

**IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court**

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**APPEAL FROM YORK COUNTY  
Court of Common Pleas**

**Edgar W. Dickson, Presiding in York County**

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**Case No. 2010-CP-46-1192**

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**Dontavious R. Mack, ..... Appellant,**

**v.**

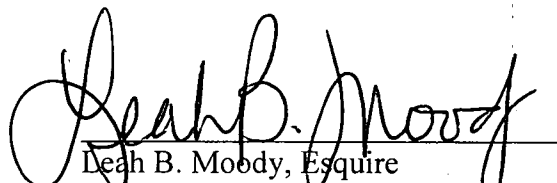
**State of South Carolina, ..... Respondent.**

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**NOTICE OF APPEAL**

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Dontavious R. Mack appeals the order of the Honorable Edgar W. Dickson, dated April 18, 2013 and mailed on May 3, 2013. Appellant received written notice of entry of the final order on May 5, 2013.

  
Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
Rock Hill, South Carolina 29731

Other Counsel of record:  
J. Rutledge Johnson, SC Attorney General's Office  
Attorney for Respondents  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
(803) 734-3970

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

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Case No. 2010-CP-46-1192

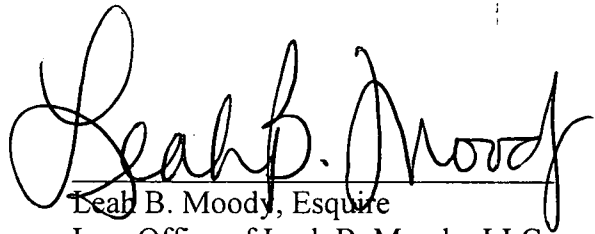
Dontavious R. Mack, ..... Appellant,

v.

State of South Carolina, ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on J. Rutledge Johnson by depositing a copy of it in the United States Mail, postage prepaid, on May 20, 2013, addressed to its attorney of record, J. Rutledge Johnson, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
235 E. Main Street, Suite 115  
Post Office Box 1015  
Rock Hill, South Carolina 29731

cc: Sharon A. Graham  
Dontavious R. Mack

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MAY 23 2013

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Dontavious R. Mack, #323350, )  
Applicant, )

2010-CP-46-1192

v. )

ORDER OF DISMISSAL

State of South Carolina, )  
Respondent. )

FILED-RECEIVED  
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CIVIL RIGHTS DIVISION  
C.C. CP. & BS  
YORK COUNTY, SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed March 22, 2010. The Respondent made its Return on August 5, 2010. An evidentiary hearing into the matter was convened on October 10, 2012, at the Moss Justice Center in York, SC. Leah B. Moody, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Monica Townsend, Louse Addison, BJ Barrowclough, Esquire and Harry Dest, Esquire also testified. This Court had before it a copy of the records of the York County Clerk of Court, records from the South Carolina Department of Corrections, and the guilty plea transcript.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the February 2007 term of the York County Grand Jury for Criminal Conspiracy (2007-GS-46-0681), Murder (2007-GS-46-0682), Armed Robbery (2007-GS-46-0683), Possession of a Weapon During

the Commission of a Violent Crime (2007-GS-46-0684), Possession of A Pistol by a Person Under the Age of 21 (2007-GS-46-0685), Possession of a Stolen Vehicle (2007-GS-46-0686), and Kidnapping (2007-GS-46-0687). Harry A. Dest, Esquire, and B.J. Barrowclough, Esquire, represented the Applicant. On August 8, 2007, the Applicant pled guilty as indicted. The Honorable Lee S. Alford sentenced him to confinement for a period of five (5) years for Criminal Conspiracy, life without parole for Murder, thirty (30) years for Armed Robbery, five (5) years for Possession of a Weapon During the Commission of a Violent Crime, one (1) year for Possession of A Pistol by a Person Under the Age of 21, five (5) years for Possession of a Stolen Vehicle, and twenty (20) years for Kidnapping, sentences running concurrently.

The Applicant filed a timely Notice of Appeal with the South Carolina Court of Appeals on August 8, 2007, and a brief was filed on Applicant's behalf pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Mack, Op. No. 2010-UP-008 (S.C. Ct. App. filed January 21, 2010).

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

1. Ineffective Assistance of Trial Counsel;
2. Ineffective Assistance of Appellate Counsel;
3. Violations of Due Process (5th, 6th, and 14th Amendments); and
4. Involuntary Guilty Plea.

At the hearing, the Applicant proceeded on his claim of ineffective assistance of plea counsel and involuntary guilty plea.

## SUMMARY OF TESTIMONY

The Applicant testified he met with Counsel Barrowclough and Dest three or four times, but did not think he had enough time to fully discuss his case. He stated the Solicitor gave him notice of the State's intent to seek the death penalty. The Applicant testified there was an initial plea offer for life without parole, which he did not accept. He then testified there was another plea offer for a straight up plea for thirty years to life imprisonment, which he accepted. In exchange, the State would not seek the Death Penalty. He stated he accepted this plea because he did not want his brother, a co-defendant in the case, to testify against him. The Applicant testified Counsel Barrowclough advised him that he would only receive thirty years.

Additionally, the Applicant testified he discussed his Constitutional rights with Counsel and submitted a plea affidavit to the court. However, the Applicant stated he did not understand the plea affidavit. The Applicant testified that during the guilty plea, he was thinking about other things and just wanted to get the plea process over with as quickly as possible. The Applicant further claimed he was coerced into pleading and would have taken this case to trial. He stated he was coerced because if he had not accepted the guilty plea, he would have been facing the death penalty. The Applicant lastly stated he was coerced by Counsel because he relied on Counsel's advice that he would receive thirty years, and that he wants a new trial.

On cross-examination, the Applicant admitted the plea court explained all of the crimes for which he was charged and the penalties they carried. He also agreed that he understood all of these and wanted to plead guilty. The Applicant acknowledged he gave up his Constitutional rights at the guilty plea. He admitted there were no threats or promises to entice him to plead guilty. The Applicant also testified he was satisfied with his Counsel, fully discussed the charges with Counsel,

was advised of the witnesses and evidence the State would present at a trial, discussed the legal defenses with Counsel, and advised Counsel of witnesses that could be called on his behalf. He testified he was not under the influence of drugs or alcohol at the guilty plea and had no mental illness. The Applicant testified he pled own his own free will because he was, in fact, guilty of these crimes. He lastly admitted he apologized to the victim's family, admitted his guilt, and accepted responsibility for his actions.

The Applicant's mother, Monica Townsend, testified she was present when the Applicant signed the plea affidavit, and Counsel Barrowclough advised the Applicant he would receive a thirty-year sentence. The Applicant's grandmother, Louise Addison, testified she discussed the amount of time the Applicant would receive with Counsel. She also stated she spoke with the Applicant and wanted the Applicant to plead guilty because the Applicant thought he would receive thirty years' imprisonment.

Counsel (Barrowclough) testified he was appointed to represent the Applicant along with Counsel Dest. Counsel testified he discussed the death penalty and its ramifications with the Applicant, along with the evidence in the case. He stated the negotiations with the State included the Applicant's straight up plea in exchange for the State not seeking the death penalty. Counsel testified the plea was for a range of thirty years to life without parole. Counsel stated he presented a plea affidavit to the Applicant, read all of the questions to the Applicant, marked all of the Applicant's answers, the Applicant signed the affidavit and then he and Counsel Dest also signed the affidavit.

Additionally, Counsel testified he never told the Applicant he would receive a thirty-year sentence. However, Counsel argued to the plea court in mitigation that the Applicant should receive



a thirty-year sentence. He then stated the open/straight up plea was the only negotiation that was acceptable to the Solicitor and was reasonable under the circumstances.

Counsel (Dest) testified he did not advise the Applicant he would receive a thirty-year sentence. Counsel stated if this case was tried, there was a strong possibility of a conviction and a sentence of the death penalty for the Applicant. The State's evidence included the Applicant's statement to police, the video recording of the convenience store, forensic evidence, and a co-defendant's statements. Counsel testified the Applicant did not desire a trial with the potential of receiving the death penalty because it was nearly impossible to win and the statutory aggravating factors were clear in this case. Counsel stated his primary goal was to try and salvage the Applicant's life.

Counsel testified he was involved in plea negotiations with the State on the Applicant's behalf. Counsel stated the Solicitor insisted on life without parole. Counsel testified while it is difficult for a nineteen year old to accept life without parole, the Applicant was willing to plead; and he, Counsel, agreed with this decision. Counsel met with the Solicitor again to negotiate, and the Solicitor finally agreed to a straight up plea. Counsel testified he focused his efforts on explaining to the plea judge why a thirty-year sentence was appropriate in this case. Counsel stated he consulted a mental health expert to interview the Applicant, and Dr. Harold Morgan found the Applicant fully competent. Counsel stated the Applicant is a smart individual who had the capacity to be a productive citizen, but was a follower who suffered from low self-esteem.

Counsel further testified he incorporated Dr. Morgan's findings into the mitigation stage of the guilty plea. Counsel tried to explain to the plea court that this case was a robbery gone wrong. The victim in this case fired a weapon at the Applicant before the Applicant fired the fatal shot as the

Applicant was fleeing the convenience store. Counsel again stated his main objective at the mitigation stage was to convince the plea judge that a thirty-year sentence was appropriate. Counsel also testified he drove to Hartsville, SC to discuss this case with the Applicant's family and explained the outcomes if the Applicant chose a jury trial. If the Applicant was found guilty at the trial, the jury's only choices would have been life without parole or the death penalty. Counsel, lastly, testified this was an open plea, and reiterated that he never promised the Applicant he would receive a thirty-year sentence.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

#### **Ineffective Assistance of Counsel**

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within

the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366,(1985).

This Court finds Counsel (Barrowclough and Dest) were competent and diligent in their representation of the Applicant in this case. Counsel sufficiently advised the Applicant of the charges against him, the potential penalties if convicted at trial, and the evidence the State would produce at trial. Counsel satisfactorily investigated this case based on the information supplied by the Applicant and the evidence available. Counsel also engaged in plea negotiations which were beneficial to the Applicant. This Court also finds the Applicant was well informed by Counsel in this case. The Applicant expressed to the plea court that he was satisfied with Counsel, had sufficient time with Counsel, and Counsel did all that the Applicant requested. Moreover, the Applicant admitted his guilt and accepted responsibility for his actions. The Applicant pled guilty without any threat or coercion and was not under the influence of any intoxicant at the plea. The

Applicant also waived his Constitutional rights afforded to him. This Court finds the Applicant pled knowingly, voluntarily, and on his own free will.

“Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.” Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997).

This Court further finds the Applicant’s testimony regarding Counsel’s promise of a thirty-year sentence is not credible while also finding Counsel’s testimony is credible. Both Counsel Barrowclough and Dest testified they never promised the Applicant he would receive a thirty-year sentence, but that they advised the Applicant of the potential sentencing range and that they would argue in mitigation for a thirty-year sentence. This Court also finds the testimony of the Applicant’s mother and grandmother not credible. This Court finds the Applicant has failed to meet his burden of proving counsel’s performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

#### **Involuntary Guilty Plea**

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate’s right to contest the validity of such a plea is usually, but not

invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

The Applicant alleged his guilty plea was not voluntarily entered because Counsel coerced him to plead guilty. At the PCR hearing, the Applicant testified he felt coerced into pleading because he relied on Counsel's advice to him that he would receive a thirty-year sentence. However, the guilty plea transcript and the Applicant's answers during cross-examination at the PCR hearing directly refute his claims.

At the guilty plea, the Applicant stated he understood the charges against him and the penalties the charges carried. (Tr. p. 4 line 25- p.7 line 9). He then stated he wanted to plead guilty to the charges. (Tr. p. 7 line 9). The Applicant also testified he understood his constitutional rights and waived those rights. (Tr. p. 7 line 10- p. 8 line 20). The Applicant testified he was not promised anything or threatened in any way to influence him to enter a guilty plea. (Tr. p. 8 line 25- p. 9 line 3). He also stated he was satisfied with his attorneys, that his attorneys had fully discussed the charges against him, that his attorneys had explained to him the witnesses and the evidence the State would have presented at trial, that his attorneys had discussed all potential legal defenses with him,

and that he had given to his attorneys the names of any and all witnesses that he could have called on his behalf. (Tr. p. 9 lines 4-23). The Applicant testified he was not under the influence of drugs or alcohol and that he had no mental or emotional condition that would interfere with his judgment. (Tr. p. 9 line 24- p. 10 line 7). He stated he was pleading on his own free will. (Tr. p. 10 line 10). The Applicant testified he was, in fact, guilty of the charges. (Tr. p. 10 line 13). Further, the Applicant did not disagree with the facts as presented by the State. (Tr. p. 27 line 6). Lastly, the Applicant, in a statement to the plea court, said, "I want to first and foremost apologize to the family and friends of Mr. Marshall... I'm pleading to this because I am guilty... I am sorry for the bad decision I made that night... I take full responsibility for my action and am here in court today to receive punishment for what I did." (Tr. p. 51 lines 6-7; lines 9-10; lines 12-13; line 24- p. 52 line 1).

On cross-examination at the PCR hearing, the Applicant freely admitted he testified to all of the above at his guilty plea.

Based on the foregoing, this Court finds the Applicant's testimony concerning an involuntary guilty plea not credible, while finding Counsel's testimony at the PCR hearing credible. This Court also finds the Applicant pled guilty freely, voluntarily and without any coercion, threats or promises. Therefore, this allegation is denied.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his

AND IT IS SO ORDERED!



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Edgar W. Dickson  
Presiding Circuit Court Judge  
Sixteenth Judicial Circuit

April 18, 2013

Orangeburg, South Carolina

## Law Office of Leah B. Moody, LLC

235 East Main Street  
Post Office Box 1015  
Rock Hill, South Carolina 29731  
[LBMatty@comporium.net](mailto:LBMatty@comporium.net)

Phone: (803) 327-4192

Fax: (803) 329-1344

May 13, 2013

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MAY 23 2013

S.C. SUPREME COURT

Mr. Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29221

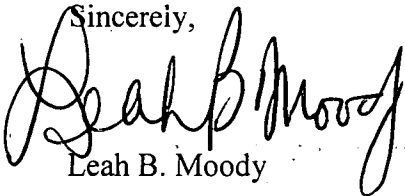
RE: Dontavious R. Mack v. State of South Carolina  
C.A. No.: 2010-CP-46-1192

Dear Mr. Shearouse:

The York County Court of Common Pleas appointed my office to represent Dontavious R. Mack in his Post Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal and Proof of Service in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope. Also enclosed is a copy of the Order of Dismissal.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

LBM/jow

Enclosure

cc: Dontavious R. Mack  
Rutledge Johnson, Esquire

Law Office of Leah B. Moody, LLC  
P. O. Box 1015  
Rock Hill, SC 29731



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