not once.

This is Brewster's appeal from the denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. He claims that his trial counsel rendered ineffective assistance by failing to object, or move for a mistrial, at any point during the deadlocked deliberations.

I.

Here are the details. Brewster was tried on two counts of armed robbery. The case went to the jury at 11:23 a.m. on the second day of trial. About three-and-a-half hours later, at 2:55 p.m., the jury sent a note to the trial judge asking: "If one person on the jury votes not guilty, what is outcome?" The judge responded: "The Court cannot answer this question but will recharge you on any instructions you wish." There is no indication that the jury asked at that time to be recharged on anything or that they were.

Less than two hours later, at 4:20 p.m., the jury sent the judge a second note, which stated: "We are nine guilty and three not guilty. What instructions would you give us as to what to do now? Everyone is firm in their decision." The judge brought the jury into the courtroom and *1048 asked the foreman, "[D]o you think there's any way this case will be resolved on a unanimous verdict?" He answered "no." The judge responded by reading the jury Alabama's pattern Allen instruction, colloquially known as a dynamite charge. See Allen v. United States, 164 U.S. 492, 501–02, 17 S.Ct. 154, 157, 41 L.Ed. 528 (1896); Dailey v. State, 828 So.2d 344, 346–47 (Ala. Crim. App. 2002). Among other things, the judge informed the jurors that if they could not agree on a verdict, "a mistrial would be declared and this case would have to be tried again." He told them that each juror was "entitled to his or her opinion of the evidence" and that none of them should "surrender an honest conviction," but he directed them to talk over their differences and to "make further efforts to arrive at a verdict" if they could conscientiously do so. The jurors deliberated for another half-hour before being sent home for the day.

The jury returned at 9:00 the next morning and continued deliberating. For reasons not explained in the record, another judge took over from the one who had presided the day before. At 10:57 a.m., almost two hours after deliberations

had resumed that morning, the jurors sent out a third note. That note, as recounted by the judge, stated that they could not reach a unanimous decision, that one juror had decided not guilty, and that "no amount of time was going to sway them." The judge brought the jurors into the courtroom and instructed them to "keep an open mind and go back point by point over the evidence that you have heard in this case and the law that was given to you by the Court and to keep deliberating." The jurors returned to the jury room at 11:00 a.m.

Nearly three hours later, at 1:45 p.m., in a fourth note, the jury once again declared itself deadlocked—really, really deadlocked—telling the judge, as he informed the attorneys, that "all jurors have decided firmly, eleven guilty, one not guilty, no possibility of resolve." (Emphasis added.) The State requested that the judge give the Allen charge again, but instead he gave the jury a written instruction ordering it to continue deliberating and telling the jurors if they needed to be "reinstructed on any elements of the crime, count one or count two, or reinstructed on any issues, i.e., the burden of proof or reasonable doubt," the court would reinstruct them. The jury did not ask for any more instructions.

At 2:02 p.m., the jury sent a fifth note, telling the judge that the lone holdout juror was "unwilling to discuss the case with them." The judge brought the jury back into the courtroom and gave it the longest additional instruction yet, covering seven-and-a-half pages of the transcript. He began by asking the jurors: "Do you remember ... [y]ou all took a solemn oath that you would well and truly try all issues submitted to you and true verdicts render ... according to the evidence in the case and the law as given to you by the Court?" He went on: "You are not at liberty to just ignore the instructions of the Court. I'm not telling you to change your mind, but I am asking you and reminding you of the oaths that you took and to take those seriously and to deliberate this case and talk." In his instruction, the judge used the word "oath" nine times. He also reminded the jury that "beyond a reasonable doubt" does not mean absolute certainty, and that "[t]here is no such thing as absolute certainty in human affairs. For justice is after all, but an approximate science." The judge concluded his lengthy instructions by telling the jury:

> I have indicated to you that there's two counts. I have reminded you of the oath that you have taken. I have given you reinstructions on reasonable doubt. I ***1049** want you to go back, and I want you to continue to deliberate. Start at the beginning, if you have to. Go over every element or any part of this case you want to discuss. But you took an oath. I take mine seriously. I hope you do the same. Take them out.

(Emphasis added.)

The jurors went back into the jury room for more deliberations at 2:14 p.m. Eleven minutes later, at 2:25 p.m., out came the jury's sixth note. It stated that the holdout juror was refusing to discuss the case and had begun doing crossword puzzles. The judge responded by ordering the bailiff "to go to the jury room and take all of the newspapers and all of the books and magazines—and whatever they need to write on is fine and dandy. Remove the others." Eighteen minutes later, deprived of a way to shield herself from the importuning of the other jurors, the holdout held out no more. At 2:48 p.m., a unanimous guilty verdict, to use the old term, "bounced out" of the jury room. Convicted of both counts of armed robbery, Brewster was sentenced to life imprisonment without parole.

II.

The Alabama Court of Criminal Appeals affirmed Brewster's conviction and sentence in a two-paragraph opinion. Brewster v. State, 51 So.3d 407 (unpublished table decision) (Ala. Crim. App. 2009).

Brewster petitioned the state trial court for postconviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. He claimed, among other things, that his trial counsel were ineffective for failing to move for a mistrial based on the jurors' repeated declarations that they were deadlocked "and/or" failing to object to the court's repeatedly ordering the jurors to continue deliberating. This is how his pro se petition stated that claim:

> Counsel w[ere] Ineffective and Petitioner was prejudiced thereby when counsel fail[ed] to move for a mistrial and/or object to the Court further instructing the jury after the jury indicated that they were deadlocked.
>
> Petitioner avers that the record in this case[ ] reveals that the jury could not reach a verdict on the charges against the petitioner, the jury indicated on several occasions that they were deadlocked. The Court gave several instructions for the jury to continue to deliberate, however the jury returned and stated that they were deadlocked and could not reach a verdict.
>
> The Trial Court, this time, with a substitute judge, again instructed the jury to reach a verdict.

> Petitioner contends that he was prejudiced by the Court's multiple charges to the jury to continue to deliberate as such coerced the j[u]ry into reaching a verdict.
>
> Counsel['s] error in this regard[ ] prejudiced the petitioner and deprived him of a fundamental fair trial.

(Citations omitted.)

The state post-conviction court summarily dismissed Brewster's petition. The Court of Criminal Appeals vacated that dismissal and remanded the case for the trial court to take evidence and enter findings of fact. On remand, the trial court did that and denied relief.[1] This is what that ***1050** court said about why it was rejecting Brewster's claim that his counsel were ineffective for failing to object or move for a mistrial based on the jury's repeated statements that it was deadlocked and the judges' repeated instructions ordering it to keep deliberating:

> It is well settled in this State that an Allen charge in a criminal case is proper so long as it is not coercive or threatening. Here, Appellant states that the jury was coerced into reaching a verdict; but he fails to cite the language that he finds coercive or threatening. Indeed, a review of all of the language in the supplemental charge fails to show that any of it was coercive or threatening. Absent such, trial counsels' [sic] performance cannot be deficient in failing to move for a mistrial where none was warranted, or objecting where no objection was merited. As a result thereof, the Appellant has failed to show that his trial counsels' [sic] performance was deficient, and this ground is found by the Court to be without merit.

(Emphasis added and citations omitted.)

Brewster appealed to the Court of Criminal Appeals, which affirmed the post-conviction trial court's decision, concluding that its "findings [were] supported by the record on remand, the record of the Rule 32 evidentiary hearing, and the record on direct appeal." (Quotation marks omitted.) The Alabama Supreme Court denied Brewster's petition for a writ of certiorari.

Brewster then filed this § 2254 petition in federal district court. He again alleged that his trial counsel were ineffective for failing to object or move for a mistrial based on the trial court's multiple instructions to the jury to continue deliberating. His federal claim was worded almost identically to the one he had raised in his state court Rule 32 petition. But this is how the magistrate judge interpreted Brewster's claim: "Brewster next argues that his trial counsel were ineffective for failing to make a motion for a mistrial or for failing to object when the trial court instructed the jury to continue deliberations after the jury informed the court that it was deadlocked." Relying on the Anti-Terrorism and Effective Death Penalty Act's deferential standard of review for claims adjudicated on the merits in state court, and the state court's reasoning that Brewster had failed to cite any coercive or threatening language in "the supplemental charge," the magistrate judge rejected the claim. The district court adopted the magistrate judge's report and recommendation and dismissed Brewster's § 2254 petition.

Brewster appealed and we granted a certificate of appealability on three claims, only two of which are relevant to our resolution of this case:

> Whether the state post-conviction court and the district court misconstrued Brewster's claim—that his trial counsel w[ere] ineffective for failing to object or move for a mistrial when the trial court continued to instruct the jury to deliberate after the jury indicated on three occasions that it was unable to reach a unanimous verdict—as arguing that trial counsel w[ere] ineffective for failing to challenge the language of the Allen instruction as coercive.
>
> Whether Brewster's trial counsel w[ere] ineffective for failing to object or move for a mistrial when the trial court repeatedly instructed the jury to continue deliberating, after the jury indicated on three occasions that it was unable to reach a unanimous verdict.[2]

***1051** III.

We review de novo the district court's denial of a habeas petition. McNair v. Campbell, 416 F.3d 1291, 1297 (11th Cir. 2005). Which means we owe no deference to the district court's decision about the state court's decision.

Ordinarily, in a § 2254 case a federal court's decision is narrowly limited by AEDPA, which permits relief on claims adjudicated on the merits in state court only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). AEDPA imposes a "highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Renico v. Lett,

559 U.S. 766, 773, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010) (quotation marks and citation omitted). "If, however, no state court has adjudicated the merits of a claim that was properly presented, 'federal habeas review is not subject to the deferential standard that applies under AEDPA.... Instead, the claim is reviewed de novo.' " Reaves v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1137, 1151 (11th Cir. 2017) (alteration in original) (quoting Cone v. Bell, 556 U.S. 449, 472, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009)).

Neither the state post-conviction court nor the state appellate court ruled on the actual claim that Brewster presented to them and is now presenting to us. Instead, they recast his claim as an attack on the language of one of the supplemental instructions (without specifying which of the supplemental instructions they were examining or how they selected that one). The state courts rejected the recast claim after finding that "a review of all of the language in the supplemental charge fails to show that any of it was coercive or threatening."

That may be well and good, as far as it goes, but it does not go far enough to cover Brewster's claim. His claim is that the total force and effect of the two trial judges instructing the jury over and over again that it must keep deliberating after the jury declared over and over again that it was unable to reach a verdict, was coercive. Brewster's claim has never focused exclusively on the particular language of any one of the several supplemental instructions. Instead, his claim has always been based on his attorneys' failure to object or move for a mistrial given the totality of the circumstances involving the jury's inability to reach a unanimous verdict and the judges' reaction to the deadlock. His is a macro claim, not a micro one.

Because the claim that we must decide is not a "claim that was adjudicated on the merits in [the] State court proceedings," 28 U.S.C. § 2254(d), we cannot defer to the decisions of the state courts in this case. See Reaves, 872 F.3d at 1151.

IV.

To prevail on his ineffective assistance of counsel claim, Brewster must "demonstrate both that (1) 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.' " United States v. Webb, 655 F.3d 1238, 1258 (11th Cir. 2011) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). We can begin with either of those two ***1052** components. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069 ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order.... In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."). We'll start with prejudice.

A.

"[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." Id. at 693, 104 S.Ct. at 2067. That means "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

In applying that standard to an attorney's failure to object or move for a mistrial, we ask whether there is a reasonable probability of a different result if counsel had objected or moved for a mistrial. That, of course, requires at a minimum an error meriting an objection or a mistrial.

How, one might ask, can we ever know if a timely objection would have been sustained and made a difference in the result, or that the mistrial motion would have been granted and thereby avoided the conviction that occurred without it? The Supreme Court in Strickland provided this guidance: "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like.... The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker." Id. at 695, 104 S.Ct. at 2068. It doesn't matter for prejudice purposes whether the judge at this defendant's trial would have sustained an objection; what counts is whether the judge would have been required to do so under the applicable law and, if so, whether doing so would have resulted in a reasonable probability of a different result.[3] The answer is yes, and yes.

*1053 A defendant "being tried by a jury is entitled to the uncoerced verdict of that body." Lowenfield v. Phelps, 484 U.S. 231, 241, 108 S.Ct. 546, 552, 98 L.Ed.2d 568 (1988). Coercion does not mean "simple pressure to agree." Smith v. United States, 542 A.2d 823, 824 (D.C. 1988). As one court explained, "such pressure is a natural function of sending twelve persons into a jury room to deliberate." Id. Pressure becomes coercive when the actions of the court result in "a minority of the jurors ... sacrific[ing] their conscientious scruples for the sake of reaching agreement." Green v. United States, 309 F.2d 852, 854 (5th Cir. 1962). While a trial court may instruct a deadlocked jury to continue deliberating, it "must not coerce any juror to give up an honest belief." United States v. Davis, 779 F.3d 1305, 1312 (11th Cir. 2015); see Showers v. State, 407 So.2d 169, 171 (Ala. 1981) ("It is quite clear that ... a trial judge may urge a jury to resume deliberations and cultivate a spirit of harmony so as to reach a verdict, as long as the court does not suggest which way the verdict should be returned and no duress or coercion is used.").

Our task in a de novo review is to examine the totality of the circumstances to see if the court's actions created a substantial risk that one or more jurors would be coerced into abandoning their honest convictions. See United States v. Woodard, 531 F.3d 1352, 1364 (11th Cir. 2008). The relevant circumstances include: (1) the total length of deliberations; (2) the number of times the jury reported being deadlocked and was instructed to resume deliberations; (3) whether the judge knew of the jury's numerical split when he instructed the jury to continue deliberating; (4) whether any of the instructions implied that the jurors were violating their oaths or acting improperly by failing to reach a verdict; and (5) the time between the final supplemental instruction and the jury's verdict. See, e.g., Lowenfield, 484 U.S. at 240, 108 S.Ct. at 552 (time between instruction and verdict); Davis, 779 F.3d at 1312–13 (total length of deliberation and number of times a jury reports deadlock); United States v. Brokemond, 959 F.2d 206, 209–10 (11th Cir. 1992) (judge's knowledge of jury's split); United States v. Fossler, 597 F.2d 478, 485 (5th Cir. 1979) (number of times jury instructed to continue deliberating); Kesley v. United States, 47 F.2d 453, 453–54 (5th Cir. 1931) (impugning jurors' integrity by accusing them of neglecting their oaths by failing to reach a verdict).

That list is not exhaustive, and the presence of some of the circumstances does not necessarily establish a substantial risk of coercion. It depends on the totality of the circumstances, an assessment of the cumulative effect of everything that went on. See Fossler, 597 F.2d at 485 (We "assess[ ] the impact of the judge's statements in light of his language and the facts and circumstances which formed their context.").

Starting down the list of relevant circumstances, we note that Brewster's jury deliberated a total of only eleven hours over two days, which is not an inordinate amount of time. The problem, or one of them, is that during those eleven hours of deliberations the jury reported being deadlocked five times—once on the first day and four times on the second.[4]

*1054 And the firmness of the deadlock only increased as deliberations continued. The jury's first deadlock note reported that the split was 9 to 3 and "[e]veryone is firm in their decision." When asked whether there was "any way this case will be resolved on a unanimous verdict," the foreman answered "no." The second deadlock note reported that the jury "could not reach a unanimous decision" and that one juror "had decided not guilty and no amount of time was going to sway them." The third one reported that "all jurors have decided firmly, eleven guilty, one not guilty, no possibility of resolve." The fourth one stated that the holdout juror was "unwilling to discuss the case." And the fifth one informed the judge that the holdout juror was still refusing to discuss the case and was doing crossword puzzles instead.

After each of the first four deadlock reports, the judge gave the jurors instructions of varying formality requiring them to continue deliberating and try to reach a unanimous verdict. After the fifth and final deadlock report, the judge's action in having all of the reading materials taken out of the jury room sent a strong message to the jury to get back to deliberating. One or two, or even three, instructions requiring a deadlocked jury to keep on deliberating might not be a problem, depending on the surrounding circumstances. But five instructions aimed at breaking a deadlock is a lot (especially, as we will discuss, when the judge knew exactly how the jury was divided).

While "[w]e have never adopted a per se rule against successive Allen charges," Davis, 779 F.3d at 1312, the more times a jury tells the court that it is deadlocked, and the more times the court responds by instructing the jury to continue deliberating, the greater the risk of coercion. In United States v. Fossler, for instance, we concluded that the use of two Allen charges at the defendant's trial coerced a verdict where the jury "indicated at three separate points in time, over a three day period, that it could not reach a decision," and "[o]nly one

hour after the second [Allen] charge was sent to the jury, a guilty verdict was returned." 597 F.2d at 485.

The circumstances in this case are more extreme. The jurors faced the cumulative effect of a formal Allen charge, three additional instructions from the court to continue deliberating after the judge knew that there was only one holdout left, and the removal of all reading material from the jury room in direct response to a report that the holdout juror was using that material to keep holding out.

Pressure on jurors, especially on holdout jurors, is increased when the instructions to keep trying to reach unanimity come from a judge who knows how split the jury is and in which direction. That is why the Supreme Court has exercised its supervisory authority to prohibit federal judges from inquiring how deadlocked juries are split. The Court has explained that inquiring about the specifics of the split "serves no useful purpose," tends to be coercive, and "can rarely be resorted to without bringing to bear ... an improper influence upon the jury." Brasfield v. United States, 272 U.S. 448, 450, 47 S.Ct. 135, 135–36, 71 L.Ed. 345 (1926). Because it is an exercise of the Court's supervisory authority over the lower federal courts, the Brasfield rule does not apply to state courts (or to state prisoners seeking habeas relief in federal court). See 28 U.S.C. § 2241(c)(3) ("The writ of habeas corpus shall not extend to a prisoner unless ... [h]e is in custody in violation of the Constitution or laws or treaties of the United States."); Lowenfield, 484 U.S. at 239–40, 108 S.Ct. at 552 (the Brasfield rule applies only to federal courts); *1055 Showers, 407 So.2d at 171 (declining to adopt the Brasfield rule for use in Alabama state courts).

Still, the Supreme Court's prohibiting federal judges from inquiring into the specifics of a jury split underscores the problem with the judge having that knowledge. Lowenfield, 484 U.S. at 240, 108 S.Ct. at 552. The problem exists whether the judge asked for the information or the jury disclosed it without any prompting. If the jury is aware that the court knows it is divided in favor of convicting the defendant, and the court repeatedly instructs the jury to continue deliberating, the jurors in the minority may feel pressured to join the majority in order to placate the judge. See Brasfield, 272 U.S. at 450, 47 S.Ct. at 135–36. That pressure only increases when, as here, the judge is told that the jury is divided 9 to 3 for conviction, and then 11 to 1 for conviction, and later that it is still hung at 11 to 1 for conviction.

The judge knew—and the jurors knew that the judge knew—there was but a single holdout standing between a mistrial and a guilty verdict. Everything that happened after the jury sent the second of five deadlock notes with the 11 to 1 breakdown has to be understood in that context. It was as if the judge were saying: "I know [there is one] of you [who is] holding up a verdict; you should stop being so stubborn and fall in line." Smith, 542 A.2d at 825. And that is what the holdout juror finally did. After three more deadlock notes and several additional instructions to keep deliberating, she finally fell in line and voted to convict.[5]

We have also held, for obvious reasons, that "comments, not upon the evidence, but reflecting on the jurors, are not permissible." Kesley, 47 F.2d at 454. In Kesley, the judge admonished the jury that "it is apparent to the court that some of you have forgotten ... your oaths as jurors. It does not seem to me that there is very much doubt as far as the facts are concerned." Id. at 453. We reversed the resulting conviction and explained that "[n]o juror should be induced to agree to a verdict by a fear that a failure so to agree will be regarded by the public as reflecting upon either his intelligence, or his integrity." Id.

The trial judge may have stepped over that line here and committed Kesley error in the lengthy instruction that he gave in responding to the jury's fourth deadlock note, which informed him that the lone holdout juror had quit discussing the case with the other jurors. In that instruction the judge used the word oath nine times, the last time being when he concluded his charge with this statement: "[Y]ou took an oath. I take mine seriously. I hope you do the same." Though the judge addressed his admonitions to the entire jury, the lone holdout must have felt as though they were aimed at her. It was her vote not to convict, after all, that had led to the lecture to begin with. And the message that was embedded in the charge to take the oath seriously was that doing so would lead to a unanimous verdict.

*1056 The final circumstance contributing to our conclusion that the verdict was coerced is how quickly the jury unanimously agreed on a verdict after the court's last instruction and action. A verdict of conviction "bounced out" of the jury room only 34 minutes after the last instruction from the judge (and only 18 minutes after the holdout juror's reading material was taken away). See Lowenfield, 484 U.S. at 240, 108 S.Ct. at 552 ("We are mindful that the jury returned with its verdict soon after receiving the supplemental instruction, and that this suggests the possibility

of coercion."); Woodard, 531 F.3d at 1364 ("In assessing whether the charge was coercive, we consider the language of the charge and the totality of the circumstances under which it was delivered, e.g., ... the amount of time between the delivery of the charge and the return of the jury's verdict."); Fossler, 597 F.2d at 485 (finding coercion where, among other things, "[o]nly one hour after the second Allen charge was sent to the jury, a guilty verdict was returned"); cf. Norton, 867 F.2d at 1364–66 (stating that the jury was not coerced because it "deliberated some four hours after the trial court's supplementary instruction, a time period not suggestive of a coercive or pressure-filled atmosphere").

To be sure, the holdout juror was not threatened with branding or exsanguination, and the jury was not hauled around in a cart. What happened at Brewster's trial would have passed muster in seventeenth-century England, but in twenty-first century Alabama it does not. The coercive circumstances that led to the verdict undermined the fundamental fairness of the trial and the reliability of the verdict. Those circumstances entitled Brewster to a mistrial under Alabama law, and also under federal law. See Orr v. State, 269 Ala. 176, 111 So.2d 639, 640 (1959); Jones v. State, 217 So.3d 947, 952 (Ala. Crim. App. 2016); Gidley v. State, 19 Ala.App. 113, 95 So. 330, 330–31 (1923); see also United States v. Amaya, 509 F.2d 8, 9–11 (5th Cir. 1975). The failure of Brewster's counsel to object and to move for a mistrial, as the coercive circumstances piled up, was prejudicial.

B.

We turn now to whether Brewster's trial counsel's failure to object and move for a mistrial was deficient performance for Strickland purposes. The standard for effective assistance of counsel is reasonableness, not perfection. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064 ("[T]he proper standard for attorney performance is that of reasonably effective assistance."); Harrington v. Richter, 562 U.S. 86, 110, 131 S.Ct. 770, 791, 178 L.Ed.2d 624 (2011) ("Strickland does not guarantee perfect representation, only a reasonably competent attorney.") (quotation marks omitted); Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 6, 157 L.Ed.2d 1 (2003) (per curiam) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). As we have pointed out, "[t]he reasonableness of a counsel's performance is an objective inquiry." Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). "And because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take." Id.

Defense counsel, of course, need not make meritless motions or lodge futile objections. Meders v. Warden, Ga. Diagnostic Prison, 900 F.3d 1330, 1349 (11th Cir. 2018) ("It is not ineffective assistance of counsel to fail to make an objection that is not due to be sustained."); Pinkney v. Sec'y, DOC, 876 F.3d 1290, 1297 (11th Cir. 2017) ("[A]n attorney will not be held to ***1057** have performed deficiently for failing to perform a futile act, one that would not have gotten his client any relief."). That is not a consideration here because, as our discussion of the prejudice component demonstrates, an objection or motion for mistrial would not have been futile or lacking in merit. We need not decide how early in the chain of coercive circumstances that counsel's failures to object or move for a mistrial became bad enough to be deficient performance for ineffective assistance purposes. The later failures suffice. By the time the jury had declared itself deadlocked for the fifth time and the judge had given his fourth instruction for it to continue deliberating, which included language implicitly criticizing the lone holdout for not giving in, any reasonable attorney would have objected and moved for a mistrial.

It is not ineffective assistance for counsel to fail to make an objection or motion that depends on the future development of the law. See United States v. Ardley, 273 F.3d 991, 993 (11th Cir. 2001); Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994). But the law at the time of Brewster's trial made clear that the risk of a coerced verdict was unacceptable. There was no need for clairvoyance.

We recognize that "defense counsel, in defending their client's interests, need not urge every conceivable objection the law would provide." Hubbard v. Haley, 317 F.3d 1245, 1259 (11th Cir. 2003). The failure to make every valid objection or pursue every motion that has merit will not necessarily take counsel's performance "outside the wide range of professionally competent assistance," which is the scope of permissible performance. See Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. But the fundamental error that Brewster's counsel let go was one that any reasonable counsel would not have overlooked or thought unworthy of pursuing. It was obvious error that unfolded over a period of two days in a course of action that grew progressively worse. Counsel had plenty of time to recognize the error and react.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Of course, counsel can for reasonable strategic reasons refrain from making a valid objection or moving for relief their client is entitled to if there are reasonable strategic reasons for not objecting or moving. See Walls v. Buss, 658 F.3d 1274, 1279 (11th Cir. 2011) ("[W]e have recognized that it can be reasonable to let incriminating evidence come to the jury's attention."); see also Richter, 562 U.S. at 109, 131 S.Ct. at 790 ("There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect.") (quotation marks omitted); Strickland, 466 U.S. at 690, 104 S.Ct. at 2066 (explaining that strategic choices between plausible options are virtually unchallengeable); Chandler, 218 F.3d at 1314 ("[A] court must not second-guess counsel's strategy."). The standard, again, is whether any competent counsel would have done as defense counsel did and taken, or failed to take, the course of action that counsel took or failed to take. Chandler, 218 F.3d at 1315. The answer to that question is not difficult here.

Even before the second judge targeted the lone holdout by having the bailiff confiscate her crossword puzzles, any reasonable attorney would have objected or moved for a mistrial. By that point there had already been five declarations of deadlock by the jury; four written and oral instructions from two different judges to continue deliberating; the implication by the second judge that by not joining the others the holdout juror was violating her oath; and the periodic disclosures of the jury's numerical breakdown in favor of ***1058** convicting Brewster. Things kept getting worse for the defense. It doesn't take "the pricking of my thumbs" to know that "something wicked this way comes" for a defendant when a jury goes from 9 to 3 for conviction to 11 to 1 for conviction and the lone holdout faces the coercive circumstances that this one did. Cf. William Shakespeare, The Tragedy of Macbeth, act 4, sc. 1.

As the Second Circuit observed: "In deciding whether to move for a mistrial when a jury reports deadlock, a defendant acting completely rationally would compare the likely consequences of allowing the jury to deliberate longer with the likely consequences of obtaining a mistrial." Lane v. Lord, 815 F.2d 876, 879 (2d Cir. 1987). Here the overwhelmingly likely consequences of the attorneys doing nothing was conviction and the resulting sentence of life without parole, while moving for the mistrial to which their client was entitled would have gotten him a new trial.

It is no answer to invoke some of our general language, as the State does, that "the decision to refrain from asking the court for a mistrial is a tactical decision entrusted to defense counsel." United States v. Burke, 257 F.3d 1321, 1324 (11th Cir. 2001). Tactical decisions need rational reasons behind them. For example, it might be reasonable for an attorney to refrain from objecting or seeking a mistrial early on in the process, or when only one or two signs of coercion are present, or when it looks like the deadlocked jury may be divided in favor of acquittal. See, e.g., Cannon v. State, 302 Ga. 327, 806 S.E.2d 584, 589 (2017) (defense attorney sought Allen charge before seeking mistrial because, "in his experience, requesting the Allen charge hastens jury deadlock and increases the chance the trial court will grant a mistrial").

One of our decisions provides a concrete example of strategic reasons for not requesting a mistrial. The Hammond case involved an attorney who did not move for a mistrial to which the defendant was entitled under state law based on a prosecutor's inappropriate comment during the sentencing phase of a capital case. See Hammond, 586 F.3d at 1332. We held that the attorney did not perform deficiently even though the defendant would have been given a mistrial of the sentencing stage if he had requested one. Id. at 1335.

We explained in Hammond that a reasonable attorney could have been leery of a mistrial for several reasons, any one of which would have been enough to show that the representation was not deficient. Id. at 1333. First, the defendant in that case was a black man accused of murdering a white woman, and his attorney had managed after five days of extensive voir dire to have a jury selected that consisted of eight black jurors and four white jurors. Id. We noted that "[a]n attorney reasonably could have considered the jury composition favorable and not wanted to risk losing it in a do-over." Id. Second, if a mistrial had been declared, the original jury (which had found Hammond guilty) would have been excused and a new one empaneled to determine only the sentence. The new jury would "be instructed that Hammond had been found guilty and then would be immersed in the horrible details of the crimes he had committed." Id. We concluded that a reasonable attorney might want to avoid that prospect in favor of keeping the original jury because it might have some residual doubts from the guilt phase of the trial. Id. at 1333–34.

Third, we also found that "an attorney could have reasonably believed that a new sentence hearing months in the future would open up for reconsideration some evidentiary rulings that had been made in ***1059** Hammond's favor." Id. at 1334. Finally, we considered that a reasonable attorney could have

relied on the presumption that the jury would disregard the prosecutor's improper remark when it was told to do so by the court and that this was a better option than seeking a mistrial. Id. "In sum," we concluded, "not asking for a mistrial was objectively within the wide range of professionally competent assistance." Id. at 1335 (quotation marks omitted).

In Brewster's case "[t]here is no indication in the record that [counsel's] failure even to raise an objection [or move for a mistrial] ... was a product of any tactical forethought and we can only speculate as to the reasons for [their] silence." Jackson v. Herring, 42 F.3d 1350, 1360 (11th Cir. 1995) (emphasis omitted). Perhaps they thought that any objection would be meritless. If so, they were really wrong. Or perhaps they didn't see the obvious signs of coercion or didn't know that a coerced verdict was unlawful. We have recognized, after all, that simple ignorance of the law is not always enough for counsel to be ineffective. See Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir. 1988) (en banc). But that is no answer either. Trial counsel's ignorance of a point of law "that is fundamental to [their] case combined with [their] failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 571 U.S. 263, 274, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014); see Hollis v. Davis, 941 F.2d 1471, 1478 (11th Cir. 1991) ("If [trial counsel] did not assert this right because [they] w[ere] unaware of it, [their] representation was not within the range of competence demanded of attorneys in criminal cases.") (quotation marks omitted). Brewster's attorneys had plenty of time during the jury's deliberations over two days to research the law if they were unfamiliar with it.

And it ultimately does not matter if trial counsel subjectively thought that the ongoing forced deliberations would somehow turn out well for Brewster. As we explained in Hammond, counsel's tactical decision must be one that an attorney reasonably could have made. See Hammond, 586 F.3d at 1332 ("Under the law of this circuit the question is not why [the defendant's] counsel failed to move for a mistrial ... but whether a competent attorney reasonably could have decided not to move for one."). As the circumstances got worse, any reasonable attorney would have objected or moved for a mistrial.

It doesn't take a Clarence Darrow to realize that if a jury has gone from 9 to 3 in favor of conviction to 11 to 1 for it, and is complaining about the lone holdout's behavior and her refusal to go along with the others, that jury is not headed toward an acquittal. See Lane, 815 F.2d at 879. Unlike in Hammond, there was no conceivable reason, no reasonable strategy, for sitting silent and seeing how things would turn out. The cards had already been dealt, face up, and it was obvious who had the losing hand. Brewster did not receive the "reasonably effective assistance" of counsel that he was entitled to under Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

V.

The judgment denying the petition for a writ of habeas corpus is **REVERSED.**

All Citations

913 F.3d 1042, 27 Fla. L. Weekly Fed. C 1644

Footnotes

1 The only evidence taken on remand was a short affidavit from the two trial counsel stating that they had advised Brewster of his right to testify at trial, which was relevant to a claim that is not involved in this appeal. Counsel offered the state post-conviction court no explanation for failing to move for a mistrial when the jury repeatedly stated that it was deadlocked or for failing to object when the judges kept ordering the jury to continue deliberating.

2 We also granted a COA on whether Brewster's counsel were ineffective for failing to request a jury instruction on mistaken identification. We need not address that issue because the other two are dispositive.

3 And to show prejudice it is usually, but not always, enough that applicable law would have required the trial judge to grant a mistrial if one had been requested. The "but not always" qualifier is necessary because the reason that the mistrial would have been required must involve constitutional concerns that go to the trial's fundamental fairness and the reliability of the result. So if, for example, a state law would have required a mistrial but that law does not touch on fundamental rights, cognizable prejudice has not occurred. See Hammond v. Hall, 586 F.3d 1289, 1339–42 (11th Cir. 2009) (noting that defendant did not show prejudice because, even though he was entitled to a mistrial under state law, that itself did not show that the proceeding produced an unreliable result under Strickland because the state law was based on pragmatic concerns, not constitutional ones).

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

As the Supreme Court explained in Lockhart: "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart v. Fretwell, 506 U.S. 364, 369–70, 113 S.Ct. 838, 842–43, 122 L.Ed.2d 180 (1993); see Green v. Johnson, 160 F.3d 1029, 1043 (5th Cir. 1998) ("In order to demonstrate prejudice, a petitioner must show not only that had counsel acted in a different manner a new trial would have been granted, but also that, as a result of counsel's incompetence, the trial was rendered fundamentally unfair or unreliable.").

4 We are not counting the first note the jury sent out, which simply asked what would happen if one person voted not guilty.

5 Disclosure of the specifics of a jury's division by itself would not necessarily be grounds for a mistrial, even in federal court. See United States v. Norton, 867 F.2d 1354, 1365 (11th Cir. 1989) ("[U]nsolicited disclosure of the jury's division by a juror is not by itself a ground for a mistrial."); Sanders v. United States, 415 F.2d 621, 631–32 (5th Cir. 1969) ("The fact that the jury contrary to the instructions of the court volunteered to the court the extent of their division and which way they stood is no reason why the court should be precluded from giving an otherwise proper Allen charge."). But disclosure that a majority of the jurors favor conviction can act as a multiplier of the coercion arising from other circumstances.

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

427 S.C. 208
Court of Appeals of South Carolina.

The STATE, Respondent,

v.

Billy Lemurces TAYLOR, Appellant.

Appellate Case No. 2016-000549

Opinion No. 5655

Submitted February 1, 2019

Filed June 12, 2019

Rehearing Denied July 15, 2019

Certiorari Granted December 16, 2019

Synopsis

Background: Defendant, who was charged with attempted murder, murder, and possession of a weapon during the commission of a violent crime, moved for mistrial after trial court instructed jury, which had informed court that it was at an impasse, to continue deliberating and to consider views of other jurors in order to avoid wasting time and resources of State and defense counsel. The Circuit Court, Greenville County, Robin B. Stilwell, J., denied motion. Defendant appealed

Holdings: The Court of Appeals, Hill, J., held that:

trial court did not err in giving deadlocked jury *Allen* charge, but

Allen charge was coercive.

Reversed and remanded.

**724 Appeal From Greenville County, Robin B. Stilwell, Circuit Court Judge

Attorneys and Law Firms

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Alphonso Simon, Jr., Assistant Attorney General Samuel Marion Bailey, all of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

Opinion

HILL, J.:

*210 **725 Seven hours and twenty minutes into their deliberations following four days of trial, the jury in Billy L. Taylor's criminal trial informed the trial court they were at an impasse. The trial court sent the jury home for the night. The next morning, the trial court gave the jury a charge derived from *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). Taylor objected to the charge and moved for a mistrial. Two-and-a-half hours later the jury returned with a *211 guilty verdict. Taylor now appeals, contending his motion for a mistrial should have been granted, and the *Allen* charge was unconstitutionally coercive. We agree the *Allen* charge was coercive and reverse.

I.

Taylor was tried for the attempted murders of Brittany Jeeter and Ashley Hiott, the murder of Rodney Nesbit, and the possession of a weapon during the commission of a violent crime. The jury began deliberating at noon on the fourth day of trial, and soon the jury asked a question about the "hand of one, hand of all" charge. After further instruction, the jury resumed deliberations at 1:50 p.m. They returned to the courtroom at 7:20 p.m. after sending a note advising they were at an impasse. The note also contained an apparent tally of successive votes the jury had taken, indicating the latest vote was 10-2 in favor of conviction on the murder charge, 8-4 for conviction on the attempted murder charges, and 11-1 for conviction on the weapon charge. The trial court sent the jury home for the night. The next morning, the trial court gave the following charge:

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

> Ladies and gentlemen, I recognize that last night you sent me a note that indicated that you were at an impasse and you told me the division that you had in that note as well.
>
> Now, I understand that the decision that you have to make is very difficult. And when you get 12 people together, it's difficult to have 12 people agree. Particularly, when you come from different walks of life and you're just thrown together on a jury, it's difficult to make that decision. I know that, oftentimes, it's difficult for two people, just two people to make a decision. It's hard for my wife and I to figure out what we're going to eat for supper sometimes. So, this decision, I recognize is hard.
>
> But understand that it's important that you come to a decision in this case. Understand that both the State and the Defense have extended significant resources and time and effort to get to this point. Also, know that the State and the County has extended resources to get to this point as well. And if you're unable to come to a verdict in this matter, then, essentially, we'd be left with having to do it all ***212** over again, extending additional resources, time and effort. Now, ladies and gentlemen, I will tell you that there are no 12 other people in the County of Greenville who are more capable or competent to come to a decision in this matter than the 12 of you are.
>
> Now, again, I understand it's hard to come to a decision. But those of you who are in the majority should listen to the people in the minority. Those of you who are in the minority should listen to the people in the majority. You should take into consideration your respective positions and you should come to a decision in this matter. Again, it really would be a waste of time, effort and resources for us to have to do all of those over again. So, I'm going to ask you to go back to your jury room and resume your deliberations. ...

After the jury left the courtroom at 9:10 a.m., Taylor moved for a mistrial and also objected to the *Allen* charge on the ground that it was unduly coercive. He asked the court to instruct the jurors that a hung jury was "a legitimate end of a criminal trial" and sometimes the result of the State's burden to prove its case beyond a reasonable doubt. ****726** The trial court denied Taylor's motions. The jury returned a guilty verdict at 11:43 a.m.

II.

A. Mistrial

We first address Taylor's argument that the trial judge abused its discretion by giving an *Allen* charge rather than declaring a mistrial. A trial court should declare a mistrial as a last resort, when all other alternatives have been exhausted. A mistrial is a drastic step, "an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009).

The trial court was well within its discretion in refusing to declare a mistrial simply because the jury, after some seven hours of deliberation, announced an impasse. We review the decision with deference to the trial court's superior position to observe the courtroom atmosphere, the jury's demeanor, and the tenor and rhythm of the trial. The trial ***213** court has several ways to respond to a deadlocked jury, including delivering an *Allen* charge. In fact, the trial judge has a duty to urge the jury—without pressuring or coercing them—to reach a verdict. *State v. Williams*, 344 S.C. 260, 263, 543 S.E.2d 260, 262 (Ct. App. 2001). We find no error in the trial court's choice to deny Taylor's mistrial motion.

B. *Allen* Charge

According to Taylor, the trial court's *Allen* charge was coercive because it did not tell the jurors not to give up their honestly held beliefs simply to reach a verdict, it targeted the minority "holdout" jurors, and pressured them by stating a mistrial would be a waste of time and resources. He further complains the charge did not inform the jurors they have a right not to reach a verdict.

Because a criminal defendant's right to due process is violated by a charge that coerces a jury to reach a verdict, courts have long struggled with what to tell a deadlocked jury. The substance of the original *Allen* charge was described as instructing the jury that:

> in a large proportion of cases absolute certainty could not be expected; that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider

> whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, [on] the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Allen, 164 U.S. at 501, 17 S.Ct. 154. The original *Allen* charge was upheld, but with time and experience courts questioned its latent coercive force, particularly when trial ***214** judges tinkered with the original version. *See United States v. McElhiney*, 275 F.3d 928, 937–38 (10th Cir. 2001) (canvassing the history and evolution of *Allen* charge); *United States v. Rogers*, 289 F.2d 433, 435 (4th Cir. 1961) (Haynsworth, J.) (noting original *Allen* charge "approaches ultimate permissible limits"), *abrogated on other grounds by Bell v. United States*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

The United States Supreme Court continues to approve *Allen*-type charges, *see Jones v. United States*, 527 U.S. 373, 382 n.5, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), but many states have banned the original *Allen* charge, with some embracing a charge developed by the American Bar Association (ABA) that must be given to juries before deliberation begins. Thomas & Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 Wm. & Mary Bill of Rts. J. 893, 914–16 (2007). Versions of the charge vary in the federal circuits, but all circuits allow them, though several recommend the ****727** ABA version. *See Lowenfield v. Phelps*, 484 U.S. 231, 238 n.1, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) ("All of the Federal Courts of Appeals have upheld some form of a supplemental jury charge.").

Although labelled the "dynamite" charge because of its proven ability to "blast a verdict out of a jury otherwise unable to agree," *United States v. Bailey*, 468 F.2d 652, 666 (5th Cir. 1972), the label could just as well describe the *Allen* charge's success in blowing up otherwise error-free trials by introducing volatile elements into the fluid and emotionally charged atmosphere prolonged jury deliberations often create. Like dynamite, the charge must be handled with extreme care.

South Carolina approves the use of a modified *Allen* charge, which must be neutral and even-handed, instruct both the majority and minority to reconsider their views, and cannot be directed at the jurors in the minority. *Workman v. State*, 412 S.C. 128, 130, 771 S.E.2d 636, 638 (2015); *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). A trial judge has a duty to urge jurors to reach a verdict, but must do so in a way that does not coerce them, eroding their independence and impartiality. No set definition of coercion has emerged; instead, we detect its presence by viewing the charge in context and in light of four factors: (1) whether the ***215** charge speaks "specifically to minority jurors"; (2) whether the charge includes "you must return a verdict" type language; (3) whether there was an "inquiry into the jury's numerical division," which is generally coercive; and (4) whether the time between when the charge was given and when the jury returned a verdict demonstrates coercion. *See Tucker v. Catoe*, 346 S.C. 483, 492–95, 552 S.E.2d 712, 717–18 (2001) (per curiam).

Like most multi-factor constructs, the *Tucker* test does not tell us the relative weight each factor carries, nor is the list of factors exclusive. *Id.* at 491, 552 S.E.2d at 716 (emphasizing the coercion inquiry "is very fact intensive"); *Workman*, 412 S.C. at 130, 771 S.E.2d at 638 (stating coerciveness must be gauged by context and circumstances).

As to the first *Tucker* factor, the charge did not in the abstract single out the minority jurors. We cannot rest on the abstract, however, and must examine the charge in the context and setting it was given. Under the circumstances here, analysis of this first factor is shaded by considerations related to the third factor's concern with knowledge of the jury's numerical split, which we will soon take up.

As to the second factor, the charge instructed the jurors "it's important that you come to a decision in this case," and "you should come to a decision in this matter." This skirts close to the language found coercive in *Jenkins v. United States*, 380 U.S. 445, 446, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) (reversing and remanding case for a new trial because the charge told the jury "[y]ou have got to reach a decision in this case"). There is a glaring difference between the trial court's obligation to tell jurors they have a duty to *attempt* to reach a unanimous verdict and telling them they "should come to a decision." Our supreme court has even cautioned trial judges "against using the following language: 'with the hope that you can arrive at a verdict.' Because jurors are not required to reach a verdict after expressing that they are deadlocked, we believe this language could potentially be construed as being coercive." *State v. Williams*, 386 S.C. 503, 515 n.7, 690 S.E.2d 62, 68 n.7 (2010).

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Because the trial judge is the authority figure in the courtroom, jurors look to the trial judge for guidance not only on *216 the law, but for matters such as courtroom conduct and protocol, even permission for breaks, meals, and telephone calls. Recognizing the enormous power such influence can wield and its capacity to compromise impartiality, our constitution forbids the trial judge from commenting on the facts. *See* S.C. Const., art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). It is precisely because jurors scrutinize the trial judge's statements and instructions—a scrutiny that becomes more acute amidst heated deliberations—that the trial judge should couch them in as neutral and dispassionate terms as language and context **728 permit. Even an otherwise benign remark, such as "you should come to a decision," could be interpreted by a rational juror that the trial judge believes the result is obvious, or at least capable of unanimous agreement. *See* Quercia v. United States, 289 U.S. 466, 470, 53 S.Ct. 698, 77 L.Ed. 1321 (1933) ("The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' ").

The third *Tucker* factor asks whether there has been inquiry into the numerical division of the jury. A trial court cannot, of course, ask the jury to reveal its division. State v. Middleton, 218 S.C. 452, 457–58, 63 S.E.2d 163, 165–66 (1951). Here the trial judge wisely did not inquire further into the specifics of the split when the jury volunteered its vote tally. The trial judge prefaced his *Allen* charge by acknowledging "you told me the division you had." So the jury knew the trial judge knew they stood 10-2 in favor of conviction on the murder charge and how they were divided on the others. This bears on our coercion analysis, for a jury laboring under such knowledge might interpret the trial judge's comments as aimed at the minority. *See, e.g.*, Brewster v. Hetzel, 913 F.3d 1042, 1054–55 (11th Cir. 2019) ("Pressure on jurors, especially on holdout jurors, is increased when the instructions to keep trying to reach unanimity come from a judge who knows how split the jury is and in which direction. ... The problem exists whether the judge asked for the information or the jury disclosed it without any prompting. If the jury is aware that the court knows it is divided in favor of convicting the defendant, and the court repeatedly instructs the jury to continue deliberating, the jurors in the minority may feel pressured to *217 join the majority in order to placate the judge."). It is not coercive to give an *Allen* charge simply because the jury volunteers how it is split, *see* Williams, 344 S.C. at 264–65, 543 S.E. 2d at 263, but the trial court's knowledge of the split is relevant. In *Tucker*, the jury twice informed the trial court of its numerical split before the *Allen* charge. 346 S.C. at 485–87, 552 S.E.2d at 713–14. The supreme court noted while the trial court did not actively inquire into the jury's division, it "failed to instruct the jurors not to disclose their division in the future." *Id.* at 494, 552 S.E.2d at 717. The court concluded "knowledge of the jury's numerical division combined with knowledge of its decisional disagreement, followed by an *Allen* charge directed, at least in part, to minority jurors, is impermissibly coercive." *Id.* at 494, 552 S.E.2d at 717–18.

During its instruction on the law after closing arguments, the trial court can instruct the jury that if it encounters division it should not disclose its numerical split. *Williams*, 386 S.C. at 515 n.7, 690 S.E.2d at 68 n.7 ("[T]o alleviate problems in future cases where the jury is deadlocked, we would advise trial judges to instruct the jurors not to disclose their numerical division."). Should the jury later report a deadlock and disclose its split, the trial court should tell the jury not to reveal its numerical division again and craft any *Allen* charge mindful of how it may be interpreted given the division. This makes an already subtle task even more delicate. *See* United States v. Vanvliet, 542 F.3d 259, 268 (1st Cir. 2008) (refusing to hold jury's volunteering of division reversible error; "Instead, the district court's knowledge of the numerical division of jurors ... might create a coercive situation if circumstances suggest that minority or 'holdout' jurors likely would infer that the court is directing the *Allen* charge specifically at them, and implying that they should vote with the majority to get the case settled expeditiously").

The fourth *Tucker* factor in determining whether an *Allen* charge is unconstitutionally coercive is whether the time between the charge and the verdict demonstrates coercion. This factor is notoriously difficult to apply without indulging in speculation given the secrecy of jury deliberations. Here, the jury returned its guilty verdict two-and-a-half hours later, which does not dispel the likelihood of coercion. We have no way of knowing what went on in the jury room, but we do *218 know that less than three hours after the *Allen* charge, the jury transformed from a body significantly divided on five serious felony charges involving multiple victims into one united by complete unanimity. *Tucker* **729 found a one-and-a-half hour interval suggested coercion when there was only one juror holding out, and (as here) the jury had been hung since late the previous afternoon. 346 S.C. at 494, 552 S.E.2d at 718.

The *Tucker* criteria have never been deemed comprehensive. The most troubling thing about the charge here is what it did not say: it did not tell the jurors they should not surrender their conscientiously held beliefs simply for the sake of reaching a verdict, an essential message that sometimes saves borderline charges from crossing the line into coercion. *See Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 423, 537 S.E.2d 279, 283 (2000) (finding trial court properly instructed a deadlocked jury by "inform[ing] the jury of the desirability of reaching a verdict ... yet remind[ing] the jury no juror should surrender his or her conscientious conviction simply to reach a unanimous verdict"); *Blake by Adams v. Spartanburg Gen. Hosp.*, 307 S.C. 14, 18, 413 S.E.2d 816, 818 (1992) ("[A] trial judge has the duty to ensure that no juror feels compelled to sacrifice his conscientious convictions in order to concur in the verdict."). Nor did the trial judge's initial charge at the end of the trial remind the jurors not to surrender their conscientious beliefs during deliberations. The original *Allen* charge included such a statement, and courts have routinely held its absence reversible error. *See* Note, *Due Process, Judicial Economy & the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123, 128 (1967) ("Almost without exception the courts have required that the charge contain the statement that 'no juror should yield his conscientious conviction' or words to that effect."). The Fourth Circuit has observed that if the original *Allen* charge were "stripped of its complementary reminder that jurors were not to acquiesce in the views of the majority or to surrender their well-founded convictions conscientiously held, it might readily be construed by the minority of the jurors as coercive, suggesting to them that they should surrender their views in deference to the majority and concur in what really is a majority, rather than a unanimous, verdict." *Rogers*, 289 F.2d at 435; *see also Smalls v. Batista*, 191 F.3d 272, 279 (2d Cir.1999) ("[A] necessary ***219** component of any *Allen*-type charge requires the trial judge to admonish the jurors not to surrender their own conscientiously held beliefs."); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977) ("The reminder that no juror should merely acquiesce in the majority opinion is ... one of the most important parts of the Allen charge."); *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981) ("It is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party.").

The charge here also overemphasized the cost and expense of a retrial. While it is not error to tell the jury that a retrial will be costly, *see State v. Singleton*, 319 S.C. 312, 316, 460 S.E.2d 573, 575–76 (1995), the Fourth Circuit has warned such statements are disfavored and should not be overbearing. *United States v. Hylton*, 349 F.3d 781, 788 (4th Cir. 2003); *see also McElhiney*, 275 F.3d at 945 (holding comments on cost of retrial can be coercive if overstressed). Also, telling the jury the case will "have" to be retried is misleading. A hung jury often acts as an alarm bell to all but the unthinking, awakening one side (sometimes both) to weaknesses in their case, which can lead to a plea deal rather than a retrial.

A trial court is not, however, required to advise the jury they have a right to not reach a verdict. *See, e.g., United States v. Arpan*, 887 F.2d 873, 876 (8th Cir. 1989); *but see United States v. Manning*, 79 F.3d 212, 222 (1st Cir. 1996) (requiring *Allen* charge to include instruction that jury has the right to fail to agree).

All of this adds up to the conclusion that the charge unduly pressured the jury. We are certain the trial court had the best intentions, but from our perspective the *Allen* charge was unconstitutionally coercive. We therefore reverse and remand this case for a new trial.

****730 REVERSED AND REMANDED.**[1]

WILLIAMS and GEATHERS, JJ., concur.

All Citations

427 S.C. 208, 829 S.E.2d 723

Footnotes

1 We decide this case without oral argument pursuant to Rule 215, SCACR.

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS
	)	2019-CP-40-5591
ARTHUR MACON, #304226 Applicant, vs	)	CERTIFICATE OF SERVICE BY MAIL
STATE OF SOUTH CAROLINA, Respondent,	)	

2021 JUL 30 PM 1:15

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

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

3. I have this day served a copy of the **Return to Applicant's Rule 59e Motion** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

E. Charles Grose, Jr.
Grose Law Firm
404 Main Street
Greenwood, SC 29646

DATED this 26th day of July, 2021.

Lindsey A. McCallister
Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Arthur W. Macon, #304226, Applicant, v. State of South Carolina, Respondent.	)	C.A. No. 2019-CP-40-5591 **RETURN TO APPLICANT'S MOTION PURSUANT TO RULE 59(E), SCRCP**

2021 JUL 30 PM 4:

This matter comes before this Court by way of Applicant Arthur Macon's motion pursuant to Rule 59(e), SCRCP, asking this Court to alter or amend its order of dismissal denying and dismissing his application for post-conviction relief. Respondent the State of South Carolina makes the following return to the motion:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections. Applicant was indicted at the January 2013 term of the Richland County Grand Jury for one count of armed robbery and four counts of kidnapping (2013-GS-40-0579). Applicant was represented by Kristy G. Goldberg (Counsel). Assistant Solicitors Richard C.R. Cathcart, Sr., and Jeremiah J. Shellenberg, Jr., prosecuted the case.

Applicant's case proceeded to a jury trial September 29 through October 3, 2014, before the Honorable DeAndrea G. Benjamin. The jury convicted Applicant as indicted on the armed robbery charge and acquitted him on all four counts of kidnapping. Judge Benjamin sentenced Applicant to a term of twenty-three years' imprisonment.

Applicant filed a timely notice of appeal from his conviction and sentence. Glen Walters, Sr., and R. Bentz Kirby of Glenn Walters & Associates, PA, represented Applicant on appeal. Applicant raised the following issues:

1. Did the Trial Court commit error when it allowed Ricky Woodberry to testify that Jason Colon was schizophrenic, had a lobotomy, was passive and had the mind of a thirteen (13) year old in order to bolster Colon's testimony against [Applicant]?

2. Did the Trial Court commit error when it allowed Ricky Woodberry to testify about Jason Colon's medical condition as the testimony was hearsay and Woodberry lacked the necessary special knowledge, skill, experience or training to testify on this issue?

The case was submitted on briefs to the Court of Appeals on December 12, 2017. Thereafter, on January 17, 2018, the Court of Appeals affirmed Applicant's conviction and sentence. State v. Macon, Op. No. 2018-UP-031 (S.C. Ct. App. filed Jan. 17, 2018). Applicant petitioned for rehearing on February 16, 2018. The Court of Appeals denied the petition for rehearing on March 22, 2018.

Thereafter, Applicant petitioned for a writ of certiorari to the South Carolina Supreme Court on May 1, 2018. The Supreme Court denied certiorari on October 18, 2018. State v. Macon, S.C. Sup. Ct. Order filed Oct. 18, 2018. The case was remitted to the circuit court on November 6, 2018.

II. CURRENT PROCEEDINGS

Applicant timely commenced this PCR action on October 4, 2019. Through counsel, Applicant amended his application on December 23, 2019. Respondent made its Return on June 15, 2020. An evidentiary hearing into the matter convened April 16, 2021, via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*,

dated September 14, 2020.[1] E. Charles Grose, Jr., Esquire, represented Applicant. Assistant Deputy Attorney General Lindsey A. McCallister and Assistant Attorney General Michael Davidson represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant's trial counsel, Kristy Goldberg, and Deputy Assistant Solicitor Daniel Goldberg, also testified.[2] Numerous exhibits were also introduced during the hearing. Applicant proceeded on the following issues, with the exception of with the exception of the claim of failure to investigate (numbered 11(b)(1) in the amended application):

1. Conflict of interest:
   a. Counsel had a conflict of interest and failed to disclose to Applicant that her husband is a Deputy Solicitor for the Fifth Circuit Solicitor's Office; and
   b. Counsel had a conflict of interest as a result of the flat fee contract agreement with the Commission on Indigent Defense that provided an incentive for Counsel to not seek a mistrial when the jury was deadlocked.
2. Pretrial:
   a. Failing to investigate, develop, and present evidence to establish that Applicant is not guilty of armed robbery; and
   b. Failing to object to an irregularity in the indictment when the body of the indictment states the grand jurors met on January 16, 2013, and the face of the indictment states the grand jurors returned a "true bill" on July 16, 2014.
3. During trial:
   a. Failing to object to the prosecutor's closing argument calling Applicant "a liar" at (Tr.368, ln. 9.); and
   b. Failing to object to the prosecution and prosecution witness improperly vouching for Jason Colon, who was the co-defendant and material witness for the State.
4. During jury deliberations:
   a. When the jurors sent a note (Court's Exhibit 4) stating, "We are not unanimous on any of the charges yet, how do you want us to proceed?" and the Solicitor agreed, "They are deadlocked," Counsel failed to object to the

[1] See S.C. Sup. Ct. Memorandum dated September 14, 2020 ("Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. *Consent of the parties or counsel is not required.* Please use WebEx, the conferencing platform supported by the Judicial Branch." (emphasis added)). Nonetheless, Applicant indicated his consent to the use of the WebEx platform.

[2] The assistant solicitor who prosecuted the case, Richard Cathcart, was also present for the hearing, but neither Applicant nor the State chose to call him as a witness.

trial court instructing the jurors to continue deliberating when that instruction did not instruct the jurors that "the verdict should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgement which was not concurred in by the majority," Allen v. United States, 164 U.S. 492, 501 (1896);

b. When the jurors sent a note (Court Exhibit 5) stating, "Still at a stalemate," trial counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330;
c. When the jurors sent a note (Court Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330;
d. When the jurors sent a note (Court Exhibit 8) stating, "We are 11-1. Same as yesterday at this same time and when we left. The one person is not in agreement with the majority and said will not change their minds [sic]," Counsel failed to object to the trial court's Allen charge that singled out the sole juror that was holding out for acquittal. Tucker v. Catoe, 346 S.C. 483, 552 S.E.2d 712 (2001); State v. Hughes, 336 S.C. 525, 521 S.E.2d 500(1999);
e. When the jurors sent a note (Court's Exhibit 12) stating, "We have deliberated for the past 8 hours and we are still in the same position. Fatigue has now set in and we need refreshing," and the foreman of the jury informed the trial court the jurors were at an "impasse" and two or three jurors wanted to terminate deliberations, Counsel failed to move for the trial court to declare a mistrial as mandated by S.C. Code Ann. § 14-7-1330.

5. Cumulative error:
   a. The cumulative effect of Counsel's errors, as set forth in 11(a)–(d), entitles Applicant to a new trial. Williams v. Taylor, 529 U.S. 362 (2000); Kyles v. Whitley, 514 U.S. 419 (1995).

After the hearing, both parties submitted additional case law for the Court to consider. On April 28, 2021, this Court informed the parties of its intent to deny relief and directed the State to prepare an order based on the grounds previously argued by the State. On June 28, 2021, Respondent submitted a proposed order pursuant to the Court's instructions.

On July 9, 20201, the Court issued an order of dismissal, denying and dismissing the post-conviction relief action in full.

On July 16, Applicant served a timely Rule 59(e), SCRCP motion. This return to the motion follows.

III. RESPONSE TO APPLICANT'S MOTION TO ALTER OR AMEND

Response to Objections to Procedure Used by This Court

Applicant first argues that the process of asking the prevailing party to draft a proposed order for the Court's review and consideration "denied Mr. Macon an opportunity to have his claims adjudicated by a judicial office." See "Threshold Matter" section of Rule 59(e), SCRCP Motion. Applicant argues by requesting the prevailing party to draft a proposed order for its consideration—a routine practice in not only post-conviction relief cases but the vast majority of cases heard by the circuit court in this state—this Court has somehow violated S.C. Code Ann. § 17-27-80, which requires judges to make specific findings of facts and conclusions of law as to each issue raised in the PCR evidentiary hearing.

Applicant's argument is premised on a faulty assumption that this Court failed to conduct its own review of the requested proposed order and simply adopted Respondent's proposed order in full without an adequate review. This is directly refuted by the record, which clearly and unequivocally establishes this Court thoroughly reviewed all evidence presented, listened to the arguments of the parties and gave each side the opportunity to present additional case law for consideration. Applicant's assertions that this Court merely adopted Respondent's proposed order of dismissal (submitted at the Court's express request) are wholly without merit.

Applicant acknowledges the Court's Order of Dismissal addresses the merits and makes findings of facts and conclusions of law as to all issues except one, which Respondent addresses below, but Applicant argues "the reasoning in the order is entirely that of an advocate and not an independent judicial officer," which allegedly violates the separate of powers doctrine in Article I, Section 8 of the South Carolina Constitution.

In Fishburne, our Supreme Court provided guidance on the preferred method for submission of proposed orders in post-conviction relief cases:

> When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.

Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019).

The exact method as set forth in Fishburne was followed in this case. The Court, after hearing arguments and reviewing case law from **both** parties, denied relief based "upon the grounds previously argued before the court by the State" and requesting Respondent prepare a proposed order. Respondent—based on the explicit instruction from the Court—prepared a proposed order with detailed findings of fact and conclusions of law. Respondent then ***twice*** – on June 15, 2021, and June 21, 2021, transmitted this proposed order to opposing counsel before submitting it to the Court on June 28, 2021. Applicant was therefore given ample time to review the order and submit objections to the proposed order both before and after it was submitted to the Court. Applicant never informed either counsel for Respondent or the Court of any objections to the order, until upon receipt of the Order, Counsel filed a timely Rule 59(e), SCRCP, motion.

Applicant argues his position is supported by Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). However, the portion Applicant quotes is related directly to capital cases and the full sentence reads: "Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of ***law in death penalty cases*, we also acknowledge that in all other cases,**

it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency." Id. (emphasis added). As discussed by our Supreme Court in Hall, it is common and routine practice in not only post-conviction relief cases, but the vast majority of cases heard by the circuit court in this state, for the prevailing party to draft a proposed order for the Court's consideration. As recently as 2019, our Supreme Court recognized the practice of calling for proposed orders from litigants remains routine, though the "finalization of [the] order is often a collaborative effort." Fishburne, 427 S.C. at 516, 832 S.E.2d at 589. Our Supreme Court has never required or even suggested that a post-conviction relief judge must write his or her orders from scratch. If the post-conviction relief court—after careful consideration—adopts the language offered, that language becomes the Court's order. The judge is free to accept or reject a proposed phrasing or finding as the Court deems appropriate.

Applicant has failed to sufficiently state how he was deprived any statutory or constitutional right by this process. The Court, as required by Section 17-27-80, made specific findings of fact and conclusions of law. If this Court decides any findings were omitted, it can issue an Amended or Supplemental Order to correct that omission.

Applicant's argument that this Court's procedures—as directly outlined in Fishburne—violate the Separation of Powers is also unpersuasive. In support of this contention, Applicant cites State v. Langford, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012); however, Langford is not analogous to the case at hand. Langford involved with the specific issue of the statutorily delegated duty of the solicitor—codified in section 1–7–330 of the South Carolina Code—to prepare the dockets for general sessions and determine the order in which the cases are called for trial. Id. The Langford Court concluded the statute violated the separation of powers because it delegated an inherently judicial function exclusively to a member of the executive branch. Id. at 435, 735 S.E.2d

at 478. Langford is inapplicable to this situation, partially because the preparation of proposed orders is not exclusively delegated to the Attorney General's Office. Rather, the post-conviction relief court has the option to request proposed orders from either party, and upon receipt of those orders, is responsible for issuing its own final order.

The procedures employed by this Court were proper and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented by the Court and comports with statutory and constitutional requirements.

Response to Argument Regarding Conflict of Interest

Applicant argues the Court's order regarding the allegation of a conflict of interest contains four errors of law: (1) there is no affirmative evidence in the record that Counsel informed Applicant she was married to Dan Goldberg, the Deputy Solicitor; (2) the order fails to acknowledge informed consent must be in writing; (3) the order fails to consider the Deputy Solicitor's supervisory role; (4) the Order fails to consider two cases – Commonwealth v. Croken, 432 Mass. 266, 273, 733 N.E. 2 1005, 1011 (2000), and People v. Jackson, 167 Cal. App. 3d 829, 213 Cal. Rprt. 521 (Ct. App. 1985) – cited in the amended application.

First, the Court correctly found Counsel did not have a conflict of interest as a result of her relationship with Goldberg. As the Court states in its Order, both Counsel and Goldberg testified Goldberg had no involvement in the prosecution of the case, and he did not even speak with Counsel about the case except as it related to, essentially, household management due to Counsel's trial schedule. The only involvement Goldberg possibly had in the case is that the file initially came across his desk, he reviewed the file to see which team or attorney it should be directed to, and he directed it accordingly to Cathcart. Goldberg repeatedly testified he had no further

involvement in the prosecution of the case, and Counsel testified she did not have any substantive discussions with Goldberg about the case, negotiations, or any defenses or strategy.

As this Court correctly found, in South Carolina, in order to impugn a criminal conviction, an Applicant must show more than "[t]he mere possibility defense counsel may have a conflict of interest. . . ." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Moreover, South Carolina's Rules of Professional Conduct only require informed consent by the client when "a lawyer related to another lawyer as [a]....spouse" personally represents an adverse client. See SCRPC Rule 1.8(k) ("A lawyer related to another lawyer as parent, child, sibling or spouse shall not *personally* represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client gives informed consent.") (emphasis added). As the Court correctly found, this situation is not applicable to Applicant because Goldberg did not personally represent the State in the criminal case against Applicant, and therefore, Counsel did not have a conflict of interest.

The cases cited in the amended application are likewise inapplicable. For example, in Jackson, the defense attorney and the prosecutor "appeared as counsel in directly adverse roles representing defendant and the People respectively at the preliminary examination, at pretrial settlement conferences, and at trial." 167 Cal. App. 3d at 831. As discussed, that is far different from the situation at hand in Applicant's case. In Croken, the court considered a situation similar to this one in which defense counsel was in a relationship with an attorney who worked at the same office as the attorney who actually handled the prosecution, and the court remanded the case for an evidentiary hearing to determine whether an actual conflict of interest existed due to the relationship. 432 Mass. at 273-77, 733 N.E. 2 at 1011-13. It specifically noted unanswered

questions in that case such as whether the attorneys ever discussed the case with each other. Id. That is exactly what this Court has already done, and it determined no conflict existed.

Therefore, there was no need for the Court to consider whether Counsel disclosed a nonexistent conflict or followed the appropriate procedures in obtaining a waiver from Applicant – i.e. a written waiver – because there was no conflict to waive.

The Court correctly found Applicant failed to establish a conflict of interest, and properly denied relief.

Response to Argument Regarding Indictment

In his Rule 59(e), SCRCP, motion, Applicant argues this Court's order of dismissal is faulty because "the order of dismissal... never considers the constitutional requirement an indictment be presented to the grand jury for a finding of probable cause." This is directly refuted by the text of the Court's Order, which states, "the amended indictment contained a scrivener's error ***as to the date the grand jury met to consider it***, which did not render the indictment, or the trial, invalid." Order. p. 22. Additionally, the amended indictment is stamped and signed by the foreman of the Grand Jury as true billed.

The Court properly denied relief.

Response to Arguments Regarding Solicitor's Closing Argument

Applicant asserts this Court's ruling that Applicant failed to meet his burden of proof as to ineffective assistance due to Counsel's failure to object to the solicitor calling Applicant a liar during closing is erroneous.

First, Applicant argues because the Court's order acknowledged Counsel's candid testimony that she was not aware of any case law to support an objection on this basis, the Court must find Counsel deficient. Additionally, Applicant argues that because Counsel was unaware

of the case law to support an objection, the Court erred in finding she had a strategic reason for failing to do so.

This argument is a misrepresentation of the standard for finding ineffective assistance and a misreading of the Court's finding on this issue. The Court found Counsel was not deficient because, even if she had known of the specific case law, she testified she would not have objected because "an objection would have been contrary to her overall trial strategy" as "she felt she had a logical explanation for the inconsistencies in Applicant's statement, and she could make the State appear to be exaggerating and taking an extreme position, which she felt was helpful to Applicant." Order. p. 23. This is the trial strategy the Court found reasonable, and thus did not prejudice Applicant.

As the Court correctly noted, the Strickland standard is flexible and allows leeway for counsel to make decisions based on the facts and circumstances of each case. Thus, "[n]o particular set of detailed rules for 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 466 U.S. at 688-689. "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. South Carolina courts have recognized this flexibility as well, particularly in the context of whether to make an objection. In Stone v. State, our Supreme Court wrote:

> Trial counsel is repeatedly required during any trial... to make split-second decisions on many subjects, including whether to object to testimony. There are a variety of reasons counsel may soundly choose not to make such an objection, including the reality that not all evidence offered by the State is harmful to the defendant. ***Under certain circumstances, therefore, counsel may employ a strategy of not objecting—even when counsel has a good argument for exclusion***—if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration.

419 S.C. 370, 383, 798 S.E.2d 561, 568 (2017) (emphasis added).

Moreover, the Court also considered that even if Counsel was deficient for failing to object, there was still no prejudice to Applicant because the solicitor's single comment did not "so infect the trial with unfairness" as to deprive Applicant of a fair trial, particularly where Applicant's credibility was already squarely in question through the evidence and testimony presented. Order. p. 25. "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6 (2003).

This Court therefore correctly found neither deficiency, nor any prejudice to Applicant, and denied relief.

Response to Arguments Regarding Improper Vouching

Applicant argues the Court's order fails to address Applicant's allegation that Counsel was constitutionally ineffective because she failed "to object to the prosecution and prosecution witnesses vouching for Jason Colon, who was the co-defendant and material witness for the State." However, neither the amended application nor Respondent's 59(e) motion point to any specific instances in the transcript to support this allegation, and it is coupled with the allegation that Counsel failed to object to the solicitor's argument that Applicant was a liar.

The reasoning in the Court's order applies to a general allegation of vouching. As the Court found, the issue of credibility was already clearly before the jury through a variety of evidence and testimony. It is obvious from the record that the jury could either believe Jason Colon when he testified that Applicant was the mastermind of the robbery, or they could believe Applicant had nothing to do with it and was in the area only because he dropped Colon off. However, Applicant fails to point to any specific instances of what he believes to be bolstering in the trial testimony or the solicitor's closing argument. See State v. Taylor, 404 S.C. 506, 514-515,

745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). ("Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain 'the assessment of witness credibility . . . within the exclusive province of the jury.'").

Moreover, Counsel strenuously objected to the testimony of Colon's father, specifically on the basis that it was improper bolstering, and the trial court limited some of that testimony. Counsel preserved the issue for appellate review, and the issue was in fact raised on direct appeal. Therefore, Counsel was not deficient nor was Applicant prejudiced.

Without more specific allegations from Applicant, Respondent does not believe the Court needs to issue a supplemental or amended order. Rather, in its Order ruling on this motion, the Court can clarify that its findings of fact and conclusions of law apply to Applicant's general allegation of bolstering or issue more specific findings on this issue as to why Counsel was not deficient, nor was Applicant prejudiced. In any event, this Court's denial of relief on this allegation was proper.

Response to Arguments Regarding Juror Deliberations

Applicant argues the Court erred in several ways in finding Counsel was not ineffective in failing to move for a mistrial. Additionally, Applicant contends the Order is faulty because it does not cite to two cases, Brewster v. Hetzel, 913 F.3d 1042 (11th Cir. 2019), and State v. Taylor, 427 S.C. 208, 829 S.E.2d 723 (2019), listed by Applicant in his amended application in support of his arguments regarding juror deliberations and the mistrial issue. However, while the Court did not cite to those cases, specifically, the substantive issues raised by each case – the appropriateness of

a mistrial motion and the appropriateness of a trial court's particular Allen charge – are both fully addressed by the Court's findings of facts and conclusions of law in the Order.[3]

First, Applicant argues the Court's finding, in denying the allegations on this issue, that Cathcart and the trial judge were not saying that the jurors were deadlocked, and in fact were in agreement that they were *not* deadlocked, is unsupported by the record. However, the Order clearly states the Court reviewed the specific portion of the record at issue and listened to Counsel's explanation and agreed with Counsel. See Tr. p. 423. Counsel was present at the hearing, heard the exchange in real time, and testified that, despite how it may appear to Applicant on the typed page, Cathcart and the trial judge were in agreement that the jury's note was *not* indicating deadlock, an assessment with which Counsel testified she also agreed. Counsel explained, specifically, the note's language included a qualifier that the jury had not reached a decision ***yet***, and was merely asking the judge what they should do, and the judge responded that it was okay for them to keep deliberating at that point.

Applicant argues Counsel testified she was unfamiliar with the law on Allen charges and did not know she could ask the trial court for that instruction. This is a clear misreading of Counsel's testimony. Counsel did not testify she was unfamiliar with the law regarding Allen charges; she testified she did not know she could ask the trial court for such an instruction a or to inquire into the position of the minority jurors at that particular point in deliberations, i.e. ***when the jury was not deadlocked.***

[3] Additionally, both cases cited by Applicant were decided in 2019 – a full five years after Applicant's trial – and therefore were clearly unavailable to Counsel as guidance on these issues.

Thus, because the Court found Counsel was correct in her assessment that the jury was not indicating it was deadlocked, the Court also correctly found neither deficiency nor prejudice because Counsel had no basis to object to the trial court not giving an Allen charge at that time.

Applicant also argues the Court erred in its assessment of the jury's next note stating it was "still at a stalemate," finding it was not evidence of deadlock. This argument, however, conveniently ignores the remainder of the jury's note which requested to be recharged on the hand of one, hand of all, and informed the trial court that the majority of jurors felt progress could made if they returned the next day. The Court also relied on the record, which shows the trial judge discussed the note with the entire jury and directed them to come back the next day, to which none of the jurors objected or informed the trial court that they felt they could not reach a verdict even with continued deliberations. Therefore, the Court's finding that this note was not an indication of deadlock is correct and supported by the record.

The Court also correctly found, in accordance with South Carolina case law, that even if this note could be considered the second indication of deadlock, the jury impliedly consented to continue deliberations based on the combination of asking for to hear a particular instruction again and by not informing the trial court that further deliberation was fruitless when given the chance to do so. See Buff v. S.C. Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) ("Accordingly, when a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments.").

Next, Applicant argues the Court's finding that the third note indicating there was a single holdout who "will not change their minds [sic]" was insufficient to trigger a mistrial is incorrect.

For the reasons detailed above, the Court's determination that this was the first indication of deadlock is correct and supported by the record. Additionally, because this was the first such indication, the Court's determination Counsel was not deficient for failing to move for a mistrial based on South Carolina Code section 14-7-1330 is correct. By the plain language of that statute, the requirements to make such a motion had not yet been met. The section at issue states:

> When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. But ***if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent*** unless it shall ask from the court some further explanation of the law.

Additionally, the Court correctly found Counsel was not deficient because the Allen charge given by the trial court at this juncture was a correct statement of the law, and therefore, was not objectionable. As the Court noted, the language given by trial judge in Applicant's case was substantially similar to the language approved by the South Carolina Supreme Court in State v. Williams, 386 S.C. 503, 690 S.E.2d 62 (2010).

Applicant asserts the Court's findings in this regard are deficient because the Court did not specifically address whether the instruction singled out the sole holdout juror. This ignores the Court's ruling on this issue as a whole. The Court quoted language from Williams acknowledging that in order for an Allen charge to be proper, it cannot be directed to the minority voters on the panel and must be even-handed and direct both the majority and the minority jurors to consider the other side's views. Immediately thereafter, the Court wrote that it found the trial judge's instruction used the identical approved language from Williams, and that the charge, as a whole, was correct statement of the law and not coercive. This clearly encompasses a determination that the language used did not single out the minority juror on the panel, and therefore, the Court's order is correct and sufficient as to this issue.

Further, Applicant argues the Court's order is incorrect as a matter of law because it found Counsel was not deficient for failing to move for a mistrial when the jury foreman told the trial court some of the jurors wanted to be out of the jury room "forever," and those jurors were not present in the courtroom when the foreman and the judge discussed continued deliberations. This argument ignores the totality of the circumstances surrounding that statement, which the Court detailed in its Order.

After the trial judge gave the Allen charge, the jury returned with another note stating they were "still in the same position" and "needed freshness" because "fatigue" had set in. After the trial court received this note, the judge summoned the foreman to clarify what the jury meant by needing "freshness." The foreman informed the court that they were not sure how much longer they could continue to deliberate, but they were "at [the court's] mercy." Tr. p. 445. The foreman continued to explain the biggest issue was that the members of the jury "just want to get out of that room." Tr. p. 445. He then told the court that although two or three jurors wanted to be out of there "forever," the jury was "willing to do what we need to do." Tr. p. 445. ***The foreman then went back to consult with his fellow jurors*** and ultimately stated, "We'll come back tomorrow." Tr. p. 447. The judge then assembled the entire jury and relayed what the foreman had said. None of the jurors indicated disagreement with returning in the morning to continue deliberating, again indicating implied consent to continue. Tr. pp. 447-48. Then, once the jury returned the next morning and resumed deliberations, it sent out no further notes and reached a decision around lunch time that afternoon. Tr. p. 450. Finally, when the jury was polled after the judge announced the verdict, all indicated this was their verdict. Tr. pp. 454-56.

Accordingly, the Court correctly found that even if this note could be considered a second indication of deadlock, the jury, after consultation with the judge, consented to continue its

deliberations, and therefore, its finding that Counsel was not deficient is supported by both the record and case law on this issue.

Finally, Applicant argues the Court erred in finding that even if the requirements of section 14-7-1330 had been met at this point, Counsel was not deficient for failing to move for a mistrial because she felt the deliberations were going in Applicant's favor. Counsel credibly testified she felt the jury's lengthy deliberations were beneficial to Applicant because it indicated the jury had questions about what happened. Counsel also testified that had she known with certainty the split was 11-1 against Applicant, she would have changed her strategy and pursued a mistrial. Counsel stated she felt that if the case were to mistry, she felt it would be better to have it done by the jury, rather than on her motion, because then the solicitor would know that there were issues with the case, and she felt Applicant would get a better offer.

Moreover, when the jury returned, they announced a verdict acquitting Applicant of all four kidnapping charges. Thus, Counsel's intuition that the deliberations might be going in Applicant's favor was not entirely incorrect and her strategy of waiting out the deliberations was not unreasonable. As Strickland states:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

466 U.S. at 689.

The Court heard Counsel's testimony as to her strategy, weighed the testimony accordingly, and found it credible. Thus, the Court's order is correct and sufficient on this issue.

Response to Arguments Regarding Cumulative Error

In asking this Court to reconsider its ruling, Applicant asserts this Court should have granted relief based on a cumulative error analysis, which he asserts is supported by case law "that incorporates the cumulative error analysis into the Strickland analysis." However, even Applicant admits his argument is based on conjecture, acknowledging that the cases he cites ***imply*** cumulative error analysis, but do not directly state it.

Again, Applicant's reliance on this argument is unpersuasive, particularly when the South Caroline Supreme Court has recognized that "whether the cumulation of several errors, 'which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina'" Lorenzen v. State, 376 S.C. 521, 535 FN 3, 657 S.E.2d 771, 779 FN 3 (2008) (citing Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) and Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006)). More to the point, the South Carolina Supreme Court, in Smalls v. State, after finding multiple deficiencies of counsel, stated

> Smalls' individual claims of deficient performance ***must be analyzed separately*** to determine whether either of them gives rise to a reasonable probability the result of the trial would have been different without counsel's error.

422 S.C. 174, 195, 810 S.E.2d 836, 847 (2018).

This Court properly rejected Applicant's assertions that he is entitled to relief based on cumulative deficiencies, particularly where the Court found none.