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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari to Aiken County

Honorable J. Cordell Maddox, Circuit Court Judge

GILBERT EDWARD DAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001247

APPENDIX

VICTOR R SEEGER
Appellate Defender

ALAN WILSON
Attorney General

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

BRIANNA SCHILL
Assistant Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR PETITIONER

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1 State of South Carolina) In the Court
2 County of Aiken) Of General Sessions

3 Indictment No.: 2017GS0202050
4

5
6 State of South Carolina,)
Plaintiff.)
7)
8 vs.) Transcript of Record
9)
10 Gilbert Day,)
Defendant.)

11
12
13 October 19, 2017
Aiken, South Carolina
14

15
16 B E F O R E:

17 The Honorable Benjamin Culbertson, Judge.
18

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

20 M. Bradley McMillian, Assistant Solicitor
Attorney for the State

21 Derek M. Bush, Esquire
22 Attorney for the Defendant
23

24 Brenda J. Sigwald, Circuit Court Reporter
To The Honorable Doyet A. Early III
25 P.O. Box 206, Jackson, South Carolina 29831

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E X H I B I T S

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(REPORTER'S NOTE: There were no exhibits
entered during this hearing.)

1 MR. MCMILLIAN: Gilbert Day.

2 GILBERT DAY,

3 having been duly sworn, testified as follows:

4 THE CLERK: He's sworn, Your Honor.

5 THE COURT: All right. What have we got?

6 MR. MCMILLIAN: Before you, Your Honor, is Gilbert
7 Edward Day. He's before you on two indictments, Indictment
8 Number 2017GS0202050, and 051, indictments for burglary in
9 the second degree violent and grand larceny more than
10 \$10,000.

11 He's going to be waiving presentment and pleading
12 guilty on both of those, Judge.

13 THE COURT: All right.

14 All right. Mr. Bush, you represent Gilbert Edward
15 Day II on the charge of burglary second degree, being the
16 violent classification, as well as grand larceny of \$10,000
17 or more?

18 MR. BUSH: I do, Your Honor.

19 THE COURT: Have you discussed with your client the
20 charges against him, his rights as a defendant and the
21 consequences of being convicted of these crimes?

22 MR. BUSH: I have, Your Honor.

23 THE COURT: In your opinion, does your client
24 understand the charges against him, his rights as a
25 defendant and the consequences of being convicted of these

1 crimes?

2 MR. BUSH: He does, Your Honor, and I believe he
3 does.

4 THE COURT: Does he wish to plead guilty or not
5 guilty.

6 MR. BUSH: He does, Your Honor, and I agree with
7 that decision.

8 THE COURT: All right. Has your client received a
9 competency evaluation?

10 MR. BUSH: He has not, Your Honor, I have no reason
11 to believe that he's not competent.

12 THE COURT: All right.

13 Sir, your name is Gilbert Edward Day II?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. Mr. Day, you have been
16 charged with burglary in the second degree, being the
17 violent classification as well as grand larceny \$10,000 or
18 more. And according to your attorney, you wish to plead
19 guilty to these charges; is that correct?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: All right. Before I can accept your
22 guilty plea, I've got to go over some questions with you to
23 be sure that you understand the charges against you, that
24 you understand your rights as a defendant, that you
25 understand the consequences of pleading guilty, and I must

1 be sure you're pleading guilty voluntarily.

2 During the past 72 hours have you taken any
3 medication, consumed any alcohol or drugs, or been under
4 any influence that would affect your ability to know why
5 you're here?

6 THE DEFENDANT: No, sir.

7 THE COURT: You understand why you're here today?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Is there anything about this hearing
10 that you want to ask your lawyer or ask me before we
11 proceed?

12 THE DEFENDANT: No, sir.

13 THE COURT: All right. One of your rights as a
14 defendant is that you cannot be prosecuted for any crime
15 unless and until you're indicted by the grand jury. What
16 that means is when you're charged with a crime, the State
17 has an obligation to present your case to a grand jury for
18 a review. The grand jury reviews your case to determine
19 whether or not there's any evidence to indicate you
20 committed the crime. If the grand jury finds there is
21 evidence you committed the crime, the grand jury would
22 indict you and the State could go forward and prosecute you
23 on the charge.

24 On the other hand, if the jury found that there was
25 no evidence against you or that the evidence against you is

1 insufficient to support the charge, then the grand jury
2 would not indict you and the State could not prosecute you.

3 At this point in time, you have not been indicted
4 by the grand jury on either one of these charges,
5 therefore, at this point in time, the State cannot
6 prosecute you on these charges and I cannot accept your
7 guilty plea unless you waive presentment to the grand jury.
8 Waiving presentment to the grand jury means that you are
9 relieving the State of its obligation to have the grand
10 jury review your case and indict you before they prosecute
11 you. You understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you wish to waive presentment to the
14 grand jury so that you can plead guilty to these charges?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: All right. Even though you waive
17 presentment to the grand jury, under the constitution of
18 the United States, you're presumed innocent of these crimes
19 and you have a right to have your guilt or innocence
20 determined by a jury trial of your peers. The State bears
21 the burden of proving your guilt beyond a reasonable doubt.
22 You do not have to prove your innocence and you cannot be
23 compelled to testify against yourself.

24 You also have the right to confront and
25 cross-examine anybody who testifies against you. If you

1 choose, you can present a defense to these charges, but
2 when you plead guilty, you give up all those rights. Do
3 you understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And do you want to give up those rights
6 and plead guilty to these charges?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Now, you understand that the burglary
9 in the second degree, I can send you to prison for 15
10 years; grand larceny, I can send you to prison for 10 years
11 or fine you within my discretion. If I impose the maximum
12 sentences allowed by law and I order that they run
13 consecutively, I could send you to prison for 25 years, do
14 you understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: You understand that the grand larceny
17 is classified as a property crime. Now, where that comes
18 into play is if you're ever convicted of three property
19 crimes, then the sentence for that third property
20 conviction can be enhanced to 10 years in prison and the
21 State would use this guilty plea against you to show a
22 property crime conviction on your record. Do you
23 understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you understand that burglary in the

1 second degree, because it is a violent classification, it
2 is classified as a violent crime, which means if you're
3 ever convicted of another violent crime, in that subsequent
4 violent crime conviction you would not be eligible for
5 probation and you would not be eligible for parole. You
6 understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Now, understand that burglary in the
9 second degree is also classified as a serious crime. What
10 that means is if you're ever convicted of three serious
11 crimes, then the sentence for that third serious crime
12 conviction, the sentence can be enhanced to life in prison
13 without the possibility of parole. And the State would use
14 this guilty plea to show a serious crime conviction on your
15 record. You understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: You also understand that by pleading
18 guilty to burglary in the second degree, you will have a
19 burglary conviction on your record; and why that is
20 important is because if you're ever charged with burglary,
21 whether it be a second or third degree, if you are charged
22 with burglary and you have two prior burglary convictions
23 on your record, that third burglary charge can be enhanced
24 to burglary in the first degree, which carries up to life
25 in prison without the possibility of parole and the State

1 would use this guilty plea to show a burglary conviction on
2 your record to enhance that charge. You understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Knowing all that do you wish to plead
5 guilty or not guilty to burglary in the second degree?

6 THE DEFENDANT: Guilty, Your Honor.

7 THE COURT: Do you wish to plead guilty or not
8 guilty to grand larceny?

9 THE DEFENDANT: Guilty.

10 THE COURT: Has anybody promised you anything or
11 threatened you in any way to get you to plead guilty?

12 THE DEFENDANT: No, sir.

13 THE COURT: Are you pleading guilty voluntarily.

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Are you satisfied with your lawyer?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Are you pleading guilty to these crimes
18 because you committed these crimes?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. I need you to listen
21 carefully while the solicitor gives me the facts of your
22 case, okay?

23 All right, sir.

24 MR. MCMILLIAN: Thank you, Your Honor. On August
25 14th, 2017, around 7:30 in the morning, Detective Jason

1 Griffin with Aiken Department of Public Safety was
2 dispatched over to the City of Aiken Engineering and
3 Utilities Building located at 655 Kershaw Street,
4 Northeast, here in the City of Aiken. He went there to a
5 burglary call; some employees had come in and found things
6 missing and essentially a side door forced open.

7 Those employees, in watching the video surveillance
8 from inside the building were able to identify Mr. Day as
9 the person on the camera. In the theft from that property,
10 there was a small city's worth of power tools and
11 equipment, a total estimated value was in excess of
12 \$150,000. They secured the warrants for burglary second
13 and grand larceny in this case.

14 Actually Investigator Griffin and Detective Billy
15 Camron, also with Public Safety, had listed him as a person
16 of interest in a slew of other property crimes here in the
17 city, most of which involved stealing from the City's
18 utilities companies.

19 He was an employee previously and had gone out on a
20 worker's comp claim in January or February and these
21 property thefts began in about May. When they ultimately
22 took him into custody, he did talk with them. He took
23 them, I believe, over the Edgefield County line to retrieve
24 some of the equipment. In the cases which ultimately he
25 wasn't charged in and these, the total of that equipment,

1 the total value of that equipment was somewhere in the
2 neighborhood of \$300,000. In my talks with Investigator
3 Griffin, the City thinks at this point they're out
4 approximately \$28,000. So a lot of that has been
5 recovered. Some of it just can't be accounted for. They
6 just didn't keep a tally of how many of certain kinds of
7 power tools were on given trucks and that sort of thing.

8 Initially in his interview with Public Safety, he
9 denied any involvement in those other crimes, but did lay
10 out where they could find the stuff.

11 Once the case was ultimately assigned to me and he
12 retained an attorney, Public Safety approached me about
13 potentially talking to him again to clear up some of these
14 additional cases that may just sit out there open. We
15 executed an immunity agreement and we are not seeking
16 additional charges for -- for those. He did ultimately sit
17 down with us and disclosed his involvement in everything.
18 And I believe they were able to actually find some
19 additional equipment after that -- after that meeting.

20 Investigator Griffin from Public Safety is here,
21 sitting behind Mr. Weeks. I think he does want to address
22 the Court at the appropriate time. Like I said, he's got a
23 restitution figure if Your Honor's inclined to do any sort
24 of split sentence, but they are asking for an active
25 sentence in this case.

1 THE COURT: All right.

2 All right. Mr. Day, you understand what the
3 allegations are against you?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Is that what happened in this case?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Mr. Bush, anything in
8 mitigation?

9 MR. BUSH: Thank you, Your Honor, and may it please
10 the Court. Mr. Day is 48 years old. He grew up in Aiken.
11 He didn't obtain his GED until 2009. Prior to his
12 incarceration, Mr. Day was married, but subsequently after
13 his arrest, about six days after his arrest, his wife
14 passed away. He's the father of two daughters and four
15 grandchildren. And I guess as solicitor McMillian
16 indicated, at the time of the incident, he had been a
17 previous employee and was probably still considered an
18 employee, but out on worker's comp with the City of Aiken.

19 He is in relatively poor health for his age. He
20 has three heart stints, hasn't been on his heart medication
21 since he's been in the jail and I guess suffers from
22 arterial artery disease.

23 Judge, he knew what he did was wrong. He -- he
24 knows he shouldn't have done it. Frankly, I think that's
25 why -- he's only been incarcerated for 67 days and I think

1 that's why within those 67 days he's met with law
2 enforcement lots trying to help them recover the stuff
3 that, that he was taking. At the time he was abusing
4 drugs, you know, while he was out of work. And frankly,
5 not only in helping them retrieve a lot of these items, I
6 mean, we went from \$300,000 worth of stuff missing to about
7 \$28,000 worth of stuff missing. He also assisted in
8 helping find out who else was involved in these situations,
9 Judge.

10 We are asking -- he has asked me, Your Honor, to
11 request a ten year sentence suspended to probation due to
12 his help. I'm asking, Your Honor, if you don't believe
13 that to be appropriate to give him an appropriate split
14 sentence, a merciful split sentence, one that will allow
15 him to opportunity to pay back Aiken City the \$28,000 that
16 they're still out from the stuff that, that he took.

17 I believe that he's going to speak to Your Honor at
18 some point. And potentially read a letter to Your Honor.
19 But given his health, and his active and very helpful
20 cooperation, Your Honor, that's what we're asking for.

21 THE COURT: All right. Mr. Day, would you like to
22 say anything?

23 THE DEFENDANT: Yes, sir. Your Honor, I'm truly
24 sorry for the laws I've broken and the people who I let
25 down, the same people who gave me a chance. I can't take

1 it back, but God knows I wish I could. Judge, leading up
2 to this, I felt my wife deserved better health care than
3 the VA was providing. I did try putting my wife on my
4 insurance and I couldn't do it with the City because she
5 had VA insurance already.

6 We tried paying out of pocket over \$200 a week for
7 month and then \$310 a week for however long we could, I
8 don't remember. We totally went broke and sold our van and
9 two of our trucks. This isn't an excuse, this is the
10 truth.

11 Your Honor, of course, my wife, she was my world.
12 She killed herself six days after I was arrested. Mr. Bush
13 has told you about my health. Even if they give me my
14 medicine now I can't take it because my stent's already
15 stopped up.

16 My stepdaughter, her dad got killed nine years ago.
17 I'm the only other family she has; my daughter, she just
18 had another baby and when I talked to my stepdaughter's
19 aunt and she's about to lose the baby she's carrying.
20 She's bleeding bad.

21 Well, Your Honor, I stand here wanting this
22 sincerely and I stand here humbled and scared and begging
23 this Court to grant me this one last chance to get straight
24 for my wife's aspirations and my girls and grand baby. I
25 would at least have money to repay the City and its

1 citizens. I can't pay all the people I hurt or the broken
2 trust. I give -- I tried my best. This is all I can say.
3 This is all the truth I have. Thank you.

4 THE COURT: Thank you.

5 The victims wish to say anything?

6 MR. MCMILLIAN: Your Honor, I don't believe
7 anybody's here from the City itself, but Detective Griffin
8 would like to address Your Honor at the appropriate time.

9 THE COURT: All right. If he could come forward.
10 Say your name.

11 THE OFFICER: Jason Griffin.

12 THE COURT: All right. Mr. Griffin, what would you
13 like to say?

14 THE OFFICER: Your Honor, we -- the City and Public
15 Safety does wish to get an active prison sentence. Mr. Day
16 recently got out of prison. Mr. McMillian may go over
17 this, but for a burglary second. I know he mentioned his
18 wife and that's unfortunate this happened in this
19 situation, but listening to the jail phone calls in
20 reference to this case, his wife was involved in this with
21 him. He was basically telling her not to -- to talk to us,
22 to go to the woods to get this, this, and this so the
23 police won't find it. When we intercepted those jail phone
24 calls, we went to her house to interview her. She led us
25 to some information that he's -- was abusive to her for

1 several years, basically she was scared of him. She feared
2 that he would kill her. We got a call -- got a phone call
3 that Sunday night saying she'd killed herself. One can say
4 that it was almost her -- as a direct result of Mr. Gilbert
5 -- of Mr. Day's actions which caused her to do that.
6 Unfortunately, she didn't have any way out according to
7 her, kind of some information she left behind.

8 He's been under investigation since May, several
9 burglaries in City facilities, several thousand dollars of
10 equipment missing and although we did recover a lot of it,
11 if it wouldn't have been with surveillance video with this
12 last one, I don't know that we would have solved this one
13 and the city would have been out almost \$300,000, a lot of
14 money. Fortunate for us, we did get the video and was able
15 to make the arrest.

16 So that's just the kind of the way we feel about it
17 with his extensive criminal history and his actions on jail
18 phone calls that, you know, just would leave one to believe
19 that his wife did what she did because of -- because of his
20 actions. And then the stuff she told us about him being
21 abusive in the past, being scared of him, that's what we
22 would like to request.

23 THE COURT: All right.

24 Prior criminal record?

25 MR. BUSH: And, Judge, if I may just briefly?

1 THE COURT: No, sir.

2 MR. BUSH: Not to respond, Your Honor, just for the
3 record, I don't have the jail phone calls for -- my client
4 hasn't heard those calls or anything like that. That's
5 all --

6 THE COURT: He's saying he didn't make any phone
7 calls?

8 MR. BUSH: No, no, sir. No, sir. But just for the
9 record, we haven't received them, so he hasn't heard them
10 and gone over them.

11 THE COURT: Well, I mean, he made the calls. He
12 knows what he said?

13 MR. BUSH: Yes, sir.

14 THE COURT: All right.

15 Prior criminal record.

16 MR. MCMILLIAN: Yes, sir, Your Honor. Beginning in
17 1985, he has a carrying a concealed weapon; a DUS in 1987;
18 a discharging into a dwelling in 1989; a DUS in 1990; a DUI
19 third in 1990; what's listed as a DUI greater than first in
20 1990; a shoplifting in 1991; failure to stop for a blue
21 light in 1991; simple assault in 1993; a public disorderly
22 conduct in 1993; 1993, simple assault; 1995, DUI; 1996 DUS;
23 six fraudulent checks in 1997; five additional fraudulent
24 checks that same year; a 1999 petit larceny; false
25 information and DUI in 2001; DUS in 2003; receiving stolen

1 goods in 2006; DUI third in 2006; three fraudulent checks
2 and a burglary from 2006; and his rap sheet actually shows
3 an additional burglary -- the court date on the 2006
4 burglary is April 29th; and then some two-and-a-half weeks
5 later there's an additional burglary in 2008, but it looks
6 like it could be where he was admitted to the department of
7 corrections.

8 THE COURT: All right. So what did he get for
9 those burglaries?

10 MR. MCMILLIAN: The April 29th, 2008 burglary shows
11 \$125. The May 16th 2008 burglary shows five years.

12 THE COURT: Anything else?

13 MR. MCMILLIAN: Two DUS's in 2011.

14 THE COURT: All right.

15 All right. Mr. Day, I will accept your guilty
16 plea. I find that it's made knowingly, voluntarily, fully
17 advised of your rights as a defendant, the nature of the
18 charge against you and the consequences of a guilty plea.
19 I also find that there is a factual basis to support these
20 charges against you.

21 On the charge of burglary in the second degree,
22 sentence of the Court is that you be confined to the
23 department of corrections for 12 years.

24 On the sentence of grand larceny, you're to be
25 committed to the state department of corrections for 10

1 years.

2 Sentences will run concurrently, you'll be given
3 credit for time served thus far.

4 MR. MCMILLIAN: Thank you, Your Honor.

5 THE COURT: Thank you.

6 * * * * * END OF TRANSCRIPT * * * * *

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1 State of South Carolina)
2 County of Aiken) **Certificate of Reporter**

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5
6 I, Brenda J. Sigwald, Official Court Reporter for
7 the Second Judicial Circuit of the State of South Carolina,
8 do hereby certify that the foregoing is a true, accurate,
9 and complete Transcript of Record of the proceedings had
10 and evidence introduced in the trial of the captioned case,
11 relative to appeal, in the Court of General Sessions in and
12 for the State of South Carolina on the 19th day of October
13 2017.

14 I FURTHER CERTIFY that I am neither kin, counsel,
15 nor of interest to any party hereto.

16 IN WITNESS WHEREOF, I have hereunto set my hand and
17 seal at Aiken County, this 31st day of October 2018.

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25

Brenda J. Sigwald
Brenda J. Sigwald,
Court Reporter and Notary Public
For the State of South Carolina
My commission expires
January 4, 2020

FORM 5

2017 A0220100778
2017 A0220100789
STATE OF SOUTH CAROLINACounty of AikenGilbert Edward O'Leary 181471

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2018CP0201052

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Trenton C.I. as of 3-3-2018 Tiger River C.I.
2. Name and location of Court which imposed sentence Aiken County Sc.
3. Name(s) of co-defendant(s) (if any) Det Weber
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Burglary II 2017FS0202050
 - (b) Grand Larceny \$10,000.00 or more 2017FS0202051

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) Burglar/ 10-19-2017 12 years
- (b) Grand Larceny/ 10-19-2017 10 years run Concurrent
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ☒
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
- _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. None / Aiken General Sessions
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. None
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. None
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. None
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) was told by my Attorney Derek Bush Public Defender file for this PCR
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective consule
- (b) Court went out of order
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Consule Didn't Challenge Burglary
- (b) Consule Helped push my case through "no medical Help"
- (c) Not insuring what the detective was going to say
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. NO
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. NO
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. NO
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. None
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. None
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) I was told just to file this
(b) _____
(c) _____

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

(a) your arraignment and plea? yes
(b) your trial, if any? _____
(c) your sentencing? yes
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? need an attorney
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

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

(a) the name and address of each attorney who represented you:
i. Derek Bush Aiken County Public Defender
ii. _____
iii. _____
(b) the proceedings at which each such attorney represented you:
i. Arraignment and Plea, Sentencing
ii. _____
iii. _____

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

To receive an attorney an a chance to go
back to court to get relief on my sentence

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

No

STATE OF SOUTH CAROLINA)

County of Aiken)

VERIFICATION

I, Gilbert Oey, 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.

Gilbert Oey

SWORN to and subscribed before me this 27th
 day of April, 2018.

[Signature] (Notary Public)

My Commission Expires:

March 24, 2027

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

1. Gilbert Edward Day II, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Gilbert Edward Day II
Applicant

SWORN or affirmed to and subscribed before me this

27 day of April 2018.

Tracy S. Rucker
Notary Public

My Commission Expires: March 24, 2027

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Gilbert Edward Day, #181471,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
IN THE SECOND JUDICIAL CIRCUIT

Case No.: 2018-CP-02-01052

**RETURN AND MOTION FOR
MORE DEFINITE STATEMENT**

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on April 30, 2018, would respectfully show this Court:

I.

Gilbert Edward Day ("Applicant") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. In November 2017, the Aiken County Grand Jury indicted Applicant for second-degree burglary, violent (2017-GS-02-2050), and grand larceny, \$10,000 or more (2017-GS-02-2051). The charges arose from an incident occurring on August 14, 2017, when employees at the City of Aiken Engineering and Utilities Building came into work, noticed a side door had been forced open, and found things missing. Upon review of the surveillance video from inside the building, the employees were able to identify Applicant, a former employee, as the person on camera. Applicant stole "a small city's worth of power tools and equipment," a total estimated value in excess of \$150,000. Tr. 9, line 24-11, line 10.

Derek Bush, Esquire, represented Applicant on the charges. Assistant Solicitor Michael Bradley McMillian, Esquire, prosecuted the case. On October 19, 2017, Applicant pled guilty as

indicted before the Honorable Benjamin H. Culbertson. Judge Culbertson sentenced Applicant to imprisonment for concurrent terms of twelve years for second-degree burglary and ten years for grand larceny. Applicant did not appeal his guilty plea or his sentence.

Attached to this Return and incorporated by reference are the records of the Aiken County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the guilty plea transcript, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Counsel did not challenge burglary
 - b. Counsel “helped push my case through ‘no medical help’”
 - c. “Not insuring what the detective was going to say.”
2. “Court went out of order.”

III.

Respondent submits Applicant’s allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must

prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 (1985).

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent moves to summarily dismiss Applicant's second allegation of "Court went out of order" for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160 (2003). An applicant may commence a post-conviction relief

action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.... S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by Applicant are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. If anything, this allegation may raise a potential direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue at the guilty plea or on appeal, and his failure to do so has waived this allegations as grounds for relief. Therefore, the Court should summarily dismiss this allegation.

V.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. 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, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

Pursuant to § 17-27-150 of the South Carolina Code of Laws, 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. Furthermore, Respondent requests that all potential exhibits and materials used to produce expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent 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 Respondent.

VI.

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code

Ann. § 17-27-50 (1985). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

VII.

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

VIII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[signature page to follow]

IX.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of plea counsel and involuntary guilty plea.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JULIE A. COLEMAN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

October 29, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	2018-CP-02-1052
	)	
GILBERT E. DAY, #181471	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent,	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion for More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Arthur K. Aiken, Esquire
Aiken & Hightower
2231 Devine Street, Suite 201
Columbia, SC 29205

DATED this the 29th day of October, 2018.



Jennifer Jennison, Legal Assistant
For Respondent

**STATE OF SOUTH CAROLINA
COUNTY OF AIKEN**

**COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT**

Gilbert E. Day #181471, Applicant vs. State of South Carolina, Respondent.	Case No.: 2018-CP-02-1052 AMENDMENT TO PCR APPLICATION
---	--

The Applicant, Gilbert E. Day (Day), amends his PCR Application filed in the above captioned case as follows:

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

Day amends his response to item 10 to add the following:

- a. Ineffective assistance of trial counsel

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

Day amends his response to Item 11 to add the following:

- a. Ineffective assistance of trial counsel

- i. At Day's plea, Detective Griffin of Aiken Public Safety made a statement to the plea court that Day's wife had told him that Day was abusive to her and that Day's actions had caused Day's wife to commit suicide. (Tr. 15-16). These statements contributed materially to the sentence that Day received. It is obvious from the plea transcript that plea counsel had no idea that Detective Griffin was going to say these terribly damaging things at Day's plea. Day's

plea counsel had an obligation to interview the potential witnesses in Day's case; to do less is deficient representation. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (at a minimum, counsel has a duty to interview potential witnesses). This deficient representation prejudiced Day because he would not have pled guilty if he had known what Detective Griffin was going to say.

ii. Day was charged with committing burglary second violent and grand larceny. The victim of these offenses was the City of Aiken's Department of Engineering and Utilities. At the time of the offenses, Day was an employee of the victim, but he was on medical leave. As an employee of the victim, Day had the victim's consent to enter its building. Consent is a defense to burglary second violent. S.C. Code § 16-11-312(B); S.C. Code § 16-11-310(3)(a). Plea counsel never explained the elements of burglary to Day, and he certainly did not discuss the consent defense with Day. Plea counsel's failure to explain the elements of burglary to Day and his failure to discuss the defense of consent with Day rendered his representation of Day deficient. This deficient representation prejudiced Day in that he would not have pled guilty if he had been properly advised of the elements of burglary in general and properly advise of the consent defense in particular.

iii. Trial counsel did not prepare Day's case for trial, and Day was left with no choice but to plead guilty.

iv. Trial counsel never discussed the advantages and disadvantages of a trial versus the advantages and disadvantages of a plea with Ford so that Ford could make an informed choice of whether to enter a plea or try his case.

v. Trial counsel did not investigate Day's case.

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

Day amends his response to Item 19 to state the following:

Order vacating conviction and sentence

Furthermore, Day requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the hearing that have not been specifically addressed in the Application or this Amended Application.

Respectfully Submitted,

AIKEN & HIGHTOWER, P.A.

BY: 

ARTHUR K. AIKEN

2231 Devine Street, Suite 201

Columbia, SC 29205

Phone: 803-799-5205

Fax: 803-799-5206

Email: art@aikenandhightower.com

ATTORNEYS FOR APPLICANT

Columbia, South Carolina
January 21, 2019

**STATE OF SOUTH CAROLINA
COUNTY OF AIKEN**

Gilbert E. Day #181471

Applicant,

vs.

State of South Carolina

Respondent.

**COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT**

Case Number: 2018-CP-02-1052

CERTIFICATE OF SERVICE

I certify that on January 22, 2019 I served the Applicant's Amendment to PCR Application in this case on the government by delivering a copy of the Amendment to the Office of the Attorney General by mail addressed to Assistant Attorney General Lindsey McCallister, PO Box 11549, Columbia, SC 29211.



Arthur K. Aiken
Aiken & Hightower, PA
2231 Devine Street, Suite 201
Columbia, SC 29205
Tel: 803-799-5205
Fax: 803-799-5206
art@aikenandhightower.com

Columbia, South Carolina
January 22, 2019

State of South Carolina)
)
)
 County of Aiken)

In the Court of Common Pleas

Second Judicial Circuit

Gilbert Edward Day,)
)
 Plaintiff,)
)
 vs.)
)
 The State of South Carolina,)
)
 Defendant.)
 _____)

2018-CP-02-01052

May 15, 2019

Aiken, South Carolina

B e f o r e:

J. Cordell Maddox, Judge

A p p e a r a n c e s:

Arthur K. Aiken, Esquire
 Attorney for the Plaintiff

Jacob Isenberg, Esquire
 Attorney for the Defendant.

Bonnie H. Kelly, CVR
 Circuit Court Reporter

I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO.</u>
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GILBERT DAY	
	DIRECT CROSS REDIRECT RE-CROSS
Mr. Aiken	6
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DEREK BUSH	
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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EV.</u>
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-- NO EXHIBITS ENTERED --

1 (On the record at 10:55 a.m.)

2 THE COURT: Okay. We're on *Gilbert Day*, right?

3 MR. ISENBERG: Yes, Your Honor.

4 THE COURT: All right.

5 MR. ISENBERG: The State calls Gilbert Day.

6 THE COURT: Mr. Day, how you doing?

7 THE APPLICANT: Fine, sir.

8 THE COURT: I'm Cordell Maddox, I'm from Anderson.

9 I'm doing the PCR's this week. Just wanted to let you
10 know, okay? Okay. They called you as their first witness,
11 so come on up.

12 MR. AIKEN: Go on ahead, Mr. Day.

13 THE COURT REPORTER: Your Honor, they haven't called
14 him.

15 THE COURT: You're not calling him as a witness?

16 MR. ISENBERG: Your -- Your Honor, I was gonna read
17 the procedure.

18 THE COURT: Oh, okay. Go ahead, then. Go ahead.

19 (The Court and Mr. Isenberg speak simultaneously.)

20 MR. ISENBERG: I ---

21 THE COURT: No. Go ahead.

22 MR. ISENBERG: --- said ---

23 THE COURT: I thought you said, "I call Gilbert Day."
24 I'm sorry.

25 THE CLERK OF COURT: I did too, that's why I'm

1 standing here.

2 MR. ISENBERG: I apologize.

3 THE COURT: That's all right. Go ahead.

4 MR. ISENBERG: Your Honor, this next case is *Gilbert*
5 *Edward Day*, case No. 2018-CP-02-01052, with a couple of
6 dashes in there.

7 He made -- he filed a return April 30, 2018. The
8 State filed -- or -- I'm sorry, he filed an application on
9 April 30, 2018. The State filed a return on October 29,
10 2018, and the application stemmed from charges of second
11 degree burglary, violent, and grand larceny for \$10,000 or
12 more. He waived and -- presented to a grand jury for
13 those indictments. He was represented by Derrick Bush,
14 Esquire and Assistant Solicitor Michael Bradley McMillan
15 prosecuted the case.

16 On October 19, 2017, he pled guilty as indicted to
17 the charges of second degree burglary, violent, and grand
18 larceny, \$10,000 or more in front of Judge Benjamin
19 Culbertson. Judge Culbertson sentenced him to 12 years,
20 and he did not file an appeal; and with that, the State's
21 ready to proceed.

22 THE COURT: Okay.

23 MR. AIKEN: Your Honor, the applicant calls Gilbert
24 Day.

25 THE COURT: All right.

DIRECT EXAMINATION BY MR. AIKEN - GILBERT DAY

6

1 MR. ISENBERG: Your Honor, if I may approach?

2 THE COURT: Yeah. I need that one.

3 GILBERT DAY, after having first
4 been duly sworn, testifies as follows:

5 THE COURT: How's it going?

6 THE APPLICANT: Gilbert Edward Day, II.

7 MR. AIKEN: If I could just have one second, Your
8 Honor.

9 THE COURT: Sure.

10 DIRECT EXAMINATION

11 BY MR. AIKEN:

12 Q Now, Mr. Day, back on October 19, 2017, you pled
13 guilty to two charges in the Aiken County Court of General
14 Sessions; is that right?

15 A Yes, sir.

16 Q Okay. One was burglary second; is that right?

17 A Yes, sir.

18 Q And the other one was grand larceny over 10,000?

19 A Yes, sir.

20 Q As I understand it, you got a 12-year sentence on the
21 burglary second.

22 A Yes, sir.

23 Q Is that right? And then a 10-year sentence on the
24 grand larceny?

25 A Yes, sir.

1 Q And those were running concurrent?

2 A Yes, sir.

3 Q So in effect, right now you're serving a 12-year
4 sentence?

5 A Correct.

6 Q And was that burglary violent or non-violent?

7 A Violent.

8 Q Okay. So you're doing 85 percent minimum?

9 A No, sir.

10 Q You're not?

11 A No, sir. It's a violent, 65, with Department of
12 Corrections.

13 Q That's right. I'm sorry, I forgot about that
14 exception.

15 Now, the burglary second, as I understand the
16 Government's allegations in that case, it was that you
17 went into an Aiken City facility after hours when noone
18 else was there and stole certain items of personal
19 property; is that right?

20 A Yes, sir.

21 Q That's the allegation they made against you?

22 A Correct. Right.

23 Q And the grand larceny is for the actual alleged
24 stealing of those items?

25 A Correct.

1 Q Okay. Now, at the time they claimed you went into
2 the Aiken City facility, were you employed by the City of
3 Aiken?

4 A Yes, sir.

5 Q Now, as an employee of the City of Aiken at that
6 time, did -- were you permitted to go into the facility
7 after hours?

8 A Yes, sir.

9 Q Now, you were actually on the payroll, but you were
10 on worker's comp ---

11 A Correct.

12 Q --- leave ---

13 A Correct.

14 Q --- is that right?

15 A Yes, sir.

16 Q Because you had had a workplace injury?

17 A Correct.

18 Q All right. Now, the Government alleged that hundreds
19 of thousands of dollars of things had been stolen; is that
20 right?

21 A Yes, sir.

22 Q Now, in the process of the handling of this case, did
23 you assist the Government in getting that property back?

24 A Yes, sir, I did.

25 Q Did -- was most of it recovered?

1 A Yes, sir.

2 Q Now, we -- we established when your plea was. Had
3 your plea been scheduled earlier?

4 A Yes, sir.

5 Q Okay. And why was it moved from the earlier date to
6 the date when you actually pled?

7 A We had to wait for the detective to come in.

8 Q In other words, the first time it was set, the
9 detective, I believe who was Jason Griffin, could not be
10 present. So it was moved to the actual day you pled?

11 A Yes, sir.

12 Q Now, before you pled -- well, you were represented by
13 Derek Bush; is that right?

14 A Yes, sir.

15 Q Okay. Now, before you pled, did Mr. Bush discuss
16 with you what he anticipated Detective Griffin was gonna
17 say?

18 A Not so much as what he thought he would say, but he
19 thought he was gonna speak good on my behalf because of me
20 turning in the stuff that got stolen.

21 Q All the assistance that you gave him?

22 A Yes, sir.

23 Q Okay. Do you know whether or not Mr. Bush actually
24 spoke with Detective Griffin before your plea?

25 A No, sir.

1 Q Now, during your plea, did Detective Griffin speak?

2 A Yes, sir.

3 Q Did he discuss some conversations that he had with
4 your then wife?

5 A Yes, sir.

6 Q Did he say that your then wife said that she was
7 afraid of you?

8 A Yes, sir.

9 Q Did he say that your then wife told him that you had
10 assaulted her?

11 A Yeah -- I'm not sure assaulted, but I was mean to
12 her. I don't think he said assaulted, but being mean.

13 Q All right. Now, tragically, your wife had committed
14 suicide by the time of your plea, correct?

15 A Yes, sir.

16 Q Did Detective Griffin insinuate that you were in some
17 way the precipitating person for that suicide?

18 A Yes, sir.

19 Q In other words, he suggested that she committed
20 suicide because of things you did?

21 A Yes, sir.

22 Q Did you have any earthly idea he was gonna say that
23 in your plea?

24 A God, no.

25 Q Did -- did that have a dramatic impact on the judge?

1 A Yes.

2 Q Okay. Did -- did -- did you notice his approach to
3 the case change in any way after he heard that?

4 A His demeanor changed. You could see he turned red in
5 the face and got real tight lipped. And then, when Mr.
6 Bush tried to say something to him, he just cut him down
7 and that was it.

8 Q In other words, he wouldn't let Mr. Bush speak ---

9 A No, sir.

10 Q --- a -- about -- about Detective Griffin's
11 allegations?

12 A No, sir. Nor the phone calls that they was --
13 supposedly got.

14 Q They -- they claimed that they had telephone calls of
15 you and your wife, correct?

16 A Yes, sir.

17 Q And that's where they came up with this notion that
18 you were somehow responsible for her suicide, right?

19 A Yes, sir.

20 Q Now, let me ask you this. This is a very important
21 question. Had you known what Detective Griffin was gonna
22 say at your plea, would you have pled guilty?

23 A No, sir.

24 Q Now, before your plea, when you had your discussions
25 with Mr. Bush -- I'm talking about all of the discussions

CROSS-EXAMINATION BY MR. ISENBERG - GILBERT DAY

12

1 you had with Mr. Bush before your plea -- did you ever
2 discuss the defense of consent?

3 A No, sir.

4 Q If you had known that burglary required entry into
5 premises without consent and that there was a consent
6 defense, would you have pled guilty?

7 A No, sir.

8 Q Thank you, Mr. Day.

9 A Thank you.

10 THE COURT: All right.

11 MR. ISENBERG: May it please the Court?

12 THE COURT: Yes, sir.

13 MR. ISENBERG: I apologize, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. ISENBERG:

16 Q Good morning, Mr. Day.

17 A Morning.

18 Q Now, you testified on direct that you would not have
19 pled if you would've known about a consent defense?

20 A Correct.

21 Q Are you in -- are you saying that you had consent to
22 enter the building?

23 A Yes, sir. I could go in there whenever I wanted to.
24 I had a combination locker in there, and ...

25 Q Okay. But at the time of the burglary, you were out

1 on a worker's comp injury, correct?

2 A Yeah. Uh-huh.

3 Q And you were not going to work?

4 A No, I wasn't going to work. No, sir.

5 Q Okay. So on the date of the charge, you did not go
6 to work that day?

7 A No, I didn't go to work that day.

8 Q Okay. Do you remember the Solicitor giving the facts
9 to the judge at the plea hearing?

10 A Not everything, no, sir.

11 Q You don't remember agreeing with the facts that the
12 Solicitor gave to the judge?

13 A Oh, yes, sir. Yes, sir.

14 Q Okay. And do you remember him saying -- the
15 Solicitor telling the judge that when they -- when the
16 police responded to the burglary call, they found a side
17 door forced open, correct?

18 A Yes, sir. But that -- that part came by the guy that
19 was with me, and also after we had done been inside the
20 building.

21 Q Okay. So the guy who was with you forced the door
22 open?

23 A Well, he cut the lock on the outside door.

24 Q Okay. So you -- you got -- you cut the lock to get
25 in?

1 A No, sir. I didn't cut the lock to get in.

2 Q But you were with the guy who cut the lock?

3 A I was already inside the building when he cut that
4 lock.

5 Q Okay. So let me back you up there. He had to cut a
6 lock to get into the building you were already inside of?

7 A To the warehouse part of it. I went into the -- the
8 main building, to where the keys were.

9 Q Okay. And ---

10 A He went into the warehouse department of it.

11 Q Okay. And you did all that on the day that you
12 weren't working, correct?

13 A Correct.

14 Q Okay. And so you're -- you're saying that you
15 wouldn't have pled had you known about the defense of
16 consent, which applies to ---

17 A Right. Yes, sir.

18 Q Okay. Just wanted to be sure.

19 And you also brought up Detective Griffin on direct
20 examination, and the fact that he testified on it at your
21 plea hearing, correct?

22 A Yes, sir.

23 Q And he talked about jailhouse phone calls ---

24 A Yes, sir.

25 Q --- correct? And he said it was his opinion, based

1 upon those jailhouse phone calls, that you had been
2 abusive with your wife, correct?

3 A I don't remember exactly how he worded that because
4 when he started talking about that, everything just went
5 blank.

6 Q Okay.

7 A But I do remember him saying something about the
8 jailhouse phone calls; and in those phone calls, there was
9 nothing mean.

10 Q Okay. Did you get a chance to review those phone
11 calls?

12 A No, sir.

13 Q Okay. So you wouldn't know what his opinion was
14 based upon the phone call that you hadn't reviewed,
15 correct?

16 A No, sir. He can have an opinion, yeah.

17 Q Okay. And you talked about the judge's demeanor
18 changing after he testified on -- at the plea hearing,
19 correct?

20 A Yes, sir. Uh-huh.

21 Q Okay. So you knew what the judge was thinking after
22 the detective testified; is that what you're saying?

23 A No, sir. I could just tell his demeanor changed, not
24 what he was thinking. Just -- his face turned red, and he
25 got real stiff looking.

CROSS-EXAMINATION BY MR. ISENBERG - GILBERT DAY 16

1 Q Okay. But that -- but the judge sentenced you to 12
2 years, correct?

3 A Yes, sir.

4 Q On two charges, correct?

5 A Twelve on one and 10 on another.

6 Q Right.

7 A Yes.

8 Q You're serving 12 years now?

9 A Oh, yeah.

10 Q Okay. And how many charges did you have dropped when
11 you pled?

12 A None.

13 Q You didn't have any charges dropped?

14 A No, sir.

15 Q Okay. How much -- how much money in value, in terms
16 of the items you helped the police recover, did you --
17 sorry. Let me rephrase that question.

18 In terms of value, in all the items you helped the
19 police recover when you were corroborate -- cooperating
20 with them, how much money did you help them recover?

21 A I'm not exactly sure.

22 Q Okay. Can you give me an estimate?

23 A They said there was still like, 20,000 left that ---

24 Q Okay.

25 A --- unaccounted for. I believe that's what it was.

1 I'm not positive, though.

2 Q Okay. Do you remember the items you helped them --
3 helped them recover?

4 A Yes, sir.

5 Q Okay.

6 A Two ---

7 Q And those were all items that you stole?

8 A Yes, sir.

9 Q Okay. So you got charged with two counts, but you
10 could've been charged with more, correct?

11 A No, sir. I don't believe so.

12 Q Well, what about the immunity deal you got?

13 A The -- I know, but they didn't know that I had done
14 that until I told them. So I couldn't have been charged
15 with them.

16 Q So your -- your counsel and the solicitor on the case
17 didn't know about the immunity deal?

18 A Yes, sir.

19 Q Okay.

20 A They knew about it.

21 Q And you got immunity for pretty much everything else
22 you had done, outside of the two charges?

23 A Yes, sir.

24 Q Okay. And you're only serving 12 years, correct?

25 A Correct.

CROSS-EXAMINATION BY MR. ISENBERG - GILBERT DAY 18

1 Q Okay. And I just wanted to cover one more thing. So
2 you were an employee at the time, right?

3 A Yes, sir.

4 Q You went out on worker's comp leave?

5 A Yes, sir.

6 Q Okay. And the day of the incident, you were at the
7 facility of Aiken, correct?

8 A Yes, sir.

9 Q Okay. And someone cut a lock with bolt cutters,
10 correct?

11 A Yes.

12 Q And they found property stolen that -- when the
13 police responded, correct?

14 A Yes, sir.

15 Q Okay. All of that happened on the day you were not
16 supposed to be there?

17 A No. I wasn't scheduled to work that day. No, sir.

18 Q Right. So you would've had no reason to be there?

19 A Unless I just wanted to get something out of my
20 locker or whatever.

21 Q Okay.

22 A Or to talk to somebody.

23 Q So are you saying now that you went to get something
24 ---

25 A No, sir. Uh-uh.

1 Q --- out of your locker that day?

2 A No, sir. I'm not saying that.

3 Q Okay. Okay. So you -- you didn't go to the -- your
4 work that day to get anything out of your locker?

5 A No, sir.

6 Q Okay.

7 MR. ISENBERG: I've got no further questions to --
8 for the witness, Your Honor.

9 THE COURT: Anything on redirect?

10 MR. AIKEN: No redirect, Your Honor.

11 THE COURT: All right. Thank you, sir. You can step
12 down.

13 THE APPLICANT: All right. Thank you.

14 (The witness steps down from the witness stand.)

15 MR. AIKEN: Your Honor, that's the Applicant's case.

16 THE COURT: Okay. You can call your first witness.

17 MR. ISENBERG: Your Honor, the State would call Derek
18 Bush, counsel for the applicant.

19 DEREK BUSH, after having first
20 been duly sworn, testifies as follows:

21 THE WITNESS: Derek Bush, D-e-r-e-k B-u-s-h.

22 DIRECT EXAMINATION

23 BY MR. ISENBERG:

24 Q Mr. Bush, thank you for joining us this morning.

25 A Yes, sir.

DIRECT EXAMINATION BY MR. ISENBERG - DEREK BUSH 20

1 Q Where do you currently work?

2 A I'm employed with the Aiken County Public Defender's
3 Office.

4 Q And how long have you been there?

5 A My first day was June 6, 2016. So I've been there
6 almost three years.

7 Q Okay. And is there a specific kind of case that you
8 usually take, or do you take all kinds of charges?

9 A I take mainly General Sessions felony cases. But as
10 can happen from time to time, those cases can get
11 remanded. So sometimes we go down into City Court as
12 well, but I'm mainly a -- a General Sessions court lawyer.

13 Q Right. And how many plea hearings to you think
14 you've participated in since you've been at the Public
15 Defender's Office?

16 A A lot. I'm -- I'm not -- I'm not sure, I -- you
17 know, I'd say probably somewhere in the range of 4 to 600
18 in three years, not in terms of plea, but just trying to
19 get them to -- to know me and -- and talk about what's
20 going on with their case.

21 I ask them why -- why they were arrested, to their
22 knowledge, let them share that with me, then we go through
23 the discovery process. I receive discovery, I typically
24 review that discovery with my clients. Afterwards, if we
25 decide, "Hey, there -- there's a plea opportunity here,"

1 we negotiate that with the State, however that works out.
2 It works out differently for -- for every plea.

3 But then on the day of the plea, we get together and
4 we talk about what constitutional rights that they're
5 gonna ultimately waive as a result of their guilty plea.
6 And I -- I go through that process with them before we
7 ever sign or initial sentence sheets, we talk about that.
8 I ask them if they have any questions.

9 Q Okay. And do you remember when you got first
10 assigned to Mr. Day's case?

11 A If you'll give me a second, I'll -- I'll load up his
12 file. I can tell you the day I got assigned. I'm pretty
13 sure the case was opened on August 17, 2017.

14 Q Okay. And how -- do you -- you may need your notes
15 for this. Do you remember how far along his case was when
16 you got assigned?

17 A Well, at -- at that point, I know he -- he had been
18 served warrants. I'm not sure what day he was arrested,
19 and I can -- I can check. I think he was arrested on
20 August 14, 2017. So I got appointed about three days
21 later, and I saw him for the first time, in the jail, on
22 August 21, 2017.

23 Q And what did y'all go over at that first meeting?

24 A At the first meeting, per my notes, I -- I -- I kinda
25 asked him what he was there for. He -- he indicated that

DIRECT EXAMINATION BY MR. ISENBERG - DEREK BUSH 22

1 he had a -- a warrant for burglary in the second degree,
2 that he also had a grand larceny warrant. He kinda gave
3 me some of this background of -- of what he thought
4 happened, and -- and why he was being charged that day.

5 Q And when he notified you of those charges, is it your
6 custom or practice to go over, sort of, the details of
7 charges and stuff like that with the Defendant?

8 A Well, at -- at that point, no. Only because I don't
9 have discovery yet.

10 Q Okay.

11 A I don't have what actually the facts are. You know,
12 warrants are pretty ---

13 Q Right.

14 A -- pretty vague. And -- and -- so I didn't have any
15 specifics yet. It was after we received discovery that we
16 talked about what each charge carries.

17 Q But -- so that day y'all just kinda went over the
18 charges, and sort of the facts that he gave you about the
19 case on why he thought he was arrested?

20 A That's correct.

21 Q Okay.

22 A That's correct.

23 Q And the reason why I ask you your custom or policy is
24 just 'cause I don't wanna miss anything in terms of, you
25 know, this meeting or that meeting. So after the -- the

1 August meeting, what was the next action you took in the
2 case?

3 A Well, we requested discovery. That was actually
4 before -- before that meeting. And -- and looking at my
5 notes, the next actions that I did for him actually were
6 all rather personal in nature. Not necessarily as it
7 related to his case ---

8 Q Right.

9 A -- as -- as Mr. Day stated, his -- his wife passed
10 away ---

11 Q Okay.

12 A -- and when his wife passed away, he called me and we
13 -- I ultimately did some work trying to help figure out
14 when visitations would be for his wife, when the services
15 would be, trying to contact some family for him.

16 Q Right.

17 A To -- to just kinda ---

18 Q So you sorta made the phone calls that he could not -
19 --

20 A That's right.

21 Q -- because he was incarcerated?

22 A That's right. Yeah. I talked to the funeral home,
23 and -- and talked to some of his family to try to help
24 communicate with him so that he would know what was going
25 on with his wife. It was a -- it was a pretty tender time

1 as ---

2 Q Right.

3 A -- as you can imagine. In -- in his life, so I -- I
4 felt like it would be polite and -- and the right thing to
5 do to try to help figure that information out for him. So
6 I did.

7 Q Right. After the personal situation, what was the
8 next action you took?

9 A It took -- it took until September 7, from my notes,
10 for the case to get assigned to the Solicitor's Office
11 here in -- in Aiken. I met with him again on the 12th --
12 Mr. Day again on September 12, 2017. And I still hadn't
13 received the report yet, but I had spoken with the
14 investigators 'cause he had told me in the first meeting
15 who the investigators were; and ultimately those
16 investigators indicated that on the night that he was
17 arrested -- that Mr. Day was arrested, he admitted to what
18 had happened, and drove them around that evening and
19 helped point out where -- where -- where stuff was located
20 that they could recover.

21 He and I talked about, at that point, that he was --
22 the he had cooperated already with law enforcement, and
23 that kind of, is what catapulted us into, I think, with --
24 with -- with that information, that's what catapulted us
25 into the immunity agreement talks because Mr. Day had

1 knowledge of -- of other items that they were looking for.

2 They were open cases where they hadn't charged anybody ---

3 Q Right.

4 A -- at the City. And they believed that Mr. Day had
5 knowledge, so at -- of -- of those things. So Mr. Day and
6 I met again, discussed what an immunity agreement would be
7 if he was willing to cooperate with law enforcement. And
8 then, ultimately, I think ---

9 Q We -- I -- I -- I did wanna ask ---

10 A Okay. Yeah.

11 Q -- you for some specifics.

12 A I'm sorry.

13 Q You said that he notified you that on the night of
14 he's -- he sort of, admitted to some things and made --
15 drove around and collected some of the items?

16 A That's correct.

17 Q Do you remember the value -- or ballpark the value of
18 the items collected that night?

19 A I don't. I'd have to look in the incident report to
20 -- to see.

21 Q Did they -- was there an -- ever an estimate given by
22 law enforcement or Mr. Day about the value of these items?

23 A Say -- I guess when -- when -- when they -- they
24 never actually told me, at that time, what the value of
25 those items were. I know overall, after we did the

DIRECT EXAMINATION BY MR. ISENBERG - DEREK BUSH 26

1 immunity agreement, we kinda went through all of the items
2 that -- that had been taken. The value was right around
3 \$300,000 ---

4 Q Okay.

5 A --- worth of stuff that had been taken. And -- and
6 it was over -- it was separate incidents, you know? Not
7 -- not all just in this same one incident. There were --
8 there were multiple incidents. But in his -- in his
9 immunity agreement meeting, you know, we -- we sat down we
10 -- we met with law enforcement, we went over all of what
11 his immunity agreement covered.

12 And he helped them recover a tremendous amount of
13 stuff. I mean, he -- he -- he gave very valuable
14 information to help them close cases and -- and recover
15 stolen items.

16 Q Right. Can you -- can you sort of walk me through
17 the process of your communication with the Solicitor's
18 Office and law enforcement in getting that immunity
19 agreement?

20 A Sure. Yeah. I -- I don't think I have all of the
21 times that I spoke with law enforcement specifically
22 stated out in my notes in my file, but -- but I remember
23 pretty -- pretty clearly ---

24 Q Right.

25 A --- what happened. Ultimately, after meeting with

1 Mr. Day, I said, "We have an opportunity to go and close
2 these cases." And he -- he wanted to help, I mean, I
3 think that was evident from the beginning. He -- he -- he
4 felt -- if I -- you know, my -- if I remember correctly,
5 he thought he wanted to do the right thing and help
6 recover some of these -- these items.

7 So I met with the solicitor, and I said, "You know,
8 my client had information that the Department of Public
9 Safety is looking for," 'cause they had already contacted
10 me --

11 Q Right.

12 A -- you know, telling me that he had driven them
13 around showing them were some of the stuff was. And in
14 that original phone call, they indicated, "We think he has
15 more information on where more items could be ---

16 Q Right.

17 A --- could be. So -- so I told that to the solicitor.
18 I assume at some point law enforcement contacted them as
19 well.

20 I said, "The only way that -- that -- you know, he
21 wants to cooperate, but I need to make sure he's protected
22 if he does; and in order to do that, we need to put an
23 immunity agreement in place," and they agreed, both law
24 enforcement and the Solicitor's Office.

25 Q And what were the specific details of the immunity

1 agreement?

2 A I -- I -- I wish I -- I had it right in front of me.
3 I -- I -- I don't. I was actually looking for it in -- in
4 my -- in my electronic files that I have in front of me. I
5 know the State's -- the Solicitor's Office may have it,
6 and if -- if you need me to get a copy of it, I -- I could
7 probably try to run downstairs and get it.

8 But ultimately what it was gonna be is that he was
9 going to share information about these open cases and
10 where items that were stolen could be located. As a
11 result of sharing that information, he was gonna be immune
12 from being charged, and any charges that sprouted out,
13 let's say, in other jurisdictions ---

14 Q Right.

15 A The Solicitor's Office here was agreeing to try to
16 help get those -- any prosecution that -- that would come
17 from his information in this meeting ---

18 Q Uh-huh.

19 A -- would try to help those other jurisdictions not
20 prosecute him. Now, obviously they couldn't guarantee
21 that the wouldn't, but they indicated that they would
22 assist in trying to get those charges dismissed as well,
23 as long as he upheld his end of the immunity agreement,
24 which also required him to -- to testify against any of
25 his co-defendants if it came to that.

1 Q And I think I wanted to know, did the -- did the
2 Solicitor's Office ever assist him in upholding their end
3 of the bargain with this immunity agreement?

4 A Well, the solicitors and -- and I both did.
5 Ultimately -- I think it was four months after his --
6 after his guilty plea. In fact, it was. It was in -- in
7 -- in February, 2018, Mr. Day notified me from -- from the
8 prison that he had some pending charges in -- in Georgia,
9 and that they were in Columbia County, Georgia ---

10 Q Right.

11 A -- and that they were preventing him from -- well,
12 pending charges are harmful when you're incarcerated in
13 the Department of Corrections. So they're preventing him
14 from having certain privileges.

15 Q Right.

16 A So I -- I actually went and spoke with investigator
17 Dodson over in Columbia County, explained to him the facts
18 of -- of -- well, got him to give me the warrant for that
19 case, to ensure that it was facts arising out of the
20 information he gave in that immunity agreement, spoke with
21 Investigator Dodson, he agreed that they did arise out of
22 that.

23 Q Right.

24 A So then the Solicitor's Office came in to help with
25 the immunity agreement, and say, "As part of this immunity

1 agreement, we gathered this information. Would you be
2 willing to dismiss," and ultimately, in April, 2018, they
3 dismissed those charges.

4 Q So both sides held up their end of the immunity
5 agreement?

6 A Yes. Yes.

7 Q All right.

8 A And -- and there's still a pending charge out there
9 against one of his co-defendants, and they may call him to
10 testify. I'm not sure whether or not they will or they
11 won't, so the immunity agreement still -- I -- I wouldn't
12 say it's fully satisfied yet ---

13 Q Right.

14 A -- but -- but up to this point, both sides have fully
15 upheld their end of that immunity agreement.

16 Q Okay. And so after this immunity agreement was in
17 place -- I'm gotta go back, what was the next action you
18 took with the case, in regards to meeting with him and
19 discovery?

20 A Yep. So -- so after that is -- is when we actually
21 met with him, and he gave them -- he gave them their, I
22 guess the -- the statement that he did relating to the
23 other incidents and the other items and where they might
24 be found.

25 Q Right.

1 A Yep.

2 Q And so he meets with them, gives them his statement.
3 After that, what was the next action y'all took in regards
4 to this case?

5 A Well, about three days after that, I received a phone
6 call from The Aiken Department of Public Safety, their
7 lieutenant, Lieutenant Campbell at the time. They -- they
8 were able to recover -- one of the things that he had
9 mentioned that they would be able to find was an air
10 trailer, and that was worth about \$14,000, and an air
11 compressor. They were able to go out and -- and -- and
12 find some of these items that were still missing at the
13 time.

14 Which ultimately, as -- as Mr. Day testified to, got
15 -- he -- he helped the city recover about \$200 and, I
16 think, \$72,000 worth of stolen items.

17 Q Right.

18 A In all. And -- and they were able to recover --
19 there was still about \$28,000 worth of stuff missing at --
20 at -- at the time of the plea. But Mr. Day had at least
21 told him where he thought those items were, or where he
22 had last seen those items. So they -- they just weren't
23 there after they went out and looked for them.

24 Q Right. Okay. And so after that, what was the next
25 stature in regards to the case?

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1 A Well, after -- after that, we ultimately pled guilty.
2 We pled guilty on October 17, 2017, and -- and you know, I
3 should be -- to -- to be fair, Mr. Day, from -- from the
4 time that -- that he was originally incarcerated, you
5 know, indicated that he wanted to -- to move forward and
6 -- and plead guilty. He -- he did that both while I was
7 at the jail, and -- and over the telephone with me.

8 Q So you're saying that he never indicated to you that
9 he wanted to go to trial?

10 A No. No.

11 Q You -- but you advised him of ---

12 A Well, he -- he had already confessed to -- to law
13 enforcement prior -- before I was involved in the case,
14 when he rode around with them and -- and showed them where
15 stuff was -- was located. And -- and we talked about, you
16 know, that he was immune from further charges, but that
17 that immunity agreement didn't cover him on these charges
18 where he -- he admitted also acts involved in this -- in
19 this current case.

20 Q Right. So they went ahead and charged him with the
21 two things that he was con -- plead guilty to, and then
22 for everything else they gave him immunity on?

23 A That's correct.

24 Q Okay.

25 A That's correct.

1 Q And -- but you said he never indicated he wanted to
2 go to trial. What, if any, advice did you give him about
3 pleading as opposed to trial?

4 A Well, I -- I think -- and -- and I don't have that in
5 my notes either, but -- but typically, I -- I advise
6 clients that they've got a right to a jury trial, they've
7 got a right to have 12 people sit in the jury box in this
8 room and require the State to prove their charges beyond a
9 reasonable doubt. And -- and then I know I've -- I talked
10 with him about the elements of -- of each crime, and
11 ultimately how the State could prove that.

12 You know, I think too, in doing the immunity
13 agreement he was so cooperative, I think we both believed
14 -- Mr. Day and I both believed that that cooperation would
15 be really helpful for him at -- when it came time for --
16 for pleading guilty.

17 Q Right. What -- what kind of investigation did you do
18 in -- in terms of interviewing other witnesses?

19 A Sure. So the -- the only -- in -- in terms of
20 interviewing witnesses, I -- I didn't actually interview
21 anybody with The Aiken Department of Public Safety. We --
22 we met with the people -- with -- with both of the
23 investigators with The Aiken Department of Public Safety,
24 together.

25 Q Right.

DIRECT EXAMINATION BY MR. ISENBERG - DEREK BUSH 34

1 A So -- so during that interaction when we were having
2 our immunity agreement meeting, 'cause this all happened
3 pretty quickly. It was a two month ---

4 Q Right.

5 A -- really, really quick process. Within that two
6 month -- within that meeting is -- is when we kinda talked
7 with them and with -- with Mr. Day kind of, about where we
8 were with the case and -- and what was going on with it,
9 you know?

10 Q Right.

11 A So outside of that, I didn't go and -- and interview
12 -- I didn't -- (a) I didn't interview any of the other two
13 investigators, and -- and (b) the other individuals there
14 were involved in the crime were -- were at large.

15 Q They hadn't ---

16 A They hadn't been arrested.

17 Q -- detained (<<??) them?

18 A Correct. And they -- they didn't actually get
19 arrested, I think until maybe after Mr. Day's plea. I --
20 I don't know that for 100 percent certain, but I know one
21 of the people is still awaiting trial at this point in
22 time and is represented. But I don't -- I don't know if
23 they were incarcerated at the time that -- that we plead
24 guilty.

25 Q Right. And he mentioned, on his direct examination,

1 you know, con -- the consent defense. What, if any,
2 discussion did y'all have about it -- pushing a defense in
3 regards to his burglary charges?

4 A Sure. So I don't remember him raising, specifically,
5 the consent. He did tell me that -- that he was out on
6 worker's compensation leave, that he did work for the
7 city. And we talked about, before his guilty plea, that
8 being out on -- on worker's compensation didn't give him
9 permission to be there at 11:30 at night, and that the
10 evidence of like, the people cutting the padlock off of
11 the door, and stealing keys, and then other people going
12 into the building with him to steal items. He -- he
13 certainly, even when he was working there, wouldn't have
14 permission to -- to be -- to be there after hours.

15 We -- we talked, at one point in time, about allowing
16 -- being allowed to be there after hours if there had been
17 like, let's say a water main break or anything like that,
18 and I asked him if he was aware of any water main breaks
19 that night, and he was ---

20 Q Right.

21 A -- not.

22 Q Right. And what, if any, indication did he give to
23 you that he would've been there for any other reason other
24 than to commit a crime?

25 A None.

1 Q So he ---

2 A None. But -- but he did believe and -- and -- and
3 did believe, when we discussed it, the he -- while he was
4 out on worker's comp that he would still be allowed to be
5 where he was located.

6 Q But with that permission, was that only during the
7 day?

8 A I'm not sure exactly what his hours were, so I -- I
9 -- I can't tell you that. But the way I kind of
10 approached it with him was, you know, people who have
11 permission to be places typically don't cut the padlocks
12 off. And -- and he told us, as he did today, he said that
13 it was the other person that he was with ---

14 Q Right.

15 A -- that helped him to cut that padlock off of the
16 warehouse.

17 Q But -- but overall, y'all did have that discussion
18 about permission to be there?

19 A Yeah. It -- it wasn't specifically as in, couched in
20 the consent as -- as a defense, but he did -- he did
21 discuss with me why he thought he could be there, and I --
22 I told him why I thought that was not true.

23 Q Okay. And in regards to the detective that testified
24 at the plea hearing, what prior knowledge did you have of
25 his role in this case before the plea hearing?

1 A Well, I knew he was the investigating officer, and he
2 was present when we did the immunity agreement and video-
3 recorded that -- that interview where he gave information
4 to help them find more -- more items. But out -- outside
5 of that, that -- that was really his role in all of this.
6 He was the lead investigator.

7 Q So what was your impression or opinion when you found
8 out he would be testifying at the hearing?

9 A Well, I mean it -- I think it -- sometimes it's --
10 it's relatively normal for -- for law enforcement to be
11 present at a plea. Sometimes they testify, too. I think
12 that's kind of at their discretion. But I -- my -- my
13 presumption was -- which I -- I didn't verify with -- with
14 him -- was that they would be talking about the immunity
15 agreement and that's it.

16 Q Right. And how did you respond when he testified at
17 the hearing?

18 A Well, I thought it was inappropriate what he said.
19 And I -- I asked the judge if I could respond. Judge
20 Culbertson told me "no."

21 I then continued to respond to just let the record
22 reflect that I had not received any of those phone calls
23 in discovery that -- that he was referencing.

24 Q Right.

25 A So I had really no idea what he -- I -- I didn't know

1 what he was talking about to be completely honest with
2 you.

3 Q Uh-huh. Right.

4 A And it was the first time that had ever been
5 mentioned to -- to me or I'm -- or to Mr. Day that -- that
6 there was even allegations that he was the reason why his
7 wife had -- had killed herself. And frankly, like -- like
8 I said, I thought that was really inappropriate.

9 Q Right. And I -- I can fully understand. But in --
10 in -- in terms of your role in that, you did everything
11 you could after he testified at the hearing?

12 A Well, I -- I did everything the judge would allow me
13 to do.

14 Q Right.

15 A Yeah. I mean, we -- we -- we certainly -- we
16 certainly tried to make a record as to the fact that I had
17 never received those phone calls and had no idea that he
18 would've said something like that.

19 Q Right. And you notified the judge that you hadn't
20 received the phones calls, and you tried to interject in
21 his testimony before he made his decision?

22 A I did. Yeah.

23 Q All right.

24 A And -- and he -- and as Mr. Day said, he shut -- the
25 -- the judge told me "no."

1 Q Right. And you notified Mr. Day that 12 years was
2 well within the range of sentencing that he could get?

3 A He -- he knew that -- that burglary in the second
4 degree, violent, carried 0 to 15 years in the Department
5 of Corrections, both by me and -- and by the judge that
6 day; and that grand larceny, valued \$10,000 or more,
7 carried 0 to 10 years.

8 Q Okay. And outside the immunity and meeting the
9 investigator before the plea hearing, you would've had no
10 other reason to have a discussion with that detective ---

11 A No.

12 Q Okay.

13 A None.

14 Q Because in -- in your mind, he -- his role didn't
15 extend beyond that in this case.

16 A Well, in -- and really, in -- in my mind, he -- Mr.
17 Day had done all he could do to help them.

18 Q Right.

19 A So you know, in -- in -- in my mind, I -- I presumed
20 that's -- that's what they were going to talk about in the
21 plea.

22 Q Right. And Mr. Day alleges that you failed to
23 provide him medical help while he was incarcerated. What,
24 if any, sort of assistance did you give him in regards to
25 medical assistance?

DIRECT EXAMINATION BY MR. ISENBERG - DEREK BUSH 40

1 A Sure. Mr. Day -- I'd have to look back on the
2 specific dates, but really, from about the time I started
3 representing him, indicated that he had -- he had heart
4 stints and that he was having chest pains and -- and
5 problems in his chest.

6 I think ultimately there was an -- an issue, if I
7 remember correctly, where he wasn't getting the blood
8 thinners that he was prescribed at the jail. And I -- I
9 don't know why they weren't giving him those. I know
10 there's a policy and procedure for how they -- they get
11 that. I'm just not super versed in that --

12 Q Right.

13 A -- for -- for how they do that.

14 But he did explain to me that -- that he was having
15 those -- those issues. I didn't have any medical records
16 to back that up, nor -- nor did I request any because by
17 the time -- really, when he started complaining about that
18 in -- in -- in September, it was less than 30 days that --
19 that we ultimately pled guilty.

20 Q Right. That -- did that give you any reason to
21 believe he could not stand for a plea hearing or a trial?

22 A No.

23 Q Okay.

24 A No. But he did complain, and -- and -- and when I
25 would visit him in the jail, would say that his chest is

1 bothering him.

2 Q Right. And you -- and you told the judge at the plea
3 hearing you had no reason to believe he was not competent
4 to stand for a period?

5 A That's right. And I think I actually told the judge
6 in the -- in the plea, that -- about his heart condition
7 that -- that my client had told me about.

8 Q Right.

9 A That Mr. Day had -- had informed me of.

10 Q Right. Okay. And just one more question: He never
11 gave you any in -- indication other than the fact that he
12 wanted to plea?

13 A That's right. Yes, sir.

14 Q Okay. He never gave you any indication that he
15 wanted to go to trial?

16 A No, sir.

17 Q And you advised him of the consequences of pleading
18 and what his chances were at trial, correct?

19 A Yeah. I mean, obviously I don't do, like, statistics
20 ---

21 Q Right.

22 A --- like, what your chances are at trial. But we
23 talked about the difference between going to trial and --
24 and pleading guilty.

25 Q Okay.

DIRECT EXAMINATION BY MR. ISENBERG - DEREK BUSH 42

1 A And -- and ultimately, that given that he had
2 confessed to law enforcement and also given a recorded
3 interview statement that ---

4 Q Right.

5 A --- the elements would likely be met at a trial.

6 Q Okay.

7 MR. ISENBERG: All right. Your Honor, I have no
8 further questions for this witness.

9 MR. AIKEN: May it please the Court, Your Honor?

10 THE COURT: Yes, sir.

11 MR. AIKEN: Just very briefly.

12 CROSS-EXAMINATION

13 BY MR. AIKEN:

14 Q Detective Griffin, did you ever speak with Detective
15 Griffin?

16 A I -- I did. Yes. Only -- only during the immunity
17 agreement process. So not outside of that.

18 Q You didn't have any conversation with him in
19 connection with the plea?

20 A I didn't.

21 Q Okay. Now, this plea had actually been scheduled for
22 before it actually occurred, right?

23 A And I heard you say that on direct. I don't remember
24 specifically if it had, but it -- but it very well could
25 have been, maybe earlier on in the week and then it was,

1 like, a later day in the week. That's possible. But I --
2 I don't have that in my notes.

3 Q You don't recall that it was moved because Ms. --
4 Detective Griffin couldn't be there?

5 A I don't recall that. I'm not saying that isn't true,
6 but -- but I don't recall that. The State may -- the --
7 the State -- the Solicitor's Office may have asked to move
8 the plea for him to be there. I -- I just don't remember,
9 and I don't have it noted in my file.

10 Q Now, what Detective Griffin said, did that have a
11 dramatic impact on the judge's demeanor?

12 A Well, you know, I'll -- I'll say this, I -- I can't
13 speculate as to, like, what he was thinking or -- or his
14 demeanor. I -- I can tell you that I wasn't actually
15 looking at the judge. I got kind of a shocked face and
16 looked at the investigator because I couldn't believe,
17 ultimately, what ---

18 Q He said that?

19 A --- what he had just said. So to say whether or not
20 the judge got a demeanor immediately after that, I'm not
21 sure.

22 I will say he was -- he was stern with me when I was
23 trying to interject about -- about that I wasn't gonna be
24 allowed to respond to those allegations.

25 Q Yeah. You requested the right to respond, and he

1 said -- he actually initially said "no."

2 A Yes, sir. And I -- against what he had asked me to
3 do, I -- I still spoke up because I felt it was the right
4 thing to do to make a record for -- for Mr. Day that we
5 hadn't received those calls.

6 Q So in -- in -- in part, Detective Griffin claimed
7 that his view of Mr. Day's personal life was supported by
8 jail calls; is that what he said?

9 A Do -- do you mind if I look at the transcript really
10 quickly?

11 Q Absolutely. Go ahead.

12 (Brief pause.)

13 A Do you want me to -- to kinda say what he ---

14 Q Yeah. Go ahead.

15 A --- what he said in here? Okay. And I'm just gonna
16 start at the line where he's talking about the -- the
17 phone calls about it; is that all right with you?

18 Q That's fine.

19 A Okay. He says (as read): "I know he mentioned his
20 wife, and that's unfortunate this happened in this
21 situation. But listening to the jail phone calls in
22 reference to this case, his wife was involved in this with
23 him. He was basically telling her not to -- to talk to
24 us. To go to the woods to get this, this, and this so the
25 police won't find it.

1 "When we intercepted those jail phone calls, we went
2 to her house to interview you. She led us to some
3 information that he's -- was abusive to her for several
4 years. Basically, she was scared of him. She feared that
5 he would kill her.

6 "We got a call -- got a phone call that Sunday night
7 saying she'd killed herself. One can say that it was
8 almost her -- as a direct result of Mr. Gilbert -- of Mr.
9 Day's actions which caused her to do that. Unfortunately,
10 she didn't have any way out according to her. Kind of,
11 some information she left behind."

12 And then he -- he -- he talked about the -- the
13 amounts that were taken from the City and all that stuff.

14 And -- and then he talked about it one more time. He
15 said (as read): "So that's just the kind of the way we
16 feel about it. With his extensive criminal history and
17 his actions on the jail phone call, that, you know, just
18 would leave one to believe that his wife did what she did
19 because of -- because of his actions; and then the stuff
20 she told us about him being abusive in the past, being
21 scared of him. That's what we would like to request."

22 And they requested an active sentence. They didn't
23 request a number, but they requested an active sentence.

24 Q Now, it -- it would've been nice to know before the
25 plea exactly what Detective Griffin was gonna say,

1 wouldn't it?

2 A It -- sure. Yeah. Well, it would've been nice to
3 know that those phone calls existed before the plea.

4 Q All right.

5 A 'Cause those -- those had not been turned over as any
6 part of -- of discovery and -- and were not in my
7 possession at the time of the plea.

8 Q Well ---

9 A And ---

10 Q --- in connection with -- go ahead, I'm sorry.

11 A I was gonna just say, too, and at -- in our meetings
12 with Detective Griffin, both mine and Mr. Day's, no
13 mention of those phone calls was made for what that's
14 worth.

15 Q Well, there was nothing preventing you from speaking
16 with Detective Griffin before the plea was there?

17 A Sure. I -- I just had no reason to believe that he
18 would say anything like that 'cause again, I -- I didn't
19 even know those -- those phone calls existed. I could've
20 never known he would've said something like that. And he
21 didn't, I guess, really -- probably wouldn't have had to
22 share that information with me had he not wanted to, prior
23 to -- to coming in for that guilty plea.

24 Q Well, as a defense lawyer in a criminal case, it --
25 it's your obligation to either interview the witnesses or

1 have someone interview them on your behalf; isn't that
2 right?

3 A Yeah. Yeah. You know, if -- if we're going to
4 trial, it's -- it's pretty normal for us to interview
5 witnesses in a case or to have an investigator do -- do
6 those interviews. That's right.

7 This was a little bit different. This was a guilty
8 plea where we had already conducted an interview with that
9 investigator as it related to Mr. Day's actions in this
10 case and no mention of those phone calls was made then.
11 And frankly, during the entirety of my representation of
12 Mr. Day, no mention of those phone calls were ever made.

13 We sent a normal Rule 5 request, and -- and you know,
14 they responded to -- to that. I -- I don't know if they
15 were going to have used those phone calls in their case in
16 chief. I can't imagine they would have. It wasn't --
17 they're not relevant. I -- I didn't even think it was
18 relevant to the plea, to be honest with you, Mr. Aiken.
19 But he said what he said, I tried to interject, and -- and
20 the judge stopped me from doing it.

21 MR. AIKEN: May I have just one moment, Your Honor?

22 THE COURT: Sure.

23 Q Thank you, Mr. Bush.

24 THE COURT: Anything on redirect?

25 MR. ISENBERG: Yes, Your Honor, just briefly.

REDIRECT EXAMINATION BY MR. ISENBERG - DEREK BUSH 48

1 THE COURT: Okay.

2 REDIRECT EXAMINATION

3 BY MR. ISENBERG:

4 Q You would agree that phone calls directing another to
5 hide evidence would be inculpatory, right?

6 A I'm sorry. Can you repeat that one for me?

7 Q You would agree that jailhouse phone calls -- records
8 telling someone else to hide evidence would be
9 inculpatory, right?

10 A Yes.

11 Q So you would not be entitled to those in discovery?

12 A Correct. That -- that -- and that's what I was
13 trying to say. And -- and the only way it -- I would be
14 is if they intended to use those in their case in chief,
15 which that witness had passed away at that time. So I --
16 I can't imagine ---

17 Q Right. So you would've had no knowledge of what was
18 on those phone calls, correct?

19 A Well, I didn't know he had even talked to his wife on
20 the phone at all. I had no knowledge that he had.

21 Q So ---

22 A The only -- the only time I actually came to know
23 about the wife was ultimately after she passed away.

24 Q Right. And so you would've -- because you didn't
25 have that knowledge, you would've had no reason to

1 interview the detective about those jailhouse phone calls?

2 A Absolutely. Correct.

3 Q Okay.

4 A Correct.

5 Q And you would agree that in that same testimony the
6 detective gave, he notified the judge that after the
7 arrest, they recovered \$300,000 worth of stuff as a direct
8 result?

9 A Really close to \$300,000.

10 Q All right.

11 A Yeah. I think it was like 272,000.

12 Q Right.

13 A But he did -- he did say that.

14 Q Right. So he told the judge, after we arrested this
15 guy, he helped us recover \$300,000 worth of stuff?

16 A He did that in the Solicitor's Office as well.

17 Q Okay.

18 A And I -- I wanna say I did, too. I may not have, I
19 may have just relied on -- on the fact that they had
20 talked about that.

21 Q Right. Okay.

22 MR. ISENBERG: So no further questions, Your Honor.

23 THE COURT: Okay. Thanks. You can step down.

24 MR. ISENBERG: And with that, we ask that the witness
25 be excused.

1 MR. AIKEN: Absolutely, Your Honor.

2 THE COURT: Without objection.

3 MR. BUSH: Thank you, Your Honor.

4 (The witness exits the stand.)

5 MR. ISENBERG: The State rests its case in chief,
6 Your Honor.

7 THE COURT: Okay. Anything in response?

8 MR. AIKEN: No, sir.

9 THE COURT: Okay. All right. Mr. -- here's the
10 deal, I've been given all this this morning. I've gotta
11 read through it.

12 I'm a little bothered by what appears to be a little
13 bit of a cheap shot. I'm not sure it rise -- it raises to
14 the level of enough to grant a PCR, but it seems to me
15 blaming you in a guilty plea is a -- maybe, at its most, a
16 cheap shot. But I wanna look at it.

17 It may -- like I said, I'm -- I'm not trying to get
18 your hope up because I've gotta read through the
19 pleadings, but give me about two weeks. I'll let you
20 know.

21 MR. AIKEN: Thank you, Judge.

22 THE COURT: Thank you.

23 MR. ISENBERG: Thank you, Your Honor.

24 (Off the record at 11:45 a.m.)

25

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Circuit Court for Aiken County, South Carolina, on the 15th day of May, 2019.

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

e/Bonnie H. Kelly

Bonnie H. Kelly,
Court Reporter

Columbia, South Carolina
February 19, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
Gilbert Edward Day,	)	Case No.: 2018-CP-02-01052
S.C.D.C. No. 181471,	)	
	)	
Applicant,	)	
	)	ORDER OF DISMISSAL
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Gilbert Edward Day ("Applicant") on April 30, 2018. Respondent made its return on October 29, 2018. The Court convened an evidentiary hearing into the matter on May 15, 2019, at the Aiken County Courthouse in South Carolina. Applicant was present at the hearing and represented by Arthur K. Aiken, Esquire. Jacob A. Isenberg, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Derek Bush ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Aiken County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds Applicant has not met his burden of establishing any constitutional deprivations or other grounds entitling him to relief and denies and dismisses the application with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. In November 2017, the Aiken County Clerk of Court certified that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

I, Robert J. Harte, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina, do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

JUN 27 2019

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FILED

06/27/2019

C.C.P. & G.S.

Deputy Clerk

Robert J. Harte
C.C.P. & G.S., Aiken County, S.C.
Charla Griffi Plausse
Deputy Clerk

Charla Griffi Plausse
Deputy Clerk

County Grand Jury indicted Applicant for second-degree burglary, violent and grand larceny, \$10,000 or more. The charges arose from an incident occurring on August 14, 2017, when employees at the City of Aiken Engineering and Utilities Building came into work, noticed a side door had been forced open, and found things missing. Upon review of the surveillance video from inside the building, the employees were able to identify Applicant, a former employee, as the person on camera. Applicant stole a total estimated value in excess of \$150,000.

Counsel represented Applicant on the charges. Assistant Solicitor Michael Bradley McMillian prosecuted the case. On October 19, 2017, Applicant pled guilty as 1 of 7 indicted before the Honorable Benjamin H. Culbertson. Judge Culbertson sentenced Applicant to imprisonment for concurrent terms of twelve years for second-degree burglary and ten years for grand larceny. Applicant did not appeal his guilty plea or his sentence.

II. PRESENT APPLICATION

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Failure to Investigate
 - i. Failure to Interview Detective Griffin before he testified at the plea hearing
 - b. Failure to advise based upon defense of consent
 - c. Failure to prepare case for trial
 - d. Failure to advise advantages and disadvantages of pleading guilty

Applicant requests relief as follows:

- Vacate conviction and sentence

At the evidentiary hearing, Applicant proceeded forward on the above-mentioned allegations.

III. SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

Applicant

Applicant testified on his own behalf at the hearing. Applicant testified he was an employee at the time he was arrested for burglary. Applicant further testified he was out on worker's compensation leave at the time he was arrested for burglary.

Applicant testified Counsel informed him Detective Griffin would speak well on his behalf. Applicant testified he did not know if Counsel had any discussions with Detective Griffin before the hearing. Applicant testified he did not know Detective Griffin was going to bring up his deceased wife during the plea hearing. Applicant testified he would not have pled guilty if he knew Detective Griffin was going to bring up his deceased wife.

Applicant testified Counsel never discussed the defense of consent with him. Applicant testified he would not have pled if he knew about the defense of consent.

Counsel

Counsel testified on behalf of Respondent at the hearing. Counsel testified Applicant confessed to multiple crimes on the night he was arrested. Counsel testified Applicant assisted law enforcement in recovering stolen items that valued at about three hundred thousand dollars. Thereafter, Counsel was assigned Applicant's case through his job at the Second Circuit Public Defender's Office.

Counsel testified he immediately began negotiating an immunity agreement on behalf of Applicant. Counsel testified he met with the Solicitor and Detective Griffin about this immunity agreement. Counsel testified he negotiated an immunity agreement which allowed Applicant to be free from prosecution for several open cases based upon items he stole in other counties and states. Specifically, Counsel testified Applicant was not prosecuted for multiple crimes in Georgia based upon this agreement.

Counsel testified he investigated Applicant's employment at the facility. Counsel testified there was no basis for a defense of consent based upon Applicant's employment. Counsel testified Applicant was not allowed at the facility because he was out on worker's compensation leave. Counsel further testified the break-in took place at a time when Applicant would not have been working. Specifically, Counsel testified the break-in took place at night when no employees were scheduled to be working. Counsel testified this is why the doors to the facility were locked. Counsel testified Applicant would not have needed to use a tool to open the facility door if he had consent to be there. Counsel further testified to going over all of these issues in a jailhouse meeting with Applicant prior to signing the immunity agreement.

Counsel testified Applicant wanted to enter into a plea from the moment he was arrested. Counsel further testified Applicant made it clear through several statements he did not want to go to trial. Counsel testified Applicant confessed in order to get a more favorable plea. Counsel testified Applicant's confession allowed him to get the immunity agreement. Counsel testified Applicant continually asked when his plea would be finalized after securing the immunity agreement.

Counsel testified he typically goes over all the charges with clients before the plea hearing. Counsel testified he further goes over how a plea hearing is structured with clients beforehand. Counsel further testified he goes over constitutional rights in this meeting. Specifically, Counsel testified he goes over the right to remain silent, right to a trial by jury, right to make the solicitor prove each element of the charge beyond a reasonable doubt, right to confront witnesses, right to call witnesses in defense, and right to have an indictment presented to the County Grand Jury. Counsel testified he remembered this type of meeting with Applicant based upon having to explain the standard to be indicted is twelve out of eighteen county grand jurors.

Counsel testified his only conversations with Detective Griffin were about the immunity agreement. Counsel testified Detective Griffin was the investigating officer for Applicant's case. Counsel further testified he believed Detective Griffin was going to testify favorably for Applicant at the plea hearing. Counsel testified he was shocked when Detective Griffin testified about Applicant's role in his deceased wife's death. Counsel testified he immediately objected to Detective Griffin's testimony. Counsel testified he did not believe there was anything more he could have done after the objection was overruled.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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." Butler, 286 S.C. at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler, 286 S.C. at 442, 334 S.E.2d at 814 (quoting Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an 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.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. 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, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). 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 (citing Strickland, 466 U.S. at 694). With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

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. Strickland, 466 U.S. at 696. 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. Id. at 696-97.

1. Failure to Investigate Detective Griffin before the Plea Hearing

a) Deficient investigation

Applicant contends Counsel is deficient based upon the failure to interview Detective Griffin before he testified at the plea hearing. For the purposes of the claim of ineffective assistance, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

Here, Counsel credibly testified he had no idea Applicant's phone conversations with his wife in prison were an issue. Counsel further credibly testified the phone calls were not exculpatory so he did not receive them in discovery. Counsel also credibly testified that neither Applicant, Assistant Solicitor, nor Detective Griffin notified him of the existence of these phone conversations. Counsel credibly recalled having conversations with Detective Griffin about Applicant's confession, assistance in recovering items, and the immunity agreement. Counsel further credibly assessed his belief testimony about confession, assistance, and immunity would be overwhelmingly positive for the court to hear from an officer. Therefore, Counsel credibly recalled believing Detective Griffin's testimony was going to be favorable for Applicant prior to

the plea hearing. At the plea hearing, Counsel notified the court he did not have the phone calls Detective Griffin referenced. (Tr. 17, L. 2-14). There is nothing in the record to suggest Counsel had knowledge about these calls before Applicant's plea hearing. Accordingly, this Court finds Counsel did a reasonable investigation into Detective Griffin based upon multiple interviews about Applicant's confession and the resulting immunity deal. Therefore, this Court finds Applicant has failed to overcome the burden to prove Counsel was deficient when investigating Detective Griffin.

b) Prejudice based upon investigation

Applicant testified he would not have pled guilty if he had known Detective Griffin's testimony beforehand. An ineffective assistance of counsel claim cannot overcome the burden to prove prejudice if the applicant merely offers speculation. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). The government's obligation to make disclosures of exculpatory material under Brady v. Maryland is pertinent not only to an accused's preparation for trial but also to his determination of whether to plead guilty; the defendant is entitled to make that decision with full awareness of favorable material evidence known to the government. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 323 (1999) (holding the solicitor committed a violation by failing to fully disclose favorable evidence about material witness altering their story before his plea hearing). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. U.S. v. Bagley, 473 U.S. 667, 676 (1985).

Here, Applicant testified he would have demanded trial with prior knowledge of Griffin's proposed testimony. Applicant further testified Counsel had no idea what Griffin was going to say

which caused a less favorable sentence. However, Counsel credibly testified there was no prior disclosure of this evidence. Counsel credibly admitted he did not anticipate Griffin testifying about evidence not previously disclosed. However, Counsel further credibly testified there was no duty to disclose because it was inculpatory and entirely unfavorable to Applicant. At the plea hearing, Detective Griffin stated referenced phone calls where Applicant told his wife not to talk to police, collect stolen items in the woods, and hide stolen items from police. (Tr. 14, L. 21-4). Griffin further stated police interviewed the wife, who informed them Applicant was abusive for several years so she feared he would kill her. (Tr. 15, L. 24-5) (Tr. 16, L. 1-2). Applicant did not present evidence to contradict the favorability of these recorded jailhouse phone calls or this witness statement. The record reflects the phone calls and statement indicated Applicant attempted to force his wife to tamper with evidence. Therefore, the phone calls and statements were not favorable to Applicant. As a result, Counsel would not have been entitled to the evidence in discovery. Therefore, this Court finds Applicant has failed to overcome the burden to prove prejudice based upon any deficient prior investigation of the evidence.

Additionally, Applicant testified Counsel should have interviewed Griffin about the hearing beforehand. Counsel credibly admitted he did not interview Griffin about planned testimony at the hearing. However, Counsel further credibly testified Griffin gave him no indication this evidence existed in multiple prior conversations about the case. Specifically, Counsel credibly recalled Griffin failing to hint at this throughout conversations about confessions, recovering items, and the immunity agreement. Counsel credibly testified Griffin would have had to disclose information about the inculpatory evidence in a witness interview. Counsel further credibly assessed his uncertainty as to whether Griffin would have. Griffin did not testify at this PCR hearing. Therefore, this Court finds Applicant can only speculate about whether Counsel

could have gotten the information at issue from Griffin beforehand. Accordingly, this Court finds Applicant has not overcome the burden to prove prejudice based upon a failure to interview Griffin before the plea hearing.

2. Failure to Advise Defense of Consent

a) Deficient advice

Applicant contends Counsel failed to advise him about the defense of consent based upon employment at the facility. However, Counsel credibly testified about looking into Applicant's employment. Specifically, Counsel credibly assessed consent was not relevant based upon three major factors. First, Counsel credibly recalled discovering Applicant was out on worker's compensation leave so he had no reason to be at the facility. Second, Counsel credibly recalled discovering the intrusion took place when no employees were scheduled to work. Third, Counsel credibly recalled assessing Applicant would not have used bolt cutters to enter the facility if he had permission to be there. Importantly, Counsel credibly testified to going over these issues with a consent defense in a jailhouse meeting with Applicant. Counsel further testified to discussing burglary elements with Applicant in a meeting before the plea hearing. Counsel credibly testified his custom is to explain elements of the charge when notifying them a solicitor will have to prove each one beyond a reasonable doubt at trial. Therefore, this Court finds Applicant has not overcome the burden to prove Counsel was deficient based upon a failure to advise him about the defense of consent.

b) Prejudice based upon advice

Applicant contends he would have gone to trial if Counsel properly advised him about the consent defense. Substantively, a person is guilty of burglary in the second degree if the person enters a building *without consent* and with intent to commit a crime therein and the entrance occurs

at nighttime. S.C. Code Ann. § 16-11-312 (B) (3) (emphasis added). In PCR, An applicant's statements during the plea hearing are considered "conclusive unless [he] presents valid reasons why he should be allowed to depart from the truth" of them. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (holding applicant did not establish ineffective assistance after a review of the plea hearing clearly refuted his assertion he believed he had a defense at the time); Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975) (adopting the rule an applicant must present reasonable allegations to depart from the truth of conclusive statements previously given at his plea hearing), overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir. 1985).

Here, Counsel credibly assessed the facts of this case did not amount to a legitimate defense of consent. At the plea hearing, Counsel notified the court Applicant was not working when the crime was committed. (Tr. 13, L. 4). Additionally, Applicant confirmed a side door was forced open when items were stolen from the facility he worked at. (Tr. 10, L. 6) (Tr. 12, L. 6). Applicant further confirmed he was the person identified on camera committing the crime. (Tr. 10, L. 7-9) (Tr. 12, L. 6). Applicant also confirmed the estimated value of power tools and equipment stolen from this building exceeded \$150,000. (Tr. 10, L. 9-12) (Tr. 12, L. 6). There is nothing in the record to contradict Applicant was caught on camera forcing a door open before stealing several pricey equipment pieces. Furthermore, Counsel credibly testified there was evidence Applicant used bolt cutters to get in the door. Accordingly, this Court finds Applicant has not presented a valid reason to depart from statements confirming he entered the building by force. Therefore, this Court finds Applicant has not overcome the burden to prove he would have gone to trial with knowledge of the consent defense.

3. Failure to Advise Advantages and Disadvantages of Trial

a) Deficient advice

Applicant contends Counsel failed to advise him of the benefits and consequences of choosing a plea or trial. However, Counsel credibly testified he customarily has a client conversation about constitutional rights before plea hearings. Specifically, Counsel credibly testified he goes over how the waiver of a right to remain silent waiver at the plea hearing means the court can begin to ask a wide range of questions. Counsel further credibly testified he goes over the right to a jury trial, burden of proof placed upon each element within the charges, right to confront witnesses, right to call witnesses in defense, and requirement to be indicted on charges before facing them at trial. Counsel credibly recalled going over this with Applicant based upon a rather long conversation about indictment requirements. Therefore, this Court finds Applicant has not overcome the burden to prove Counsel was deficient based upon failure to advise benefits and consequences of pleading and going to trial.

b) Prejudice based upon advice

Applicant contends he would have gone to trial with sufficient advice about the benefits and consequences. The South Carolina Supreme Court has found deficient counsel does not prejudice an applicant where the basis for their decision to avoid trial was a favorable plea. Goins v. State, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012) (finding no prejudice where evidence showed Applicant accepted the plea after State offered to dismiss certain charges).

Here, Applicant testified knowledge of the consent defense would have caused him to give trial serious consideration. However, Counsel credibly recalled Applicant stating several times his desire to avoid trial. Counsel further credibly testified Applicant confessing to several crimes and assisting in item recovery because he wanted to get the best possible plea deal. Specifically, Counsel credibly recalled Applicant helping police officers recover hundreds of thousands of

dollars in stolen good. Finally, Counsel credibly recalled continually asking when the plea hearing was going to be after the immunity agreement was finalized. At the plea hearing, the Assistant Solicitor notified the Court Applicant helped them recover about \$272, 000 worth of items after his arrest. (Tr. 11, L. 1-5). Furthermore, the Assistant Solicitor told the Court Applicant disclosed his involvement in everything. (Tr. 11, L. 16-7). Finally, Applicant confirmed both of those statements were accurate. (Tr. 12, L. 6). Therefore, this Court finds Applicant's decision to plead guilty was primarily to get a more favorable deal through confession and assistance. Accordingly, this Court finds Applicant was not prejudiced based upon alleged deficient advice about the benefits and consequences of going to trial.

4. Failure to Prepare Case for Trial

a) Deficient preparation

Applicant contends Counsel failed to prepare the case for trial. To establish counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (relief denied where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial); Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999) (trial counsel not ineffective for failing to timely request discovery because contents of documents were not presented at PCR hearing).

Here, Counsel credibly testified Applicant made it clear his desire was to avoid trial. Counsel further credibly testified Applicant wanted to focus on assisting police to recover items to increase his chances of getting a favorable plea offer. Counsel also credibly testified Applicant believed confessing to everything would put him in a better position than not cooperating. As previously mentioned, Counsel credibly recalled doing an investigation into Applicant's status at work to see if he had a right to be present when items were stolen. Thereafter, Counsel credibly testified to notifying Applicant the facts did not support raising a defense of consent. Counsel credibly testified the rest of representation was spent formalizing the immunity agreement followed by formalizing a plea agreement. However, Counsel credibly recalled notifying Applicant before the plea hearing he still had the constitutional right to request a formal grand jury indictment. Counsel further credibly testified Applicant had no interest in anything except going through with the plea hearing based upon prior cooperation. At the plea hearing, Applicant did waive his right to be indicted on all charges. (Tr. 6, L. 1-15). The record further reflects Counsel concluded before the plea hearing a consent defense was meritless for multiple adequate reasons including worker's compensation leave, time of crime, and forcing the door open. Therefore, this Court finds Applicant has not presented an issue Counsel should have spent more time preparing to address. Accordingly, this Court finds Applicant has not overcome the burden to prove Counsel was deficient based a failure to prepare for trial.

b) Resulting prejudice

Applicant contends he had no choice but to plead guilty based upon Counsel's failure to prepare for trial. An applicant's statements during the plea hearing are considered "conclusive unless [he] presents valid reasons why he should be allowed to depart from the truth" of them. Dalton, 376 S.C. at 137, 654 S.E.2d at 874;

Here, Applicant testified the only option Counsel presented to him was pleading guilty. Applicant further testified his only choice was to plead guilty. At the plea hearing, Applicant told the court he was pleading voluntarily. (Tr. 9, L. 14). Applicant further told the court he was satisfied with Counsel. (Tr. 9, L. 16). Applicant also told the court he was pleading guilty because he was guilty. (Tr. 9, L. 19). Additionally, Applicant confirmed the set of facts proffered by the Assistant Solicitor. (Tr. 12, L. 6). As previously mentioned, Applicant also voluntarily waived his right to an indictment. (Tr. 6, L. 1-15). Thus, the record clearly refutes Applicant's assertion that he felt forced to plead guilty. Accordingly, this Court finds Applicant has not overcome the burden to prove prejudice based upon an alleged failure to prepare for trial.

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must remain in custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 25 day of June, 2019.



J. CORDELL MADDOX
Presiding Judge
Second Judicial Circuit

Anderson, South Carolina

WITNESSES

Aiken Department Of Public Safety

William J Cameron

Law Enforcement Case #: 17-04412

MBM

ARREST WARRANT NUMBER

2017A0220100778 FILED October 19 2017

Robert L. White
CCJP. & G.S.
Ann Sanders as
Deputy Clerk

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: November 9, 2017

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2017GS0202050

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2017

**THE STATE
vs.**

GILBERT EDWARD DAY, II

CDR #: 0086

Indictment for

BURGLARY IN THE SECOND DEGREE

§ 16-11-0312(B)

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	BURGLARY IN THE SECOND DEGREE
COUNTY OF AIKEN	)	
	)	§ 16-11-0312(B)

At a Court of General Sessions, convened on November 13, 2017, the Grand Jurors of Aiken County present upon their oath:

That GILBERT EDWARD DAY, II did in Aiken County on or about August 13, 2017, wilfully and unlawfully enter without consent and with the intent to commit a crime therein, a building, located at 655 Kershaw Street, Aiken, South Carolina and the defendant enter or remain in the nighttime. All in violation of §16-11-312(B) of the Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR

WITNESSES

Aiken Department Of Public Safety

Ronald J Griffin

Law Enforcement Case #: 17-04412

MBM

ARREST WARRANT NUMBER

2017A0220100789

FILED October 19 2017

Robert J. White
C.C.P. & G.S.

Ann Sanders
Deputy Clerk

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: November 9, 2017

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2017GS0202051

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2017

THE STATE

vs.

GILBERT EDWARD DAY, II

CDR #: 3421

Indictment for

GRAND LARCENY

§ 16-13-30(B)

J. STROM THURMOND, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)

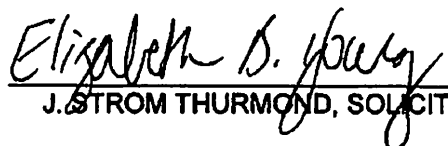
INDICTMENT FOR
GRAND LARCENY

§ 16-13-30(B)

At a Court of General Sessions, convened on November 13, 2017, the Grand Jurors of Aiken County present upon their oath:

That **GILBERT EDWARD DAY, II** did in Aiken County on or about August 14, 2017, feloniously take and carry away a 2012 Case Excavator, a tow Master trailer, Stihl Chop Saws, and varies equipment tools valued at Ten Thousand Dollars or more and belonging to with intent to deprive the owner permanently of such property. All in violation of §16-13-30, Code of Laws of South Carolina (1976), as amended.

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


J. STROM THURMOND, SOLICITOR